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## ABSTRACT

The present dissertation addresses the right to truth in the field of international human rights law. The objective is to verify the outlines of this right that make it unique, and which justify its own (disputable) existence in the human rights scenario as a legally binding norm. Departing from a historical perspective of the emergence of this right in International Law, the intent is to analyze the multiple debates that have marked the development of the right to truth throughout the past decades. It is explored, therefore, how the *a priori* abstract notion of *truth* became a right and the strict relation this has with the social mobilizations of victims of gross violations of human rights. To accomplish this, the dissertation spans across the struggle, in particular, of the relatives of disappeared victims during the 1970's and 1980's when the dictatorships reigned in Latin America. It follows on the expansion of the right to truth during what has been known as the *fight against impunity*, until it reaches the main human rights courts. To finalize, it discusses the inclusion of the right to truth in the International Convention on the Protection of All Persons from Enforced Disappearance and the measures more commonly used to realize such right. The dissertation concludes that the right to truth carries a singularity that is crucial for the protection of victims of gross human rights violations.



## ZUSAMMENFASSUNG

Die vorliegende Dissertation befasst sich mit dem Recht auf Wahrheit im Bereich des Internationalen Menschenrechtsgesetzes. Das Ziel ist die Umrisse dieses Rechts zu untersuchen, die es so einzigartig machen und welche seine (bestreitbare) Existenz als verbindliche Rechtsnorm im Szenario der Menschenrechte rechtfertigen. Anhand einer historischen Perspektive der Erscheinung dieses Rechts im internationalen Recht, beabsichtigt diese Arbeit eine Begegnung mit den verschiedenen Debatten, die die Entwicklung des Rechts auf Wahrheit über die letzten Jahrzehnte auszeichneten. Demnach wird untersucht, wie die a priori abstrakte Auffassung von Wahrheit zu einem Recht wurde und wie dies eng mit der sozialen Bewegung von Opfern schwerer Verletzungen der Menschenrechte verbunden ist. Um dies zu erreichen, befasst sich die Dissertation hauptsächlich mit dem Kampf der Verwandten von verschwundenen Opfern der in den 1970er und 1980er Jahren in Lateinamerika herrschenden Diktaturen. Sie begleitet die Ausweitung des Rechts auf Wahrheit während der sogenannten *Kampf gegen Straflosigkeit Phase* bis es zu den Hauptgerichtssälen für Menschenrechte gelangte. Zum Abschluss diskutiert die Doktorarbeit den Einbezug des Rechts auf Wahrheit in die Internationale Konvention zum Schutz aller Personen vor dem Verschwindenlassen und die meist genutzten Maßnahmen zur Anwendung dieses Rechts. In ihrer Dissertation kommt die Autorin zum Schluss, dass das Recht auf Wahrheit eine Einzigartigkeit besitzt, die für den Schutz von Opfern schwerer Verletzungen der Menschenrechte entscheidend ist.



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## ABBREVIATIONS

ACHR American Convention on Human Rights

AI Amnesty International

BiH Bosnia and Herzegovina

CELS Center for Legal and Social Studies

CED Committee on Enforced Disappearance

CONADEP Argentine National Commission on the Disappearance of Persons

ECHR European Convention on Human Rights

ECtHR European Court of Human Rights

FEDEFAM Federación Latinoamericana de Asociaciones de Familiares de Detenidos Desaparecidos (Latin American Federation of Associations of Relatives of Detainees-Disappeared).

IACHR Inter-American Commission on Human Rights

IACtHR Inter-American Court of Human Rights

ICED International Convention on the Protection of All Persons from Enforced Disappearance

ICJ International Commission of Jurists

ICJ International Court of Justice

ICC International Criminal Court

ICMP International Commission on Missing Persons

ICRC International Committee of the Red Cross

ICTY International Criminal Tribunal for the former Yugoslavia

IHL International Humanitarian Law

OAS Organization of the American States

TC Truth Commission

UN United Nations

UNTAES United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium

UNWGEID United Nations Working Group on Enforced and Involuntary Disappearance

USA / US United States of America



## INTRODUCTION

In 1943, in the city of Lvov, Nazi soldiers began exhuming and cremating the bodies of those who had been murdered and buried in the camp of *Janowksa* in Poland. Along with their special unit of inmates called *Sonderkommando*, responsible for the disposal of the bodies of the deceased victims, they initiated the process of recovering the remains from the pits and laying them on special platforms in stacks, each containing 1200 – 1600 corpses. Tar and petrol were then poured over the bodies, which were burned. The remaining ashes were scattered on the fields or buried; large bones were collected separately and crushed in a *bone-crusher* machine, which was specially designed to accelerate the "task". The *bone-crusher* was so important that it even had an allocated supervisor. However, he failed to destroy it before leaving the camp and, consequently, the machine was recovered by the Soviets, who used it as material evidence at war crimes trials in the Soviet Union<sup>1</sup>.

The *bone-crusher* represents the ultimate ambition of vanishing with the bodies thus eliminating all evidence of crime. These machines were among a number of measures aimed at disappearing with bodily remains in the Nazi camps. Unlike flesh, bones do not disintegrate completely with fire, i.e. burning them is not sufficient. Something else then was necessary to turn them into powder, making it easier to get rid of them<sup>2</sup>. That is why the *bone crusher* played such essential role in the killing machinery.

Years after *Janowksa*, decades after the Holocaust, the governments of countries in Latin America under military dictatorships faced the issue of how to make individuals disappear. The objective was quite ambitious: beyond vanishing with the bodies, after killing the individuals, all the traces of the victims' whereabouts should also be erased. This should include how they were taken by state's agents, to where they were taken, and finally what happened to them. Eliminating the body was the final step of a sequence of acts of human rights violations, which included, as a rule, physical and psychological torture. Many methods were applied to give an end to those killed – some were thrown from airplanes into the sea, some were buried in mass graves under the NN (*nomen*

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<sup>1</sup> FALK, Avner. *Anti-Semitism: A History and Psychoanalysis of Contemporary Hatred*. WestPort: Praeger Publisher, 2008, p. 188.

<sup>2</sup> BBC News. *Treblinka: Revealing the hidden graves of the Holocaust*. 23 January 2012. Available at: <<http://www.bbc.com/news/magazine-16657363>> Last Access: 20 January 2018.

*nescio* – name unknown) classification, some were drowned in rivers, others left to be eaten by animals<sup>3</sup>.

To conceal evidence of gross violations of human rights was not new by the time of those dictatorships in Latin America; nor before them. It certainly not began during the World War II as well. History, sadly, is full of examples – each carrying their own singularity and pain – of violations being silenced, being concealed. At times of war, the progressive development of International Humanitarian Law since its first treaty in the XIX century proved unfortunately its inability to catch up with the atrocities before they took place. The World War II occurred in times when IHL had no provisions for protecting civilians. The concern for the fate of individuals was restricted, still, to combatants.

Few decades later, in the early 1970's, the conflict between Cyprus and Turkey would raise debates, restricted however to times of war, on the question of individuals with unknown fate, unaccounted for<sup>4</sup>. To not return the mortal remains to the family is also a weapon, capable of infringing on relatives terrible suffering and representing a profound act of indignity to those deceased. To discover one's whereabouts, even after the end of conflicts, has revealed to be a difficult and highly political task.

At the time of the conflict in Cyprus, relatives began organizing themselves, founding associations and struggling to find public space to speak loud about the violations committed against them and their family members. IHL, in turn, would instate in its Additional Protocol I to the 1977 Geneva Conventions the obligation to clarify, in times of war, the final fate not only of soldiers, but also of civilians. Information on their whereabouts should be investigated and reported and the mortal remains returned to the families.

What probably few would have foreseen was the need to search for deceased victims in times of apparent peace. To employ, in moments not affected by armed conflicts, expressions such as mass graves, lost bodies, butchered corpses, missing individuals could appear, at the very least, unusual. This was aggravated by the states' reluctance in providing information on those events. To find out what had happened to those individuals whose relatives and friends claim that vanished under the hands of state's

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<sup>3</sup> For further reading on the violence inflicted by Latin American dictatorships on their victims, see: GUEST, Iain. *Behind the Disappearances – Argentina's Dirty War Against Human Rights and the United Nations*. Pennsylvania: Pennsylvania University Press, 1990.

<sup>4</sup> See United Nations Resolution on Missing Persons in Cyprus, e.g.: United Nations, Commission on Human Rights, Resolution 4 (XXXI), 13 February 1975; United Nations, General Assembly, Resolution 3450 (XXX), 9 December 1975.

agents, that never returned home, was somehow part of a new moment in the human rights domain – the moment to search for *truth*.

With the relatives of disappeared and missing victims organizing themselves, particularly in Latin America, some specific characteristics of what became known as *enforced disappearance* were drawn. Furthermore, those relatives coordinated several acts of protests worldwide and took up to the United Nations what was taking place in their countries and with their families. They claimed they needed to know the truth, they wanted to know where their relatives were, they wanted to unravel the network of concealed information<sup>5</sup>.

As years went by, the dictatorships that once were responsible for initiating this process ended. However, the struggle to know, the fight for information continued. It was a new context for human rights, in which past violations mattered as much as present ones. What went on with individuals under a certain political regime was as important as what was happening to those individuals under a present political regime. The human rights movement, maybe without completely realizing it, started to look increasingly into the past. Bygones began playing a central role in the human rights debates and conferences were organized in different parts of the world to discuss how to confront past violations. In other words, the human rights movement took the task of avoiding violations of the past to be purposely forgotten, as if they were being *swept under the carpet*. After all, if violations were committed, those responsible could not just go away unpunished for it. And the victims could not simply let it go as if nothing had happened. In fact, many did not.

The search for the *truth* went on, reaching significant stature. After been named by the IACHR as the *right to know the truth*, references to the existence of such right circulated in several UN documents until it reached Human Rights courts. Meanwhile, it also became closely linked to truth commissions established throughout the world and, more specifically, to the South African Truth and Reconciliation Commission. In this path, which culminated with the introduction of the right to truth in the International Convention for the Protection of All Persons from Enforced Disappearance, adopted in December 2006, this right has also been the object of strong criticism. Most of it, surely, can be attributed to the word *truth* itself and the vagueness it invokes. How could the Law intend to regulate such a thing as *truth*? How can one know, in the first place, which *truth* is Law trying to protect?

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<sup>5</sup> See Chapter II.

The right to truth was then accused of lacking distinct content, of having vague normative scope and enforceability, i.e. of being too broad<sup>6</sup>. Similarly, other authors pointed to its “open texture and indeterminacy”<sup>7</sup>, which would lead to “lingering doubts about its normative content and parameters”<sup>8</sup>. The right to truth was also branded as being just “above a good argument and somewhere below a clear legal rule”<sup>9</sup> and even to be simply a synonym to the duty of states to investigate gross human rights violations<sup>10</sup>.

What the critics seem to have in common is the concern with the broadness of the right to truth and a suspicious stance when it comes to recognize it as a legally binding norm, despite the provision in the ICED. Facing these views, the present dissertation will aim at sustaining that, as a product of actual demands on the part of victims of gross violations, the right to truth emerges – with its uniqueness - as a concrete response to gaps in the normative framework of human rights law.

### ***Objectives and Issues Pursued***

The present dissertation investigates the right to truth in International Law. It verifies how what once was just an “emerging principle in international law”<sup>11</sup> became in a few decades a legally binding norm in international human rights law. Therefore, it intends to reconstruct the events that allowed and influenced such rapid development, while it pursues to reveal the importance of maintaining the right to truth linked to the demands of victims. The main objective is to prove that the right to truth can only be understood as a concrete and tangible right, defying the criticism relating to its broadness, if the needs and demands of victims are exposed. The study, therefore, consists in exploring the development of this particular human rights norm since the early mobilizations up to its introduction in the ICED, asserting that it carries a unique scope and meaning.

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<sup>6</sup> KYRIACOU, Nicolas. *An Affront to the Conscience of Humanity: Enforced Disappearance in International Human Rights Law*. PhD Thesis presented to the European University Institute. Florence: 2012, p. 200.

<sup>7</sup> FREEMAN, Mark. *Truth Commissions and Procedural Fairness*. Cambridge: Cambridge University Press, 2006, p. 6; LEYH, Brianne McGonigle. *The Right to truth in International Criminal Proceedings: An Indeterminate Concept from Human Rights Law*. Utrecht University's Montaigne Centre for Judicial Administration and Conflict Resolution, 2013, p. 20. Last Access 05 January 2018. Available at: <[http://montaigne.rebo.uu.nl/wp-content/uploads/2013/11/McGonigle-Leyh\\_Libor-Zwaak.pdf](http://montaigne.rebo.uu.nl/wp-content/uploads/2013/11/McGonigle-Leyh_Libor-Zwaak.pdf)>

<sup>8</sup> NAQVI, Yasmin. *The right to truth in international law: fact or fiction?* In: International Review of the Red Cross, Volume 88, Number 862, June 2006, p. 273.

<sup>9</sup> Ibidem.

<sup>10</sup> European Court of Human Rights. *Case of El-Masri v. The Former Yugoslav Republic of Macedonia*. Joint Concurring Opinion of Judges Casadevall and López Guerra. Application no. 39630/09, 13 December 2012.

<sup>11</sup> MENDEZ, Juan. *The Right to Truth*. In: Reining Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference 17-21 September 1998. Èrès, 1998, p. 255.

The first chapter opens the dissertation with the normative origins of the right to truth that finds its place in International Humanitarian Law. The objective is to verify the processes that led to the inclusion of the so-called *right to know* in the Additional Protocol I to the 1977 Geneva Conventions. Thus, the chapter will follow the increasing concern in IHL for the final fate of the combatants and their families' access to information on this matter. The return of mortal remains, their proper identification and their protection against acts of disrespect were included in IHL since its early documents but were not – until the Additional Protocol I – provided for as a right. This essential change is then exposed based on the *travaux préparatoires* of the instrument at stake, as well as on documents of the Red Cross on the right to know.

In chapter II, the repercussions of the right to know and its early expansion into the field of human rights law are investigated. It ascertains how the increasing knowledge and concern – at domestic and international levels – with gross violations committed by authoritarian governments, with emphasis on enforced disappearance, influenced the introduction of the right to know in human rights documents. The chapter also follows the struggle of victims, in particular, of relatives of disappeared individuals as a key element in understanding and exposing the arising of the search for the truth in the decades of 1970's and 1980's.

The third chapter aims at comprehending how the search for the truth, initiated in particular due to the military dictatorships in Latin America, was incorporated in a much broader related movement - the fight against impunity - known as *transitional justice*. The objective is to evaluate the impact of the new democratic world movement, corroborated by the end of the communist regimes, in the right to truth, i.e. in its scope, expectations, outlines and meaning. In addition, the chapter pursues to verify the link between these changes and the victims demands for clarification of past violations.

Chapter four constitutes an essential piece of the present dissertation. It exposes how the struggle for the truth was understood by Human Rights courts and, consequently, the way in which it was elaborated in their decisions. The work of three courts will be analyzed: The Inter-American Court of Human Rights, the European Court of Human Rights and the Human Rights Chamber for Bosnia-Herzegovina. The intention is not only to prove how the right to truth has assumed such an important role in the human rights scenario, but also how the decisions of these courts attend to victims' expectation by properly applying the right to truth.

Chapter five concludes the dissertation with the inclusion of the right to truth in the ICED and with the existent measures to implement this right. The objective is to investigate the

main arguments presented by sponsors for the introduction of the right to truth in the Convention and to verify to what extent this introduction matches victims' struggle. Also, by examining these arguments, it is possible to explore what are the main challenges in the acceptance and recognition of the right to the truth. The second part of the chapter exposes and analyses the principal efforts, conducted by states, to accomplish the realization of the right to truth.

### ***Investigation Path and Sources***

The direction chosen for this investigation follows the path crossed by the right to truth itself. In order to prove that this right is a product of the concrete victims' demands, particularly those of enforced disappearance, this dissertation will traverse the expansion experienced by the struggle for the *truth* until its inclusion in the ICED. By choosing this path, the present work aims at keeping itself attained to the experience and views of the victims. More than speculative debates on the importance of truth, the objective is to illustrate what are the needs of those who claim for such right, taking as point of departure the initial demands for truth in the context of the dictatorships in Latin America. Only by understanding how the right to truth emerged and why it has developed into a human rights norm, it is possible to verify that it is not just "above a good argument"<sup>12</sup> with dubious parameters.

The methodology employed in studies relating to the right to truth and specifically in the field of transitional justice, has taken certain subjective and abstract values such as healing, reconciliation and forgiveness<sup>13</sup> much into consideration. However, if on one hand they are precious and noble values, on the other, they tend to remain too much in the rhetoric arena. Thus, it is crucial to identify what actually substantiates the right to truth.

To capture this, it was necessary to look deep into the organizations of relatives, i.e. how they were formed, what they were demanding, their cause and work at domestic and international levels. Taking these aspects into consideration, it was possible to note their repercussion in the United Nations and in the Inter-American system of Human Rights, in addition to their further influences. It is interesting to observe how these victims' pressures, how their suffering so rapid has impacted official speeches from international organs.

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<sup>12</sup> NAQVI, Yasmin. *The right to truth in international law: fact or fiction?* p. 273.

<sup>13</sup> See, for example: TEITEL, Ruth. *Transitional Justice*. Oxford: Oxford University Press, 2000. KRITZ, Neil (ed.) *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. Vols. I-III. Washington, D.C.: U.S. Institute of Peace Press, 1995.



In addition to the victims' organizations, another source used to elaborate this dissertation was the work of human rights NGOs. Some of them, such as the International Commission of Jurists, Amnesty International and Human Rights Watch, played an essential role in supporting the right to truth, moreover, in Human Rights courts. The reports from these NGOs helped publicizing this right, reinforcing its central role in cases of gross violations and pushing for official recognition by international organs.

The repercussion of these efforts is clearly shown in the reports of UN Experts, UN resolutions, decisions by the courts and finally in international norms. All these documents represent, each one in its own time, the expansion and growing influence of the right to truth, which, in turn, also affects the human rights literature. In this regard, it is quite particular the way in which the right to truth is usually portrayed in academic works - as a rule, it is strictly bounded with truth commissions. For this reason, to conclude the path of the dissertation, the measures to implement the right to truth are exposed and some of its main conceptions challenged.



## I. The Right to *Know* in International Humanitarian Law

The right to truth finds its origins in the law of armed conflict<sup>14</sup>. The fate and whereabouts of the combatants missing in action or upon capture, and families' access to information on their loved ones, were concerns present in the early stages of modern IHL. Although the first provision in IHL concerning this right, called the "right to know", is established in the 1977 Additional Protocol I to the Geneva Conventions of 1949, previous documents reveal its roots and early influence.

The first IHL document to establish the need to fix the identity of the dead in combat was the *1880 Oxford Manual*. Its Article 20 provides that all objects found with the dead shall be collected in order to be send to the enemy government or army<sup>15</sup>

This provision was later improved with the creation of an information bureau for prisoners of war in the *1899 Annex to the Hague Convention with Respect to the Laws and Customs of War on Land*. The bureau, established in each of the belligerent states, would be responsible not only for collecting and receiving all objects of personal use, but also to answer all inquiries on prisoners of wars. It would be kept informed of internments and transferrals, as well as of admissions into hospital and deaths. The establishment of an information bureau was later reaffirmed in the *1907 Hague Regulations* and in the *1929 and 1949 Geneva Conventions*<sup>16</sup>.

Seven years after the *1899 Hague Convention* was adopted, the *1906 Geneva Convention* brought further advances related to the search of the missing. Its Article 3 provides not only for the search of the wounded, but also for their safety and protection. In case of the deceased, a careful examination of the bodies must be conducted prior to their interment or incineration in order to facilitate their identification. Furthermore, belligerents would have to keep each other mutually informed of internments and transfers, together with admissions to hospitals and deaths that may occur to the sick and wounded in their hands.

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<sup>14</sup> NAQVI, Yasmin. *The Right to truth in International Law: Fact or Fiction?* p. 248. CITRONI, Gabriella; SCOVAZZI, Tullio. *The Struggle Against Enforced Disappearance and the 2007 United Nations Convention*. Leiden: Martinus Nijhoff Publishers, 2007, p. 347-348.

<sup>15</sup> Under Article 20 of *The Laws of War on Land*, Oxford, 9 September 1880: "The dead should never be buried until all articles on them which may serve to fix their identity, such as pocket-books, numbers, etc., shall have been collected. The articles thus collected from the dead of the enemy are transmitted to its army or government".

<sup>16</sup> Article 14 of the *Regulations to the Hague Convention respecting the Laws and Customs of War on Land*, The Hague, 18 October 1907; Article 77 of the *Geneva Convention*, 29 July 1929; Article 122 of the *III Geneva Convention*, 12 August 1949 and Article 136 of the *IV Geneva Convention*, 12 August 1949.

Despite the evident concern in the IHL documents with the identification of the dead and wounded, no mention to combatants' families was made until the *1929 Geneva Convention*. Its Article 77 stipulates that each belligerent Power would have to provide information on the capture of prisoners of war, as well as of all "particulars of identity at its disposal to enable the families concerned to be quickly notified and stating the official addresses to which families may write to the prisoners"<sup>17</sup>.

In addition, the *1929 Geneva Convention* establishes the right of prisoners of war to have their wills received and drawn up and, if the case, to have a death certificate issued. All prisoners of war also have the right to be properly buried with the necessary indications in their graves<sup>18</sup>.

These provisions established in the *1929 Geneva Convention* remained in the following *1949 Geneva Conventions*. However, the atrocities committed during the Second World War, especially considering the lack of protection given to civilians, required further developments relating to the search and identification of persons. In this regard, a central contribution was the introduction of Article 26 in the Fourth Geneva Convention of 1949. It lays down that the parties to the conflict must allow and facilitate enquiries made by members of families dispersed due to the war, with the objective "of renewing contact with one another and of meeting"<sup>19</sup>.

It is important to emphasize that the Convention does not go into details on how the parties must facilitate the reunion of families. Nevertheless, the 1958 Commentary lists some examples, among which are included the organization of official information bureau (Article 136 IV Geneva Convention 1949, Article 122 III Geneva Convention 1949); notification by postal authorities of changes of address and possible places of evacuation (Article 48 III Geneva Convention 1949, Article 128 IV Geneva Convention 1949); and the provision of identity tags for children under twelve years of age (Article 24, paragraph 3 IV Geneva Convention 1949)<sup>20</sup>.

In fact, the concern with the suffering inflicted on families due to the lack of information was the main reason for the introduction of the right to know in Article 32 of the 1977 Additional Protocol I to the 1949 Geneva Conventions relating to the victims of international armed conflict. The sponsors of the proposal considered that to remove the

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<sup>17</sup> Article 77 of the *Geneva Convention*, 29 July 1929.

<sup>18</sup> Article 76 of the *Geneva Convention*, 29 July 1929.

<sup>19</sup> Article 26 of the IV Geneva Convention, 12 August 1949.

<sup>20</sup> PICTET, Jean (Ed.) *Commentary on the IV Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War*. Geneva: ICRC, 1958, P. 198.

uncertainty over the fate of loved one was a fundamental humanitarian principle<sup>21</sup>. Therefore, Article 32 establishes that “the activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and in this Protocol shall be prompted mainly by the right of families to know the fate of their relatives”.

This principle was carefully considered by the sponsors of the Additional Protocol I following two influential events that are important to mention. First, the XXII International Conference of the Red Cross held in Teheran in 1973 adopted Resolution V, which called on parties of armed conflict to take all actions within their powers in order to mark and locate the graves of the deceased. In addition, it requested the parties to facilitate exhumation, if this is the families’ will, and “to provide information about those who are missing in action”<sup>22</sup>.

Similarly, on 6 November 1974, the UN General Assembly adopted Resolution 3320 (XXIX) entitled “assistance and co-operation in accounting for persons who are missing or dead in armed conflicts”, in which it was considered that the desire to know the whereabouts of loved ones is “a basic human need” which should be met “to the greatest extent possible”<sup>23</sup>.

As requested by the UN General Assembly, the UN Secretary-General brought Resolution 3320 to the attention of the second session of CDDH. In addition, some states prepared drafts and submitted proposals on the subject<sup>24</sup>. It is interesting to note that despite the growing importance of missing persons in IHL, as shown above, there were initially no provisions on the subject in the draft of Additional Protocol I. Apart from this, the ICRC accepted the introduction of a new provision, especially as it met what had been previously requested by Resolution V of the XXII International Conference of the Red Cross and UN Resolution 3320<sup>25</sup>.

The new provision, in its final version, was included as the third section of Part II dedicated to the wounded, sick and shipwrecked. It aimed at filling the gaps left by previous IHL documents, especially regarding civilians who were not internees protected by the Fourth Geneva Convention of 1949; to the maintenance of graves and the keeping

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<sup>21</sup> Official Records. Volume XI. CDDH/II/SR.19, p.185.

<sup>22</sup> ICRC. Resolution V. XXII International Conference of the Red Cross. Teheran, November 1973.

<sup>23</sup> United Nations, General Assembly, Resolution 3320 (XXIX), 6 November 1974.

<sup>24</sup> Official Records. Volume III, CDDH/II/56, p. 98-109.

<sup>25</sup> Official Records. Volume XI. CDDH/II/56, p. 187. See also: SANDOZ, Yves, SWINARSKI, Christophe, ZIMMERMANN, Bruno (Eds.) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Geneva: Martinus Nijhoff Publishers, 1987, p. 340.

of records, as well as access to graves; the duty to allow exhumation, return of the remains and finally the duty to secure and exchange information on the missing and dead<sup>26</sup>.

To provide for all this information, the third section was divided in two articles, which dealt separately with the issue of the missing persons (Article 33) and the remains of the deceased (Article 34). The right to know, which was introduced as an amendment by the delegates of France, Greece, Cyprus and the Holy See, was supposed to be included in the first paragraph of Article 33 (*Article 20 bis* in the draft)<sup>27</sup>. However, the Drafting Committee of Committee II decided to place it in a separate article (present Article 32) as the general principle of the Section<sup>28</sup>.

It is important to note that the greatest innovation of Article 32 was not to provide for information on the whereabouts of relatives, but to recognize it as a right. To know the fate of loved ones was not only a basic human need or a humanitarian principle, but also a right. It was exactly in this aspect that the right to know faced some objection. The delegate of United Kingdom, for example, considered not “wise” to go further than recognizing it as a basic need of families to know what had happened to their relatives.

It also stated that parties to conflicts would, in any case, not be prompted by this right but, on the contrary, by winning the war<sup>29</sup>.

Similarly, the delegate of the former Yugoslavia was also against the introduction of a “right to know”, as it would merely state “the motive behind the article, which could surely be taken for granted”<sup>30</sup>. The Rapporteur of the Working Group, the delegate of United States, replied to this objection by recognizing that, exceptionally, it would be stated the premises on which an article is based. However, the delegate emphasized that the introduction of the general principle was made “in response to a strong feeling of many delegations and institutions that it was important to express in the Protocol the idea that families had a right to know what had happened to their relatives”<sup>31</sup>.

As mentioned in the 1987 Commentary, it surely seems that most sponsors of the 1977 Additional Protocol I wanted all the activities undertaken in the context of Section III to be guided by the concern of relieving the suffering of families regarding their missing and

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<sup>26</sup> Official Records. Volume XI. CDDH/II/56, p. 185,186.

<sup>27</sup> The right to know was introduced as an amendment on the 11 March 1975. Official Records. Volume III. CDDH/II/259, p. 102.

<sup>28</sup> SANDOZ, Yves, SWINARSKI, Christophe, ZIMMERMANN, Bruno (Eds.) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, p. 344.

<sup>29</sup> Official Records. Volume XI. CDDH/II/SR.35, p. 371.

<sup>30</sup> Official Records. Volume XII. CDDH/II/SR.76, p. 231.

<sup>31</sup> Ibid, p. 232.

dead relatives<sup>32</sup>. The right to know was, thus, introduced in IHL as a principle related not only with the search and exchange of information on missing persons, but also with the care for the remains of the deceased.

This potential to mitigate the pain of families soon helped expand the scope of applications of the right to know. In 1981, the XXIV International Conference of the Red Cross, in Manila, adopted Resolution II recognizing, in cases of enforced disappearance, the right of families to be informed on the whereabouts, health and welfare of their relatives in both international and internal armed conflicts<sup>33</sup>. By adopting Resolution II, the ICRC brought two innovations in regards to the right to know. First, it recognized the applicability of this right in cases of enforced disappearance, although IHL treaties do not refer to the term “enforced disappearance” as such. Second, it extended the right to know also to internal armed conflicts, even though the 1977 Additional Protocol I only covered victims of international armed conflict.

The understanding present in Resolution II was reaffirmed in later International Conferences of the Red Cross and Red Crescent, counting with the important support of states not party to Additional Protocol I<sup>34</sup>. In fact, the ICRC has played a very important role in addressing the attention of the international community to the right to know and to the issue of missing persons. An example is the ICRC report entitled “the missing and their families” launched as part of a process aimed at “addressing the plight of people who are unaccounted for as a result of armed conflict or internal violence and of their relatives”<sup>35</sup>.

In this report, the ICRC recognizes that the most fundamental need of families of missing persons is information on the fate of their loved ones. When it proves impossible to account for those who are disappeared, the loss of human lives must be acknowledge and the families allowed to honor the memory of the missing in a dignified manner<sup>36</sup>. It is important to note that by families, the ICRC adopts a broad understanding which

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<sup>32</sup> SANDOZ, Yves, SWINARSKI, Christophe, ZIMMERMANN, Bruno (Eds.) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, p. 347.

<sup>33</sup> ICRC. Resolution II. XXIV International Conference of the Red Cross and Red Crescent Movement, Manila, 1981.

<sup>34</sup> See: ICRC. Resolution XIII. 25th International Conference of the Red Cross, 1986; ICRC. Resolution II. 26th International Conference of the Red Cross and Red Crescent, 1995; ICRC. Resolution I. 27th International Conference of the Red Cross and Red Crescent, 1999.

<sup>35</sup> ICRC. *The Missing and Their Families - Summary of the Conclusions arising from Events held prior to the International Conference of Governmental and Non-Governmental Experts (19-21 February 2003)*. Available at: < ICRC/TheMissing/01.2003/EN/10> Last Access: 16 January 2003, p. 9.

<sup>36</sup> Ibid.

includes not only family members, but also close friends, taking into account cultural environment<sup>37</sup>.

Another important step in recognizing a right to know in IHL, in addition to expanding its scope, was the inclusion of this right by the ICRC as a norm of customary law. In a study published in 2005, the ICRC catalogues 161 norms of customary IHL among which rule 117 relates to accounting for missing persons<sup>38</sup>. It establishes that “each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict”<sup>39</sup> as well as to provide their families with any information concerning their fate and whereabouts.

This rule is applicable in both international and internal armed conflicts and, according to the ICRC, it is supported by the prohibition of enforced disappearances (Rule 98) and the requirement to respect family life (Rule 105). It is also consistent with the obligation to record all available information prior to disposal of the dead (Rule 116)<sup>40</sup>.

The recognition of the right to know as a norm of customary law fulfilled two major gaps left by the 1977 Additional Protocol I. Firstly, while some states have not ratified the Protocol, they remain however bound by customary IHL. Consequently, the right to know would be binding to states party and not party to the 1977 Additional Protocol I. This is particularly important taking into consideration that, contrary to the 1949 Geneva Conventions, the 1977 Protocols are not universally ratified.

In addition, States would be bound to comply with this right in internal and international armed conflicts, as previously decided by the ICRC in the 1981 International Conference in Manila<sup>41</sup>. As most of the armed conflicts today are non-international<sup>42</sup>, to expand the scope of applicability of the right to know to these situations represents a necessity, above all, for the victims.

Indeed, the development of the right to know in IHL reveals a growing expansion of its scope, insofar as such right gains attention at international level. The possibility to

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<sup>37</sup> Ibid, p. 11. This understanding was already present in the 1987 Commentary on the Additional Protocol I to the Geneva Conventions of 1949. See: SANDOZ, Yves, SWINARSKI, Christophe, ZIMMERMANN, Bruno (Eds.) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, p. 346.

<sup>38</sup> ICRC. *Customary International Humanitarian Law*. Volume I: Rules. UK: Cambridge University Press, 2005, p. 421.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> ICRC. Resolution II. XXIV International Conference of the Red Cross and Red Crescent Movement, Manila, 1981.

<sup>42</sup> ICRC. *Customary International Humanitarian Law* (29/10/2010). Available at: <<https://www.icrc.org/eng/war-and-law/treaties-customary-law/customary-law/overview-customary-law.htm>> Last access: 10 May 2017.



mitigate the pain of families in times of armed conflict – and peace - by revealing the fate of their relatives would come to play a main role in international human rights law, especially in cases of enforced disappearance. This would become an elemental key for the development, and importance, of the right to know in International Law.



## **II. The Emergence of *Truth* in International Human Rights Law: Initial Responses against Enforced Disappearance**

The first antecedents of the right to truth in international human rights law followed the increasing concern at international level with the situation of the missing and disappeared persons and their relatives. Initially established in the 1977 Additional Protocol I to the 1949 Geneva Conventions, the right to know, as it is called in IHL, is provided for as the right of the relatives to know the fate of their next of kin. The reflects of this new provision are already present during the 1970's and 1980's within the UN system and in the IACHR, marking the initial transition of the right to know from IHL to international human rights law.

### ***United Nations Resolutions on the Missing and Disappeared (1970's)***

The right to truth finds its initial expressions in international human rights law in early UN resolutions related to the missing and disappeared persons in the 1970's. Despite no explicit mention to a *right to truth*, these resolutions reflect the rising concern at international level with the practice of disappearances and their very damaging consequences. Among them, the absence of information provided to the families on the fate of their missing and disappeared relatives has received special attention, as the suffering and anguish of these families became widely known.

Initially, the UN resolution which first dealt with the issue of missing persons was related to armed conflict. Adopted on 6 November 1974, the resolution, entitled "assistance and co-operation in accounting for persons who are missing or dead in armed conflicts", established that the "desire to know the fate of loved ones in armed conflicts is a basic human need which should be satisfied to the greatest extent possible"<sup>43</sup>. Therefore, all the information concerning the missing and dead persons in armed conflicts must be provided without delay even if other issues remain pendent. Also, the parties to the conflicts must take actions to help locate and mark the graves of the dead and to facilitate the exhumation, if requested by the families<sup>44</sup>.

In the following year, the issue of the missing persons was again object of attention in the UN. In the resolution 4 (XXXI) dated 13 February 1975, the UN Commission on Human Rights requested the "intensification of efforts" with the objective to track and account for missing persons in Cyprus<sup>45</sup>. This concern was reaffirmed in the resolution

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<sup>43</sup> United Nations, General Assembly, Resolution 3220(XXIX), 6 November 1974.

<sup>44</sup> Ibid.

<sup>45</sup> United Nations, Commission on Human Rights, Resolution 4 (XXXI), 13 February 1975.

entitled “missing persons in Cyprus” of 9 December 1975 in which the UN General Assembly expressed its preoccupation with the fate of a considerable number of Cypriots who were missing due to the armed conflict in the region. Also, it asserted, in the context of Cyprus, the basic need of families to be informed about missing relatives<sup>46</sup>.

These understandings were restated in future UN resolutions which also called for the establishment of an investigatory body to confront this humanitarian problem<sup>47</sup>. Accordingly, the Committee on Missing Persons (CMP) in Cyprus was created in April 1981 under the auspices of the UN. The primary objective of the Committee is to recover the remains of around 2000 persons who went missing during the conflicts, enabling their families to arrange for a proper burial. The cause of death and the responsibility for it are not, however, under the Committee’s competence<sup>48</sup>. The work of the CMP followed the repeatedly failing in reaching an agreement between the two communities on the situation in Cyprus and, consequently, it remained at a standstill for many years<sup>49</sup>. As it will be mentioned later in this work, the difficulties in clarifying the whereabouts of the missing persons in Cyprus would lead their relatives to seek redress at the European Court of Human Rights.

At regional level, the situation of the families of missing persons in Cyprus was also an object of concern. In a resolution dated 11 January 1983, the European Parliament, recalling the UN resolutions, recognized the suffering caused to the families by not knowing the fate of their relatives, as well as by the uncertainty as to their personal and legal status. It then claimed that the right to know the fate of a family member, who has involuntarily disappeared due to the action of governments or their agents, is “an inalienable right”. Therefore, “every effort must be made by all those concerned” to put an end to the suffering and uncertainty of these families<sup>50</sup>.

In addition to the conflict in Cyprus, another event with important repercussions in the UN was the coup d’état in Chile in 1973 and the terrible consequences which followed. The initiative to raise the debate on Chile in the UN, beginning what would be a long process against the military junta, seemed to have come from Soviet Union and other members of the Soviet bloc. They understood the overthrow of President Allende as a political-ideological event which had to be condemned even if it meant compromising the

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<sup>46</sup> United Nations, General Assembly, Resolution 3450 (XXX), 9 December 1975.

<sup>47</sup> See, for example: United Nations, General Assembly, Resolution 32/128, 16 December 1977; United Nations, General Assembly, Resolution 33/172, 20 December 1978; United Nations, General Assembly, Resolution 36/164, 16 December 1981.

<sup>48</sup> See: Committee on Missing Persons in Cyprus, <[www.cmp-cyprus.org](http://www.cmp-cyprus.org)>.

<sup>49</sup> KYRIAKOU, Nikolas. *An Affront to the Conscience of Humanity: Enforced Disappearance in International Human Rights Law*, p. 31.

<sup>50</sup> European Parliament, *Resolution on Missing Persons in Cyprus*, 11 January 1983.

tenet of the Soviet foreign policy of not allowing the United Nations (or any other international body) to interfere in the States' internal affairs<sup>51</sup>. The Soviet political interest was then combined with the demands for an UN interference in the issue of human rights in Chile<sup>52</sup>, which resulted in resolutions of condemnation adopted by the UN General Assembly every year from 1974 until 1989.

In fact, until the Chilean coup, the UN had only publicly and consistently condemned two governments – South Africa and Israel - for gross human rights violations. The dramatic event in Chile changed the UN's approach to human rights which usually employed confidentiality and therefore no publicity about the governments involved.<sup>53</sup> Accordingly, the Chilean case would allow the public exposure of different violations committed by the military apparatus, among which is included the phenomenon of disappearance, with the consequent arise of an intense struggle against its practice.

The first of the UN resolutions to confront the issue of the *disappearances*, although not making use of this word, was resolution 3448 dated 9 December 1975 which called upon Chilean authorities to ensure that steps were taken “to clarify the status of those individuals who are not accounted for”<sup>54</sup>. In that same year, the Sub-Commission on Prevention of Discrimination and Protection of Minorities in its resolution 4 affirmed that among many issues which needed special attention, the “prolonged and often indefinite detention of large numbers of unconvicted persons without formal charges brought against them” deserved special concern. Also, the Sub-Commission expressed its worry with the “position of the family and relatives of arrested and detained persons”<sup>55</sup>.

An explicit mention to disappearances was made in resolution 31/124 of 16 November 1976 concerning Chile, in which the UN General Assembly expressed its indignation “with the disappearances of persons for political reasons”, calling the authorities for their forthwith clarification. Also, it requested the immediate release of those who were arbitrarily arrested or detained without charge and those who were in prison for political reasons only. In addition, it invited the UN Commission on Human Rights to draft

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<sup>51</sup> MOSKOWITZ, Moses. *The Roots and Reaches of the United Nations: Actions and Decisions*. Netherlands: Sijthoff and Noordhoff, 1980, p. 76-77.

<sup>52</sup> The United Nations General Assembly in its resolution 3219 (XXIX) of 6 November 1974 recognized that the United Nations Commission on Human Rights had received numerous reports from a wide variety of sources denouncing Human Rights violations in Chile, including threats to life and liberty. United Nations, General Assembly, Resolution 3219 (XXIX), 6 November 1974.

<sup>53</sup> WRIGHT, Thomas C. *State Terrorism in Latin America: Chile, Argentina and International Human Rights*. New York: Rowman and Littlefield, 2007, p. 75.

<sup>54</sup> United Nations, General Assembly, Resolution 3448 (XXX), 9 December 1975.

<sup>55</sup> United Nations Sub-Commission. *Report of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities - Resolution 4 (XXVIII)*, E/CN.4/1180 - E/CN.4/Sub.2/364, 28 November 1975.

recommendations on possible humanitarian, legal and financial aid to those arbitrarily arrested or imprisoned, to those who were in exile and to their relatives<sup>56</sup>.

It is worth noting that the Chilean coup was also a matter of concern at the Council of Europe, being object of several recommendations of its Parliamentary Assembly<sup>57</sup>. In the recommendation 868, it recognized “the anxiety of families whose members have disappeared” and stressed the “right of these families to know the fate of the missing persons”, while noting that the “Chilean governmental authorities” had not ordered “serious research into the fate of the missing persons”<sup>58</sup>.

Similarly to the Council of Europe, the UN General Assembly in the resolution 32/118 of 1977 recognized the failure of the Chilean authorities in providing a satisfactory account concerning the missing persons, as well as in accepting their responsibility for the large number of such persons. Also, it considered unsatisfactory the way in which the Chilean authorities dealt with the relatives of the disappeared victims on occasion of their hunger strike at the headquarters of the UN Economic Commission for Latin America at Santiago<sup>59</sup>.

The hunger strike, which was organized by the Chilean *Association of Relatives of Missing-Detainees*, took place on 14 June 1977 as part of the relatives’ initiative in Chile to push the issue of their loved ones into the public arena. In fact, relatives of the disappeared, as it will be shown throughout this work, played a major role not only in drawing attention of the international community to the cases of enforced disappearance, but also to their personal plight in clarifying the circumstances of such cases. Many of these relatives engaged in activism due to their personal experience of loss<sup>60</sup>, which became the main pillar of their human rights demands. As an example, only in 1977, three different women organizations composed by relatives were established: The Mothers (*Las Madres de la Plaza de Mayo*) and the Grandmothers (*Las Abuelas de la Plaza de Mayo*) in Argentina, and the Committee of Mothers (*CoMadres*) in El Salvador. In 1978, the *Mothers*, which started with dozens of mothers of disappeared, was already

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<sup>56</sup> United Nations, General Assembly, Resolution 31/124, 16 November 1976.

<sup>57</sup> Council of Europe, Parliamentary Assembly, Recommendation 830, 27 January 1978; Resolution 608, 26 January 1976, Council of Europe, Parliamentary Assembly, Recommendation 868, 28 June 1979.

<sup>58</sup> Council of Europe, Parliamentary Assembly, Recommendation 868, 28 June 1979.

<sup>59</sup> United Nations, General Assembly, Resolution 32/118, 16 December 1977.

<sup>60</sup> NAFTAI, Patricia. *The Subtext of New Human Right Claims: A Socio-Legal Journey into the Right to Truth*. In: *Diverse Engagement: Drawing in the Margins*, M. French, S. Jackson & E. Jokisuu (eds.) Cambridge: Cambridge University, 2010, p. 120.

including hundreds of activists. By 1981, their weekly protests in front of the Presidential Palace in Buenos Aires counted with thousands of participants<sup>61</sup>.

If some relatives of disappeared succeed in forming organizations and publicizing their struggle for information concerning their next of kin, others had their experience almost completely silenced. An important example concerns the case of Uganda under the government of Idi Amin Dada. During his military rule (1971-1979), countless Ugandans disappeared by clandestine security forces. While some vanished without leaving a trace and no clue on their whereabouts, others disappeared in broad daylight, after being detained in front of their families<sup>62</sup>.

In 1974, the International Commission of Jurists (ICJ) in response to requests made by Ugandans and non-Ugandans produced a study on the violations of human rights and the rule of law under the government of Idi Amin. The study provides “detailed accounts on the killing and disappeared of many prominent citizens”, but it recognizes the lack of information concerning the “circumstances of the deaths of countless other anonymous victims”. According to the ICJ, as most of these victims were “ordinary citizens who disappeared without attracting public attention”, there were “no investigations, no commissions of inquiry, no reports and no help provided to their families”<sup>63</sup>.

The ICJ's report had indeed some impact in Uganda as, on the same day of its publication, Idi Amin announced that he would establish a commission of inquiry to investigate the disappearances in the Country<sup>64</sup>. Four members were chosen to compose the Commission: The Justice Mohamed Saied, Captain Salim and two police superintendents - Stephan M. Kyefulumia and A. Esau. The investigations began on 15 July 1974 and were concluded on June 1975 with a report of more than 800 pages and 545 testimonies. Many of those who testified were relatives, especially wives and mothers of the disappeared victims<sup>65</sup>.

Their testimonies often describe the physical and psychological trauma resulted from witnessing the abduction of a relative, including wives who had to watch their husbands

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<sup>61</sup> Ibid, p. 120.

<sup>62</sup> See: DECKER, Alicia. ‘*Sometimes you may leave your husband in Karuma Falls or in the forest there*’: a gendered history of disappearance in Idi Amin's Uganda, 1971-1979. In: Journal of Eastern African Studies, vol. 7, n. 1, 2013.

<sup>63</sup> International Commission of Jurists. *Violations of Human Rights and the Rule of Law in Uganda*. Geneva, 1974, p. 61. See also: Amnesty International. *Human Rights in Uganda*, June 1978.

<sup>64</sup> DECKER, Alicia. ‘*Sometimes you may leave your husband in Karuma Falls or in the forest there*’: a gendered history of disappearance in Idi Amin's Uganda, 1971-1979, p. 128.

<sup>65</sup> A copy of the final report produced by the Ugandan's Commission of Inquiry is available thanks to the United States Institute for Peace and it is available at <<http://www.usip.org/publications/truth-commission-uganda-74>>. Last access 01 September 2017.

being beaten and dragged away, and even punched until unconscious before “loaded onto truck like a bag of cotton”<sup>66</sup>. In other testimonies, relatives report their searches for the disappeared, travelling between not only prisons and barracks, but also forests and swamps which were known for serving as dump sites for bodies. Another common theme among the testimonies was the hardships which accompanied the disappearance of a family member, such as the loss of the breadwinner and its financial consequences. Many women lost their homes, cars and their children could no longer attend school<sup>67</sup>. In the case of wives of militaries who disappeared, some reported having received bus warrants to leave definitively the barracks where they were living, without hearing any news from their husbands. Due to the financial difficulties, these women tried to withdraw the salary of their husbands in the bank, but they were informed that the Army had ordered the payments to be suspended<sup>68</sup>.

Even though the report was never published in Uganda and that it acquired limited publicity abroad, the collection of testimonies and their accounts on the events that took place under Idi Amin’s government represent an important historical document on the impacts of the disappearances to the relatives involved. Nevertheless, considering the adverse political climate and the lack of commitment to pursue a real change in human rights policy in Uganda, the relatives of disappeared victims remained unassisted in their struggle to know the whereabouts of their next of kin.

The dictatorship of Idi Amin in Uganda coincided with the communist regime of the Khmer Rouge in Cambodia (1975-1979) under the leadership of Pol Pot. Biographical reports reveal that relatives and friends disappeared after being taken by Khmer Rouge security forces. The victims included officials of the former government, intellectuals, teachers, students, members of ethnic minorities, currents within the ruling movement who were out of line with the leadership, and alleged “counter-revolutionaries”<sup>69</sup>. The families of these victims had no way to obtain information on their fate and did not dare to ask authorities for fear to disappear as well. Also, relatives of disappeared victims were not allowed to mourn, as it could be considered complicity with the “crimes” committed by their family members. In some cases, entire families disappeared from

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<sup>66</sup> Republic of Uganda. *Report of the Commission of Inquiry into the Disappearance of People in Uganda*, p. 620.

<sup>67</sup> See, for example: *Report of the Commission of Inquiry into the Disappearance of People in Uganda*, p. 351-352, 635, 425, 795.

<sup>68</sup> *Ibid*, p. 579, 581, 587, 596, 603, 604, 616

<sup>69</sup> Amnesty International. *Disappearances and Political Killings: Human Rights Crisis of the 1990's – A Manual for Action*, December 1993, p. 6.



villages after being taken away in trucks to unknown destinations<sup>70</sup>. As a result of the atrocities committed, among which disappearances are included, the Khmer Rouge regime was responsible for 19.733 mass graves, containing the bodies of over 1.1 million people from which only around 9.000 were exhumated<sup>71</sup>.

Unfortunately, Uganda and Cambodia were among many other countries in which disappearances were taking place. Without naming none of them, the UN General Assembly in its resolution 33/173 of 20 December 1978 did acknowledge receiving reports from different parts of world informing of cases of enforced or involuntary disappearance of persons. It expressed to “be deeply moved by the anguish and sorrow” caused by the disappearances to the relatives “specially spouses, children and parents”<sup>72</sup>. In fact, this UN resolution was particularly important, as it was the first to be entirely dedicated to the issue of the disappeared persons. In addition, despite not making an explicit reference to the *right to know* or *right to truth*, it recognizes the suffering of the relatives of the disappeared and their demands to have the fate of their loved ones clarified.

Similarly, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1979 condemned the practice of disappearances as a method for political intimidation and called attention to the “deep anguish and the heavy material burden experienced by the families and friends of persons who had disappeared”<sup>73</sup>. Accordingly, in its resolution 5B, the Sub-Commission considered that disappearances pose not only “a legal but also a moral obligation” to the participants of the UN activities, which is ensured by “the principles of elementary humanity which inspire the international community”. These participants must “take account at every appropriate opportunity of disappearances brought to their knowledge” and “combine efforts to locate” the disappeared persons in different regions of the world<sup>74</sup>.

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<sup>70</sup> NIKE, Howard de J., QUIGLEY, John., ROBINSON Kenneth J. (eds.) *Genocide in Cambodia – Documents from the Trial of Pol Pot and Ieng Sary*. Pennsylvania: University of Pennsylvania Press, 2000, p. 137.

<sup>71</sup> The numbers are provided by the *Documentation Center of Cambodia’s (DC-Cam) Mass Grave Mapping Project*, an independent NGO which started as a field office for Yale University’s Cambodian Genocide Program in 1995. ETCHESON, Craig. “*The Number*” -- *Quantifying Crimes Against Humanity in Cambodia*. Retrieved from: Documentation Center of Cambodia’s (DC-Cam) Mass Grave Mapping Project. Available at <[http://www.d.dccam.org/Projects/Maps/Mass\\_Graves\\_Study.htm](http://www.d.dccam.org/Projects/Maps/Mass_Graves_Study.htm)> Last access 01 October 2017.

<sup>72</sup> United Nations, General Assembly, Resolution 33/173, 20 December 1978.

<sup>73</sup> United Nations Sub-Commission. *Report of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities – Resolution 5B (XXXII)*, E/CN.4/1350 - E/CN.4/Sub.2/435, 5 September 1979.

<sup>74</sup> Ibid.

In the next year, on July 1980, the *World Conference of the United Nations Decade for Woman* took place in Copenhagen and in a resolution entitled *Question of Missing and Disappeared Persons* drew attention to the effects of such issue on women, both as direct victims and as relatives of victims<sup>75</sup>. Women indeed faced specific kinds of situations whenever they or their family member disappeared, which include crimes of a sexual nature with political ends, forced abortion and loss of the family's breadwinner<sup>76</sup>. Starting with the report of Uganda's commission of inquiry, many situations dealing specifically on how the disappearances tend to affect women and their struggle in clarifying the fate of their family members will be mentioned throughout the present work.

During the years that followed the 1980 *World Conference*, the issue of disappearances and the consequent suffering caused to the relatives of the victims were object of UN resolutions almost on a yearly basis. In addition to the adoption of these resolutions, other mechanisms aimed at halting human rights abuses, among which the practice of disappearances are included, were established within the UN system. Accordingly, in 1975, early in the regime of President Pinochet, the UN established an *Ad Hoc Working Group* to investigate and report to the UN Commission and the UN General Assembly on the human rights situation in Chile and to make recommendations for improvement<sup>77</sup>. Its first report introduced the right of families to know the fate of their relatives in the context of Chile, introducing for the first time in an UN document the right to know originally established in IHL.

### ***United Nations Ad Hoc Working Group in Chile (1975)***

The UN *Ad Hoc Working Group* on the Situation of Human Rights in Chile was set up in 1975 after the coup d'état, which in 1973 deposed the democratically elected President Allende. It was the second Special Procedure of the former UN Commission on Human Rights, following the *Ad Hoc Working Group of Experts on Southern Africa* established in 1967.

As the Chilean government cancelled the visit of the Working Group in 1975, the fact-finding was conducted based on oral and written evidence collected in other locations. It was only in 1978 that an agreement was reached, enabling three members of the

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<sup>75</sup> United Nations. *World Conference of the United Nations Decade for Woman*. Resolution 23 – Question of Missing and Disappeared Persons. A./CONF.94/35, July 1980.

<sup>76</sup> HAYNER, Priscilla. *Unspeakable Truths*. New York: Routledge, 2011, p. 85-90. See also: International Center for Transitional Justice. *The Disappeared and Invisible – Revealing the Enduring Impact of Enforced Disappearance on Women*, March 2015.

<sup>77</sup> FLOOD, Patrick James. *The Effectiveness of UN Human Rights Institutions*. Westport: Praeger Publishers, 1998, p. 87.

Working Group to visit Chile<sup>78</sup>. This change of attitude followed the adoption of the Chilean amnesty and some reduction in the level of repression, which seems to have led the advisors of Pinochet to convince him of allowing an UN visit<sup>79</sup>.

The delegation arrived in July 1978 to inquire about human rights violations in the Country, meeting government officials, leaders of the church, relatives of disappeared victims and survivors of the regime. One defining moment was the visit to Villa Grimaldi detention center kept by the former Chilean Intelligence Service (DINA), where around 4.500 people were held prisoners, of whom 240 disappeared<sup>80</sup>. In this visit, the UN Working Group was accompanied by two Chileans, Rodrigo Muñoz Muñoz and Héctor Zamorano, who had been tortured in Villa Grimaldi, but survived to tell their experiences<sup>81</sup>.

Another significant event, which was not initially on the official itinerary, was a meeting with relatives of disappeared persons. Three members of the Working Group were present in the meeting - Mr. Ermacora, Mr. McCarthy and Mr. van Boven – which counted with the participation of over four hundred relatives, almost all women carrying photos of their sons and daughters. Most of these mothers were members of the Association of Relatives of Detained Disappeared (*Agrupacion de Familiares de Detenidos Desaparecidos*) created in the end of 1974 with the support of the former Committee for Peace (*Comité Pro Paz*), a human rights organization composed by members of the Catholic Church and the Chilean Jewish community<sup>82</sup>.

After the meeting with the relatives, Mr. Ermacora brought the matter to the attention of the Chilean government and found that the Ministry of Interior had a file on each case. When the members of the Group divided up the information collected with a view to prepare the draft of the report, Mr. Ermacora asked for the disappearances<sup>83</sup>. The situation of the missing persons was then included as the title of Part V of the report and divided into the analysis of specific cases concerning missing persons (A), the efforts undertaken on behalf of them made mainly by relatives (B), the response of the

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<sup>78</sup> TRINDADE, A. A. Cançado. *Co-Existence and Co-ordination of Mechanisms of International Protection of Human Rights (at Global and Regional Levels)*. In: *Recueil des Cours – Collected Courses of The Hague Academy of International Law*, II, Tome 202. Dordrecht: Kluwer Academics, 1987, p. 374.

<sup>79</sup> WRIGHT, Thomas C. *State Terrorism in Latin America: Chile, Argentina and International Human Rights*, p. 80.

<sup>80</sup> *Ibid*, p. 80.

<sup>81</sup> GUEST, Iain. *Behind the Disappearances – Argentina's Dirty War Against Human Rights and the United Nations*, p. 130-131.

<sup>82</sup> *Ibid*, p. 131-132.

<sup>83</sup> *Ibid*, p. 132.

government to these cases (C) and finally the right of families to know the fate of their relatives (D).

Regarding the right to know, it was considered in relation to the necessity of an exhaustive investigation of the disappearances, as the visit to Chile revealed first-hand the importance not only to relatives of the disappeared, but also to different sectors of society of knowing “truthful answers in the cases of missing persons”<sup>84</sup>. The recognition of such a right was based on the 1977 Additional Protocol I to the Geneva Conventions of 1949. Similarly to the debates taken place during the *travaux préparatoire* of the Protocol, the conclusions of the report emphasized the state of uncertainty in which the relatives of missing persons constantly find themselves, without knowing the whereabouts of their loved ones. This uncertainty, as shown in the report, is reaffirmed by the families in their demands “to learn the truth about what happened” to their relatives, to “arrive at the truth” or, in similar words, to obtain “the truth concerning their missing relatives”<sup>85</sup>.

In the specific case of Chile, the delegation concluded that the difficulties in establishing the truth concerning the cases of missing persons were due to the “unwillingness of the executive branch and to the inability of the judicial branch in investigating such cases”. Also, neither branch of government would be prepared “to coordinate its investigation with that of the other”<sup>86</sup>.

As a solution to these problems, the Group proposed the establishment of an independent commission of inquire which would clarify the facts in each case and collect all the information from the various judicial proceedings. In addition, it would also gather and analyze the testimonies of all witnesses, as well as have access to the records of all government agencies<sup>87</sup>.

Even though this proposal was made in 1978, Chile would establish a commission of inquiry only after the end of the dictatorship in 1990. The *Rettig Commission*, as it was called, was responsible for documenting human rights abuses which resulted in death or disappearance during the years of military rule (September 11, 1973 - March 11, 1990). Consequently, torture and other abuses that did not result in the death of the victim were outside the scope of the commission’s mandate. For those last abuses, a second

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<sup>84</sup> United Nations *Ad Hoc* Working Group on the Situation of Human Rights in Chile. *Final Report – Protection of Human Rights in Chile*. A/33/331, 25 October 1978, at para. 418.

<sup>85</sup> *Ibid*, at para. 402.

<sup>86</sup> *Ibid*, at para. 420.

<sup>87</sup> *Ibid*, at para. 421.

commission of inquiry was appointed in 2003 and reopened in 2010 for more 18 months<sup>88</sup>.

The final report of the *Ad Hoc* Working Group in Chile is one of the first antecedents to reveal the transition of the right to know from IHL to international human rights law. It shows that this transition is related to the early debates regarding disappearances and to difficulties in clarifying these cases. Also, the speech of relatives of missing persons, which is present throughout the report, demonstrates the initial link between the right to know and the demands for truth<sup>89</sup>.

Following the conclusion of the final report in 1978, the UN replaced its Working Group for a special rapporteur, a position which was renewed until 1990 when the dictatorship ended. In addition, the UN also appointed in 1979, in a precedent-setting move, two experts specifically to investigate the disappearances in Chile, Mr. Felix Ermacora and Mr. Waleed M. Sadi. After Mr. Walled's resignation due to political pressure, Mr. Ermacora decided to carry out the work alone and submitted his first report to the UN General Assembly on 21 November 1979<sup>90</sup>.

Due to important contributions of this report to the development of the right to know in international human rights law, some remarks on it will be pointed out. Firstly, according to the Mr. Ermacora, the objective of the report was, *inter alia*, to find "an adequate response" to the right of families to know the fate of their relatives embodied in 1977 Additional Protocol I to the 1949 Geneva Conventions and "supported by the Chilean Catholic Church"<sup>91</sup> (in a reference to the Chilean Vicariate of Solidarity - *Vicaría de la Solidaridad*)<sup>92</sup>.

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<sup>88</sup> Regarding truth commissions in Chile, see: ENSALACO, Mark. *Truth Commissions for Chile and El Salvador: A Report and Assessment*. In: Human Rights Quarterly, Vol. 16. N. 4, November 1994, p. 656-675.

<sup>89</sup> See, for example: United Nations *Ad Hoc* Working Group on the Situation of Human Rights in Chile. *Final Report – Protection of Human Rights in Chile*, at para. 402, 405, 406, 422 and Annex LVI.

<sup>90</sup> United Nations, Commission on Human Rights, *Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and Human Rights framework for the protection of persons from enforced or involuntary disappearances*, E/CN.4/2002/71, 8 January 2002, at para. 13.

<sup>91</sup> United Nations, General Assembly, *Report of Mr. Felix Ermacora on the Question of the Fate on the Missing and Disappeared Persons in Chile*, A/34/583/Add.1, 21 November 1979, at para. 4.

<sup>92</sup> The Vicariate was created in 1976 after the dissolution by Pinochet of the Committee of Peace (*Comite pro Paz*), which integrated members from different religions, in December 1975. Previously to Mr. Ermacora's report, the Church had already demonstrated its support to the right to know, as the Holy See had been one of the sponsors of the introduction of this right in the 1977 Additional Protocol I to the 1949 Geneva Conventions.

The realization of this right means, according to the Expert, that a proper investigation of each case of a missing person is necessary in order to clarify the fate and location of the victim and to have them informed to the relatives. The Expert thus proposed to analyze the available information on disappeared persons in Chile “so as to make the factual information as clear as possible” for the relatives of disappeared persons, the international community and finally the Chilean government<sup>93</sup>.

With a view to achieve this purpose, Mr. Ermacora examined, *inter alia*, the activities of the Association of Relatives of Missing Detainees, mentioning for example its protests in the building of the Ministry of Justice. In this event, the relatives chained themselves to the fence surrounding the building, reason why they were arrested and accused of violating the law of national security. However, the judge in charge for the case released them, as he found no basis for the prosecution. The objectives of the Association in organizing such protests were to call attention to their struggle in obtaining answers concerning the fate and location of disappeared persons. Also, the Association aimed at exposing its objections to the use of the Chilean Amnesty Law to avoid the investigation and prosecution of persons responsible for the disappearances<sup>94</sup>.

Additionally, the Expert pointed out the special attention given by the Association of Relatives to women who were pregnant when they were detained and whose whereabouts were still unknown. From seven cases particularly mentioned by the Association, two concerned women who gave birth while in detention. Nevertheless, no information about the fate and location of the women and their children were obtained by the Expert<sup>95</sup>.

These events led Mr. Ermacora to conclude that “a tragic humanitarian problem still remains for those relatives” either wives, children, husbands or parents who do not know the whereabouts of their loved ones. Also, he emphasized that this situation is responsible for causing economical, moral and psychological problems to the families of disappeared persons<sup>96</sup>.

An important example provided by Mr. Ermacora of the dramatic situation of the relatives concerned the case of *Lonquén*. This case consists in the discovery of 15 bodies of indigenous farmworkers who disappeared after been detained by the police shortly after the coup in 1973. The bodies were found by the Vicariate of Solidarity in 1978 after

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<sup>93</sup> United Nations, General Assembly, *Report of Mr. Felix Ermacora on the Question of the Fate on the Missing and Disappeared Persons in Chile*, at para. 4.

<sup>94</sup> *Ibid*, at para. 42.

<sup>95</sup> *Ibid*, at para. 43.

<sup>96</sup> *Ibid*, at para. 46.

having their location revealed by an informant. This was the first evidence of mass murder committed by the regime of Pinochet<sup>97</sup>. After the remains were found, the relatives of victims of *Lonquén* requested their return in order to organize a proper burial<sup>98</sup>.

After numerous requests made by the relatives to the Chilean authorities, the Military Court to end the hunger strike organized by the families announced its decision to return the remains to them. However, this was not done, and the relatives heard in the radio on 14 September 1979 that all the remains had already been buried in a cemetery in *Isla de Maipo*. From the 15 bodies found, 14 were buried in a common grave. The Vicariate protested claiming that there is no right that authorizes a “burial of a person without the consent of the family” and considered this attitude “unfeeling and inhumane to the suffering of fellow human beings”<sup>99</sup>.

The remains of the victims of *Lonquén* were finally exhumed in 2006 and sent to forensic examination to have their identity and cause of death clarified. The process was concluded in March 2016. In this same year, the Chilean justice prosecuted seven local policemen accused for the crimes in *Lonquén*. The former Tinent, Mr. Lautaro Castro Mendoza, the chief of the patrol, was condemned to twenty years of prison. Five other policemen were sentenced to fifteen years of prison, also as authors of the crime. The seventh defendant was condemned to eleven penalties of sixty days in prison accused of participating solely in the kidnapping of the victims<sup>100</sup>. It is important to note that the case of *Lonquén* was one of the few cases in which the fate or location of the victim was clarified either during the military dictatorship in Chile or after it ended<sup>101</sup>.

Taking into consideration the difficulty in solving the cases of disappearances, Mr. Ermacora concluded that “much needs to be done to determine the whereabouts and fate of each individual missing person and thus respond to their relatives right to

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<sup>97</sup> DAVILA, Jerry. *Dictatorship in South America*. UK: Willey-Blackwell, 2013, p. 168.

<sup>98</sup> United Nations, General Assembly, *Report of Mr. Felix Ermacora on the Question of the Fate on the Missing and Disappeared Persons in Chile*, at para. 71.

<sup>99</sup> Ibid, at para. 71, 72.

<sup>100</sup> La Nación. *Caso Lonquén: Confirman Condena a 7 Carabineros por el Crime de 15 Campesinos*. 16 May 2017. Available at: <<http://lanacion.cl/2017/05/16/caso-lonquen-confirman-condena-a-7-carabineros-por-el-crimen-de-15-campesinos/>>. Last access: 01 May 2018.

<sup>101</sup> As reported by organizations of Human Rights in Chile, until the end of July 2016, only 8 % of the cases of disappearances were solved with the actual fate of the victims clarified.

Retrieved from: Resumen Latinoamericano. *Chile: Familiares de desaparecidos ocupan el Ministerio de Defensa en Protesta* (29 July 2016) Available at: <<http://www.resumenlatinoamericano.org/2016/07/30/chile-familiares-de-desaparecidos-ocupan-el-ministerio-de-defensa-en-protesta/>> Last access 01 September 2017.

know”<sup>102</sup>. The Expert emphasized that the efforts and civic courage of private individuals, the Church and the Association of Relatives of Missing Detainees were responsible for the public recognition of the fact that persons were disappeared<sup>103</sup>. Furthermore, according to Mr. Ermacora, the clarification of the fate of a person is also important regarding the question of compensation. In order to determine the compensation, the whereabouts of the victim and the responsibility for these whereabouts must be defined. Only after this definition, the responsibility of the State “come into operation in order to make good the harm caused by illicit acts attributable to the State”<sup>104</sup>. This would be case, for example, of the relatives of victims of *Lonquén*.

In addition, the Expert stated to have no doubts that the phenomenon of missing persons constitutes a situation of gross human rights violations which involves not only few and individual cases. On the contrary, its practice was repeatedly committed throughout the Country. Therefore, according to Mr. Ermacora, the Chilean government owns to the international community to “clarify and explain the fate” of the disappeared persons, to “punish the responsible” for the disappearances, “to compensate the relatives of the victims” and to prevent such practices from happening again in the future. Also, the Expert indicated that the Chilean government may request a cooperation with the UN in order to respond to the right to know of the relatives of missing persons<sup>105</sup>.

However, as observed in the report, the problem concerning disappeared persons was not limited to Chile<sup>106</sup>. On the contrary, the UN General Assembly had received reports from different parts of the world denouncing the practice of enforced disappearance<sup>107</sup>. By 1980, following proposals of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in its resolution 5B (XXXII) and of Mr. Ermacora as the Expert on Missing Persons in Chile, the UN Commission on Human Rights action pointed to the creation of a mechanism able to respond urgently to the reports on disappearances<sup>108</sup>. As a result, in that same year, the Working Group on Enforced or Involuntary Disappearances was established as the first thematic special procedure with a mandate worldwide in scope.

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<sup>102</sup> United Nations, General Assembly, *Report of Mr. Felix Ermacora on the Question of the Fate on the Missing and Disappeared Persons in Chile*, at para. 143.

<sup>103</sup> Ibid, at para. 144.

<sup>104</sup> Ibid, at para. 158.

<sup>105</sup> Ibid, at para. 165, 177.

<sup>106</sup> Ibid, at para. 5, 193.

<sup>107</sup> United Nations, General Assembly, Resolution 33/173, 20 December 1978.

<sup>108</sup> GUTTER, Jeroen. *Thematic Procedures of the United Nations Commission on Human Rights and International Law: in Search of a Sense of Community*. Utrecht: University of Utrecht, 2006, p. 85.



### ***United Nations Working Group on Enforced or Involuntary Disappearance (1980)***

By resolution 20 (XXXVI) dated 29 February 1980, the UN Commission on Human Rights established a working group on enforced or involuntary disappearance for an initial period of one year, “consisting of five of its members” to work “as experts in their individual capacity”. The working group was created with the objective to “examine questions relevant to enforced or involuntary disappearance of persons”<sup>109</sup>.

In fact, the creation of the UNWGEID was a response of the UN to the problem of enforced disappearance, which was then causing concern mainly in Argentina<sup>110</sup>. The military *coup d'état* in the Country deposed the President Isabel Perón, known as *Isabelita*, on 24 March 1976. During the seven following years, the Argentine witnessed a dark period in their history which resulted in around 30.000 disappeared persons and 350 secret detention centers<sup>111</sup>. By the end of the 1970's, the consequences of the Argentine coup were well known and some attempts to respond to them were put in practice.

In regard specifically to the disappearances, a compromise on a possible mechanism was included in the agenda of the Commission on Human Rights in 1979, but it fell through due mostly to the resistance of the Argentine delegation, which insisted on the confidential procedure<sup>112</sup> for consideration of the complaints. With the support of Soviet Union, in what was called “unholy alliance”<sup>113</sup>, Argentina succeeded in including its name for first time in the UN blacklist under the confidential procedure. Therefore, the discussions concerning enforced disappearance were postponed until the next session in 1980<sup>114</sup>.

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<sup>109</sup> United Nations, Commission on Human Rights, Resolution 20 (XXXVI), 29 February 1980. For an early analytical description of the functions and nature of the UNWGEID, see: RODLEY, Nigel S. *United Nations Actions Procedures against Disappearances, Summary or Arbitrary Executions and Torture*. In: Human Rights Quarterly, Vol. 8, No. 4, Nov. 1986, p. 700-730.

<sup>110</sup> FLOOD, Patrick James. *The Effectiveness of UN Human Rights Institutions*, p. 49.

<sup>111</sup> CONADEP, *Nunca Mas*. Buenos Aires, 1984, *Conclusión*. The exact number of disappeared victims is, however, not known. The official estimative provided by CONADEP and by the Argentine government points to around 10.000 victims. On the other hand, some human rights organizations claim that the number of victims disappeared reaches 30.000. See: *Listas de Detenidos-Desaparecidos y Asesinados en Argentina. Proyecto Desaparecidos*. Available at: < <http://www.desaparecidos.org/arg/victimitas/listas/> > Last access 4 September 2017.

<sup>112</sup> The confidential procedure is also known as “1503” in reference to the number of the Economic and Social Council resolution responsible for establishing it. This resolution, adopted in 1970, provided a method for considering communications, including the ones sent by individuals, “which appear to reveal a consistent pattern of gross and reliably attested violations of Human Rights and fundamental freedoms”. United Nations, Economic and Social Council, Resolution 1503 (XLVIII), 27 May 1970.

<sup>113</sup> JR., Howard Tolley. *The Concealed Crack in the Citadel: The United Nations Commission on Human Rights' Response to Confidential Communications*. In: Human Rights Quarterly, Vol. 6, No. 4, November 1984, p. 440.

<sup>114</sup> LIVERMORE, Daniel J.; RAMCHARAN, B.G. *Enforced or Involuntary Disappearance: An Evaluation of a Decade of United Nations Action*. In: Canadian Human Rights Yearbook, 217,

During the interim, NGOs actively acted in order to publicize the issue of enforced disappearance and create international pressure on the Commission. Also, relatives of disappeared persons continued sending communications to the UN informing of cases of disappearances<sup>115</sup>. Furthermore, on 10 May 1979, the UN Economic and Social Council, noting the “lack of time” of the Commission in its past session, requested it and its Sub-Commission to consider the question of disappeared persons at their next session as a matter of priority<sup>116</sup>.

By the 1980 session, “a consensus seemed to be building”<sup>117</sup>, pointing to the necessity of a concrete response on the part of the UN system. Therefore, the question to be discussed was what kind of mechanism should be implemented in response to enforced disappearances. Originally, the UN Commission on Human Rights was planning to establish a working group specifically for Argentina, analogous to the one created for Chile<sup>118</sup>. Until then, as already mentioned, the government of Argentina had avoided the public exposure of an UN condemnation by relying on the confidential procedure installed against it in 1979, and by offering cooperation with the Commission on Human Rights and the Sub-Commission. Also, Argentina seemed to have pressured members of these bodies with different kinds threats made by its Ambassador at that time, Gabriel Martínez<sup>119</sup>.

In the 1980 session, the Argentine government again succeed in avoiding the creation of a country-specific instrument by arguing that it would violate the legal equality of the states. Consequently, the initial proposal could not obtain majority in the UN Commission. However, Theo van Boven, director of the division in the UN, suggested to establish a working group with a broader mandate, which was accepted despite Argentina’s resistance<sup>120</sup>.

It is also important to note that the 1980 session counted with a public debate concerning the disappearances. The representative of Amnesty International emphasized the effort

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1989-1990, p. 220; PREMONT, Daniel. *United Nations Procedures for the Protection of all Persons Subjected to any Form of Detention or Imprisonment Symposium International Human Rights*. In: Santa Clara Law Review, Vol. 20, No. 3, 1980, p. 625.

<sup>115</sup> KRAMER, David; WEISSBRODT, David. *The 1980 UN Commission on Human Rights and the Disappeared*, Quarterly, Vol. 3, No. 1, February 1981, p. 18.

<sup>116</sup> United Nations, Economic and Social Council, Resolution 1979/38, 10 May 1979.

<sup>117</sup> LIVERMORE, Daniel J.; RAMCHARAN, B.G. *Enforced or Involuntary Disappearance: An Evaluation of a Decade of United Nations Action*, p. 220.

<sup>118</sup> GUTTER, Jeroen. *Thematic Procedures of the United Nations Commission on Human Rights and International Law: in Search of a Sense of Community*, p. 88.

<sup>119</sup> FRULLI, Micaela. *Nino Cassese and the Early Stages in the Fight against Enforced Disappearance*. In: Journal of International Criminal Justice, No. 12, 2014, p. 807.

<sup>120</sup> RAMCHARAN, B.G. *The Protection Roles of UN Human Rights Special Procedures*. Leiden: Martinus Nijhoff, 2009, p. 2.

of AI in submitting to the UN thousands of names of disappeared persons from Argentina, Nicaragua, Uganda, Ethiopia and Afghanistan. Also, he discussed the case of two Argentines, who were victims of enforced disappearance, tortured and sent to secret camps, but escaped to tell their experience<sup>121</sup>. Since recently after the coup, AI began receiving information on individuals who had disappeared, been tortured, arrested and/or killed in Argentina. In August 1976, it published a summary with testimonies of torture and detention in Argentina and in November that same year it visited the Country. In 1978, as consequence of continuing evidence of disappearances, the organization launched a world-wide publicity campaign to pressure the Argentine government to end its policy of systematic abduction and to acknowledge the detentions of the disappeared. Also, between 1977 and 1982, AI sent numerous communications to the UN and to the IACHR reporting a consistent pattern of gross violations of human rights in Argentina<sup>122</sup>.

This active participation of NGOs, as well as of relatives of disappeared victims was essential for the creation of the UNWGEID. It was much due to their work that the UNWGEID received specific information for its first report concerning around 11.000 to 13.000 cases related to countries such as Argentina, Bolivia, Brazil, Chile, Cyprus, El Salvador, Ethiopia, Guatemala, Indonesia, Mexico, Nicaragua, Peru, the Philippines, South Africa and Uruguay. The fact that other countries were not mentioned in the report did not mean, according to the UNWGEID, that enforced disappearance was not taking place in those locations. In some cases, relatives feared the consequences of filling reports, as lawyers and others dealing with cases of disappearance were actually threatened and even disappeared during their searches. Another reason for the lack of information could be ignorance of the existence of the Working Group and its mandate or some impediment or unwillingness in submitting cases to its appreciation<sup>123</sup>.

One of the primary tasks of the UNWGEID is to assist families in clarifying the whereabouts of their disappeared relatives, playing the important role of requesting states' representatives for information on the cases brought to the Group. Some of the cases received by the UNWGEID regarding its first report and the contexts in which they took place will be examined next, with exception of the Latin American countries which will be analyzed along with the IACHR.

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<sup>121</sup> KRAMER, David; WEISSBRODT, David. *The 1980 UN Commission on Human Rights and the Disappeared*, p. 24.

<sup>122</sup> WEISSBRODT, David; BARTOLOMEI, Maria Luisa. *The Effectiveness of International Human Rights Pressures: The Case of Argentina, 1976-1983*. In: Minnesota Law Review, Volume 75, 1991, p. 1017, 1018.

<sup>123</sup> UNWGEID. *Question of Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Question of Missing and Disappeared Persons*, E/CN.4/1435, 26 January 1981, at para. 49, 50.

First, with regard to Cyprus, the UNWGEID decided due to the “delicate and complex nature”<sup>124</sup> of the situation not to include in the report any specific information concerning cases of enforced disappearance in the Country. However, the UNWGEID stated to have received information of disappearances from the Turkish Cypriot community, from the Cypriot government, as well as from the Pancyprian Organization of the Relatives of Undeclared Prisoners and Missing Persons. Based on its humanitarian work, the Working Group accepted the invitation to visit Cyprus, although it emphasized its complementary role to the machinery already established to investigate the fate of missing persons<sup>125</sup>.

In addition to Cyprus, the UNWGEID received information concerning the disappearance of nine persons in early 1979 in Ethiopia. The victims were detainees in the cellars of the former Menelik Palace for five years and, after being sent to interrogation sessions, never returned. In addition, it was also reported the disappearance of five members of the Ethiopian Socialist Movement after two years detained in a military base in Addis Ababa in July 1979. Another reported case concerned the arrest of the General Secretary of the Ethiopian Evangelical Mekane Yesus Church by heavily armed men wearing civilian clothes in Addis Ababa in July 1980. The government of Ethiopia denied that such events took place and accused Amnesty International, the responsible for sending these reports to the UNWGEID, of conducting a campaign against the Country<sup>126</sup>.

At the time the UNWGEID concluded its first report, Ethiopia was under the dictatorship of Mengistu Haile Mariam, the most prominent officer of the Communist military junta, who governed the Country from 1974 until 1991. This period was marked by civil wars and famines in Ethiopia resulting in hundreds of thousands of victims. Unfortunately, the cases mentioned by the UNWGEID were among the few cases of disappearance properly documented in Ethiopia, even though thousands other victims were known or believed to had been taken into custody by security forces<sup>127</sup>.

The disappearances occurred in their majority during the so-called *red terror* period in which security forces began the killings against people suspected from being members of the opposition. According to testimonies provided by relatives of disappeared, bodies were left on the roadside to advertise the killings of the previous night. Those who inspected the piles of corpses, to see if they were family members or friends, were

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<sup>124</sup> Ibid., at para. 79.

<sup>125</sup> Ibid., at para. 79-83.

<sup>126</sup> Ibid., at para. 102-106.

<sup>127</sup> AMNESTY INTERNATIONAL. *Ethiopia and Eritrea – The Human Rights Agenda*. November 1991, p. 7

targeted for execution or imprisonment. The relatives were not allowed to mourn, and in some cases, they had to pay one Ethiopian dollar for every “wasted bullet”<sup>128</sup> in order to have the body returned to them. In the case of the conscripts, they were occasionally not allowed to communicate with their families who had no way to know of their fate. In addition, the Ethiopian government refused to recognize the existence of thousands of prisoners captured by rebel fronts<sup>129</sup>. As few of these cases were properly documented, the exact number of disappeared victims in Ethiopia between 1974 and 1991 is not known.

Another country mentioned in the report of the UNWGEID was Indonesia. The Group had received information concerning 22 cases of disappearance occurred in East Timor between 1977 and 1979. Some of the victims were known to be under detention by the Indonesian Forces while others disappeared just after having been arrested<sup>130</sup>. Most of the disappeared were members of the *Revolutionary Front for an Independent East Timor* (FRETILIN), one of the movements of resistance that fought for the independence of East Timor. Initially, FRETILIN fought against the Portuguese colonization and then against Indonesia that occupied the Country in October 1975, remaining in its territory until 1999 when the East Timorese voted for the independence in a referendum sponsored by the UN<sup>131</sup>.

The cases of disappearance received by the UNWGEID were part of a common practice in East Timor during the Indonesian occupation. Many members of resistance groups disappeared during the occupation and the mere suspicion of ties to these groups justified the capture or detention of several individuals. The bodies of the victims would be disposed of in a way to avoid them of being future tracked and identified. While some were buried in the forest, others were thrown from a sheer cliff face. Another common practice consisted in dismembering the bodies and dumping them into the ocean. At times, the mutilated bodies were exposed in public places to terrify the population. In other cases, relatives of disappeared reported that bodies were buried in mass graves, although they did not have the resources to exhume and identify the corpses<sup>132</sup>.

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<sup>128</sup> AFRICA WATCH. *Evil Days – 30 Years of War and Famine in Ethiopia*. September 1991, p. 102

<sup>129</sup> Ibid., p. 285.

<sup>130</sup> UNWGEID. *Question of Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular Question of Missing and Disappeared Persons*, at para. 117-121.

<sup>131</sup> BLAU, S; KINSELLA, N. *Searching for Conflict Related Missing Persons in Timor-Leste: Technical, Political and Cultural Considerations*. International Journal of Security and Development, 2(1), 2013, p. 1-2.

<sup>132</sup> Ibid, p. 2.

Along with the cases of disappeared persons suspected from resisting the occupation, Timorese men, women and children went missing due to Indonesian military attacks. The intensity of these attacks would make impossible for the relatives to later recover the bodies. Also, the Indonesian militaries conscripted young Timorese men and boys who, after been sent to the Army, never came back and their families were left without any news on their whereabouts. Thousands more young Timorese infants and children were taken from their biological family to be send to Indonesia<sup>133</sup>.

During the 24 years of Indonesian occupation, around 200.000 people died of starvation, or after being displaced or arrested by Indonesian forces and as a result of mass violence, such as massacres. However, the exact number of victims who disappeared is unclear, as in some cases the death was never conclusively confirmed by the relatives. The East Timorese organization *Law, Human Rights and Justice* (HAK), formed in 2001 with the objective to unite victims of past abuses, estimates that the whereabouts of 853 victims remain unknown due to Indonesian occupation<sup>134</sup>.

The abuses committed by Indonesian forces, however, were not limited to occupied territories. Several disappearance cases occurred in Indonesia's own territory under the regime of President Soeharto, who governed the Country from 1967 until 1998. Most of these disappearances were politically motivated and took place during the massacres committed by military apparatus which started in 1965 when a purge against the PKI (Communist Party of Indonesia) killed around one million victims. After the dictatorship ended, relatives of disappeared formed the Indonesian Association of Families (IKOHI) and on their own initiative started the excavations of burial sites in order "to transfer the remains of the victims to a better location"<sup>135</sup>. Unfortunately, disappearances still occur in Indonesia and are normally linked with agrarian conflicts and religious activities<sup>136</sup>.

Similarly, to Indonesia, Philippines was also among the Countries with reported cases of disappearances. Since 1972, repression had ramped in the Country due to the Martial Law issued by President Ferdinand Marcos and among its consequences suspended the habeas corpus in the Country. Not surprisingly, the practice of disappearances

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<sup>133</sup> Ibid.

<sup>134</sup> SANTOS, Sisto dos. *From a Dark and Brutal History: Enforced Disappearances in Timor-Leste*. Asia-Pacific Human Rights Information Center, FOCUS Journal, March 2014, Volume 75. Available at: <<https://www.hurights.or.jp/archives/focus/section3/2014/03/from-a-dark-and-brutal-history-enforced-disappearances-in-timor-leste.html>>. Last access: 08 May 2018.

<sup>135</sup> KANESIA, Putri; KUSNADI, Rini. YURINO, Ari; UNTUNG, Bedjo. *Disappearances, Exhumation and Psychosocial Intervention – Caught Between Looking to the Future and Remembering the Past*. In: *We Need the Truth: Enforced Disappearance in Asia*. Guatemala: Equipo de Estudios Comunitarios y Accion Psicossocial - ECAP, 2011, p. 118, 125.

<sup>136</sup> CITRONI, Gabriella; SCOVAZZI, Tullio. *The Struggle Against Enforced Disappearance and the 2007 United Nations Convention*, p. 67.

became widespread, especially in rural areas. In Mindanao, for example, bodies were found along highways, canals and rivers often left in conditions which would make them hard to be identified. In some of these cases, the corpses were mutilated or found bullet-riddled with their hands and feet bound. Other victims “reappeared” after weeks or even months of interrogation and torture in secret detention centers<sup>137</sup>.

It was in this context that the UNWGEID had received information concerning 231 disappearances. The cases, which occurred between 1975 and 1980, were divided in three different categories: first - disappearances with no evidence of death; second - disappearances ending in death (known in Philippines as “salvaging”) and finally, disappearances for a prolonged period followed by appearance in official detention centers. The Working Group transmitted to the Philippine Government the details concerning the cases reported, but it received no information on the whereabouts of the disappeared<sup>138</sup>.

Considering this situation, some of the relatives of the disappeared victims joined efforts and, in November 1985, formed the non-governmental organization FIND (Families of Victims of Involuntary Disappearance). Among its objectives, the organization aims at gathering information about disappearance cases, at providing support to the families of the victims and at organizing forensic search missions to the suspected burial sites<sup>139</sup>. From about 855 documented cases of enforced disappearances under the dictatorship of Ferdinand Marcos, 595 remain unclarified<sup>140</sup>.

Another case received by the UNWGEID concerns South Africa and its former colony, Namibia. First, the Group made an initial distinction between incommunicado detention and disappearance, stating that if the authorities acknowledge that a person is in detention, the situation does not constitute a disappearance. The UNWGEID then emphasized that its main concern is with the cases of disappearances, i.e. the cases in which the person is not only under incommunicado detention, but also without the relatives being entitled to any information at all<sup>141</sup>.

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<sup>137</sup> International Commission of Jurists. *The Philippines: Human Rights After Martial Law*, 1984, p. 24.

<sup>138</sup> UNWGEID. *Question of Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular Question of Missing and Disappeared Persons*, at para. 145-149.

<sup>139</sup> Ibid.

<sup>140</sup> GOMEZ, Leonor. *Enforced Disappearance and the Struggle for Justice*. Retrieved from: Task Force Detainees of Philippines. <[http://main.tfdp.net/index2.php?option=com\\_content&do\\_pdf=1&id=330](http://main.tfdp.net/index2.php?option=com_content&do_pdf=1&id=330)>. Accessed 01 September 2017.

<sup>141</sup> UNWGEID. *Question of Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular Question of Missing and Disappeared Persons*, at para. 175, 177.

In the case of South Africa, the Group stressed that the State had “equipped itself with a body of legislation”<sup>142</sup> which assured that a person could disappear, and the relatives left with no ways to obtain information about their family member. Therefore, the Group concluded that the situation in South Africa was different from other countries, as its special legislation made the practice of disappearance lawful. There was, however, information provided by a NGO that suggested that in the cases in which a person is arrested under these special laws, the relatives are generally able to find out the exact location of their family member after rounding police stations<sup>143</sup>.

Previously to the report of the UNWGEID, South Africa had been the object of several UN resolutions and of the first Special Procedure established by the UN Commission on Human Rights in 1967. The historical context of the apartheid in the Country set in motion this international concern and, after 46 years of segregation, resulted in the creation of the Truth and Reconciliation Commission in 1995. The details of this story have been well documented, although the role of the disappearances has not been a major issue among them<sup>144</sup>.

Yet around 2.000 persons disappeared during the apartheid era in South Africa, particularly when the government intensified the violence against resistance movements in the 1970's and 1980's. According to Khulumani Support Group, an NGO formed in 1995 by victims and survivors of apartheid atrocities, the number of victims increases to almost 7.000, if considered, in addition to the disappeared, the persons who went missing during the apartheid.<sup>145</sup> Most of the victims were members of the armed wings of major liberation groups, even though there are also reported cases of politically unaffiliated individuals<sup>146</sup>. Many relatives of these victims asked the Khulumani Group for help in clarifying the fate of their family members, as well as having the remains of the bodies returned to them. Despite efforts in exhuming the bodies of missing and disappeared victims, the families which received the remains are still very few<sup>147</sup>.

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<sup>142</sup> Ibid., at para. 183.

<sup>143</sup> Ibid, at para. 175.

<sup>144</sup> GOLDBERG, Willa. *Even Flowers Bloom on Unmarked Graves: Stories of Disappeared South Africans*. Independent Study Project (ISP) Collection, Spring 2013, p. 8.

<sup>145</sup> Khulumani Support Group. *Give Back my Dead Son*. (01 May 2014) Available at: <<http://www.khulumani.net/khulumani/in-the-news/item/942-give-back-my-dead-son.html>> Accessed 01 August 2017.

<sup>146</sup> ARONSON, Jay D. *Humanitarian DNA Identification in Post-Apartheid South Africa*. In: WAILOO, Keith; NELSON, Alondra; LEE, Catherine (eds.). *Genetics and the Unsettled Past: The Collision between DNA, Race, and History*. New Brunswick, NJ: Rutgers University Press, p. 296-298.

<sup>147</sup> Ibid, p. 300. See also: ARONSON, Jay D. *The Strengths and Limitations of South Africa's Search for Apartheid-Era Missing Persons*. In: *The International Journal of Transitional Justice*, Vol. 5, 2011, p. 264.



All these cases mentioned above, which are surely examples of a much broader picture, led the UNWGEID to some conclusions that are important to mention. Firstly, as stated by the Group, the reported cases of disappearance had warranted the “deepest concern both for the danger to the life, liberty and physical security of the disappeared persons and for the anguish and sorrow caused to their relatives”<sup>148</sup>. Also, the UNWGEID expressed its understanding for the “pain felt by the relatives” of disappeared persons “in their quest to find their family members” and it recognized “the courage displayed by many in their activities”<sup>149</sup>. Accordingly, the UNWGEID claimed to strongly believe that the families “have a right to learn what happened to their relatives”<sup>150</sup>.

The recognition of such right was based by the UNWGEID on Article 32 of the 1977 Additional Protocol I to the Geneva Conventions of 1949<sup>151</sup>. Similarly to the report of the UN *Ad Hoc* Working Group in Chile, the UNWGEID first analysis reveals that the introduction of the right to know in international human rights law is related to the early debates concerning enforced disappearances\_and to the struggle of relatives of disappeared to obtain information on the fate and whereabouts of their next of kin.

This struggle is clearly exposed in the statements provided to the UNWGEID by representatives of human rights and relatives’ organizations from Argentina (*Mothers of the Plaza de Mayo, Relatives of Persons Missing and Detained for Political Reasons, Centre for Legal and Social Studies, Argentine Human Rights Commission, Commission of Solidarity of Relatives of Detained-Disappeared and Dead in Argentina* and *Group of Argentine Lawyers Exiled in France*), El Salvador (*El Salvador Human Rights Commission*), Guatemala (*Democratic Anti-Repression Front*), Nicaragua (*Permanent Commission for Human Rights*) and Uruguay (*Association of Relatives of Missing Uruguayans*).

These organizations denounced the disappearances as a practice of intimidation used by the governments. As the practice includes the insistent denial of state’s authorities in acknowledging the detention of the disappeared person, the organizations requested the Group to intervene in order to obtain information concerning the victims’ location. According to the representatives of these organizations, the appeals sent to international

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<sup>148</sup> UNWGEID. *Question of Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular Question of Missing and Disappeared Persons*, at para. 189.

<sup>149</sup> *Ibid.*, at para. 192.

<sup>150</sup> *Ibid.*, at para. 189 - 192.

<sup>151</sup> *Ibid.*, at para. 187.

organizations were a consequence of the fact that at the domestic level all possible formalities had already been exhausted and no progress was achieved<sup>152</sup>.

The Argentine *Commission of Solidarity* stated that for four years the relatives were searching for their family members, travelling all around the world to ask for help in locating them. For that reason, its representatives wanted to know what the UN Commission on Human Rights was doing about the disappeared and what was it planning to do. The *Commission of Solidarity* also claimed to have come before the UN Commission for four years, twice a year, and that it had never heard a satisfactory answer to its demands. The organization concluded that with the creation of the UNWGEID it was high time for something to be done<sup>153</sup>.

The creation of the UNWGEID had indeed represented an important step in the struggle against enforced disappearance. Particularly, it revealed and publicly exposed the disappearances as a worldwide issue and therefore not limited to a specific region or country. As Louis Joinet once stated, if Argentina had the sad privilege of being among the first countries to alert the international community to the phenomenon of disappearances, the mobilizations which arose against it revealed that, in fact, this drama takes place worldwide<sup>154</sup>. Accordingly, it was certainly not surprising that the UNWGEID in its first report dealt with information concerning fifteen countries of four different continents, although it only felt able to confirm 2.300 cases of disappearance.

Furthermore, it is also not surprising that with this worldwide facet, the cases of enforced disappearance would attract different initiatives aimed at fighting against its practice. Therefore, in addition to the creation of the UNWGEID, other remarkable events part of this struggle took place in different regions of the world. Two specific ones are worth mentioning, as they occurred also in 1981, the same year that the UNWGEID adopted its initial report. During the months of January and February of 1981 in France, the Paris Bar Association, exiled Argentine lawyers and Human Rights NGOs organized the first international conference on enforced disappearance. In a tribute to the historical phrase of Julio Cortazar, the conference was called *Le Refus de l'Oubli*. This was the first international effort in order to promote a convention on enforced disappearance<sup>155</sup>. The

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<sup>152</sup> Ibid, Annex XII, p. 2.

<sup>153</sup> Ibid, Annex XII, p. 9.

<sup>154</sup> JOINET, Louis. *Droits de L'homme et la Mémoire: la Convention Internationale pour la Protection de Toutes les Personnes Contre les Disparitions Forcées*. Available at: UNESCO. <[http://portal.unesco.org/shs/fr/files/12759/12414437587speech\\_joinet\\_14042009\\_fr.pdf/speech\\_joinet\\_14042009\\_fr.pdf](http://portal.unesco.org/shs/fr/files/12759/12414437587speech_joinet_14042009_fr.pdf/speech_joinet_14042009_fr.pdf)>. Accessed 04 September 2017.

<sup>155</sup> TAYLER, Wilder. *Background to the Elaboration of the Draft International Convention for the Protection of All Persons from Forced Disappearance*. In: International Commission of Jurists. *The review - Impunity, Crimes Against Humanity and Forced Disappearance*, N° 62-63,

Rapporteur of the conference, Louis Joinet, affirmed in its final report that the right to know established in IHL should also be applied in times of peace to the disappeared persons and their families<sup>156</sup>. Few years later, in 1985 and 1997 respectively, Mr. Joinet would draft, as an UN Special Rapporteur, two highly influential reports on amnesty and impunity, which due to their importance in the development of a right to truth will be latter examined in the present work.

In addition to the conference, 14 family member organizations from different countries in Latin America joined their efforts in order to support a treaty against disappearance at the global level. This union of organizations called *Latin American Federation for the Association of Relatives of Detained-Disappeared* - FEDEFAM – was established in 1981, creating the first draft treaty to recognize enforced disappearance as a crime against humanity already in 1982<sup>157</sup>. FEDEFAM helped to internationalize the disappearances, uniting relatives throughout Latin America, and encouraging them to make appeals to the UN. The organization counts with affiliates in fourteen Latin American countries and support groups throughout Europe<sup>158</sup>.

Since its first report, the UNWGEID has contributed for the protection and promotion of the right to truth worldwide. In 2011, it adopted a *General Comment on the Right to truth in Relation to Enforced Disappearances* to draw attention to the obligations under the 1992 Declaration on the Protection of All Persons from Enforced Disappearance that flow from the right to truth. The UNWGEID recognized in the *Comment* that the right to know the truth is an absolute right not subject to any limitation or derogation<sup>159</sup>.

Within the United Nations system, other bodies took part in protecting the human rights violated in cases of enforced disappearance. Among them, the Human Rights Committee played an important role in addressing major issues related to such cases, as the right to know of relatives of disappeared persons.

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September 2001, p. 65. CITRONI, Gabriella; SCOVAZZI, Tullio. *The Struggle Against Enforced Disappearance and the 2007 United Nations Convention*, p. 95.

<sup>156</sup> JOINET, Louis. *Rapport General*. In: *Le Refus de L'oubli - La Politique de Disparition Forcée de Personnes*, Colloque de Paris, January-February 1981, p. 302.

<sup>157</sup> NAFTALI, Patricia. *The Subtext of New Human Right Claims: A Socio-Legal Journey into the Right to Truth*, p. 124.

<sup>158</sup> FEDEFAM. Federación Latinoamericana de Asociaciones de Familiares de Detenidos-Desaparecidos. Accessed 15 October 2017. <<http://www.desaparecidos.org/fedefam/>>

<sup>159</sup> UNWGEID. *General Comment on the Right to truth in Relation to Enforced Disappearances*, A/HRC/16/48. 22 July 2010, p. 1

### ***Human Rights Committee - Case Quinteros v. Uruguay (1983)***

The Human Rights Committee, responsible for monitoring the implementation of the 1966 International Covenant on Civil and Political Rights, recognized the right to know for first time in the case of *Quinteros v. Uruguay* in 1983. Ms. Quinteros submitted on behalf of her daughter, Elena Quinteros Almeida, and on her own behalf, an individual complaint which was examined by the Committee under Article 5 of the Optional Protocol.

In this case, the victim Elena Quinteros Almeida was taken from her home in Montevideo on 24 June 1976. Few days later, while being kept completely incommunicado, she was taken by militaries to a spot in Montevideo near the Embassy of Venezuela. She seemed to have told them that she had a meeting at that place with a person whom they wished to arrest. Elena Quinteros succeeded in getting away from the militaries, entering the Embassy of Venezuela, where she shouted out her name to the passers-by. The militaries then entered the Embassy, from where Elena Quinteros was once again taken away<sup>160</sup>.

Ms. Quinteros claimed that since the day of this incident not only she could never obtain any information from the Uruguayan authorities concerning the whereabouts of her daughter, as well as never had her detention officially admitted. In order to support her claims, Ms. Quinteros attached a part of a booklet called *Mujeres y Niños Uruguayos Desaparecidos* ("Missing Uruguayan Women and Children") concerning the disappearance of her daughter. According to this publication, on 2 March 1979, the Ambassador and Representative of Uruguay to the United Nations Commission on Human Rights at Geneva, who was at that time Director of Foreign Policy of the Ministry of Foreign Affairs, informed Ms. Quinteros that her daughter was alive and that she had been taken from the Venezuelan Embassy by Uruguayan authorities<sup>161</sup>.

In addition, Ms. Quinteros enclosed the testimony of two persons. The first witness, a former detainee, claimed he had met Elena Quinteros in a military unit, where she heard the victim crying during sections of torture. Furthermore, the testimony also asserted that Elena Quinteros was in an extremely poor state of health. The second witness was a refuge at the Embassy of Venezuela in Montevideo. He claimed to have seen the victim being dragged away from the Embassy by a policeman<sup>162</sup>.

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<sup>160</sup> Human Rights Committee. *Case Quinteros v. Uruguay*, Communication n° 107/1981, 21 July 1983, at para. 1.2.

<sup>161</sup> Ibid, at para. 1.4.

<sup>162</sup> Ibid, at para. 1.5 and 1.6.

Ms.Quinteros asserted, regarding her daughter, that Articles 7 (prohibition of torture), 9 (right to liberty and security), 10 (rights of persons deprived of liberty), 12 (freedom of movement), 14 (right to a fair trial), 17 (right to respect for private and family life) and 19 (freedom of expression) of the ICCPR had been violated. Also, she added that she was a victim of violations of Article 7, based on the psychological torture caused by the absence of information concerning her daughter, and 17 ICCPR due to the interference in her private and family life<sup>163</sup>. In response to these allegations, the Uruguayan government simply informed that Elena Quinteros had been sought in Uruguay since 8 May 1975. Therefore, it concluded that the communication was unfounded since the Government had no part in the episode described<sup>164</sup>.

The Committee recognized that the Uruguayan Government had only denied the accusations claimed against it, making no attempt to address them seriously. Based on this fact and on the information provided by Ms.Quinteros, the Committee concluded that there was a breach of Articles 7, 9 and 10 (1) ICCPR<sup>165</sup>.

Regarding the allegations made by Ms.Quinteros on her own behalf, the Committee noted that the Uruguayan Government did not contradict the information that Ms.Quinteros was in Uruguay at the time of the incident involving her daughter. In addition, it claimed to understand “the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts”<sup>166</sup>. According to the Committee, Ms.Quinteros has “the right to know what has happened to her daughter”, as she is also “a victim of the violations of the Covenant suffered by her daughter in particular, of Article 7” related to the freedom from torture or cruel, inhuman or degrading treatment or punishment<sup>167</sup>.

This conclusion marks the first time that the Committee recognized the right to know in its decisions, connecting it with the continuous suffering of the relatives concerning the whereabouts of their next of kin and thus to the demand for clarification of the facts regarding the disappearance. Furthermore, it is important to note that this was the first case in which the Committee addressed, in a precedent-setting move, the issue of relatives as victims of enforced disappearance<sup>168</sup>. This recognition by the Committee reveals a complex aspect of the disappearances which involves the existence of victims

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<sup>163</sup> Ibid, at para. 1.9.

<sup>164</sup> Ibid, at para. 6.

<sup>165</sup> Ibid, at para. 8 and 13.

<sup>166</sup> Ibid, at para. 14.

<sup>167</sup> Ibid, at para. 14.

<sup>168</sup> VERMEULEN, Marthe Lot. *Enforced Disappearance: Determining State Responsibility under the International Convention for the Protection of all Persons from Enforced Disappearance*. Utrecht: Utrecht University School of Law, 2012, p. 179-180.

apart from those who personally suffered the arrest, torture and, in many cases, the loss of life<sup>169</sup>. As previously mentioned, the trauma caused to families of victims can be severe and may lead to long-lasting consequences, such as emotional breakdown, missed educational opportunities and loss of a breadwinner<sup>170</sup>.

As measures of reparation to the harms suffered, the Committee established the obligation of Uruguay to clarify what happened to Elena Quinteros and to secure her release; to bring to justice the responsible for her disappearance; to provide financial compensation for wrongs caused and finally to ensure that these violations do not happen again in the future<sup>171</sup>. Uruguay did not observe the obligation ordered by the Committee to reveal the facts surrounding the disappearance of Elena Quinteros and therefore never clarified her fate. Her mother, Ms. Quinteros, passed away on January 2001 without knowing the exact circumstances of what had happened to her daughter. According to the organization *Mothers and Relatives of Detained-Disappeared Uruguayans* formed in 1983, there are still more than two hundred cases of disappeared persons which remain unclarified in the Country<sup>172</sup>.

Regarding the Committee on Human Rights, it reaffirmed its innovative understandings in future cases, even though it has not further elaborated on a specific “right to know” or “right to truth”<sup>173</sup>. The case of *Quinteros v. Uruguay* marked, however, the development of this right in International Human Rights Law, as one of its first antecedents.

### ***Inter-American Commission on Human Rights (1985-1986)***

The IACHR, an organ created by the Organization of the American States in 1959, recognized the right to know the truth for the first time in its annual report of 1985-1986. In a groundbreaking understanding, the IACHR referred directly to a right to know in relation not only to the family members, but also to societies<sup>174</sup>. These statements followed the Commission’s remarkable role in fighting against human rights violations during the repressive period of the 1960’s, 1970’s and early 1980’s in Latin America. By 1986, most of the countries under dictatorships in South and Central America were

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<sup>169</sup> CITRONI, Gabriella; SCOVAZZI, Tullio. *The Struggle Against Enforced Disappearance and the 2007 United Nations Convention*, p. 106.

<sup>170</sup> BASSIOUNI, Cherif M. *International Recognition of Victims’ Rights*. In: Human Rights Law Review, 6.2, 2006, p. 256.

<sup>171</sup> Human Rights Committee. *Case Quinteros v. Uruguay*, at para. 16.

<sup>172</sup> Madres y Familiares de Uruguayos Detenidos Desaparecidos. Accessed 30 August 2017. <<http://desaparecidos.org.uy/nuestra-historia/>>

<sup>173</sup> VERMEULEN, Marthe Lot. *Enforced Disappearance: Determining State Responsibility under the International Convention for the Protection of all Persons from Enforced Disappearance*, p. 332.

<sup>174</sup> IACHR. *Annual Report 1985-1986*, OEA/Ser.L/V/II.68, 26 September 1986, Chapter V.

beginning their processes of democratic transition, which was reflected, as it will be further observed, in the IACHR annual report of 1985-1986.

Previous reports, however, already reveal the concern of the IACHR with the whereabouts of political prisoners and the information provided to their relatives. Since its report concerning the *Situation of Political Prisoners and their Families in Cuba* of 1963, the IACHR had already addressed the lack of information provided to the relatives of political prisoners. Despite not making an explicit reference to *disappearances*, the IACHR emphasized that in many cases the prisoners were shot, and their families left without any information concerning their whereabouts either during the time detained or after the execution<sup>175</sup>. In 1970, in another report concerning Cuba, the IACHR acknowledged that families of prisoners are constantly kept alarmed and disoriented regarding the fate of their relatives either by receiving notice of deaths occurred in detention centers without mentioning the identity of the victims, either by the transfer of prisoners without informing their next of kin. In other cases, the IACHR observed that some families had not received any information at all concerning the fate of their relatives.<sup>176</sup>

A direct mention to disappeared persons was later introduced in the report on the *status of human rights in Chile* of 25 October 1974 after a visit of the IACHR to the Country during this same year. The IACHR dedicated chapter IX of the report to the issue of *detention for an indeterminate period of time and persons who have disappeared*, affirming that the disappearances were one of the factors which caused greatest concern and anxiety to Chilean families. Also, it stated that there were hundreds of persons suffering “to know the whereabouts of a parent, a spouse or a child”<sup>177</sup>.

These understandings were reaffirmed in future reports of the IACHR concerning the situation in Chile, as the Commission was also putting effort in defining the characteristics of such *disappearances*. In its 1976 annual report, the IACHR observed that there were a high number of cases of persons who according to evidence were detained by military or police authorities, but whose detention was denied, and the location was unknown. In addition to the illegal deprivation of freedom, the IACHR recognized the anguish of relatives and friends without knowing if the victim is dead or alive and “who are unable to avail themselves of the remedies established under law or

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<sup>175</sup> IACHR. *Report on the Situation of Political Prisoners and their Families in Cuba*, OEA/Ser.L/V/II.7, 17 May 1963, Chapter V.

<sup>176</sup> IACHR. *Second Report on the Situation of Human Rights in Cuba*, OEA/Ser.L/V/II.23, 7 May 1970, Chapter II.

<sup>177</sup> IACHR. *Report on the Status of Human Rights in Chile*, OEA/Ser.L/V/II.34, 25 October 1974, Chapter IX.

to lend them material and moral assistance”<sup>178</sup>. Also, according to the IACHR, the number of such cases was increasing in many American countries, as the practice seemed “a comfortable expedient” to avoid the application of legal guarantees related to “the defense of personal freedom, physical security, dignity and human life itself”<sup>179</sup>.

In the following year, in its 1977 annual report, the IACHR recognized that the disappearances constitute a multiple violation of rights of the victim and a “true form of torture” for the relatives and friends due to the uncertain fate of their loved ones and to the powerless feeling to provide legal, moral and material assistance<sup>180</sup>. This recognition of relatives as victims will be also present in future decisions of the main Human Rights courts, revealing the complexity of the crime of enforced disappearance and its dramatic consequences for the families involved.

In 1978, the IACHR again expressed its concern to the refusal of many governments in providing information on the fate of persons “kidnapped from their homes, places of work, ports or airports or in public thoroughfares” usually “by non-uniformed, heavily armed individuals, traveling in unmarked vehicles”. These individuals acted “with such security and impunity that they are assumed to be forces invested with some authority”<sup>181</sup>. According to the IACHR, this practice affects the entire circle of families and friends of the victims who are forced to live in a constant state of uncertainty and to whom the deprivation of contact with the victim creates serious family issues<sup>182</sup>.

The IACHR observed with special attention the case of children who witnessed the kidnapping of their parents and the case of women who were pregnant when arrested and whose children, instead of been placed into the custody of their families, were placed in institutions or given up to adoption. The IACHR considered that these families have a “natural right”<sup>183</sup> to try to find the children whose location is unknown. Nevertheless, according to the Commission, no progress had been achieved in locating the disappeared victims, as all the efforts of relatives, friends, institutions and of the IACHR itself to clarify the whereabouts of the victims were “fruitless”<sup>184</sup>.

It is worth noting that despite these previous reports of the IACHR alerting for the practice of enforced disappearance and calling the General Assembly of the OAS to pass a

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<sup>178</sup> IACHR. *Second Report on the Situation of Human Rights in Chile*, OEA/Ser.L/V/II.37, 28 June 1976, Chapter II.

<sup>179</sup> Ibid.

<sup>180</sup> IACHR. *Annual Report 1977*, OEA/Ser.L/V/II.43, 20 abril 1978, Part II.

<sup>181</sup> IACHR. *Annual Report 1978*, OEA/Ser.L/V/II.47, 29 June 1979, Section Two, Part II.

<sup>182</sup> Ibid.

<sup>183</sup> IACHR. *Annual Report 1982-1983*, OEA/Ser.L/V/II.61, 27 September 1983, Chapter II.

<sup>184</sup> IACHR. *Annual Report 1978*, OEA/Ser.L/V/II.47, 29 June 1979, Section Two, Part II.



resolution on this issue, the GA had only acted in 1979 in its resolution 443, in which it declared that the practice of enforced disappearance “is an affront to the conscience of the hemisphere”<sup>185</sup>. Also, it endorsed the IACHR’s recommendations for “prompt clarification of the status of persons who have disappeared”<sup>186</sup> and requested the States to avoid passing laws which could obstruct the prosecution of the responsible for the crimes. It was only few years later, in 1983, that the OAS characterized enforced disappearance as a “crime against humanity”<sup>187</sup>. The response of the OAS to the phenomenon of enforced disappearance was considered by some authors as “limited”<sup>188</sup>, especially taken into consideration the findings of the IACHR visit to Argentina on September 1979<sup>189</sup>. As the Argentine’s reaction to the IACHR report was very negative, which included threats to leave the OAS, this would have avoided the General Assembly from passing a very condemning resolution on disappearances<sup>190</sup>.

In fact, due to the report of the IACHR, Argentina had faced one of most serious diplomatic reverses since taking power<sup>191</sup>. However, if it succeeded in not being criticized by name in the OAS General Assembly, it was certainly negatively affected by the publicly exposure of the IACHR decisive and highly critical conclusions. Many of these conclusions were related to the delicate issue of the disappearances, which received special attention by the IACHR. Considering their importance, some remarks ought to be made.

The IACHR dedicated chapter III of its report to the *problem of the disappeared*, providing a deep analysis of this phenomenon and of its moral, legal, financial and social implications which affected “all members of the Argentinian society”<sup>192</sup>. The IACHR collected numerous testimonies which were received personally from the victims and their families. In Buenos Aires, around the building where members of the Commission

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<sup>185</sup> OAS, General Assembly, AG/Res.510 (X-01/80), 31 October 1979.

<sup>186</sup> OAS, General Assembly, AG/Res. 445 (IX-0/79), 31 October 1979.

<sup>187</sup> OAS, General Assembly, AG/Res.666 (XIII-0/83), 18 November 1983.

<sup>188</sup> United Nations, Commission on Human Rights, *Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and Human Rights framework for the protection of persons from enforced or involuntary disappearances*, at para. 11. BRODY, Reed; GONZÁLEZ, Felipe. *Nunca Más: An Analysis of International Instruments on Disappearances*. In: Human Rights Quarterly, Vol.19, No. 2, May 1997, p. 368, 369.

<sup>189</sup> Ibid.

<sup>190</sup> Ibid. See also: GUEST, Iain. *Behind the Disappearances – Argentina’s Dirty War Against Human Rights and the United Nations*, p. 239.

<sup>191</sup> GUEST, Iain. *Behind the Disappearances – Argentina’s Dirty War Against Human Rights and the United Nations*, p. 177.

<sup>192</sup> IACHR. *Report on the Situation of Human Rights in Argentina*, OEA/Ser.L/V/II.49, 11 April 1980, Chapter III, A.

were hearing the testimonies, thousands of individuals filled the street, giving confidence to many people to seek information related to the whereabouts of their next of kin<sup>193</sup>.

The IACHR observed that the uncertainty regarding the whereabouts of the victims had greatly upset the families, especially the children who, in some cases, witnessed the kidnapping of their parents and the mistreatment suffered during the raid. As many of these children would never see their parents again, they would likely present psychological problems inherited by these events<sup>194</sup>. In addition, the IACHR expressed its concern with many man and woman between 18 and 25 years of age who were affected by anxiety and suffering due to the pass of time without knowing the whereabouts of their parents, brothers or sisters. Also, the Commission mentioned the case of spouses of the disappeared, man and woman, who were aggressively and forcibly separated, living “in an environment of severe mental disturbances, accentuated by the many economic and legal problems that this separation poses for them”<sup>195</sup>. In fact, the spouses of the disappeared had to live without knowing if they were still married or if they were widowed.

Another situation which deserved special attention of the IACHR concerned the *unidentified dead*, also called *nomen nescio* (N.N.). The Commission had received information about burials which were performed at night in public cemeteries. The corpses were not identified, and the graves marked with the initials *NN*. Some of these graves seemed to contain infants and newly born children. By analyzing the death certificates prepared by the army physicians, the Commission found out that the diagnosis of the cause of death was, in many cases, a result of “destruction of the brain produced by a firearm projectile”<sup>196</sup>. In order to clarify the identification of the *NN* victims, the IACHR requested the Argentine government to inform how many people were buried under those circumstances and their names. The Commission, however, did not receive any reply to its request<sup>197</sup>.

The discovery of graves marked with *NN* helped clarify that many disappeared persons were being buried in secret graves. However, the secrecy surrounding these graves forced the relatives and friends of the disappeared to continuously search for the whereabouts of their next of kin. By doing so, the relatives made use of “every available legal procedure”, especially *habeas corpus*, “denunciations of illegal deprivation of liberty

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<sup>193</sup> WEISSBRODT, David; BARTOLOMEI, Maria Luisa. *The Effectiveness of International Human Rights Pressures: The Case of Argentina, 1976-1983*, p. 1021.

<sup>194</sup> IACHR. *Report on the Situation of Human Rights in Argentina*, Chapter III, G.

<sup>195</sup> Ibid.

<sup>196</sup> Ibid, Chapter II, D.

<sup>197</sup> Ibid.

in courts of justice or to the police”, as well as “administrative measures in accordance with procedures established at the Ministry of the Interior”<sup>198</sup>. Nevertheless, all these efforts were fruitless. The Executive kept denying that the detainees were on record. This situation of denial, according to the IACHR, caused deep anxiety to the relatives who turned, in many cases, to the Catholic Church and to international organizations, such as the Commission itself, in order to obtain answers from the authorities<sup>199</sup>.

The IACHR mentioned the solidarity which existed among the relatives of disappeared and made a reference to the work of the notorious *The Mothers of the Plaza de Mayo*. One of these *Mothers*, in an interview with the Commission, affirmed that the Argentine citizens together with the relatives should understand the “truth” behind the cases of disappearances because it was their “commitment with future generations”. Otherwise, “a shadow of sadness will remain forever over the descendants of this shattered generation and peace will not come to so many desolate families”<sup>200</sup>.

Considering “these and other problems” posed by the disappearances, the Commission concluded that they “cannot be resolved as long as the situation of these thousands of disappeared persons is not clarified in a final and responsible manner”<sup>201</sup>. In this regard, the IACHR stated that it had made strong efforts in order to exhaust all possibilities to “determine the truth” concerning the disappearances, which included “inquiries at prison establishments, military installations, cemeteries” and resocialization centers. All these efforts, however, were “in vain”<sup>202</sup>. The IACHR, based on these circumstances and the information it received, affirmed to have reached the painful conclusion that the great majority of the disappeared was dead, which involved a heavy responsibility for the captors and for those who kept the victims detained<sup>203</sup>.

Unfortunately, according to the IACHR, “the explanations of the Government have been extremely inadequate and unconvincing”. Accordingly, its “replies add little of substance, and do not persuasively contradict the occurrence of the alleged events”. In the view of these circumstances, the IACHR expressed its conviction “that the material facts of the denunciations must be assumed to be true”<sup>204</sup>.

The military dictatorship in Argentina ended on 10 December 1983. Five days later, the civil President Alfonsín established by a decree the National Commission on the

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<sup>198</sup> Ibid, Chapter II, E.

<sup>199</sup> Ibid.

<sup>200</sup> Ibid.

<sup>201</sup> Ibid.

<sup>202</sup> Ibid.

<sup>203</sup> Ibid.

<sup>204</sup> Ibid.

Disappearance of Persons, CONADEP (*Comisión Nacional sobre la Desaparición de Personas*), with the objective to clarify the cases of enforced disappearance which took place in Argentina during the repressive years<sup>205</sup>. Interestingly, it seemed that Argentina looked toward Bolivia for the idea of creating a commission to investigate the violence of the military years. Bolivia had established in October 1981 a National Commission of Inquiry into Disappearances with Carmen Loyola Guzman, a member of the Association of Relatives of the Detained, Disappeared and Martyred for National Liberation (ASOFAMD), as its executive secretary. The Bolivian Commission was the first Latin American truth commission, although it was disbanded less than two years after its creation without producing a final report<sup>206</sup>.

Argentina adjusted the Bolivian's initiative into its national experience with the objective of clarifying the cases of enforced disappearance. In order to accomplish such objective, CONADEP could hire personnel, as well as have access to government facilities. Also, it supposed to receive cooperation from the security forces whenever requested. However, as it was an extra judicial commission, it had no subpoena powers and it was not authorized to compel testimonies<sup>207</sup>.

Argentine human rights organizations opposed from the beginning against this model of commission. Instead, they preferred a congressional commission of inquire with extraordinary powers to compel testimony and to obtain access to documents. Nevertheless, apart from the Mother of Plaza de Mayo, these organizations, after expressing their disagreements with the commission's structure, cooperated intensely with its work. Many of their members eventually joined CONADEP as advisors or staffers<sup>208</sup>. One important example concerned the *Center for Legal and Social Studies* (CELS) formed by three fathers of disappeared victims: Emilio Mignone, José Westercamp and Augusto Conte MacDonell. CELS had the objective of providing legal aid and assistance to victims' families, especially in the case of the disappearances. Their members coined the expression *detained-disappeared* (*detenido-desaparecido*) in a reference to the participation of state security forces in the cases of disappearance<sup>209</sup>.

Due to CELS important work, it received invitations to affiliate with the International Commission of Jurists in Geneva and with the International League for in New York.

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<sup>205</sup> Republic of Argentina. Article 1, Decree n° 187/1983, 15 December 1983.

<sup>206</sup> HAYNER, Priscilla. *Fifteen Truth Commissions – 1974 to 1994: A Comparative Study*. In: Human Rights Quarterly, Vol. 16, No. 4, November 1994, p. 613.

<sup>207</sup> Republic of Argentina. Article 3 and 4, Decree n° 187/1983, 15 December 1983.

<sup>208</sup> America Watch. Report written by Juan Mendéz - *Truth and Partial Justice in Argentina: An Update*, April 1991, p. 14-15.

<sup>209</sup> GUEST, Iain. *Behind the Disappearances – Argentina's Dirty War Against Human Rights and the United Nations*, p. 212-213.

However, the invitations made to its members to join CONADEP or to give it legal advice were turned down, revealing its suspicious attitude towards the new established commission. Similarly, the director of the human rights organization *Justice and Peace*, Adolfo Pérez Esquivel, who won the Nobel Peace Prize in 1980, also refused to join CONADEP. In both cases, the members of these organizations end up agreeing to contribute with the Commission, becoming indispensable collaborators to its work<sup>210</sup>.

After the first few weeks of 1984, CONADEP began receiving testimonies from relatives as well as from victims who survived the camps where disappeared persons were held detained. Many relatives were providing information about their disappeared next of kin for the first time which consequently increased the number of victims from 6.500 persons to 8.960. In order to collect these testimonies, CONADEP established branches in different cities such as Mar del Plata or Córdoba and some of its staffers travelled to other smaller locations. Also, it requested Argentine embassies and consulates to encourage exiles to provide information on their experiences. Testimonies were collected in cities such as New York, Geneva, Caracas, Mexico City, Madrid and Paris<sup>211</sup>.

The witnesses provided leads for the National Commission to inspect military and police facilities where disappeared persons were previously seen. The CONADEP members had also visited clandestine cemeteries and areas of public graveyard where militaries were accused of bury unidentified bodies. These inspections caused strong reactions among the militaries, provoking complaints followed by denial of the information concerning the visited locations<sup>212</sup>. A particularly controversial inspection concerned the ESMA (Higher School of Mechanics of the Navy) complex located in Buenos Aires. The CONADEP team was accompanied by six former detainees who were requested to make sketches before the visit according to their memories of the location. After arrival, the former detainees guided the team to the basement and ground floor of one the buildings specifying where the abductions were planned and the location of the torture room. In accordance with the information received, the instruments of torture had been removed and the torture room filled of filing cabinets. The inspection of ESMA, despite being brief, was resented by the militaries and the National Commission was requested to exercise restraint<sup>213</sup>.

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<sup>210</sup> Ibid., p. 383. See also: America Watch. Report written by Juan Mendéz - *Truth and Partial Justice in Argentina: An Update*, p. 14.

<sup>211</sup> America Watch. Report written by Juan Mendéz - *Truth and Partial Justice in Argentina: An Update*, p. 17.

<sup>212</sup> Ibid., p. 17 -18.

<sup>213</sup> GUEST, Iain. *Behind the Disappearances – Argentina's Dirty War Against Human Rights and the United Nations*, p. 384 -385.

Albeit the military pressure, on 4 July 1984 CONADEP conducted a two-hour program on television presenting testimonies of former detainees and of relatives of disappeared persons. Ernesto Sabato, the president of CONADEP, and Antonio Troccoli, the Ministry of Interior, presented the introductory and closing statements. Mr. Troccoli's words became well known for comparing the violence of the State with the violence of "the subversion and terrorism", equally condemning them. The statements of the Ministry, an approach called *the theory of two devils* in Argentina, were an effort to temper the impact caused by the testimonies given to the program, by justifying the military actions against civilians<sup>214</sup>. The television program reached more than 1.600.000 viewers, making the voices of the relatives heard by a mass audience for the first time<sup>215</sup>.

After months of investigation, the CONADEP sent to the government in September 1984 its final report with around 50.000 pages. Its summarized version was published as a book entitled *Nunca Más* (Never Again), also known as *Informe Sabato* (Sabato's Report) in a reference to its President, Ernesto Sabato. In its foreword, Ernesto Sabato affirms that the number of disappeared persons discovered was close to 9.000, but that the CONADEP team believed it was actually much higher. Many families had not yet reported the disappearance of their loved ones for fear of reprisals. Mr. Sabato also emphasized that the report was not a product of any feeling of vindictiveness or vengeance. On the contrary, it was based on the requests for truth and justice, as an indispensable demand of Argentine society was to ascertain the truth of what had happened and to confront its immediate past<sup>216</sup>.

In order to achieve these demands, CONADEP faced *inter alia* the issue of relatives as victims, dedicating a chapter of its report to confront the consequences of enforced disappearance to the families involved. The Commission concluded that the stability and structure of the family of the person who disappears are profoundly affected by the arrest, by the anxious search for news at public offices, law courts, police stations and military garrisons, by the hope that some information will arrive and by the fantasy of a bereavement that is never confirmed. According to CONADEP, behind each disappearance there is a family destroyed or dismembered, as well as assaulted in its right to privacy and security of its members<sup>217</sup>.

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<sup>214</sup> America Watch. Report written by Juan Méndez - *Truth and Partial Justice in Argentina: An Update*, p. 18.

<sup>215</sup> CRENZEL, Emilio. *Políticas de la Memoria: La Historia del Informe Nunca Más*. In: Papeles del CEIC, Vol. 61, September 2010, p. 11.

<sup>216</sup> CONADEP, *Nunca Mas*. Buenos Aires, 1984, Prologo; Capítulo 4.

<sup>217</sup> Ibid., Capítulo 2, C.

However, there were other problems posed for the relatives in addition to the suffering of the disappearance of a family member. Eventually, families were victims of robbery, physical violence, disappearance and/or used as hostages. Also, many relatives suffered torture together with their next of kin or were forced to witness torture sessions of their loved ones. Some of these cases had the presence of children who suffered dramatic consequences due to these events including suicide. In other cases, infants were born in captivity due to their mothers' detention and subsequently given up to adoption. The CONADEP made special reference to the work of the Grandmothers of the Plaza de Mayo and their struggle in clarifying the whereabouts of these disappeared infants, as well as children who were seized at the time of their parents' detention. According to the Commission, there were 147 unclarified cases of disappeared infants and children<sup>218</sup>.

Despite no explicit mention to the right to know, the CONADEP's report reveals the initial struggle in Argentina, especially of relatives, to search for the clarification of the facts regarding the cases of disappearances. This struggle was far from ending, but the public exposure in the report of what happened and how it happened represented an important step in what Juan Méndez calls the *truth phase* in Argentina, i.e. the establishment of the "painful truth about repression"<sup>219</sup>. The search for information concerning the events that took place during the repressive period is thus associated with a search for the *truth* of the facts. As stated in CONADEP's report, covering up the truth and misinformation were essential to the most important acts of the military governments which entailed secrecy and deniability<sup>220</sup>. In regard specifically to the disappearances, the denial of the State to recognize that it was holding the victim in custody created a radical situation of uncertainty and silence for the family and friends of the victim. In this context, the word *truth* becomes associated with the struggle to know the whereabouts of the victims and to end obfuscations and denials imposed by the State.

Despite its search for the truth, the CONADEP report did not clarify the whereabouts of the victims. Therefore, the progress made in discovering the fate of each of the disappeared persons had been subordinated, as concluded in the report, to the progress made in determining which individuals are responsible for the repressive acts committed<sup>221</sup>. In order to facilitate this task, the report sent to the government included a

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<sup>218</sup> Ibid.

<sup>219</sup> America Watch. Report written by Juan Méndez - *Truth and Partial Justice in Argentina: An Update*, p.61.

<sup>220</sup> CONADEP, *Nunca Mas*. Buenos Aires, 1984, Capítulo 1– D; Consideraciones Generales.

<sup>221</sup> Ibid, Capítulo 6.

list containing several hundred names of military men and police responsible for repressive and illegal acts<sup>222</sup>.

Although CONADEP could not achieve all its objectives, it served as an important example to other Latin American countries which also produced their own *Nunca Mas* reports. For example, in Brazil, the Archdiocese of São Paulo, based on the criminal cases opened by the Military Justice against the “subversives”, produced a report called Brazil: Never Again (*Brasil: Nunca Mais*), detailing the human rights violations which took place in the Country. As the main method of political intimidation used by the militaries was torture, the report describes the techniques and instruments of physical and psychological torture used against the prisoners based on their testimonies before the military courts. In accordance to the descriptions, among the most common methods and instruments were electrical shocks, drowning, macaw's perch (*pau de arara*), iron chair, beatings, exposure to high cold temperatures for many consecutive days (*the fridge*), starvation and rape<sup>223</sup>.

Regarding the disappearances, the Archdiocese concluded that 125 persons disappeared during the years of the military rule in Brazil (April 1964 – March 1985)<sup>224</sup>. Hereof, it stated that the disappeared victims characterize the worst stage of political repression in a country and the perpetuation of the suffering caused by the uncertainty of a relative's fate is “crueler than the most creative human ingenuities of torment”<sup>225</sup>. Therefore, the Archdiocese requested the clarification of the whereabouts of the disappeared in order provide them a proper burial and to ensure their families the right to mourn. The legal basis of this request is enshrined, as stated in the report<sup>226</sup>, in Article 120 of the III Geneva Convention of 1949<sup>227</sup>.

In addition to Brazil, another Country which also published its own *Nunca Mas* report was Guatemala. The *Report of the Project for the Reconstruction of Guatemala's Historical Memory* was published in 1998, detailing the human rights violations of 36 years of civil war. Previously to this domestic initiative, the long period of “generalized

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<sup>222</sup> International Commission of Jurists. *Argentina: The Truth About the Disappeared*. In: The Review, No. 33, December 1984, p. 5.

<sup>223</sup> Archdiocese of São Paulo. *Brasil: Nunca Mais*. Petrópolis: Editora Vozes, 1985, p. 34-41.

<sup>224</sup> Unfortunately, the Brazilian Truth Commission concluded that the number of cases of disappearance is higher than the estimative of the Archdiocese of São Paulo. In its final report made public in 2014, the Commission presented a list with the name of 243 victims. Federative Republic of Brazil. *Relatório da Comissão da Verdade (Report of the Truth Commission)*. Brasília: CNV, 2014, p. 577-582.

<sup>225</sup> Archdiocese of São Paulo. *Nunca Mais*, p. 260. (Original in Portuguese. Author's translation)

<sup>226</sup> *Ibid.*, p. 272.

<sup>227</sup> Article 120 of III Geneva Convention of 1949 is related to wills, death certificate, burial and cremation of prisoners of war.



violence”<sup>228</sup> of the civil war had already been followed with “particular concern”<sup>229</sup> by the IACHR which resulted in a remarkable report on the situation of human rights in the Country.

The IACHR made its report public in 1981 and considered that Guatemala was “under a state of terror” characterized by a spiral of violence<sup>230</sup>. Indeed, the Country had gone through troubled political times since the overthrow of the democratically elected President Arbenz Guzmán on June 1954, followed by an internal armed conflict that extended from 1960 until the peace agreement in 1996. Numerous paramilitary organizations such as *MANO* (Anti-Communist Organized National Movement) or *Ojo por Ojo* (An Eye for an Eye) initiated anti-subversive campaigns in parallel with the ones implemented by governmental security forces<sup>231</sup>. In 1968, the Archbishop of Guatemala was kidnapped by a paramilitary group and the American ambassador was killed during a frustrated kidnapping attempt by leftist guerrillas. Between 1971 and 1973 only, 22.000 cases of disappearances and deaths were reported<sup>232</sup>. By the time the IACHR concluded its report on Guatemala, the UN Commission on Human Rights had previously called the Country a “gross violator” in public. It was one of the few cases, at that time, which were publicly exposed by the UN Commission without been dealt first in a confidential procedure<sup>233</sup>.

The 1981 report confirmed the allegation of the UN Commission. According to the IACHR, in Guatemala the violence became so generalized that the “lack of respect for the human life” predominated <sup>234</sup>. One of the “most serious situations” analyzed by the IACHR was the existence of “secret cemeteries” also known as “body dumps”<sup>235</sup>. Their purpose was to hide the bodies of the missing persons shot *en masse* in extrajudicial executions perpetrated in agricultural areas and Indigenous communities and to make the identification of the victims impossible. The IACHR concluded that the existence of these cemeteries was “an abominable fact”<sup>236</sup> which caused even more suffering to the

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<sup>228</sup> IACHR. Report on the Situation of Human Rights in the Republic of Guatemala. OEA/Ser.L/V/II.53, 13 October 1981, Introduction – A.

<sup>229</sup> Ibid.

<sup>230</sup> Ibid, Chapter II, B.

<sup>231</sup> Ibid.

<sup>232</sup> GOOD, Martha, MARLER, Karen. ROSSWURM, Richard H.; STEIN, Heather; SPECTOR, Lea; JR. WOODBRIDGE, Frederick. *Synopsis of the 1980-81 Country Reports of the Inter-American Commission on Human Rights*. Human Rights Quarterly, Vol. 4, No. 3 (Autumn, 1982), p. 421.

<sup>233</sup> GUEST, Iain. *Behind the Disappearances – Argentina’s Dirty War Against Human Rights and the United Nations*, p. 225

<sup>234</sup> IACHR. Report on the Situation of Human Rights in the Republic of Guatemala. OEA/Ser.L/V/II.53, 13 October 1981, Chapter II, A

<sup>235</sup> Ibid, Chapter II, F.

<sup>236</sup> Ibid.

relatives of missing persons. In addition to their long searches in hospitals, jails and morgues, the relatives also had to go to “the distant and inhospitable areas where these cemeteries are found”<sup>237</sup> to try to seek some date or indication that they loved ones were buried in those locations. Also, the IACHR stated that when bodies were found, they appeared, in a rule, brutally disfigured, nude, without documents or signs of identification<sup>238</sup>.

In other cases, the IACHR reported the discovery of bodies “floating in the rivers, inside plastic bags, thrown on the streets, in highway ditches or in gorges”<sup>239</sup>. Also, in many instances, some bodies were burned or thrown into the ocean or into the mouths of volcanos. According to the IACHR, these situations caused an “endemic climate of total alarm, and even terror”<sup>240</sup> in Guatemala.

In 1985, the IACHR concluded another report on Guatemala after visiting the Country in that same year. It heard testimonies of relatives of victims of enforced disappearance and observed their efforts of all kinds to clarify the whereabouts and fate of their next of kin, including political, judicial and administrative formalities. The IACHR also observed that there was no organization of relatives of disappeared, especially due to political interference, until June 1984 when *GAM* (Mutual Support Group for the Appearance Alive of Our Relatives) was established. After one year, this organization integrated 640 families with 538 cases of disappearances occurred between the years of 1980 and 1985.<sup>241</sup> Most of the victims of disappearance were men between twenty and forty years of age, some were women (among which several were pregnant) and minors between six and sixteen years of age<sup>242</sup>.

After analyzing the activities of the relatives of disappeared persons, the IACHR concluded that from the point of view of drawing attention to their cause, the relatives achieved extraordinary results. However, if considered the release and appearance alive of the disappeared victims, the relatives had not succeeded at all. On the contrary, the members of *GAM* were themselves disappearing after been constantly persecuted, followed by armed agents and threatened with death. On March 1985, one member of the directorate was kidnapped and few days later his body was found with the tongue cut. In the following month, the wife of a disappeared student leader, who also

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<sup>237</sup> Ibid.

<sup>238</sup> Ibid.

<sup>239</sup> Ibid.

<sup>240</sup> Ibid, Conclusions and Recommendations, A.

<sup>241</sup> IACHR. Third Report on the Situation of Human Rights in Guatemala. OEA/Ser.L/V/II.66, 3 October 1985, Capítulo II.

<sup>242</sup> SCHIRMER, Jennifer G. *Those Who Die for Life Cannot Be Called Dead: Women and Human Rights Protest in Latin America*. In: *Feminist Review*, No. 32, Summer 1989, p. 15.

participated in the activities of *GAM*, was kidnapped together with her younger brother and her three years old child. The three were later found dead. Considering these events, the IACHR requested the highest political and military authorities of Guatemala for special protection for the relatives<sup>243</sup>.

As civil wars seemed to spread in Central America, reported cases of persecution against relatives of disappeared victims, religious leaders and members of human rights organizations revealed not to be limited to Guatemala. An important example concerns El Salvador. The Country was under a civil war since October 1979 when young officers organized a coup aimed at breaking the mold of repression, causing indignation of left-wing civilians. After the US announced the approval of a military aid to the Salvadoran's militaries, the Archbishop of San Salvador, Oscar Romero, protested. He was one of the main human rights' references in the Country, detailing every Sunday in the cathedral the violent events which took place in the previous week. Mr. Romero was shut down on 24 March 1980 while saying a mass<sup>244</sup>. The UN General Assembly chose the day of his assassination as the International Day for the Right to truth of Victims of Gross Human Rights violations.

It was with the encouragement of Archbishop Romero that mothers of disappeared victims in El Salvador formed in 1977 the *CoMadres*. After the civil war irrupted in 1979, the members of *CoMadres* began taking pictures of the corpses left into the streets and common mass graves located in open spots. In 1980, Marianella García Villas, the President of *El Salvador's Independent Human Rights Commission*, took these pictures to Mr. van Boven of the UNWGEID in Geneva. Few years later, Ms. García Villas was killed by the Salvadoran Army during a fact-finding investigation<sup>245</sup>.

These conflicts involving the El Salvadoran government had been observed with concern by the IACHR. On January 1978, the Commission visited El Salvador, meeting Archbishop Romero and his colleagues. They claimed to suffer harassment due to the dedication in helping the peasants to engage in activities which would enable them to exercise their rights and improve their living conditions. In accordance with the testimony of Archbishop Romero, this support of the Catholic Church to the peasants was resented by landowners and businessmen who accused its members of taking part in terrorist and

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<sup>243</sup> IACHR. Third Report on the Situation of Human Rights in Guatemala. OEA/Ser.L/V/II.66, 3 October 1985, Capítulo II.

<sup>244</sup> GUEST, Iain. *Behind the Disappearances – Argentina's Dirty War Against Human Rights and the United Nations*, p. 218

<sup>245</sup> *Ibid*, p. 367.

subversive activities. Consequently, the Government, for its part, reacted violently against the Church and interpreted its positions as politically opposed to the regime<sup>246</sup>.

The members of the Commission also met relatives of victims of disappearance who claimed to encounter great difficulties due to the lack of cooperation of the government. The families stated that the governmental authorities were interfering in judicial processes to prevent the whereabouts of their next of kin to become known. In addition, it was emphasized the continuing denial of the authorities in acknowledging to have any information concerning the disappeared victims. The relatives revealed to be insecure about what could happen to them, as many were being followed or sought by the security forces<sup>247</sup>.

Conflicts between relatives and authorities were also reported in Nicaragua. On 30 January 1978, relatives (mostly wives and mothers) of disappeared victims took over the Office of Program Development of the United Nations to peacefully protest. They were dispersed with tear gas and several of them were seriously wounded. In another episode, the National Guard dispersed a demonstration organized by university students on behalf of prisoners and disappeared persons by throwing tear gas from helicopters. Some of these students were seriously injured after tear gas canisters fell on their heads<sup>248</sup>.

By 1978, Nicaragua was under the regime of Anastasio Somoza Debayle who became President in 1967 and ruled the Country under a constant state of violence. The first report of the IACHR on the situation in Nicaragua covered the retaliation of the National Guard to the attacks to its detachments organized by the opposition, the Sandinista National Liberation Front. The members of the IACHR confirmed that during the retaliation numerous atrocities were committed by the National Guard, including mass murders of minors and summary executions of civilians during house-to-house searches<sup>249</sup>. It was on July 1979, after eighteen years of armed struggle, that the Sandinistas deposed President Somoza. Contrarily to the expected, the end of Somoza's government did not bring peace to Nicaragua as a civil war (the *Contra War*) irrupted in the Country and lasted for almost twelve years<sup>250</sup>.

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<sup>246</sup> IACHR. *Report on the Situation of Human Rights in El Salvador*, OEA/Ser.L/V/II.46, 17 November 1978, Introduction, C, at para. 22.

<sup>247</sup> Ibid., at para. 33.

<sup>248</sup> IACHR. *Report on the Situation of Human Rights in Nicaragua*, OEA/Ser.L/V/II.45, 17 November 1978, Introduction, A.

<sup>249</sup> IACHR. *Report on the Situation of Human Rights in the Republic of Nicaragua*, OEA/Ser.L/V/II.53, 30 June 1981, Introduction, A at para. 3.

<sup>250</sup> See: BOTHMANN, Astrid. *Transitional Justice in Nicaragua 1990–2012: Drawing a Line Under the Past*. Springer, 2015.

The IACHR was invited to conduct an on-site observation in Nicaragua shortly after the Sandinistas assumed the government. It concluded that most violations of human rights took place on July 1979, the month in which President Somoza was deposed. An example of these violations concerns the case of detainees of a prison known as “La Pólvara” who, according to information received by the IACHR, “were taken from the jail, executed and buried in common ditches”<sup>251</sup>. The relatives of prisoners together with members of the Nicaraguan *Permanent Commission on Human Rights* and with judicial authorities inspected the sites where the bodies were buried. Some of the relatives managed to find the bodies of their next of kin among piles of other bodies and requested their exhumation. The Judge of the Criminal District of Granada in charge denied the request, not allowing the exhumation. Afterwards, it seems that those piles of corpses were burned, drenched in diesel fuel<sup>252</sup>.

The relatives of the prisoners in a letter sent to the IACHR stated that the uncertainty related to the whereabouts of their next of kin, who vanished from the prison where they were supposed to be, caused them “anxiety and constant pain”<sup>253</sup>. These families claimed to face the possibility that their relatives may still be alive, but without any legal or physical support. Also, in accordance with the testimony of families, their lives were “seriously affected”<sup>254</sup> by the disappearances which included breakdowns and even death as a result of the prolonged suffering. Some mothers and wives of disappeared victims revealed to live under “depressed conditions” without work, home and personal possessions. They stated to be victims of “hatred” while forced to live “alienated from society”<sup>255</sup>. The relatives requested therefore for the fate of their next of kin to be clarified, for those who are alive to be released and for those responsible for the crimes to be prosecuted<sup>256</sup>.

These dramatic events which, as mentioned above, took place with tireless repetition throughout Latin America marked hardly its countries. As some states in Central America were still immersed in civil wars, others as Argentina, for example, were concluding their dictatorial period and the question of how to respond to human rights violations of the recent past began to arise. Accordingly, the IACHR 1985-1986 annual report reflects the concern with the legacy that the dictatorships in Latin America were leaving behind. It recognizes the “urgent needs for national reconciliation and social pacification” which

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<sup>251</sup> IACHR. *Report on the Situation of Human Rights in the Republic of Nicaragua*, 30 June 1981, Chapter II, B, at para.1.

<sup>252</sup> Ibid, Chapter II, B, Case 7057: Dr. Francisco Mayorga Ramírez.

<sup>253</sup> Ibid., Chapter II, B, at para. 8.

<sup>254</sup> Ibid.

<sup>255</sup> Ibid, Chapter VIII, D, at para. 3.

<sup>256</sup> Ibid, Chapter II, B, at para. 8.

must in any case be bound by the “ineluctable exigencies of an understanding of the truth and of justice”<sup>257</sup>.

In this context, the IACHR recognized that “family members of the victims are entitled to information” concerning what “happened to their relatives”<sup>258</sup>. This understanding followed, as observed above, the IACHR constant concern with the suffering inflicted on relatives due to the absence of information regarding their loved ones. Also, it emphasizes that despite the end of the dictatorships, the obligation to clarify the cases of disappearances continues. In other words, the change of political regime could not be an excuse to avoid the investigation of such cases and to deny the relatives the actual facts concerning their next of kin’s whereabouts. The usual “forgive and forget” state policy in which gross violations of human rights were simply left behind due to the change of government could no longer play any legitimate role.

In addition, the IACHR considered in a precedent setting move that “every society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future”<sup>259</sup>. This was the first time that the right to know was considered in relation not only to individuals, but also to societies as a whole. Its main objective would be to avoid human rights violations from happening again in the future, as societies would be aware of the aberrant crimes of the past.

It has been in fact the position of the IACHR that the holders of the right to truth are the direct victims, the family members and the societies. As stated in the 1985-1986 report, this access to the truth presupposes freedom of speech responsibly exercised, investigating committees and the provision of necessary resources in order to allow, if demanded, the judiciary to undertake investigations. Interestingly, the IACHR emphasized that these principles would bring about justice rather than vengeance and therefore “neither the urgent need for national reconciliation nor the consolidation of democratic government will be jeopardized”<sup>260</sup>.

These understandings expressed by the IACHR in the 1985-1986 annual report were a first and important step in the development of the right to know in international human rights law. It adds not only the societal aspect to this right, as also associates it with the democratic transitions in Latin America. In fact, as the 1980’s witnessed the increasing

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<sup>257</sup> IACHR. *Annual Report 1985-1986*, Chapter V.

<sup>258</sup> Ibid.

<sup>259</sup> Ibid.

<sup>260</sup> Ibid.

debate concerning the fight against impunity and blanket amnesties, the right to know the truth would acquire broader facets and a major role in the international scenario.

### **Conclusion**

The right to know established in the 1977 Additional Protocol I to the 1949 Geneva Conventions was initially recognized by the UN in its resolution concerning missing persons in Cyprus. The families of the missing victims, due to the armed conflict in the region, were left without any information concerning the whereabouts of their next of kin. The anguish and suffering caused to these relatives by this situation of uncertainty, without knowing the actual fate of their family members, gained important attention at international and regional level. It was, in fact, Cyprus with the support of Greece, Holy See and France that sponsored the establishment of the right to know in IHL.

As the protection to the missing persons and their relatives increased, occupying an important position in the IHL debates, the phenomenon of the disappearances emerged as one of the most dramatic consequences of the Latin American dictatorships. Although there were cases of disappearances in the 1970's in other parts of the world, like Asia and Africa, the practice was publicly known with Chile under the rule of Pinochet. Shortly after the coup in 1973, thousands of individual complaints "deluged the United Nations Commission on Human Rights and the Inter-American Commission on Human Rights"<sup>261</sup>, denouncing *inter alia* the disappearances of persons. The victims of this practice were normally taken by security forces to clandestine detention centers, tortured and then killed. Their bodies were concealed in many different forms – left in forests, thrown in rivers, oceans, mouths of volcanos or hidden in mass graves. In any case, the purpose was to eliminate any material evidence of the crime, guarantying the impunity of the perpetrators.

When family members inquired about the fate of their next of kin, the authorities denied having any information about them. The relatives would continue to search for their loved ones for years, sometimes an entire life, oscillating between hope and despair unable to go through a process of disclosure and mourning<sup>262</sup>. This struggle led them to denounce the most clandestine facet of the dictatorial regimes – the disappearances. The crimes which were supposed to be hidden and denied were then publicly exposed in the plight

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<sup>261</sup> PASQUALUCCI, Jo M. *The Whole Truth and Nothing but the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System*. In: Boston University International Law Journal, Vol. 12, 1994, p. 322.

<sup>262</sup> NOWAK, Manfred. *Torture and Enforced Disappearance*. In: KRAUSE, Catarina; SCHEININ, Martin (eds.). *International Protection of Human Rights: A Textbook*. Turku: Institute for Human Rights, Åbo Akademi University, 2009, p. 152.

of these relatives. Isolated in the situation of imposed silence caused by the disappearances, some of them began organizing themselves, forming associations identified with the human rights cause. Their loss would place them as victims along with their disappeared next of kin and would underpin debates on human rights at international level.

This process began, as mentioned above, mostly due to the military dictatorship in Chile, but soon spread to many other countries, achieving a decisive moment with the coup in Argentina in 1976 and the brutal repression which followed. While the IACHR was producing highly critical and remarkable reports, the UN initiated a process of strengthening its human rights machinery, which was accused of being selective and politicized<sup>263</sup>. However, if there was a “gradual strengthening of the political will of states to utilize the United Nations for human rights purposes”<sup>264</sup>, this *will* also depend on the possibility to forge political coalitions<sup>265</sup>. The cases of Chile and Argentina made some of these coalitions possible, allowing the establishment of the UN *Ad Hoc* Working Group in Chile and the nomination of one expert - a former member of the Working Group – Mr. Ermacora to investigate the disappearances in the Country. Another initiative was the creation in 1980 of the UN Working Group on Enforced or Involuntary Disappearance, the first thematic special procedure with a worldwide mandate.

Regarding the Chilean procedures, it is important to mention that both reports – one produced by the Working Group and another by Mr. Ermacora - were the first UN documents to introduce the right to know in the context of disappearances. Thus, they recognize the right of families to know the fate and whereabouts of their disappeared next of kin based on Article 32 of the 1977 Additional Protocol I. Also, both reports detailed the drama lived by the relatives of disappeared victims, their state of uncertainty and their efforts to draw attention to their cause<sup>266</sup>.

Regarding the UNWGEID, its implementation made possible for cases of disappearances occurred in many different parts of the world to become known, creating

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<sup>263</sup> See, e.g.: FITZPATRICK, Joan. *Human Rights in Crisis: The International System for Protecting Human Rights During States of Emergency*. Pennsylvania: University of Pennsylvania Press, 1994, p. 126. JR., Howard Tolley. *The Concealed Crack in the Citadel: The United Nations Commission on Human Rights' Response to Confidential Communications*, p. 453. LIVERMORE, Daniel J.; RAMCHARAN, B.G. *Enforced or Involuntary Disappearance: An Evaluation of a Decade of United Nations Action*, p. 230.

<sup>264</sup> FLOOD, Patrick James. *The Effectiveness of UN Human Rights Institutions*, p. 87.

<sup>265</sup> FITZPATRICK, Joan. *Human Rights in Crisis: The International System for Protecting Human Rights During States of Emergency*, p. 126.

<sup>266</sup> United Nations *Ad Hoc* Working Group on the Situation of Human Rights in Chile. *Final Report – Protection of Human Rights in Chile*. A/33/331, 25 Outubro 1978; United Nations, General Assembly, *Report of Mr. Felix Ermacora on the Question of the Fate on the Missing and Disappeared Persons in Chile*, A/34/583/Add.1, 21 November 1979.



a direct channel between relatives and friends of the disappeared victim and the UN. The UNWGEID, for its part, receives the reports of disappearances and transmit them to the governments concerned. By opening this channel of communication between family members (and other sources reporting cases of disappearances) and the governments, the UNWGEID brought hope and gave voice to the relatives when they had almost no one to whom they could resort to. For the Argentine relatives, the UNWGEID played a very singular role, since the Group publicly criticized Argentina in an UN document for the first time and made possible for the disappearances in the Country to be exposed and investigated.

Similarly to the conclusions of the members of the Working Group in Chile and to the Expert, Mr. Ermacora, the first report of the UNWGEID recognizes the right to know the fate of family members based on Article 32 of the 1977 Additional Protocol I. It is therefore another example of the application of the right to know in contexts of disappearances on behalf of the family members of the disappeared victims<sup>267</sup>.

The right to know was indeed gaining acceptance in human rights law and in 1983 it was recognized in a case of the Human Rights Committee concerning a disappeared Uruguayan victim. The Committee accepted that the mother of the victim, Ms. Quinteros, was suffering from deep anxiety due to a continuous state of uncertainty regarding the fate of daughter, Elena Quinteros. Based on this fact, the Committee concluded that there was a violation of Article 7 ICCPR (freedom from torture or cruel, inhuman or degrading treatment or punishment) and that Ms. Quinteros had the right to know what had happened to her daughter<sup>268</sup>. The clarification of the facts concerning the disappearance was considered by the Committee as a measure of reparation, an understanding which, in case law, would be further developed by the Inter-American Court of Human Rights.

In this initial development of a right to truth in international human rights law, the role of the IACHR was certainly decisive. Throughout the 1970's and early 1980's, the IACHR exposed in its reports the disappearances in several Latin American countries. By doing so, the Commission was confronted with the struggle of relatives of disappeared victims who, in addition to the search for their family members, were also themselves being persecuted and in some cases disappearing. Members of human rights organizations and religious leaders were also target by the dictatorial regimes and occasionally killed.

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<sup>267</sup>UNWGEID. *Question of Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Question of Missing and Disappeared Persons*, E/CN.4/1435, 26 January 1981.

<sup>268</sup> Human Rights Committee. *Case Quinteros v. Uruguay*, at para. 14.

Concerned with the legacy that the dictatorships would leave behind, the IACHR recognized explicitly in its 1985-1986 annual report that the relatives are entitled to information concerning what happened to their loved ones. Furthermore, societies have the right “to know the truth about past events”<sup>269</sup>, including the motives and circumstances in which the crimes came to be committed. In the Commission’s view, by accomplishing the *truth*, the countries would be preventing the crimes from happening again in the future.

In this scenario, the word *truth*, associated with a right to know about past events, emerges as an antonym for what the dictatorial regimes represented, i.e. secrecy, deniability, obfuscations. The types of violations committed under these regimes and their characteristics were related with secret information, misinformation, secret detention centers, hidden mass graves, deniability, concealing of bodies, censorship<sup>270</sup>. Therefore, the need for a *truth* in this specific context is the need for the clarification of facts in individual and collective perspectives, revealing what had happened in past events.

The end of the dictatorships, however, would prove that the *truth* is very hard to be achieved also in democratic periods. The recent established democracies would not be able to solve cases of past human rights violations as one may had expected. The struggle of the relatives of disappeared victims therefore continued as the fight against impunity and blanket amnesties emerged as a main issue related to the past dictatorial regimes.

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<sup>269</sup> IACHR. *Annual Report 1985-1986*, Chapter V.

<sup>270</sup> ROHT-ARRIAZA, Naomi; POPKIN, Margaret. *Truth as Justice: Investigatory Commissions in Latin America*. In: *Law and Social Inquiry*, No.20, 1995, p. 81-82.

### III. The Fight against Impunity: Expanding the Struggle for the *Truth*

Impunity literally means the exemption from punishment. In the human rights context, it means the lack of remedies for victims of human rights violations<sup>271</sup>. It may assume a *de jure* form – when the cause of impunity is the existence of a legal obstacle preventing the implementation of remedies – or a *de facto* form – when the authorities have no will or competence (normally political) to prevent impunity<sup>272</sup>. The close approximation between impunity and human rights – and the consequent debates regarding it - were a product, initially, of the end of the dictatorships in Latin America. Specifically, impunity was related with the debates on how to approach perpetrators of human rights violations of the previous regimes, and the pernicious effects of amnesties and pardons<sup>273</sup>. This concern with the consequences of the phenomenon of impunity was particularly grave in cases of gross violations of human rights which include enforced disappearance, torture and extra judicial execution. More generally, the proximity of the issue of impunity with human rights also fits an important debate, which emerged more intensively in the early 1990's, related to the question of how to respond to past human rights abuses. This debate would originate the so-called *transitional justice* field<sup>274</sup>.

In this context, the right to truth, which had been recognized by the IACHR in 1986, would play a significant role. human rights advocates, relatives and NGOs would convoke this right in their demands to know about the facts involving past abuses. Accordingly, the right to truth, originated in IHL as the right of families to know the whereabouts of their relatives, would be no longer restricted to cases of enforced disappearance. On the contrary, it would expand to cover all gross violations of human rights as the right to know about the circumstances in which those violations took place. In this movement of expansion, the right to truth would be considered a collective right while also linked to the access to information and to the right to reparation, constituting in this last aspect a measure of satisfaction.

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<sup>271</sup> AMBOS, Kai. *Impunity and International Criminal Law – A Case Study on Colombia, Peru, Bolivia, Chile and Argentina*. In: Human Rights Law Journal, Vol. 18, 29 August 1997, p. 1.

<sup>272</sup> ARTUCIO, Alejandro. *Impunity and International Law*. In: Justice - Not Impunity. International Meeting on Impunity of Perpetrators of Gross Human Rights Violations. (2 to 5 November 1992 Palais des Nations – Geneva), Geneva: ICJ, 1993, p. 185-186.

<sup>273</sup> United Nations, Commission on Human Rights. Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political) - Final Report Prepared by Mr. Joinet Pursuant to Sub-Commission Decision 1996/119, E/CN.4/SUB.2/1997/20, 26 June 1997, Introduction, at para. 2-6.

<sup>274</sup> About the emergence of the *transitional justice* field, see: ARTHUR, Paige. *How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice*. In: Human Rights Quarterly, Volume 31, Number 2, May 2009, p. 321-367.

The present chapter aims at examining the close link between the right to truth and impunity, focusing on the latter as the main contributor for the consolidation of this right in the human rights context. Parallel to this consolidation, the fight against impunity also facilitated the expansion of the right to truth and its inclusion in agendas that, although connected, link this right with varied subjects. The association of the right to truth with other rights and the consequent broadness of its scope would be then analyzed.

### ***UN Initial Reaction to Amnesty Laws***

Throughout the 1970's, human rights organizations, relatives of victims and legal experts organized a campaign to support the grant of amnesty for political prisoners. Especially in Latin America during the dictatorships, amnesties were considered as a viable solution to the political persecution allowing those detained to be released and those in exile to return to their countries. Organizations such as the Brazilian Committee for Amnesty, the International Secretariat of Jurists for Amnesty in Uruguay (SIJAU) and the Secretariat for Amnesty and Democracy in Paraguay (SIJADEP) emerged as a result of the mobilizations of civil society and organized opponents to the dictatorial regimes<sup>275</sup>.

Nevertheless, the amnesties, which were once a possibility of hope and freedom for political prisoners in Latin America became in the 1980's insurance on impunity with the proliferation of self-amnesty laws proclaimed by the militaries<sup>276</sup>. As amnesties obstruct the criminal prosecution in respect to conducts committed before they were proclaimed, the military grant themselves such legal measure in order to guarantee their impunity<sup>277</sup>.

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<sup>275</sup> United Nations, Commission on Human Rights. *Question of the impunity of perpetrators of Human Rights violations*, Final Report prepared by Mr. Louis Joinet, at para. 2.

<sup>276</sup> Ibid, at para. 3.

<sup>277</sup> Amnesties have been the subject of intense analysis in the legal scholarship. See, for example: OSHEA, Andreas. *Amnesty for Crime in International Law and Practice*. Leiden: Kluwer, 2002; QUINN, Robert J. *Will the Rule of Law End? Challenging Grants of Amnesty for the Human Rights Violations of a Prior Regime: Chile's New Model*. In: Fordham Law Review, Vol. 62, Issue 4, 1994, p. 905-960. ROHT-ARRIAZA, Naomi; GIBSON, Lauren. *The Developing Jurisprudence on Amnesty*. In: Human Rights Quarterly, Vol. 20, 1998, p. 843-885; MICUS, Annelen. *The Inter-American Human Rights System as a Safeguard for Justice in National Transitions: From Amnesty Laws to Accountability in Argentina, Chile and Peru*. Leiden: Brill Nijhoff, 2015; NTOUBANDI, Faustin Z. *Amnesty for Crimes Against Humanity Under International Law*. Leiden: Martinus Nijhoff, 2007. LESSA, Francesca; PAYNE, Leigh A. (eds) *Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives*. New York: Cambridge University Press, 2012. MALLINDER, Louise. *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide*. Portland: Hart Publishing, 2008. DUGARD, John. *Dealing with Crimes of a Past Regime. Is Amnesty still an Option?* In: Leiden Journal of International Law, 1999, Vol.12, p.1001-1015; Rwelamira, M.R., & Werle, G. (eds.) *Confronting Past Injustices: Approaches to Amnesty, Reparation and Restitution in South Africa and Germany*, Durban: Butterworths, 1996; GOLDMAN, Robert K. *Amnesty Laws and International Law*. In: International Commission of Jurists. *Justice – Not Impunity. International Meeting on Impunity of Perpetrators of Gross Human Rights Violations* (2 to 5 November 1992 Palais des Nations – Geneva), p. 209-222.

In other cases, such as Uruguay and El Salvador, civilian governments agreed to concede amnesties for fear of military retaliation or because they were part of a compromise between the civil elites and the military high command<sup>278</sup>.

One of the first countries to decree an amnesty law was Chile already in 1978, five years after the coup. The Chilean Interior Minister Sergio Fernández presented the amnesty as a generous humanitarian act, claiming that the government “does not harbor grudges and knows that pardon and oblivion must open new paths to the reunified country”<sup>279</sup>. This policy of oblivion was precisely what the relatives of disappeared victims feared the most, as it would cover up the crimes, forcing the issue of the disappearances to be left in the past and consequently avoiding the truth from being revealed<sup>280</sup>.

Within the UN system, the amnesties were initially debated in the Human Rights Committee already in 1979, one year after Pinochet’s self-amnesty decree. Some of the Committee’s members considered that disappearances in whatever circumstances involved state responsibility and questioned the immunity granted by the amnesty law to persons who could otherwise be indicted for serious violations of human rights<sup>281</sup>. In reply to these questions, the government of Chile claimed that the amnesty had to be general and could not be granted in fragments. The government explained that it would be unfair, for example, for a policeman who exceeded his authority to be punished while a terrorist would be allowed to go free under the amnesty. The government continued by alleging that amnesty did not mean that “offences should not be investigated to a certain criminal responsibility”, as those benefiting from such measure would still have to confront their “social responsibilities”. This means, according to the government, that if the offender is a holder of government office, he or she would be subject to administrative sanctions<sup>282</sup>. Implicitly, the Chilean authorities were trying to equate the responsibility of the perpetrators with the one of the victims of human rights violations.

In addition to Chile, another case mentioned by the Human Rights Committee in its 1979 report concerned Spain. Some members of the Committee requested explanations regarding the measures implemented by the Country in its transition towards political democracy especially those taken against supporters of the previous regime. The

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<sup>278</sup> ROHT-ARRIAZA, Naomi. *After Amnesties are Gone: Latin American National Courts and the New Contours of the Fight Against Impunity*. In: Human Rights Quarterly, Volume 37, Number 2, May 2015, p.346.

<sup>279</sup> STERN, Steve J. *Memory – The Curious History of a Culture Code Word*. In: Radical History Review, Issue 124, January 2016, p. 124.

<sup>280</sup> Ibid.

<sup>281</sup> United Nations, General Assembly. Report of the Human Rights Committee. A/34/40, 27 September 1979, at para. 81.

<sup>282</sup> Ibid., at para. 102.

Committee asked if the amnesty was applied restrictively, to what extent the rights of the persons had been restored, and what were the steps taken regarding public officials who worked for the former regime, but who might have been unjustly dismissed from their posts<sup>283</sup>. The Spanish government did not answer all these questions individually but claimed that the Amnesty Act embodied the search of the new Spanish democracy to establish itself based on national reconciliation<sup>284</sup>.

These debates in the Human Rights Committee touched upon some important issues which are worth mentioning. First, it reveals that while the case of Chile raised the concern with the probability of impunity for perpetrators of serious violations, the Spanish amnesty remained associated with the need to avoid arbitrary actions towards those who worked for the previous regime. As José Zalaquett explains, from the early 1970's to the early 1980's, the human rights movement confronted governmental policies regarding alleged crimes committed by deposed regimes. For example, in countries such as Greece, after the end of the military regime in 1974; Vietnam, following the Hanoi's victory; and Nicaragua, after the overthrow of Somoza in 1979 when the Sandinistas brought thousands of alleged supporters of the former dictator to trial. Mr. Zalaquett notes that "human rights watchdogs" were worried about "unfair trials or any arbitrary action for past human rights violations"<sup>285</sup>.

Indeed, when the Human Rights Committee adopted its 1979 report, the central focus of human rights activism was on current violations and only rarely it was concerned with past abuses or with preventing violations from happening again. Until the mid-1980's, the human rights movement focused on publicly shaming repressive governments into treating citizens more fairly. This would include organizations such as AI or Human Rights Watch whose investigations concerned basically repressive regimes. Political shifts, however, beginning in the 1980's would bring new developments, presenting impunity as a real and concrete issue<sup>286</sup>. These changes were related initially with the end of dictatorships in Latin America followed by the political liberalization in Eastern Europe and many other regions of the world<sup>287</sup>. Progressively, the human rights

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<sup>283</sup> Ibid., at para. 183.

<sup>284</sup> Ibid. at para. 207.

<sup>285</sup> ZALAUQUETT, José. *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*. In: *Hastings L.J.*, 43, August 1992, p. 1427.

<sup>286</sup> ARTHUR, Paige. *How 'Transitions' Reshaped Human Rights: A Conceptual History of Transitional Justice*. In: *Human Rights Quarterly*, Volume 31, Number 2, May 2009, p. 334-336.

<sup>287</sup> ZALAUQUETT, José. *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, p. 1427.

movement turned its attention to past abuses, elaborating the best forms to confront them.

In this context, the concern of the Human Rights Committee with Chile in 1979 shows an initial phase of the important debate concerning amnesty laws and impunity. From a broader perspective, it reveals – as it will be elaborated throughout this chapter - the relevance that past abuses were acquiring in human rights law with the focus based on international obligations of the State<sup>288</sup>. Such obligations would include the duty to investigate gross violations of human rights and to prosecute and punish those responsible for committing them.

It is important to note that even though Spain was not initially fully considered in this process, it does not mean that the Franco's regime did not leave victims behind. On the contrary, the Spanish Civil War (1936-1939) made up to 200.000 victims of execution and once it ended a further 20.000 Republicans were killed<sup>289</sup>. The end of the dictatorship in 1976 inaugurated a long and painful period for the relatives who wanted to know the whereabouts of their next-of-kin disappeared during the Francoist Spain. In the view of these families, the national reconciliation was based on oblivion consolidated on the Amnesty Law of 1977 and focused on governmental stability. The leaders of the Spanish transition did not include the victims and their families in the process and none of their successors showed interest in carefully revising the past. This avoidance in accounting for past violence was also known in Spain as *pact of forgetting* or *pact of silence*, and it would begin to be overcome, although very limitedly, only in the twenty-first century with the 2007 Law of Historical Memory<sup>290</sup>.

In this process of overcoming pacts of silence, impunity would appear as an obstacle for past human rights violations to become known. Considering this issue, the UN Sub-Commission in its resolution 15 (XXXIV) dated 1981 reiterated the right of families to

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<sup>288</sup> International Commission of Jurists. *International Law and the Fight Against Impunity*. Practitioners Guide N° 7, 2015, p. 14.

<sup>289</sup> RENSHAW, Layla. *Exhuming Loss: Memory, Materiality and Mass Graves of the Spanish Civil War*. California: Left Coast Press, 2011, p. 22.

<sup>290</sup> About the post-dictatorship period in Spain and its challenges regarding human rights obligations, see: FERRÁN, Ofelia; HILBINK, Lisa. *Legacies of Violence in Contemporary Spain: Exhuming the Past, Understanding the Present*. New York: Routledge, 2017; TAMAYO, Giulia. *Los Derechos de las Víctimas de la Guerra Civil Española y el Franquismo en el Contexto de la Experiencia Mundial y las Obligaciones Internacionales Sobre Verdad, Justicia y Reparación*. In: Entelequia. Revista Interdisciplinar: Monográfico, n° 7, Septiembre 2008, p. 255-271. ÁLVAREZ, Javier Chinchón. *El Tratamiento Judicial de los Crímenes de la Guerra Civil y el Franquismo en España – Una Vision de Conjunto desde el Derecho Internacional*. Bilbao: Universidad de Deusto, 2012. AGUILAR, Paloma. *Justice, Politics and Memory in the Spanish Transition*. In: The Politics of Memory – Transitional Justice in Democratizing Societies. Alexandra Barahona de Brito; Carmen González-Enríquez; Paloma Aguilar (eds). Oxford: Oxford University Press, 2001, p. 92 – 118.

know the fate of their relatives and urged the States with reported cases of disappearance to repeal or refrain from adopting laws which could prevent inquiries regarding such disappearances. Also, it requested the States to give attention to the need for special measures for the protection of relatives, providing information on the fate of disappeared victims<sup>291</sup>.

Few years later, in 1983, the Sub-Commission named a Special Rapporteur on Amnesties, Mr. Louis Joinet, to study the technical nature of amnesties and their impact in the safeguard and promotion of human rights. His report was made public in 1985 and defined amnesty as “whether the persons amnestied have or have not been tried or convicted or served a sentence, their conduct is deemed not to have constituted an offence and the penalty is considered never to have been enforced”<sup>292</sup>. Also, amnesties were considered as judicial expressions of political acts whose effects directly concern the promotion of human rights and, in some cases, the return to democracies. In this regard, the Special Rapporteur affirmed that authoritarian regimes would be tempted to grant amnesties to themselves to avoid future prosecutions from the new democratic governments. The grant of self-amnesties would thus seek impunity, and not reconciliation<sup>293</sup>.

The Special Rapporteur dedicated special attention to cases of torture, involuntary or forced disappearance or extrajudicial execution which, whenever systematically committed under the tolerance of higher authorities, cause “such an infringement of the human condition that the right to oblivion may become a right to impunity”<sup>294</sup>. Regarding compensation for the victims and their families, the Special Rapporteur stated that in cases of involuntary or forced disappearance a families’ right to know the fate of their relatives was becoming increasingly recognized. An example provided by Mr. Joinet of an effort to give effect to the right to compensation concerned Uruguay. According to the Rapporteur, the Chamber of Deputies of Uruguay set up a parliamentary commission to investigate the cases of disappearances in order to facilitate future actions by the Courts. The Rapporteur continued by affirming that these measures, which are based on the work of CONADEP in Argentina, should be encouraged in other countries as well<sup>295</sup>.

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<sup>291</sup> United Nations, Sub-Commission on Prevention of Discrimination and Protection of Minorities. Resolution 15 (XXXIV). Question of the Human Rights of persons subjected to any form of detention or imprisonment, E/CN.4/1512, 10 September 1981.

<sup>292</sup> United Nations, Commission on Human Rights. Study on amnesty laws and their role in the safeguard and promotion of Human Rights - Report by Mr. Louis Joinet. E/CN.4/Sub.2/1985/16, 21 June 1985, at para. 5.

<sup>293</sup> *Ibid.*, at para. 31.

<sup>294</sup> *Ibid.*, at para. 72.

<sup>295</sup> *Ibid.*, at para. 81.



The report of Mr. Joinet on amnesties was particularly important for revealing the attention that amnesties laws were gaining in the 1980's especially regarding debates on how to address atrocities of a recent past. Also, it shows that the right to know initially associated with cases of disappearances was gaining growing attention and would come to play a crucial role in these debates. Although Mr. Joinet does not make an explicit reference to truth commissions, he recognizes in this early 1980's report that one measure which gives effect to the right to compensation is the establishment of investigatory commissions aimed at clarifying disappearances occurred in the past.

Despite the pioneering work of the UN Sub-Commission and of the UN Human Rights Committee, impunity and, in particular, amnesties represented for some instances of the UN a necessary step towards democracy especially in cases of internal armed conflict. For example, the UN General Assembly supported unconditionally the Esquipulas II Agreements adopted in August 1987 which followed the *Agreement on Procedures for the Establishment of a Firm and Lasting Peace in Central America* (Esquipulas I), signed by the Governments of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua<sup>296</sup>. In the chapter dedicated to national reconciliation of the Esquipulas II Agreement, the Central American presidents had agreed to issue "amnesty decrees," establishing provisions aimed at guaranteeing the "inviolability of life, freedom in all its forms, property and security of persons" included in the amnesty<sup>297</sup>. This provision would justify the amnesty laws enacted by Guatemala, Honduras, Nicaragua and El Salvador<sup>298</sup>.

Another event involving amnesty laws which deserved the attention of the UN General Assembly concerned Haiti. Due to the Haitian crisis in the early 1990's, the constitutional government of Jean Bertrand Aristide and the *de facto* regime of General Raúl Cédras signed the Governors Island Agreement in 1993. The document established that the return to democracy in the Country included, *inter alia*, granting amnesty for the members of the *coup d'état*<sup>299</sup>. In a report to the General Assembly, the UN Secretary General stated that in the case of Haiti the priority was to safeguard the stability in the Country with the return of Mr. Aristide as President, the nomination of a Prime Minister at the

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<sup>296</sup> United Nations, General Assembly. Resolution 42/24, 15 November 1988.

<sup>297</sup> United Nations, General Assembly. *Letter dated 27 August 1987 from the Permanent Representatives of Costa Rica, El Salvador, Guatemala and Nicaragua to the United Nations addressed to the Secretary-General*. A/42/521, 31 August 1987, p. 4.

<sup>298</sup> Guatemala: Decree No. 32/88 of 23 June 1988. Honduras: Decree No. 199/87 of 26 November 1987. Nicaragua: Amnesty Law of 18 November 1987. El Salvador: Decree No. 805 of 27 October 1987.

<sup>299</sup> STOTZKY, Irwin P. *Silencing the Guns in Haiti: The Promise of Deliberative Democracy*. Chicago: Chicago Press, 1997, p. 32-33.

head of the Government for National Salvation, and the enactment of an amnesty<sup>300</sup>. After some consideration, the President Aristide would finally decide for a text which did not impede to bring to justice the responsible for gross violations of human rights<sup>301</sup>.

Despite President Aristide's decision, the supportive attitude of the UN General Assembly regarding the possibility of an amnesty would gain the attention of the Special Rapporteur on the situation of human rights in Haiti, Mr. Marco Tulio Bruni-Celli. In his report, the Rapporteur concluded that while in Europe an international tribunal was established to confront the crimes committed during the civil war in former Yugoslavia, in the Americas the prevailing point of view supported reconciliation and pardon embodied in the so-called impunity laws. Mr. Bruni-Celli noted that this issue of amnesty laws posed legal complications which were still being discussed (in the early 1990's) for they involved the competence of human rights bodies, and the obligations of the states that ratified international human rights conventions<sup>302</sup>.

The support to amnesty laws provided by some instances of the UN was in fact in accordance with the view of some legal scholars and policymakers who believed that the fragility of recent established democracies would not be able to bare any criminal investigation. Among those who shared this perspective, there was a strong doubt that prosecutions could cooperate for peace and reconciliation. For these reasons, amnesties were in several occasions supported and welcomed especially when seen as a promise of peace. Mr. Alexander Boraine, for example, claimed that the "socio-political circumstances sometimes demand some form of amnesty in order to achieve peace"<sup>303</sup>. This view corroborated by Mr. Boraine, among other experts, will be further analyzed, but it is important to mention that the legal complications posed by amnesties laws go, in reality, beyond the impossibility of prosecution of those responsible for the violations.

In several occasions, truth itself was denied to relatives of disappeared victims based on the argument that amnesty laws avoided investigations from taking place. For example, in 1992, as part of the investigations of the El Salvadorian Truth Commission, the Argentine forensic team and the Institute of Forensic Medicine conducted the

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<sup>300</sup> United Nations, General Assembly. *Situation of Democracy and Human Rights in Haiti*. A/47/908, 27 March 1993, at para. 17.

<sup>301</sup> International Commission of Jurists. *International Law and the Fight Against Impunity*, p. 14.

<sup>302</sup> United Nations, General Assembly. *Situation of Human Rights in Haiti. Interim Report on the Situation of Human Rights in Haiti by Professor Marco Tulio Bruni Celli*, A/49/513, 14 October 1994, at para. 147.

<sup>303</sup> BORAINÉ, Alexander. *South Africa's Truth and Reconciliation Commission and the International Community*. In: *Verdad y Justicia – Homenaje a Emilio F. Mignone*. Instituto Interamericano de Derechos Humanos. San José Costa Rica: IIDH, 2001, p. 264.

exhumation of some victims of the *El Mozote* massacre<sup>304</sup>. The scientific work confirmed that the victims were civilians, and in their great majority, children. After the El Salvadorian Government approved the amnesty law in 1993, the authorities suspended the investigations which also included the exhumations. In 2000, the legal assistance of the Archbishopric obtained an authorization to proceed with the exhumations only for humanitarian reasons, i.e. to return the bodies back to the relatives in order for them to arrange a proper burial. In other cases, NGOs like the Human Rights Centre Madeleine Lagadec were also allowed to carry exhumations, but again only for humanitarian reasons<sup>305</sup>.

For most relatives, however, the exhumations depended on the information concerning the whereabouts of their disappeared next of kin. As amnesty laws were preventing investigations from taking place, relatives' organizations began approaching new strategies that could lead to the access of facts concerning the disappearances. In Argentina, for example, a turning point took place in 1995 when the retired Argentine Navy Captain Adolfo Scilingo publicly declared to have participated in two of the weekly "death flights" which had the mission to throw the bodies of disappeared victims into the sea. Following the former Captain declaration, other militaries also decided to come forward and give their testimonies in cases involving torture, murder and kidnappings<sup>306</sup>.

Confronted with the *confessions*, Argentine human rights organizations decided to focus their strategy on the Judiciary. According to Martín Abregú, former Executive Director of CELS, the social impact of the declarations of Mr. Scilingo revealed another crucial issue of the Argentine State terrorism: the right of the families to know the final fate of their loved ones and of the whole society to know about the methodology used by the militaries to commit atrocities. CELS then decided to present several petitions to the Argentine courts requesting the continuation of the investigations into the disappearances occurred in ESMA. Two of the main cases were the *Mignone* and the *Lapacó*, both concerning disappeared victims who had been taken to ESMA after their abduction. Differently from previous legal actions, this time the requests were based on the right to truth as a

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<sup>304</sup> The Massacre took place in a village called *El Mazote* in El Salvador on 11 December 1981 during the Civil War, when the Salvadoran Army allegedly killed more than 800 civilians. In 2012, the IACtHR condemned El Salvador for the massacre in *El Mozote* and nearby places. In 2016, the Salvadoran Judge Jorge Alberto Guzman reopened the case and in March 2017 summoned twenty suspect ex-soldiers to appear in court. See: IACtHR. *Case of the Massacres of El Mozote and Nearby Places v. El Salvador*. Judgment of 25 October 2012.

<sup>305</sup> POPKIN, Margaret. *La Búsqueda de la Verdad y la Justicia Después de las Comisiones de la Verdad en Centroamérica*. In: Verdad y Justicia – Homenaje a Emilio F. Mignone. Instituto Interamericano de Derechos Humanos. San José Costa Rica: IIDH, 2001, p. 234-235.

<sup>306</sup> ABREGÚ, Martín. *La Tutela Judicial del Derecho a la Verdad en la Argentina*. In: Revista IIDH, vol. 24, 1996, p. 11-12.

subjective right of the relatives and a right of people to know their history. The petitions also referred to the right to mourn of the relatives which was based on the recognition that mourning is one of the main pillars of western culture concerning death<sup>307</sup>.

Interestingly, these cases did not aim at sanctioning those eventually found guilty for the crimes. The request was limited to the determination of the facts concerning the crimes committed. Accordingly, it would not violate the existing laws which prevented prosecutions from taking place. On the contrary, the intention of the petitioners was to prove that the citizens' right to know about gross violations goes beyond any of the so-called impunity laws. As stated by Mr. Martín Abregú, the lack of investigations postpones the suffering of the relatives and reaffirms one of the main objectives of the disappearances: to cause pain and anxiety to the families of the victims<sup>308</sup>.

The Argentine Court initially decided in favor of the relatives and ordered the military to provide the information regarding the whereabouts of the disappeared victim of ESMA. The Armed Forces replied that they did not hold information on the cases of disappearances and that there was no way to know about what happened. Furthermore, the military affirmed that the court had no jurisdiction or competence to request such information from them, what could have been done only by the President of the Nation. Shortly after this statement, the Argentine justice decided to drop proceedings. It was only in 1998 that the Argentine Supreme Court finally recognized the right of the relatives to know the fate of their next of kin. This recognition, as it will further mention, did not prevent one of the victims, Carmen Lapacó, from presenting a complaint before the IACHR for Argentina's violation of the right to truth<sup>309</sup>.

In addition to judicial cases, another alternative found by the relatives to respond after the Scilingo's confessions to the scenario of impunity and denial was the so-called *escraches*. Such practice consists in shaming publicly perpetrators of the dictatorship-era crimes, invading neighbourhoods near their homes and work-places. The objectives are: to expose their identity, to publicize their crimes, to produce social condemnation, and to challenge the apparent normality in which they live. The responsible for this strategy was the organization of relatives H.I.J.O.S. (Sons and Daughters for Identity and Justice against Forgetting and Silence) founded in 1995 by children of disappeared victims. Their declaration "we don't forgive, we don't forget, we don't reconcile"

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<sup>307</sup> Ibid., p. 15

<sup>308</sup> Ibid., p. 20.

<sup>309</sup> CELS. *Reclamo judicial por derecho a la verdad - Casos Mignone y Lapacó*. Accessed: 20 March 2017.  
<<http://www.cels.org.ar/agendatematica/?info=detalleDocF&ids=11&lang=es&ss=41&idc=593>>

announced their standpoint on the issue of justice which the *escraches* materialized very well<sup>310</sup>. Also, it reveals the on the contrary of what one might have thought not only amnesty laws do not necessarily cooperate for “reconciliation”, but also the silence imposed by the state denial cannot be mistaken with forgetfulness.

Even though Argentina repealed the Due Obedience and the Full Stop Law in 2005<sup>311</sup>, the H.I.J.O.S. continued organizing *escraches* so that persistent obstacles to justice could be brought to the fore. Despite occurring less frequently, the post-2005 *escraches* widened the selection of targets to include, for example, civilians who participated in the repression. With the increasing opportunities for justice after 2005, the activities of the organization took place in the courtrooms instead of in neighborhoods. Some members of the H.I.J.O.S would stay outside the courtrooms to alert the passersby that the trial was about to begin, revealing that the work of the organization is not only influenced by the lack of justice, but also by the understanding that justice itself goes beyond its association with amnesty laws<sup>312</sup>.

The alternatives found by victims and relatives to fight against situations of impunity imposed by amnesty laws were certainly decisive to pressure for official solutions to challenge this situation. Within the UN system, all its instances<sup>313</sup> would recognize that amnesty laws which prevent the perpetrators of gross human rights violations from being investigated, prosecuted and punished by the courts of justice are incompatible with

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<sup>310</sup> LESSA, Francesca; LEVEY, Cara. *From Blanket Impunity to Judicial Opening(s) H.I.J.O.S. and Memory Making in Postdictatorship Argentina (2005–2012)*. Latin American Perspectives, Issue 202, Vol. 42 No. 3, May 2015, p. 208-209. See also: FEITLOWITZ, Marguerite. *A Lexicon of Terror: Argentina and the Legacies of Torture*. Oxford: Oxford University Press, 2011, p. 211; DRULIOLLE, Vincent. *H.I.J.O.S. and the Spectacular Denunciation of Impunity: The Struggle for Memory, Truth, and Justice and the (Re-)Construction of Democracy in Argentina*. In: Journal of Human Rights, 01 April 2013, Vol.12(2), p.259-276.

<sup>311</sup> In 2003, the Argentine Congress annulled the 1986 “Full Stop” law and the 1987 “Due Obedience” law. In 2005, the Argentine Supreme Court upheld the unconstitutionality of these both laws, originally decided by a judge in 2001 in a case brought by CELS and *Abuelas de Plaza de Mayo*. In a process initiated in 2005, federal judges struck down pardons issued by the President Menem between 1989 and 1990. For subsequent developments, see: Human Rights Watch. World Report 2012: Argentina. Available at: <<https://www.hrw.org/world-report/2012/country-chapters/argentina>> Last access: 01 May 2018.

<sup>312</sup> LESSA, Francesca; LEVEY, Cara. *From Blanket Impunity to Judicial Opening(s) H.I.J.O.S. and Memory Making in post-dictatorship Argentina (2005–2012)*, p. 209.

<sup>313</sup> See, for example: United Nations Security Council. Report of the Secretary-General - The rule of law and transitional justice in conflict and post-conflict societies, S/2004/616, 20 July 2004, at para.10; United Nations Security Council. Resolution No. 1400 of 2002, Statute of the Special Court for Sierra Leone, article 10. United Nations Commission on Human Rights Resolution No. 2004/72, “Impunity,” 21 April 2004, at para. 3; United Nations Commission on Human Rights Resolution No. 2005/81, “Impunity,” 21 April 2005, at para. 3; United Nations General Assembly, Seventh Report of the United Nations Secretary-General on the Observers’ Mission in Sierra Leone, S/1999/836, 30 July 1999, at para. 7; United Nations General Assembly. Report of the Secretary-General on the establishment of a Special Court for Sierra Leone, S/2000/915, 4 October 2000, at para. 22.

States' obligations under international law. As it will further examine, human rights regional systems<sup>314</sup> and international criminal tribunals<sup>315</sup> would also share this opinion, creating an international consensus concerning the prohibition of amnesties for gross violations of human rights.

### ***International Conferences on Impunity***

Along with the debates concerning amnesty laws, which embody one possible facet of the impunity issue, a concern in the human rights movement on how to address atrocities of a recent past was arising significantly. Different dilemmas faced by countries all over the world began echoing in different initiatives aiming at contributing for this new and polemic debate. For example, in the autumn of 1988, the Aspen Institute organized a conference in Maryland where a group of activists, clerics, academics and lawyers from countries such as Argentina, Brazil, Chile, Guatemala, Haiti, Philippines, South Africa, South Korea and Uganda met to discuss their experiences with previous governments responsible for gross violations of human rights. The conference called *State Crimes: Punishment or Pardon* explored at length whether there was a duty under International Law to punish human rights violators. The participants concluded that although there was no such an obligation under customary international law, various international treaties may require punishment expressly or by implication<sup>316</sup>.

Regarding amnesties, the participants expressed the opinion that the enactment of self-amnesty laws was "an affront to the rule of law and to the principle that no one should benefit from one's own bad faith"<sup>317</sup>. In addition, the participants agreed that the

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<sup>314</sup> See, for example: **African Commission of Human Rights**. Judgment of July 2008, Communication No. 246/02, Case of *Mouvement ivoirien des droits humains (MIDH) v. Côte d'Ivoire*, para. 91. Judgment of 11 May 2000, Communications No. 54/91, 61/91, 98/93, 164/97-196/97 and 210/98, Case of the *Malawi African Association and Others v. Mauritania*. Judgment of 21 May 2006, Communication No. 245/02, Case of *Zimbabwe Human Rights NGO Forum v. Zimbabwe*. **European Court of Human Rights**. Judgment of 2 November 2004, Application No. 32446/96, Case of *Abdülşamet Yaman v. Turkey*, para. 55; 2 Judgment of 17 October 2006, Application No. 52067/99, Case of *Okkalı v. Turkey*, para. 76; and Judgment of 5 June 2007, Application No. 34738/04, Case of *Yeşil and Sevim v. Turkey*, para. 38. For the **Inter-American System of Human Rights**, see *IACHR Individual Cases on Impunity and Truth*.

<sup>315</sup> See, for example: International Criminal Tribunal for the former Yugoslavia. Judgment of 10 December 1998, *The Prosecutor v. Anto Furundzija*, Case No. IT-95-17/1-T 10, para. 155; Appeals Chamber of the Special Court for Sierra Leone, Decision on preliminary motion on jurisdiction, 25 May 2004, *The Prosecutor v. Moinina Fofana*, Case No. SCSL-2004-14-AR72 (e), operative paragraph 3; The Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes committed during the Period of Democratic Kampuchea Judgment of 11 April 2011, Case No. 002/19 09-2007-ECCC/OCIJ (PTC75).

<sup>316</sup> HENKIN, Alice H. *State Crimes: Punishment or Pardon (Conference Report)*. In: *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. Volume I. General Considerations. Neil J. Kritz (ed). Washington: United States Institute for Peace, 1995, p. 186.

<sup>317</sup> *Ibid.*, p. 185.

successor government has the “obligation to investigate and establish the facts” in order to reveal the truth, making it part of the “nation’s history”<sup>318</sup>. In this regard, when it comes to gross violations of human rights there must be knowledge and acknowledgment, i.e. the events must be officially recognized and publicly revealed. There was also a common agreement that truth-telling responds to the demands of justice for the victims, benefits national reconciliation and prevents exculpatory versions of the events of the past<sup>319</sup>.

Mr. Lawrence Weschler, one of the participants of the conference, claimed that two same imperatives rose to the fore of the meetings: “the intertwined demands for truth and justice”. Truth, however, would be more urgently demanded by the victims than justice. People were not insisting on sending perpetrators to jail, but on the truth to be established<sup>320</sup>. The full knowledge of the truth, according to Zalaquett, is particularly important in cases of disappearances which by their very nature rests on secrecy and perpetuates pernicious effects while the truth remains hidden. Among these effects is the suffering of the relatives of victims and indeed the violation of their rights when the fate of their next of kin is unknown<sup>321</sup>.

Following the Aspen Conference in 1988, other initiatives aimed at debating the issue of impunity were established. The Permanent Peoples’ Tribunal (PPT), for example, held sessions in twelve countries in Latin America between 1989 and 1991 to confront the issue of impunity for crimes against humanity in the region. The PPT condemned amnesties granted by many Latin American states to militaries, considering that the international norms which regulate crimes against humanity had already achieved the status of *ius cogens* under International Law<sup>322</sup>.

Concomitantly to the establishment of the PPT, important events in the world would mark deeply the debates on impunity, as the end of the 1980’s concluded with the fall of the Berlin Wall and the collapse of communist regimes. In 1992, a conference called *Justice in Times of Transition* took place in Salzburg, Austria, to debate “how to deal with

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<sup>318</sup> Ibid., p. 186.

<sup>319</sup> Ibid., p. 186.

<sup>320</sup> WESCHLER, Lawrence. *A Miracle, A Universe – Settling Accounts with Torturers*. New York: Pantheon Books, 1990, Foreword.

<sup>321</sup> ZALAQUETT, José. *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints*. In: *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. Volume I. General Considerations. Neil J. Kritz (ed). Washington: United States Institute for Peace, 1995, p. 6.

<sup>322</sup> TAYLER, Wilder. *La Problemática de la Impunidad y su Tratamiento en las Naciones Unidas – Notas para la Reflexión*. In: *Revista IIDH*, Vol. 24, 1996, p. 203. See also: Javier Giraldo Moreno, SJ. *Tribunal Permanente de los Pueblos sobre Impunidad*. Available at: < <http://www.javiergiraldo.org/spip.php?article50> > Last Access: 20 March 2017.

individuals who served the former oppressive regimes”<sup>323</sup>. The meeting, organized by the New York based Charter Seventy-Seven Foundation, counted with fifty participants who shared the similarity of coming from a country which was under a repressive regime, been liberated, and was then “obliged to cope with the legacy of the ousted system”<sup>324</sup>.

One of the main themes of the conference was the possible lessons that the Central and Eastern Europeans and former Soviets, who had just emerged from communist regimes, could learn from the Latin American transition of the 1980’s and early 1990’s. As participants struggled over whose pain and suffering was worst, they gradually recognized many similarities in their dilemmas, particularly: the *acknowledgement* – to forget or to remember the abuses - and the *accountability* – whether the prosecution of perpetrators is desirable<sup>325</sup>.

When debating the issue of acknowledgment, the participants concluded *inter alia* that in the view of the international human rights community amnesties are malignances, working as licenses to repeat the same crimes, even during civilian governments. Instead of contributing for national reconciliation, amnesties divide societies and pervert the rule of law by imposing an official forgetting. Victims of human rights violations become second class citizens as their legal recourses are eliminated by amnesties. The prerogative to abolish or to forget state crimes, if it exists, should be exclusively of the victims and not of the state itself<sup>326</sup>.

In the view of the participants *remembering*, which would mean to tell the truth about the past, is essential for three different reasons: to seek justice for the victims; to contribute for national reconciliation; and to deter further violations and abuses. Lawrence Weschler, who was previously present at the Aspen Conference in 1988, emphasized once again the importance not only of the general knowledge concerning events of the past, but also of the official recognition of the truth. The challenge of this official recognition would be to allow the victims and societies to move forward<sup>327</sup>.

In addition to the conference *Justice in Times of Transition*, another important initiative also took place in 1992. The *International Meeting Concerning Impunity for Perpetrators of Gross Human Rights Violations* was organized by the International Commission of

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<sup>323</sup> ALBON, Mary. *Project on Justice in Times of Transition* (Report of the Project’s Inaugural Meeting, Salzburg March 7-10, 1992). New York: The Charter Seventy Seven Foundation, p.

<sup>324</sup> KRITZ, Neil J. *The Dilemmas of Transitional Justice*. In: *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. Volume I. General Considerations. Neil J. Kriz (ed). Washington: United States Institute for Peace, 1995, p. xxix.

<sup>325</sup> Ibid.

<sup>326</sup> ALBON, Mary. *Project on Justice in Times of Transition*, p. 3.

<sup>327</sup> Ibid., p. 4.



Jurists and the *Commission Nationale Consultative des Droits de l'Homme* of France under the auspices of the UN. It counted with the participation of experts, jurists, legislators and victims from around the world. The meetings were presided over by the UN Special Rapporteur on impunity Mr. Louis Joinet. A compilation of the papers presented during the meeting was published under the title *Justice - Not Impunity*<sup>328</sup>.

In the commentaries of the meeting, the ICJ affirmed that impunity became a serious concern in several countries in the world not only for policy makers, but also for NGOs and social and political organizations, especially those which represent the victims. The urgent need to analyse such issue could be related to the necessity to hold peace negotiations, to end armed conflicts or serious internal disturbances. In any case, the participants considered that impunity is not the best option either for ethical reasons or considering the equity between the victims<sup>329</sup>.

Due to the close relation between impunity and truth, one of the appeals made by the participants recalled that in “all circumstances truth is an obligation” as “the future of a people cannot be built on ignorance or the negation of their history” and considering that “the people’s knowledge of their history of suffering forms a part of the cultural heritage and as such must be preserved”<sup>330</sup>. Even in exceptional circumstances aimed at enabling the return to democracy, the restrictions on legal punishment should not, among other conditions, violate the rights of the victims including the right to know the truth, the right to equitable compensation and, if appropriate, the right to full rehabilitation<sup>331</sup>.

In this context, the right to know the truth emerges as part of the second phase in the history of human rights which - according to Gérard Fellous Secretary-General of the *Commission Nationale Consultative des Droits de l'Homme* – is marked by the will to investigate violations, and to find and punish the responsible. This new phase follows the initial one introduced by the United Nations Charter which enshrined the human rights, and by the 1948 Universal Declaration of Human Rights which provided the basic principles. These instruments characterized the emergence of human rights at the international scenario<sup>332</sup>.

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<sup>328</sup> International Commission of Jurists. *Justice – Not Impunity. International Meeting on Impunity of Perpetrators of Gross Human Rights Violations*. 2 to 5 November 1992 Palais des Nations – Geneva. Geneva: ICJ, 1993.

<sup>329</sup> International Commission of Jurists. *The International Meeting Concerning Impunity*. In: The Review, No. 49, 1992, p. 47.

<sup>330</sup> Ibid., p. 49.

<sup>331</sup> Ibid., p. 50.

<sup>332</sup> FELLOUS, Gérard. *General Report*. In: International Commission of Jurists. *Justice – Not Impunity. International Meeting on Impunity of Perpetrators of Gross Human Rights Violations* (2 to 5 November 1992 Palais des Nations – Geneva). Geneva: ICJ, 1993, p. 337.

In this new scenario in which investigations of past violations acquire a mandatory character, the right to truth rises as the guarantor of the knowledge involving the circumstances of such violations. As it is possible to infer from the above, the ICJ meeting elaborates a right to truth based on the clarification of the past, and on the knowledge and preservation of history itself. Such right seems therefore to cover not only those primarily affected by the violations, but ultimately the *people* and their *history*.

One year after the ICJ's conference, the Catholic Institute for International Relations brought together in London human-rights groups, church-based groups, refugees' representative organizations, and development agencies to debate the significance of the right to truth in countries where gross violations systematically took place. The conference counted with participants from Ethiopia, Europe, Guatemala, South Korea, Namibia, and South Africa. Ian Linden, General Secretary of the Catholic Institute for International Relations, reported that the attendants analysed the right to truth under different perspectives including the political implications of amnesty and impunity; the cultural and psychological aspects involving individuals recovering from human rights violations; and the potentially of NGOs to pressure governments to provide information on past violations<sup>333</sup>.

One of the participants Albie Sachs, professor at the University of Western Cape, emphasized that due to the painful disclosure of African National Congress (ANC) violations in Angola, he would not support the idea of having any group holding the truth about the past. Guatemalan human rights lawyer Frank La Rue and the Argentine lawyer Rodolfo Mattarollo, on the other hand, advocated for the right to truth and agreed that Truth Commissions are important in recognizing such right and in achieving some degree of disclosure. The Namibian advocate Ms. Bience Gawana-Minney noted the urgent need in her Country for some acknowledgement of what had occurred considering the experience of impunity for both security forces and violators in SWAPO. In regard to NGOs, Mr. David Bryer former director of Oxfam (UK and Ireland) considered some practical implications of the right to truth for development agencies. He stated that these agencies played a relevant role in sharing information in society although they had to balance the good of disclosure with the needs of the people they tried to serve<sup>334</sup>.

An interesting aspect of the conference, mentioned by Mr. Ian Linden, consisted on the fact that it included participants from completely different cultures, and their great majority agreed on the importance of a right to truth. There was an understanding that

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<sup>333</sup> LINDEN, Ian. *Conference Report: The Right to Truth: Amnesty, Amnesia, and Secrecy*. In: *Development in Practice*, Volume 4, Number 2, June 1994, p. 141.

<sup>334</sup> *Ibid.*, p. 141-142.

this right contributed for the strengthening of democracy and human development. The participants concluded that the right to truth would be basic for human beings to achieve their full potential<sup>335</sup>. Considering that the Catholic Conference took place in 1993, such conclusions reveal not only how the right to truth was important at the time, but also how rapid was its development. After all, the IACHR had mentioned a right to truth for the first time in 1986 in the specific context of the fall of Latin American dictatorships. However, in the international scenario of the early 1990's, the right to truth emerges as central and indispensable in the debates concerning past violations of human rights.

Such role attributed to the right to truth would be consolidated along with the emergence in human rights of the transitional justice field. One of the attendants at the 1992 conference *Justice in Times of Transition* was Mr. Neil Kritz who would publish in 1995 the influential three-volume compendium called *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. His volumes containing articles of 48 authors would be known as “a canon of the transitional justice literature”, representing a “key driver in the early proliferation of the term”<sup>336</sup>. The meaning attributed to “transitional justice”, despite further contested by different legal scholars<sup>337</sup>, comprehends countries “in various regions in the world” which moved away from “undemocratic and repressive rule towards the establishment of constitutional democracies”<sup>338</sup>. Transitional justice would then confront possible measures to respond to past abuses committed by previous authoritarian regimes.

Among these measures, Mr. Kritz in his general introduction considers the acknowledgment of the past as one of the dilemmas of the transitional justice and states that the “full accounting of the past” was “increasingly seen as an important element”<sup>339</sup> to a successful transition. As examples of measures, which may establish the facts and figures of past events, Mr. Kritz mentions trials, truth commissions and other “several

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<sup>335</sup> Ibid., p. 142.

<sup>336</sup> ARTHUR, Paige. *How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice*, p. 331.

<sup>337</sup> See, for example: PREYSING, D. *Transitional Justice in Post-Revolutionary Tunisia (2011-2013): How the Past Shapes the Future*. Berlin: Springer, 2016, p. 32.35. ASH, Timothy Garton. *The Truth About Dictatorship*, New York Review of Books, 19 February 1998. POSNER, Eric A.; VERMEULE, Adrian. *Transitional Justice as Ordinary Justice*. The Law School of the University of Chicago: Public Law and Legal Theory Working Paper No. 40, March 2003, p.1-50. MOURALIS, Guillaume. *The Invention of Transitional Justice in the 1990s*. In: *Dealing with Wars and Dictatorships*, L. Israël and G. Mouralis (eds.) The Hague: TMC Asser Press, 2013, p. 81-96.

<sup>338</sup> MANDELA, Nelson. *Foreword. Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. Volume III. General Considerations. Neil J. Kritz (ed). Washington: United States Institute for Peace, 1995, p. xxi.

<sup>339</sup> KRITZ, Neil J. *Dilemmas of Transitional Justice*. In: *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. Volume I. General Considerations. Neil J. Kritz (ed). Washington: United States Institute for Peace, 1995, p. xxvi.

variations”<sup>340</sup>. Interestingly, Mr. Kritz’s publication suggests that the concern with “truth”, i.e. knowing about past events, was already quite internationalized and well received in 1995, claimed to constitute one of the transition’s main pillar, *a condition of legitimacy for an official policy*<sup>341</sup> to deal with past abuses. The importance given to *truth* did not seem, however, to underestimate the concern with the prosecution of perpetrators of human rights violations, although some authors pointed to the fact that criminal trials could bring instability to new democracies.

Indeed, the fact that some articles could reflect a suspicious attitude towards criminal trials was not surprising. At the time the volumes were published, the 1990’s were witnessing the *truth v. justice* debate which, by confronting these two principles, tried to find the best options for recent established democracies to respond to past abuses<sup>342</sup>. In this context, truth was associated with truth commissions and justice with criminal prosecution, although it could also include civil liability. Some supporters of truth commissions opposed to criminal trials, either from a national or an international initiative<sup>343</sup>. Others understood that although the prosecution of human rights violators is “a moral imperative”<sup>344</sup>, there should be limits to its actuation, such as the Argentine full stop law of 1986, which set a date after which no indictment could take place<sup>345</sup>.

To the opponents of criminal trials, amnesty laws are guarantors of peace and stability of fragile democracies. They are a “necessary evil”, a price to be paid to avoid “chaos and bloodshed”<sup>346</sup>. For example, in a column entitled “Truth, Not Trials” published on September 09, 1994 in the Washington Post, Mr. Charles Krauthammer exalted the Chilean government option of establishing a truth commission instead of abrogating its

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<sup>340</sup> Ibid.

<sup>341</sup> ZALAQUETT, José. *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints*, p. 6-9.

<sup>342</sup> NAFTALI, Patricia. *The Politics of Truth: On Legal Fetishism and the Rhetoric of Complementarity*. In: *Revue québécoise de droit international*, December 2015, p. 103.

<sup>343</sup> See, for instance: Robert I. Rotberg and Dennis Thompson (Eds.). *Truth v. Justice: The Morality of Truth Commissions*. New Jersey: Princeton, 2000; MINOW, Martha. *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence*. Boston: Beacon, 1999.

<sup>344</sup> MALAMUD-GOTI, Jaime. *Transitional Governments in the Breach: Why Punish State Criminals?* In: *Human Rights Quarterly*, Volume 12, No. 1, February 1990, p.5

<sup>345</sup> Jaime Malamud-Goti – was along with Carlos Nino one of the chief architects of the Alfonsín’s prosecution policy in Argentina. He strongly supported the limitation of prosecutions sustaining that not punishing all violators of human rights is not in breach with the moral duties of state authorities. See: MALAMUD-Goti, Jaime. *Transitional Governments in the Breach: Why Punish State Criminals?* In: *Human Rights Quarterly*, Volume 12, No. 1, February 1990, p.1-16.

<sup>346</sup> KRAUTHAMMER, Charles. *Truth, not Trials*. The Washington Post, 09 September 1994. Available at:

<[https://www.washingtonpost.com/archive/opinions/1994/09/09/truth-not-trials/7b5cda3d-83e6-4cd2-9c40-c596044a7d4c/?utm\\_term=.cb7231b42777](https://www.washingtonpost.com/archive/opinions/1994/09/09/truth-not-trials/7b5cda3d-83e6-4cd2-9c40-c596044a7d4c/?utm_term=.cb7231b42777)> Last Access 20 March 2017.

amnesty law which “would have sparked civil unrest and invited another coup”. According to the columnist, the democratically elected Chilean government decided wisely that “between absolution and justice lies truth”, the “full and unimpeachable accounting of the past”. Mr. Krauthammer continued alleging that South Africa implemented its own truth commission based on the Chilean experience, taking therefore its “first duty after liberation not vengeance and retribution but truth and social peace”. In other words, the columnist associates criminal trials with revenge and truth commissions with social peace, although he recognizes that this means an incomplete victory for justice<sup>347</sup>. In accordance with his view, the victims who support trials do it for being revengeful, as if criminal prosecutions had no relation with lawfulness or fairness, but with vindictiveness only.

The opinions of Mr. Krauthammer were shared by many others including former US President Jimmy Carter. As a freelancer peace negotiator, the former President made these opinions his trademark to deal with leaders who could have been accused of committing gross violations in order to conclude peace<sup>348</sup>. In these cases, truth - embodied in the form of truth commissions - is presented as an alternative to justice, as if it could offer in addition to a complete disclosure to the victims all the information they would like to know, fulfilling all their needs.

Another supporter of truth as the best option for countries in transition is Mr. Alexander Borraïne, who in 2002 would found the International Center for Transitional Justice. In the book entitled *Truth v. Justice*, Mr. Borraïne argued that forgiveness is preferable to trials which are not only costly but can also cause further divisions in societies. Based on the South African example, Mr. Borraïne stated that the Truth and Reconciliation Commission left no “victor and vanquished”<sup>349</sup> and concluded that the best alternative to deal with the past is through a commission which has a limited life so that people can move on to the future. According to the former commissioner, even if prosecutions had taken place, most offenders would have gone free as criminal prosecutions are time consuming, and securing evidence leading to a conviction is usually complicated. In addition to this argument, Mr. Borraïne adds that criminal trials are not desirable as their final word is punishment. He explains that when societies are under their process of

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<sup>347</sup> Ibid.

<sup>348</sup> MÉNDEZ, Juan E. *Responsabilización por los abusos del pasado*. In: Revista de Relaciones Internacionales, Vol.6, No. 13, 1997, p. 7.

<sup>349</sup> BORRAÏNE, Alexander. *Truth and Reconciliation in South Africa*. In: Truth v. Justice: The Morality of Truth Commissions. Robert I. Rotberg and Dennis Thompson (Eds.). New Jersey: Princeton, 2000, p. 156.

transition, punishment cannot be the final word if considered the search for healing and reconciliation<sup>350</sup>.

The South African truth commissioner Mr. Dumisa Ntsebeza also shared Mr. Borraïne's opinion. In his view, truth restores the dignity of the victims, sending them and their kin free. It also challenges impunity by exposing and shaming the perpetrators of human rights abuses, substituting therefore very well the penal justice<sup>351</sup>. Holding this same position is the legal scholar Ms Martha Minow who suggests that litigation is not an ideal form of social action due to its emotional and financial costs. Furthermore, trials focus on the perpetrators not on the victims whose testimonies do not aim telling their own stories. Accordingly, truth commissions may be according to Ms. Minow better than prosecutions, allowing the victims to feel safe while acknowledging their pain and suffering<sup>352</sup>.

Under the perspective that truth would bring more benefits than justice, a relative or partial impunity would be necessary and almost inevitable. This view, which is influenced by high levels of political pragmatism, supports that demands for justice do not adjust to pacific transitions to democracy, but that at least the truth about the most serious crimes can be known. Truth is then considered as a measure of justice itself, dissimulating, as Mr. Wilder Tayler affirms, the transaction of principles implied in such operation (truth in exchange for justice)<sup>353</sup>. Although the thesis supported by Mr. Borraïne and many others recognizes the occurrence of past abuses, it does renounce justice in the name of *reconciliation*.

Those affected by human rights violations did not easily accept such renouncement to justice. The result was that human rights organizations, relatives of disappeared and many others social organizations engaged during several years in a struggle to accomplish their demands. In many places, impunity prevailed or the conflicts against it remain, but several initiatives - as the reactions to amnesty laws or the international conferences mentioned above - represent the initial steps towards the prohibition of impunity in cases of gross violations of human rights.

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<sup>350</sup> Ibid., p. 141-157.

<sup>351</sup> NTSEBEZA, Dumisa B. *The Uses of Truth Commissions – Lessons for the World*. In: Truth v. Justice: The Morality of Truth Commissions. Robert I. Rotberg and Dennis Thompson (Eds.). New Jersey: Princeton, 2000, p. 160.

<sup>352</sup> MINOW, Martha. *The Hope for Healing – What Can Truth Commissions Do*. In: Truth v. Justice: The Morality of Truth Commissions. Robert I. Rotberg and Dennis Thompson (Eds.). New Jersey: Princeton, 2000, p. 238.

<sup>353</sup> TAYLER, Wilder. *La Problemática de la Impunidad y su Tratamiento en las Naciones Unidas – Notas para la Reflexión*, p. 197-199.

In South Africa, for example, the political party AZAPO (Azanian People's Organisation) -inspired in the Black Consciousness Movement - and the families of some prominent survivors brought a case against the Truth and Reconciliation Commission before the Constitutional Court of South Africa. They challenged the constitutionality of the amnesty provisions established in the Promotion for National Unity and Reconciliation Act<sup>354</sup>, arguing that it violated the citizens' right to seek redress from the courts for justiciable disputes. The challenge also involved the 1949 Geneva Conventions which instruct states to pursue criminal prosecutions of the responsible for grave breaches<sup>355</sup>.

The Court however upheld the constitutionality of the impugned provisions, considering that they are not inconsistent with international norms and do not breach South Africa's obligations in terms of public international law instruments. In the view of the Court, the Geneva Conventions could not override the constitutional provision demanding for the Truth and Reconciliation Commission. Therefore, the TRC could grant conditional amnesty (under the truth for amnesty model) to cases involving acts committed in the pursuit of political objectives associated with the conflict of the apartheid, including crimes such as torture and enforced disappearance<sup>356</sup>.

In its decision, the South African Constitutional Court opted for not confronting adequately the developments under international law which established the obligation of states to investigate, prosecute and punish those responsible for gross violations of human rights. At the time, prosecution was a rising duty occupying a central role in the argumentation of those human rights advocates, relatives and scholars who supported not only truth, but also justice. The legal academic field witnessed the publication of several articles about the duty to prosecute, its international standards and its recognition as an affirmative international law obligation. Among them, it is worth mentioning Ms. Naomi Roht-Arriaza's pioneering comment entitled *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law* and Ms. Diane Orentlicher's article *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*. Both works, published few years before the establishment of the South African Truth Commission, recognize that the *Convention on the Prevention and*

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<sup>354</sup> The Promotion for National Unity and Reconciliation Act, based on the South African Constitution, established that "in order to advance reconciliation and reconstruction amnesty shall be granted in respect of acts, omissions and offences associated with political objectives committed in the course of the conflicts of the past" (preamble). Therefore, the Truth and Reconciliation Commission should facilitate "the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective" (chapter 2 4-c). South Africa. Promotion for National Unity and Reconciliation Act 34 of 1995.

<sup>355</sup> CORNELL, Drucilla. *Law and Revolution in South Africa: uBuntu, Dignity, and the Struggle for Constitutional Transformation*. Fordham University Press, 2014, chapter 3.

<sup>356</sup> Ibid.

*Punishment of the Crime of Genocide*, the *Convention against Torture* and the 1949 *Geneva Conventions* enshrine the duty to prosecute. The legal scholars go even further and consider that the duty to prosecute is also an emerging norm of customary law<sup>357</sup>.

Despite these understandings, in the case of South Africa, as well as in many others in different countries, the obligation to bring perpetrators of gross violations of human rights to justice was sacrificed in the name of truth and reconciliation. This movement coming usually from the governments in power is quite peculiar especially considering that, in the 1980's, when victims demanded to know what happened, they normally heard as an answer that truth would prevent reconciliation from taking place. The researcher Mr. Richard Carver recalls that at that stage human rights movement was unsophisticated in the way it wrote its questions. Its members simply claimed that people have a right to know what happened in situations of gross human rights violations. The governments then would reply, stating that although they would like to clarify all that had happened, they "have an obligation to the nation as a whole to reconciliation" and if they "reveal the truth it will impede reconciliation"<sup>358</sup>. The human rights movement would come with a second argument claiming that reconciliation is not possible until the full disclosure of the truth, which is sustained until nowadays. Nevertheless, around fifteen years later, truth and reconciliation became inseparable concepts, as the South African example clearly reveals<sup>359</sup>.

The details of these debates concerning truth commissions and other measures aimed at implementing the right to truth will be analyzed in a specific chapter, but it is worth noting that the meanings attributable to truth and to reconciliation may be challenged especially taking into consideration the existence of different actors involved in past abuses of human rights. The perspective of some victims, for example, may consider that truth commissions establish only a partial and selective version of the truth, as much information remain unrevealed to them. Governments, on the other hand, may tend to advocate that truth commission fulfill completely their obligation to clarify the truth about past violations, closing future paths that could lead to investigations of the abuses and the consequent disclosure of individual cases. Similarly, the word *reconciliation*, widely

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<sup>357</sup> ROHT-ARRIAZA, Naomi. *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*. In: California Law Review Vol. 78, Issue 2, 1990, p. 451-512. ORENTLICHER, Diane. *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*. In: The Yale Law Journal, Vol. 100, No. 8, Symposium: International Law, June, 1991, p. 2537-2615.

<sup>358</sup> CARVER, Richard. *Truth, Justice and information*. Huntingdon College. Accessed 05 January 2017.

< <http://fs.huntingdon.edu/jLewis/FOIA/Art19/RTK-Carver-Art19-647.htm> >

<sup>359</sup> Ibid.



propagated by Archbishop Desmond Tutu<sup>360</sup>, may also assume different contours depending on the perspective of those involved. For example, governments may claim that amnesties support reconciliation by preventing prosecutions, while victims may see it quite differently.

In the conflicts between truth and justice, however, the argumentation in favour of both principles would progressively gain attention as the focus based on the international obligations emerged. This chapter presents several examples of the emergence of this recent focus, such as the publications by legal scholars – already mentioned above - on the duty to prosecute. The opposition *truth v. justice* would be then overcome by the so-called *complementary* speech, which considers that truth is in fact interconnected with justice and thus none of them must be understood separated from the other<sup>361</sup>. This understanding clearly affronts the political pragmatism view of the *truth v. justice* debate centred on security and stability<sup>362</sup>. While some authors justify this legal shift on the obstacles posed by impunity to the rule of law, and to the distinct human tragedies in several parts of the world<sup>363</sup>; others point to the emergence of a “truth business” composed by experts in transitional justice who support both truth and justice as tools to combat impunity. This new “business field” would have pushed the complementary to the main UN Human Rights bodies, lobbying in its favour (and eventually succeeding)<sup>364</sup>.

Currently, there is indeed an international consensus supporting both truth (particularly truth commissions) and justice (criminal prosecution) as the main measures to confront impunity. In this process, the influence of NGOs was crucial<sup>365</sup>. Amnesty International and Human Rights Watch illustrate well the introduction of the fight against impunity – and its measures - in the NGOs’ agenda with the publication of statements on the issue.

### ***The Introduction of Impunity in the NGOs’ Agenda - Human Rights Watch (1989) and Amnesty International (1991)***

In 1989 and 1991 Human Rights Watch and Amnesty International respectively adopted policy statements on impunity. While HRW confronted the issue in a document entitled *Accountability for Past Human Rights Abuses* dated December 1989, AI made an oral statement before the UN Commission on Human Rights proposing an official UN study

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<sup>360</sup> See: TUTU, Desmond. *No Future without Forgiveness*. New York: Doubleday, 1999.

<sup>361</sup> NAFTALI, Patricia. *The Politics of Truth: On Legal Fetishism and the Rhetoric of Complementarity*, p. 103-104.

<sup>362</sup> International Commission of Jurists. *International Law and the Fight Against Impunity*, p. 14.

<sup>363</sup> Ibid.

<sup>364</sup> NAFTALI, Patricia. *The Politics of Truth: On Legal Fetishism and the Rhetoric of Complementarity*, p. 119.

<sup>365</sup> International Commission of Jurists. *International Law and the Fight Against Impunity*, p. 14.

on the phenomenon of impunity. These statements, influenced by the political changes witnessed in the 1980's, would mark these global NGOs' posture concerning impunity, and in 1995 would be part of Mr. Neil Kritz's compendium on transitional justice.

In its statement, HRW held that in case of gross violations of human rights, the most important means of establishing accountability is for the governments themselves to expose all possible information on past abuses. This would include the identity of the victims, and of all those who carried out the abuse; those who aided or abetted them; and those responsible for devising the policies and practices which resulted in the violations. In addition, governments must investigate, prosecute and punish the perpetrators of gross violations. Accordingly, immunity laws and decrees are null and void if promulgated by the perpetrators themselves, if applied to crimes against humanity or in any case involving conflict with international law<sup>366</sup>.

The duty to prosecute prevails over impunity even when most of the population is unwilling to hold accountable the responsible for gross abuses. This is particularly important in cases involving ethnical, religious or political minorities, as in the view of the HRW "it is not the prerogative of the many to forgive the crimes against the few". In another guideline, HRW considered that the obedience to orders (with exception of cases of duress) cannot be used as a valid defence to those accused of gross violations. Additionally, HRW insisted that at all circumstances governments when investigating, prosecuting and punishing must act in conformity with due process of law<sup>367</sup>.

HRW reaffirmed these understandings in its 1989 report but concluded that during that year it was not successful in promoting such standards on impunity<sup>368</sup>. In Uruguay, for example, a quarter of the electorate challenged the amnesty law (*Ley de Caducidad de la Pretensión Punitiva del Estado*), requesting in a petition a referendum to repeal the amnesty. However, in 1989 the referendum resulted in a defeat and the amnesty law remained in force. This event was particularly devastating for human rights groups, including the Uruguayan organization Mothers and Relatives of Detained-Disappeared, who had the number of its members dramatically reduced after the referendum. Despite

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<sup>366</sup> Human Rights Watch. *Policy Statement on Accountability for Past Abuses*. In: *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. Volume I. General Considerations. Neil J. Kritz (ed). Washington: United States Institute for Peace, 1995, p. 217.

<sup>367</sup> Ibid, p. 218.

<sup>368</sup> Human Rights Watch. *World Report 1989 - Seeking Accountability for Past Abuses*. Available at: < <https://www.hrw.org/reports/1989/WR89/>> Last access 20 March 2017

the lost, the organization of relatives continued to search for their loved ones and focused its work on the cooperation with FEDEFAM<sup>369</sup>.

Another example provided by HRW concerned Argentina where interestingly the political response to full accountability efforts was quite rapid<sup>370</sup>. In 1985, five members of the three juntas that had ruled Argentina between 1976-1983 were convicted. However, shortly after, on 24 December 1986, former President Alfonsín called a special session of Congress and passed a law putting a full stop to any prosecutions not brought within six days. The human rights organizations had to work very fast to bring charges to as many militaries as possible in a period of six days. By the time the law took effect, around four hundred former officers still faced charges<sup>371</sup>.

The prosecutions displeased the militaries and in April 1987 army units organized a rebellion to pressure for an amnesty. On 5 June 1987, after the rebellion collapsed, President Alfonsín passed a new law expanding the concept of due obedience, which covered all the crimes committed during the dirty war. Alfonsín's successor Carlos Menem, who assumed control of the government in July of 1989, granted presidential pardons to all those convicted or under trial for state and subversive acts of terrorism, for misconduct in the war, or for rebelling against democratic institutions. These pardons included even the main officers responsible for organizing the whole repressive structure<sup>372</sup>.

In Romania, the Helsinki Watch condemned the execution of Nicolai and Elena Ceausescu on Christmas Day 1989. It requested instead the institution of a commission to compile a full account of the crimes of the Ceausescu era, and the prosecution of those responsible for gross abuses to take place in accordance with due process. In Africa, there was also a strong pressure from Africa Watch in countries like Uganda, South Africa and Zimbabwe<sup>373</sup>.

The NGO assumed that impunity would continue to be important in the years to come with the struggle against amnesty laws in Uruguay and Argentina, with the work of the IACtHR, and the succession of President Pinochet by a civilian government in Chile<sup>374</sup>. The conclusion of HRW was confirmed and, in 1991, AI would dedicate an oral statement

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<sup>369</sup> See: LESSA, Francesca. *Memory and Transitional Justice in Argentina and Uruguay: Against Impunity*. New York: Palgrave Macmillan, 2013, chapter 5.

<sup>370</sup> Human Rights Watch. World Report 1989 - Seeking Accountability for Past Abuses.

<sup>371</sup> GUEST, Iain. *Behind the Disappearances – Argentina's Dirty War Against Human Rights and the United Nations*, p. 390.

<sup>372</sup> Ibid.

<sup>373</sup> Human Rights Watch. World Report 1989 - Seeking Accountability for Past Abuses.

<sup>374</sup> Ibid.

before the UN Commission on Human Rights to impunity. The Organization argued that this phenomenon is among the main causes which contribute to continuing patterns of violence including torture, killing and disappearance<sup>375</sup>. Accordingly, it agrees with HRW, emphasising the importance of the duty to investigate cases of gross violations and to prosecute and punish those responsible for them.

Investigations, in the view of AI, would allow the truth to emerge, attending a demand coming not only from victims, but also from relatives and societies at large who want to know the truth about past abuses. To bring the perpetrators to justice is important therefore not only in individual cases, but also sends the message that human rights violations are not tolerated and that those responsible for them will be prosecuted. When states fail to protect human rights, they intimidate the victims and their relatives to try to access domestic remedies such as habeas corpus. AI mentioned the case of Sri Lanka where relatives of disappeared fearing reprisals decided not to inquiry authorities about the fate of their family members and not to file actions on their behalf in the courts. The NGO alleged having documented several cases in which relatives, after making inquiries, received death threats, and their lawyers and witnesses had been killed after testifying in the courts<sup>376</sup>.

In this fight against impunity, AI stood against amnesty laws which prevent prosecution for gross violations. In the view of the NGO, amnesties have been normally implemented more due to pressure from the previous governments, whose members likely still retain influence in the democratic period, than to accomplish national reconciliation and peace. The complications of amnesties however do not lie only on the prevention of prosecutions or close investigations or trials, but also on the undermining of the search for truth<sup>377</sup>.

In 1992, AI would restate its points of view on the issue of impunity in its annual report, arguing that without perpetrators fearing the discovery and punishment, cycles of violence will never be broken. This reality becomes even more problematic, AI affirms, when considered that gross violations are increasingly taking place under elected governments with explicit human rights commitments and institutions. The gulf between

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<sup>375</sup> Amnesty International. *Policy Statement on Impunity*. In: *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. Volume I. General Considerations. Neil J. Kritz (ed). Washington: United States Institute for Peace, 1995, p. 219.

<sup>376</sup> *Ibid.*, p. 219-220.

<sup>377</sup> *Ibid.*, p. 220.

these commitments and the practice can only be overcome if abuses are investigated and the responsible brought to justice<sup>378</sup>.

When providing examples of cases of impunity, AI mentioned, similarly to HRW, the cases of Uruguay and Argentina. Moreover, it criticized the amnesties laws in Chile and Honduras which aimed at covering killings, torture and disappearances. The Organization also mentioned that in various countries in Africa, such as Benin and Congo, governments granted immunity from prosecution to former government and security forces in order to avoid any political confrontation. The effect of allowing individuals to act with impunity would be, according to AI, to avoid a close examination of the systems which permitted them to commit abuses and therefore to postpone necessary reforms<sup>379</sup>.

The difficulties in pursuing the prosecutions of perpetrators of human rights abuses are also owned to obstacles posed to the collect of evidence. As stated in AI's report, many of those with experience in past abuses were dead or went in exile and were unwilling to return to their countries to give their testimonies. Furthermore, much of the material evidence are usually destroyed – documents are burned, and bodies are buried in secret graves. For those reasons, AI considered crucial to present information in public forums, such as commissions of inquiry. Otherwise, trials may never take place. In Ethiopia, for example, six months after the end of Mengistu Haile-Mariam's regime, hundreds of former government officials were detained, but no action was made to bring them to the courts<sup>380</sup>.

AI concluded that the States willing to confront past abuses had to comply with three main obligations: to investigate allegations of human rights violations, to bring to justice the responsible and not to pass amnesty laws which prevent the emergence of truth and accountability before the law. The investigations would have the objective to establish individual and collective responsibility and to provide a full account of the truth to the victims, their relatives and society<sup>381</sup>.

The statements from AI and HRW both indicate not only the concern of the human rights movement with impunity, but also the centrality that this issue was acquiring in the late 1980's and early 1990's. Impunity is not only the failure to remedy human rights violations; it is the origin of them. Either due to indifferent attitudes or to actions

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<sup>378</sup> Amnesty International. Amnesty International Report 1992. *Getting Away with Murder*. UK: AI, 1992, p. 1-2.

<sup>379</sup> Ibid., p. 1-7.

<sup>380</sup> Ibid., p. 7.

<sup>381</sup> Ibid., p. 8-9.

intentionally aimed at blocking prosecutions from taking place, states contribute to what AI calls “continuing patterns of violence”<sup>382</sup>. They fail therefore to respond to the rightful demands of victims, relatives and societies. Most importantly, both global NGOs understand that prosecutions attend to several objectives which go beyond punishment to include, for example, the right to truth. This reveals a perspective which considers that bringing those responsible for gross violations to justice is also a measure able to implement the truth.

What both NGOs mean by truth seems to relate to the full disclosure of individual cases including the clarification of the identity of all those involved in the violations, either victims or perpetrators. This is one of the reasons why amnesties are targets of criticism by AI and HRW, i.e. for preventing the cases from being solved; they prevent the truth from becoming known. Such position adopted by these global NGOs goes in the opposite direction of all those who in the *truth v. justice* debate support only truth: for they dissociate the possibility of individual disclosure of the cases from prosecutions or close investigations or trials. By doing so, the “supporters of truth” leave the entire responsibility for solving the cases to truth commissions, as if these bodies could clarify all the human rights violations which took place.

The work of AI and HRW, among other NGOs, would influence justice, along with truth, to acquire a central role in the debates concerning past human rights abuses. In addition to NGOs, however, it is also important to mention the work of regional human rights bodies particularly the IACHR and its role in promoting truth while fighting against impunity.

### ***Inter-American Commission on Human Rights Individual Cases on Impunity and Truth***

Since the beginning of the democratic transition in Latin America in the 1980's and particularly in the 1990's, the work of the IACHR has become progressively case-based. As previously mentioned, in the 1970's, the Commission produced several highly relevant country reports in which it investigated the human rights violations committed by dictatorships still installed at that time. When these regimes began to fall, the IACHR continued to concern about them, but this time it was their legacy which was gaining attention, i.e. the human rights violations that several states had the intention to leave behind<sup>383</sup>. In many individual cases brought before the IACHR, the victims would confront

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<sup>382</sup> Amnesty International. *Policy Statement on Impunity*, p. 219.

<sup>383</sup> DYKMANN, Klaus. *Impunity and the Right to Truth in the Inter-American System of Human Rights*. In: *Iberoamericana*, VII, 26, 2007, p. 47.

abuses committed during the repressive years, including torture, disappearance and extra judicial execution. In response, the Commission would firm its position on the issue of impunity, developing its understanding on amnesty laws, the right to truth and the duty to prosecute.

The IACHR first cases dealing with amnesties date back 1992. The Commission examined three cases in which amnesty laws were granted to perpetrators of gross human rights violations. – a military massacre of seventy-four civilians in El Salvador<sup>384</sup>; enforced disappearance and kidnapping of children in Uruguay<sup>385</sup>; enforced disappearance, torture, summary execution and kidnapping in Argentina<sup>386</sup>. In the case of Uruguay, the IACHR affirmed that the states, when granting amnesties, must consider the nature and gravity of the facts involved. Crimes such as disappearances, torture and kidnapping of children are considered gross violations of human rights and for this reason the social need for their clarification and investigation is not the same as in other crimes<sup>387</sup>.

In all the three cases, the IACHR concluded that in face of gross violations the states have an obligation to investigate; to allow the victims to participate in judicial investigations; and to ensure a fair compensation for the harm caused. However, only in the case of El Salvador the IACHR was explicit in ordering the state to identify the responsible for the violations, to bring them to justice, to have their responsibility defined and to apply sanctions in accordance with the extreme gravity of the case<sup>388</sup>. The conclusions of the IACHR in these 1992 reports introduced the duty to prosecute and to provide compensation as a regional rule in the Inter American System<sup>389</sup>.

Despite the proximity of these cases with the pursuit to know about what had happened, the IACHR did not address the right to know the truth explicitly in a case until 1995. The communication concerned the disappearance of Manuel Bolaños who was detained by the Ecuadorian Marine on 14 October 1985 supposedly to have his identification documents reviewed. Mr. Bolaños was never seen again. After his disappearance, the relatives presented *habeas corpus* petitions before the appropriate courts, but they were

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<sup>384</sup> IACHR. Report No. 26/92, Case 10.287, OEA/Ser.L/V/II.83, *Massacre of las Hojas* (El Salvador), 24 September 1992.

<sup>385</sup> IACHR. Report No. 28/92, Cases No. 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374 and 10.375 (Uruguay), 2 October 1992.

<sup>386</sup> IACHR. Report No. 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311 (Argentina), 2 October 1992.

<sup>387</sup> IACHR. Report No. 28/92, at para. 38.

<sup>388</sup> IACHR. Report No. 26/92, Conclusions, at para. 5a.

<sup>389</sup> PINTO, Monica. *The Role of the Inter-American Commission and Court of Human Rights in the Protection of Human Rights: Achievements and Contemporary Challenges*. In: Human Rights Brief, 20, No. 2, 2013, p. 35.

rejected. Mr. Bolaños's family decided then to contact the UNWGEID asking for information on his whereabouts. On 9 June 1987 the relatives received the response - which the UNWGEID transmitted from the government of Ecuador - stating that Mr. Bolaños had died, and an investigation into the circumstances and possible responsibility had been initiated on October 29 1985<sup>390</sup>.

The government however never established the responsibility of those involved in the disappearance of Mr. Bolaños and never clarified the facts and details related to the event. The Commission found several violations in the case among which the violation of the family's right to truth about what happened to Manuel Bolaños, the circumstances of his detention and death, and the location of his remains. Following the understanding of the IACtHR, the Commission stated that this right arises from the State's obligation to "use all means at its disposal to carry out a serious investigation of violations committed within its jurisdiction in order to identify those responsible."<sup>391</sup> Therefore, the Commission reaffirmed its understanding in the 1992 cases that the victims have a right to a judicial investigation carried by a criminal court with the objective to establish responsibility for human rights violations and to sanction the responsible for them.

The IACHR considered that the investigations carried out by the Ecuadorian naval authorities despite lasting three years and four months failed to exhaust all available measures to know the truth. The Commission emphasised that the Government was in possession of all information the family had the right to know including where Mr. Bolaños had been held, the fact of his death, and the location of his remains. Despite that, the relatives never obtained any of this information. The IACHR concluded that "the lack of an investigation by impartial competent authorities, and the delay and insufficiency of the investigation which was carried out and the failure of the State to provide information" characterise a serious violation of the right of the relatives to prompt and effective judicial recourse enshrined in Article 25 of the American Convention<sup>392</sup>. Consequently, the domestic channels effectively prevented the family from ensuring their right to justice and their right to know the truth about what happened to Mr. Bolaños.

If the right to know the truth derives from the duty to investigate, this duty in turn flows from the duty to ensure and protect human rights enshrined in the American Convention. Whenever the state allows the investigations to be carried out by potentially implicated

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<sup>390</sup> IACHR. Report No. 10/95. Case 10.580, Manuel Bolaños (Ecuador), 12 September 1995, background, at para. 2-3.

<sup>391</sup> Ibid., merits, para. 45 (in a reference to the *Velásquez Rodríguez* case at the IACtHR, Judgment of July 29, 1988 at para. 166)

<sup>392</sup> Ibid., merits, at para. 46.



organs, it compromises impartiality and independence. In the case of Manuel Bolaños, the militaries conducted the investigations when they did not have legal authority to perform such functions and neither could they act with independence and impartiality. Accordingly, the IACHR concluded that this situation constituted *de facto* impunity which is corrosive of the rule of law and violates the principles of the American Convention<sup>393</sup>.

Finally, regarding the location of the body of Mr. Bolaños, the IACHR noted that the proper burial upon the death of a person is an act of immense importance for the relatives. The right to know the truth protects the family's wish to have the body of the disappeared victim returned to them to provide a proper burial<sup>394</sup>. For this reason, the IACHR characterized the right to truth as the most intimate and profound right and considered that in the present case it was continuously denied to Mr. Bolaños's family<sup>395</sup>.

In the case of *Manuel Bolaños v. Ecuador*, the IACHR addressed the right to truth as an individual right only. However, in future cases, the Commission would reaffirm its previous understanding elaborated in the 1985-1986 annual report in which it considered the right to truth both as an individual and collective right. In accordance with this perspective, the right to truth derives not only from Article 25 (Right to Judicial Protection), but also from Articles 1(1) (Obligation to Respect Rights), 8 (Right to a Fair Trial), and 13 (Freedom of Thought and Expression) of the American Convention.

The first occasion in which the IACHR decided for this elaboration was in the 1998 report concerning a group of cases of Chile. In these cases, the petitioners asserted that the continued application of the 1978 amnesty law in Chile violated the right of victims to justice. According to the petitioners, their claims do not concern human rights violations resulting from the illegal detention and disappearance of the persons. On the contrary, they were strictly related with the fact that the amnesty law remained in effect under the democratic government, even after Chile ratified the American Convention<sup>396</sup>.

The Commission recognized that many States parties to the ACHR resorted to amnesties in order to foster national peace and reconciliation. By doing so, they would have "abandoned an entire group, including many innocent victims of violence, who feel deprived of the right to seek remedy in their rightful claims against those who committed

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<sup>393</sup> Ibid., merits, at para. 48.

<sup>394</sup> Ibid., merits, at para. 25.

<sup>395</sup> Ibid., conclusions, at para. 2.

<sup>396</sup> IACHR. Report N° 25/98, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.657, 11.675, 11.705 (Chile), 7 April 1998, background.

acts of barbarity against them”<sup>397</sup>. Accordingly, the IACHR concluded that amnesties invalid the obligation of States under Article 1.1 IACHR and therefore constitute a violation of this same article.

Regarding the right to truth, the Commission explained that it has a collective nature, allowing societies to have access to information on the development of the democratic system; and an individual nature which in its turn allows the families to have access to some kind of reparation in those cases in which amnesty laws are in force. The Commission continued stating that the ACHR protects the right to seek and receive information in cases of disappearances which obliges the states to clarify the whereabouts of the individuals disappeared. The duty to investigate such cases, from which the right to truth derives, continues until the fate of the disappeared victim is revealed and in case the victim is dead the location of the remains. Any legal or factual impediments preventing the access to relevant information connected to the facts and circumstances involving the violation of a fundamental right constitute, in accordance with the IACHR, a violation of Article 25 ACHR<sup>398</sup>.

The Commission also referred to the decisions of the Human Rights Committee especially those involving a violation of the right to life in which the lack of information concerning the facts of the violation, including the identity of the responsible, entitled the families to receive compensation. The IACHR emphasised the understanding of the Committee that reparation is not satisfied merely with money. On the contrary, the initial step in the process of reparation of the families should consist in ending the state of uncertainty in which they find themselves. This could only be achieved with the revelation of the whole truth about what had happened<sup>399</sup>.

In addition to the families of the disappeared victims, the Commission reasserted that societies are also entitled to information concerning past abuses as “part of the reparation owed as a satisfaction and a commitment not to repeat the violation in the future”<sup>400</sup>. Under this perspective, by clarifying the facts of past violations, the right to truth is considered a measure of satisfaction and a way to prevent future violations. It is important to note that the IACHR considered that the government of Chile violated the right to truth although it had established the Truth and Reconciliation Commission. In accordance with the Commission’s view, the Chilean Truth Commission was not a

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<sup>397</sup> IACHR. Report N° 25/98, Part VII – Observations of the Commission on the Allegations of the Parties, at para. 41.

<sup>398</sup> Ibid., Part VII – Observations of the Commission on the Allegations of the Parties, at para. 88-89.

<sup>399</sup> Ibid., at para.93.

<sup>400</sup> Ibid., at para. 95.

judicial organ and its work was restricted to establishing the identity of victims of the violation of the right to life. For this reason, the Truth Commission was considered by its own nature limited and therefore not able to clarify all the facts surrounding the disappearances<sup>401</sup>.

The IACHR maintained the understanding developed in the case of Chile in future individual cases. However, it gradually extended the reach of the right to truth to others human rights violations such as torture and extra judicial execution. For example, the case of *Ignacio Ellacuría S.J. et al v. El Salvador* of 1999 concerned the extra judicial execution of six Jesuit priests and two women by agents of the State. According to the complaint, the executions occurred on November 16, 1989 at the residence of the Jesuit Order located within the premises of the *Universidad Centroamericana “José Simeón Cañas”* in San Salvador. On that same day, the organization Americas Watch submitted a petition to the IACHR reporting the events mentioned above. Despite the Commission’s efforts to establish a friendly settlement which would include the clarification of the truth and the delimitation of the responsibility of the supposed perpetrators, the State never responded to the proposal<sup>402</sup>.

The report of the Truth Commission indicated that members of the armed forces were responsible for the killings. The State eventually convicted two members of the army, but they were later released due to the 1993 amnesty law<sup>403</sup>. The IACHR reaffirmed that amnesty laws prevent the alleged authors of the violations to be investigate, prosecute and punish, enshrining them impunity and therefore violating Articles 1 (1), 8 and 25 ACHR. In this context, the IACHR considered that the right to know the truth regarding the facts that gave rise to serious violations of human rights and the right to know the identity of the perpetrators constitute an obligation which must be satisfied by the State to the victims and societies as a whole<sup>404</sup>.

Similarly to the considerations made in the 1998 case of Chile, the IACHR recognized that the El Salvadorian Truth Commission played an important role in establishing the facts surrounding the most serious violations, and in promoting national reconciliation. However, the IACHR once again affirmed that despite the essential work of the Truth Commission, it cannot be considered “as a suitable substitute for proper judicial procedures as a method for arriving at the truth”. The IACHR continued stating that “the

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<sup>401</sup> Ibid., at para.97.

<sup>402</sup> IACHR. Report No. 136/99, Case 10.488, Ignacio Ellacuría, S.J et al. (El Salvador), 22 December 1999, at para. 1-5, 10.

<sup>403</sup> Ibid., part III, *position of the parties*, at para. 33-37.

<sup>404</sup> Ibid., *The compatibility of the General Amnesty Law with the American Convention*, at para.218-232.

value of truth commissions is that they are created, not with the presumption that there will be no trials”, but that they represent “a step towards knowing the truth and, ultimately, making justice prevail”. In fact, it would be the “overriding need to combat impunity” which justifies the obligation of the states to investigate violations, to identify those responsible, to punish them, and to ensure adequate compensation for the victim. Accordingly, the Commission concluded that El Salvador violated the right to truth “to the prejudice of the victims’ relatives, the members of the religious and academic community to which the victims belonged, and Salvadoran society as a whole”<sup>405</sup>.

It is important to note that in this case of El Salvador the IACHR explicitly referred to the study on impunity of Mr. Louis Joinet, United Nations Special Rapporteur. In accordance with the Commission, its doctrine and practice regarding amnesties is consistent with the conclusions of Mr. Joinet in his report on impunity particularly with Principle n° 20 (duty of states with respect to the administration of justice)<sup>406</sup>. In this respect, Mr. Joinet states that impunity originates from the fact that states do not comply with their obligation to investigate violations and to adopt, particularly when it comes to the administration of justice, measures to guarantee that those responsible are prosecuted and punished. Impunity would be also related with states’ failure to provide victims with effective remedies, to compensate them for the harm suffered and to prevent the repetition of such violations<sup>407</sup>.

Undoubtedly, through the fight against impunity, the IACHR consolidated its understanding concerning the right to truth. The importance of such right was then associated with the failure of states to investigate human rights violations and to prosecute and punish the responsible for them. This failure, which characterized the phenomenon of impunity, was in turn justified in several states by amnesty laws in force. In this context, the right to truth was related not only with enforced disappearance cases, but with others gross violations as well, such as torture and extra judicial execution. Accordingly, in the view of the IACHR, the right to truth concerns the right of relatives to know the fate of their loved ones, and the right to know about the facts surrounding the violations, including who committed them<sup>408</sup>.

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<sup>405</sup> Ibid., at para. 229-230, 239.

<sup>406</sup> Ibid., at para. 204.

<sup>407</sup> United Nations, Commission on Human Rights. Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political) - Final Report Prepared by Mr. Joinet Pursuant to Sub-Commission Decision 1996/119, E/CN.4/SUB.2/1997/20, 26 June 1997, Annex II, Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, Principle 20.

<sup>408</sup> About the IACHR and its role in the fight against impunity, see also: International Commission of Jurists. *International Law and the Fight Against Impunity*, p. 244-245; CASSEL, Douglass. *La*

Despite this initial recognition of the right to truth and the strong support it found in the human rights movement in general, the first norms of international human rights law which point to the issue of impunity did not explicitly refer to such right. There is an implicit approach, however, an aspiration to reveal the facts involving past abuses when considered the right to an effective investigation or to access the findings of an investigation.

### ***The Emergence of International Norms Confronting Impunity***

The directions that the issue of impunity would take in the UN and in the OAS, highly influenced by human rights organizations and by relatives of disappeared victims demanding justice and truth, suggested the need of future norms to confront the phenomenon<sup>409</sup>. The first instruments of international human rights law that expressly point to the question of impunity were the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, in 1989; the *Declaration on the Protection of All Persons from Enforced Disappearance* (DED), in 1992; and the *Inter-American Convention on Forced Disappearance of Persons* in 1994.

#### ***UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary or Summary Executions (1989)***

In 1986, the UN Economic and Social Council requested the UN Committee on Crime Prevention and Control to analyze the question of extra-legal, arbitrary or summary executions with the objective to elaborate principles for the effective prevention and investigation of such practices<sup>410</sup>. On December 1989, the UN General Assembly approved the *Principles on the Effective Prevention and Investigation of Extra Legal, Arbitrary or Summary Executions*. This instrument explicitly affirms the obligation of the States to investigate and to bring to justice the suspects of committing executions. Also, it reaffirms the principle of universal jurisdiction already established in the Convention

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*Lucha Contra la Impunidad Ante el Sistema Interamericano de Derechos Humanos*. In: Verdad y Justicia – Homenaje a Emilio F. Mignone. Instituto Interamericano de Derechos Humanos. San José Costa Rica: IIDH, 2001, p. 357-410; IACHR. *The Right to truth in the Americas*. OEA/Ser.L/V/II.152, 13 August 2014; PASQUALUCCI, Jo M. *The Whole Truth and Nothing but the Truth: Truth Commissions, Impunity and Inter-American Human Rights System*, p. 321-370.

<sup>409</sup> See: International Commission of Jurists. *International Law and the Fight Against Impunity*; TAYLER, Wilder. *La Problemática de la Impunidad y su Tratamiento en las Naciones Unidas – Notas para la Reflexión*. In: Revista IIDH, Vol. 24, 1996, p. 185-213.

<sup>410</sup> LAWSON, Edward. *Encyclopedia of Human Rights*. Second Edition. Washington: Taylor and Francis, 1996, p. 486.

against Torture (CAT) of 1984 and rejects the exception of due obedience as justification for executions<sup>411</sup>.

The Principles go even further by declaring that “in no circumstances, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions”<sup>412</sup>. The introduction of this provision marked the first time that a human rights instrument suggested that the faculty of states to grant measures of impunity is not discretionary<sup>413</sup>. This is particularly important because it reveals that the guidelines regarding gross violations would not be supportive to amnesty laws, although the 1970’s and the 1980’s witnessed an intense proliferation of this legal instrument.

The Principles also established the obligation of the states to ensure that persons deprived of their liberty are held in officially recognized places of custody. All the information concerning their custody and whereabouts must be promptly available to relatives, lawyers or other persons of confidence. In case the execution is confirmed, the relatives of the deceased are entitled to be informed of any hearing and to have access to all information relevant to the investigation. The relatives are also entitled to have a medical or other qualified representative present at the autopsy. After the identity of the deceased is determined, the relatives shall be promptly informed, and a notification of death posted. Following the conclusion of the investigation, the body of the deceased shall be returned to the family. Finally, the Principles provide in its last article that the relatives and dependants of victims of extra-legal, arbitrary or summary executions are entitled to fair and adequate compensation within a reasonable time<sup>414</sup>.

#### *UN Declaration on the Protection of All Persons Against Enforced Disappearance (1992)*

Many of the principles established in the UN instrument on Effective Prevention and Investigation of Extra Legal, Arbitrary or Summary Executions of 1989 would be reaffirmed by the UN in the Declaration on the Protection of All Persons from Enforced Disappearance adopted on 18 December 1992. Previously, the UN Commission on Human Rights had already recommended the UN Sub-Commission to consider preparing an instrument against unacknowledged detention of persons. In 1988, the

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<sup>411</sup> Principles 18 and 19 of the UN *Principles on the Effective Prevention and Investigation of Extra Legal, Arbitrary or Summary Executions*.

<sup>412</sup> Principle 19.

<sup>413</sup> TAYLER, Wilder. *La Problemática de la Impunidad y su Tratamiento en las Naciones Unidas – Notas para la Reflexión*, p. 205.

<sup>414</sup> Principles 6, 16 and 20.

chance to elaborate a declaration arose during one of the proceedings of the UN Sub-Commission's Working Group on Detention. After one of the officials in the Working Group suggested that some sort of declaration could be useful, NGOs representatives present at the meeting decided to produce a first draft<sup>415</sup>. Reed Brody, representative of ICJ, collaborated with UN Sub-Commission expert Mr. Louis Joinet to present an initial version of the text before the Working Group on Detention<sup>416</sup>.

In fact, the ICJ assumed the primary role in coordinating the preparation of the draft, working together with AI and other NGO experts. In 1990, the ICJ organized an expert meeting chaired by Reed Brody to assist the chairman of the Working Group on Detention, Alfonso Martínez who was in charge for preparing a revised text. The meeting counted with the participation of NGO representatives, the *Federation Internationale des Droits de L'homme*, the UN Centre for Human Rights, the FEDEFAM and various other participants present due to their membership with UN working groups, such as the UNWGEID<sup>417</sup>.

The cooperation of FEDEFAM was particularly important since a declaration on disappearances would help the relatives to achieve an essential objective in their struggle - the elaboration of a convention. The declaration was therefore seen by the families of disappeared victims as a necessary and intermediate step towards a convention on disappearances<sup>418</sup>. Indeed, FEDEFAM considered that one of the most urgent needs for Latin America was the implementation of international legal instruments to help preventing and sanctioning human rights violations. Domestic legislations were not enough because, according to FEDEFAM, the crime of enforced disappearance was not codified, and the national legislators had no will in doing so. A convention would, for these reasons, reinforce the efforts of organizations of relatives to counter impunity in newly democratized states<sup>419</sup>.

Indeed, the 1992 Declaration was an important step in the protection of relatives and in the struggle against impunity, although it demanded compromises involving the term

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<sup>415</sup> The NGOs' representatives present at the meeting were: Nigel Rodley and Ingrid Kirscher of Amnesty International, David Weissbrodt of the Minnesota Lawyers Committee for Human Rights, and Reed Brody of the International Commission of Jurists. CLARK, Ann Marie. *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms*. New Jersey: Princeton, 2001, p. 91.

<sup>416</sup> Ibid., p. 91.

<sup>417</sup> BRODY, Reed; GONZÁLEZ, Felipe. *Nunca Más: An Analysis on International Instruments on "Disappearances"*, p. 373. CLARK, Ann Marie. *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms*, p. 91.

<sup>418</sup> CLARK, Ann Marie. *Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms*, p. 92.

<sup>419</sup> MASCAYANO, Poríby Cecilia (FEDEFAM) *Para que Nunca Más – So that Never Again*. In: *Aquelarre – A Latin American Women's Magazine*, Oct. Nov. Dec. 1989, p. 39.

*crimes against humanity* and certain juridical issues such as universal jurisdiction and the statute of limitation on the crime itself. For example, despite the insistence of human rights groups and relatives of disappeared victims to characterize enforced disappearance as crime against humanity, the final text dropped the operative article containing such provision. Instead, the sponsors opted for including it in the preamble only<sup>420</sup>.

Article 1 enumerates non-exhaustively the human rights which are considered violated with acts of disappearances and affirms that such acts place the victims outside the protection of law, causing them and their relatives severe suffering. Due to the particular gravity of cases of enforced disappearance, Article 13 enshrines the obligation of states to investigate promptly, impartially and thoroughly such cases even if there is no formal complaint. The Declaration also establishes in its Article 10 that information on the detention of persons deprived of liberty, including the location of such persons, shall be made promptly available to their relatives. In the cases of abducted children of mothers who were victims of enforced disappearance, the Declaration imposes in the Article 20 the obligation of the States to search for, identify and return the children to their families of origin. This last provision reflects a particular concern of FEDEFAM to include in international standards the issue of abducted children. In addition to these provisions, the Declaration also provides for the victims and their families the right to obtain adequate compensation, including the means to cover their rehabilitation. If the victim died as a result of the enforced disappearance, the dependents should be entitled to compensation as well<sup>421</sup>.

Additionally to the provisions mentioned above, the 1992 Declaration took innovative steps concerning the issue of legal impunity. Article 18 states that “persons who have or are alleged to have committed” enforced disappearance are not allowed to benefit “from any special amnesty law or others similar measures which might have the objective to except them from any criminal proceedings or sanction”. The expression *similar measures*, according to Mr. Reed Brody, refers to legislation such as the Argentines Laws Full Stop and Due Obedience and the Uruguayan Law on the Expiration of the Punitive Claims of the State<sup>422</sup>. The Declaration went even further and affirmed that the

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<sup>420</sup> BRODY, Reed; GONZÁLEZ, Felipe. *Nunca Más: An Analysis on International Instruments on “Disappearances”*, p. 378.

<sup>421</sup> Article 19

<sup>422</sup> BRODY, Reed; GONZÁLEZ, Felipe. *Nunca Más: An Analysis on International Instruments on “Disappearances”*, p. 385.



states in the exercise of the right of pardon should consider the extreme seriousness of acts of enforced disappearance<sup>423</sup>.

Since 1993, the UNWGEID is responsible for monitoring the observance of states with the obligations deriving from the 1992 Declaration and for supporting governments with its implementation<sup>424</sup>. The UNWGEID has elaborated several comments to the Declaration, including a *General Comment on the Right to truth* in which it interprets the obligations in the Declaration that flow from such right. In accordance with the UNWGEID, these obligations include: investigations which must be conducted until the fate and the whereabouts of the person have been clarified; the obligation to have the progress and results of these investigations informed to the interested parties; the obligation to guarantee full access to archives; and the obligation to ensure that witnesses, relatives, judges and other participants in any investigation are entirely protected<sup>425</sup>.

Despite not established in the 1992 Declaration, the UNWGEID recognized that the right to truth entails the families to have the remains of their loved one returned to them, and to dispose of those remains in accordance with their own tradition, religion or culture. The remains should be conclusive identified, including the use of DNA analysis. The process of identification of the remains, and of disposal of those remains, should always occur with the full participation of the family. This process should also include fully informing the general public of such measures<sup>426</sup>.

The 1992 Declaration on Enforced Disappearance would gain attention at the World Conference on Human Rights, a high point in the progressive recognition of impunity as a human rights issue. The most important result of the Conference was the *Vienna Declaration and Programme of Action* adopted by consensus on 25 June 1993. Specifically addressing the practice of enforced disappearance, the Vienna Declaration “calls upon all States to take effective legislative, administrative, judicial or other measures”<sup>427</sup> aimed at preventing, terminating and punishing acts of enforced disappearance. Also, it reaffirms that it is the duty of all States to investigate “whenever

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<sup>423</sup> Article 18, para.2.

<sup>424</sup> United Nations, Commission on Human Rights, *Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and Human Rights framework for the protection of persons from enforced or involuntary disappearances*, at para. 46.

<sup>425</sup> United Nations, Working Group on Enforced or Involuntary Disappearances. General Comment on the Right to Truth in Relation to Enforced Disappearances, A/HRC/16/48, 2010.

<sup>426</sup> Ibid.

<sup>427</sup> United Nations. Vienna Declaration and Program of Action. Adopted by the World Conference on Human Rights, 25 June 1993, at para. 62.

there is reason to believe that an enforced disappearance has taken place on a territory under their jurisdiction”<sup>428</sup> and, if the facts are confirmed, to prosecute those responsible.

The Vienna Declaration condemned, in addition to disappearances, all “gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of all human rights”<sup>429</sup>. Among these violations and obstacles, the Vienna Declaration included torture, summary and arbitrary executions, arbitrary detentions, racial discrimination, foreign occupation, poverty, hunger and other denials of economic, social and cultural rights, religious intolerance, terrorism, discrimination against women and lack of the rule of law<sup>430</sup>.

Regarding grave violations of human rights, the Vienna Declaration established that States should repeal legislation leading to impunity for those responsible for such abuses, providing therefore a solid basis for the rule of law. Also, it supported the efforts of the UN Commission on Human Rights and its Sub-Commission to study all the aspects of the phenomenon of impunity<sup>431</sup>. At that time, the Expert, Mr. Louis Joinet, was developing his work as an UN Special Rapporteur on Impunity, which would culminate with his 1997 report.

It is important to note that the first World Conference on Human Rights which took place in Teheran in 1968 did not make any reference to impunity, revealing that the concern with such issue was somehow recent. Indeed, the World Conference manifests the actual state of reflection and the concerns related to the field of human rights<sup>432</sup>. In the early 1990’s, that meant considering *inter alia* the end of the Cold War, including a great number of human rights violations consequents of the breakup of former Yugoslavia and Soviet Union. For example, the ethnical cleansing in the former Yugoslavia played a crucial role in the Conference and some delegations even emphasized its geographic proximity with Vienna<sup>433</sup>. While condemning “genocide, ‘ethnic cleansing’ and systematic rape of women in war situations” - which causes “mass exodus of refugees and displaced persons” - the World Conference openly called for the perpetrators of such crimes to be punished and for such practices to immediately stop<sup>434</sup>.

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<sup>428</sup> Ibid.

<sup>429</sup> Ibid., at para. 30.

<sup>430</sup> Ibid.

<sup>431</sup> Ibid., at para. 60, 91.

<sup>432</sup> TAYLER, Wilder. *La Problemática de la Impunidad y su Tratamiento en las Naciones Unidas – Notas para la Reflexión*, p. 208.

<sup>433</sup> FLINTERMAN, Cees. *Vienna Declaration and Programme of Action: 20 Years Later*. In: Netherlands Quarterly of Human Rights, Vol. 31/2, 2013, p. 129.

<sup>434</sup> United Nations. Vienna Declaration and Program of Action. Adopted by the World Conference on Human Rights, 25 June 1993, at para. 28.

*Inter-American Convention on Forced Disappearance of Persons (1994)*

In the wake of this intense movement against impunity, the OAS took up its work in elaborating the first international binding instrument on enforced disappearance. In 1987, due to the increasing concern with the phenomenon of forced disappearance, the General Assembly of the OAS requested the IACHR to elaborate a draft Convention. The IACHR presented the initial text in 1988 but it stagnated until 1992 in the Committee on Juridical and Political Affairs of the OAS. In fact, it was the adoption of the Declaration on Enforced Disappearance in the United Nations that influenced the OAS to speed the process of the Convention<sup>435</sup>. After some debate at the 1992 regular session in Nassau, the General Assembly agreed with the participation of NGOs in the elaboration of the Convention which together with a group of member States renewed the efforts for the elaboration of a draft<sup>436</sup>. The treaty was finally adopted in 1994, although in the process it lost many positive elements. For example, the Convention reaffirms that the systematic practice of forced disappearance of persons constitutes a crime against humanity, but it does so in the preamble instead of in the body of the treaty as initially thought<sup>437</sup>.

Despite being a reaction to the dictatorial rule of the 1970's and 1980's and to the impunity which followed, the Convention did not explicitly refer to the right to know or to the right to truth. It reveals, however, a concern with keeping the relatives informed of the whereabouts of the detainees. For example, in Article XI States Parties are requested to establish official registries of the detainees which should be kept up to date and available to relatives, judges, attorneys among other authorities. Also, Article XIV provides that after the IACHR receives a petition or communication informing of an alleged forced disappearance case, "its Executive Secretariat shall urgently and confidentially address the respective government", requesting it "to provide as soon as possible information as to the whereabouts of the allegedly disappeared person"<sup>438</sup>.

The Convention also provides in Article X that in exceptional circumstances, such as state of war or threat of war, the right to expeditious and effective judicial procedures and recourse shall be employed to determine the whereabouts or state of health of the

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<sup>435</sup> United Nations, Commission on Human Rights, *Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and Human Rights framework for the protection of persons from enforced or involuntary disappearances*, at para. 47.

<sup>436</sup> The participation of NGOs however was limited to the use by the OAS General Assembly of their studies and reports when considered necessary. As pointed by the scholar Klaas Dykmann "in the view of the courageous role many non-governmental institutions had played during authoritarian rule, the debate at the General Assembly was somewhat awkward (...)" DYKMANN, Klass. *Impunity and the Right to Truth in the Inter-American System of Human Rights*, p. 54.

<sup>437</sup> BRODY, Reed; GONZÁLEZ, Felipe. *Nunca Más: An Analysis on International Instruments on "Disappearances"*, p. 381-382.

<sup>438</sup> Article XIV of the 1994 Inter-American Convention on Forced Disappearance of Persons.

disappeared victim, “or of identifying the official who ordered or carried out such deprivation of freedom”. All the competent judicial authorities responsible for pursuing such procedure should have free access not only to all detention centers, but also “to all places where there is reason to believe the disappeared person might be found” including those subjects to military jurisdiction.

In fact, the Convention is more emphatic about determining the criminal liability of the alleged perpetrators than about revealing the truth. Article IX, for instance, provides that in the trials of persons supposedly responsible for enforced disappearance, privileges, immunities or special dispensations are not admitted: The States have the obligation to punish those who committed the crime of enforced disappearance. Nevertheless, regarding the duty to investigate enforced disappearance cases, the American Convention was quite vague, and did not make any explicitly mention to such duty. It would be possible, however, to infer such duty from the general obligations not to tolerate the practice of disappearance and to punish the responsible.

The American Convention despite constituting an important step in the struggle against enforced disappearance as the first binding instrument on such practice, it also had its setbacks<sup>439</sup>. The fact that right to truth is not explicitly enshrined in the treaty is one of them. In view of the role such right was playing in the dramatic scenario of disappearances and the struggle of the families in finding the whereabouts of their next of kin, the lack of an explicit provision for the right to truth was undoubtedly a step back towards a more protective system.

### ***The Convergence of Truth in Varied Agendas***

If in the 1970's and the 1980's the right to truth initially emerged in the context of the struggle against enforced disappearance, in the 1990's with the end of dictatorships in several countries in the world, it becomes closely associated with impunity in cases of gross violations of human rights. The connection between the right to truth and the fight against impunity in the early 1990's opened the way for this right to expand its scope to cover not only enforced disappearance, but other gross violations, and to entail not only the relatives to know the whereabouts of their family members, but also the *general public* or *societies* to know about past abuses. This expansion is clearly a result of the

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<sup>439</sup> For a complete analysis of the 1994 Inter-American Convention on Forced Disappearance of Persons, including its setbacks, see: CONTRERAS, Carla Alejandra Encalada; TORRES, Patricia Lucia Carevic. *El Delito de Desaparición Forzada de Personas: Análisis de la Convención Interamericana y los Fundamentos de su Insuficiencia*. Santiago: Universidad de Chile, 2012. See also: BRODY, Reed; GONZÁLEZ, Felipe. *Nunca Más: An Analysis on International Instruments on “Disappearances”*.

inclusion of such right in diverse agendas in which truth transits through the struggle against enforced disappearance and confronts past abuses and impunity simultaneously. In this process, different actors supporting the right to truth convoke this right integrating it in their mobilizations and causes.

This part of the present chapter aims at presenting three different, but inter-related, perspectives of the right to truth which emerged in the 1990's as a result of the work and study of legal scholars and human rights activists: truth and access to information, truth as measure of reparation and truth as a pillar of the struggle against impunity.

*Richard Carver (Article 19) and Frank La Rue (CALDH): Truth and Access to Information*

In 1993, Mr. Richard Carver, Senior Consultant of the British organization *Article 19*, published the report *Malawi's Past: The Right to Truth*. The initiative was a response to the demands of relatives of victims of political killing for investigations into what happened. In the report, Mr. Carver concluded that as Article 19 (Freedom of Expression) of the Universal Declaration of Human Rights guarantees the access to information, it also includes the right to know the facts about past human rights violations. In other words, the right to truth about past human rights violations flows from the right to information. In the view of Mr. Carver, such right applies particularly to situations concerning human rights abuses committed on a systematic scale<sup>440</sup>.

In another report elaborated few years later, Mr. Carver revisits the right to truth with the objective to emphasize its importance and to analyze different ways to exercise such right. In order to explain the scope of the right to truth, Mr. Carver tells the story of a woman from a village in Zimbabwe who during the liberation war was suspected of feeding the ZANLA (Zimbabwe African National Liberation Army) guerrillas. Due to this suspicion, she had to report to the army every day. Once, as she did not report, the soldiers went to her house to look for her. They saw a woman in the fields, and deduced she was trying to hide from them. After shooting her, the soldiers destroyed the house. However, the person who was shot was the mother in law of the suspected woman, but the soldiers did not check the identity of the victim and therefore did not notice the "mistake"<sup>441</sup>.

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<sup>440</sup> Article 19. *Who Wants to Forget? Truth and Access to Information about past Human Rights Violations*. Report of Mr. Richard Carver.

<sup>441</sup> Ibid., p. 6.

Few months later, Zimbabwe finally held democratic elections. Its new Prime Minister, Robert Mugabe publicly declared his will to “reconcile” with the white population and guaranteed that he wanted to “draw a line through the past”. The agreement which provided for the independence of Zimbabwe granted amnesty for crimes committed during the war<sup>442</sup>.

The woman in Carver’s story who lost her house and her family suffered a personal tragedy, but she also represents a “commonplace of a country at war”<sup>443</sup>. By the time Mr. Carver wrote about her story, two decades had passed, and nothing was resolved. The victim was still waiting to learn who was responsible for the violations against her family, and to receive some reparation for what happened. The question, as the researcher notes, is whether Mr. Mugabe was entitled to reconcile, drawing a line through the past without consulting the victims. Those who suffered the abuse in the village of Matabeleland in Zimbabwe searched for truth and justice without any acknowledgement from the authorities<sup>444</sup>.

Mr. Carver argues that the right to seek, receive and impart information enshrined in Article 19 of the Universal Declaration of Human Rights “also places an obligation upon governments to facilitate the uncovering of information about past human rights violations”<sup>445</sup>. Such obligation is particularly important when violations occurred on a massive scale and entire societies need to come to terms with the past. Accordingly, it requires states to cooperate with civil society in finding the means to establish the truth, instead of pursuing only their own initiatives<sup>446</sup>.

The argument which supports the right to truth is no different from the argument in favor of freedom of information: it “should be routinely available to the public so that they can hold those in power to account for their actions”<sup>447</sup>. In this context, Mr. Carver emphasized the crucial role played by NGOs and community organizations in guarantying that effort to uncover the facts of past abuses respond to the demands of the victims. This would prevent the facts from becoming “vessels for official or mythologized views of the past”<sup>448</sup>.

As Mr. Carver noted, in 1993 when Article 19 published the *Malawi’s past* report, the right to truth was a new concept, and it was indeed very unusual the approximation of

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<sup>442</sup> Ibid., p. 6.

<sup>443</sup> Ibid., p. 6.

<sup>444</sup> Ibid., p.7

<sup>445</sup> Ibid., p. 8

<sup>446</sup> Ibid., p. 8.

<sup>447</sup> Ibid., p. 11.

<sup>448</sup> Ibid., p. 67.

this right with freedom of information. However, in accordance with Mr. Carver, “it turned out that Guatemalan human rights activists were arguing along very similar lines at the same time”<sup>449</sup>. In fact, the Guatemalan human rights expert and co-founder of the organization CALDH (Centre for Human Rights Legal Action), Mr. Frank La Rue has been another supporter of the link between right to truth and right to information.

This understanding appears initially in his work related to the end of the armed conflict in Guatemala – the Country to where he returned after almost 14 years in exile. Back to Guatemala, Mr. La Rue reestablished CALDH, which was initially founded in Washington, and worked in several legal cases including the first genocide cases against former Guatemalan military dictatorships. In an article entitled *Guatemala: From Declaring Peace to Achieving Peace*, Mr. La Rue argues that based on the obligation of the states to protect and promote human rights, there is also the obligation to investigate when violations to these rights take place, and to prosecute those responsible. Connected to these obligations, states should also release information to the public especially to relatives, victims and their communities. This last obligation, according to Mr. La Rue, is crucial as human rights violations are not only an affront to individuals, but also to entire societies and to democracies. The Expert continues alleging that any society has the right to know who committed the abuses, the reasons why they did so, the intellectual authors behind the violations and who gave the orders. By providing this information, the states fulfil the right to truth, which is fundamental in the human rights movement<sup>450</sup>.

In his article, Mr La Rue provides some examples of how Guatemala is searching for the truth. First, he mentioned the Guatemalan Truth Commission, also called Commission for Historical Clarification, sponsored by the UN as part of the peace process. Mr. La Rue recognizes two weakness in the Commission, namely not being authorized to name the responsible for the violations, and the limited duration of one year for the investigations. In 1994, in a memorandum addressed to the groups concerned with the Guatemalan peace process, Mr. La Rue had already criticized the Truth Commission, emphasising that its crucial point was to fully account for systematic human rights violations. This included to explain why and how they were committed, and most importantly by whom. The official acknowledgement of the past and of those responsible

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<sup>449</sup> Ibid., p. 8. Ms. Priscilla B. Hayner in her article *Fifteen Truth Commissions – 1974 to 1994: A Comparative Study* noted that both Frank La Rue and Richard Carver were among the first Human Rights advocates to articulate the right to truth. HAYNER, Priscilla. *Fifteen Truth Commissions – 1974 to 1994: A Comparative Study*, p. 611.

<sup>450</sup> LA RUE, Frank. *Guatemala: From Declaring Peace to Achieving Peace*. In: Trócaire Development Review, Dublin, 1998, p. 48.

for the bloodshed in Guatemala could create the appropriate environment for the democratic transition in the Country. In the view of the Expert, those who want to hide their responsibility for past actions were not willing to change their attitudes in the future<sup>451</sup>.

By not naming the responsible for the abuses in Guatemala, the Truth Commission would have disrespected the will of the civil society. Mr La Rue considered that this was the biggest obstacle in the search for the truth and claimed that half the truth is not the truth. He then defined the right to truth as a moral, historical and legal right of all victims of human rights violations and their relatives. This would be extremely relevant as a nation cannot build its future if it does not have the right to fully acknowledge its past. Despite that, the Expert concluded that the Commission played a vital role in Guatemala as it officially acknowledges the participation of the militaries in the policy of genocide. Also, the establishment of the Commission would be a way to recognize the existence of the right to truth, opening a path for the victims to seek their truth<sup>452</sup>.

Another measure aimed at satisfying the right to truth was a report prepared by the Catholic Church recording the experience of the armed conflict in Guatemala. This project called *Recovery of Historical Memory* collected the testimonies of victims encouraging them to reflect about the violent experiences they went through. Also, it was the first time that the names of the implicated individuals are mentioned in a report. Mr. La Rue concluded that this initiative might help bringing the responsible for violations to justice<sup>453</sup>. Unfortunately, two days after the Church published the report, the Chairman of the group working on this project Bishop Juan Gerardi was murdered in his home. Initially, the police did not link his murder with his political activities, but finally in 2001 three former military officers were convicted of the crime<sup>454</sup>.

As stated by Mr. La Rue, the reason why is so important to elaborate different measures aimed at implementing the right to truth lies on the danger that after truth commissions conclude their work, truth-telling process will end. Mr. La Rue supports that the truth must be systematically and continuously told. Truth-telling, says the Expert, in Guatemala or any other place demands answers to political questions related to oppression and the use of economic resources. In this search for the truth, it must be clear that truth and justice are not the same. On the contrary, they might constitute different stages in the

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<sup>451</sup> Ibid., p. 49.

<sup>452</sup> Ibid., p. 49-50.

<sup>453</sup> Ibid., p. 50.

<sup>454</sup> See: GOLDMAN, Francisco. *The Art of Political Murder: Who Killed Bishop Gerardi?* London: Atlantic Books, 2008.



process towards peace and democracy. At the same time, the victims might want to pursue truth instead of justice or they might consider truth more important than justice. In any case, human rights groups can encourage communities to seek for justice, but they cannot force the process especially considering the political risks involved<sup>455</sup>.

Mr. La Rue would continue to support the link between the right to truth and right to information, developing this understanding in his reports as UN Special Rapporteur on the Promotion and Protection of the Rights to Freedom of Opinion and Expression. In a statement directed to underline the proximity between the right to truth and the right to information, the Expert explained that clarifying past or present human rights violations required the disclosure of information held by states. The victims find numerous obstacles in obtaining this information from states even after the fall of dictatorships. Accordingly, Mr. La Rue emphasised that the denial by the states to provide information constitutes an additional violation as it prolongs the pain and suffering of the victims<sup>456</sup>.

As the disclosure of information is important not only for the victims and their families, but also to the general public, states have the obligation to preserve and disseminate such information. Most importantly, the denial of information based on national security concerns can never be used as a justification to prevent the clarification of the abuses. According to the Expert, this attitude involving national security bodies “weakens public trust in state institutions”<sup>457</sup>. For that reason, officials or bodies who obstruct the access to information must be held accountable<sup>458</sup>.

Mr. La Rue’s recommendations to implement the right to truth taking into consideration the access to information include national laws and practices that allow simplified procedures. States should also consider establishing an institution which would be in charge for the access to information or to appoint a focal point, such as an Information Commissioner. In addition, it would be important for states to enhance the capacity of public bodies and officials to properly respond to requests for information<sup>459</sup>.

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<sup>455</sup> LA RUE, Frank. *Guatemala: From Declaring Peace to Achieving Peace*, p. 50.

<sup>456</sup> United Nations. Statement by Frank La Rue. 68th session of the General Assembly, 25 October 2013, p. 3-4. See also: United Nations, General Assembly. Report of the Special Rapporteur Mr. Frank La Rue on the promotion and protection of the right to freedom of opinion and expression. A/68/362, 4 September 2013.

<sup>457</sup> Ibid., p. 4.

<sup>458</sup> Ibid., p. 4.

<sup>459</sup> Ibid., p. 5.

The link between the right to truth and the right to information has been recognized by the IACHR<sup>460</sup>, IACtHR<sup>461</sup> and the Office of the United Nations High Commissioner for Human Rights<sup>462</sup>. Nevertheless, this recognition does not imply that the right to truth – as supported by Article 19 - flows from the right to information. The OHCHR organized an expert workshop on the right to truth in which the participants concluded that although the right to information may work as an instrumental right to implement the right to truth, both are independent rights - different and separated from each other<sup>463</sup>.

*UN Special Rapporteur Theo van Boven: Truth as a Measure of Reparation (1993)*

By resolution 1989/13, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities requested Mr. Theo van Boven to prepare a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms. The study would have the objective to examine the possibility of developing some basic principles and guidelines regarding reparations<sup>464</sup>. Accordingly, Mr. Theo van Boven produced a preliminary study in 1990, which resulted in the 1993 final report, including the draft principles and guidelines on restitution, compensation and rehabilitation.

In the 1993 report, the Special Rapporteur began his analysis by determining the notion of victim and of gross violations of human rights. The definition of *victim* is in accordance with the 1985 *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* which applies the term to both individuals and collectivities who have suffered harm including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights. Also, the word *victim* would include, if appropriated, the immediate family or dependents of the direct victim and persons who

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<sup>460</sup> IACHR. Report No. 136/99, Case 10.488, Ignacio Ellacuría, S.J et al. (El Salvador), 22 December 1999; IACHR, *Application before the Inter-American Court of Human Rights in the Case 12.590, José Miguel Gudiel Álvarez et al. ("Diario Militar") v. Guatemala*, February 18, 2011.

<sup>461</sup> IACtHR. *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 24, 2010; IACtHR. *Case of Gelman V. Uruguay*. Merits and Reparations. Judgment of February 24, 2011.

<sup>462</sup> United Nations, Commission on Human Rights. Study on the right to truth - Report of the Office of the United Nations High Commissioner for Human Rights. E/CN.4/2006/91, 8 February 2006, at para. 43.

<sup>463</sup> Ibid.

<sup>464</sup> United Nations, Commission on Human Rights. Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of Human Rights and fundamental freedoms - Final report submitted by Mr. Theo van Boven, Special Rapporteur. E/CN.4/Sub.2/1993/8, 2 July 1993, at para. 1-2.

have suffered harm in intervening to assist victims in distress or to prevent victimization<sup>465</sup>.

The term *gross*, as explained by the UN Special Rapporteur, not only characterizes "violations", but also marks their serious aspect. In other words, the term "gross" relates to the type of human right that is being violated and includes at least genocide; slavery and slavery-like practices; summary or arbitrary executions; torture and cruel, inhuman or degrading treatment or punishment; enforced disappearance; arbitrary and prolonged detention; deportation or forcible transfer of population; and systematic discrimination<sup>466</sup>.

In order to collect information on the practice and national law concerning the right to reparation for victims of gross violations of human rights, the Special Rapporteur requested governments to share some of their experiences. However, the responses to the request were scarce, and the Rapporteur could only cover the situation in few countries. Among them, it was Chile and its efforts to repair the wrongs of the past, namely the 1990 National Commission for Truth and Reconciliation. Mr. van Boven observed that the establishment of such commission and the activities which followed "constituted by themselves a first measure of redress" as they provided partial satisfaction to the families of the victims regarding "their wish to know the circumstances in which their relatives were killed or made to disappear"<sup>467</sup>.

In fact, the Chilean National Commission aimed at achieving three categories of reparation: first, symbolic reparation to vindicate the victims; second, legal and administrative measures to solve several problems relating to the acknowledgement of death (family status, inheritance, legal representation for minors); third, compensation including social benefits, health care and education. After the Commission concluded its work, the Chilean Congress approved Law 19.123 of 31 January 1992, creating the National Corporation for Reparation and Reconciliation for a period of two years. Its objective was to take the necessary measures to comply with the recommendations contained in the report of the National Commission<sup>468</sup>.

The Special Rapporteur, taking these experiences into consideration, concluded that Chile focused much on revealing the truth concerning serious violations of human rights pertaining to the right to life. Nevertheless, it remained unclear on whether the Chilean

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<sup>465</sup> Ibid., at para. 14-15.

<sup>466</sup> Ibid., at para. 8-13.

<sup>467</sup> Ibid., at para. 106, 114.

<sup>468</sup> Ibid., at para. 114.

government had any will to bring those responsible to justice, and to extend the measures of reparation to other violations rather than the right to life<sup>469</sup>.

Indeed, the Chilean solution had raised some debate concerning its achievements, even if considered the search for the truth and its clarification. Mr. Alejandro González, former President of the Chilean National Corporation for Reparation and Reconciliation, recognized that despite the effective redress of the dignity of the victims, the report of the Chilean Truth Commission left pending some fundamental requirements of justice. These included, for example, the individualization of the authorship of the crimes, the determination of personal responsibility, and the clarification of the whereabouts of the disappeared victims. Mr. González also noted that in the cases of disappeared prisoners whose remains were not returned to the families, the Chilean Commission had not clarified their final fate<sup>470</sup>.

In addition to Chile, another Country mentioned by Mr. van Boven was Argentina. The Special Rapporteur examined the Argentinean Law No. 24.043 promulgated on 23 December 1991 which provided for indemnification from the State to persons who, at the time that the state of siege was in force, were placed at the disposal of the National Executive or, who, as civilians, suffered detention by acts of military tribunals. This law, according to Mr. van Boven, did not attend the needs of victims (including the relatives) for numerous reasons. First, it has not been a full disclosure of the cases of disappearances. Also, the responsibility of state's agents for the abductions has been too hard to prove due to the clandestine character of these activities. Third, the relatives of disappeared victims had revealed some reluctance in claiming financial compensation, as they considered it a form of bribe since "their primary demand, to learn the truth about the fate of the persons detained/disappeared, has not been fulfilled"<sup>471</sup>.

Another example provided by the Special Rapporteur concerned Uganda, where there were several limitations on claims for compensation. The most important was Decree N° 1 of 1987 enacted by the National Resistance Government (NRM) which established the statutory immunity, preventing the institution of claims against the Government regarding assaults, loss of life, arrest and detention, seizure, use, destruction or damage to property. The immunity would cover the cases perpetrated by agents of Government

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<sup>469</sup> Ibid., at para. 117.

<sup>470</sup> GONZÁLEZ, Alejandro. *The Treatment of Victims and of their Families Rehabilitation, Reparation and Medical Treatment*. In: International Commission of Jurists. *Justice – Not Impunity. International Meeting on Impunity of Perpetrators of Gross Human Rights Violations*. 2 to 5 November 1992 Palais des Nations – Geneva, p. 328.

<sup>471</sup> United Nations, Commission on Human Rights. *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of Human Rights and fundamental freedoms* - Final report submitted by Mr. Theo van Boven, Special Rapporteur, at para. 119.

prior to the NRM's assumption of power in 1986, i.e. during the brutal regime of Idi Amin Dada. Other reasons why the victims in Uganda did not have an effective remedy included, for example, lack of knowledge of law and basic human rights on the part of many victims and many obstacles preventing the access to the courts<sup>472</sup>.

Based on the analysis of the examples above, the Special Rapporteur noted a contradictory move of governments: while they still wanted to dissociate themselves from the responsibility for the violations, they also wanted to provide redress for the wrongs committed. In this ambiguous scenario, most of victims still failed to receive reparation due *inter alia* to the resistance of government to acknowledge certain types of serious violations, such as the disappearances, and due to the operation of amnesty laws. In fact, Mr. van Boven concluded that there is a strict connection between impunity of perpetrators of gross violations of human rights and the failure to provide just and adequate reparation to the victims and their families or dependents. He asserted that in several situations in which impunity *de facto* or *de iure* prevails for those responsible for abuses, the victims have their right to seek and receive redress denied<sup>473</sup>.

The Special Rapporteur noted that legal bodies, which included the IACHR and the Human Rights Committee, had already developed a line of action consisting of the obligation of states to investigate the facts, to bring to justice the responsible, and to ensure reparation to the victims. Mr. van Boven mentioned that the UNWGEID had also confronted the issue of impunity and concluded that the factor which contributes the most to the phenomenon of disappearances is that of impunity: the irresponsibility of perpetrators of human rights violations aggravates even more if they are not brought to justice<sup>474</sup>.

The Special Rapporteur further affirms that if impunity prevails, the right to reparation is likely to become an illusion, despite relevant international standards. Indeed, it appears that the perspective of the victim is often despised, as many authorities consider it an inconvenience. This marginal position attributed to the victims is probably due to the bother they cause authorities when demanding truth and affirming that its revelation constitutes the first requirement of justice. Taking this into consideration, Mr. van Boven included in his conclusions, involving the UN and the intergovernmental organizations, that all appropriate instances should establish national and international centers or institutions for the promotion of justice for victims of gross violations of human rights. Such centers or institutions should set up and keep a permanent public record of truth.

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<sup>472</sup> Ibid., at para. 122.

<sup>473</sup> Ibid., at para. 124.

<sup>474</sup> Ibid., at para. 128-130.

Furthermore, they should gather and collect information, laws, studies and other materials on relevant national experiences, promote an exchange of experiences and comparisons, distil relevant lessons, and help to build up a store of knowledge<sup>475</sup>.

Regarding who is entitled to claim reparation, the Special Rapporteur proposes in the draft of the *general principles and guidelines* to include the direct victims and, if appropriated, the immediate family, dependents or other persons having a special relationship to the direct victims. As a forming part of the right to reparation, Mr. van Boven considered truth as a measure of satisfaction which would imply the “verification of the facts and full and public disclosure of the truth”<sup>476</sup>.

The introduction of truth as a measure of satisfaction reflects the attention that this principle was gaining in the early 1990’s, especially due to its connection with the so-called transitional justice. As Mr. van Boven explained, his studies on reparation originated at a time of political shift in different parts of the world “with prospects of a higher degree of human rights advancement”<sup>477</sup>. These times also witnessed the creation of transitional justice mechanisms, focusing on the criminal responsibility of perpetrators of gross violations and on the exposure of the wrongs inflicted on the victims. Accordingly, in the view of the Expert, the study on reparation fit the search for transitional justice and the climate of improved human rights awareness<sup>478</sup>.

Another important aspect concerning the introduction of truth in the *general principles* relates to its association with gross violations, and not only with enforced disappearances. Accordingly, as elaborated by Mr. van Boven, truth would not only protect the relatives’ demand to clarify the fate of their family member, but also a broad verification of the facts which would include the full and public disclosure of its results (truth).

This broader conception of truth had been previously considered during the 1992 *Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms* from which Mr. van

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<sup>475</sup> Ibid., at para. 130-136.

<sup>476</sup> Ibid., p. 56-57.

<sup>477</sup> BOVEN, Theo van. *The United Nations 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*, p.1. United Nations Audiovisual Library of International Law. Accessed 20 March 2017. <[http://legal.un.org/avl/pdf/ha/ga\\_60-147/ga\\_60-147\\_e.pdf](http://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf)>

<sup>478</sup> Ibid.

Boven “drew considerable benefit”<sup>479</sup>. When examining the non-material reparation, the participants concluded that the most important measures include the disclosure of the truth and public recognition of the fact that wrong had been done. The revelation of the truth would allow removing the stigma from the victims who carry a sense of responsibility for their own victimization. The public disclosure of the facts, complementarily, clarifies that the victims were not responsible or guilty for causing harm to themselves<sup>480</sup>.

The perspective of *truth as reparation* would be latter supported by different Human Rights bodies. The IACHR, particularly, justified such view on the fact that the right to truth emanates from guarantees of justice. It considered the acknowledgement of the facts important, constituting a way of “recognizing the value of persons as individuals, as victims and as holders of rights”<sup>481</sup>. Also, the Commission understands that the knowledge of the circumstances of manner, time and place, motives and the identification of the perpetrators are essential in order provide “full reparations to victims of violations”<sup>482</sup>.

In 2005, the UN General Assembly would adopt by consensus the UN *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*. This instrument reaffirmed that truth is a measure of satisfaction but added that its disclosure is subordinated to the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations<sup>483</sup>. The *Basic Principles* also established as a separate measure of satisfaction “the search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed”<sup>484</sup>. The measure also includes, in the case of the death of the victims, “assistance in the recovery, identification and reburial

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<sup>479</sup> United Nations, Commission on Human Rights. Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of Human Rights and fundamental freedoms - Final report submitted by Mr. Theo van Boven, Special Rapporteur, at para. 5.

<sup>480</sup> BOVEN, Theo van; FLINTERMAN, Cees; GRÜNFELD, Fred; WESTENDORP, Ingrid (Editorial Committee). *Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Summary and Conclusions*. In: *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. Volume I. General Considerations. Neil J. Kritz (ed). Washington: United States Institute for Peace, 1995, p. 502.

<sup>481</sup> IACHR. *The Right to truth in the Americas*. OEA/Ser.L/V/II.152, 13 August 2014, at para. 124.

<sup>482</sup> *Ibid.*, at para. 124.

<sup>483</sup> United Nations, *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*. A/RES/60/147, 16 December 2005, principle 22 (b).

<sup>484</sup> *Ibid.*, 22 (c).

of the bodies” consonantly the will of the victims, or the cultural practices of their families and communities<sup>485</sup>.

Section X of the UN *Basic Principles and Guidelines*, which concerns the *access to relevant information concerning violations and reparation mechanisms*, establishes that the victims and their representatives are “entitled to seek and obtain information on the causes” of their victimization and “on the causes and conditions” related to the gross violations of human rights and serious violations of IHL and “to learn the truth regarding these violations”<sup>486</sup>.

*UN Special Rapporteur Louis Joinet: Truth as a Principle against Impunity (1997)*

In 1997, the UN Special Rapporteur on Impunity, Mr. Louis Joinet, submitted to the UN Sub-Commission his final report on the *Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)*. In its annex, the Expert included the proposal of a *Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, which would be also known as the “Joinet Principles”. Due to the elaboration of the right to truth as one of the principles to combat impunity along with justice and reparation, Mr. Joinet’s analysis marked the development of this right, influencing Human Rights bodies and courts. As previously mentioned, Mr. Joinet followed closely the process initiated by NGOs and relatives aimed at struggling against the impunity which was occupying especially since the 1990’s a major scene at the international and domestic scenarios.

In 1995, Mr. Joinet had also participated in the UN meeting of experts organized by the UN Special Rapporteur on Human Rights and State of Emergency, Mr. Leandro Despouy, with the objective to examine the rights not subject to suspension in situations of emergency and exceptional circumstances. Among such rights, Mr. Joinet accentuated the importance of respecting the right to truth in all circumstances<sup>487</sup>.

The experts present in the meeting noted that in practice the question involving remedy for victims of human rights violations during an emergency or period of repression usually emerges after such periods have terminated, and democracy restored. However, some Governments insist even after the alleged danger had passed that peace and stability

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<sup>485</sup> Ibid., 22 (c).

<sup>486</sup> Ibid., section X, principle 24.

<sup>487</sup> United Nations, Commission on Human Rights. Eighth annual report and list of States that, since 1 January 1985, have proclaimed, extended or terminated a state of emergency, presented by Mr. Leandro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37. E/CN.4/Sub.2/1995/20, 26 June 1995, at para. 39.



demand suspension of legal proceedings regarding human rights violations committed during the crisis. This, the experts concluded, does not fall in the scope of derogation, since there is no more danger to the nation. On the contrary, after the return to stable and regular conditions, the respect to the right to know is crucial<sup>488</sup>.

This right, as Mr. Despouy explains in the report of the meeting, is strictly related to the right to a remedy and to rights of the family. For example, the Convention on the Rights of the Child expressly establishes that children, who have become separated from family members due to detention, imprisonment, exile or death in detention, are entitled to information about the absent next of kin. The Special Rapporteur also mentioned the decision of the Human Rights Committee in the case *Quinteros v. Uruguay* and the initial decisions on amnesty laws of the IACHR. Based on the “concurring jurisprudence in these systems and in the opinions of the pertinent United Nations rapporteurs”, Mr. Despouy concluded that the right to truth constitutes a rule of customary international law<sup>489</sup>. Mr. Joinet, however, did not introduce this understanding in his report on impunity, despite his quite broad view on the right to truth presented in the document.

The process involving Mr. Joinet’s report on impunity began when in 1991 an informal coalition of international human rights organizations which included AI, ICJ and FEDEFAM requested the UN Sub-Commission to initiate a study on impunity<sup>490</sup>. The initiative was successful and the Sub-Commission entrusted Mr. Louis Joinet and Mr. El Hadji Guissé to study the impunity of perpetrators of violations of human rights. In 1994, the Sub-Commission decided to split the study in two, entrusting Mr. Joinet with

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<sup>488</sup> Ibid., at para. 39-40.

<sup>489</sup> Ibid., at para. 40. It is important to mention that this opinion raised some debate, and in an article presented in the Siracusa Impunity Conference in 1998, the UN Special Rapporteur Mr. Juan Méndez contested such status attributed to the right to truth understanding that it required further elaboration. Few years later, in an article entitled *The Right to truth in International Law: Fact or Fiction?* the researcher Yasmin Naqvi revisited the subject concluding for the emergence of something approaching a customary law, even though with different contours. This would be confirmed by the numerous references that Human Rights bodies and courts make to this right in connection to other fundamental Human Rights. Also, the researcher affirms to exist not only a widespread practice of mechanisms aimed at revealing the truth in countries where gross violations have taken place, but also a consistent recognition that such revelation is essential. Despite supporting the approach towards customary law, Ms. Naqvi’s final statement indicated that the right to truth would still be a matter to be agreed upon. See: MENDÉZ, Juan. *The Right to Truth*. In: *Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference*, 17-21 September 1998, Christopher C. Joyner (Special Editor); M. Cherif Bassiouni (General Editor). Toulouse: Érès, 1998, p. 260. NAQVI, Yasmin. *The Right to Truth in International Law: Fact or Fiction*, p. 245-273.

<sup>490</sup> TAYLER, Wilder. *La Problemática de la Impunidad y su Tratamiento en las Naciones Unidas – Notas para la Reflexión*, p. 204.

the aspect of civil and political rights and Mr. El Hadji Guissé with that of economic, social and cultural rights<sup>491</sup>.

Previously, in his report on amnesty laws dated 1985, despite not explicitly referring to a right to truth, he had already noted an increasing recognition of the right of relatives of disappeared victims to know their whereabouts<sup>492</sup>. In the 1997 report, the Special Rapporteur placed the right to know along with justice and reparation as one of the pillars to combat impunity. He established four general principles to the right to know: the inalienable right to truth, the duty to remember, the victims' right to know and finally the guarantees to give effect to the right to know<sup>493</sup>.

Regarding the first principle, the affirmations of the Special Rapporteur revisit the initial elaboration of the IACHR in its annual report of 1985-1986. In this document, the IACHR explicitly refers to an inalienable right to know the truth about past events, which would include the motives and circumstances surrounding the commitment of the crimes, so that such events do not reoccur in the future<sup>494</sup>. Similarly to this understanding, Mr. Joinet considered that every person has the inalienable right to truth "about past events and about the circumstances and reasons which led, through the consistent pattern of gross violations of human rights, to the perpetration of aberrant crimes". Such right, according to the Expert, has a preventive facet, i.e. it is essential to avoid the repetition of "aberrant crimes" in the future<sup>495</sup>.

The second principle concerns the duty to remember which provides that "people's knowledge of the history of their oppression is part of their heritage"<sup>496</sup>. This duty is in accordance with Mr. Joinet's corollary, i.e. the collective facet of the right to truth with its main objectives to preserve the collective memory from extinction and to prevent the development of revisionist and negationist arguments<sup>497</sup>.

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<sup>491</sup> United Nations, Commission on Human Rights. Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political) - Final Report Prepared by Mr. Joinet Pursuant to Sub-Commission Decision 1996/119, E/CN.4/SUB.2/1997/20, 26 June 1997, Introduction, at para. 12.

<sup>492</sup> United Nations, Commission on Human Rights. Study on amnesty laws and their role in the safeguard and promotion of Human Rights - Report by Mr. Louis Joinet. E/CN.4/Sub.2/1985/16, 21 June 1985, at para. 81 – 6.

<sup>493</sup> United Nations, Commission on Human Rights. Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political) - Final Report Prepared by Mr. Joinet Pursuant to Sub-Commission Decision 1996/119, Introduction, at para. 16-18.

<sup>494</sup> IACHR, *Annual Report of the Inter-American Commission on Human Rights 1985-1986*, OEA/Ser.L/V/II.68, Doc. 8 rev. 1, 26 September 1986, Chapter V.

<sup>495</sup> United Nations, Commission on Human Rights. Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political) - Final Report Prepared by Mr. Joinet Pursuant to Sub-Commission Decision 1996/119, I The Right to Know Principle 1.

<sup>496</sup> Ibid., I The Right to Know Principle 2.

<sup>497</sup> Ibid.

It is important to mention that the right to truth despite understood with a broad scope would still keep its individual facet, i.e. as the right of the victims to know the truth about the circumstances in which violations occurred and, in the event of death or disappearance, the victim's fate. The Special Rapporteur called this individual dimension of the right to truth – the *victims' right to know* - and placed it as the principle 3 to combat impunity<sup>498</sup>.

For the implementation of the right to truth, the Special Rapporteur proposed in the Principle 4 two different measures: to establish extrajudicial commissions of inquiry, and to preserve archives relating to human rights violations. The former in turn has three objectives which consist in dismantling the apparatus that allowed the abuses to be routinely committed, to collect evident to the judiciary, and to give back the human rights advocates their good names, as they are normally accused by the oppressors to denounce lies. It is necessary however to prevent these commissions from becoming excuses for not going before the courts. For this reason, the Special Rapporteur presented four essential aspects to the work of extrajudicial commissions of inquiry: guaranteed independence and impartiality, safeguards for witnesses and victims, guarantees for persons implicated and publicity for the commission's reports<sup>499</sup>.

Concerning the preservation of archives, the Special Rapporteur stated that technical measures and penalties should apply to those who remove, destroy, conceal or falsify archives containing evidence of violations especially with the objective to ensure impunity for perpetrators of human rights violations<sup>500</sup>. That was the case, for example, of South Africa where the Truth and Reconciliation Commission reported that a mass destruction of official records had taken place in the early 1990's. The documents mostly containing the inner workings of the apartheid state's security apparatus were obliterated, what the Truth Commission considered the imposition of a selective amnesia. In Haiti, multinational forces disappeared with the archives of the paramilitary organization FRAPH (Front for the Advancement and Progress of Haiti) and the Haitian Armed Forces, depriving the Truth Commission of this Country of an essential source of information<sup>501</sup>.

In addition to the preservation of archives, their access must also be facilitated to victims and persons related to claim their rights, for persons implicated who request it for their

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<sup>498</sup> Ibid., I The Right to Know Principle 3.

<sup>499</sup> Ibid., I Right to Know, Principles 5-12.

<sup>500</sup> Ibid., I Right to Know, Principles 13-18.

<sup>501</sup> MATTAROLLO, Rodolfo. *Las Comisiones de la Verdad*. In: Verdad y Justicia – Homenaje a Emilio F. Mignone. Instituto Interamericano de Derechos Humanos. San José Costa Rica: IIDH, 2001, p. 135, 163.

defense, and for those interested in historical research. To courts and extra judicial commissions of inquiry, the access to the archives must be free. In case of archives containing names, which allow the identification of individuals to whom they relate, principle 16 of the report provides that every person is entitled to know whether his or her name appears in the files. If it does, the person has the right to question the content of the information concerning him or her by exercising a right of reply. The document containing his or her version should then be attached to the document challenged. The archives containing names should not constitute incriminating evidence unless it concerns service officials or persons working with them on an ongoing basis<sup>502</sup>.

These provisions related to archives are particularly important as the access to them tend to indicate to which way “the political winds are blowing”<sup>503</sup>. In East Europe, particularly, many countries adopted the approach of opening files consisting in a policy quite different from truth commissions. Sometimes it implicated opening the records of the former regime to public examination, often leading to the “lustration” or purging of those involved with the former security apparatus without giving the accused any opportunity for defense. In other cases, such as in East Germany, a mechanism was established to allow the public access to the records kept on them by the former secret police<sup>504</sup>.

Independently of the measures implemented by the states to confront the past, it is important to mention that the three pillars to combat impunity – justice, truth and reparation – should not be, as emphasized by Mr. Joinet, obstacles to the national reconciliation. In fact, they would not be even legal standards, but guiding principles aimed at avoiding distortions in the process of reconciliation. The Special Rapporteur explains that impunity presents a paradox of the oppressed who after taking over the responsibility of the State, find themselves limited to policies of national reconciliation which compromise their initial commitment against impunity. These pillars and their

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<sup>502</sup> United Nations, Commission on Human Rights. Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political) - Final Report Prepared by Mr. Joinet Pursuant to Sub-Commission Decision 1996/119, I The Right to Know, Principle 18.

<sup>503</sup> ADLER, Nanci. *In Search of Identity: The Collapse of the Soviet Union and the Recreation of Russia*. In: *The Politics of Memory – Transitional Justice in Democratizing Societies*. Alexandra Barahona de Brito; Carmen González-Enríquez; Paloma Aguilar (eds). Oxford: Oxford University Press, 2001, p. 293.

<sup>504</sup> Article 19. *Who Wants to Forget? Truth and Access to Information about past Human Rights Violations*. Report written by Mr. Richard Carver, p. 45-47.

principles, therefore, would prevent any discrepancy in the process of *reconciliation* to prevail<sup>505</sup>.

For many years, this Set of Principles was under analysis for adoption by the UN Commission on Human Rights. Meanwhile, the IACHR and the IACtHR used it as a source of law, regularly citing it as a reference<sup>506</sup>. The UN Commission on Human Rights would confirm that Mr. Joinet's report has already been applied at the regional and national levels. This would lead it to invite other States, intergovernmental organizations and NGOs to consider including the Principles into their endeavors against impunity<sup>507</sup>.

The UN Commission on Human Rights, however, did not endorse the Principles, deciding in 2004 that it should be updated according to the latest developments in the field of international law. An updated version of the document elaborated by Ms. Orentlicher was presented to the UN Commission in 2005, who accepted it and recommended States to implement it. This last version of the Principles, which kept much of the content of the previous 1997 document, would be used as a normative guide, in addition to the Joinet Principles, by several Human Rights bodies and courts<sup>508</sup>.

### **Conclusion**

The fight against impunity initially emerged in the context of the end of the dictatorships in Latin America. The human rights movement usually concerned with current violations turned itself progressively towards past abuses, facing the questions of what to do with perpetrators of violations of the previous regime – and more generally - of how to respond to past abuses, especially those involving gross violations of human rights. These concerns followed the political shifts of the end of the 1980's and early 1990's with the end of the communist regimes, opening the path to the emergence of the so-called *transitional justice* field.

In this scenario, human rights advocates, NGOs, relatives and victims, revisiting the right to truth initially presented by the IACHR in its 1985-1986 annual report, convoke this right including it in their post-dictatorships demands. In their cases before national courts and international human rights bodies, the right to truth appears as an essential claim aimed

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<sup>505</sup> United Nations, Commission on Human Rights. Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political) - Final Report Prepared by Mr. Joinet Pursuant to Sub-Commission Decision 1996/119, Afterword, at para. 51.

<sup>506</sup> CASSEL, Douglas. *La Lucha Contra la Impunidad Ante el Sistema Interamericano de Derechos Humanos*, p. 406.

<sup>507</sup> International Commission of Jurists. *International Law and the Fight Against Impunity*, p. 39.

<sup>508</sup> United Nations, Commission on Human Rights. Updated Set of principles for the protection and promotion of Human Rights through action to combat impunity, E/CN.4/2005/102/Add.1, 8 February 2005.

at fulfilling the victims need to know what happened in the past. This was a result, in great deal, of the fact that victims confronted not only the lack of political will of states to clarify what had happened, but also the amnesty laws. These measures prevented prosecutions from taking place and, additionally, also prevented the past from being revealed.

Organizations such as FEDEFAM, Amnesty International, Human Rights Watch and the International Commission of Jurists played a decisive role in integrating the right to truth with the fight against impunity. While pushing the impunity issue to be debated in the international human rights bodies, these organizations also recognized the indispensable role of the truth in the process of confronting the past. For the relatives of disappeared victims, particularly, the impunity was necessarily related with the unresolved cases of enforced disappearance, involving therefore the lack of information concerning the whereabouts of their next of kin.

However, the right to truth would also assume a collective facet, covering not only the individuals directly affected by the violations, but also societies. This, which may be one of the most ambiguous aspects of the right to truth, supported by Mr. Louis Joinet in his Basic Principles and Guidelines on Impunity is considered even as a form to prevent negationism, revisionism and to avoid violations from occurring again. By knowing what happened in the past, societies would be able to prevent tragedies in the future and to restrain those interested in denying what happened.

As impunity seemed to rely on silence to persist, keeping a close relation with oblivion, truth arises as a demanded right, occupying a central role throughout the 1990s in the debates concerning past abuses. Even to those who did not see prosecutions as the best option towards the perpetrators of gross violations, truth emerged as a perfect solution: allied with peace, contributor of reconciliation, enemy of revenge and a necessary tool for the victims to overcome the suffering of the past. Interestingly, this flexible aspect of the right to truth allowed it to be convoked by different actors - either individuals or organizations – and adjusted accordingly to their demands.

Although the right to truth appeared to be immersed in different objectives and agendas there is one common factor in all the contexts involving this right – to know about past abuses, particularly, when associated with gross violations. How to achieve the truth and which truth really satisfies the victims, however, point to the complexity of the issues involved and will be debated properly in a separate chapter. Nevertheless, the fight against impunity crystallized the importance of the right to truth while it also opened the

doors for this right to expand, acquiring a certain flexibility which would allow it to transit through different – although inter-related – contexts.





#### **IV. The Search for *Truth* Reaches the Courts**

The recognition of the right to truth by Human Rights courts represents an essential part of its development. With the victims pushing their demands concerning the clarification of gross human rights violations to the contentious sphere, the Judges' understandings helped delimitating the scope and meaning of the right to truth while articulating it with other rights established in the human rights instruments. Initially, this movement was more commonly associated with cases of enforced disappearance, as shown in the previous chapters, but increasingly it was incorporated to other gross violations, such as extra judicial rendition.

The present chapter aims at exploring the human rights courts' findings on the right to truth, while pointing for their similarities and differences. Each of the courts, referred to in this chapter, e.g., the IACtHR, the ECtHR and HRCBH, carries its own particularities when recognizing the right to truth: from broader to narrower views, from times of peace to times of war. Consequently, and perhaps most importantly, to uncover these findings allows one to answer, considering the demands of the victims, whether there is only one formula to apply the right to truth and whether to have one could be even desirable.

##### ***Inter-American Court of Human Rights***

The Inter-American Court has played a decisive role in developing the right to truth, its contours and meaning, when facing concrete situations of serious Human Rights violations, particularly of enforced disappearance of persons. The Court, similarly to the Inter-American Commission, dealt with numerous cases in which there was an interest on behalf of the States to keep the human rights violations silently uncovered and unsolved. The demand of the victims, supported by NGOs and the civil societies of several countries, pushed to the contentious sphere the struggle for the clarification of these situations. In this regard, the IACtHR appeared to have become – in many cases – a space for the victims, including for the relatives of the deceased victims, to have recognized the occurrence of the violations.

Since the first case it decided, the notorious *Velasquez Rodriguez v. Honduras* in 1988<sup>509</sup>, the Court began elaborating on the right to truth, although without initially referring explicitly to this right. What the Court expressed in this first moment was the

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<sup>509</sup> IACtHR. *Velasquez Rodriguez v. Honduras*. Series C No. 4, Judgment of July 29, 1988.

concern with solving the cases through the investigation by the States of the facts concerning the violations and the prosecution and punishment of the alleged perpetrators, although limiting itself to order the States solely to pay pecuniary compensation. However, it was deriving from the duty to investigate that the Court further, in its jurisprudence, welcomed the right to truth, understanding that it derives fundamentally from the access to justice, i.e. a combination of Articles 8 and 25 ACHR.

The introduction of the right to truth by the Court acquired some complex aspects which will be also debated in this present chapter. One of them is related to the legal fundamentals of the right to truth, i.e. if it should derive from the access to justice or from the main substantive right violated in the case (right to life, for example). Also, the recognition of the societal aspect of the right to truth, entitling societies to know about the facts surrounding past human rights violations remains with open gaps. For example, to what extend are societies entitled to know what happened, i.e. how can they know and have access to information concerning past human rights violations, if that information may never be complete. Despite the remaining issues on the elaboration of the right to truth, the decisions of the IACtHR have collaborated largely for its development at international level with the most comprehensive jurisprudence on this right.

### ***Initial Approaches to the Right to Truth: Velasquez Rodriguez (1988) and Castillo-Paez (1997)***

In 1988, the IACtHR faced the case of an enforced disappearance of a Honduran citizen, **Angel Manfredo Velasquez Rodriguez**, by agents of the National Office of Investigations and of the Armed Forces of Honduras. This pioneering decision of the IACtHR<sup>510</sup>, which was also the first case admitted by the Court<sup>511</sup>, has been widely studied, becoming a reference in the human rights international case law, in particular, for its findings in regard to the duty to investigate human rights violations<sup>512</sup>. In the decision, the Court concluded that such duty – which is not explicitly provided for in the

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<sup>510</sup> Ibid.

<sup>511</sup> The Inter-American Court of Human Rights decided its first contentious case in 1981, but considered the application inadmissible. IACtHR. In the matter of *Viviana Gallardo et al.* Series A No. 101, 22 July 1981, No. G 101181.

<sup>512</sup> See, for example: GROSSMAN, Claudio. *The Velasquez Rodriguez Case: The Development of the Inter-American Human Rights System*. In: John Noyes, Laura Dickinson, and Mark Janis (Eds.) *International Law Stories* St Paul: Foundation Press, 2007, Chapter 3; DWYER, Amy S. *The Inter-American Court of Human Rights: Towards Establishing an Effective Regional Contentious Jurisdiction*. In: Boston College International and Comparative Law Review, Volume 13, Issue 1, p. 127-166; PASQUALUCCI, Jo M. *The Whole Truth and Nothing but the Truth: Truth Commissions, Impunity and Inter-American Human Rights System*, p. 321-370.

ACHR - derives from the obligation, enshrined in Article 1.1 ACHR, of the States Parties to "ensure" the free and full exercise of the rights recognized by the ACHR to every person subject to its jurisdiction. In order to comply with this obligation to ensure, States should organize all its structures through which public power is exercised in a way of making them capable of ensuring the enjoyment of human rights<sup>513</sup>.

Resulting from this obligation, the States should prevent, investigate and punish any violation of the rights recognized by the ACHR and additionally - when possible - to attempt restoring the right violated and to provide compensation for the damages resulted from the violation. The duty to investigate continues until the clarification of the final fate of the disappeared victim. However, the IACtHR - beginning to elaborate on the relatives' right to know - considered that even when "those individually responsible for crimes cannot be legally punished"<sup>514</sup>, the States still have the obligation to inform the relatives of the fate of their disappeared kin and, if appropriated, the return of their remains. In other words, even in cases in which amnesty laws prevent the investigation of the violations and the prosecution and punishment of those responsible for them, the States still have the obligation to reveal the whereabouts of the disappeared victims.

Therefore, the truth regarding these victims' fate must be established independently from the intention to prosecute and punish the perpetrators. Such obligation seems to derive from the duty to investigate, which in turn forms part of the right violated in the case, i.e. the right to life (Article 4 ACHR) read together with the obligation to ensure (Article 1.1 ACHR). Also, the victim of the breach is the same victim who suffered the violation of the right to life, i.e. the relatives were not considered by the Court victims of the failure of the State to investigate and to inform them about Mr. Velasquez's whereabouts<sup>515</sup>.

As it is possible to infer from the above, the IACtHR made no explicit mention to the relatives' right to know or right to truth in the case of *Velasquez Rodriguez*, although it clearly appointed to the existence of an obligation to reveal the whereabouts of the disappeared victim. In fact, the Court would only rule on a substantive right to truth for the first time in the **Castillo Paez** case in 1997. The application concerned the detention and subsequent disappearance of Ernest Rafael Castillo-Páez by the Peruvian Police in 1990. The IACHR innovated in this case by invoking a violation of Article 17 ACHR (Rights of the Family) - due to the disintegration suffered by Mr. Castillo Paez's family as a result of his disappearance - and a violation of the right to truth and information, in view

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<sup>513</sup> IACtHR. *Velasquez Rodriguez v. Honduras*. Series C No. 4, Judgment of July 29, 1988, at para. 166.

<sup>514</sup> *Ibid.*, at para. 181.

<sup>515</sup> *Ibid.*, at para. 169 -188.

of the State's failure to investigate the events that gave rise to this case. The Commission, however, invoked the right to truth without citing any specific provision of the ACHR<sup>516</sup>.

The Court, in response, argued that the claim of a violation of Article 17 refers to a consequence of the forced disappearance of Ernesto Rafael Castillo-Páez, which it considered proved, in violation of the American Convention, with all its legal consequences. In regard to the right to truth, the Court stated that such right “does not exist in the ACHR although it may correspond to a concept that is being developed in doctrine and case law”<sup>517</sup>, which was already dealt with in the Court's decision to establish Peru's obligation to investigate the events that led to the violations of the ACHR. The Court had in fact mentioned such obligation of the Peruvian State, but it did not make any reference to a right to truth<sup>518</sup>.

However, it affirmed that even when “internal difficulties might prevent the identification of the individuals responsible for crimes of this kind, the victim’s family still have the right to know what happened”<sup>519</sup> to their relatives and, if appropriate, where the remains are located. Although one could argue that the expression *internal difficulties* may cover a broad variety of issues, the Court specified that they include the Amnesty Law signed by the former Peruvian President Fujimori in 1995. This Law – explains the IACtHR – not only “obstructs the investigation and the access to the courts”, but also “prevents the victim’s next of kin from learning the truth and receiving the reparations to which they are entitled”<sup>520</sup>.

From the statements of the Court presented above, it is possible to infer that despite rejecting the Commission’s claim on a violation of the right to truth, the IACtHR did recognize the relatives’ *right to know what happened*. Also, the Court stated that this right would flow from the obligation of the States to investigate. Nevertheless, it is not very clear from which right the duty to investigate, in turn, derives. Contrarily to the decision of *Velasquez Rodriguez* in which the Court explicitly claimed that the duty to investigate derives from Articles 1.1 and 4 ACHR, in the *Castillo-Paez* case, the duty to investigate is not explicitly connected with any article of the American Convention. The Court only affirmed that the States had the obligation to investigate in connection with the violations of the ACHR mentioned in the case (Articles 4, 5, 7 and 25 all in relation

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<sup>516</sup> IACtHR. *Case of Castillo Páez v. Peru*. Merits. Series C No. 34. Judgment of November 3, 1997, at para. 85.

<sup>517</sup> *Ibid.*, at para. 86.

<sup>518</sup> *Ibid.*, at para. 86.

<sup>519</sup> *Ibid.*, at para. 90.

<sup>520</sup> *Ibid.*, at para. 90.

to Article 1.1)<sup>521</sup>. Without explicitly been placed under any specific article, the duty to investigate appears, therefore, to derive indeterminately from all the violations found by the Court.

The relatives of Mr. Castillo-Paéz, in an allusion to the Amnesty Laws in force, also expressly invoked the obligation to investigate when requesting the Court to “require the Peruvian State to remove any legal obstacle that would prevent it from conducting the investigation and eventually punishing those responsible”<sup>522</sup>. Their main concern was the Peruvian Government’s view which sustained that the Amnesty Laws prevented the Court from ordering the events to be investigated. In response, the IACtHR - as shown above - simply lists harmful consequences deriving from amnesty laws without condemning them. Such position reveals an evident cautious attitude of the Court when confronting domestic legislation of the States which are contrarily to the ACHR. By avoiding to explicit reprehend the adoption of amnesty laws, the Court opted – similarly as it did in *Velasquez Rodriguez*<sup>523</sup> – for emphasizing the *remaining* right to know. In other words, such right appears in this initial moment as a right which exists when amnesty laws are in force and the identification of the responsible is not possible. Moreover, this understanding of the Court presents an important distinction between criminal investigations, i.e. aiming at prosecuting the responsible for the violations, and the clarification of the fate of the victim, since the latter subsists even when the former cannot be pursued.

Despite the distinction explained above, the Court – when decided on the remedies - did not include literally the obligation to reveal the whereabouts of the victim, but ordered the State, in addition to pay pecuniary compensation, to investigate the facts, “to identify and punish those responsible and to adopt the necessary domestic legal measures to ensure that this obligation is fulfilled”<sup>524</sup>. This approach, which considers the obligation to investigate as a measure of reparation, would be kept by the Court in future decisions, while the legal fundamentals of such obligation in the ACHR would be also deeper elaborated.

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<sup>521</sup> Ibid., at para. 90.

<sup>522</sup> Ibid., at para. 104.

<sup>523</sup> Nevertheless, in the *Velasquez Rodriguez* case, as mentioned above, the Court did not explicitly refer to a right to know, but to an obligation to inform the relatives of the fate of their disappeared kin and, if appropriated, the return of their remains. IACtHR. *Velasquez Rodriguez v. Honduras*. Series C No. 4, Judgment of July 29, 1988, at para. 181.

<sup>524</sup> IACtHR. *Case of Castillo Páez v. Peru*. Merits. Series C No. 34. Judgment of November 3, 1997, at para. 118. Previously, the IACtHR had already ordered the State of Venezuela in the case of *El Amparo* to investigate the events referred to in the case, and to punish those responsible. IACtHR. *Case of El Amparo v. Venezuela*. Reparations and Costs. Series C No. 28. Judgment of September 14, 1996, at para. 64.

### ***Legal Framework of the Right to Truth in the American Convention on Human Rights***

The recognition of the right to truth by the IACtHR, which occurred for the first time in the case of *Bamaca Velasquez v. Guatemala* in 2000, implied the development of legal fundamentals based on the ACHR to justify the introduction of this right in the Court's ruling. To achieve this purpose of finding a legal basis for the right to truth, the Court made use of existing rights established in the ACHR, namely Articles 8 (right to a fair trial) and 25 (judicial protection) which together constitute the obligation of the States to investigate human rights violations and to prosecute those responsible for them. After elaborating on this basis for the right to truth, the Court has also found other possible sources for this right in the ACHR, such as Articles 13 (freedom of expression) and 5 (right to humane treatment) in addition to Article 8 of the Convention on the Rights of the Child.

#### ***Access to Justice as the Prime Fundament: Articles 8 and 25 ACHR (Bámaca Velasquez 2000)***

Few years after judging the *Castillo Paez* case, the Court would revisit the right to truth in the case **Bámaca Velasquéz v. Guatemala**<sup>525</sup>, changing its initial elaboration on this matter. The application concerned the detention and further disappearance of Mr. Efraín Bámaca Velasquéz by the Guatemalan armed forces in 1992. The introduction of the right to truth appears as a result of convergent pressures, including of the victims, of the Inter-American Commission and of NGOs. Since the *Castillo Paez* case in 1997, the Commission used the *inalienable right to know the truth* as a basis when referring some cases to the Court with the objective to persuade it to recognize *truth* as a right. As already mentioned, the Commission's strategy failed, and the Court refused to agree that there was a right to truth, a position it kept until the *Bamaca Velasquez* case in 2000.

Differently from previous cases, in this application, the right to truth counted with an important allied: The International Commission of Jurists. This NGO, whose support was essential for the development of the right to truth, presented *amicus curiae* on the right before the IACtHR. The document consisted mainly in exposing the development of the right to truth and its repercussion in the universal and regional systems of human rights protection. Interestingly, some references used by the ICJ in its legal brief would be then introduced by the Court in its decision, including the studies of the UN Special

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<sup>525</sup> IACtHR. *Case of Bámaca Velásquez v. Guatemala*. Merits. Series C No. 70. Judgment of November 25, 2000.

Rapporteur Mr. Theo van Boven on reparation and of the UN Special Rapporteur Mr. Louis Joinet on impunity<sup>526</sup>. These both perspectives – impunity and reparation – and their connection with the right to truth were, as it will be shown, emphasized by the Court, constituting essential pillars for the recognition of *truth* as a right in its case law.

While welcoming for the first time the expression *right to truth*, the Court understood that this right “is subsumed in the right of the victim or his next of kin to obtain clarification of the facts relating to the violations and the corresponding responsibilities from the competent State organs, through the investigation and prosecution established in Articles 8 and 25 of the Convention”<sup>527</sup>. With this affirmation, the IACtHR confirms that the right to truth derives from the obligation of the States to investigate. Those entitled to this obligation are the victims and, in case of a violation of the right to life (Article 4 ACHR), their relatives<sup>528</sup>. Moreover, as mentioned above, the obligation to investigate (and therefore the right to truth) flows from the right to a fair trial (Article 8 ACHR) and the right to judicial protection (Article 25 ACHR).

The decision of the Court to place the duty to investigate under these two articles deserves special attention, since it helps clarifying the understanding of the IACtHR concerning the meaning and scope of the right to truth. For this reason, it is important to ask what justifies placing the duty to investigate under Articles 8 and 25 ACHR and what is the relation between the combination of these articles and the search of the relatives for the clarifications of the violations.

The Court has indeed provided some arguments justifying its legal reasoning. Regarding Article 8 ACHR, the IACtHR explained that it includes the right of the victims’ relatives to judicial guarantees, entitling them to “be heard and act on their respective proceedings”<sup>529</sup> aiming at clarifying the facts and at punishing the liable parties in addition to receiving a proper compensation. The fair trial, therefore, would play a central role for the relatives of the disappeared as it upholds their “right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal for the determination of rights”<sup>530</sup>. In other words, the Court understands that the

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<sup>526</sup> International Commission of Jurists. *Legal Brief – Amicus Curiae presented before the IACtHR in the case of Efraín Bámaca Velásquez vs. Guatemala*. In: *The Review* – Nº 62-63, 2001, p. 129-158.

<sup>527</sup> IACtHR. *Case of Bámaca Velásquez v. Guatemala*, at para. 199.

<sup>528</sup> QUIROGA, Cecilia Medina. *La Convención Americana: Teoría y Jurisprudencia - Vida, Integridad Personal, Libertad Personal, Debido Proceso y Recurso Judicial*. Chile: Centro de Derechos Humanos. Facultad de Derecho Universidad de Chile, December 2003, p. 112-113.

<sup>529</sup> IACtHR. *Case of Durand and Ugarte v. Peru*. Merits. Series C No. 68. Judgment of August 16, 2000, at para. 128.

<sup>530</sup> *Ibid.*, at para. 113.

individuals have the right to demand the criminal prosecution against those suspected responsible for human rights violations, substantiating this affirmation on Article 8 ACHR.

Regarding Article 25 ACHR (right to judicial protection), the IACtHR understands that the right to an effective recourse should guarantee the rights of the victims and relatives to the identification of the liable parties of the violations and to the use of due diligence to identify and establish the victims' whereabouts. Accordingly, it is the States' responsibility not only "to design and recognize an efficient recourse"<sup>531</sup>, but also "to assure duly implementation of said recourse by its judicial authorities"<sup>532</sup>. In this regard, it appears that the Court identifies Article 25 ACHR as the source of the recourse to have those responsible for the human rights violations prosecuted and punished, as well as to have the fate of the disappeared victim clarified.

As it is possible to infer from the above, the Court indicates two sources for the right to truth in the ACHR: Articles 8 and 25, which read together express the access to justice, and Article 1.1, expressing, in this context, the duty to prevent. With these two sources, the Court identified the States' duty to investigate and to prevent human rights violations which, from the examination of IACtHR decisions, points to the recognition of a right to truth.

However, not all judges agreed that Articles 8 and 25 ACHR are the most appropriated to express the right to truth either of the victims or of societies. The former President of the Court, Judge Cecilia Medina Quiroga, challenged more than once in her separate opinions the combination of Articles 8 and 25 ACHR consistently applied by the Court<sup>533</sup>. In her view, the obligation to investigate human rights violations and to prosecute and punish the responsible for them are better placed under the substantive right that has been violated, considering the general obligation to guarantee rights, contained in Article 1(1) ACHR<sup>534</sup>. In fact, this position, as mentioned above, had been previously adopted by the Inter-American Court in the case of *Velasquez Rodriguez* in 1988, but changed after in the decision of *Blake v. Guatemala* in 1998.

The legal reasoning provided by Judge Cecilia Quiroga to justify her disagreement with the majority of the Court lied on the nature of the rights at stake, namely the right to a fair trial (Article 8) and to judicial protection (Article 25). Regarding the former, the Judge

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<sup>531</sup> Ibid., at para. 121.

<sup>532</sup> Ibid.

<sup>533</sup> For example: Partially Dissenting Opinion of Judge Medina Quiroga. IACtHR. *Case of Nineteen Tradersmen v. Colombia* Merits, Reparations and Costs. Series C No. 109, 5 July 2004; IACtHR. *Case of Moiwana Community v. Suriname*, Series C No. 124.

<sup>534</sup> Ibid.



explains that, contrarily to what one might argue, it does not establish the right to a remedy, but to due process of law, i.e. it comprises the series of formalities which should be observed in the procedural instances to protect the individual's right to have - on the one hand, any disputes that arise between two parties and, on the other hand, the guilt or innocence of a person - decided with the highest level possible of justice. In other words, Article 8 ACHR establishes – broadly - the access to justice while it also regulates the way in which justice itself should be dispensed<sup>535</sup>. Article 25 ACHR, in turn, provides for remedies of a judicial nature, although it covers only prompt, simple and effective remedies, which leads one to conclude that it refers particularly to the *habeas corpus*. Therefore, while Article 25 embodies the right to a judicial remedy, Article 8 establishes the way in which this is processed<sup>536</sup>.

Taking these clarifications into consideration, it becomes difficult, in the view of Ms. Quiroga, to relate the right to a simple, prompt and effective remedy with the right to the opening of an investigation and, subsequently, a trial which, obviously, do not carry those characteristics. Moreover, concerning the due process (Article 8), it would not in itself establish the previous existence of the rights that will be determined according to the procedural norms it describes. That is, the missing step that connects Article 8 to the facts of the case is to determine the legal source of the next of kin's right to know the truth of what has happened, and to require the State to prosecute those allegedly responsible<sup>537</sup>.

The legal source of the right to truth, as Judge Quiroga mentions, would be – instead of a combination of Articles 8 and 25 ACHR - the States' duty to guarantee provided for in Article 1.1 ACHR connected with the substantive right which was violated (right to life, for example)<sup>538</sup>. This approach, which takes the substantive right into consideration when referring to the duty to investigate, appears to be more adequate not only for it simplifies the legal argumentation, as also for it emphasizes the importance of the obligation to ensure the rights embodied in the ACHR. As Judges Cançado Trindade and M. Pacheco Gómez noted in their opinion in the case of *Las Palmeras*, if one does not embrace the “wide scope” – which comprises all the rights protected by the ACHR - of the general and fundamentally important obligation to ensure the protected rights, established in

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<sup>535</sup> QUIROGA, Cecilia Medina. *La Convención Americana: Teoría y Jurisprudência - Vida, Integridad Personal, Libertad Personal, Debido Proceso y Recurso Judicial*, p. 280, 281.

<sup>536</sup> Ibid., p. 364, 365.

<sup>537</sup> Partially Dissenting Opinion of Judge Medina Quiroga. IACtHR. *Case of Nineteen Tradesmen v. Colombia* Merits, Reparations and Costs. Series C No. 109, 5 July 2004.

<sup>538</sup> QUIROGA, Cecilia Medina. *La Convención Americana: Teoría y Jurisprudência - Vida, Integridad Personal, Libertad Personal, Debido Proceso y Recurso Judicial*, p. 364.

Article 1(1) of the ACHR, “one would be depriving this latter of its effects in domestic law”<sup>539</sup>.

Also, as explained by Judge Quiroga, the choice to place the duty to investigate under Articles 8 and 25 ACHR is not that easily justifiable, demanding in fact such a legal elaboration that the right to truth may appear harder to apply in concrete situations of human rights violations than it is. This becomes particularly clear when considering the option of the Court to combine these articles of ACHR to uphold the sources of the duty to investigate in this legal instrument. On the other hand, as well put by Scovazzi and Citroni, the commitment of the IACtHR “to grant the relatives of the victims the right to know the truth”, albeit such right is not expressly provided for in the American Convention, “can only be applauded”<sup>540</sup>.

Indeed, this recognition of the right to truth had very relevant consequences for it affected the measures of reparation granted by the Court. In the case of *Bamaca Velasquez*, the IACtHR explained that the right to truth - understood as the possibility of the next of kin to know what happened to the victim and, if appropriated, the whereabouts of the victim’s mortal remains - evokes an expectation which the State must satisfy to the family of the victims and to society as a whole<sup>541</sup>. Thus, the Court ordered the Guatemalan State to locate the mortal remains of Mr. Efraín Bámaca Velásquez, to disinter them in the presence of his widow and next of kin, and to deliver them back to the family. The Court therefore – as in the *Velasquez Rodriguez* case - assumed a clear position concerning exhumations. In its view, they should be conducted not only for the relatives, but also for the deceased victim, as the “care for the mortal remains of a person is a form of observance of the right to human dignity”<sup>542</sup>.

Furthermore, to find the mortal remains of the disappeared victims is a form of reparation which should be fulfilled – in the view of the Court - through a criminal investigation or other efficient and appropriate proceeding. When found, the bodily remains must be given to the next of kin as soon as possible, being the State in charge for all funeral expenses<sup>543</sup>. The introduction of this measure of reparation represents undoubtedly a very important step towards attending the relatives’ demands to have the return of their loved ones back to them, which is a central aspect in cases of enforced disappearance.

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<sup>539</sup> Joint Separate Opinion of Judges AA Cançado Trindade and M. Pacheco Gómez. IACtHR. *Case of Las Palmeras v. Colombia*. Merits. Series C No. 90. Judgment of 6 December 2001.

<sup>540</sup> SCOVAZZI, Tullio, CITRONI, Gabriella. *The Struggle against Enforced Disappearance and the 2007 United Nations Convention*, p. 352.

<sup>541</sup> IACtHR. *Case of Bámaca Velásquez v. Guatemala*, at para. 90.

<sup>542</sup> IACtHR. *Case of Bámaca Velásquez v. Guatemala*, Judgment of February 22, 2002 (Reparations and Costs), at para. 76.

<sup>543</sup> *Ibid.*, at para. 82.

As noted by the researcher, Ms. Pérez Solla, there is a main issue involving the right to truth, which is to provide a “special empowerment” to the deceased victims’ family, enabling them “to claim before domestic and international instances specific activity from the States’ organs”<sup>544</sup> to achieve a full disclosure on the victims’ fate. In other words, this specific activity may be dissociated from the pursue of the States to investigate human rights violations, as it is placed as a measure of reparation in addition to such duty to investigate and bring to justice those responsible for the violations.

*Complementary Sources: Articles 13 and 5 ACHR / Article 8 Convention on the Rights of the Child*

Beyond articles 8 and 25 ACHR, which constitute as mentioned above the access to justice, the Court has understood that the right to truth derives from other articles of the American Convention. Article 13, for example, concerning freedom of expression has been invoked by the IACHR in several occasions<sup>545</sup>, but it was only welcomed by the Court in 2010 in the case of *Gomes Lund v. Brazil*. This application concerned the enforced disappearance of members of the armed conflict known as “Guerrilla of Araguaia”, which took place in northern Brazil (in the region of Araguaia) between 1967 and 1974. Its combatants were members of the Brazilian Communist Party and installed the Guerrilla with the objective to foment a socialist revolution. The Brazilian Armed Forces carried out military missions against the guerrilla fighters, which were concluded in 1974, leaving seventy victims disappeared<sup>546</sup>.

The relatives of these victims brought the case before the Inter-American system claiming *inter alia* a violation of their right to truth due to the lack of information concerning the fate and whereabouts of their kin, emphasizing that more than eighteen years have passed since the events. At domestic courts, several actions of non-criminal nature had been initiated since 1982, aiming at establishing the circumstances of the enforced disappearances and the localization of the bodily remains through the access to official

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<sup>544</sup> SOLLA, Maria Fernanda Pérez. *Enforced Disappearances in International Human Rights*. North Carolina: McFarland and Company, 2006, p. 188.

<sup>545</sup> See, for example: IACtHR. *Case of Castillo Páez v. Peru*. Merits. Series C No. 34. Judgment of November 3, 1997, at para. 85. *Case of Barrios Altos v. Peru*, Judgment of 14 March 2001, Merits, Series C No. 75, at para. 45.

<sup>546</sup> Brazilian National Archive (Arquivo Nacional). Project Revealed Memories (Memórias Reveladas). Available at: <<http://www.memoriasreveladas.gov.br/index.php/component/phocagallery/3/detail/134-a-reacao>>. Last access: 01 July 2017. See also: IACtHR. *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*. Preliminary Objections, Merits, Reparations, and Costs. Series C No. 219. Judgment of November 24, 2010, at para. 85-90.

documents on the military operations in the region. It was considering these domestic initiatives that the Court examined the right to truth<sup>547</sup>.

Differently from previous cases faced by the Court, the relatives of the disappeared victims of the Guerrilla did not underpin their claim of a violation of the right to truth on the lack of criminal investigations. Instead, they laid their argumentation on the ineffective response of the Brazilian authorities to the judicial measures presented by them solely to obtain the information on their relatives<sup>548</sup>. In this regard, the Court took into consideration the Ordinary Action filed by the families, concluding that the right to truth is connected – in the situation at stake – to the right to seek and receive information enshrined in Article 13 of the American Convention<sup>549</sup>.

The Court reaffirmed its previous understanding that in cases of violations of Human Rights the State authorities should not employ “mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security”<sup>550</sup> to deny providing the information requested by the judicial or administrative authorities responsible for the ongoing investigation or pending procedures. Also, in regard to investigations of punishable facts, the decision to classify the information as secretive or to reject releasing it cannot rely upon solely on the State organ whose members are responsible for committing the wrongful acts. Similarly, the Court understands that the final decision on the existence of the requested documentation cannot be left to the discretion of this same organ<sup>551</sup>.

The IACtHR, despite recognizing this legal link between the right to truth and the access to information, again considered that such right is also enshrined in the right to access to justice. Thus, in the case of *Gomes Lund*, the right to truth would have two different sources in the American Convention: Article 13 (freedom of expression) and Articles 8 and 25 (access to justice)<sup>552</sup>. Based on this understanding, one could infer that the right to truth is composed both by the obligation of the States to provide the information concerning gross violations of human rights, clarifying the facts and circumstances of what had happened, and by the obligation to investigate criminally the violations and to prosecute and punish those responsible for them.

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<sup>547</sup> IACtHR. *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, at para. 1-3.

<sup>548</sup> *Ibid.*, at para. 3.

<sup>549</sup> *Ibid.*, at para. 183-231.

<sup>550</sup> *Ibid.*, at para. 202.

<sup>551</sup> *Ibid.*

<sup>552</sup> *Ibid.*, at para. 200-202.

This elaboration on the right to truth is particularly important for it highlights that by having different sources in the ACHR, such right cannot be solely equivalent to the obligation of the States to pursue criminal investigations. In other words, the right to truth would not be a synonym for the duty to investigate. The IACtHR openly faced this issue in the case of *Comunidad Campesina de Santa Barbara v. Peru* when it affirmed that despite the right to truth's circumscription under the access to justice, its nature is broader, i.e. its violation may affect different rights enshrined in the American Convention depending on the context and the particular circumstances of the case<sup>553</sup>. From the above outlined, it appears that to achieve the *truth*, revealing it to the victims and to society as a whole, requires not one single measure, but – depending on the case – several, including opening official documents kept under the States' authorities control, to find the responsible for the violations and to prosecute them, and to find, if appropriate, the mortal remains of the victims and to return them to the families.

This combination of requirements of the right to truth which points to its distinction among other rights also appears in the case of *Gomes Lund*, when the Court considered that the State's violation of the freedom of thought and expression (Article 13 ACHR) in relation to Articles 1(1), 8(1), and 25 of the same instrument has as fundament the harm caused to the right to seek and receive information, as well as to the right to know the truth<sup>554</sup>. With this statement, the Court indicates in what some authors called "risky judicial audacity"<sup>555</sup> that the right to truth has an autonomous nature, which can be consequently infringed based on its own delimitations.

It is important to mention that despite its use as an autonomous fundament, the right to truth in fact serves to justify a violation of an article of the ACHR, namely Article 13. In other words, if on one hand the right to truth acquires more independence by serving as a fundament, yet it appears still associated with rights already established in the ACHR. This understanding is related with the fact that the right to truth – not being explicitly provided for in the American Convention – demands that any infringement to it should be followed by a violation of an article established in the American Convention. Therefore, even when considered an autonomous right, the right to truth when violated should, as a rule, follow a violation of an article explicitly enshrined in the ACHR.

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<sup>553</sup> IACtHR. Case of *Comunidad Campesina de Santa Barbara v. Peru*. Preliminary Objections, Merits, Reparations, and Costs. Series C No. 299. Judgment of 1 September 2015, at para. 321-322.

<sup>554</sup> IACtHR. Case of *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, at para. 325.

<sup>555</sup> BURGORGUE-LARSEN, Laurence; TORRES, Amaya Úbeda de. *The Inter-American Court of Human Rights: Case Law and Commentary*. Oxford: Oxford University Press, 2011, p. 700.

Some Judges of the Inter-American Court would support, based on the *Gomes Lund* decision, that the right to truth should, as a rule, be considered an autonomous right under the Court's jurisprudence. The Judge Eduardo Ferrer Mac-Gregor, for example, argued that the Court case law could evolve in such a way to allow "the full recognition of the right to know the truth", acknowledging its autonomy, and establishing "its content, meaning and scope with increased precision"<sup>556</sup>. In the view of the Judge, to keep the right to truth subsumed in Articles 8 and 25 ACHR "encourages the distortion of the essence and intrinsic content of each right"<sup>557</sup>.

From the considerations exposed above, it is possible to infer that the legal elaboration of the Court, which justifies the recognition of the right to truth, comprises basically two related conceptions: the right to truth derives from the duty to investigate; this duty in turn derives from the combination of Articles 8 and 25 ACHR. One may contest the first of these statements, as Judge Ferrer Mac-Gregor did, or the second, as Judge Cecilia Quiroga had done during several years while working at the Court. Concerning this second argumentation, it is quite clear from the decisions of the IACtHR, despite the critics noted above, that the duty to investigate flows from Articles 8 and 25 ACHR, instead of from the substantive right violated in the concrete case. In regard to the former, the right to truth although already understood as an independent right, remains – as a rule – placed under the duty to investigate and therefore subsumed in Articles 8 and 25 ACHR.

Nevertheless, there were cases in which despite associating the right to truth with other rights established in the ACHR – beyond the standard association with the access to justice – the right to truth remained limited to the scope of the provisions of the ACHR. In other words, the Court did not recognize it as an autonomous right; instead, it understood that such right could derive from other rights established in the ACHR in addition to Articles 8 and 25 ACHR. In this regard, it is important to mention the relation elaborated by the IACtHR between the right to truth and Articles 5 ACHR and 8 of the Convention on the Rights of the Child.

Concerning Article 5 ACHR, the Inter-American Court considers that relatives – particularly of disappeared individuals – are also victims of a violation of humane treatment. The Court explained that the suffering of the relatives in cases of enforced disappearance is a direct result of this practice, as the ignorance of the whereabouts of

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<sup>556</sup> MAC-GREGOR, Eduardo Ferrer. *The Right to truth as an Autonomous Rights under the Inter-American Human Rights System*. In: Mexican Law Review. Volume IX, Number 1, 2016, p. 125-126.

<sup>557</sup> Ibid, p. 136.

the disappeared victims is what causes the next of kin profound anguish<sup>558</sup>. For this reason, they too are victims of the violation of Article 5 ACHR. For example, in the case of *Anzualdo Castro v. Peru* - involving an enforced disappearance - the Court would make a direct relation between the violation of the right to truth and the cruel, inhumane and degrading treatment suffered by the relative of the disappeared victim. In its words, “the continued deprivation of the truth regarding the fate of a disappeared person”<sup>559</sup> characterizes cruel, inhumane and degrading treatment against the close next of kin. The Court appeared to have derived this connection from the physical and mental sequels endured by the relatives due to the disappearance, and to the impact on their social and work relations.

Similarly, in the case of *Gudiel Álvarez et al. (Diario Militar) v. Guatemala* which concerned 26 allegations of enforced disappearance, one of extrajudicial execution, and one of detention and torture of a child, the Court found a direct relation between the right to truth and the violation of Article 5 ACHR. However, in this case, the main justification for said association lied on the concealment of information about severe human rights violations from the Guatemalan Historical Clarification Commission. The Court argued that several of the next of kin in the case were not allowed to know the truth of what happened to their loved ones by the Commission, owing to the refusal of the State authorities to hand over information. In addition, the appearance of compromising documents by unofficial channels revealed that the State had withheld information from the Commission in regard to the facts of the instant case. This, together with the impunity that persisted in this case led the Court to conclude that the next of kin have been prevented from knowing the truth through either judicial or extrajudicial channels<sup>560</sup>.

In other words, the failure of the State to clarify what happened to the victims of serious violations once a Truth Commission is established – withholding the information necessary to accomplish this objective – constitutes a violation, along with the continue impunity, of Article 5 ACHR in respect to the next of kin of these victims.

If the enforced disappearance also led to the illegal abduction of the children of the disappeared victim, the Court connected the right to truth with the right to identity. In the case of *Gelman v. Uruguay*, for example, the applicant, Ms. María Macarena Gelman García, was born while her mother was in captivity and, shortly after the birth, given to a

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<sup>558</sup> See, for example: IACtHR. *Case of Trujillo Oroza V. Bolivia*. Reparations and Costs. Judgment of February 27, 2002. Series C No. 92, at para. 114; *Case of La Cantuta V. Peru*, at para. 125.

<sup>559</sup> IACtHR. *Case of Anzualdo-Castro v. Peru*. Preliminary Objection, Merits, Reparations and Costs. Series C No.202. Judgment of September 22, 2009. at para. 105.

<sup>560</sup> IACtHR. *Case of Gudiel Álvarez et al. ("Diario Militar") v. Guatemala*. Merits, Reparations and Costs. Series C No. 253. Judgment of November 20, 2012, at para. 302.

Uruguayan family. The Court argued that despite the possible violation of her personal integrity during her birth and her first weeks of life, the actual infringement of her right to psychological integrity took place when she discovered her identity. In other words, the violations to her psychological and moral integrity resulted both from the enforced disappearance of her mother, Maria Claudia Gelman, and from the violation of her right to know the truth about her own identity<sup>561</sup>.

The ACHR does not explicitly provides for the above mentioned “right to identity”, but the Court supports that it can be determined based on Article 8 of the Convention on the Rights of the Child, which establishes that said right covers the right to nationality, to a name and to family relationships. In the case such as the Ms. Maria Macarena Gelman, the violation to the right to an identity would only cease – according to the Court – with the revelation of the truth about said identity, including the guarantee to the factual and juridical means to recover this true identity and, if appropriate, a family relationship, with the relevant legal effects to follow<sup>562</sup>.

From the above exposed, one could infer that the source of the right to truth, either in the ACHR or in other human rights instrument, is flexible, varying in accordance with the concrete case faced by the IACtHR. As a rule, however, the Court considers that the right to truth derives from Articles 8 and 25 ACHR, which combined constitute the States’ duty to investigate human rights violations and prosecute and punish those responsible for them.

### ***The Incompatibility between the Right to Truth and Amnesty Laws: Barrios Altos Case (2001)***

On 3 September 2001, shortly after judging the *Bamaca Velasquez* application, the IACtHR would face the case of ***Barrios Altos v. Peru*** concerning the actions of members of the Peruvian Army who were acting on behalf of a death squad known as the “Colina Group”. The military members of this squad were responsible for carrying out “anti-subversive” programs including the one known as Barrios Altos when they indiscriminately fired at a crowd killing fifteen people and gravely injuring four more. After this incident, the Peruvian authorities passed an amnesty law which - as already

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<sup>561</sup> IACtHR. *Case of Gelman v. Uruguay* Merits and Reparations. Series C No. 221. Judgment of February 24, 2011, at para. 118.

<sup>562</sup> Ibid. at para. 122.



mentioned above – covered all human rights violations committed between 1980 and 1995<sup>563</sup>.

The case of Barrios Altos was the first in which the IACtHR explicitly declared amnesty laws incompatible with the ACHR, becoming the pioneering international court to fulminate an amnesty law<sup>564</sup>. The IACtHR understood that “all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility inadmissible”<sup>565</sup>, as they prevent the investigation of serious human rights violations and the prosecution and punishment of those responsible for them. The legal reasoning provided by the Court to justify this incompatibility lied on Articles 1 (1) (Duty to Ensure), 2 (Domestic Legal Effects), 8 (Right to a Fair Trial) and 25 (Right to Judicial Protection) ACHR. The IACtHR explained that the amnesty laws adopted by Peru impeded the victims’ next of kin and the surviving victims from being heard by a judge (Article 8.1); violated the right to judicial protection (Article 25); prevented the investigation, capture, prosecution and conviction of those responsible - thus failing to comply with Article 1(1) of the Convention - and obstructed the clarification of the events of the case. Lastly, the adoption of self-amnesty laws, which are incompatible with the ACHR, meant that Peru failed to comply with the obligation to adapt internal legislation, as embodied in Article 2 ACHR<sup>566</sup>.

As it is possible to infer from the above, the Court, by considering the amnesty laws incompatible with the ACHR, reveals an evident concern with impunity. In fact, it explicitly stated that these laws leave the victims defenseless and perpetuate impunity, as they preclude the identification of the individuals who are responsible for human rights violations, obstructing the investigation and access to justice and preventing “the victims and their next of kin from knowing the truth and receiving the corresponding reparation”<sup>567</sup>.

Interestingly, not only did the Court reprobate the Peruvian amnesty laws, but it did so with base on Articles 8 and 25 ACHR, making use therefore of a legal reasoning which includes the right to truth of the victims and their next of kin. Thus, it was resting on the duty to investigate which is as a rule the source of the right to truth in the ACHR that the

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<sup>563</sup> IACtHR. *Case of Barrios Altos v. Peru*. Merits. Series C No. 75. Judgment March 14, 2001, at para. 2.

<sup>564</sup> TRINDADE. Antonio Augusto Cançado. *The End of the Self-Amnesty Laws*. Available at: Eremias Delizoicov Documentation Centre. <<http://www.desaparecidospoliticos.org.br/pagina.php?id=193>>. Last access 01 July 2017.

<sup>565</sup> IACtHR. *Case of Barrios Altos v. Peru*. Merits. Series C No. 75. Judgment March 14, 2001, at para. 41.

<sup>566</sup> *Ibid.*, at para. 41-44.

<sup>567</sup> *Ibid.*, at para. 43.

Court decided on the incompatibility of the amnesty laws. Considering the decision in the case of *Castillo Paez*, taken only four years before *Barrios Altos*, the IACtHR has shown a considerable change in its understanding and, also, in the importance attributed to the right to truth, which assumed the role of justifying the incompatibility of amnesty laws with the ACHR.

Nevertheless, despite its understanding in the *Barrios Altos* case, the Court did not order the Peruvian State to guarantee that the amnesty laws do not offer any impediment to investigation, prosecution and punishment of those responsible for human rights violations. The removal of any legal obstruction to the obligation of the States to investigate only took part in the roll of reparations in the case of *Almonacid-Arellano et al. v. Chile* of September 2006. In this case, the Court went even further in its elaboration on amnesty laws, deciding that the Chilean State should certify that the amnesty decree at stake would not continue to prevent the investigation of Mr. Almonacid-Arellano's extra-legal execution and the identification and, as appropriate, punishment of those responsible. This obligation should be also extended to others similar violations committed in Chile<sup>568</sup>.

As the Court explained, the duty to investigate includes the "duty of the States to reach the truth through judicial proceedings", as Articles 1(1), 8 and 25 ACHR "protect truth as a whole"<sup>569</sup>. With this decision, the Court confirmed that the right to truth serves as a fundament to the fulmination of amnesty laws, playing an essential role as a measure of reparation to the victims. This is particularly important for it reveals that, even when the right to truth is subsumed in Articles 8 and 25 ACHR, it produces specific consequences which reverberate in the protection given to the victims, in special in the measures of reparation ordered by the Court. It is exactly in this aspect that the right to truth presents in the case law of the IACtHR its main contribution, i.e. expanding the scope of the reparations provided to the victims. This contribution would be broadened even more with the innovation introduced by the Court, which considered that not only individuals are victims, but also the communities where they belong. This collective view of victims will be analyzed below.

### ***The Right to Truth and the Collective Purposes***

To attend the demands of those primarily affected by the human rights violations and their relatives was not the only concern of the IACtHR when introducing the right to truth

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<sup>568</sup> IACtHR. *Case of Almonacid Arellano et al. v. Chile*. Preliminary Objections, Merits, Reparations and Costs. Series C No. 154. Judgment of September 26, 2006, at para. 171.

<sup>569</sup> *Ibid.*, at para. 150.

in its case law. The Court paid particular attention to the collective demands of those communities where the violations occurred, considering that to know about what had happened in the past is a basic need also of collectivities. The main argument seems to lie on the importance of preventing the violations from happening again, as the Court sustains that to know about the past helps avoiding atrocities from occurring again in the future. Also, as the States commonly argued that the creation of truth commissions would *per se* be able to establish the *truth* of the facts, the Court probably felt compelled to make distinctions between different representations of truth, both collective and individual ones, such as the *historical truth* and *judicial truth*.

### *Truth Commissions and the Concept of Historical Truth*

The condemnation of amnesty decrees as a *measure of reparation* was not the only innovation introduced by the IACtHR in *Almonacid Arellano*. In this case, the Court would also firm important elaborations concerning truth commissions and their connection with clarifying the *truth*. As previously mentioned, Chile had two commissions: the *Rettig* and the *Valech*, which were established in 1990 and in 2004 respectively. The IACtHR emphasized their importance “in trying to collectively build the truth of the events which occurred between 1973 and 1990”<sup>570</sup>. In regard to Mr. Almonacid Arellano, the Court mentioned that his name appeared in the *Rettig* report along with a summary of the circumstances of his execution. Mr. Arellano, as stated in the report, was arrested by the police at his home on 17 September 1973. While getting into the police truck, Mr. Arellano was shot by his captors, who took him to the hospital, where he died on the following day<sup>571</sup>.

Despite these findings of the Chilean truth commission, the Court remarked that they cannot be a substitute for the judicial truth, i.e. “for the duty of the State to reach the truth through judicial proceedings”<sup>572</sup>. For the truth, which is accomplished by truth commissions, the Court named it *historical truth*, existing along with the *judicial truth*. Both would be protected by Articles 1.1, 8 and 25 ACHR, meaning that States – even when establishing truth commissions – should also carry out a judicial investigation of the facts related to the violations, attribute responsibilities, and punish all those who turn out to be participants<sup>573</sup>.

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<sup>570</sup> Ibid., at para. 149.

<sup>571</sup> Ibid., at para. 82.

<sup>572</sup> Ibid., at para. 150.

<sup>573</sup> Ibid.

For its role in clarifying the *historical truth*, the commissions would be considered as an initial measure of reparation to the victims and the conclusions they achieve, the Court uses as part of the body of evidence<sup>574</sup>. In the case of *Baldeón-García v. Peru*, for example, the IACtHR considered that the contributions of truth commissions “amount to positive progress on that matter”. However, despite this “preliminary reparation, the investigation and judicial punishment of perpetrators”<sup>575</sup> would be still pending.

Based on this view of the Court, which differentiates the *historical truth* from the *judicial truth*, one could conclude that – for the Inter-American System - there would be no exclusive measure for implementing the right to truth. In fact, the concept of inter-relation between truth commissions and judicial measures reflects a trend in the human rights movement’s struggle against impunity, which concluded that extra judicial commissions of inquiry do not fulfill alone the States’ duty to investigate<sup>576</sup>. Therefore, they should be accompanied by judicial measures aimed at prosecuting and punishing those responsible for the violations.

What is important to point out in the elaboration of the Inter-American Court is that the complementarity it proposes presents *truth* as a goal both for truth commissions and for judicial measures. In other words, *truth* would not be restricted to truth commissions in dichotomy to judicial measures, which would in turn represent the aspect of *justice*. Although the measures to implement the right to truth will be analyzed in detail in a further chapter, it is worth mentioning the IACtHR’s pioneering work in understanding truth as an aspect of judicial measures and the importance this has for the victims - particularly when considering the limitations truth commissions normally go through due to the lack of information provided by the States. Also, by presenting this understanding, the Court supported that judicial measures do not limit themselves to pursue punishment for the suspected perpetrators. On the contrary, they would also intent to clarify the events surrounding the human rights violations.

As mentioned previously, in the case of *Gomes Lund v. Brazil*, for example, the main object of conflict was an ordinary action filled by the relatives of the disappeared victims with the purpose of receiving information concerning their whereabouts, instead of pursuing the criminal investigation of the perpetrators. Even after the establishment of a truth commission in Brazil, the final fate of the victims of the *Gomes Lund* case was not

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<sup>574</sup> See, for example: *Case of Maritza Urrutia v. Guatemala*. Merits, Reparations and Costs. Series C No. 103. Judgment of November 27, 2003.

<sup>575</sup> IACtHR. *Case of Baldeón García v. Peru*. Merits, Reparations and Costs. Series C No. 147. Judgment of April 6, 2006, at para. 167.

<sup>576</sup> See chapter II.

clarified and their mortal remains were not returned to their relatives<sup>577</sup>. It is because of cases like this that a broad perspective of measures aimed at establishing the truth is so important.

Regarding truth commissions, the pronouncements of the Court correspond to the victims' dissatisfaction with this measure or, in other words, to the failure to attend their individuals claims. These would include particularly the need to pursue a judicial investigation and to reveal what happened in the cases of enforced disappearance including the final fate of the victims<sup>578</sup>. It is likely that due to the impossibility of truth commissions to clarify all the facts related to past human rights violations, the Court concluded that they establish the *historical truth* of the events, indicating a broader and more collective expression of truth.

With the expression *historical truth*, however, the Court does not seem to refer – as the term may imply - to an imposition of one specific perspective concerning past events, pushing in an authoritarian way a political writing of History. Instead, as mentioned above, it indicates that there is a truth which is related to the circumstances and to the context in which the violations occurred, but that it does not cover specifically every individual case. In a way, it is a form found by the Court to recognize that, despite the limitations, truth commissions do shed light on what had happened. This is particularly clear when, for example, in the case of *Almonacid Arellano*, the Court emphasized “the important role played by the different Chilean Commissions in trying to collectively build the truth of the events which occurred between 1973 and 1990”<sup>579</sup>. The Court continued stating that despite the effort to establish the *historical truth* these Commissions would still have left open the States' obligation to comply with the *judicial truth*. In other words, the Court associates a more collective approach of the truth, which would be pursued by truth commissions, with the historical truth.

In addition to truth commissions and the concept of *historical truth*, the IACtHR would also develop another important consideration – originally presented by the IACHR -

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<sup>577</sup> JUSTAMAND, Michel. *Arqueologia, História e Direitos Humanos na Guerrilha do Araguaia*. XXVIII Simpósio Nacional de História. Lugares dos Historiadores: Velhos e Novos Desafios. 27-31 July 2015. Available at: <[http://www.snh2015.anpuh.org/resources/anais/39/1425466805\\_ARQUIVO\\_ArtigoparaaANPUH.pdf](http://www.snh2015.anpuh.org/resources/anais/39/1425466805_ARQUIVO_ArtigoparaaANPUH.pdf)> Last Access: 20 July 2017.

<sup>578</sup> See, for example: IACtHR. *Case of La Cantuta v. Peru*. Merits, Reparations and Costs. Series C No. 162. Judgment of November 29, 2006, at para. 61 (a); 125 (f). *Case of Maritza Urrutia v. Guatemala*. Merits, Reparations and Costs. Series C No. 103. Judgment of November 27, 2003, at para. 173 (b). *Case of Baldeón García v. Peru*. Series C No. 147. Merits, Reparations and Costs. Judgment of April 6, 2006, at para. 132.

<sup>579</sup> IACtHR. *Case of Almonacid Arellano et al. v. Chile*. Preliminary Objections, Merits, Reparations and Costs. Series C No. 154. Judgment of September 26, 2006, at para. 149.

concerning the collective purpose of the right to truth, namely what is known as its societal dimension.

### *The Societal Dimension of the Right to Truth*

The recognition of a societal dimension of the right to truth was not an innovation of the IACtHR. As mentioned previously in this work, the IACHR first referred “to society’s inalienable right to know the truth about past events” in its annual report of 1985-1986<sup>580</sup>. The Court, in turn, only explicitly welcomed this collective or societal dimension in the case of *Bamaca Velasquez* in 2000. When examining the preventive measures of reparation, it considered, under Article 1.1 ACHR, that the duty to ensure also covers the obligation to prevent violations from occurring again. The preventive measures and those against recidivism begin – as explained by the IACtHR - by revealing and recognizing the atrocities of the past. Societies, in its view, “have the right to know the truth” concerning these atrocities, “so as to be capable of preventing them in the future”<sup>581</sup>.

The introduction of the societal dimension of the right to truth in the Court’s case law is therefore closely related with the obligation of the States to prevent human rights violations from taking place. Accordingly, its fundament lies on the conception that to know about what happened in the past avoids violations from being repeated in the future. In other words, if the States do not allow the general public to be informed of past violations, more likely they will occur again. For these reasons, the Court understood that, in addition to the obligation to investigate and punish the responsible for the violations, States have also to publicly divulge the results of this investigation in a way to facilitate societies to know the truth<sup>582</sup>.

As it is possible to infer from the above, the obligation of the States, which derives from societies’ right to know the truth, has a positive nature which requires them to actively take measures to inform of all that occurred in regard to human rights violations. Moreover, this public dissemination of information related to the violations “requires the procedural determination of the most complete historical record possible”<sup>583</sup>, including a

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<sup>580</sup> Inter-American Commission on Human Rights. *Annual Report 1985-1986*. OEA/Ser.L/V/II.68 Doc. 8 rev. 1, 26 September 1986, Chapter V.

<sup>581</sup> IACtHR. *Case of Bamaca Velásquez v. Guatemala*, Judgment of February 22, 2002 (Reparations and Costs), at para. 76.

<sup>582</sup> See, for example: IACtHR. *Case of Juan Humberto Sánchez v. Honduras*. Preliminary Objection, Merits, Reparations and Costs. Series C No. 99. Judgment of June 7, 2003, at para. 186. IACtHR. *Case of Baldeón García v. Peru*. Merits, Reparations and Costs, at para. 199. IACtHR. *Case of Almonacid Arellano et al. v. Chile*. Preliminary Objections, Merits, Reparations and Costs, at para. 157.

<sup>583</sup> See, for example: IACtHR. *Case of the Rochela Massacre v. Colombia*. Merits, Reparations and Costs. Series C No. 163 Judgment of May 11, 2007. para. 195; *Case of Ibsen Cárdenas and*

description of the patterns of joint action, the identification all those who participated in various ways in the violations and their corresponding responsibilities<sup>584</sup>.

The objective of the Court appears to lie on the concern to provide large scale violations with an appropriate publicity including the States' acknowledge of their responsibility for the events. For the Judge Cecilia Quiroga, such concern would be in accordance with the idea that the ACHR creates a conduct code for the States, which interest all community, and not only the individuals directly affected in the concrete cases<sup>585</sup>. For other authors, however, such collective approach raises the possibility of an "abuse of memory"<sup>586</sup> on behalf of the States, i.e. when to remember becomes an obligation; it implies necessarily that one of the parts involved in the conflict will be the one responsible for telling what happened. In other words, one version of the facts would always overlap on the other and therefore only a single narrative would be known by the community.

This debate involving the possible abuses of the collective dimension of the right to truth was widely elaborated by the UN Expert Mr. Olivier de Frouville in his work "The Human Right to truth in International Law: On Some 'Untimely Meditations'" in which he proposes that any process of victim recognition is part of a *political writing of History*. This, he says, may be criticized for raising two difficulties, namely "competition among victims, leading to the dislocation of society into communities, and the leaden weight of an official history that is not open to discussion"<sup>587</sup>. Despite not affiliating to any of those critics, the author does agree that there is "no historical experience of transitional justice" which would be "entirely safe from one or other of these criticisms"<sup>588</sup>.

Transposing this debate to the decisions of the IACtHR on the collective aspect of the right to truth, it is important to mention that the Court has remained so far in the limits of the case decided. In other words, more than desiring entire communities to know one specific version of the facts concerning past human rights violations, the Court requests

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*Ibsen Peña v. Bolivia*. Merits, Reparation and Costs. Series C No. 217. Judgment of September 1, 2010, at para. 158, *Case of Chitay Nech et al v. Guatemala*. Preliminary Objections, Merits, Reparations, and Costs. Series C No. 212. Judgment of May 25, 2010, at para. 234

<sup>584</sup> Ibid.

<sup>585</sup> QUIROGA, Cecilia Medina. *La Convención Americana: Teoría y Jurisprudência - Vida, Integridad Personal, Libertad Personal, Debido Proceso y Recurso Judicial*, p. 113.

<sup>586</sup> The expression *abuse of memory* is used by Mr. Olivier de Frouville in his work "The Human Right to truth in International Law: On Some 'Untimely Meditations'" based on the book of the philosopher Tzvetan Todorov, *Les Abus de la Memoire*. See: TODOROV, Tzvetan. *Les abus de la mémoire* Paris: Arléa, 1995; FROUVILLE, Olivier de. "The Human Right to truth in International Law: On Some 'Untimely Meditations'". In: Sorbonne-Assas Law Review Panthéon-Assas (Paris II) University, 2015. Available at: <http://lawreview.u-paris2.fr/issue/2015/human-right-truth-international-law-some-untimely-meditations>. Last access: 25 July 2017.

<sup>587</sup> FROUVILLE, Olivier de. "The Human Right to truth in International Law: On Some 'Untimely Meditations'", p. 11.

<sup>588</sup> Ibid.

States to publicize only the results of the investigations concerning the case at stake. Thus, this is not about imposing one version of the events related to historical contexts but allowing and facilitating the access of the general public to information regarding serious violations. Consequently, what the Court stimulates is the debate, the openness of information when it comes to State crimes, the possibility to know about the past.

For those reasons, it is problematic the criticism towards the collective right to truth, as it leads to inaction and paralysis, becoming, as explained by Mr. Frouville, “an attack on the living”<sup>589</sup>, who expect some recognition for their cases. It is a radical position in fact to support that, since it is not possible to publicize all the cases involving gross violations, it is improper to guarantee the right to truth to just a part of them. The fact that there is, as a rule, a struggle to give a voice and to provide proper justice to all of those who suffered serious violations, especially in situations of armed conflict, does not mean that it is wrong or necessarily unfair when a group of victims obtain this recognition.

Likewise, the argument that the Court’s concern with the publicity of cases of gross violations, or their commemoration, may create tensions in the “reconciliation process”<sup>590</sup> falls in a kind of relativism, which does see any difference between the parties involved in the case. As if it would be correct to silence what happened to some for fear of what the revelation of their cases would cause in the general public or in the political elites. The importance of the societal dimension lies exactly in its objective to publicize cases of gross violations of human rights, avoiding them to be conveniently hidden and silenced.

If, on one hand, it is very hard to prove empirically how to know about the past may help communities to prevent violations in the future<sup>591</sup>, it is definitely not in ignorance of what happened that these communities will be able to improve the protection of human rights. That is, to connive with the lack of information provided in cases of human rights violations is certainly not the answer to an effective prevention. In this aspect, the concern with the publication of the cases could not be more appropriate.

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<sup>589</sup> Ibid., p. 12.

<sup>590</sup> CAMPISI, Maria Chiara. *From a Duty to Remember to an Obligation to Memory? Memory as Reparation in the Jurisprudence of the Inter-American Court of Human Rights*. In: *International Journal of Conflict and Violence*, Vol. 8 (1), 2014, p. 69.

<sup>591</sup> For an empirical approach of transitional justice measures, namely trials and truth commissions, see: SIKKINK, Kathryn; WAILLING, Carrie Booth. *The Impact of Human Rights Trials in Latin America*. In: *Journal of Peace Research*, vol. 44. No. 4, 2007, p. 427-445.



### *Human Rights Chamber for Bosnia and Herzegovina*

The Human Rights Chamber for Bosnia and Herzegovina was a judicial body established under Annex 6 to the General Framework Agreement for Peace (Dayton Peace Agreement) and signed by the three Bosnian Parties, i.e. the State of BiH and its two Entities – the Bosniac-Croat Federation and the *Republika Srpska*. The Chamber operated from March 1996 until December 2003<sup>592</sup> with the objectives to implement the ECHR and all its protocols in Bosnia-Herzegovina and to decide on discriminations to the enjoyment of the rights and freedoms established in 15 international and European agreements. With a composition of eight international judges and six Bosnian judges, the Chamber had competence to decide on applications submitted by individuals and legal entities - claiming to be victims of human rights violations - against any of the three Bosnian Parties. For the applications to be considered admissible, the violations should have occurred after the entry into force of the Dayton Peace Agreement in December 1995<sup>593</sup>.

The establishment of the Chamber was a result of international efforts to confront the legacy of human rights violations committed during the armed conflict which raged the region between 1992 and 1995. The numerous tragedies occurred during the conflict included large scale disappearances of individuals, mostly male civilians of Muslim origin (also called *Bosniaks*), in military attacks and “ethnic cleansing” operations. The Bosnian Serb forces together with their allies – the Yugoslav National Army and the Serb paramilitary forces - were responsible for more than 80% of the disappearances. The victims were mostly last seen while detained in concentration camps established by the Bosnian Serb forces<sup>594</sup>.

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<sup>592</sup> According to the Agreement Pursuant to Article XIV of Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina, the cases that were still pending before the Chamber after 31 December 2003 should be examined by a Human Rights Commission within the Constitutional Court of Bosnia and Herzegovina. The Commission was also entrusted with a mandate to examine complaints about non-enforcement of the decisions of the Human Rights Chamber and to issue declarations in this connection, without offering any other redress. New cases alleging Human Rights violations would be decided by the Constitutional Court of Bosnia and Herzegovina.

<sup>593</sup> NOWAK, Manfred. *Enforced Disappearances in Bosnia and Herzegovina: Recent Developments in International Jurisprudence*. In: Özel Sayı (Hrsg.), Akademik Yaşamının 55. Yılı Onuruna Rona Aybay'a Armağan (Rona Aybay A Tribute to 55 Years of Academic Life of Honor) Legal Journal of Law/Legal Hukuk Dergisi, Legal Yayıncılık, Kadıköy-İstanbul 2014, p. 2752-2753.

<sup>594</sup> NOWAK, Manfred. *Disappearances in Bosnia Herzegovina*. In: Michael O'Flaherty/ Gregory Gisvold (Eds.), *Post-War Protection of Human Rights in Bosnia and Herzegovina*, The Hague/London/Boston: Martinus Nijhoff, 1998, p. 107-108.

The tragedy of the disappearances either due to military attacks or ethnic cleansing made more than 30.000 victims<sup>595</sup> and left more than 100.000 family members, mostly refugees or internally displaced persons, waiting to know the final fate of their loved ones. Most relatives hoped their disappeared kin could still be alive<sup>596</sup>.

Nevertheless, despite the dramatic scenario of the missing persons, the Chamber dealt only with a very limited number of cases brought on behalf of these victims and/or their families, among which the *Srebrenica* applications are included<sup>597</sup>. In some occasions, the Chamber decided that the fact that the “disappearances” occurred before the official signature date of the Dayton Peace Agreement on 14 December 1995, meant that these cases were *ratione temporis* outside its competence<sup>598</sup>. Yet since disappearances are a continuing crime until they have been resolved, the Chamber focused on the failure of the Bosnian authorities to investigate the cases of disappearances, to trace the missing persons, to exhume the mortal remains of the victims found in mass graves and to identify these human beings, to inform the families of the results of this investigation, to bring the perpetrators to justice and to provide the relatives an effective remedy and adequate reparation for the harm suffered<sup>599</sup>.

It was in these cases involving missing persons and the search of their relatives to know their fate and whereabouts that the Chamber recognized, in its case law, the right to truth under Article 3 ECHR. In fact, it was in the *Srebrenica* case in March 2003 that the Chamber explicitly elaborated on a right to truth for the first time, although it had previously recognized the obligation of the respondent Party to provide accurate and complete information on the fate of the disappeared victim. In case of death, as it will be analyzed below, the Chamber had ordered that the remains of the deceased victim should be returned to the family.

In the leading case on enforced disappearance *Palic v. The Republika Srpska*, for example, the applicant, a wife of a disappeared colonel of the Bosnian Army, claimed that the uncertainty about her husband’s fate led to a violation of her and her children’s

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<sup>595</sup> International Commission on Missing Persons. *Bosnia and Herzegovina*. Accessed 01 April 2017. <<https://www.icmp.int/where-we-work/europe/western-balkans/bosnia-and-herzegovina/>>

<sup>596</sup> NOWAK, Manfred. *Disappearances in Bosnia Herzegovina*, p. 117.

<sup>597</sup> Amnesty International. *Bosnia-Herzegovina: Honoring the ghosts – challenging impunity for “disappearances”*, March 2003.

<sup>598</sup> See, for example: See Case No. CH/96/15, *Ratko Grgić against the Republika Srpska* (Decision on the merits of 5 August 1997), Case No. CH/97/74, *Džemal Balić against the Republika Srpska* (Decision on the admissibility of 10 September 1998).

<sup>599</sup> NOWAK, Manfred. *Enforced Disappearances in Bosnia and Herzegovina: Recent Developments in International Jurisprudence*, p. 2753.

“right to know about the fate of one’s husband and father”<sup>600</sup>. The Chamber, under Article 3 ECHR, and relying on the Human Rights Committee decision on *Quinteros v. Uruguay*, found that Ms. Palic was a victim of ill treatment due to the anguish in not knowing the whereabouts of her husband. Moreover, under Article 8 ECHR (right to respect for private and family life), the Chamber found that “the respondent Party is arbitrarily withholding” information on Colonel Palic “which must be in its possession”<sup>601</sup> and which concerns his fate and the location of his body, if he is no longer alive. Therefore, the Chamber considered that the *Republika Srpska* violated Ms. Palic’s right to respect for private and family life<sup>602</sup>.

Few months after judging *Palic*, the Chamber took a similar approach in the case of ***Unkovic v. The Federation of Bosnia Herzegovina*** of 9 November 2001. The application concerned the disappearance of the Golubovic family, including the applicant’s daughter, son in law and grandchildren. After losing contact with his daughter, the applicant heard rumors that she and her family had been killed. In January 1999, the applicant learned from the newspaper that two men had been arrested for the killing of the Golubovic family in Konjic in July 1992. The applicant argued that the lack of information provided by the authorities of the respondent Party caused him pain and sorrow. Even though the final fate of the Golubovic family was confirmed and those responsible for their deaths brought before a court, the Chamber concluded that the investigations lasted for too long, violating the right of the applicant to be free from inhuman or degrading treatment<sup>603</sup>.

Despite the recognition of the applicant’s entitlement to know what had happened to his family, the Chamber made no literal reference to the *right to truth*, which would occur for the first time in its case law with the **Srebrenica** applications. The “largest and most horrific mass execution of civilians in Europe”<sup>604</sup> since the Second World War would bring

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<sup>600</sup> Human Rights Chamber for Bosnia and Herzegovina. Case No. CH/99/3196 *Avdo and Esma Palic against Republika of Srpska* (Decision on Admissibility and Merits 11 January 2001), at para. 36.

<sup>601</sup> *Ibid.*, at para. 84.

<sup>602</sup> *Ibid.*

<sup>603</sup> Human Rights Chamber for Bosnia and Herzegovina. Case no. CH/99/2150. *Dordo Unkovic against The Federation of Bosnia and Herzegovina* (Decision on Admissibility and Merits 9 November 2001), at para. 98-99. However, in 2002, the Chamber would review this decision, concluding to be found no violation of the applicant’s rights protected by the Convention based on “the successful completion of the main criminal trial against the murderers of the Golubovic family, as well as the difficult post-war circumstances in Bosnia and Herzegovina”. In: Human Rights Chamber for Bosnia and Herzegovina. *Digest: Decisions on Admissibility and Merits (1996-2002)* Sarajevo, 2003, p. 232.

<sup>604</sup> Human Rights Chamber for Bosnia and Herzegovina. Cases no. CH/01/7604 et al., *Selimovic & 48 Others v. the Republika Srpska (Srebrenica cases)*, (Decision on Admissibility and Merits of 7 March 2003), at para. 202.

the right to truth into the European scenario, ensuring the relatives of the *Bosniak* men killed by the Army of the *Republika Srpska* their right to know about the fate and whereabouts of their missing loved ones.

The Srebrenica case comprised forty-nine applications of the immediate family members of the missing victims seeking to “know the truth”<sup>605</sup>. Among these relatives, the impact of the tragedy in Srebrenica on women of the Bosnian Muslim community called the attention of the Chamber. Considering the patriarchal structure of this community, the Chamber emphasized the numerous obstacles posed by the disappearance of the men in the lives of the women, including to assume the role of head of the family and to conduct family business in the public sphere. In addition to the material problems, such as finding a job and providing for the family, women also faced psychological issues related to the tragedy and to the lack of disclosure, as most men of Srebrenica were still listed as missing<sup>606</sup>.

This “exceptionally high level of trauma”<sup>607</sup> –of which the experience of women is an example - justified the Chamber’s conclusion for an interference with the right to respect for private and family life. Such right, embodied in Article 8 ECHR, also protects, according to the Chamber, the access to information concerning the fate and whereabouts of a family member. In that regard, the Chamber recalled that Articles 32 and 33 of the 1977 Additional Protocol I to the 1949 Geneva Conventions reinforce in “the context of the aftermath of an armed conflict, the positive obligation arising under Article 8 of the European Convention for the *Republika Srpska*”<sup>608</sup> to disseminate to the families the information concerning the missing victims of the 1995 events in Srebrenica. In other words, the respondent Party has the obligation to provide all the information it possesses on the missing victims to the families including the locations of the mass gravesites. If, despite having the information, the respondent Party refuses to reveal it to the family members, then it “has failed to fulfill its positive obligation to secure the family member’s right protected by Article 8”<sup>609</sup>.

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<sup>605</sup> Ibid., at para. 204.

<sup>606</sup> Ibid., at para. 28. For an analysis on the gender issues resulting from the war in BiH, see: Impunity Watch. *War Victims and Gender Sensitive Truth Justice Reparations and Non-Recurrence in Bosnia Herzegovina* – Report by Mara Sostaric, 2012. LEYDESDORFF, Selma. *Surviving the Bosnian Genocide – The Women of Srebrenica Speak*. Indiana: Indiana University Press, 2011.

<sup>607</sup> Human Rights Chamber for Bosnia and Herzegovina. Cases no. CH/01/7604 et al., *Selimovic & 48 Others v. the Republika Srpska (Srebrenica cases)*, (Decision on Admissibility and Merits of 7 March 2003),, at para. 180.

<sup>608</sup> Ibid., at para. 175.

<sup>609</sup> Ibid., at para. 181.

This understanding developed by the Chamber reveals an evident proximity between Article 8 ECHR and the right to truth. Nevertheless, the Chamber explicitly referred to this right not under Article 8, but under Article 3. By failing to inform the relatives “about the truth of the fate and whereabouts of their missing loved ones, the respondent Party violated the right of the applicants to be free from inhuman and degrading treatment”<sup>610</sup>. This right also comprises the positive obligation of the respondent Party to conduct a meaningful and effective investigation and to make known a full statement of disclosure of all relevant facts, which should be available to the public<sup>611</sup>.

Concerning the remedies, and considering the applicants demand to know the truth, the Chamber ordered the respondent Party to release urgently all information “presently within its possession, control, and knowledge”<sup>612</sup> regarding the fate of the missing victims. This information should clarify whether any of the missing persons are still alive and held in detention and if so, their exact location; or whether the victims have been killed in the Srebrenica tragedy, and if so, the location of their mortal remains. If any of the missing victims were still unlawfully detained, they should be immediately release by the authorities of the *Republika Srpska*.

Additionally, the Chamber ordered the respondent Party to conduct “a full, meaningful, thorough, and detailed investigation” into the circumstances which caused the human rights violations in order to reveal to the “applicants, all other family members, and the public” the responsibility of *Republika Srpska* for the massacre in Srebrenica in July 1995, “including its subsequent efforts to cover up those facts, and the fate and whereabouts of the persons missing from Srebrenica since July 1995”<sup>613</sup>. Such investigations should also be carried with the objective to bring those responsible for the violations in Srebrenica to justice in domestic courts or to extradite those wanted by the International Criminal Tribunal for the Former Yugoslavia<sup>614</sup>.

The Chamber also decided - after a long reflection<sup>615</sup> - to award collective compensation in the benefit of all family members of the missing victims of Srebrenica since July 1995. This compensation consisted in a contribution to the Foundation of the Srebrenica-Potocari Memorial and Cemetery that oversaw erecting a memorial and creating “a

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<sup>610</sup> Ibid., at para. 191.

<sup>611</sup> Ibid.

<sup>612</sup> Ibid., at para. 211.

<sup>613</sup> Ibid., at para. 212.

<sup>614</sup> Ibid.

<sup>615</sup> PICARD, Michele; ZINBO, Asta. *The Long Road to Admission: The Report of the Government of the Republika Srpska*. In: Investigating Srebrenica. Edited by Isabelle Delpla, Xavier Bougarel, Jean-Louis Fournel. New York: Berghahn Books, 2012, p. 136.

solemn burial place for those persons who died as a result of the Srebrenica events”<sup>616</sup>. Despite the recognition that the applicants suffered personally pecuniary and non-pecuniary damages, the Chamber decided not to make any individual compensation. In its view, the collective compensation in addition to the other orders established in the decision constitute the “best form of reparation for the violations” of the applicants’ rights enshrined in Articles 3 and 8 ECHR “to know the fate and whereabouts of their missing loved ones and discrimination in connection with these rights”<sup>617</sup>.

Contrarily to the Chamber’s view, the *Association of the Mothers of Srebrenica and Podrinje* criticized the collective compensation, opposing to accept the money from the *Republika Srpska* for the cemetery and the memorial of Potocari. Many women actually considered that it would have been preferable for the Chamber to award only individual instead of collective compensation. Moreover, the Association argued that the Chamber missed the point, as the actual victims were not the relatives but those who were missing, i.e. the violation of human rights was the massacre itself and not the fact that the *Republika Srpska* did not reveal the location of the mortal remains of the deceased victims<sup>618</sup>.

The position of the Association of the Mothers is absolute understandable especially considering that disappearances have indeed a continuous nature, i.e. even if they began to occur before the entry into force of the Dayton Peace Agreements, this should not have prevented the Chamber from considering them admissible<sup>619</sup>. Also, the disappearances had –as already mentioned – a strong social and economic impact on the lives of many relatives, which emphasizes the relevance of awarding an individual compensation. On the other hand, it is important to note that the decision of the Chamber made possible the public acknowledgement of the grievances of the disappeared victims’ relatives<sup>620</sup>. Also, Srebrenica-Potocari Memorial and Cemetery became not only a place

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<sup>616</sup> Human Rights Chamber for Bosnia and Herzegovina. Cases no. CH/01/7604 et al., *Selimovic & 48 Others v. the Republika Srpska (Srebrenica cases)*, (Decision on Admissibility and Merits of 7 March 2003), at para. 215.

<sup>617</sup> Ibid., at para. 218.

<sup>618</sup> PICARD, Michele; ZINBO, Asta. *The Long Road to Admission: The Report of the Government of the Republika Srpska*, p.137

<sup>619</sup> This controversy was heightened by the decision of the Chamber to strike out further applications against the *Republika Srpska* regarding Srebrenica as in the case of **Alija Ibisevic et al.** on the basis that the *Selimović* ruling had covered all issues. FERSTMAN, Carla; ROSENBERG, Sheri. *Reparations in Dayton's Bosnia and Herzegovina*. In: Carla Ferstman Mariana Goetz Alan Stephens (Eds) *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity*. Leiden, Boston: Martinus Nijhoff Publishers, 2009, p. 495.

<sup>620</sup> See: BLUMENSTOCK, Tilman. *Legal Protection of the Missing and Their Relatives: The Example of Bosnia and Herzegovina*. In: *Leiden Journal of International Law*, 19, 2006, p. 773–793.

for remembrance, but also a final resting place for almost 7.000 victims of the massacre<sup>621</sup>.

Finally, in its last observation concerning the reparations, the Chamber considered that another appropriate remedy would be a public apology of the respondent Party to the victims' relatives of the Srebrenica tragedies and to the *Bosniak* community of Bosnia and Herzegovina. Along with the apology, the *Republika Srpska* should also make a public acknowledgement of its responsibility for the events in Srebrenica. Nevertheless, the Chamber observed that both the acknowledgement and the apology could only suit as a remedy if expressed honestly and sincerely, and not obliged by a court. In other words, the Chamber did not order the respondent Party to take these steps, but it expressed the hope "that someday these statements will be forthcoming from the *Republika Srpska* on its own initiative"<sup>622</sup>. Shortly after the judgment of the Srebrenica applications, in 2004, the Bosnian Serb authorities would issue a public apology for Srebrenica for the first time<sup>623</sup>.

In November 2003, the Chamber judged the case of ***Popovic & Others v. the Federation of Bosnia and Herzegovina*** concerning the abduction and disappearance of Dragoljub Popovic in the *Travnik* area. The applicants are his mother, wife and two children. After few years without knowing if Mr. Popovic was still alive, his wife found out based on two testimonies that he had been killed. She obtained a sketch of the location of Mr. Popovic's body and took it to the Federation Ombudsmen office in *Zenica*, asking help to find the remains and to initiate criminal proceedings into his disappearance and death. The applicants, however, did not receive the appropriate support. On the contrary, they alleged that the attitudes of the respondent Party showed a pattern of obstruction the investigations into Mr. Popovic's death, which "prevented them from obtaining his mortal remains and bringing the perpetrators of the crime to justice"<sup>624</sup>.

When examining whether there was a violation of Article 3 ECHR, the Chamber noted that although the applicants had "some knowledge" of what had happened to Mr. Popovic, they still did not have his mortal remains returned to them and therefore were

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<sup>621</sup> Srebrenica Genocide Memorial. Accessed 01 May 2017. <<https://www.potocarimc.org/>>

<sup>622</sup> Ibid., at para. 219.

<sup>623</sup> Concerning the official apologies for the tragedies of the war in BiH, see: DENTI, Davide. *Public Apology in the Western Balkans: The Shadow of Ambiguity*. In: Daniël Cuyppers, Daniel Janssen, Jacques Haers and Barbara Segaert (Eds.) *Public Apology between Ritual and Regret: Symbolic Excuses on False Pretenses or True Reconciliation Out of Sincere Regret*. Amsterdam: Rodopi, 2013, p. 103-122.

<sup>624</sup> Human Rights Chamber for Bosnia and Herzegovina. Case no. CH/02/10074. *Ljiljana, Anka, Lazar and Natasa Popovic against the Federation of Bosnia and Herzegovina*. (Decision on Admissibility and Merits of 7 November 2003), at para. 108.

not “able to bury him in accordance with their tradition and beliefs”<sup>625</sup>. The remains – as emphasized by the Chamber – are “of primary importance to bring closure to the trauma and loss”<sup>626</sup> experienced by the family. The Chamber concluded that the respondent Party failed to conduct a meaningful investigation into Mr. Popovic’s disappearance and death and, therefore, violated Article 3 ECHR in respect to the applicants.

Furthermore, the Chamber also found a breach of Article 8 ECHR due to the failure of the respondent Party to make the information on Mr. Popovic’s fate and burial site accessible to the applicants. For the violations of Articles 3 and 8 ECHR, the Chamber ordered the respondent Party “to conduct a full, meaningful, thorough, and detailed investigation into the disappearance and death of Dragoljub Popovic and provide this information to the applicants”<sup>627</sup>. The investigations should also aim at returning the mortal remains of Mr. Popovic to his family and to bring those responsible for his abduction and death to justice.

An important aspect of the Popovic case lies on the fact that despite the family’s awareness of the death of Mr. Popovic, the Chamber still found the respondent Party responsible for not conducting a meaningful investigation, which included the returning of the remains to the relatives. The emphasis of the Chamber on the importance of the mortal remains reveals clearly that what it would consider the *right to truth* – understood under the scope of Article 3 ECHR - also comprises information on the burial site and the exhumation of the body with its further returning to the family. This understanding follows the provision of Articles 32 and 34 of the 1977 Additional Protocol I to the 1949 Geneva Conventions and would be also reaffirmed in Article 24 of the 2010 International Convention on the Protection of All Persons from Enforced Disappearance.

In December 2003, the Chamber faced a group of cases of disappearances - the *Visegrad Missing Persons* cases - in which it would again recognize the right to truth under Article 3 ECHR<sup>628</sup>. Similarly to the case of Srebrenica, the Chamber - confronted

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<sup>625</sup> Ibid., at para. 140.

<sup>626</sup> Ibid., at para. 160.

<sup>627</sup> Ibid., at para. 173.

<sup>628</sup> Human Rights Chamber for Bosnia and Herzegovina. Case No. CH/02/8879 et al. *Smajic et al. against the Republika Srpska (Visegrad Missing Persons cases)*, (Decision on Admissibility and Merits 05 December 2003); Case No. CH/02/9358 et al. *Malkic et al. against the Republika Srpska (Vlasenica Missing Persons cases)*, (Decision on Admissibility and Merits 22 December 2003); Case No. CH/02/9851 et al. *M.C. et al. against the Republika Srpska (Rogatica Missing Persons cases)*, (Decision on Admissibility and Merits 22 December 2003); Case nos. CH/02/10235 et al. *Mujic et al. against the Republika Srpska (Bratunac Missing Persons cases)* (Decision on Admissibility and Merits 22 December 2003); Case No. CH/02/9180. Jovanovic against the Federation of Bosnia and Herzegovina (Decision on Admissibility and Merits 5 December 2003); Case nos. CH/02/12551 et al. *Huskovic et al. against The Federation of Bosnia and Herzegovina* (Decision on Admissibility and Merits 22 December 2003).



with large scale Human rights violations - opted for collective compensation although recognizing the personal damages suffered by the applicants<sup>629</sup>. This time, however, the Chamber ordered the contribution to be paid to the Institute for Missing Persons founded by all domestic missing persons' commissions, the International Commission on Missing Persons, the ICRC and the associations of relatives of missing persons. The work of the Institute consists in "collecting, registering, and storing remains and data about missing persons; exhuming and identifying missing persons from the armed conflict; and advocating for the release of information"<sup>630</sup>.

As mentioned above regarding the Srebrenica applications, the decision of the Chamber to award *only* collective compensation did raise critics. As well put by Citroni and Scovazzi, such decision after the recognition of the Chamber that the relatives suffered pecuniary and non-pecuniary damages "is not supported by any further explanation"<sup>631</sup>. The Chamber, however, seemed to be aiming not only at forcing authorities to implement collective solutions but also at reaching large groups of victims<sup>632</sup>. Indeed, cases of large scale violations do face numerous additional complexities in order to be solved. In this regard, it is important to remember the financial difficulties involved in the process of exhumations and identification of the mortal remains which had been pointed out by the UN Expert on missing persons in the territory of the former Yugoslavia, Mr. Manfred Nowak, in his report of 1997. *The need to clarify the fate and whereabouts of missing persons by means of exhuming and identifying mortal remains*, explains the Expert, demanded a comprehensive budget which had been proved hard to achieve due to the lack of financial support both from national and international authorities<sup>633</sup>. Therefore, ordering the *Republika Srpska* to pay the collective compensation represented also a form of confronting the issue of the exhumations and identification of the remains and their economic implications.

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<sup>629</sup> An exception is the case of the disappearance of Ms. Mara Jovanovic also judged in December 2003. In this case, whose (single) applicant was the husband of the disappeared victim, the Chamber kept the individual compensation.

<sup>630</sup> Case nos. CH/02/12551 et al. *Huskovic et al. against The Federation of Bosnia and Herzegovina* (Decision on Admissibility and Merits 22 December 2003), at para. 93.

<sup>631</sup> CITRONI, Gabriella; SCOVAZZI, Tullio. *The Struggle against Enforced Disappearance and the 2007 United Nations Convention*, p. 243.

<sup>632</sup> CLARK, Kate; VLAMING, Frederiek De. *War Reparations in Bosnia and Herzegovina: Individual Stories and Collective Interests*. In: Dubravka Zarkov; Marlies Glasius (Eds.) *Narratives of Justice In and Out of the Courtroom Former Yugoslavia and Beyond*. Springer, 2014, p. 179.

<sup>633</sup> United Nations. Commission on Human Rights. Special process on missing persons in the territory of the former Yugoslavia – Report submitted by Mr Manfred Nowak. E/CN.4/1997/55, 15 January 1997, at para. 52.

Moreover, the award of collective compensation also intended “to keep the collective memory of the victims of the massacres alive”<sup>634</sup>, i.e. the construction of the memorial-cemetery in the case of Srebrenica, for example, would not only assist the families in the process of finding and burying their loved ones, but it would also serve as a remembrance of what happened. In this context, the Chamber innovated in the European scenario of reparations for Human rights violations by revealing its concern with the historical legacy which would be left by the armed conflicts in the region and, particularly, with the Srebrenica genocide.

It was exactly due to its concern with the legacy of the genocide and the consequent option to order the compensation to be paid to the Cemetery-Memorial which indicates that the Chamber went beyond the individual *truth* of every victim. From the exhumation, identification and burial of the victims the *truth* of what had happened could be preserved and therefore kept to present and future generations in a memorial. Therefore, the choice for a communal burial for the deceased victims represents also the choice for a *truth* which would concern not only the relatives of those buried there but also a general collectivity.

Interestingly, if the Chamber was expected to lay its decisions upon the case-law of the ECtHR, the result came up, in reality, a bit more diverse in terms of reparation (despite the limitation of opting between *only* individual or *only* collective compensation, for example)<sup>635</sup> and more explicit regarding recognition of a right to truth. Consequently, it faced, in a more emphatic way, the scenario of large and gross violations of Human rights, offering the victims more protection and recognizing their suffering more assuredly than the ECtHR.

Despite such efforts, there are still many victims who disappeared during the armed conflict in Bosnia-Herzegovina whose final fate and whereabouts were not yet clarified. Relatives are still struggling to find out what happened and where are the remains of around 8.000 victims<sup>636</sup>. The full implementation of the 2004 Law on Missing Persons has also been constantly requested by the associations of relatives along with Human

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<sup>634</sup> NOWAK, Manfred. *Reparation by the Human Rights Chamber for Bosnia and Herzegovina*. In: Koen De Feyter, Stephan Parmentier, Marc Bossuyt, Paul Lemmens (Eds). *Out of the Ashes: Reparation for Victims of Gross Human Rights Violations*. Antwerpen, Oxford: Intersentia, 2006, p. 255.

<sup>635</sup> The Chamber has also ordered the respondent Party to conduct investigations and to the reveal the whereabouts of the victim even when those accused for the violations had already been prosecuted.

<sup>636</sup> VULLIAMY, Ed. *The Appalling Reality of Bosnia's Missing Dead*. BBC Future, 12 December 2016. Accessed 01 May 2017. <<http://www.bbc.com/future/story/20161212-the-appalling-reality-of-bosnias-missing-dead>>

rights NGOs. They argue *inter alia* that there have been numerous difficulties in the establishment of a national fund for the families of missing persons and in the functioning of the Missing Persons Institute (MPI)<sup>637</sup>. Considering the more than twenty years have passed since the Peace Agreements were signed, their requests represent that obtaining truth may be a long road.

### *European Court of Human Rights*

The emergence of the right to truth in the case-law of the European Court of Human Rights derived initially from cases of enforced disappearance. The focus on the suffering and anguish of close relatives of disappeared victims has led the Court to conclude for a violation of Article 3 ECHR (prohibition of torture) in respect of those relatives. This violation would not be, however, based on the disappearance of a family member, but rather on the reaction of the authorities towards such event. That is, the lack of proper investigations of the disappearances with the aim to clarify what happened and consequently to inform the relatives of the facts would be initially the main point to the Court.

In addition to enforced disappearances, the European Court would recognize the right to truth - under the states' duty to investigate – also in cases of extraordinary rendition and ill treatment. Nevertheless, this recognition of the right to truth, as it will be shown below, was very timid, despite - particularly in cases of large scale Human rights violations - strongly promoted by several NGOs and actively demanded by the victims.

The ECtHR began addressing the issue of the search of victims for the *truth* in 1998 in the case **Kurt v. Turkey**, the first case of enforced disappearance brought before the Court. The applicant, Ms.Koçeri Kurt, alleged that her son, Mr. Üzeyir Kurt, disappeared in circumstances which engage the responsibility of the Turkish State. She applied to the European Commission of Human Rights in 1994 on her own behalf and on behalf of her son.

In the judgment of 28 May 1998, the ECtHR concluded that the Turkish authorities failed to explain the whereabouts and fate of Mr. Kurt and to conduct an investigation despite Ms.Kurt's insistence that her son was detained and that she feared for his life. As a result, the applicant was left "with the anguish of knowing that her son had been detained and that there is a complete absence of official information as to his subsequent fate". This

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<sup>637</sup> TRIAL. *Follow-Up Report on the Implementation by Bosnia and Herzegovina of the Recommendations issued by the Working Group on Enforced or Involuntary Disappearances*, February 2014. Amnesty International. Bosnia and Herzegovina: Justice for the families of the missing must be a priority for the state, 27 August 2015.

anguish, which “has endured over a prolonged period of time”<sup>638</sup>, led the ECtHR to find a breach of Article 3 (prohibition of torture) in respect to Ms.Kurt herself. Furthermore, the Court concluded that the denial of the State to provide the applicant an effective remedy which could clarify the fate of her son violates Article 13 ECHR (right to an effective remedy).

These violations of Articles 3 and 13 justified an award of compensation to Ms.Kurt “given that the authorities have not assisted the applicant in her search for the truth about the whereabouts of her son”<sup>639</sup>. Despite the Court’s association of the pursuit for truth with the clarification of the fate of the disappeared victim, it does not mention a *right to know* or a *right to truth*. There is, however, an evident concern with the elucidation of the final fate of Mr. Kurt and with the difficult situation imposed to his mother due to his disappearance<sup>640</sup>. In the view of the Court, this situation is aggravated by the lack of will of state authorities in solving the case.

Shortly after judging *Kurt v. Turkey*, the ECtHR faced other cases of enforced disappearance, although it did not mention the right to truth or the right to know<sup>641</sup>. In 2001, the Court delivered its views on the case of ***Cyprus v. Turkey***, involving *inter alia* the issue of the Greek-Cypriot missing persons and their relatives. The Court considered that Turkish authorities failed “to conduct an effective investigation into the whereabouts and fate of Greek-Cypriot missing persons who disappeared in life-threatening circumstances”<sup>642</sup>. It also referred to the anguish and suffering experienced by the relatives of missing persons due to the lack of information concerning their next of kin. Nevertheless, again the ECtHR made no explicit reference to the right to truth.

In 2006, in a group of cases against **Russia** concerning enforced disappearances in Chechnya, the ECtHR found that delays in the investigation compromised its effectiveness, as required by Article 2 ECHR (right to life). Consequently, it also adversely affected “the prospects of arriving at the truth”<sup>643</sup>. Despite this statement, the Court made no further elaboration of the implications of such phrase, such as “whether

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<sup>638</sup> ECtHR. Case *Kurt v. Turkey*, Judgment of 25 May 1998, at para. 133.

<sup>639</sup> Ibid., at para. 175.

<sup>640</sup> Similarly: ECtHR. Case of *Tas v. Turkey*, Judgment of 14 November 2000; *Orhan v. Turkey*, Judgment of 18 June 2002.

<sup>641</sup> See, for example: Case of *Çakici v. Turkey*, Judgment of 8 July 1999; Case of *Timurtas v. Turkey*, 13 June 2000.

<sup>642</sup> ECtHR. Case *Cyprus v. Turkey*. Judgment of 10 May 2001, at para. 136.

<sup>643</sup> ECtHR. Case *Bazorkina v. Russia*. Judgment of 27 July 2006, at para. 121. Case of *Baysayeva v. Russia*, Judgment of 27 July 2006, at para. 122

this consideration extends beyond the usual aim of a criminal investigation to discover the truth”<sup>644</sup>.

In 2009, in the case ***Varnava and Others v. Turkey***, the ECtHR again confronted the issue of the disappearances of persons in Cyprus during the Turkish military operations in the north of the Country in July and August 1974. In this application, the international NGO *Redress* submitted written observations, debating the issue of reparations under international law regarding enforced disappearance cases. According to the NGO, the European Court awarded compensation in almost all cases of enforced disappearance, but it did not specify “additional forms of just satisfaction to put an end to existing violations and prevent recurrence”. The NGO also noted that while the ECtHR considered that an effective remedy required an effective investigation, the *International Convention for the Protection of All Persons from Enforced Disappearance* provided that measures should be taken “to enable victims to know the truth regarding the circumstances of the disappearance”. Examples of these measures include not only investigation into the circumstances of the facts of the case, but also the publication of the investigations’ results, the “exhumation and return of the body, as well as damages for moral suffering”<sup>645</sup>. The NGO also emphasized that the right to truth had been previously recognized by the UN Human Rights Committee. Regardless *Redress’s* observations, the ECtHR did not explicitly recognize a right to truth.

However, the Court did find a violation of Article 3 ECHR with respect to the relatives of the missing victims, who would themselves be victims of ill treatment due to the absence of information concerning their next of kin. The ECtHR argued that the Turkish authorities neglected their “obligation to account for the whereabouts and fate of a missing person”<sup>646</sup>. This indifferent attitude towards the “real concerns” of the relatives is therefore categorized by the Court as inhuman treatment<sup>647</sup>.

In 2011, the European Court judged the case ***Association 21 December 1989 a.o. v. Romania*** which concerned the lethal repression of the anti-government demonstrations in December 1989 in Bucharest. The applicants are three Romanian nationals - Mr Teodor Mărieș, Mr Nicolae Vlase and Mrs Elena Vlase – in addition to the *Association 21 December 1989*. Mr. Mărieș took part in the demonstrations and, currently, is the

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<sup>644</sup> VERMEULEN, Marthe Lot. *Enforced Disappearance: Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance*, p. 338.

<sup>645</sup> ECtHR. Case *Varnava and Others v. Turkey*. Judgment of 18 September 2009, at para. 220, 221.

<sup>646</sup> Ibid, at para. 200.

<sup>647</sup> Ibid, at para. 201.

president of the *Association 21 December*. Mr and Mrs Vlase are the parents of Nicolae N. Vlase, who died during the crackdown on demonstrations which took place in Braşov in December 1989. They alleged that the Romanian authorities did not conduct any serious investigations into the repression to the 1989 demonstrations, what was confirmed by the ECtHR in its judgment<sup>648</sup>.

Under the procedural limb of Article 2 ECHR, the Court considered that the political and social compromises of the Government cannot justify “the length of the investigation without the applicants or the public being informed of its progress”<sup>649</sup>. On the contrary, the relevance of the disclosure of the investigations to the Romanian society “consists in the right of the numerous victims to know what had happened” which implies the “right to an effective judicial investigation and a possible right to compensation”<sup>650</sup>. Such societal importance attributed to the investigations “ought to have prompted the domestic authorities to deal with the case speedily and without unnecessary delay, in order to prevent any appearance of tolerance”<sup>651</sup> with unlawful acts.

The ECtHR continued emphasizing “the importance of the right of victims and their families and heirs to know the truth about the circumstances surrounding events involving a massive violation of rights as fundamental as that of the right to life”<sup>652</sup>. Moreover, in the case of use of lethal force against civilian population as a response to demonstrations preceding the fall of a dictatorial regime, the Court concluded that it cannot accept that an investigation has been effective when “it is terminated as a result of the statutory limitation of criminal liability” or when “it is the authorities themselves who have remained inactive”<sup>653</sup>.

In addition to these statements, under Article 46 ECHR (binding force and execution of judgment), the Court again stressed the need of the Romanian State to effectively investigate the events surrounding the repression to the demonstrations, also considering the importance “of Romanian society to know the truth” about the political situation of December 1989<sup>654</sup>. It is important to note that the Court does not mention a *right of society to the truth*, but only emphasizes the societal *importance* to know the

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<sup>648</sup> ECtHR. *Case Association 21 December 1989 a.o.v. Romania*, Judgment of 24 May 2011, at para. 12-19.

<sup>649</sup> *Ibid.*, at para. 142. See also: *Case of Sandru et autres c. Roumanie*, Judgment of 8 December 2009, at para. 69. *Case of Crăiniceanu et Frumuşanu c. Roumanie*, Judgment of 24 April 2012, at para. 95.

<sup>650</sup> *Ibid.*

<sup>651</sup> *Ibid.*

<sup>652</sup> *Ibid.*, at para. 144.

<sup>653</sup> *Ibid.*

<sup>654</sup> *Ibid.*, at para. 194.

truth. This is particularly relevant when considering who is entitled to the right to truth. Based on the findings of the case *Association 21 December*, one may conclude that the right in question remains attached in the ECtHR to the victims.

The application of *Association 21 December* was the first in which the European Court explicitly refers to a right to truth. It does so under the procedural limb of Article 2 ECHR, i.e. flowing from the States' duty to investigate situations of mass violations of Human rights. Nevertheless, as the mention to the right to truth was timid, the exact contour of this right to the ECtHR remained uncertain.

One year after judging *Association 21 December 1989 a.o. v. Romania*, the European Court would again explicitly refer to the right to truth in the case ***El-Masri v. The Former Yugoslav Republic of Macedonia***. The application concerned the extraordinary rendition<sup>655</sup> of an individual, Mr. El-Masri, wrongly suspected of being involved in terrorist activities. After being seized and detained by Macedonian agents, the applicant was transferred to the custody of the US Central Intelligence Agency (CIA) while still in Macedonian territory, and subsequently sent to a secret detention facility in Afghanistan. The applicant alleged that Macedonia had been responsible for ill treatment while he was detained under its custody and "for the failure to prevent him from being subjected to 'capture shock' treatment when transferred to the CIA rendition team at Skopje Airport". Moreover, Mr. El Masri further complained that Macedonia had been responsible for his ill-treatment in the "Salt Pit" detention facility in Afghanistan "by having knowingly transferred him into the custody of US agents even though there had been substantial grounds for believing that there was a real risk of such ill-treatment"<sup>656</sup>. Mr. El-Masri reported that while detained in Salt Pit, he suffered physical assaults, sleep deprivation, forced feeding, received inadequate food and water, and lack of any medical assistance. The applicant claimed that such conditions amounted to treatment contrary to Article 3 ECHR, what was confirmed by the Court. Also, in the context of this article, Mr. El-Masri complained that the investigation conducted by the Macedonian authorities on the events reported had not been effective<sup>657</sup>.

The UN Office of the High Commissioner for Human Rights and the NGOs Redress, AI and ICJ, which contributed with written observations as third-party interveners, all

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<sup>655</sup> For an analysis of the practice of extraordinary rendition, see for example: European Center for Constitutional and Human Rights (Ed.) *CIA – Extraordinary Rendition, Flights, Torture and Accountability – An European Approach*. Germany: ECCHR, 2009; WEISSBRODT, David; BERGQUIST, Amy. *Extraordinary Renditions: A Human Rights Analysis*. In: Harvard Human Rights Journal, Vol. 19, 2006, p. 123-160.

<sup>656</sup> ECtHR. *Case of El-Masri v. The Former Yugoslav Republic of Macedonia*, Judgment of 13 December 2012, at para. 168.

<sup>657</sup> Ibid.

referred to the right to truth, supporting its recognition in the case in question. The OHCHR even emphasized that the right to truth is “an autonomous right triggered by gross violations”<sup>658</sup>, while the NGOs pointed to the connection of this right with the fight against impunity and the suppression of information concerning the practice of serious human rights violations<sup>659</sup>.

The ECtHR, taking these submissions of the third-party interveners into consideration, addressed the right to truth under Article 3 ECHR in the context of the inadequate character of the investigation regarding the extra judicial rendition. It considered that the case of *El-Masri* is important “not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened”<sup>660</sup>. It then noted that the issue of extraordinary rendition is attracting worldwide attention, triggering inquiries “by many international and intergovernmental organizations, including the United Nations Human Rights bodies, the Council of Europe and the European Parliament”<sup>661</sup>. In the view of the latter, some States concerned were not interested in having the truth of these cases revealed. In this regard, the Court recognized that “the concept of ‘State secrets’ has often been invoked to obstruct the search for the truth”, affirming that the authorities of the Former Yugoslav Republic of Macedonia used this same approach “to hide the truth” of what had happened to Mr. *El-Masri*<sup>662</sup>.

These authorities after having been informed of the allegations of the applicant “should have endeavored to undertake an adequate investigation in order to prevent any appearance of impunity in respect of certain acts”. Contrarily, by not doing so, it denied the applicant information regarding what had happened, including obtaining a detailed account of the “suffering he had allegedly endured and the role of those responsible for his alleged ordeal”. The Court then concluded that the summary investigation conducted by the Macedonian authorities cannot be considered “as an effective one capable of leading to the identification and punishment of those responsible for the alleged events and of establishing the truth”<sup>663</sup>. The ECtHR found therefore a violation of Article 3 ECHR in its procedural limb.

The applicant, however, based his right to know to the truth not only on Article 3 ECHR, but also on Article 10 ECHR (Freedom of Expression). He alleged to have the right to be

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<sup>658</sup> *Ibid.*, at para. 175.

<sup>659</sup> *Ibid.*, at para. 177-179.

<sup>660</sup> *Ibid.*, at para. 191.

<sup>661</sup> *Ibid.*

<sup>662</sup> *Ibid.*

<sup>663</sup> *Ibid.*, at para. 192.



informed of the truth regarding the circumstances that led to the violations of his Convention rights. The Court considered that such allegation “overlaps with the merits of the applicant’s complaints under Article 3 and has already been addressed in relation to those complaints”. It considered that the case of Mr. El-Masri did not raise any issue, which should be examined under Article 10 alone. Therefore, the ECtHR concluded that such complaint is ill-founded and rejected it in accordance with Article 35 §§ 3 (a) and 4 of the Convention<sup>664</sup>.

These analyses made by the ECtHR concerning the right to truth resulted in two joint opinions in the case of Mr. El-Masri, which clearly reveals the doubts about the path that this right should take in the Court’s decisions. The opinion of Judges Tulkens, Spielmann, Sicilianos and Keller argued that the right to truth was denied in the context of the absence of any effective remedies to the victim, which violates Article 13 ECHR. The Judges explain that *truth* in this scenario should not be understood in a “philosophical or metaphysical” way, but as a right “to ascertain and establish the true facts”<sup>665</sup>. For example, in enforced disappearance cases, the right to truth is a specifically “compelling norm”, what can be explained due to the secrecy surrounding the victims’ fate<sup>666</sup>.

In the case of Mr. El-Masri, based on the findings of the Court, one could conclude that the right to truth has a place in the context of Article 3 ECHR. Nevertheless, the Judges Tulkens, Spielmann, Sicilianos and Keller found that the Court is not really explicit about that even when it notes “that there was an inadequate investigation which deprived the applicant of the possibility of being informed”<sup>667</sup>. The Judges, contrarily to what was decided in the sentence of the ECtHR, affirm that the right to truth would be better placed in the context of Article 13 ECHR, especially considering the link to the procedural obligations under Articles 3, 5 (right to liberty and security) and 8 (right to respect for private and family life). Such view would be justifiable based on the gravity of the human rights violations in issue, committed in the context of the secret detentions and renditions system, together with the widespread impunity commonly present in multiple jurisdictions in respect of such practices<sup>668</sup>.

The Judges further clarify that the right to truth is “not a novel concept in our case-law, nor is it a new right”; it is implicit established in other provisions of the ECHR, particularly the procedural aspect of Articles 2 and 3, “which guarantee the right to an investigation

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<sup>664</sup> Ibid., at para. 264.

<sup>665</sup> Ibid., Joint Concurring Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller, at para. 2.

<sup>666</sup> Ibid.

<sup>667</sup> Ibid., at para. 3.

<sup>668</sup> Ibid., at para. 4.

involving the applicant and subject to public scrutiny". The truth is the objective of the investigations and the "*raison d'être* of the related quality requirements", such as transparency, diligence, independence, and disclosure of results. For society, truth helps "strengthening confidence in public institutions and hence the rule of law". For those individuals directly involved – the relatives and friends –revealing "the true facts and securing an acknowledgment of serious breaches of human rights and humanitarian law" is a measure of reparation – a form of redress – sometimes even more important than compensation. Moreover, the Judges considered that "the wall of silence and the cloak of secrecy prevent these people from making any sense of what they have experienced and are the greatest obstacles to their recovery"<sup>669</sup>.

The joint opinion ends with the conclusion that an explicit reference to the right to truth as flowing from Article 13 ECHR would not be original, but it would in a "sense cast renewed light on a well-established reality". Taking this into consideration, the Judges claimed "that the judgment's somewhat timid allusion to the right to truth" under Article 3 ECHR in addition to the absence "of an explicit acknowledgment of this right in relation to Article 13 of the Convention give the impression of a certain over-cautiousness"<sup>670</sup>.

Contrarily to the understanding of Judges Tulkens, Spielmann, Sicilianos and Keller, the joint opinion of Judges Casadevall and López Guerra considered that no separate analysis concerning the existence of a "right to truth" was necessary. This was justified on the fact that all investigations involving ill-treatment must serve to clarify the circumstances - which caused the injuries suffered by the victims - and to identify the perpetrators. The Judges claimed to be "evident" that the objectives of any investigation are to find out "the truth of the matter" independently of how important is the case for the general public, which makes the separate analysis of the right to truth in the case of El-Masri "redundant"<sup>671</sup>.

According to Judges Casadevall and López Guerra, the right to a serious investigation, which is correspondent to the right to truth, derives from Articles 2 and 3 ECHR. These rights should be equally considered not only in cases which attract wide public attention, but also in cases which do not. The Judges, thus, concluded that "as far as the right to truth is concerned, it is the victim, and not the general public, who is entitled to this right as resulting from Article 3 of the Convention, in the light of the Court's case-law"<sup>672</sup>.

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<sup>669</sup> Ibid., at para. 5-6.

<sup>670</sup> Ibid, at para. 7 and 10.

<sup>671</sup> Ibid., Joint Concurring Opinions of Judges Casadevall and López Guerra.

<sup>672</sup> Ibid.

When examined together, these two divergent opinions reveal not only the disagreements regarding the right to truth, but also how the Court adopted an intermediate view between a more elaborated perspective of this right and its full equalization with the duty to investigate<sup>673</sup>. Nevertheless, despite the important step in recognizing the individual and societal dimensions of the right to truth, its references in the case were scarce, leaving doubts on crucial aspects of the right in question. These would include, e.g. if the right to truth is an independent right, understood separately from the duty to investigate, or the legal implications of such societal dimension. In any case, the El-Masri application was the first in which the ECtHR made an explicit mention to the general public's right to know.

The disagreements regarding the right to truth would continue in future cases of the ECtHR, such as in ***Janowiec a.o. v. Russia***. This case, also known as the “Katyn application”, concerned fifteen Polish nationals who were relatives of twelve victims of the Katyn Massacre of 1940. The applicants, the youngest of whom was then seventy years old<sup>674</sup>, were mostly children of the executed Polish victims. They claimed that the procedural limb of Article 2 – the duty of effective investigation into a case of deprivation of life of their closest – had been breached since 1998, when Russia ratified the ECHR. Furthermore, the applicants accused the Russian authorities of having subjected them to inhuman treatment in breach of Article 3 due to the lack of information about the fate of their relatives, additionally to the dismissive approach towards their requests for information<sup>675</sup>.

The Soviet Union had recognized the responsibility for the Massacre only in 1990. In this year, it initiated investigations into the events of 1940, which were concluded in 2004 in secrecy. Furthermore, the Russian Chief Military Prosecutor's Office claimed, in response to the applicants' initiatives to solve the matter at domestic level, that there was no evidence of the execution of Polish citizens in 1940. The only fact that could be proved was the detention of Polish nationals in camps in the spring of 1940, who would “had disappeared”<sup>676</sup> afterwards. The Russian authorities disregarded all evidence concerning the so-called dispatching lists “at the disposal of the NKVD”<sup>677</sup>, which contain names of

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<sup>673</sup> FABBRINI, Federico. *The European Court of Human Rights, Extraordinary Renditions and the Right to truth: Ensuring Accountability for Gross Human Rights Violations Committed in the Fight Against Terrorism*. In: Human Rights Law Review, Vol. 14, 2014, p. 102.

<sup>674</sup> KAMINSKI, Ireneusz C. *The Katyń Massacres before the European Court of Human Rights: From Justice Delayed to Justice Permanently Denied*. In: East European Politics and Societies and Cultures, Volume 29, Number 4, November 2015, p. 784–810.

<sup>675</sup> ECtHR. Case of *Janowiec a.o. v. Russia*. Judgment of 21 October 2013.

<sup>676</sup> Ibid, at para. 174.

<sup>677</sup> ECtHR. Case of *Janowiec a.o. v. Russia*. Judgment of 16 April 2012, at para. 122.

the prisoners of war and specific dates of their transportation. Additionally, the Russian authorities also dismissed the results of the German excavation in the Katyń Forest in 1943, when the remains of three people were identified<sup>678</sup>.

In the ECtHR, the former Fifth Section<sup>679</sup> conducted the first judgment of the *Katyn application* on 16 April 2012. Regarding the procedural aspect of Article 2 ECHR, the Chamber decided not to be able to take cognizance of the merits of the complaint, despite recognizing that the Katyń Massacres were a war crime and therefore imprescriptible under international law. This fact alone, in the view of the majority, was not enough to fulfill the Court's competence to verify whether the investigations at domestic level were effective. Moreover, the majority (Judges from Russia, Ukraine, Slovenia, and the Czech Republic) decided that information shedding new light on the crime's circumstances is a necessary requirement for the Court's competence. Accordingly, new elements concerning the crime in question should come into the public domain after the State's ratification of ECHR, providing "a bridge from the distant past into the recent post-ratification period"<sup>680</sup>. In the case of *Katyn*, the Judges found that no such "bridge" existed.

In regard to the obligation imposed by Article 3 ECHR, the Chamber emphasized its humanitarian nature, urging the authorities to react to the "plight of the relatives of the dead or disappeared individual in a humane and compassionate way"<sup>681</sup>. States are bound to comply with the requirements of Article 3 even when they are not responsible for the original act of death or disappearance. Nevertheless, for a relative to be victim of ill treatment in the context of Article 3, the ECtHR takes into consideration "the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question and the involvement of the family member in the attempts to obtain information about the disappeared person"<sup>682</sup>. In the case of *Katyn*, the Court concluded that children born after the disappearance or death of the father do not have strong family ties with them, as they did not have any contact with the ancestor. Regarding grandchildren and nephews, the Chamber also argued that they do not have strong family ties with the ancestors in question. Therefore, the Court found that they are not victims of ill treatment resulting from the absence of information

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<sup>678</sup> Ibid., at para. 123.

<sup>679</sup> The Judges which composed the chamber were Dean Spielmann (president, Luxembourg), Karel Jungwiert (Czech Republic), Boštjan M. Zupančič (Slovenia), Anatoly Kovler (Russia), Mark Villiger (Swiss representing Liechtenstein), Ganna Yudkivska (Ukraine), and Angelika Nusberger (Germany).

<sup>680</sup> ECtHR. Case of *Janowiec a.o. v. Russia*. Judgment of 16 April 2012, at para. 140.

<sup>681</sup> Ibid., at para. 152.

<sup>682</sup> Ibid., at para. 151.

related to their relatives. In other words, only children - who met the father (or mother) - and spouses of the disappeared or dead victim fall into the scope of Article 3 ECHR<sup>683</sup>.

According to this understanding, the Court considered that only the nine children and the widow of the Katyn victims could be considered themselves victims under Article 3 ECHR. In their regard, the ECtHR stated that they suffered a double trauma, i.e. losing their relatives in the war and not being allowed “for political reasons to learn the truth about what had happened”. Consequently, they were “forced to accept the distortion of historical fact by the Soviet and Polish Communist authorities for more than fifty years”<sup>684</sup>. The Chamber revealed to be struck by the resistance of the Russian authorities “to recognize the reality of the Katyn massacre, to which the applicants’ relatives had fallen victims”<sup>685</sup>.

In this context, the Court emphasized that “the authorities’ obligation to account for the fate of the missing person cannot be reduced to a mere acknowledgment of the fact of death”, even when the State “is not legally responsible for the death or disappearance”<sup>686</sup>. In the view of most of the Chamber, Article 3 requires the States “to exhibit a compassionate and respectful approach to the anxiety of the relatives of the deceased or disappeared person and to assist the relatives in obtaining information and uncovering relevant facts”. Accordingly, if the State remains inert, such silence “in face of the real concerns of the relatives may only be categorized as inhuman treatment”<sup>687</sup>.

Similarly to the understanding of the Human Rights Committee concerning Article 7 ICCPR, the ECtHR considered that Article 3 ECHR requires the respondent State to account for the circumstances of the death and the location of the grave of the victims. In the case of Katyn, the Russian authorities did not inform the applicants about the circumstances surrounding the death of their relatives and did not make any effort to locate their burial sites<sup>688</sup>.

By alleging not to be possible to clarify the victims’ fate, the Russian authorities – according to the Court – denied that such crime against humanity took place in Katyn, “which runs counter to the fundamental values of the Convention and of democracy, namely justice and peace”<sup>689</sup>. The ECtHR thus concluded that the applicants had to

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<sup>683</sup> Ibid., at para. 151-154.

<sup>684</sup> Ibid., at para. 156.

<sup>685</sup> Ibid., at para. 159.

<sup>686</sup> Ibid.

<sup>687</sup> Ibid., at para. 162, 163. See also: ECtHR. *Case of Varnava and Others v. Turkey, Judgment of 18 September 2009, at para. 201.*

<sup>688</sup> Ibid., at para. 164.

<sup>689</sup> Ibid., at para. 165.

carry the burden of the efforts to clarify the facts concerning the circumstances of their relatives' death, "whereas the Russian authorities demonstrated a flagrant, continuous and callous disregard for their concerns and anxieties". For these reasons, the Court observed that the way in which the state's authorities dealt with the applicants' enquiries characterized inhuman treatment within the meaning of Article 3 of the Convention<sup>690</sup>.

In June 2012, the representatives of the applicants requested to refer the Katyn case to the Grand Chamber. This time, six NGOs presented *amicus curiae* briefs supporting the claims of the applicants. These organizations were Amnesty International, Open Society Justice Initiative, Public International Law & Policy Group (The Hague), and the Human Rights Center "Memorial" which acted jointly with the European Human Rights Advocacy Center and the Essex Transitional Justice Network. Despite this cooperation, the ruling ended up being more negative to the applicants than the first chamber's decision. The Grand Chamber rejected that the relatives of the Katyn victims had been themselves victims of ill treatment in the context of Article 3 ECHR. The only violation found by the Grand Chamber concerned Article 38 ECHR since Russia had not duly co-operated with the Court<sup>691</sup>.

Concerning the state's obligation to account for the fate of the missing persons mentioned in the 2012 decision, the Grand Chamber restricted itself to state that as the applicants knew that their close relatives had been murdered, there was no uncertainty concerning their fate. The suffering of the applicants, in the view of the Court, did not reach a dimension and character distinct from the emotional distress considered inevitable to relatives of victims of serious human rights violations. Accordingly, the majority of the Grand Chamber concluded that there was no violation of Article 3 ECHR<sup>692</sup>.

In two separate opinions – one of Judges Ineta Ziemele, Vincent A. de Gaetano, Julia Laffranque, and Helen Keller; and another of Judge Wojtyczek – the right to truth was again a matter of debate, receiving special attention. In the Judge's Wojtyczek opinion, the relatives were victims of ill treatment, characterizing a violation of Article 3 ECHR. This understanding was based on the facts that the applicants lost their relatives in the war; were confronted with official propaganda attributing the crime to the Germans; and during the years of the communist regime "any private attempt to conduct research into the truth of the Katyn massacre was punished"<sup>693</sup>. In this regard, the Judge reaffirmed

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<sup>690</sup> Ibid., at para. 166.

<sup>691</sup> ECtHR. Case of *Janowiec a.o. v. Russia*. Judgment of 21 October 2013.

<sup>692</sup> Ibid., at para. 188.

<sup>693</sup> Ibid. Partly Concurring and Partly Dissenting Opinion of Judge Wojtyczek, at para. 2.

the Chamber's view of the 2012 decision which found that the applicants were in fact victims of multiple traumas – the killing, the denial and the lack of information<sup>694</sup>.

Contrary to the conclusion of the Grand Chamber, Judge Wojtyczek disagreed with the distinction between two categories of applicants and, ultimately, of relatives. In the Judges' view, all applicants revealed to have a strong family tie with the Katyn victims. This includes those children who did not have the chance to meet the father due to the massacre<sup>695</sup>.

Similarly to Judge's Wojtyczek opinion, Judges Ziemele, Gaetano, Laffranque, and Keller also argued that the applicants were victims of violation of Article 3 ECHR and that the Russian investigation into the events was not effective, violating therefore Article 2 in its procedural aspect. According to their partly dissenting opinion, the Katyn case concerns the "obligation to investigate and prosecute gross human rights and humanitarian law violations which under international law are not subject to statutory limitations"<sup>696</sup>. In this context, concomitantly to the applicants' "undeniable interest" in the clarification of the whereabouts of their relatives, the obligation to investigate and prosecute those responsible for grave human rights and serious humanitarian law violations also attends "fundamental public interests by allowing a nation to learn from its history and by combating impunity"<sup>697</sup>.

The Judges supported this claim on the *UN 2005 Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*<sup>698</sup> which states that reconciliation lies on the full satisfaction of justice. For this to be achieved, the interests of the victims must be jointly secured, with "observance of the right to know and, by implication, the right to truth, the right to justice and the right to reparation, without which there can be no effective remedy against the pernicious effects of impunity"<sup>699</sup>. Moreover, the right to truth constitutes "a vital safeguard against the recurrence of violations", protecting "the collective memory of the affected people, which is a part of its

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<sup>694</sup> Ibid, at para. 10.

<sup>695</sup> Ibid.

<sup>696</sup> Ibid., Jointly Partly Dissenting Opinion of Judges Ziemele, Gaetano, Laffranque, and Keller, at para. 1

<sup>697</sup> Ibid., at para. 24.

<sup>698</sup> United Nations. Commission on Human Rights. *Updated Set of principles for the protection and promotion of Human Rights through action to combat impunity*. E/CN.4/2005/102/Add.1, 8 February 2005.

<sup>699</sup> ECtHR. Case of *Janowiec a.o. v. Russia*. Judgment of 21 October 2013. Jointly Partly Dissenting Opinion of Judges Ziemele, Gaetano, Laffranque, and Keller, at para. 24.

heritage”<sup>700</sup>. The Judges considered that the case in question turned “the applicants’ long history of justice delayed into a permanent case of justice denied”<sup>701</sup>.

Indeed, in the case of Katyn, the European Court adopted a very complicated position towards the relatives, which reflects clearly its unwillingness to confront the Second World War’s “black chapter”<sup>702</sup>. One first issue worth mentioning is the distinction between varied *categories* of relatives defined by the Chamber under Article 3 ECHR. The lack of contact between some applicants and their relatives –victims of Katyn – cannot be used as a synonym for lack of family ties especially when considered that this absence of contact is due to the victims’ killing. It is because the victims died in the war that the applicants had no contact with them. To use this as an argument aimed at denying the applicants the protection they demand means to reproduce the injustice they are suffering. Moreover, to support that *strong family ties* only exist between children and parents and among spouses is an unquestionably narrow view of *family*, which restricts severally the beneficiaries.

Another issue which deserves special attention concerns the denial by the Grand Chamber to consider that the applicants faced uncertainty regarding their relatives’ fate. By finding that the death of the relatives of the applicants became “an established historical fact”<sup>703</sup>, the Court disregarded the right of the families to a full disclosure of what had happened including the right to have the remains of the bodies returned to them in order to facilitate burial and commemoration rituals. In this aspect, the Chamber delivered a more protective (and more appropriated) view to the applicants when it recognized that “the authorities’ obligation to account for the fate of the missing person cannot be reduced to a mere acknowledgment of the fact of death”<sup>704</sup>. To inform the relatives of the circumstances of the death of their kin as well as the location of the grave is an obligation incumbent to the States under Article 3 ECHR in respect to the relatives<sup>705</sup>. Therefore, the conclusion of the Grand Chamber that the certainty of the death – which by the way was not confirmed by the Russian authorities – excluded a violation of Article 3 ECHR seems very limited.

This becomes even graver when considering that the Russian authorities concluded the investigations, which could possibly provide information on the applicants’ relatives, in

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<sup>700</sup> Ibid.

<sup>701</sup> Ibid., at para. 36.

<sup>702</sup> ECtHR. Case of *Janowiec a.o. v. Russia*. Judgment of 16 April 2012. Joint Concurring Opinion of Judges Kovler and Yudkivska.

<sup>703</sup> ECtHR. Case of *Janowiec a.o. v. Russia*. Judgment of 21 October 2013, at para. 186.

<sup>704</sup> ECtHR. Case of *Janowiec a.o. v. Russia*. Judgment of 16 April 2012, at para. 162.

<sup>705</sup> Ibid.



2004 in secrecy. In other words, the investigations were still taking place after Russia ratified the ECHR, which happened in 1998. Almost seven years after the ratification, the investigations ended without the relatives having access to the results. This fact could have been easily used by the Court as the *bridge*<sup>706</sup> required to connect the past events occurred before the ratification of the Convention with the recent post entry into force period. Also, it was one more reason to justify the applicants' anguish situation to find out what happened to their relatives.

The Russian scholar Mr. Yaroslav Kozheurov argues that the events of the Katyn tragedy could have been analyzed under Article 10 ECHR (freedom of expression). If focused on the secrecy of the Russian investigations, the argument supporting a breach of Article 10 could have led – in the view of the scholar - to the recognition of the right to truth by the Grand Chamber<sup>707</sup>. Nevertheless, it is important to note that the obstacles faced by the applicants in the case of Katyn seem to be based on the temporal scope of the European Convention rather than on the articles which sustain their claims. Also, in past cases, the ECtHR had already rejected the possibility of recognizing the right to truth under Article 10 ECHR – one more reason why such argument would likely not have worked in the Katyn application. In any case, it is indeed regrettable that the Grand Chamber in the case of Katyn did not recognize the right to truth, what could likely have provided the relatives the justice they were so long waiting for.

Shortly after judging the Katyn case, the ECtHR again faced an application involving war-times. The case ***Lejla Fazlić a.o. v. Bosnia and Herzegovina*** concerned disappearances in the context of the ethnic cleansing of the *Prijedor* area during the war in Bosnia and Herzegovina. The applicants, who are relatives of the disappeared victims, alleged that there was no effective investigation into the disappearance and death of their family members, and that the authorities had been indifferent to their suffering. They relied on Articles 2, 3, 5, 8 and 13 ECHR<sup>708</sup>.

The Court, in its turn, rejected the application considering especially the authorities' efforts to clarify what had happened, including conducting exhumations in the *Prijedor* and nearby areas. The ECtHR found that, although unfortunate, the fact that the remains of the applicants' missing relatives have not yet been identified is not sufficient to find a

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<sup>706</sup> ECtHR. Case of *Janowiec a.o. v. Russia*. Judgment of 21 October 2013, at para. 160.

<sup>707</sup> KOZHEUROV, Yaroslav. *The Case of Janowiec and other v. Russia: Relinquishment of Jurisdiction in Favour of the Court of History*. In: XXXIII Polish Yearbook of International Law, 2013, p. 241.

<sup>708</sup> ECtHR. Case *Lejla Fazlić a.o. v. Bosnia and Herzegovina*. Decision of 3 June 2014, at para. 29.

procedural violation of Article 2 ECHR<sup>709</sup>. This understanding clearly indicates once again that the European Court is tending not to consider the return of the remains of the victims to their families as an aspect of the right to truth. Unfortunately, such perspective excludes from the relatives the possibility of a full disclosure and of an “absolute proof of death”<sup>710</sup> of their kin.

Above all, it would have been crucial to consider that the relatives have been waiting more than twenty years to know what exactly happened to their kin. Such long time living under this constant state of uncertainty is beyond any doubt unreasonable, characterizing a violation of Article 3 ECHR in respect to the relatives. As the Director of the organization TRIAL, who helped the applicants to bring the case before the ECtHR, precisely noted: “*the families are still awaiting justice to be served and, until the fate and whereabouts of their loved ones are established with certainty, they will not be able to mourn them and move on with their lives*”<sup>711</sup>.

Regarding the access of the relatives to the ongoing investigations, the Court emphasized “the importance of the right of victims and their families and heirs to know the truth about the circumstances surrounding events involving a massive violation of rights as fundamental as that of the right to life”<sup>712</sup>. Nevertheless, the Court explained that the procedural aspect of Article 2 does not demand the authorities to provide access to police files, or copies of all documents collected during an ongoing inquiry, or to consult or inform the relatives about every step. In other words, the ECtHR understands that the names of the suspects against whom insufficient evidence has been gathered for prosecution should be not immediately given to the families. Such attitude could lead the families to believe that the suspects are indeed guilty which may possibly cause negative repercussions<sup>713</sup>.

On 24 July 2014, the right to truth would again gain attention in two cases involving the Polish State. Similarly to the *El-Masri* case, the applicants, **Mr. Husayn** a stateless Palestinian and **Mr. Al-Nashiri** a citizen of Saudi Arabia, were victims of extraordinary rendition in the context of the fight against terrorism as response to the events of 11

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<sup>709</sup> Ibid., at para. 35.

<sup>710</sup> KLINKNER, Melanie; SMITH, Ellie. *The Right to Truth, Appropriate Forum and the International Criminal Court*. In: Natalia Szablewska; Sascha-Dominik Bachmann (Eds). *Current Issues in Transitional Justice towards a More Holistic Approach*. Springer, 2015, p. 7.

<sup>711</sup> Trial. Bosnia and Herzegovina: ECtHR Denies Justice to Victims of Enforced Disappearances and Arbitrary Executions. Accessed 1 April 2017. <<https://trialinternational.org/latest-post/bosnia-and-herzegovina-echr-denies-justice-to-victims-of-enforced-disappearances-and-arbitrary-executions/>>

<sup>712</sup> Ibid., at para. 38.

<sup>713</sup> Ibid. See also: ECtHR. *Case of Mujkanovic v. Bosnia and Herzegovina*. Decision of 3 June 2014, at para. 40.

September 2001. The applicants were seized in 2002, followed by several transfers between secret locations in different countries, and finally detained for several months in Poland. The Court collected sufficient evidence to conclude that a secret agreement between the US and Polish authorities existed, which allowed the organization of flights, transfers and detention of individuals outside the usual formalities. Moreover, Poland was aware of the conditions concerning the treatment of the applicants and therefore bore responsibility for their situation<sup>714</sup>.

In both cases, the third-party interveners again submitted written observations supporting the recognition of the right to truth. In the case of *Husayn (Abu Zubaydah)*, specifically, Amnesty International and the International Commission of Jurists jointly presented a written submission dedicated almost entirely to the right to truth. In their document, the organizations propose the recognition of the right to truth not only under the duty to investigate – flowing from the procedural limb of Articles 3 and 5 ECHR – but also under Article 13 (Right to an effective remedy). They argue that in cases of rendition and secret detention, “the positive obligations of the States require that they take all reasonable measures open to them to disclose to victims, their families and society information about the human rights violations those victims suffered within the renditions system”<sup>715</sup>. Furthermore, the interveners requested the Court to consider that the doctrine of state secrets cannot be used to prevent investigations on crimes under international law. To allow such limitation would be inconsistent with the right to truth, including its individual and collective dimensions, i.e. the general public’s right to know the truth about gross violations of human rights<sup>716</sup>.

In both judgments, the Court admitted that the “Polish public has a legitimate interest in being informed of the investigation and its results”. It also stressed the importance of democratic oversight over intelligence services and expressed concerns whether the Polish legal order contained “appropriate safeguards – both in law and in practice – against intelligence services violating Convention rights, notably in the pursuit of their covert operations”<sup>717</sup>.

In regard specifically to the right to truth, the ECtHR referred to it explicitly under the procedural aspect of Article 3. The Court explained that in cases involving serious

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<sup>714</sup> ECtHR. *Case of Husayn (Abu Zubaydah) v. Poland*. Judgment of 24 July 2014; *Case of Al Nashiri v. Poland*. Judgment of 24 July 2014

<sup>715</sup> Written Submissions on Behalf of Amnesty International and the International Commission of Jurists Intervenors. *Husayn (Abu Zubaydah) v. Poland* Application no. 7511/13, 17 October 2013, p. 9.

<sup>716</sup> *Ibid*, p. 10.

<sup>717</sup> ECtHR. *Case of Husayn (Abu Zubaydah) v. Poland*. Judgment of 24 July 2014, at para. 491; *Case of Al Nashiri v. Poland*. Judgment of 24 July 2014, at para. 497.

violations of human rights, the right to truth belongs not only “to the victims of the crime and his or her family, but also to other victims of similar violations and the general public, who have the right to know what has happened”. The Grand Chamber noted that the investigations into serious human rights violations are essential in assuring “public confidence in their adherence to the rule of law and in preventing any appearance of impunity, collusion in or tolerance of unlawful acts”<sup>718</sup>.

Similarly to the case of *El-Masri*, the applicant Mr. Al-Nashiri complained under Article 10 ECHR that the State in question due to “its refusal to acknowledge, disclose and promptly and effectively investigate details of his secret detention, ill-treatment and rendition had violated his and the public’s right to truth”<sup>719</sup>. The UN Special Rapporteur, as a third-party intervener, supported the complaint, arguing that only the right to receive information under Article 10 could reflect entirely the collective dimension of the right to truth. Both these rights - to receive information and to the truth – about gross and systematic human rights violations are closely connected. To argue that the right to truth flows only from Article 3 presupposes that under international law, it could be invoked only by the victim of the underlying violation. Contrary to this understanding, the Special Rapporteur claimed that, once the right to truth was recognized as a “free standing principle of international law”, those entitled to invoke this right include not only the individuals with legitimate interest and representative interest groups, but also the media due to its “duty to seek the truth and to inform the public”<sup>720</sup>. Despite the complaint of the applicant and the statements of the UN Special Rapporteur, the Court declared the complaint ill-founded and therefore inadmissible<sup>721</sup>.

Few months after judging Mr. Husayn and Mr. Al-Nashiri’s applications, the Grand Chamber delivered its judgment on the case ***Mocanu a.o. v. Romania***. The applicants - Mrs Anca Mocanu, Mr Marin Stoica, Mr Teodor Mărieș (President of the Association 21 December 1989) – complained that the Romanian authorities did not conducted an effective investigation into the repression of which they had been victims during the anti-government demonstrations of June 1990 in Bucharest. The intervention of security forces in the demonstrations resulted in numerous civilian victims, such as the husband of Ms. Anca Mocanu, Mr Velicu-Valentin Mocanu, who was killed by gunshots. Regarding the applicant, Mr. Teodor Mărieș, he was the leader of a group of demonstrators on University Square in June 1990. He detained for fourteen hours, being subjected to acts

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<sup>718</sup> ECtHR. *Case of Husayn (Abu Zubaydah) v. Poland*. Judgment of 24 July 2014, at para. 489; *Case of Al Nashiri v. Poland*. Judgment of 24 July 2014, at para. 495.

<sup>719</sup> ECtHR. *Case of Al Nashiri v. Poland*. Judgment of 24 July 2014, at para. 580.

<sup>720</sup> *Ibid.*, at para. 483.

<sup>721</sup> *Ibid.*, at para. 581-582.

of physical and psychological violence. After his release, Mr. Măries found the headquarters of his organization *21 December* ransacked. Few days later, he was again stopped and arrested. He was held in pre-trial detention until 30 October 1990 and finally acquitted of all the charges by the Supreme Court of Justice on 24 February 1992. Contrarily to Mr. Măries, the applicant Mr. Marin Stoica, did not participate in the demonstrations. He was walking on the street in his way to work when armed individuals took him by force. After suffering ill treatment, which led him unconscious, he woke up in the hospital. Afraid of being further victim of ill treatment, Mr. Stoica fled from the hospital and went home<sup>722</sup>.

Before being referred to the Grand Chamber, the case of *Anca Mocanu* was judged by the Third Section of the ECtHR on 13 November 2012. In this first decision, under the procedural limb of Article 2 ECHR, the Judges reaffirmed the importance for cases of gross violations of the right of victims, their families, heirs and society to be informed of the truth concerning the circumstances of those events, “which implies the right to an effective judicial investigation”<sup>723</sup>. By questioning the investigation conducted by the Romanian authorities into the death of Mr. Mocanu, the ECtHR emphasized its relevance not only to the wife of the victim, Ms. Mocanu, but also to Romanian society, which has the right to know what had happened. This implies “the right to an effective judicial investigation and a possible right to compensation”, which “ought to have prompted the domestic authorities to deal with the case speedily and without unnecessary delay”, avoiding therefore “any appearance of impunity for certain acts”<sup>724</sup>.

Regarding Mr. Măries, the Court found that the State did not fail in its procedural obligation arising from Article 3 ECHR, as the applicant did not present any evidence of the physical and mental effects resulted from the ill-treatment he suffered. Also, the ECtHR concluded that the applicant took too long to present any complaints before the domestic authorities. For those reasons, the Court declared his complaint inadmissible. Similarly to this understanding, when analyzing the complaint of Mr. Stoica, the Court considered that there was no violation of Article 3 ECHR due to the applicant’s delay (eleven years) in presenting his complain before the Romanian authorities. Regarding the ransacking committed by the Romanian authorities in the headquarters of the

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<sup>722</sup> ECtHR. *Case of Mocanu a.o. v. Romania*. Judgment of 13 November 2012 (Third Section); Judgment of 17 September 2014 (Grand Chamber).

<sup>723</sup> ECtHR. *Case of Mocanu a.o. v. Romania*. Judgment of 13 November 2012, at para. 224.

<sup>724</sup> *Ibid.*, at para. 230. Similarly: *Case of Jelic v. Croatia*. Judgment of 12 June 2014, at para. 93-95.

*Association 21 December*, the Court found that the investigations, which lasted nineteen years, was excessively long, violating Article 6 § 1 ECHR<sup>725</sup>.

The decision of the majority of the Court holding that there was no violation of Article 3 under its procedural limb in respect to the applicants Mr. Stoica and Mr. Măries resulted in a debate with two separate opinions. Judge Streteanu agreed with the decision of the majority, sustaining that the violence committed against Mr. Stoica was indeed subjected to a limitation period under domestic law, reason why the authorities ended the investigations<sup>726</sup>. On the contrary direction, Judges Ziemele and Sikuta argued that ending an investigation alleging “prescription requires a serious analysis on the part of the Court as to the compatibility of such an outcome with the requirements of Article 3”. To this “serious analysis” it must be added that the events in question – which took place on 13 and 14 June 1990 - “are part of the process through which Romania overthrew the former totalitarian regime”<sup>727</sup>. The Judges emphasized that the Court’s case law does not accept the State to justify its inaction with pardon, amnesty or prescription<sup>728</sup>.

Moreover, despite Mr. Stoica’s delay in complaining about what happened to him, the most serious delays and inefficiencies can actually be attributed to the Romanian authorities “in circumstances where they were under a special obligation to shed light on what happened”<sup>729</sup>. Such circumstances, in the view of the Judges, involved gross violations of human rights which justify the importance “of a proper investigation charged with establishing the truth”<sup>730</sup>. Judges Ziemele and Sikuta then concluded for a violation of Article 3 ECHR in relation to Mr. Stoica.

The Grand Chamber would agree with Judges Ziemele and Sikuta in its judgment of 17 September 2014. In addition to the violation of Article 2 ECHR in respect to Ms. Mocanu, the Court also found a violation of Article 3 in respect to Mr. Stoica. Despite no explicit reference to the right to truth, the ECtHR recognized that the case is complex, but it does not justify the length of the investigations. The political and societal stakes attributed by the government as the cause of such length in the investigations represent, in the view of the Court, their importance to the Romanian society. These stakes should have led the authorities to confront the case “promptly and without delay in order to avoid any appearance of collusion or tolerance of unlawful acts”<sup>731</sup>.

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<sup>725</sup> Ibid., at para. 263-281.

<sup>726</sup> Ibid., Concurring Opinion of Judge Streteanu.

<sup>727</sup> Ibid., Dissenting Opinion of Judge Ziemele Joint by Judge Sikuta at para. 1

<sup>728</sup> Ibid., at para. 4.

<sup>729</sup> Ibid.

<sup>730</sup> Ibid., at para. 5.

<sup>731</sup> ECtHR. *Case of Mocanu a.o. v. Romania*. Judgment of 17 September 2014, at para. 338.

The European Court would again deliver its opinion in a case of historical importance in October 2015. The case of **Vasiliauskas v. Lithuania** concerned the conviction for genocide of a former member of the Soviet repressive body MGB (Ministry of State Security) by Lithuanian courts. The applicant was accused of killing Lithuanian partisans in 1953, who were members of the *Movement of the Struggle for the Freedom of Lithuania*, resistant to the Soviet Union's invasion of Lithuania. The Lithuanian judiciary considered that the execution of the partisans and the consequent final dissolution of the resistant's movement constituted genocide. The applicant brought the case before the ECtHR questioning the Lithuanian's conception of genocide and therefore his conviction in the national courts in 2004<sup>732</sup>.

The right to truth, despite not mentioned in the Court's decision, was again a matter of debate in the dissenting opinion of Judge Ziemele. While most of the Court concluded that the condemnation for genocide of the applicant constituted a breach of Article 7 ECHR, Judge Ziemele found that – on the contrary – the conviction was in accordance with international law. In her view, the Court when confronted with the case in question dealt not only with the rights of the applicants; instead, it found itself “at the centre of a complex social process in a society seeking to establish the truth about the past and its painful events”<sup>733</sup>. The Judge also referred to the recent work of the United Nations on the issue of mass human rights violations, particularly, its set of principles to combat impunity which is “indispensable for peace in any society going through complex historical transitions”<sup>734</sup>. To Judge Ziemele, it would be very relevant for the European Court to be guided “by these broader principles regarding the right to truth and prohibition of impunity”<sup>735</sup>.

Again, the right to truth appears as a matter still disputable in the European Court. Despite already recognized under the procedural aspect of Articles 2 and 3 ECHR and under the substantive aspect of Article 3 ECHR, the right to truth has not yet been subjected to an extensive elaboration by the ECtHR. Additionally, the doubts expressed by some of its Judges in regard to the right to truth also reflect – as shown above in the case law - a cautious attitude of this Court when facing some cases of gross violations of human rights. That is, the reluctance of the Court in introducing the right to truth in its case law appears to be also a part of a broader hesitation when confronting gross

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<sup>732</sup> ECtHR. Case of *Vasiliauskas v. Lithuania*, Judgment of 20 October 2015.

<sup>733</sup> Ibid., Dissenting Opinion of Judge Ziemele, at para. 27.

<sup>734</sup> Ibid. See: United Nations. Commission on Human Rights. *Updated Set of principles for the protection and promotion of Human Rights through action to combat impunity*. E/CN.4/2005/102/Add.1, 8 February 2005.

<sup>735</sup> Ibid.

violations, especially considering *inter alia*: the limitations on the measures of reparation, the lack of recognition of the status of victims for the relatives of those who suffered violation of their right to life and the failure to acknowledge the essentiality of exhumations for the full disclosure of the cases.

Despite some progress of the European Court in the elaboration of the right to truth, the limitations mentioned above seem not to be in accordance with the development at international level that such right has acquired so far. Unfortunately, this is a burden which mostly falls on the victims' shoulder and may contribute to the perpetuation of injustice and impunity.

### **Conclusion**

The recognition of the right to truth by human rights courts has been part of a gradual movement in which the victims, including the relatives of those deceased, and the NGOs played a central role. By taking their claims to the contentious sphere and demanding protection under the right to truth, the victims challenged the courts, pushing them to formulate new legal elaborations, which could "find a place" for this right in the American and European Conventions on Human Rights.

The answers provided by the courts varied. The Inter-American Court, for example, was the first to consent with the existence of the right to truth and, although revealing some initial reluctance, decided for an approach, which derived this right from the access to justice, i.e. from a combination of Articles 8 and 25 ACHR. Nevertheless, while associating the right to truth with the duty to investigate in most of its decisions, the IACtHR also presented said right as multifaceted, applying it differently depending on the case at stake. In the judgment of *Gomes Lund v. Brazil*, for example, the Court applied the right to truth as a fundament to justify a violation of Article 13 ACHR<sup>736</sup>. This was the first case in which the right to truth was considered, in the human rights case-law, as an independent right.

Furthermore, the IACtHR has also understood that the right to truth is a remedy for the victims, ordering the States to investigate human rights violations and to prosecute and punish those alleged responsible for them. The European Court, contrarily, kept a restrictive approach on reparations, limiting itself to order the States to pay pecuniary compensation to the victims. In fact, the ECtHR has insisted in a timid elaboration on the right to truth, which appears to be part of a broader scenario, i.e., of a certain reluctance

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<sup>736</sup> IACtHR. *Case of Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*. Preliminary Objections, Merits, Reparations, and Costs. Series C No. 219. Judgment of November 24, 2010.



to confront gross violations of human rights with the firmness they require. This becomes clear in cases like the *Katyn* application or the *Lejla Fazlić a.o. v. Bosnia and Herzegovina*.

Another Court, the Human Rights Chamber for Bosnia and Herzegovina, despite also having the ECHR as parameter, developed an approach on the right to truth, which differs significantly from the ECtHR. When facing the cases, especially of enforced disappearance occurred during the war in Bosnia-Herzegovina, the Chamber took into consideration the States' failure to inform the relatives "about the truth of the fate of their missing loved ones"<sup>737</sup>. Consequently, it included as measure of reparation the investigation of the alleged violations and the publicity of a full statement of disclosure of all relevant facts.

However, it is likely that the most important contribution of the Chamber, in contrast with the ECtHR, is the emphasis it added on returning the mortal remains of the deceased victims to their families, which includes to know where these mortal remains are located and their further exhumation. This is one central issue, also emphasized by the IACtHR, but which the ECtHR tends to underestimate in its decisions, especially due to its restricted view on the right to truth. In cases of enforced disappearance, the right to truth, when proper applied, should guarantee to the families of those disappeared the right to a full disclosure, i.e. to make a proper ceremony, including the burial or cremation, in accordance with their believes. Without this final act, the right to truth – in this type of case – remains incomplete and, most importantly, the victims' needs remain unfulfilled

In this regard, as one could infer from the reading of the case-law present in this chapter, the demands of the victims regarding the right to truth may vary, depending on the case at stake. Even in cases of enforced disappearance, the main claim – as mentioned in the case of *Gomes Lund* for example – may be the information concerning the final fate of the victim instead of the criminal investigation of what had happened. On the other hand, there are other cases of gross violations, such as extra-judicial execution, which may not require the exhumation of mortal remains, so fundamental in situations involving disappearances. These concrete situations reveal not only that there are multiple ways to apply the right to truth, but also that due to the different demands of the victims, to have one single understanding of this right is not desirable.

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<sup>737</sup> Human Rights Chamber for Bosnia and Herzegovina. Cases no. CH/01/7604 et al., *Selimovic & 48 Others v. the Republika Srpska (Srebrenica cases)*, (Decision on Admissibility and Merits of 7 March 2003),, at para. 191.

The jurisprudence of the human rights courts constitutes therefore a main source to understand the right to truth and the contexts in which this right is demanded to act. The lack of its recognition, while aiming at attending legal formalities, has proven to weaken the protection given to the victims, particularly for its repercussion in the measures of reparation. As the courts evolved their understanding on such right, one can clearly realize the fundamental role, when it comes to gross violations of human rights, which it acquired.

## **V. *Truth* as a Binding Norm: The International Convention on the Protection of All Persons from Enforced Disappearance**

The progressive importance attributed to the right to truth at international level, emphasized by its role in the fight against impunity and its development in human rights courts, would pose the need for the clarification of its meaning and scope in an international binding instrument. The elaboration of an International Convention on the Protection of All Persons from Enforced Disappearance created then the opportunity to debate the possibilities of placing *truth* as a *right* for the first time.

With the introduction of the right to truth in the ICED the question of how to implement this right would more than ever assume a central role. Would truth commissions be enough to achieve the objectives of the right to truth as established in the Convention? If not, what are other possible measures? And for cases falling outside the scope of disappearances? Taking these questions into consideration, the present chapter aims at investigation the process of including the right to truth in the ICED, including the challenges and supports such right found in the way. Also, this chapter will discuss possible measures to implement the right to truth, confronting the main controversies on the matter.

### ***The International Convention on the Protection of All Persons from Enforced Disappearance***

The International Convention on the Protection of All Persons from Enforced Disappearance was the first international legally binding instrument to provide for the right to truth. As mentioned in the previous chapters, the right to truth emerged in the context of the outbreak of enforced disappearance cases during the military dictatorships in Latin America. This close link between such right and the disappearances is quite present in the jurisprudence of human rights courts and standard settings. Therefore, the elaboration of an international convention on enforced disappearance would pose, as it did, the need to face the right to truth, to place it inside specific parameters, accommodating it in a proper normative framework.

The conceptual basis for the emergence of norms on disappearances was, as showed in the previous chapters, highly facilitated by the interaction between NGOs, as well as

through varied conferences which helped experts and victims to share and elaborate ideas. In this regard, it is worth noting this aspect of “sophistication”, as mentioned by the researcher Ms. Ann Clark<sup>738</sup>, resulted from this intense interaction and which, by encouraging the debate, allowed the human rights movement to reflect on the best development for the contemporary web of norms.

The question which arises, therefore, from the elaboration of an international convention on forced disappearance is what right to truth is provided for in the text, i.e. which are the demands that it covers and what kind of protection it offers. In other words, considering that the ICED is the only binding instrument until now to include the right to truth in its text, it is crucial to verify what it considered as the concept of the right to truth and what would be the legal consequences arising from it.

### *Background to the Elaboration of the ICED*

The project of an international convention covering enforced disappearance was lengthy expected by the relatives of disappeared victims and NGOs. Its preparation dates back the 1981 colloquium convened by the Human Rights Institute of the Paris Bar Association. As referred to in chapter III, the rapporteur of this colloquium, Mr. Louis Joinet, while member of the UN Sub-Commission and as Chairman-Rapporteur of the Working Group on the Administration of Justice, was fundamental in both drafting the Declaration and the Convention on Forced Disappearance of Persons. It was based on his draft that the UN Sub-Commission adopted in 1998 the draft international convention on the protection of all persons from forced disappearance<sup>739</sup>.

An important step in this process was the adoption of the Inter-American Convention on Forced Disappearance of Persons in 1994, which intensified the debates concerning international norms on disappearances, while NGOs such as AI, ICJ and FEDEFAM established a major cooperation to elaborate a draft international Convention. With this objective in mind, meetings concerning a possible convention began along with the 1994 session of the UN Sub-Commission. Shortly after, in 1996, AI convened an expert meeting to elaborate a first draft for submission to the UN Sub-Commission<sup>740</sup>. In 1997,

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<sup>738</sup> CLARK, Ann Marie. *Diplomacy of Conscience. Amnesty International and Changing Human Rights Norms*, p. 100.

<sup>739</sup> United Nations. Commission on Human Rights. *Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and Human Rights framework for the protection of persons from enforced or involuntary disappearances*, 7 January 2002, E/CN.4/2002/71, at para. 49.

<sup>740</sup> TAYLER, Wilder. *Background to the Elaboration of the Draft International Convention for the Protection of All Persons from Forced Disappearance*, p. 67. See also: ANDREU-GUSMAN, Federico. *The Draft International Convention on the Protection of all Persons from Enforced*

several members of NGOs met with the WGEID to debate issues related to the draft, including how the proposed convention should be monitored. A sessional working group of the UN Sub-Commission continued working on a draft, presenting a complete text in 1998 in a version which is mainly based on the UN Declaration on the Protection of All Persons from Enforced Disappearance, as well as on the Inter-American Convention on Forced Disappearance of Persons, the Convention Against Torture and the practice of WGEID<sup>741</sup>.

Attending the UN Commission's request, several Governments in addition to International organizations and NGOs elaborated their opinions on the 1998 draft. In 2000, the UNWGEID not only welcomed the initiative, but also presented its own comments on the text. In the following year, the UN Commission took two important initiatives in its resolution 2001/46. First, at paragraph 11, it requested the appointment of an independent expert, who would be Mr. Manfred Nowak, to "examine the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearance" and to determine breaches "in order to ensure full protection from enforced or involuntary disappearance"<sup>742</sup>. The result was the 2002 Report in which the UN Expert pointed *inter alia* not only for the need of a binding instrument on forced disappearances, as well as for a major gap concerning the right to truth. In his view, due to the lack of a unanimous consent on the contours of the right to truth, any future binding instrument on enforced disappearances should define the concept and the legal consequences of such right<sup>743</sup>.

The other initiative presented by the UN Commission in its resolution 2001/46 was the creation of an Inter-Sessional Open-ended Working Group which would be responsible for elaborating a draft legally binding normative instrument for the protection of all persons from enforced disappearance. This would be based on the 1998 draft and would take into consideration the findings of the UN Expert, Mr. Manfred Nowak. This Working Group, chaired by the French Ambassador Mr. Bernard Kessedjian, met between the regular sessions of the UN Commission on Human Rights, beginning its work in January 2003. As requested by Latin American, European and African States, as well as by the UN Sub-Commission on the Promotion and Protection of Human Rights, the UNWGEID and numerous NGOs, such a Working Group allowed an open participation. Not only

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*Disappearance*. In: The Review – International Commission of Jurists. September 2001, n° 62-63, p. 81.

<sup>741</sup> United Nations Commission on Human Rights. *Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and Human Rights framework for the protection of persons from enforced or involuntary disappearances*, at para. 49.

<sup>742</sup> *Ibid.*, at para. 1.

<sup>743</sup> *Ibid.*, at para. 80.

were all of those involved in the process, e.g. Governments, experts, intergovernmental and non-governmental organizations able to express their points of view, as also they did so in “an appropriate forum for negotiations aimed at achieving consensus on the adoption”<sup>744</sup> of the convention.

The work of the Inter-Sessional Working Group culminated with the adoption of a final project of the Convention on 23 September 2005. On this occasion, the Associations of Families of the Disappeared and other supportive NGOs, including FEDEFAM, published a Joint Statement, declaring their satisfaction with the negotiations and with its outcome. Despite some critics, as the lack of an explicit provision prohibiting amnesties, these organizations of relatives expressed their enthusiasm for the Convention and *inter alia* for the recognition of the right to truth in its text. They also requested the UN members to hand the Convention over for signature and ratification already in the year following the adoption of the final project by the Working Group<sup>745</sup>.

Finally, in 2006, which was named by organizations of relatives of disappeared victims as the “year of the Convention”<sup>746</sup>, the Human Rights Council adopted the ICED followed by the Third Committee of the United Nations General Assembly and by the General Assembly in plenary by Resolution 61/177. The ICED contains a preamble and forty-five articles, aiming at strengthening the response against the practice of enforced disappearance. The body responsible for monitoring the Convention, as provided for in its text, is the Committee on Enforced Disappearances constituted by independent experts who meet in two annual sessions<sup>747</sup>.

### *The Right to Truth in the ICED*

As mentioned above, the ICED was the first international binding instrument to establish the right to truth in its text. The importance of this normative step, especially for the relatives of disappeared victims, is without precedent. However, the introduction of the right to truth in the ICED was done after a “lengthy”<sup>748</sup> debate, while facing suspicious

<sup>744</sup> ANDREU-GUSMAN, Federico. *The Draft International Convention on the Protection of all Persons from Enforced Disappearance*, p. 105.

<sup>745</sup> Associations of families of the disappeared and other supportive NGOs on the occasion of the adoption of the Draft International Convention for the Protection of All Persons from Enforced Disappearances. **Joint Statement.** Available at: [http://www.icaed.org/fileadmin/user\\_upload/JOINT\\_STATEMENT.doc](http://www.icaed.org/fileadmin/user_upload/JOINT_STATEMENT.doc). Last Access: 19 January 2018.

<sup>746</sup> CITRONI, Gabriella; SCOVAZZI, Tullio. *The Struggle Against Enforced Disappearance and the 2007 United Nations Convention*, p. 262

<sup>747</sup> Ibid.

<sup>748</sup> United Nations Commission on Human Rights. *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*. E/CN.4/2006/57, 2 February 2006, at para. 87.

attitudes from few delegations. The main issues present in the discussions involving the right to truth during the *travaux préparatoires* of the ICED, as it will be shown below, concerned its connection with amnesty laws and with the right to seek and impart information.

Already in its first meeting, the Inter-Sessional Open-ended Working Group began facing these controversial aspects related to the search for the truth. After the UN Expert, Mr. Manfred Nowak, had mentioned the importance of defining the right to truth, the initial discussions involving such right appeared related to the immunity and amnesty issues<sup>749</sup>. In fact, this was a critical issue during the meetings, as the 1992 Declaration provides in Article 16/3 that no privileges, immunities or special exemptions should be admitted in trials of persons responsible for enforced disappearances. In the same way, it also establishes that those who allegedly committed enforced disappearance shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction<sup>750</sup>. Regarding the right of pardon, the 1992 Declaration provides that its exercise should consider the extreme seriousness of the acts of enforced disappearance.

From the exposed above, one could conclude that, if based on the 1992 Declaration, the ICED would have to prohibit amnesties for cases of enforced disappearance, as well as privileges, immunities and special exemptions in trials of persons responsible for enforced disappearances. However, some delegations, particularly the American, Algerian and South African, considered that exceptions should be allowed when perpetrators agree to reveal information with the objective to achieve the truth or when the enforced disappearance does not constitute a crime against humanity (i.e. when it does not take place in a context of widespread cases of disappearances)<sup>751</sup>. For instance, the US delegation supported privileges and immunities for those who, in the course of trials, provide information able to clarify the facts and reach the truth. Further,

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<sup>749</sup> See: United Nations Commission on Human Rights. *Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*. E/CN.4/2003/71, 12 February 2003. United Nations Commission on Human Rights. *Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*. E/CN.4/2004/59, 23 February 2004.

<sup>750</sup> Article 18 Declaration on the Protection of All Persons from Enforced Disappearance of 18 December 1992.

<sup>751</sup> United Nations Commission on Human Rights. *Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*. E/CN.4/2003/71, 12 February 2003, at para. 48.

this delegation would also support mitigating the circumstances of the penalty for those cases when the alleged authors contribute to locate the whereabouts of the victim<sup>752</sup>.

Other delegations also emphasized that the existence of amnesties could not be ignored, as they were eventually necessary in processes of national reconciliation. Considering these factors, reservations arose to a right of victims to know the truth “in all circumstances” and some delegations proposed to include solely a reference to a commitment by States to supply such information. This same proposal would be again submitted during the debates concerning the introduction of the right to truth in the preamble of the ICED<sup>753</sup>.

In response to the debates on amnesties, the Chairperson suggested two alternatives. The first was to prohibit amnesties to be granted before the judgment or conviction of the alleged authors of enforced disappearances. The second option was to remove from the text all references to pardons and amnesties, inserting instead a provision stating that “no measure may have the effect of preventing effective recourse to any remedy or the securing of reparation, or of interrupting the search for disappeared persons”. Additionally, the text would provide that “the right to obtain accurate and full information on the fate of disappeared persons, in particular” should be “guaranteed in all circumstances”<sup>754</sup>.

This provision, submitted by the US, Algerian and South African delegates, is therefore a result of compromises between different positions on the prohibition of amnesties. However, if, on one hand, this provision guaranteed the victims’ right to know the fate of the disappeared; on the other hand, it was very lenient, as the perpetrators could be amnestied without any previous criminal prosecutions or penalties. Many NGOs, including FEDEFAM, and Latin American delegations vetoed this proposal for it could “encourage impunity rather than combating it”<sup>755</sup>. They also questioned the beneficial result of amnesties in the process of reconciliation and, taking the Latin American experience into consideration, they argued that trials may also have positive effects in

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<sup>752</sup> Drafting Group - International Convention for the Protection of All Persons from Enforced Disappearance, 2003b, *Informal Minutes of the First Session*, January 7. In: NAFTALI, Patricia. *Crafting a “Right to Truth” in International Law: Converging Mobilizations, Diverging Agendas?* - Champ penal, Vol. XIII | 2016, 12 février 2016. Available at: <http://journals.openedition.org/champpenal/9245> Last Access: 25 January 2018.

<sup>753</sup> United Nations Commission on Human Rights. *Report of the intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*. E/CN.4/2004/59, 23 February 2004, at para. 78.

<sup>754</sup> Ibid., at para. 79-80.

<sup>755</sup> NAFTALI, Patricia. *Crafting a “Right to Truth” in International Law: Converging Mobilizations, Diverging Agendas?* At para. 30.



the reconciliation<sup>756</sup>. In their view, this is particularly important, as, in several Latin American countries, truth and reconciliation commissions were not able to guarantee the victims' right to truth<sup>757</sup>.

The debates ended with an agreement to remove all references to amnesties from the draft Convention<sup>758</sup>. As a result, the Convention on Enforced Disappearance was silent on the matter of amnesty, grace or pardon laws for perpetrators of enforced disappearances and their accomplices. This silence constitutes an evident setback in comparison to the 1992 Declaration, leading the associations of relatives to recognize that "the absence of an explicit provision [on amnesties] may send out a wrong signal to the international community."<sup>759</sup>

As mentioned above, the lack of this provision results from political compromises, which are expected in the elaboration of a binding legal instrument, and should not be understood, as already suggested in the legal literature, as an *abandonment of the parties' demands*, particularly, of the relatives of the disappeared victims<sup>760</sup>. On the contrary, the difficulties, which arose in the debates involving amnesties and truth, appear intrinsically related to political choices and experiences of the participant delegations. For instance, the negotiations of the ICED occurred while the US Intelligence Agency was executing its program on extraordinary renditions in the aftermath of the 9/11 tragedy. The US "War on Terror" caused numerous cases of disappearances of persons allegedly connected to *Al-Qaeda*. Another example is Algeria who, at the time of the elaboration of the Convention, contemplated a Charter for Peace and Reconciliation granting blanket amnesties for combatants of the 1990s civil war, despite the discordance of associations of relatives of disappeared. Finally, the position of the South African delegation can be justified due to its experience after the apartheid when it implemented the model of *truth for amnesties* with the Truth and Reconciliation Commission in 1994<sup>761</sup>.

These experiences certainly influenced the result on the debates on amnesties and immunities in the ICED. Unfortunately, those delegations, who shared the view that

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<sup>756</sup> Ibid.

<sup>757</sup> Ibid.

<sup>758</sup> Ibid.

<sup>759</sup> Associations of families of the disappeared and other supportive NGOS on the occasion of the adoption of the Draft International Convention for the Protection of All Persons from Enforced Disappearances. **Joint Statement**.

Available at: [http://www.icaed.org/fileadmin/user\\_upload/JOINT\\_STATEMENT.doc](http://www.icaed.org/fileadmin/user_upload/JOINT_STATEMENT.doc). Last Access: 19 January 2018.

<sup>760</sup> NAFTALI, Patricia. *Crafting a "Right to Truth" in International Law: Converging Mobilizations, Diverging Agendas?* At para. 30.

<sup>761</sup> Ibid, at para. 28.

prohibiting amnesties in a legally binding instrument is a too serious limitation to the domestic jurisdiction of States, succeed with their pressure and the final text ended, as already mentioned, silent. This approach not only challenges what is provided for in the 1992 Declaration, but also defies the understanding of several international instruments, the practice of the United Nations and international *ad hoc* tribunals<sup>762</sup>.

The discussions involving amnesties were not, however, the only controversial aspect related to the process of including the right to truth in the text of the ICED. Another issue, which appears in the *travaux préparatoire*, concerns some aspects of the right to obtain information about persons deprived of their liberty. Some delegations, led by the UK, China, the USA, Egypt, and Iran, advocated the inclusion of some limitations to the right to information as a compromise between, on one hand, its role in protecting against enforced disappearance and, on the other hand, the right to privacy. In their view, certain information should not be disclosed, allegedly, due to the safety of the individual concerned, the right to privacy and to avoid jeopardizing criminal investigations<sup>763</sup>.

In response, the Latin American States along with Italy and Spain requested the exclusion of any provision allowing States to refuse providing information. They argued, with the support of several NGOs, that the physical integrity of the disappeared victim and the right to life is predominant and takes precedence over the right to privacy. There was also some concern that restricting the access to information could, in fact, produce legalized forms of enforced disappearance. For that reason, the delegations mentioned above and the UN Expert, Mr. Louis Joinet, emphasized the importance of always disclosing certain information related to enforced disappearance, such as the place of detention, but other delegations such as Canada and the UK opposed it<sup>764</sup>. They eventually reached a consensus, agreeing that the right to information could only be restricted on an “exceptional basis” and it is only applicable when “a person is under the protection of law and the deprivation of liberty is subject to judicial control”<sup>765</sup>.

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<sup>762</sup> See, *inter alia*: Report of the Secretary General prepared pursuant to Resolutions 1160(1998), 1199(1998) and 1203(1998) of the Security Council, S/1999/99, 29 January 1999, para. 32; and Report of the High Commissioner for Human Rights pursuant to Commission on Human Rights Resolution 2000/24 – Situation of Human Rights in Sierra Leone, E/CN.4/2001/35, 1 February 2001, para. 6. Regarding the judgments of international *ad hoc* tribunals, see ICTY, Case Prosecutor v. Furundzija, judgment of 10 December 1998, No. IT-95-17/1-T 10, para. 155; and Appeal Chamber of the Special Tribunal for Sierra Leone, Case Prosecutor v. Moinina Fofaza, judgment on preliminary objections of 25 May 2004, No. SCSL- 2004-14-AR72(e), para. 3.

<sup>763</sup> Intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance 5th Session (Geneva 12 - 23 September 2005) Available at: [http://www.icaed.org/fileadmin/user\\_upload/final\\_session\\_working\\_group.pdf](http://www.icaed.org/fileadmin/user_upload/final_session_working_group.pdf). Last Access 30 January 2018.

<sup>764</sup> Ibid.

<sup>765</sup> Article 20/1 ICED.

Additionally, it was also agreed that in no case shall these restrictions be allowed in cases related to a conduct of enforced disappearance<sup>766</sup>.

It is important to note that despite not being synonyms – the right to information and the right to truth - the provisions on the former affect directly the right to truth. Their link is unquestionable, although the right to seek, receive and impart information is in fact an aspect of the freedom of expression, as provided for in Article 19 of the *International Covenant on Civil and Political Rights*. In case, for example, the ICED provided that the access to information concerning the whereabouts of the person deprived of liberty could be restricted even in situations considered as enforced disappearance, this would clearly impose a strong limitation on the main aspect of the right to truth: to know the disappeared person's whereabouts.

As both these rights have a strong link, during the discussions on the preamble of the Convention, instead of including the expression right to know the truth, the USA found more appropriated to replace it with the “right to freedom to seek, receive and impart information”<sup>767</sup>. In its view, this right is, contrarily to the right to truth, well established in International Law, as it is provided in the *International Covenant on Civil and Political Rights*. Due to the opposition, particularly of Latin American delegations, the right to information did not replace the right to truth, but it was added in the preamble instead<sup>768</sup>. Consequently, the last sentence in the preamble provides for two principles: the first affirms *the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person*, and the second establishes *the right to freedom to seek, receive and impart information to this end*.

Despite the introduction of this second principle in the preamble, the US delegation kept its reservation on the right to truth, which in its view can only be understood under the freedom of information enshrined in article 19 of the International Covenant on Civil and Political Rights. This also applies to the provision of Article 24, paragraph 2 of the ICED, which provides for the right to truth<sup>769</sup>. The US reluctant attitude towards the right to truth was, in fact, not new. During the 28th ICRC/Red Cross Conference in December 2003, the United States Government acknowledged that a “right to know” is referred to in Article 32 of the 1977 Additional Protocol I to the Geneva Conventions, but for the United States

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<sup>766</sup> Article 20/2 ICED.

<sup>767</sup> *Intersessional open-ended working group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance 5th Session (Geneva 12 - 23 September 2005)* Available at: [http://www.icaed.org/fileadmin/user\\_upload/final\\_session\\_working\\_group.pdf](http://www.icaed.org/fileadmin/user_upload/final_session_working_group.pdf). Last Access 30 January 2018.

<sup>768</sup> Ibid.

<sup>769</sup> Ibid.

it is only “in the spirit”<sup>770</sup> of that Article that families should be informed of the fate of their missing family members. Although it is not clear what *in the spirit* means, one could conclude, by the US position towards the right to know the truth, that it exempts itself from complying with such right. As well put by Ms. Citroni and Mr. Scovazzi, “one may wonder whether the United States”, who does not accept any legal obligation with the right to truth, “reserves for itself the possibility to impart to the victims information which is not true”<sup>771</sup>.

In any case, the link between the right to truth and the right to access information has been, as mentioned in chapter III, already dealt with by the legal literature and standard settings, such as in the works of the Mr. Richard Carver and the UN Special Rapporteur Mr. Frank La Rue. There are, however, complicated legal consequences when considering the right to truth solely under the right to access information. First, that would deprive the right to truth from being an autonomous right, as this right would in fact constitute an aspect of the right to information. Even though, from the point of view of the victim, what is most important is to know the truth, irrespective of getting it as the application of an autonomous right; Yet, to have this right considered independent would not only contribute to clarify its scope and content, but it would also be in accordance with the understanding of different international bodies and instruments<sup>772</sup>. That was, in fact, the majority opinion during the *travaux préparatoire* of the ICED, which culminated with the inclusion of an autonomous right to truth.

The second controversial legal consequence of subjugating the right to truth to the right to information lies on the restrictions, which would be imposed on the former, since the right to information is not a non-derogable right, subjected therefore to the limitations (such as national security) established in article 19, paragraph 3 *International Covenant on Civil and Political Rights*. Furthermore, to know the truth may cover other aspects which are not clear whether the right to information, in turn, would also protect, such as the States’ obligation to investigate and the States’ obligation to carry out exhumations.

The delegations, who supported the right to truth, overcame the obstacles and controversial issues on the matter and, despite some fallbacks related to this right, the

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<sup>770</sup> US Department of State. Explanation of U.S. Position on the Right to Truth, in Response to the Related Resolution at HRC 12. Available at: <https://www.state.gov/documents/organization/153502.pdf> Last Access: 05 February 2018.

<sup>771</sup> CITRONI, Gabriella; SCOVAZZI, Tullio. *The Struggle Against Enforced Disappearance and the 2007 United Nations Convention*, p. 260.

<sup>772</sup> MAC-GREGOR, Eduardo Ferrer. *The Right to truth as an Autonomous Right Under the Inter-American Human Rights System*, p. 126.

final text of the Convention included the right to truth in its preamble and body, as following:

**In the Preamble:** Affirming the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end.

**In Article 24 (2):** Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.

Article 24 of the ICED, in which the right to truth is included, contains provisions dedicated, mostly, to the relatives of the disappeared victims. In this article, the main demands of these families, expressed in the voices of associations, NGOs and UN Special Rapporteurs throughout the years, converge, organized among seven paragraphs. In addition to the right to truth in paragraph 2, the other claims of the relatives include to be recognized as victims (24 para. 1); to have the States obliged to reveal the whereabouts of the disappeared person, releasing her or, in case of death, to return the mortal remains (24 para. 3); to have the right to obtain reparation and compensation (24 para. 4); to have considered a wide range of measures of reparation, such as restitution, rehabilitation, satisfaction and guarantees of non-repetition (24 para. 5); to have the States obliged to resolve the legal situation of disappeared persons, whose fate has not been clarified, and that of their relatives, in areas which include social welfare, financial matters and family law (24 para.6); the right “to form and participate freely in organizations and associations” aimed at clarifying the circumstances of enforced disappearances and the fate of disappeared persons, and at providing support to the victims of enforced disappearance (24 para.7).

Regarding the provisions mentioned above, some reflections are worth noting. First, the initial paragraph of Article 24 ICED establishes a broad notion of victim which, going beyond the disappeared person, also covers “any individual who has suffered harm as the direct result of an enforced disappearance”. Accordingly, the definition of victim is not restricted to the disappeared person but includes also the relatives and all of those negatively affected for assisting the material victims and their relatives, such as human rights defenders and lawyers. Examples of varied cases related to those victims can be found in the present work and are, as a rule, connected with searching for the truth, i.e. with struggling to know what had happened. To provide those individuals the status of

victims constitutes an important advance and represents an example of alignment between the ICED and the understanding of international human rights tribunals<sup>773</sup>.

The third paragraph of Article 24 brings another essential contribution of the ICED, establishing that not only is the State bound “to search for, locate and release disappeared persons”, but also “in the event of death, to locate, respect and return their remains”. In fact, the ICED was the first human rights binding instrument to establish a provision related to the mortal remains of victims, covering a major gap within the international framework. If, at first glance, one could find odd to refer to such obligations in times of peace, the reality in cases of enforced disappearances prove that these are strong demands for the relatives. Although outside the field covered in the present thesis, it is worth noting that there are numerous works published in the field of Psychology and Psychiatry dedicated to the issue of grief and loss in cases in which the final fate of the disappeared victim remains unknown to the family<sup>774</sup>. It has been observed that the absence of the body challenges the relatives to move on with their lives, as it takes from them the possibility of a full disclosure. Furthermore, to provide the disappeared victims the possibility of a decent burial is an act, above all, of respect for them, and a contribution for their “moral and social rehabilitation”<sup>775</sup>.

Despite placed in different paragraphs, the struggle for the truth has also been a struggle to know the final location of the mortal remains of the disappeared victims and to offer them a proper burial and a ceremony in accordance with their families believes. To pursue these objectives, exhumations became a central issue in cases of enforced disappearance throughout the world. Some of these cases, particularly those related to large scale violations, became quite known, such as the victims disappeared during the Spanish Civil War, the victims of the *Katyn* massacre, the victims of the war in Bosnia-Herzegovina, the victims of the *Khmer Rouge* in Cambodia, the victims of dictatorships in East Timor and in Central and South America. In all these locations, and so many

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<sup>773</sup> See Chapter IV, particularly, the IACtHR and the Human Rights Chamber for Bosnia and Herzegovina.

<sup>774</sup> See, for example: PREITLER, Barbara. *Grief and Disappearance: Psychosocial Interventions: Psychosocial Interventions*. New Delhi: SAGE, 2015. FURNHAM, Adrian. PERSAUD, Raj; *Coping With Not Knowing What Happened to a Missing Loved One*. In: Psychology Today, 17 June 2017.

Available at: <https://www.psychologytoday.com/blog/slightly-blightly/201706/coping-not-knowing-what-happened-missing-loved-one>. Last Access: 15 February 2018. BUTOLLO Willi. HAGL, Maria. POWELL, Steve. *Missing or Killed - The Differential Effect on Mental Health in Women in Bosnia and Herzegovina of the Confirmed or Unconfirmed Loss of their Husbands*. In: European Psychologist (2010), 15, pp. 185-192.

<sup>775</sup> United Nations Commission on Human Rights. *Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and Human Rights framework for the protection of persons from enforced or involuntary disappearances*, at para. 87.

others, there are families waiting and struggling to have the mortal remains of their relatives exhumed and returned to them.

Regarding paragraphs 4 and 5 of Article 24, the obligation of the States to provide compensation and a broad range of measures of reparation to the victims of enforced disappearance is in accordance with the development, both doctrinal and jurisprudential, on the issue of reparation for grave human rights violations. As mentioned in chapter III, a landmark in the debates on reparations is Mr. van Boven's *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms* in which he considers as a measure of satisfaction and as a guarantee of non-repetition "the verification of the facts and full and public disclosure of the truth"<sup>776</sup>. In fact, the truth has been understood by human rights tribunals, such as IACtHR as a measure of reparation to the relatives. Despite the ICED clear intention to establish the right to truth as an autonomous right, and not as a measure of reparation, one does not seem to exclude the other. To order the States to comply with the right to truth still appears in concrete situations to be the most important recognition of the courts, either if it comes as a measure of reparation or as the application of truth as an independent right.

The paragraph 6 of Article 24 faces a very delicate issue in cases of enforced disappearance, which is the regulation of the legal status of the disappeared victims with the objective to solve matters related to social welfare, inheritance and property rights. This is particularly important as the disappearances place their victims in a "legal limbo" which, due to the concealment of their final fate and whereabouts, it is unknown whether they are dead or alive. As in most countries there are no domestic legislation addressing social and legal consequences of disappearances, presumption of death has been normally applied. Furthermore, the award of compensation has been dependent on obtaining a declaration of death to the disappeared victims. These policies result in the lack of an accurately address of the circumstances of enforced disappearance, imposing an additional emotional distress on relatives, which normally amounts to ill-treatment. In several cases, the presumption of death serves the purpose of impeding investigations and granting impunity to the perpetrators. For those reasons, paragraph 6 begins with the sentence "without prejudice to the obligation to continue the investigation until the

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<sup>776</sup> United Nations Commission on Human Rights. *Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of Human Rights and fundamental freedoms* - Final report submitted by Mr. Theo van Boven, Special Rapporteur, 2 July 1993, E/CN.4/Sub.2/1993/8, p. 57.

fate of the disappeared person has been clarified”, further establishing the States’ obligation to confront and solve the legal status of the disappeared victim<sup>777</sup>.

The last paragraph of Article 24 deals with a strong mark of the relatives’ struggle in searching for their loved ones: the formation “of 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”. In the chapter dedicated to the initial responses to the practice of enforced disappearance, the process which led to the creation of these organizations and associations was exposed, as well as the obstacles and difficulties face by them in trying to obtain information on their relatives. Several of their members throughout the world faced the persecution, the fear and the violence in their struggle; many of them lost their own lives in this course. This paragraph bounds States “to guarantee the right to form and participate freely” in these organizations and associations in a clear attempt to protect the relatives of the disappeared victims from any kind of persecution and oppression while searching for the *truth*.

These paragraphs of Article 24 ICED mentioned above are all intrinsically related with the right to truth which, in turn, was placed in paragraph 2. The initial part of this paragraph begins establishing that *every victim has right to know the truth*. As mentioned above, under the ICED, *victim* carries a broad definition, including all individuals who suffered harm as a direct result of the enforced disappearance. The paragraph 2 then continues providing that the right to truth concerns three different elements: “the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person”. This means that the victims are entitled to the truth of the facts related to these three elements, i.e. to know only one of them should not exempt the States from providing information on the others.

The decision to include these aspects of the right to truth in the ICED is essential, as in most of the cases, as it will be discussed below in the measures to implement the right to truth, is very rare to have all these elements of the truth fulfilled by the States. In several situations, the States despite implementing some measure, such as a truth commission, still are not able to clarify all that had happened in a case of enforced disappearance. Similarly, States may even carry criminal investigations and eventually condemn the suspect, but not establish the whereabouts of the victim, for instance. Thus, to have three varied aspects of the right to truth provided for in a binding instrument helps

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<sup>777</sup> See: CITRONI, Gabriella. *The Pitfalls of Regulating the Legal Status of Disappeared Persons Through Declaration of Death*. In: *Journal of International Criminal Justice*, Volume 12, Issue 4, 1 September 2014, Pages 787–803.



clarifying the scope of this right and consequently in what consists the obligation of the States. Most importantly, it guarantees the relatives the access to a wide range of information related to what had happened, including the circumstances of the disappearance, the fate of the victim and the progress and results of the investigations.

### ***Implementing the Right to Truth: Available Measures***

When considering the measures to implement the right to truth, it is essential to bear in mind that this right, as elaborated above, is not constituted by only one aspect. Consequently, to reflect on the enforcement of the right to truth presupposes the understanding that hardly there would be a measure able to satisfy simultaneously all the demands derived from this right. In other words, the approach to implement the right to truth may vary depending on the case, and on the demands of the material victims and their relatives.

Furthermore, as the right to truth may also be applied to cases outside the scope of enforced disappearance, such as extra-judicial rendition, for example, the measures may also vary in accordance with the issues at stake in every case. Anyhow, the ICED remains as the principal guideline when it comes to understand the right to truth, its scope and content, i.e. to reflect on how to implement the right to truth, one should consider the clarification of the circumstances of the violation, the final fate of the victim and the access to information concerning the progress and results of the investigations. Below, this part of the present chapter will aim at identifying and assessing a range of approaches which have been employed in different countries in the quest to uncover the facts about past human rights violations.

### ***Truth Commissions***

Truth commissions are likely the measure most commonly associated with the right to truth. Per definition, they are extra judicial commissions of inquiry, working officially and temporarily with the objective to investigate a pattern of violations over a certain period of time. Their work is usually concluded with a final report and recommendations for reforms. The decision to create a truth commission requires normally the approval of the legislative power, i.e. either a Congress or a Parliament<sup>778</sup>.

Initial experiences with these commissions were reported in Uganda (1974) and Bolivia (1982-1984), both set up to investigate cases of disappearances. Their main method of

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<sup>778</sup> See: HAYNER, Priscilla B. *Unspeakable Truths - Transitional Justice and the Challenge of Truth Commissions*. Second Edition. New York: Routledge, 2011.

investigation, as it would be commonly associated with truth commissions' work, was the collection of testimonies of the victims. Despite concluding its work with a final report, Uganda's truth commission did not have the authorization of the former Dictator Idi Amin to publish the stories of the victims, as well as the commission's own recommendations on the matter of disappearances. The Bolivian truth commission disbanded before finalizing its report<sup>779</sup>.

Following this pattern of investigating disappearances, it would be the *Argentine National Commission on the Disappearance of Persons* (1983-1984) and its well-known *Nunca Más* report the ones responsible for increasing truth commissions popularity among possible measures to face gross violations, particularly of previous regimes<sup>780</sup>. Similarly to Bolivia and Uganda, however, the Argentine report was also not able to identify the final whereabouts of the disappeared victims. This, however, did not exclude it from accomplishing remarkable achievements, such as publicizing the atrocities of the dictatorship and giving voices to the victims<sup>781</sup>.

Based on the Argentine experience, which was the first truth commission to publish a final report, Uruguay (1985) and Chile (1990-1991) also implement commissions aimed at investigating the cases of disappearances which took place while the Countries were under military dictatorships. The work of these Latin American commissions marked what would be called the "first generation"<sup>782</sup> of truth commissions, i.e. as a measure pursuing some discretion in dealing with State violence. The work of these commissions while confronting the violations also intended to gain time to a potential criminal stage in the fight against impunity, reason why they included criminal investigations in their reports' recommendations<sup>783</sup>.

It appears that an unresolved issue involving *truth* also began with these commissions. So far, they faced recent pasts, gave voices to the victims, reported the violations which occurred and exposed entire structures of institutionalized violence; yet they have not clarified the individual cases. That is, from an individual perspective of the cases, these commissions while offering an essential overview of what had happened, were as a rule unable to expose the facts involving the violations, providing information on the cases – individually. The most evident example is the unclarified fate of the disappeared victims,

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<sup>779</sup> See Chapter III.

<sup>780</sup> CONADEP, *Nunca Mas*. Buenos Aires, 1984.

<sup>781</sup> The *Nunca Más* report is constituted basically by testimonies of the victims. See Chapter II.

<sup>782</sup> This classification is found at: CUEVA, Eduardo González. *Tendencias en la Búsqueda de la Verdad*. In: Anuario de Derechos Humanos, N. 3, 2007.

<sup>783</sup> See, for example, the reports of Guatemala, Chile and El Salvador.

which persisted after the conclusion of these commissions, such as in Chile and Argentina, for example.

While the relatives of the disappeared victims continued with their struggle to find out the whereabouts of their loved ones, truth commissions ascended as an essential tool in what became known as *transitional justice*. Not only it deserved references in the main literature on the topic<sup>784</sup>, but also in UN documents<sup>785</sup>. The UN Expert, Mr. Louis Joinet, for example, mentioned in his known *principles against impunity* that extra-judicial commissions of inquiry (in which truth commissions are included) are one of the measures, along with the opening of archives, able to implement the right to know. In his view, these commissions *could dismantle the machinery which allowed the criminal behavior, preserve evidence for the courts and reveal the truth of what the oppressors often denounced as lies*<sup>786</sup>.

Despite these quite ambitious objectives, the UN Expert did not consider commissions of inquiry as the only possible measure to implement the truth, which according to the researcher Mr. Richard Carver, is precisely because commissions can never hope to address every individual case<sup>787</sup>. It was for this reason that Mr. Joinet detailed the importance of opening archives to the public, as it will be further observed in the part of this chapter dedicated to archives and opening of files.

In any case, the popularity of truth commissions seems to have achieved its climax with the South African experience. During the years of 1995 until 2002<sup>788</sup>, South Africa established the *Truth and Reconciliation Commission* to investigate gross human rights violations perpetrated under the Apartheid regime (1960 – 1994). Under the banner of *national reconciliation*<sup>789</sup> and making use of the controversial power to grant amnesty to

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<sup>784</sup> See, for example: TEITEL, Ruth. *Transitional Justice*. Oxford: Oxford University Press, 2000. KRITZ, Neil (ed.) *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*. Vols. I–III. Washington, D.C.: U.S. Institute of Peace Press, 1995.

<sup>785</sup> See, for example: United Nations Office of the United Nations High Commissioner for Human Rights. *Rule of Law Tools for Post-Conflict States – Truth Commissions*, HR/PUB/06/1, 2006; United Nations, Commission on Human Rights. Study on the right to truth - Report of the Office of the United Nations High Commissioner for Human Rights. E/CN.4/2006/91, 8 February 2006.

<sup>786</sup> United Nations Commission on Human Rights. *Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)* - Final Report Prepared by Mr. Joinet Pursuant to Sub-Commission Decision 1996/119, E/CN.4/SUB.2/1997/20, 26 June 1997, Introduction, at para. 19.

<sup>787</sup> Article 19. *Who Wants to Forget? Truth and Access to Information about past Human Rights Violations*. Report written by Mr. Richard Carver, p. 45.

<sup>788</sup> The original mandate ended in 1998 but it was further extended.

<sup>789</sup> See the reports of the South African Truth and Reconciliation Commission – Available at: <http://www.justice.gov.za/trc/report/index.htm> Last Access: 25 February 2018.

perpetrators who confessed their crimes truthfully and completely to the commission, the TRC became a sort of *model* to countries willing to deal with their authoritarian pasts.

With the South African experience, truth commissions entered their “second generation”, in which truth appears necessarily associated with reconciliation and healing<sup>790</sup>. In this scenario, they would no longer be the first step towards criminal investigations; they would be the main step, the one able to offer a solid restorative justice framework, glorified as superior models of justice. The promise, leaded by the Archbishop Desmond Tutu<sup>791</sup>, of giving and proving forgiveness, of overcoming past traumas through reconciliation, while the truth is exposed, inspired several other countries. After all, this promise also seems to represent the possibility of facing the past in a non-traumatic or conflictive manner and, most importantly, without the involvement of the judicial power - at least in its criminal field. Despite no other country has established this *truth for amnesty* configuration, truth commissions frequently remained as the first mechanism proposed after periods of wide spread violence. Statistics show that in past twenty-five to thirty years, more than thirty countries opted for the creation of a commission<sup>792</sup>. In fact, truth commissions became so popular that in 2001, the first truth commission consulting firm in the world, the International Center for Transitional Justice (ICTJ), inaugurated a shop in a Wall Street office suite<sup>793</sup>.

This main role in confronting past abuses, however, was not immune to some debate, and consequently critics arose, defying truth commissions’ real possibility to achieve all the objectives it promised. One of the most important text in this regard was published already in 1996 under the authorship of Mr. Michael Ignatieff. In the emblematic *Articles of Faith*, in a reference to the religious inspiration of the South African truth commission, he argued that “all that a truth commission can achieve is to reduce the number of lies that can be circulated unchallenged in public discourse”. As an example, he mentions that in Argentina the commission’s “work has made it impossible to claim that the military did not throw half-dead victims into the sea from helicopters”<sup>794</sup>. In other words, the expectations towards truth commissions should just not be kept so high.

When contesting the scope of work of truth commissions, Mr. Ignatieff was referring to their potential of reconciling, of healing, of overcoming divisions in societies or *nations*.

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<sup>790</sup> CUEVA, Eduardo Gonzaléz. *Tendencias en la Búsqueda de la Verdad*, p. 104.

<sup>791</sup> TUTU, Desmond. *No Future without Forgiveness*. New York: Doubleday, 1999.

<sup>792</sup> ANTKOWIAK, Thomas. *Truth as Right and Remedy in International Human Rights Experience*. Michigan Journal of International Law N. 23, 2002, p. 996.

<sup>793</sup> TEPPERMAN, Jonathan. *Truth and Consequences*. In: Foreign Affairs, March/April 2002 Issue. Available at: <https://www.foreignaffairs.com/articles/2002-03-01/truth-and-consequences>. Last Access: 25 February 2018.

<sup>794</sup> IGNATIEFF, Michael. *Articles of Faith*. In: Index on Censorship Vol 25, Issue 5, 1996, p. 110.

In his view, *nations* do not have such a thing as a psyche, which can forgive and be reconciled after knowing the truth (which in turn is also a complicated concept). They also do not implement any social or institutional reform and, therefore, they do not solve the conflicts within a society. This becomes even more complicated when considering that, for the victims, the process so easily denominated as *healing* may be the trickiest of all, i.e. the past and the present tend to overlap one on the other as the painful memories usually came back to torment those who experienced them<sup>795</sup>. The reality is that, despite the noble aims evoked normally by the political elites to justify the implementation of truth commissions, they are hard to achieve while based on abstract and debatable concepts, such as healing, reconciliation, nation.

Similarly to Mr. Ignatieff's arguments, the researcher Mr. Richard Carver observes that when one refers to "healing wounds" of nations' "traumas", this can only be understood as manners of speaking. This misunderstanding is that the process of national reconciliation is routinely described in terms of anthropomorphic metaphors, but "societies are not single bodies; they are structurally divided"<sup>796</sup>, he claims.

Furthermore, Mr. Carver also remembers that few people have ever argued that once the truth was available then reconciliation was automatic. He recalls that in some of the early TRC hearings, Archbishop Tutu seemed to be obliging victims to reconcile with the perpetrators of horrendous crimes. This awkward attitude challenged what many felt as a restraint to the victims' right to use the information as they wish. Some families, for example, argued against making the production of information a "tradeoff" for immunity<sup>797</sup>. This revealed that no one can predict for sure what will be the reaction to detailed information about the torture and death of a loved one. It is even more unrealistic (and maybe too demanding) to expect them to reconcile either immediately or even latter.

In this regard, the former member of the *Peruvian Truth and Reconciliation Commission*, Eduardo González Cueva, justifies this expectation of reconciliation in the appropriation of truth commissions particularly by post-transition political elites, who imposed the illusion of a non-traumatic answer to the authoritarian past<sup>798</sup>. In other words, truth commissions were used as political instruments, which while giving voice to the victims, were also used to end a process of facing the past, as if only them were enough to deal with all that had happened. With a more controversial approach, the member of the

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<sup>795</sup> Ibid.

<sup>796</sup> Article 19. *Who Wants to Forget? Truth and Access to Information about past Human Rights Violations*. Report written by Mr. Richard Carver, p. 42.

<sup>797</sup> Ibid.

<sup>798</sup> CUEVA, Eduardo González. *Tendencias en la Búsqueda de la Verdad*, p. 103.

*Commission of Investigation on Enforced Disappeared of Persons of Nepal*, Mr. Bishnu Pathak, argues that instead of protecting the victims and their families, truth commissions may have concentrated their jobs to protect their lords (perpetrators) in the name of amnesty and reconciliation<sup>799</sup>.

In fact, some years after South Africa concluded its truth commission, even Archbishop Desmond Tutu argued that the commission had worked only on the "promotion"<sup>800</sup> of reconciliation, but not on its achievement. Also, Mr. Richard Goldstone -- a strong supporter of the commission and a judge on South Africa's Constitutional Court -- regretted that "national reconciliation is one of those generalizations that doesn't have a great deal of content. In South Africa today, we still have a great deal of distance between the two communities. I'm not sure the truth commission has been all that successful in that area."<sup>801</sup>

It is evident that South Africa has a very particular legacy to confront: the apartheid. The radical discrimination of the black community which resulted in its brutal segregation and violation (in numerous forms) demanded a commission that could - or at least try to - facilitate the integration of the different ethnicities, so that they could coexist with each other. In other places, however, where the *(re)integration* was not such a strong issue, the critics confronted some other difficulties.

It may be illustrating to mention that the Swiss Association for the Prevention of Torture (APT) and the Chilean Corporation for Promotion and Defense of the Rights of People (*La Corporación de Promoción y Defensa de los Derechos del Pueblo* - CODEPU) developed a comparative study involving the truth commissions of Argentina, Chile, El Salvador, Guatemala and South Africa. The objective was to understand, by making use of interviews, the impact and significance of the establishment of truth commissions on the victims of human rights violations and their relatives. Some of the main criticisms regarding the clarification of the truth concerned the very way it was constructed. That is, the information given to the commissions was provided by human rights organizations and those directly affected by the violations. The participation of those allegedly responsible for these violations was very limited, resulting in reports composed basically by information given by the victims<sup>802</sup>.

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<sup>799</sup> PATHAK, Bishnu. *World's Disappearance Commissions: An Inhumanious Quest for Truth*. World Journal of Social Science Research, Vol. 3, No. 3, 2016, p. 298.

<sup>800</sup> CLARK, Janine Natalya. *Transitional Justice, Truth and Reconciliation: An Under-Explored Relationship*. In: International Criminal Law Review, 11, 2011, 249.

<sup>801</sup> TEPPERMAN, Jonathan. *Truth and Consequences*.

<sup>802</sup> Corporacion de Promocion y Defensa del Derechos del Pueblo; Association for the Prevention of Torture. *Truth Commissions: An Uncertain Path?*

Another issue pointed by the interviewers concerned the methodology employed in the investigations of the commissions, i.e. aimed at establishing a general pattern of gross violations, rather than investigating every case. A member of the South African Commission, for example, recognized that in terms of providing the victims the truth, it did not do a good job, as every victim wanted to know about his or her own case. A Chilean survivor was also critical, stating that the truth established in the commission of Chile only concerned the occurrence of the violation, leaving aside how and why it happened. This victim called it a *truth for impunity*. As a result, the study concluded that the truth established by these commissions was only partial, not attending fully to the expectations of those who suffered harm<sup>803</sup>.

An aggravating circumstance noted by these victims to the implementation of truth lies on the fact that, not in every truth commission, the name of the perpetrators is mentioned in the final reports<sup>804</sup>. "Naming names" is, in fact, a delicate issue, which tends to divide opinions in the human rights movement. Mr. José Zalaquett, for example, opposes the publication of those names, believing it would violate the due process, as well as interfere with judicial functions, to which the commissions are not competent for<sup>805</sup>. Mr. Juan Mendéz, on the other hand, believes that, despite naming names entails a severe stigma, a strict position towards their revelation may lead to an unacceptable limitation of the truth, which the commissions are in charge to reveal and the governments committed to clarify<sup>806</sup>. Consequently, the UN Expert Juan Mendéz supports the revelation of names only if there is no possibility of a criminal action. In these cases, the commission should study the information it receives very closely and envisage mechanisms that would allow a minimum right of defense for those who may be implicated before it<sup>807</sup>.

The practical problem involved in the proposal of Mr. Mendéz is how one should know, for sure, what are the possibilities of criminal actions in the future. It might be cases, such as Argentina, for example, in which trials were only successfully pursued years after the establishment of the truth commission. In fact, Argentina has shown that the process of

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Available at: [https://www.apr.ch/content/files\\_res/Truth%20Comm\\_Executive%20Summary.pdf](https://www.apr.ch/content/files_res/Truth%20Comm_Executive%20Summary.pdf)  
Last Access: 27 February 2018.

<sup>803</sup> Ibid.

<sup>804</sup> Ibid.

<sup>805</sup> ZALAUQUETT, José. *Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints*. In *State Crimes: Punishment or Pardon* - in Justice and Society Program of the Aspen Institute (ed.) (Queenstown, MD: Aspen Institute, 1989), p. 59.

<sup>806</sup> MENDÉZ, Juan E. *Responsabilización por los Abusos del Pasado*. *Revista de Relaciones Internacionales* N. 13., Vol. 6, March 2015, p. 9.

<sup>807</sup> MENDÉZ, Juan E.; MARIEZCURRENA, Javier. *Accountability for Past Human Rights Violations: Contributions of the Inter- American Organs of Protection*. In: *Social Justice*, Vol. 26, No. 4, 1999, p. 92.

facing the violations of the dictatorship is still in movement. In November 2017, judges responsible for Argentina's most high-profile human rights trial condemned 29 former officials to life in prison, in a case that documented the widespread practice of killing civilians by throwing them from the aircrafts<sup>808</sup>.

This difficulty in foreseeing what steps will be taken towards past abuses should therefore set aside truth commissions from considering the possibility of criminal investigations as a prerogative to decide on "naming names" in the reports. As a matter of fact, what seems to be at stake in these debates related to *naming names* is the expectation that truth commissions would be able (or should be able) to fulfil all aspects of *truth* by themselves. When the IACtHR, for example, states that the right to truth entails the victims to know who are the responsible for committing the violations, the Court does not mention that this information should necessary be provided by truth commissions<sup>809</sup>. This is particularly important to mention, because the ideal would be evidentially to obtain this information through criminal investigations. If, however, the commissioners decide to publish the name of the perpetrators, they should allow, as Mr. Méndez noted, a minimum right of defense for those who may be implicated before it.

Interestingly, a former member of the Brazilian truth commission (which in fact opted for publishing the name of the alleged perpetrators in its final report) when asked about the right of defense to those whose names are in the report, answered that no military showed up before the commission to contest his/her name's inclusion. According to his statement, despite the highly controversial debates related to the policy of naming names, involving members and non-members of the commission, the publication of the names, after all, did not influenced the military to come forward to contest it. After the release of the report, there was also no retaliation coming from the military and, somehow peacefully, people could know the names of those who worked for the "repression machinery"<sup>810</sup>.

The interviewees, however, whose countries' truth commissions did not mention the names of perpetrators in their reports, such as Chile for example, felt rightfully that they were not receiving the *truth* promised to them. It is probably one of the major issues involving truth commissions, despite usually understudied, that of how far they actually implement the truth. This evidently varies depending on the truth commission, and, most

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<sup>808</sup> The New York Times. *29 Argentines Sentenced to Life in Prison in 'Death Flights' Trial*. By Daniel Politi and Ernesto Londoño. 29 November 2017. Available at: <<https://www.nytimes.com/2017/11/29/world/americas/argentina-death-flights-trial-dictatorship.html>> Last Access: 10 January 2018.

<sup>809</sup> See Chapter IV – IACtHR.

<sup>810</sup> Pedro Rolo Benetti. Telephone Interview, December 2017.



importantly, on what is understood by *truth*. What the critics seem to demonstrate is in fact a discontent not only with the lack of criminal investigations, but with the limitations of these commissions in clarifying all that had happened regarding the violations. This lies precisely on the fact that they are usually seen as the *only* possible measure to achieve the truth or, in other words, that they *necessarily* establish the *truth* expected by the victims.

In this regard, it is important to frame that, in accordance with the ICED, the truth covers the circumstances of the disappearances and the final fate of the victims. In case of deceased victims, the mortal remains should also be located and returned to the families. For cases outside the scope of the disappearances, the 2005 *Basic Principles and Guidelines on the Right to a Remedy and Reparation* establishes that the truth encompass the verification of the facts, as well as their full and public disclosure<sup>811</sup>.

Taking these instruments into consideration, when it comes to the *truth* – as a right – the commissions to fully establish it would have, at least, to clarify what had happened and the final fate of the disappeared person (in cases of enforced disappearance), as well as to verify the facts related to other violations, individually. This may be evidently too much to ask of a truth commission, and, for that reason, for as much as it works well, a commission can hardly provide the truth completely. As the researcher Ms. Janine Clark notes, the conception that TCs establish the truth is problematic because it oversimplifies the whole process of how to achieve the *truth*: not only the commissions depend – almost entirely - on how much victims and perpetrators are willing and able to reveal, but they are also necessarily intertwined with politics, and this may have a significant impact on the extent to which they are able to establish the truth<sup>812</sup>. Furthermore, truth commissions work as temporary bodies, requiring them necessarily to be selective on their investigations<sup>813</sup>. In Guatemala, for example, the commission was initially given only six months to complete its work with the possibility of extending its time frame for more six months. Within this short period, the commissioners had the job to investigate more than thirty years of war and 200.000 lost lives<sup>814</sup>.

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<sup>811</sup> United Nations 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*. A/RES/60/147, 16 December 2005, principle 22 (b), (c).

<sup>812</sup> CLARK, Janine Natalya. *Transitional Justice, Truth and Reconciliation: An Under-Explored Relationship*, 250, 251.

<sup>813</sup> Ibid.

<sup>814</sup> TOMUSCHAT, Christian. Foreword of *Memory of Silence: The Guatemalan Truth Commission Report*. Daniel Rothenberg (Ed.). New York: Palgrave Macmillan, 2012, xv, xvi.

With such obstacles, one could wonder why truth commissions became so easily known and accepted as an indispensable measure to implement the victims' right to truth. In the 1980's and 1990's, they did in fact represented (or at least that was the expectation) part of a new phase, a new beginning after the end of the dictatorships - more transparent, more committed with human rights, more democratic. They did somehow represent that the past would not be forgotten; on the contrary, it would be clarified and exposed. It was based on these aspects that truth commissions marked the border between what those societies were – intolerant, violent, authoritarian - and what they hope they have become – peaceful, protective, fairer<sup>815</sup>. The reality, as discussed above, has revealed unfortunately something different.

Another argument sustains that truth commissions are a measure aimed at achieving the collective dimension of the right to truth, i.e. the truth to society as a whole. Thus, instead of satisfying the individuals' aspect of the right to truth, the commissions would be concerned in revealing a societal aspect, already recognized by the IACtHR<sup>816</sup>. In this regard, it is critical to emphasize that the societal dimension is not an overview of what had happened, nor it is limited to the dissemination of information of past gross violations. Instead, it is the public's right to know what had happened, i.e. not only those directly involved, but all the individuals. This is clearly related with the circulation of information but remains attached to the disclosure of the individual cases. That is, the societal dimension guarantees every individual the right to know about gross violations of the past, independently of being themselves the primary victims. The idea behind this reasoning is to avoid gross violations from been hidden from the population which would challenge their remembrance as a way of prevention.

To bear in mind that truth commissions have limitations and for that reason they should not be considered the only measure aimed at establishing the truth is not the same as ignoring their positive aspects. One of them is their official status, the fact that they often enjoy formal powers to compel the production of information and seek a standard of proof that is credible. These are specialized bodies established to uncover facts about the past (or a specific aspect of the past) and their findings are awaited as a definitive statement of the historical record<sup>817</sup>. This is likely one of the reasons why the victims participate in truth commissions, taking great pains to recount their suffering, i.e. with a view to seek

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<sup>815</sup> GRANDIN, Greg. *The Instruction of Great Catastrophe: Truth Commissions, National History, and State Formation in Argentina, Chile and Guatemala*. In: *The American Historical Review*, Vol. 110, N. 1, February 2005, p. 46.

<sup>816</sup> See Chapter IV – IACtHR.

<sup>817</sup> Article 19. *Who Wants to Forget? Truth and Access to Information about past Human Rights Violations*. Report written by Mr. Richard Carver, p. 45.

acknowledgement from the State that their claims are credible, and the atrocities were wrong. A member of the Chilean organization, *La Agrupación de Familiares de Detenidos Desaparecidos* (AFDD), for example, claimed that the Truth and Reconciliation Commission established by President Aylwin was very important, as it formalized the truth, and vindicated the memory of the victims by stating that they were not subversives or delinquents<sup>818</sup>.

Furthermore, if it is unrealistic to expect truth commissions to establish the truth of all cases, the same applies to any other measure, as any approach to the past will hardly be totally unproblematic and complete. A glance at the experiences of recent commissions, such as Brazil<sup>819</sup>, reveals how hard these compromises can be, e.g. when the relatives of disappeared victims are left without any new information on their loved ones' whereabouts. However, they also leave the legacy of a report describing numerous clandestine detention centers, as well as the methods of torture applied to the prisoners. They expose, in many ways, entire structures of institutionalized violence, and this written document remains, as mentioned above, as historical record<sup>820</sup>.

Considering that those responsible for gross violations will usually tend to hide what had happened as much as they can, the initiative to uncover publicly some information about those events is a remarkable act, which should be applauded. It is a step towards the elucidation of gross violations, despite not the only possible one. In this manner, the UN Expert, Mr. Juan Méndez, notes – in a reference to the lack of information to the structure of the death squads in El Salvador truth commission's report - that even limited truth is valid, particularly when the commissioners and their staff work impartially and in good faith.<sup>821</sup> And, this is exactly what should be kept in mind when it comes to truth commissions: the truth may not be complete, their results may disappoint several victims, yet they represent not only a step towards the elucidation of the past, but they also formalize the State responsibility for the violations.

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<sup>818</sup> QUIJANO, Danilo. *Chile, DH y Comisión de la Verdad*. In: *América Latina en Movimiento*, Opinión, 24 February 2002. Available at: <https://www.alainet.org/es/active/2032#slide> Last Access: 15 January 2018.

<sup>819</sup> The National Truth Commission (In Portuguese *Comissão Nacional da Verdade*) was approved by the Chamber of Deputies of Brazil on 21 September 2011. Despite the findings, which were published on 10 December 2014 in the commission's final report, the whereabouts of the disappeared victims remained unknown and the Brazilian Amnesty Law, valid.

<sup>820</sup> TEPPERMAN, Jonathan. *Truth and Consequences*. In: *Foreign Affairs*, March/April 2002 Issue. Available at: <https://www.foreignaffairs.com/articles/2002-03-01/truth-and-consequences>. Last Access: 25 February 2018.

<sup>821</sup> MÉNDEZ, Juan E.; MARIEZCURRENA, Javier. *Accountability for Past Human Rights Violations: Contributions of the Inter- American Organs of Protection*, p. 91.

### Archives

The preservation of archives, and the access to them, have been considered an important measure to implement the right to truth. The UN Expert, Mr. Louis Joinet, included them in his report on impunity back in the 1990's<sup>822</sup> and more recently, in 2011, the Human Rights Council invited the Office of the UN High Commissioner for Human Rights to convene a seminar on the importance of archives to guarantee the right to truth<sup>823</sup>.

The relevant role attributed to archives lies, on one hand, on the fact that their records – either official or non-official - are often crucial to uncover the facts concerning gross human rights violations. Among the non-official records, one can include those of NGOs, political parties directly linked to repressive regimes, and persons and groups who were in exile. The official records, or governmental records, include not only classified intelligence reports, security memoranda, and diplomatic cables which contain facts and analysis vital to uncovering abuses, but also “common” documents, such as civil and land registries, and even population census<sup>824</sup>.

In some cases, for example, it has been possible to trace victims of enforced disappearance by making use of registries of entrance and exit in hospitals, detention centers or institutes of forensic medicine. In other words, when it comes to search for proves, it is important to keep in mind, additionally to the files kept by non-governmental agents, the huge arsenal of potential evidence which constitute the administration of a modern State due to its particular register activity<sup>825</sup>.

Indeed, among the most important archives are those originated from the institutions and individuals that participated in the violations as authors, either materially or intellectually. Unfortunately, those are exactly, as a rule, the hardest to have access to. When involved in violations, the military and often also the police tend to deny access to their documents and when they allow, it is usually in a parsimonious way. In Brazil, for example, the

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<sup>822</sup> United Nations Commission on Human Rights. *Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)* - Final Report Prepared by Mr. Joinet Pursuant to Sub-Commission Decision 1996/119, E/CN.4/SUB.2/1997/20, 26 June 1997.

<sup>823</sup> United Nations Human Rights Council. *Report of the Office of the United Nations High Commissioner for Human Rights on the seminar on experiences of archives as a means to guarantee the right to truth*. A/HRC/17/21, 14 April 2011, Summary.

<sup>824</sup> DUMON-PEROTIN, Anne. *Los archivos, la verdad y la justicia: Reflexiones sobre la experiencia latino-americana*, p. 8. Ponencia presentada en el Taller “Verdad Histórica y Verdad Judicial: En la búsqueda de complementariedades”, organizado por la Agencia Alemana de Cooperación Técnica GTZ, Santa Marta, Colombia, 23-24 de noviembre 2009.

Available at: <http://historiapolitica.com/datos/biblioteca/perotin1.pdf>. Last Access: 20 January 2018.

<sup>825</sup> Ibid., p. 8-9.

Superior Military Court has kept the archives related to the judgments of political prisoners during the military dictatorship under secrecy. This still occurs despite the Brazilian Constitutional Court has more than once decided that all the archives related to the military dictatorship should be open to the public on an unrestricted basis<sup>826</sup>.

One of the reasons evoked by the Brazilian Constitutional Court to justify its decision is also very present in the human rights debates on the right to truth, i.e.: if, on one hand, archives are keys in revealing what happened, they also conserve the information of past events. Thus, they do not only contain “living documents” (that are still relevant to the pursuit of justice or redress, for example), but they also keep the past preserved, which could help avoiding this same past from been forgotten and from been denied<sup>827</sup>.

Nevertheless, governments are generally reluctant to open files related to human rights abuses due to their evidently self-incriminatory character and fearing that disclosure could reveal intelligence sources and methods, and compromise security. Another argument, perhaps more legitimate, sustains that the information contained, for example, in the files of repressive agencies is not necessarily accurate, which can be particularly damaging when false allegations are made of complicity in the repressive structure.

An example took place in Poland in 1992 when the Interior Minister sent a list of politicians and officials suspected of being former secret police agents to parliamentary deputies. Among the names, even President Lech Walesa was accused of having been a secret police informer. In response, President Walesa dismissed the government within a matter of days, which interestingly led to an impassioned public debate on the use of secret police files. On one hand, the Polish civil society demanded the opening of files and their access for all interested parties. On the other hand, the main issues raised by those who opposed the opening were precisely the inherent unreliability of material in the files – which, after all, were often collected with the objective of blackmailing the subject – and the scandal when the contents were suddenly made public<sup>828</sup>.

It was not Poland, however, the only Country which went through intense debates on the opening of the files of repressive agencies. In fact, with the end of the Communist rule in the Soviet bloc, political pressure arose in almost every East European country to

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<sup>826</sup> G1 – Oglabo. *STF determina que Superior Tribunal Militar libere arquivos secretos da ditadura*. Por Fabiano Costa, G1, Brasília, 16/03/2017. Available at: <https://g1.globo.com/politica/noticia/stf-ordena-que-tribunal-militar-libere-arquivos-secretos-da-epoca-da-ditadura.ghtml>. Last Access: 25 January 2018.

<sup>827</sup> BICKFORD, Louis. *Preserving Memory: The Past and the Human Rights Movement in Chile*. An essay prepared for LASA 2000 - *The Latin American Studies Association, XXII International Congress*, March 16-18th, 2000, p.12.

<sup>828</sup> Article 19. *Who Wants to Forget? Truth and Access to Information about past Human Rights Violations*. Report written by Mr. Richard Carver, p. 48.

cleanse the polity of legacies of the previous regime. Among those legacies were the secret service activities, and the key position they performed in the repressive apparatus. Until the 1960's, those activities covered various forms of physical coercion, including torture, with the objective to acquire information from the victims. Later, this method was partially replaced by extremely high psychological pressure, in which the private life of individuals was disturbed with the use, for example, of hidden listening devices at home, interference in personal relations and secret entrance in private premises<sup>829</sup>.

With the information obtained, the secret services' agents aimed at intimidating the targeted persons, their family members and others with whom they kept a close relation. Those targeted would, for example, suffer failures in their professional and personal lives, e.g. losing their position under the claim of *feigned incompetence* or having the entrance at the university denied. The purpose of such attitudes was to break mentally and emotionally the individuals, making them feel inadequate, isolated, cornered<sup>830</sup>.

After the collapse of the Communist regime, the question of what to do with all the information gathered by the secret services arose. Along with it, the question of what would be the best approach towards those who worked and collaborated with the past regime, including the agents of the secret services, also gained attention. In this context, the archives played an essential role<sup>831</sup> in the political process known as "decommunization"<sup>832</sup>, serving to verify the collaboration of individuals with the police. Beginning in Czechoslovakia and Germany in 1990-1991<sup>833</sup>, laws were passed requiring

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<sup>829</sup> VERDERY, Katherine. *Secrets and Truth: Ethnography in the Archive of Romania's secret Police*. Budapest: Central European University Press, 2014, p. 1-5.

<sup>830</sup> GERVIENĒ, Silvija; GRUODYTĒ, Edita. *The Right to Know the Truth in the Light of the Right to Privacy: The Case of Victims of the Communist Regime in Europe*. In: Baltic Journal of European Studies Tallinn University of Technology, Vol. 7, N. 2, p. 291.

<sup>831</sup> The debates on records and secret files proliferated so intensely after the fall of the communist bloc that in 1995 the UNESCO together with the International Council of Archives published a study concerning records and archives created by security services of former repressive regimes. The objective was to provide not only an analysis of the situation of these archives but also recommendations for their management and permanent preservation. United Nations Human Rights Council. *Report of the Office of the United Nations High Commissioner for Human Rights on the seminar on experiences of archives as a means to guarantee the right to truth*, at para.8.

<sup>832</sup> "Decommunization refers to the wider removal and exclusion of people from office for having been functionaries of the Communist party or related institutions". FOWLER, Brigid; SZCZERBIAK, Aleks; WILLIAMS, Kieran. *Explaining Lustration in Eastern Europe: 'A Post-communist politics approach'*. In: Sussex European Institute, Working Paper N. 62, March 2003, p. 4.

<sup>833</sup> "In Czecho-Slovakia, a lustration/decommunization law was passed in October 1991, barring former high-level party officials, members of the police forces, and their collaborators from occupying high public posts within the state sector (including the military, the judiciary, universities, and state mass media) for five years. Soon after, the German Bundestag passed a bill that provided the logistics for security checks of people occupying, applying for, or being elected to state offices. It also enabled all citizens to see copy and publicize their personal STASI files". In: LOS, Maria. *Lustration and Truth Claims: Unfinished Revolutions in Central Europe*. Law & Social Inquiry, Vol. 20, No. 1, Winter, 1995, p. 121-122.

that aspirants to political office and certain other posts be vetted through the secret policy archive to verify if they had served as collaborators. This policy became known as *lustration*, spreading in the region in different levels throughout the following two decades.

The literature on lustration tend to identify this measure as highly political, i.e. as a result of ongoing power struggles between various parties and factions. Indeed, to those political parties that grew out of the communist power structures, there were many reasons to oppose lustration. In addition to its potential to escalate into a full-blown “decommunization”, lustration was associated with other threatening possibilities, such as the disclosure of the full contents of the Secret Archives and possible prosecution of those implicated. Thus, to the most ardent advocates, the passage of a lustration bill depended on their ability to persuade a heterogeneous plurality of legislators that the safeguarding of democracy required it<sup>834</sup>.

In addition to these political aspects, the opening of the records also affected very private and intimate aspects of the individuals’ life. In Germany, for example, where citizens gained access to their files<sup>835</sup>, the results were, in several cases, quite negative, as individuals were covered with shock and surprise, when founding out, for example, that their spouses or friends had spied on them. The impact of the secret police spying system, when revealed, devastated families and long-term relationships<sup>836</sup>.

This occurred despite the evident effort to balance the interests of openness and those of privacy of the *Stasi Records Act* of 1992. For example, the Act differentiates various categories of applicant who may access the records, as well as various types of person about whom information may be held. Those who may have access to the files include individuals, public and private bodies and those carrying out political or historical

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<sup>834</sup> WILLIAMS, Kieran; FOWLER, Brigid; SZCZERBIAK, Aleks; *Explaining Lustration in Eastern Europe: 'A Post-communist politics approach'*, p. 9.

<sup>835</sup> According to Richard Carver, explaining the opening of files in Germany: “The approach of opening the records was most thoroughly implemented in Germany. In a quite elaborated form, Germany created by statute a mechanism to permit the public access to the files held on them by the former secret police. This was probably achieved due to the fact that the East German secret police, the Stasi, was arguably the most assiduous and comprehensive of the Communist intelligence agencies. It had an estimated 111,000 full-time employees, used countless informers and maintained files on literally millions of individuals, both Germans and foreigners. Also, the East German state did not simply collapse, as other Communist states did, to be followed by an awkward transitional period. Its functions were rapidly taken over by the developed and efficient West German apparatus, into whose hands the State records fell. This is a set of historical circumstances that are unlikely ever to be repeated”. Article 19. *Who Wants to Forget? Truth and Access to Information about past Human Rights Violations*. Report written by Mr. Richard Carver, p. 46.

<sup>836</sup> See: ASH, Timothy Garton. *The File: A Personal History*. London: Atlantic Books, 2009.

research. Thus, for example, a “data-subject”, the person on whom the file has been kept, may request to have it “depersonalized”, i.e. to subtract all identifying contents<sup>837</sup>.

Concerning the privacy of others named in the files, an interesting solution was implemented. The documents requested are initially photocopied and the revelatory personal information about others erased. Then, the documents are photocopied again, so that they cannot be read when held up to the light. This aimed at avoiding the exposure of personal information not directly relevant to the inquiry being made<sup>838</sup>.

Despite these efforts to balance different interests, the Stasi Act did not avoid, as mentioned above, complications concerning private and public interests. Those issues are intimately related with the fact that either the German secret police, the Stasi, or the others communist intelligence agencies worked collecting the “most intimate details of private life”<sup>839</sup>, a policy also known as “State voyeurism”<sup>840</sup>. Many times, those details were distorted to force the impression that the suspect individual was in fact a spy. This, however, should not prevent the public access to the records, reason why, in principle, a similar approach (to the German solution) appears as an interesting option anywhere where the repressive apparatus has been characterized by systematic recordkeeping<sup>841</sup>.

As the researcher from the French National Archive Ms. Anne Pérotin-Dumon notes, no one needs to be specialized in archiving to understand that to tell the truth, testimonies and experts either in forensic anthropology or law are not enough. It is also necessary to have documentary proof found in the archives<sup>842</sup>. In this sense, what is important to note is that the *right to truth* does not concern the authenticity of the information collected by the secret agents, i.e. it does not lie at the credibility of their work. Instead, it lies at the fact that those agents worked with the objective to spy on those people who were filed, and the information collected are those found in the records. Thus, the right to truth is not about challenging how the information in the records actually match the reality, but to give the individuals concerned and the general public the right to know that such records existed and what they contain. This also sheds light on a broader perspective of the all system, i.e. on how the repressive apparatus worked.

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<sup>837</sup> Article 19. *Who Wants to Forget? Truth and Access to Information about past Human Rights Violations*. Report written by Mr. Richard Carver, p. 47.

<sup>838</sup> Ibid.

<sup>839</sup> Ibid.

<sup>840</sup> See: VERDERY, Katherine. *Secrets and Truth: Ethnography in the Archive of Romania's secret Police*. Budapest: Central European University Press, 2014

<sup>841</sup> Article 19. *Who Wants to Forget? Truth and Access to Information about past Human Rights Violations*. Report written by Mr. Richard Carver, p. 47.

<sup>842</sup> DUMON-PEROTIN, Anne. *Los archivos, la verdad y la justicia: Reflexiones sobre la experiencia latino-americana*, p. 8



However, if this debate about the authenticity of the records is normally situated in cases concerning the files of secret polices, the arsenal of possible archives to be used in the elucidation of human rights abuses goes much beyond. Therefore, despite possible problems arising from the opening of files, one would hope that new democratic governments would introduce access to information laws and that the scope of such laws would include information held by the old regime.

This is particularly important, as another neglected instrument for allowing access to information about past human rights abuses are the information laws themselves. First, most of these laws concern allowing *individuals* – normally those directly affected by the abuses - the access to information, instead of the public at large. This is normally based on the requirement that access to information should be necessary for the individual to exercise other constitutionally or internationally guaranteed rights, as, for example, for an individual to exercise his or her right to seek redress. Consequently, the individual nature of queries under most freedom of information acts means that they will reach only a very limited public, rather than the public at large<sup>843</sup>.

The second aspect worth mentioning on the use of the freedom of information acts concerns the exemptions, i.e. when they are drawn too broadly, aimed at encompassing all information of the security agencies. National security, for example, is a common reason provided by authorities with the objective to hold back information, and in fact many human rights violations are committed in the name of “national security”. Access to information that may disturb national security should be restricted on a very limited basis. It is only by making the question of national security a matter of public scrutiny and contention that it will cease to be used as an effective cover for abusive behavior<sup>844</sup>.

To have information laws properly drafted is essential for guaranteeing the right to truth, allowing the individuals and the public at large access to archives. In the United States, for example, a NGO has used the federal Freedom of Information Act to obtain copies of records for truth commissions in El Salvador, Guatemala and Peru and for prosecutions in Chile, Peru, and Spain<sup>845</sup>. This reveals the central role that official documents may play when dealing with past abuses.

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<sup>843</sup> Article 19. *Who Wants to Forget? Truth and Access to Information about past Human Rights Violations*. Report written by Mr. Richard Carver, p. 49.

<sup>844</sup> Ibid.

<sup>845</sup> United Nations Human Rights Council. *Report of the Office of the United Nations High Commissioner for Human Rights on the seminar on experiences of archives as a means to guarantee the right to truth*, at para. 11.

### *Criminal Investigation*

Criminal investigations tended to be seen in the human rights literature as opposed to truth efforts. Those, in turn, were normally associated with truth commissions, and criminal investigation with justice. Recently, the human rights movement has replaced this notion, which separates so rigidly truth and justice, for the complementary discourse, i.e. truth commissions and trials complete each other as two faces of the same coin. Yet the complementary speech still supports that while truth commissions represent the truth, criminal investigations (and ultimately trials) represent justice<sup>846</sup>.

Such understanding has some flaws that are important to mention. First, it is arguable, as already mentioned in the part dedicated to truth commissions, that truth can only be achieved with truth commissions. In fact, truth commissions themselves may not even clarify the all truth (comprising the elements provided for in the ICED), particularly when they lean much on testimonies, rather than on official records. Second, the complementary speech tends to see truth and justice as separated from each other, despite complementing each other. That is, the truth is not *in* justice and vice-versa. Contrarily to this understanding, one could argue that truth may be found in criminal investigations, as these aim exactly in clarifying what happened. Thus, it is somehow expected that investigations reveal, if not all, at least some information of what has taken place. Justice, in turn, may also be found in truth as this aims to be an attitude of fairness to the victims regarding the abuses committed. If the relative of a disappeared victim, for example, obtains information on the circumstances of the disappearance, as well as on the location of the remains of his or her loved one, this certainly represents an act of justice towards the relative.

The fact is that a very rigid separation between truth and justice may simplify what is highly complex, i.e. not only the link they have, but how truth itself can be achieved. In the case, for example, of *Unkovic v. The Federation of Bosnia Herzegovina*, judged by the Human Rights Chamber, the final fate of the applicant's family was clarified during criminal investigations which also resulted in the conviction of two suspects for the disappearances. The Chamber found in the review of its first decision on the case that, as all relevant information to the applicant was disclosed during the criminal trial, the respondent Party fulfilled its positive obligation to provide, based on Article 8 ECHR, information concerning the fate and whereabouts of a family member<sup>847</sup>. In other words,

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<sup>846</sup> See, for instance, NAFTALI, Patricia. *The Politics of Truth: On Legal Fetishism and the Rhetoric of Complementary*. Hors-série décembre 2015 La justice pénale internationale comme projet politique et sélectif, 29 octobre 2015, Revue québécoise de droit international, p. 101-128.

<sup>847</sup> Human Rights Chamber for Bosnia and Herzegovina. Case no. CH/99/2150. *Unkovic v. Federation of BiH*, decision on review of 6 May 2002.

the investigations and subsequent trial of the suspects was enough to satisfy the State's obligation towards justice and truth.

The IACtHR has also interesting findings on the relation between truth and justice. By pointing to two different categories of truth, i.e. *historical truth*, as the one obtained in truth commissions, and *judicial truth* as the one obtained with judicial measures, the IACtHR not only recognizes the limitation of truth commissions, but also the possible achievements of judicial measures. In the case of *Almonacid Arellano v. Chile*, for example, the Court remarked that truth commissions cannot be a substitute for the judicial truth, i.e. "for the duty of the State to reach the truth through judicial proceedings"<sup>848</sup>. To the Court, the judicial truth would include carrying out a judicial investigation of the facts related to the violations, attribute responsibilities, and punish all those who turn out to be participants<sup>849</sup>.

As mentioned in the part dedicated to the case-law of the IACtHR, there would be no exclusive measure, in the view of the Court, for implementing the right to truth. This is particularly important, as for the Court truth is understood *to be* a goal both for truth commissions and for judicial measures. Consequently, judicial measures do not limit themselves to pursue punishment for the suspected perpetrators. On the contrary, they would also intent to clarify the events surrounding the human rights violations.

Nevertheless, despite the importance of considering truth beyond truth commissions, it is still possible to find some reluctance to incorporate the right to truth in the scope of criminal law, and particularly, in the territory of international criminal law. This field, responsible for investigating and prosecuting international crimes, especially genocide, crimes against humanity and war crimes, follows rigidly the principles of criminal law, i.e. favoring a strict construction to protect the rights of the accused and the fair trial<sup>850</sup>.

Based on this, recent works have supported that international criminal courts should be wary of whole-heartedly embracing the right to truth, as this would remain an indeterminate concept, and its contours, open-textured. It is argued that in the International Criminal Court, for example, when the petitioners invoke the right to truth, they would hardly associate it with any context, legal doctrine or specific relationship between the victim and accused. This would cause traditional criminal law lawyers at the

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<sup>848</sup> *Case of Almonacid Arellano et al. v. Chile*. Preliminary Objections, Merits, Reparations and Costs. Series C No. 154. Judgment of September 26, 2006, at para. 150.

<sup>849</sup> *Ibid.*

<sup>850</sup> LEYH, Brianne McGonigle. *The Right to Truth in International Criminal Proceedings: An Indeterminate Concept from Human Rights Law*, p. 3.  
Available at: <[http://montaigne.rebo.uu.nl/wpcontent/uploads/2013/11/McGonigle-Leyh\\_Libor-Zwaak.pdf](http://montaigne.rebo.uu.nl/wpcontent/uploads/2013/11/McGonigle-Leyh_Libor-Zwaak.pdf)> Last Access: 20 February 2018

ICC some tension that could explain why despite early acknowledgement of this right in pre-trial decisions, no mention to the right to truth appears in final judgments<sup>851</sup>.

The controversy caused by the right to truth in the ICC is in fact related to the place of victims in international criminal proceedings, which still assign them a very narrow role, usually only allowing for testimony as a witness. In the case of the Rome Statute, despite providing for victim participation, it does not consider the victim an actual party to the proceedings<sup>852</sup>. Furthermore, the rights and powers of victims, and the modalities of their participation, are not expressed with clarity and so are left to the judges to develop<sup>853</sup>.

For example, one of the main issues related to the right to truth in the ICC concerns the possibility of victims to participate during the investigation of a situation prior to the naming of a suspect. One justification for allowing this participation supports that it helps ensuring the victims' right to truth, as their contribution could be invaluable in helping to shape charges, which could later be brought against an accused<sup>854</sup>. On the other hand, those, who suspect of these positive aspects brought by the right to truth, argue that, if victims were permitted to intervene so early in the process, the objectivity of the proceedings could be in jeopardy, as well as the integrity of the Office of the Prosecutor<sup>855</sup>.

Ultimately, the Pre-Trial Chamber concluded that victims could participate in proceedings before the naming of a suspect. Despite not provided in the Rome Statute, the Court argued that a broad approach to the participation of victims during this phase could be inferred from a general view of the Statute and Rules along with several human rights documents. The judges sustained that "victims are affected *in general* at the investigation stage, since the participation at this stage can serve to clarify the facts, to punish the perpetrators of crimes and to request reparations for the harm suffered"<sup>856</sup>. Furthermore, the judges also noted that early victim participation was an admirable goal of the drafters, emphasizing that the creation of the Court took place in a context in which international

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<sup>851</sup> Ibid., p. 20.

<sup>852</sup> Article 68 (3) of the Rome Statute.

<sup>853</sup> MOFFETT, L. *Meaningful and Effective? Considering Victims' Interests Through Participation at the International Criminal Court*. Criminal Law Forum, 26(2), 2015, p. 255-289.

<sup>854</sup> LEYH, Brianne McGonigle. *The Right to Truth in International Criminal Proceedings: An Indeterminate Concept from Human Rights Law*, p. 14.

<sup>855</sup> Ibid.

<sup>856</sup> ICC, *Situation in Democratic Republic of the Congo*, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, Pre-Trial Chamber I, No. ICC-01/04-101-tEN-Corr, 17 January 2006, para. 63.

human rights law was progressively placing more and more importance on the role of victims in criminal proceedings<sup>857</sup>.

Based on these arguments, the decision granted six victim-applicants the right to participate in pre-trial proceedings during the investigation phase, although it was limited to access to public documents. Unfortunately, for these victims, when the first case concerning the Democratic Republic of Congo emerged with the arrest and transfer of Mr. Thomas Lubanga Dyilo in March of 2006, the six applicants subsequently failed to meet the criteria for obtaining victim status. It was alleged that the harms they suffered did not relate to the charges presented by the prosecutor. Thus, the applicants, who initially gained victim status, had their participatory rights later denied in specific proceedings<sup>858</sup>.

The Pre-Trial Chamber refused to allow for an appeal on this matter, which was followed by successive Pre-Trial Chambers until 2008. It was only two years after the 2006 decision that the Pre-Trial Chambers in the Darfur and the Democratic Republic of Congo situations eventually granted leave to appeal the issue. The Appeals Chamber, in turn, found that victims could no longer participate during the investigative phase prior to the naming of a suspect. In its argumentation, the Chamber sustained that investigations are not judicial proceedings, but rather inquiries conducted by the prosecutor into the alleged commission of crimes and the identification of those responsible<sup>859</sup>.

Despite this understanding, victims participating in a case against an accused have continuously asserted their right to truth both during pre-trial and trial proceedings. In the opening statements in the *Lubanga* trial, the Principal Counsel for the Office of Public Counsel for Victims stated that “the central interest of victims in establishing the truth about the facts and identification of those responsible and statement and declaration of who is responsible is at the root of the *right to truth*”. The Principal Counsel continued explaining that the position of the victim in the proceedings was ‘to contribute to the establishment of the truth’<sup>860</sup>

As it is possible to infer from the above, the ICC has been inconsistent in its position regarding the right to truth. Initially, the Court seemed to take the right to truth highly into consideration when touching upon the rights of victims in the proceedings. Later, however, there is no mention of the right to truth or right to a remedy in the final

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<sup>857</sup> Ibid, at para. 50.

<sup>858</sup> LEYH, Brianne McGonigle. *The Right to Truth in International Criminal Proceedings: An Indeterminate Concept from Human Rights Law*, p. 15.

<sup>859</sup> Ibid., p. 16.

<sup>860</sup> Ibid.

judgments. In *Katanga/Ngudjolo*<sup>861</sup>, the single judge from the Pre-Trial Chamber held that victims have a fundamental interest in the determination of the facts, the identification of those responsible, and the declaration of their responsibility. These interests, the judge considered, are at the root the right to truth. Thus, when the right to truth is satisfied through criminal proceedings, victims have a general interest in their outcome, as they (the proceedings) “bring clarity about what happened and close possible gaps between the factual findings resulting from the criminal proceedings and the actual truth”<sup>862</sup>.

Contrary to the approach adopted by the single judge in *Katanga/Ngudjolo*, who considered that the personal interests of victims are necessarily present in a criminal proceeding against the accused, the Trial Chamber in *Lubanga* adopted a piecemeal approach. Although the Trial Chamber acknowledged that victims share several general interests like those identified by the Pre-Trial Chamber in *Katanga* such as the right to truth and justice, it nevertheless determined that an analysis of Article 68(3) of the Rome Statute requires the specific personal interests of individual victims to be connected to the specific issues present in the cases at stake<sup>863</sup>.

Thus, to exercise their participatory rights, victims should demonstrate how their personal interests are affected by the specific proceedings. In practice, before the Court, this requires the victims’ representative to prove how the testimony of a certain witness or the admission of a certain evidence influence the personal interests of their clients. Once the Trial Chamber decides in favor of the applicant, it would then specify the victims’ precise participation (such as questioning the witness or submitting a document). The Trial Chamber emphasized that victims are not parties to the proceedings and may have party-like rights, which are neither automatic nor unconditional. The Appeals Chamber agreed with this approach<sup>864</sup>.

After this initial phase of inconsistent jurisprudence, the ICC finally clarified that although victims can participate in judicial proceedings which occur in respect of a situation – as opposed to a particular case with identified individuals – a prosecutorial investigation is

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<sup>861</sup> ICC, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Decision on the Set of Procedural Rules Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case, Pre-Trial Chamber I (Single Judge), No. ICC-01/04-01/07-474, 13 May 2008.

<sup>862</sup> *Ibid.*, at para. 32.

For further reading on the decision, see: STOLK, Sofia. *The Victim, the International Criminal Court and the Search for Truth: On the Interdependence and Incompatibility of Truths about Mass Atrocity*. Journal of International Criminal Justice, 13, 2015, 973-994.

<sup>863</sup> LEYH, Brianne McGonigle. *The Right to Truth in International Criminal Proceedings: An Indeterminate Concept from Human Rights Law*, p. 17.

<sup>864</sup> *Ibid.*, p. 18.

itself not a judicial proceeding. Consequently, victims may have limited rights to seek review of prosecutorial policy or decisions implementing it<sup>865</sup>.

These barriers to the emergence and realization of the right to truth at the ICC can be perceived from the victims' points of view as arbitrary. The lack of possibility to challenge the prosecutor, for example, is a great obstacle to victims in their attempt to learn the truth. This is particularly evident when victims seek an explanation from the prosecutor for why a decision that resulted in a negative outcome was taken. Despite the victims' disappointment, it appears that any attempt to expand the breadth of truth-seeking activity and disclosure by the Court is likely to result not only in practical and jurisprudential difficulties, but risks impinging upon the defendant's right to a fair and expeditious trial<sup>866</sup>.

It is, in fact, hard to cogitate what issue arising before the court could be more inherently linked to victims' "personal interests" than the investigation or arrest and surrender of a suspect. In that regard, an examination of Article 68(3) Rome Statute appears to indicate that the participation of victims does not lie only on what is helpful to the parties or the chamber. Instead, it envisages participation for the victims themselves. It recognizes that, having experienced the alleged crimes as an often life-changing cause of suffering and harm, victims have a specific interest in how those crimes are dealt with. Therefore, the main issue of Article 68 (3) Rome Statute is whether the victim has a personal interest, instead of centralizing the interest on the chamber<sup>867</sup>.

What is important to note concerning these victims' claims before the ICC is the role they attributed to the right to truth, i.e. as a guarantor of their participation in the Court's prosecutorial investigations and judicial proceedings. This reveals the victims' own acknowledgment that truth may be achieved through criminal law and for that reason they are closely linked to the Court's actions. In other words, because victims have the right to know about past violations, and as the investigations and trials aim at confronting this past, victims are necessarily related to these proceedings.

Based on this, it is hard to visualize how victims' interest in participating in the investigation of crimes they suffered, and the link this has with their right to have these

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<sup>865</sup> MOFFETT, L. *Meaningful and Effective? Considering Victims' Interests Through Participation at the International Criminal Court*. Criminal Law Forum, 26(2), 2015, p. 266.

<sup>866</sup> DAVIS, Howard; KLINKNER, Melanie. *A Right to Truth, Victims and the ICC*. Available at: <<http://torturemag.org/a-right-to-truth-victims-the-icc/>>. Last Access: 07 February 2018.

<sup>867</sup> In that regard, it is worth mentioning the article of HIRST, Megan. *ICC Chamber Excludes Victims from Bashir Cooperation Proceedings* – 05 April 2017. Available at: <<https://www.ijmonitor.org/2017/04/icc-chamber-excludes-victims-from-bashir-cooperation-proceedings/>> Last Access: 20 March 2018.

same crimes clarified, can possibly be an “indeterminate”<sup>868</sup> or “too broad”<sup>869</sup> request – even if considered the criminal law standards. This is especially disappointing to the victims, because it prevents them from being heard on issues that fundamentally affects their human rights to truth, accountability, and reparations.

When it comes to international courts, however, the ICC was not the only one to face problematic issues in implementing the right to the truth. The ICTY (International Criminal Tribunal for the former Yugoslavia), which worked from 1993 until 2017, recognized, already in 1996, “its mission of revealing the truth about the acts perpetrated and suffering endured” in addition to “identifying and arresting those accused of responsibility”<sup>870</sup>.

The intention of the Court to reveal the truth was shortly confronted by the complex reality of the parties involved. The case of the Bosnian Serb, General Krstić, for example, concerned the genocide against the Bosnian Muslims in Srebrenica. General Krstić and a few of his close associates, senior officers of the Bosnian Serb army, were found guilty and sentenced for the crime<sup>871</sup>. Nevertheless, the truth disclosed at the ICTY had basically no impact in the region of the former Yugoslavia until it was acknowledged by *Republika Srpska*. The human rights activist, Ms. Natasa Kandić, explains that *Republika Srpska* received the condemnation of General Krstić by the ICTY as a confirmation of the anti-Serb stance of the Tribunal, instead of actually admitting his guilty<sup>872</sup>.

It would be only in June 2004 that the *Republika Srpska* would admitted, through an official report, its responsibility for the liquidation of 7,800 Bosnian Muslims in Srebrenica. Although the Bosnian Muslims understood this recognition as coerced and insincere and the Bosnian Serbs saw it as another result of foreign pressure and unfairness, the report was, above all, an official statement of responsibility<sup>873</sup>.

Despite these discordances, the case of *Prosecutor v. Radislav Krstić*<sup>874</sup> shows an evident concern of the ICTY in deeply investigating the facts connected with the actions

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<sup>868</sup> LEYH, Brianne McGonigle. *The Right to Truth in International Criminal Proceedings: An Indeterminate Concept from Human Rights Law*, p. 20

<sup>869</sup> Ibid.

<sup>870</sup> GROOME, Dermot. *The Right to Truth in the Fight against Impunity*. In: Berkeley Journal of International Law, Volume 29, Issue 1, Article 5, 2011, p. 187.

<sup>871</sup> ICTY. *Prosecutor v. Krstić*, Case No. IT-98-33-T, 2001 WL 34712271, Judgment 02 August 2001; ICTY *Prosecutor v. Krstić*, Case No. IT-98-33-A, 2004 WL 2781931, Judgment 19 April 2004.

<sup>872</sup> KANDIĆ, Natasa. *The ICTY Trials and Transitional Justice in Former Yugoslavia*. In: Cornell International Law Journal, Volume 38, Issue 3, 2005, p. 789.

<sup>873</sup> Ibid, p. 790.

<sup>874</sup> ICTY. *Prosecutor v. Krstić*, Case No. IT-98-33-T, 2001 WL 34712271, Judgment 02 August 2001.



of the accused. Its sentence contains almost two hundred pages of *findings of fact*, in which the Court addresses in details the events surrounding Srebrenica from 1991-1995. Beginning with the breakup of the Socialist Federal Republic of Yugoslavia, the Court leans on the historical background exposed in the earlier *Tadic* judgment<sup>875</sup>. Differently from the latter, however, the former judgment focusses on a micro-history of a town, Srebrenica, and on its strategic importance in the region of Bosnia. In addition, the narrative of the ICTY concentrates on the failure of the UN Protection Force (UNPROFOR) to protect Srebrenica from the three heavily armed brigades of the Bosnian Serb Drina Corps.

If it is certain that the judgment of General Krstic did not clarify the location of the missing persons of Srebrenica, it did shed light on the events related to this tragedy, including who was responsible for it. Even the ICTY's Appeals Chamber, despite finding Krstic guilty of the lesser count of aiding and abetting genocide<sup>876</sup>, kept the view that genocide had indeed occurred in Srebrenica, and maintained the historical account elaborated in the initial judgment<sup>877</sup>.

The judgment of General Krstic would also take part in future decisions of other international courts. The ICJ, for example, in the case of *Bosnia and Herzegovina v. Serbia and Montenegro* – the first decision on the merits in a case filed pursuant to Art. IX Convention for the Prevention and Punishment of the Crime of Genocide - relied faithful to the conclusions of the ICTY concerning the Srebrenica massacre. Based on them, the ICJ found that Serbia had been derelict in its duty to prevent genocide, provided for in Art. I Genocide Convention<sup>878</sup>. On the other hand, the ICJ has been highly criticized for its conclusion that Serbia was not direct responsible for genocide committed on the territory of Bosnia and Herzegovina between 1992 and 1995<sup>879</sup>. This was certainly an unfortunate decision of the Court and has been highly criticized throughout the academic literature<sup>880</sup>.

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<sup>875</sup> ICTY. The *Prosecutor vs. Dusko Tadic* a.k.a. "Dule", Case No. IT-94-1-T, Judgment 7 May 1997.

<sup>876</sup> General Krstic had been initially sentenced to forty-six years of imprisonment. The ICTY's Appeals Chamber then reduced the sentence to thirty-five years in prison. See: ICTY (in the Appeals Chamber) *Prosecutor v. Krstic*, IT-98-33-A, Judgment 19 April 2004, at para. 275.

<sup>877</sup> ICTY (in the Appeals Chamber) *Prosecutor v. Krstic*, IT-98-33-A, Judgment 19 April 2004, at para. 266-275.

<sup>878</sup> ICJ. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43.

<sup>879</sup> Ibidem.

<sup>880</sup> See, for example: SCHABAS, William A. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide Case (Bosnia and Herzegovina v Serbia and Montenegro)* In: Max Planck Encyclopedia of Public International Law, December 2008. Available at: <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1245>>

### *Exhumation*

The exhumations are one of the most important issues related to solving enforced disappearance cases and clarifying the truth. Its implementation allows the relatives to have returned to them the final remains of their loved ones, which not only permits a proper burial (or cremation, if the case), but also -consequently- the closure of a situation of uncertainty. Thus, exhumations play the central role of ending a cycle of violations with the final location of the mortal remains conclusively discovered and then properly transferred back to the family.

The emergence of the practice of exhumation – and more generally the forensic sciences - in cases of disappearances dates back to 1984 when the American anthropologist Mr. Clyde Snow, and then *Director of the Science and Human Rights Program of the American Association for the Advancement of Science*, Mr. Eric Stover, traveled to Argentina to investigate the graves of the disappeared victims of the military dictatorship. During this occasion, Mr. Snow, with a group of young students, formed the *Argentine Forensic Anthropology Team*, the first organization dedicated to employing forensic expertise to the investigation of political violence<sup>881</sup>. Since then, it has conducted missions in more than thirty countries including Bosnia, East Timor, Sierra Leone and South Africa. Also, it has initiated and trained many similar organizations elsewhere, such as in Chile, Guatemala and Peru, resulting in a Latin American regional professional network in 2003<sup>882</sup>.

Shortly after, other organizations followed Mr. Snow's initiative to link forensic science with human rights causes, including national teams in Latin America and a program of the US-based Physicians for Human Rights. Working with these organizations are experts from varied scientific disciplines, such as archeology, anthropology, pathology, radiography, and more recently DNA analysis. Their objectives include locating mass graves, gather and record evidence about victims (such as their cause and manner of death), and identifying the bodies and returning them to surviving relatives<sup>883</sup>.

However, the process of founding and financing these organizations was not always simple. An important example took place in 1996 while the UN was carrying its *special*

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Last Access 07 May 2018; WILSON, Richard Ashby. *Humanity's Histories Evaluating the Historical Accounts of International Tribunals and Truth Commissions*. In: Politix, 2007, 4, n° 80, p. 31-58.

<sup>881</sup> ROSENBLATT, Adam. *International Forensic Investigations and the Human Rights of the Dead*. In: Human Rights Quarterly, volume 32, N. 4, November 2010, p. 921-922.

<sup>882</sup> Argentine Forensic Anthropology Team. *History of EAAF*. Available at: [http://eaaf.typepad.com/founding\\_of\\_eaaf/](http://eaaf.typepad.com/founding_of_eaaf/) Last Access: 01 March 2018.

<sup>883</sup> ROSENBLATT, Adam. *International Forensic Investigations and the Human Rights of the Dead*, p. 922.

*process on missing persons in the territory of the former Yugoslavia*. The responsible for this process was Mr. Manfred Nowak, then expert member of the WGEID. In his report dated March 1996, the UN Expert detailed his proposal to establish “a high-level multilateral commission on missing persons”<sup>884</sup> constituted by representatives of Bosnia and Herzegovina, the *Republika Srpska*, Croatia and Serbia and Montenegro. The commission would also include the participation of the *High Representative* (annex 10, Dayton Agreement), the *Ombudsperson* (annex 6, Dayton Agreement), the Transitional Administrator of UNTAES, a representative of the ICRC and the Expert Mr. Nowak himself. The objectives of this commission covered the mediation between the parties with specific concern for their encouragement to cooperate and to disclose information on the whereabouts of the missing persons. This would include compiling updated lists of all missing and detained persons and coordinating the excavation of mass graves<sup>885</sup>.

The UN Expert succeed in obtaining the support of the representatives of the Republic of Croatia, the Republic of Bosnia and Herzegovina and the *Republika Srpska* in his efforts to establish the multilateral commission<sup>886</sup>. Nevertheless, when he tried to pass a resolution in the UN Commission on Human Rights, the representative of the USA blocked his proposal and the resolution consequently did not pass<sup>887</sup>.

As previously mentioned in this work<sup>888</sup>, exhumations were a critical issue in the context of the armed conflicts in the territory of former Yugoslavia with around 30.000 missing persons placed in more than 300 mass graves<sup>889</sup>. The obstruction towards the resolution certainly delayed the victims’ relatives the access to their “right to know the truth and to be properly informed about the fate and the whereabouts of their husbands, sons and other family members unaccounted for”<sup>890</sup>. As explained by Mr. Nowak, the search of the relatives for the truth “includes the urgent need to locate, guard and excavate these mass graves and to exhume and identify the mortal remains therein”<sup>891</sup>.

Despite not approving the resolution, however, the US former President, Mr. Bill Clinton, would “strangely enough”<sup>892</sup> announce in Lyon at the G-7 summit in 1996 the creation of

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<sup>884</sup> United Nations, Commission on Human Rights. Special process on missing persons in the territory of the former Yugoslavia Report submitted by Mr. Manfred Nowak. E/CN.4/1996/36, 4 March 1996, at para. 81.

<sup>885</sup> Ibid.

<sup>886</sup> Ibid, at para. 82.

<sup>887</sup> Mr. Manfred Nowak. Telephone Interview. May 2018

<sup>888</sup> See the chapter on the Human Rights Chamber of Bosnia and Herzegovina, in particular, the Srebrenica case.

<sup>889</sup> United Nations, Commission on Human Rights. Special process on missing persons in the territory of the former Yugoslavia. Report submitted by Mr. Manfred Nowak, at para. 1.

<sup>890</sup> Ibid, at para. 84

<sup>891</sup> Ibid, at para. 85.

<sup>892</sup> Mr. Manfred Nowak. Telephone Interview. May 2018

the *International Commission on Missing Persons*. The main aim of the organization “was to help account” for the reported missing persons “as a result of the fighting from 1991 to 1995”<sup>893</sup> in former Yugoslavia. The reason behind this apparently contradictory attitude lies, in accordance with Mr. Nowak, on the will of the US to take the credit for the creation of ICMP, instead of granting it to the UN<sup>894</sup>.

The ICMP had, unfortunately, this mark in its initial phase of elaboration. It became, however, one the most important intergovernmental organization to addresses the issue of persons missing as a result either of armed conflicts and violations of human rights or natural disasters. This importance reveals how was necessary to exist an organization covering matters which include assisting governments in the exhumation of mass graves and DNA identification of missing persons, providing support to family associations, and assisting in the elaboration of strategies and institutions to search for missing persons<sup>895</sup>.

It is also important to mention the role this organization has played in the Srebrenica tragedy. It was in early 1999, with the ICMP’s support, that the rate of Srebrenica identifications increased dramatically. Already in the following year, the ICMP completed the new storage and morgue facility and began an ambitious plan of developing DNA labs in Bosnia containing a DNA reference database of all the families of Bosnia’s missing. With this database, the ICMP identified the remains of Srebrenica victims by matching the DNA of the remains to the information of the database<sup>896</sup>. As a result, to the present date, almost 7.000 victims of Srebrenica were both identified and buried<sup>897</sup>.

More recently, another relevant contribution involved the ICMP and the Brazilian Perus Working Group, established in 2014 to identify bodies that were interred in a clandestine mass grave in Sao Paulo, Brazil. In the beginning of 2018, the ICMP has announced the first identification of a victim buried at the cemetery: Dimas Antonio Casemiro, who was killed by agents of the military regime in April 1971. The remains of opponents of the military government were buried at the cemetery without identification between 1971 and 1975. The identification of the body of Dimas Antonio Casemiro was confirmed following

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<sup>893</sup> International Commission on Missing Persons. History. Available at <<https://www.icmp.int/about-us/history/>> Last Access: 05 March 2018.

<sup>894</sup> Mr. Manfred Nowak. Telephone Interview. May 2018

<sup>895</sup> International Commission on Missing Persons. History. Available at <<https://www.icmp.int/about-us/history/>> Last Access: 05 March 2018.

<sup>896</sup> VOLLEN, Laurie. *All That Remains: Identifying the Victims of the Srebrenica Massacre*. In: Cambridge Quarterly of Healthcare Ethics, 10, 2001, p. 339.

<sup>897</sup> International Commission on Missing Persons. *Srebrenica Figures as of 31 May 2017*. Available at: <https://www.icmp.int/wp-content/uploads/2017/07/srebrenica-eng-2017.pdf> Last Access 15 March 2018.

analysis of biological samples sent from Brazil to ICMP's laboratory system. This result ended 47 years of waiting for the victim's relatives<sup>898</sup>.

The role of these organizations dedicated to applying forensic sciences in human rights causes also influenced the final text of the ICED. The *Argentine Forensic Anthropology Team*, for example, participated in sessions of the UN Drafting Group of the ICED to promote the use of international standards applicable to forensic techniques for the identification of remains<sup>899</sup>. Despite not explicitly mentioning forensic techniques, Article 24(3) ICED ultimately provides the obligation "to take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, locate, respect and return their remains".

The location, respect and return of the remains, although not included in the same paragraph as the right to truth, are intrinsically related with it. As mentioned above, the struggle of the relatives to know the truth has also been the struggle to find the disappeared body. Without the body – or its remains – the story of what happened to the victim is not complete, perpetuating the pain of the families. For instance, until nowadays in Chile, relatives of disappeared victims search for the bones of their loved ones in the immense desert of Atacama, where bodies of political prisoners had allegedly been concealed. When it became clear that relatives would search for the bodies, the former Dictator Pinochet had them dug up and moved or thrown into the sea. However, the process of excavation was incomplete, and some bodies still turn up, along with heads and feet (as these parts of the body will likely hang over the edge of the backhoe's shovel as it scoops them out of the earth). A group of women still walk on the desert with small shovels in their hands, as they have been doing for almost three decades, looking for the bones of their loved ones. This is a clear example of the wonder of family members for the truth and for its outcome<sup>900</sup>.

This proximity between the right to truth and the return of mortal remains to the families has been consistently recognized by the IACtHR in its jurisprudence. In the case of *Bamaca Velasquez*, for example, the Court ordered the Guatemalan State to locate the

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<sup>898</sup> International Commission on Missing Persons. *ICMP Helps to Identify Victims Of 1970s Military Regime in Brazil*. Available at: <<https://www.icmp.int/press-releases/icmp-helps-to-identify-victims-of-1970s-military-regime-in-brazil/>> Last Access: 16 March 2018.

<sup>899</sup> NAFTALI, Patricia. *Crafting a "Right to Truth" in International Law: Converging Mobilizations, Diverging Agendas?* At para. 13.

<sup>900</sup> VOLK, Steven S. *Chile and the Traps of Memory*. In: Nacla – Reporting on the Americas since 1967. Available at: <<https://nacla.org/article/chile-and-traps-memory>> Last Access: 10 March 2018. This article of Mr. Volk is written on the occasion of the release of the beautiful documentary of Patricio Guzman, *Nostalgia for the Light*, which portraits *inter alia* the struggle of the relatives of disappeared victims in Chile.

mortal remains of Mr. Efraín Bámaca Velásquez, to disinter them in the presence of his widow and next of kin, and to deliver them back to the family. Similarly to the Velasquez Rodriguez case, the Court assumed a clear position concerning exhumations, deciding that they should be conducted not only for the relatives, but also for the deceased victim, as the “care for the mortal remains of a person is a form of observance of the right to human dignity”<sup>901</sup>.

Furthermore, to the IACtHR, to find the mortal remains of the disappeared victims is a form of reparation which should be fulfilled through a criminal investigation or other efficient and appropriate proceeding. When found, the bodily remains must be transferred to the next of kin as soon as possible, being the State in charge for all funeral expenses<sup>902</sup>. The introduction of this measure of reparation represents undoubtedly a very important step towards attending the relatives’ demands to have the return of their loved ones back to them, and ultimately to fulfil their right to truth.

Closely to the understanding of the IACtHR is the Human Rights Chamber for Bosnia and Herzegovina’s position towards returning the mortal remains of the deceased victim to the families. In the Chamber’s view, this returning is essential to bury the victim in accordance with her or his tradition and beliefs<sup>903</sup>. The remains – as emphasized by the Chamber – are “of primary importance to bring closure to the trauma and loss”<sup>904</sup> experienced by the family of the missing victim. Therefore, by not making the information on the fate and burial site accessible to the applicants and by not returning the mortal remains, the Chamber accused a breach of Articles 8 and 3 ECHR.

The reparation measures for those violations fell under the State’s duty “to conduct a full, meaningful, thorough, and detailed investigation into the disappearance and death”<sup>905</sup> of the victim. This investigation is thus presented with a quite broad scope as it should aim, in accordance with the Chamber, to provide information to the relatives, to return the mortal remains and to bring those responsible for the disappearance and death to justice<sup>906</sup>. In the case of Srebrenica, however, the Chamber went even further and decided to award a contribution to the *Foundation of the Srebrenica-Potocari Memorial*

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<sup>901</sup> IACtHR. *Case of Bámaca Velásquez v. Guatemala*, Judgment of February 22, 2002 (Reparations and Costs), at para. 76.

<sup>902</sup> Ibid., at para. 82.

<sup>903</sup> Human Rights Chamber for Bosnia and Herzegovina. Case no. CH/02/10074. *Ljiljana, Anka, Lazar and Natasa Popovic against the Federation of Bosnia and Herzegovina*. (Decision on Admissibility and Merits of 7 November 2003), at para. 140.

<sup>904</sup> Ibid., at para. 160.

<sup>905</sup> Ibid., at para. 173.

<sup>906</sup> Ibid.

and Cemetery, responsible for erecting a memorial and creating “a solemn burial place for those persons who died as a result of the Srebrenica events”<sup>907</sup>.

These postures adopted both by the IACtHR and by the Chamber of Bosnia and Herzegovina are essential to protect the victims’ right to truth. On a very different direction is the ECtHR which has not positively recognized the relatives’ legal claims to have mortal remains of their loved ones back despite previous mentions to the right to truth in its jurisprudence. In the case of *Lejla Fazlić a.o. v. Bosnia and Herzegovina*, for example, the Court found that, although unfortunate, the fact that the remains of the applicants’ missing relatives have not yet been exhumed and identified is not sufficient alone to find a procedural violation of Article 2 ECHR<sup>908</sup>. In the Court’s view, since the authorities were making efforts to clarify what had happened, including conducting exhumations in the nearby areas where the relative of the applicant disappeared, this was enough to fulfil the State’s obligations. In other words, the fact that, after all, the applicants were not provided with a proper closure for their case, remaining without a body to mourn and to bury did not breach the ECHR.

The ECtHR has assumed a similar position in the dramatic cases of Katyn and the Spanish Civil War. For the relatives of those executed in Katyn<sup>909</sup>, the denial of the European Court in protecting their right to have the mortal remains of their loved ones exhumed and identified led basically to a “end of the road” situation, i.e. it is highly unlikely that they will ever receive information about their loved ones. The Court equally found complaints lodged in 2009 by families of the Spanish disappeared to be inadmissible due to being filed too late<sup>910</sup>. It is important to remember that taking measures to ensure the right to truth of these families is a duty of the state, but numerous European countries are failing to meet their responsibility. The European Court of Human Rights missed a chance to push two such states – Spain and Russia – to fulfill their duties and to provide answers to the families of the disappeared persons<sup>911</sup>.

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<sup>907</sup> Human Rights Chamber for Bosnia and Herzegovina. Cases no. CH/01/7604 et al., *Selimovic & 48 Others v. the Republika Srpska (Srebrenica cases)*, (Decision on Admissibility and Merits of 7 March 2003), at para. 215.

<sup>908</sup> ECtHR. Case *Lejla Fazlić a.o. v. Bosnia and Herzegovina*. Decision of 3 June 2014, at para. 35.

<sup>909</sup> ECtHR. Case of *Janowiec a.o. v. Russia*. Judgment of 16 April 2012.

<sup>910</sup> MARQUEZ, Lydia Vicente; MELÓN, Mercedes. *A European Court of Human Rights’ Decision Devoid of Justice*. In: The Global Journal, 12 February 2013. Available at: <<http://www.theglobaljournal.net/article/view/994/>> Last Access: 17 March 2018.

<sup>911</sup> BARANOWSKA, Grazyna. *The Right to truth for the Families of Victims of the Katyn Massacre*, 6 January 2018. Available at: <<https://verfassungsblog.de/the-right-to-the-truth-for-the-families-of-victims-of-the-katyn-massacre/>> Last Access 10 May 2018.

In other situations, however, the practice of exhumation has not been welcomed either by relatives or by the communities to which the victims belonged. This reluctance may be attributed to religious or political reasons and should be respected. The right to truth does not intend to impose on anyone – either relatives or individuals from a certain community - nothing that they may not want to know or that are against their own beliefs.

An interesting case took place in Poland in the city of Jedwabne where, in July 1941, 1600 Jewish individuals were murdered. Some were beaten to death, some bludgeoned, some knifed, and some beheaded. Most, however, were herded into a barn where, after the kerosene had been poured and the doors sealed, they were burned to death. In the early 2000s, the historian Mr. Jan Gross published a book with documents from diaries and trial records attributing the responsibility for those tragic events to the Poles instead of to the Germans. The Polish government, in shocked reaction to Gross' book, ordered some preliminary exhumations at Jedwabne to investigate the real possibility of such accusations. One of the groups that had representation (though not participation) at the preliminary exhumations conducted was the Physicians for Human Rights<sup>912</sup>.

In exploring the question of doing further exhumations in Jedwabne, Physicians for Human Rights approached some Polish rabbinical leaders who claimed that exhumation is absolutely forbidden according to Jewish law<sup>913</sup>. Thus, because of a compromise with the local Jewish community, Polish authorities conducted an inconclusive dig at Jedwabne in 2001, which did not include exhumations, and which was stopped as soon as human remains were encountered<sup>914</sup>.

Another case took place in Argentina and led, in 1986, to the division of the notorious organization Madres de la Plaza de Mayo. Some of the Madres opposed to the exhumations, supervised by Mr. Snow, believing that this practice would destroy the living memory of the disappeared. Instead, the Madres preferred to direct their actions to public protests and to the resignification of the political ideas of the disappeared, normally former members of political organizations. The view, sustained by these members/relatives, due to its controversies gave scope for the foundation of *Madres-Línea Fundadora*, constituted by those mothers who were in favor of exhumations. In their view, the recovery of the bodies was a way to recovery the disappeared to History

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<sup>912</sup> POLAK, Joseph A. *Exhuming their Neighbors: A Halakhic Inquiry*. In: *Tradition - A Journal of Orthodox Jewish Thought*, Vol. 35, No. 4 (Winter 2001), p. 23-24.

<sup>913</sup> Halacha, the Jewish Orthodox law, forbids disturbing human remains except when doing so has the potential of preventing a larger desecration or to save human life. See: Rabbi Geller. *Exhuming the Dead*. POLAK, Joseph A. *Exhuming their Neighbors: A Halakhic Inquiry*.

<sup>914</sup> POLAK, Joseph A. *Exhuming their Neighbors: A Halakhic Inquiry*.



and to the societies they belonged. In that sense, they support that the bodies and the forensic investigations not only constitute important sources of criminal evidence, but also shed light to the truth about the past. Additionally, the exhumations allow the victims to have a proper funeral and ceremony in accordance with the families' beliefs<sup>915</sup>.

When the relatives of disappeared victims began their struggle in the 1970's to know the truth, they would shortly after found out that most of those individuals taken by state authorities were probably dead. The exhumations then emerged as an imperative – to those who wanted – to know what happened and to finally end the absent of information and the silence on the victim's fate. In some cases, not even exhumations could solve: to those bodies thrown into the ocean or to those completely burned, the disappearance prevailed, but the voices of those struggling for truth and justice have never been muted.

### **Conclusion**

The project of an international convention covering enforced disappearance was lengthy expected by the relatives of disappeared victims and NGOs. With its implementation, the debates on a possible provision for the right to truth intensified. As covered previously in this work, it was due to the practice of enforced disappearance that the right to truth emerged in international human rights law. With the growing influence of this right after the collapse of dictatorships in South America and the proliferation of truth commissions throughout the world, it was somehow expected that a binding instrument on disappearances would finally debate the implementation of the right to truth.

It was very important that the ICED provided also for the aspects which constitute the right to truth, i.e. the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. In other words, if one is entitled to the truth, it is crucial to know to the truth of *what* exactly. With article 24 (2), the convention clearly tried to answer this question by including the three elements above. This means that if states should take measures in attending the right to truth as drafted in the ICED, they should consider all these elements mentioned in the article to be sure that such right was fulfilled.

Taking this into consideration, one can conclude that hardly there would be only one measure able to clarify the all truth independently of the case at stake. For example, in several countries which established truth commissions, such as Chile, Argentina and South Africa, the relatives of disappeared victims continued their struggle to know the

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<sup>915</sup> NAFTALI, Patricia. *Crafting a "Right to Truth" in International Law: Converging Mobilizations, Diverging Agendas?* At para. 23.

whereabouts of their loved ones even after these commissions concluded their work. This happened exactly because these truth commissions did not fulfill all the elements of the right to truth. For that reason, it is important to consider other measures able to achieve the truth, which may vary depending on the case.

The present chapter discussed four different measures usually immersed in the debates on how to implement the right to truth - truth commissions, archives and the opening of files, criminal investigation, and exhumations. It is important to note, however, that these measures are examples of how to concretize such right, i.e. they are not the only ones. Civil society have searched, and eventually applied, other initiatives. For example, one could mention the “mock-trials” or “tribunals” such as the “Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery,” known as the Tokyo Women’s Tribunal, which investigated and condemned violence against women, and especially the issue of “comfort women,” during the Second World War. This achievement had the contours of an unofficial truth-telling experience modeled on a criminal tribunal, but with no actual power to adjudicate. It took place in Tokyo during the month of December 2000.

To consider that there is a roll of different measures that may be applied to implement the right to truth is also important, as such right also takes part in other cases of gross violations beyond enforced disappearance. In those cases, then, what would be the situation of the right to truth taking into consideration that it is only provided for in the ICED? There are two possible indications of the scope of this right in cases beyond disappearances. One could be inferred from Article 24 (2) ICED itself. This provision points to a right to truth which should clarify the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Then, if it is not a disappearance the violation occurred in a concrete case, the right to truth guarantees the victim to know the circumstances of the harmful events and the progress and results of the investigation.

Corroborating this interpretation, one can quote the 2005 UN *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* which establishes as measure of satisfaction the “verification of the facts and full and public disclosure of the truth”<sup>916</sup>. Moreover, in the scope of remedy, the Guidelines provide that “victims and their representatives should be entitled to seek and obtain

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<sup>916</sup> United Nations, *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*. A/RES/60/147, 16 December 2005, principle 22 (b).

information”<sup>917</sup> on the reasons related to their victimization and “on the causes and conditions pertaining to the gross violations of human rights (...) and to learn the truth regarding these violations”<sup>918</sup>.

In other words, even if the case does not concern enforced disappearance, victims have the right to truth about the gross violation which cause them direct or indirect harm. To learn the truth in those cases is a measure of reparation and a remedy which states should comply with. This is perhaps one of the most important conquests of the introduction of the right to truth in international human rights law – to avoid violations from being silenced and concealed, and the voices and lives of those who suffered the gravest brutalities from being despised.

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<sup>917</sup> Ibid, section X, principle 24.

<sup>918</sup> Ibid.



## **Final Remarks > From Social Mobilizations to a Legally Binding Norm: the Uniqueness of the Right to *Truth***

In the end of February 2018, the Uruguayan association Mothers and Relatives of Detainees-Disappeared (*Madres y Familiares de Detenidos Desaparecidos*) renounced their participation in the Working Group for Truth and Justice, a commission created in 2015 by President Tabaré Vazquéz. The objective of this Group is to investigate human rights violations which took place during the dictatorship (1973-1985) in Uruguay. This was the second effort in the Country, following the Commission for Peace, established in 2000 to study the crimes of the dictatorship. To the relatives, however, this was an “immense and persistent work of asking and waiting”<sup>919</sup> that has not resulted in any real and concrete information on the disappeared. They claim that to advance with truth and justice requires not only the work of victims and families, but also the establishment of a policy which faces the delays and excuses of those who actually have the information<sup>920</sup>.

The present dissertation aimed at exposing that the right to truth is a product of this struggle – of victims who were left in the dark about what had happened to them or to their relatives. Throughout the world, even when not speaking loud about their losses and traumas, victims who survived the terror of gross violations, for those who were victims of torture, of extra-judicial rendition, in times of war or peace, during dictatorships or apparent democracies, *the past may insist in not passing*. For those deceased, it is left the indignity of their death, and the pursue of authorities to silence what happened to them. Interestingly, such strong effort in concealing evidence is normally what echoed in public spheres at national and international levels. It was, after all, the silence and denial towards the demands of the victims, the missing and disappeared bodies, which pushed these violations to the public arena.

However, the States are those responsible for dealing with the violations they committed, and they are demanded to clarify the violations they intend to hide. The right to truth remains as if it were rowing countercurrent, defying the will of many authorities and the domestic and international normative frameworks. When the UN Expert, Professor

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<sup>919</sup> Madres y Familiares de Detenidos-Desaparecidos. *Comunicado a la Opinión Pública*. Montevideo, 1° de marzo 2018. Available at: <<https://desaparecidos.org.uy/2018/02/comunicado-a-la-opinion-publica/>> Last Access: 10 March 2018. (Translated from Spanish to English by the Author).

<sup>920</sup> Ibid.

Ermacora, after a visit to Chile with the then United Nations *Ad Hoc* Working Group, concluded that the issue of missing persons deserved a specific treatment, he resorted to IHL to find a solution. It was in the 1977 Additional Protocol I, under the *right to know*, that he found the answer. It appeared that the acts of times of war had reached also the times of peace. And international human rights law, at that time, could not provide the proper solutions for the complexity of the violations that were taking place.

With the increasing number of known cases of disappearances, a new lexicon arose, trying to denominate and explain what was happening - the state violence and brutality, but also the way it was intended to happen – through concealing, denying, disguising, covering up. The systematic practice of vanishing with bodies of deceased victims without never informing the families on the whereabouts of the individuals had been reported in other places before Latin America<sup>921</sup>. But, it was certainly the way how the families organized themselves that made difference, constituting a key element in understanding the right to truth.

By exposing their voices at public spheres, the relatives, but also those who survived detentions centers, strengthened the role of victims, fortifying their importance at international level. They influenced the work of UN members, such as Professor Ermacora himself, reverberating in UN reports and resolutions. Some of these were highly significant as, for example, the works of Mr. Theo van Boven, Mr. Louis Joinet, Mr. Manfred Nowak, Mr. Juan Mendéz and Mr. Frank LaRue. In a kind of contradictory way, the silence on the disappeared victims' whereabouts competed then with the loudness of the denounces, as these were achieving higher and higher places. And as the victims fought for truth, their demands would be then crystalized in the IACHR annual report of 1985-1986 as the *right to know the truth about past events*<sup>922</sup>.

This denomination – *truth* - emerges, in fact, as an antonym to the attitudes of denial of the states, to the obscurity of information. Truth meant the clarification of the violations – the uncovering of the clandestine detention centers as places for torture and murder, of the final fate of those disappeared, of the dismantlement of entire structures build to hide brutality. Contrarily to what was already suggested in the literature, there is no indication that either when the relatives claimed for it or when the IACHR recognized such right in its annual report, they meant to attribute any philosophical meaning for

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<sup>921</sup> For example, in Uganda under the regime of the former Dictator Idi Amin. See, chapter II.

<sup>922</sup> IACHR. *Annual Report 1985-1986*, OEA/Ser.L/V/II.68, 26 September 1986, Chapter V.

truth<sup>923</sup>. As said, the choice for the word *truth* seemed more as a reaction, a response to the kind of violations committed.

The fact is that the right to truth would find a very fertile soil when applied in the context of gross violations others than enforced disappearance. This can be explained based on different reasons. First, the emergence of a right to truth coincided with a specific movement in human rights of facing carefully the transformation of past authoritarian regimes into more or less liberal democracies. The weight attributed to violations which had taken place under these pasts regimes began mattering as much as those of present ones. The right to truth would then fit as a glove, playing the role of emphasizing the importance of clarifying the past, coming in terms with it.

Secondly, the end of the 1980's and beginning of the 1990's marked the end of the dictatorships in Latin America, but also the end of the communist rule in the East. Symbolized by the fall of the Berlin wall, the new democratic movement influenced authorities, intellectuals and representatives of victims' associations to debate how to deal with the recent communist oppressor past. This allowed several parts of the world to join in the common debate of overcoming - by challenging - the violations of the past. Dictators and their collaborators, fearing reprisals, decreed amnesties while some also flee their countries.

The human rights movement, in this process, questioned the pros and cos of several measures aimed at confronting violations, e.g. trials, truth commissions, purging. In some countries, like Romania, for instance, the switch of regime was more dramatic with the main communist leader killed, while being filmed, along with his wife<sup>924</sup>. It was, at large, the fear of situations like the Romanian that would influence a general option for measures understood as being *pacific*, as capable of helping to preserve recent democracies, instead of putting them in risk of eternal conflicts. Many voices then in the human rights movement would support investigations in the model of an extra-judicial commission, aiming at more tranquil and temperate approaches towards previous regimes<sup>925</sup>.

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<sup>923</sup> As indicated by: NAQVI, Yasmin. *The Right to truth in International Law: Fact or Fiction?* p. 249-254.

<sup>924</sup> The former Romanian Dictator Nicolae Ceausescu was executed with his wife, Elena, on Christmas Day, 1989. After a melodramatic show trial, the couple was lined up against a wall and executed, strafed with bullets.

<sup>925</sup> For example, MINOW, Martha. *Making History or Making Peace: When Prosecutions Should Give Way to Truth Commissions and Peace Negotiations*. Journal of Human Rights, 7:2, 14 June 2008, p.174-185. ROTBERGM Robert I; THOMPSON, Dennis (Eds.). *Truth v. Justice: The Morality of Truth Commissions*. New Jersey: Princeton, 2000.

The world knew the Argentine CONADEP report, called *Nunca Más*, produced by an extra-judicial commission of inquiry. But, it would be with the South African Truth and Reconciliation Commission that the right to truth and the search for the best way for confronting past violations would bound together completely. In this match, truth would be also directly associated with *healing* and *forgiveness*, working like a “magic potion” through the work of what became known as truth commissions.

It is, somehow, an interesting result that such concern with past violations, such strong movement to avoid their forgetfulness, of giving voices to the suffering of the victims would tend more to extra-judicial commissions than to judicial measures. The times of the fight against impunity resulted, in fact, in quite soft practices based on speeches of a shared truth to reach national reconciliation and peace. The fact is that this model has been offered to countries willing to leave behind their conflicts such as Sierra Leona, Serbia or Montenegro<sup>926</sup>. When some authors suggested that the best approach for the former Yugoslavia after the war was the establishment of truth commissions, the UN Expert Juan Mendéz responded clearly that it was “hard to see what could possibly be gained by another ‘truth report’ in the Balkans, after UN thematic and country-specific rapporteurs have documented the crimes so painstakingly while the international community prefers not to hear”<sup>927</sup>. In his view, the UN had sponsored a ‘truth commission’ for the former Yugoslavia, in the form of the commission headed by Professor M. Cherif Bassiouni which preceded the creation of the special tribunal<sup>928</sup>.

The frustrations, however, of previous experiences - such as in the Latin American region – could have alerted for a misconception with the meaning of *truth*. If the right to truth, which emerged from the social mobilizations of the 1970’s and 1980’s, was directed to concrete information on the fate of disappeared victims and to the clarification of obscure structures of clandestine violence, the truth elaborated in the 1990’s was much more *elastic*. What it is very important to note, however, is that this *elasticity* represented, for example, in its association with *reconciliation* and *forgiveness*, leading even to the enactment of amnesty laws, was never really what the victims were fighting for. By dissociation *truth* from *reconciliation*, there is no intention in this work to ignore the noble values of living peacefully in society, forgiving, etc. It is simply to note that a speech, having as basis the right to truth, was elaborated - particularly with view to the South

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<sup>926</sup> LEFRANC, Sandrine; STEIN, Mariana. *Las políticas del perdón y de la reconciliación. Los gobiernos democráticos y el ajuste decuentas con el legado del autoritarismo*. Desarrollo Económico, Vol. 45, No. 178 (Jul. - Sep., 2005), p. 164.

<sup>927</sup> MENDEZ, Juan E. *Responsabilización por los Abusos del Pasado*, p. 7 – For the English version: <[https://kellogg.nd.edu/sites/default/files/old\\_files/documents/233.pdf](https://kellogg.nd.edu/sites/default/files/old_files/documents/233.pdf)> Last Access: 15 March 2018.

<sup>928</sup> Ibid.



African experience - that instead of supporting the claims of the victims, overlapped them.

The reality exposed by the associations of relatives worldwide, which this present dissertation had the concern to investigate, reveals in fact that even where truth commissions were established, the claims of the victims *for truth* were – as a rule - not solved. Even worst is the fact that after establishing truth commissions, some countries may consider that their obligations with truth were fulfilled and close the doors for future investigations. This is the main reason why it is essential to be aware of such model, which supports truth and reconciliation and forgiveness in the form of commissions. As once observed, “the attitude that everything should be forgotten and forgiven, which would be proper for those who suffered injustice, is practiced by those party supporters who committed the injustice”<sup>929</sup>.

The case-law of human rights courts presented in chapter IV well demonstrates that the victims kept pushing their demands for *truth* throughout the decades in different regions of the world. Their dissatisfaction with current domestic measures and their search for truth gain in those cases a very concrete contour of what it is at stake, i.e. what they demand and what they challenge. These cases represent therefore an essential prove of how the right to truth is not indeterminate or too broad.

What differs from the victims’ claims is the way in which the courts apply the right to truth. That is, the methodology chosen by the courts, namely the IACtHR, the ECtHR and the Human Rights Chamber for Bosnia and Herzegovina to incorporate the right to truth in their sentences is not the same as the content of the right itself. This is particularly important because the right to truth is not provided for in the ACHR nor in the ECHR. The fact that the IACtHR opted for a combination of articles to incorporate the right to truth in its decisions may be criticized, as it has been by some of its own judges<sup>930</sup>, without necessarily affecting the importance of having such right recognized.

Similarly, if the Human Rights Chamber and the ECtHR understood that the right to truth derives from a procedural violation of the right to life and the prohibition of torture, it does not mean that such right can be left out, i.e. as though the content and normative scope attributed to it already exist through the positive obligations of the states towards Articles

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<sup>929</sup> ADORNO, Theodor. *The Meaning of Working Through the Past*. In: Critical Models: Interventions and Catchwords, trans. Henry W. Pickford. New York: Columbia University Press, 2005, p. 89.

<sup>930</sup> MAC-GREGOR, Eduardo Ferrer. *The Right to truth as an Autonomous Rights under the Inter-American Human Rights System*. In: Mexican Law Review. Volume IX, Number 1, 2016; Partially Dissenting Opinion of Judge Medina Quiroga. IACtHR. *Case of Nineteen Tradesmen v. Colombia* Merits, Reparations and Costs. Series C No. 109, 5 July 2004

2 and 3 ECHR. In fact, to mention an example, it is the lack of recognition by the ECtHR of the relatives' right to have the mortal remains of their family members returned to them, which is an essential aspect of the right to truth, that has led to considerable flaws in the protection of those victims. This can be evidentially seen in cases such as the *Katyn* tragedy and the application concerning the war in Bosnia and Herzegovina<sup>931</sup>.

It is for those reasons that the introduction of the right to truth in the ICED is so essential. Not only it made of *truth* a legally binding norm, but it contributed to specify the contours of such right. The ICED emerges therefore as a concrete response to the demands of the victims, supporting to the right to truth a more precise and accurate meaning. Despite the compromises made concerning amnesty laws, the Convention allowed the right to truth to reflect more specifically what the victims expect from it, i.e. the search for information and particularly for knowing the final fate of the disappeared kin. The right to truth offers therefore a protection which is unique, allowing the voices of the victims to confront the imposed silence of states' authorities. It resounds their demands, resulting directly from their search to have the cases clarified and to avoid what happened to them and their relatives from being forgotten and denied.

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<sup>931</sup> ECtHR. Case *Lejla Fazlić a.o. v. Bosnia and Herzegovina*. Decision of 3 June 2014; ECtHR. Case of *Janowiec a.o. v. Russia*. Judgment of 21 October 2013.

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