





**TRANSITIONAL  
JUSTICE**  
HANDBOOK FOR LATIN AMERICA



**FÉLIX REÁTEGUI**  
Editor

# TRANSITIONAL JUSTICE

HANDBOOK FOR LATIN AMERICA

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### **Amnesty Commission of the Ministry of Justice**

The Amnesty Commission is an agency of the Brazilian State in the Ministry of Justice and is composed of 24 members, a majority being civil society or academics, one of which is indicated by the victims and the other by the Ministry of Defense. The Amnesty Commission was founded in 2001, ten years ago, with the objective to grant moral and economic reparations for victims of acts of repression, arbitrary and human rights violations committed between 1946 and 1988, and now has more than 70,000 amnesty applications filed. By 2011, more than 35,000 people were granted “political amnesty”, thus promoting an official apology of the violations committed by the State. In approximately 15,000 of these cases, the Commission also recognized the right to economic compensation. The collection of the Amnesty Commission is the most comprehensive document of the Brazilian dictatorship (1964-1985), combining official documents and interviews with numerous collections aggregated by the victims. This collection will be made publicly available through the Political Amnesty Memorial in Brazil, a site of memory and honor of the victims currently under construction in the city of Belo Horizonte. In 2007 the Commission has begun several projects to promote education, citizenship and memory by leading sessions for assessing applications to the places where the violations occurred, promoting public calls for funding initiatives for social memory and fostering international cooperation for the exchange of practices and knowledge, with emphasis on the countries of the South. This book integrates the actions of this international cooperative project by the Amnesty Commission.

### **United Nations Program for Development**

The United Nations Development Programme (UNDP) is the global development network of the United Nations, present in 166 countries. Its core mandate is to combat poverty and promote human development in the context of democratic governance. Working together with governments, private sector and civil society, UNDP connects countries to knowledge, experience and resources to work with people in order to build a dignified life. This is accomplished by working together on solutions drawn by member countries to strengthen local capacity and provide access to human, technical and financial resources through external cooperation and an extensive network of partners.

### **Brazilian Agency of Cooperation of the Ministry of Foreign Affairs**

The Brazilian Cooperation Agency (ABC), which is a part of the structure of the Ministry of Foreign Affairs (Itamaraty), has the task to negotiate, coordinate, implement and monitor programs and technical cooperation projects in Brazil, run on the basis of agreements signed by Brazil with other countries and international organizations. To fulfill its mission, ABC's foreign policy is guided by the SRM and the national development priorities, as defined in sectoral plans and programs of the Government.

### **International Center for Transitional Justice**

The International Center for Transitional Justice (ICTJ) is intended to remedy and prevent violations of human rights, in order to address the legacy of serious abuses committed during armed conflict or authoritarian regimes. To fulfill this mission, ICTJ uses the extensive knowledge gained in several countries, like advising truth commissions, reparations programs and other mechanisms of transitional justice. ICTJ works in partnership with governments, civil society actors and others in defending the rights of victims and the search for integrated solutions to promote accountability and create more just and peaceful societies.



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Latin America has been, in recent years, the great reference for scholars of political transitions and the agents responsible for carrying out such transitions. The quality of public policies, the tenacity of democratic movements and the struggle for human rights in the region serve as an indispensable reference for any new work or action being undertaken in this area. There remains therefore, no doubt, that the process of democratization served the intended purpose: *to transform a region that had been marked by authoritarianism into a kaleidoscope of new ways to exercise rights and powers from a democratic and humanistic perspective.*

Looking into the kaleidoscope of Latin America, however, leads us to view a number of differences between the transitional processes that impact each local situation in a different way. As it is an indisputable success of the whole region to democratize itself, it is equally undeniable the uniqueness of each situation in the national processes. This work—the result of direct cooperation between the Amnesty Commission of the Ministry of Justice, the Brazilian Agency for Cooperation of our Ministry of Foreign Affairs, the United Nations Development Programme and the International Center for Transitional Justice (editors)—hopes to show the reader two aspects of our kaleidoscope: observing the cyclical movement of democratization of the region, and also knowing the individual experiences of each country and what was the most successful.

The Ministry of Justice made the decision to finance this initiative with the goal of reinforcing an agenda of Latin American integration and also to improve our relations of South-South cooperation. This project aims to contribute to the strengthening of an ever growing dialogue, a focused understanding of our similarities, accepting our differences and above all—the collaborative construction of better alternatives for the future.

Serving as a reference book on Transitional Justice, *Handbook for Latin America* was conceived in order to support the construction of

democracy-building initiatives, whether the product of governmental action or civil society efforts. Containing the basic texts on the subject—many of which are originally available only in one of three languages—they are now presented (as well as previously unpublished contributions) to also serve as an introductory textbook for academics and new students to the subject.

With this contribution to the debate in Latin America, we sincerely hope to further coordinate and include our example of regional integration and also open new doors allowing Brazil to receive international cooperation while also providing it. By doing this, we hope to promote what is best in the current process of globalization: the breaking of barriers—whether they be geographical, linguistic or cultural.

**José Eduardo Cardozo**  
**Minister of Justice**  
Brazil

The United Nations (UN) has worked within the framework of human development since the early 1990s. Based on a design that goes beyond the material conditions achieved by human beings, human development promotes the expansion of awareness about the range of options and opportunities for citizens within a society.

Through the vision of the United Nations, the development process is thus intrinsically linked to the expansion of rights. Democracy—both political and social—appears in this context as one of the key milestones for the pace and quality of the construction process for a more just and equal society. As hard as it may seem, transparency is essential to the exercise of democracy, because by bringing these facts to light and knowing the difficult moments of the past, we are able to exercise proper justice in their regard.

The Universal Declaration of Human Rights was censored by the Brazilian military regime. At the time, the decision gave the document a positive, subversive character because of its recognition of the value of each individual and the assurance of their protection from the state and social organizations. This event only reinforces the notion that the recognition of human rights and ensuring access to them are still considered complex and revolutionary in many contexts. The evolution of societies implies the evolution of the rights of its citizens, and it is up to the citizens themselves to monitor and adapt this cyclic and continual process.

Due to the common past, the exchange of experiences among Latin American countries proves to be a practice relevant to the process of recognition and guarantee of rights. On the one hand, Latin America has worked extensively on the topic of transitional justice—providing a strong example to the rest of the world—but on the other, we still have much to accomplish.

For the UN family, transitional justice is the set of mechanisms used to address the historical legacy of the authoritarian regimes of violence. In its core elements are truth and memory, through the knowledge of the facts and the history of redemption. If Human Development only exists when it includes the recognition of the rights of people, it can be said that we have a moral obligation to support the creation of mechanisms and processes that promote justice and reconciliation. In Brazil, both the Amnesty Commission and the Truth Commission are vital tools to the historical process of rescue and reparation procedures and each can ensure more transparent and efficient processes.

It is the UN's role as an agent of change and transformation, to raise awareness and teach to those who do not share these ideals about the importance of building respect for human rights, the corner stone on which the United Nations Charter is built. It is through this prism that the ideals of a more just and peaceful world must be achieved. Justice, peace and democracy are not mutually exclusive goals. Rather, they are mutually reinforcing imperatives.

Thus, the UN highlights the importance of this book as a reference on Transitional Justice which will strengthen the national foundations of democracy and stimulate debate on the subject, while contributing to the promotion of greater regional integration and a repositioning of the world stage in relation to this issue.

**Jorge Chediek**  
**Resident Representative**  
United Nations Development Programme (UNDP)  
**Resident Coordinator**  
UN System in Brazil



According to Amartya Sen, the expansion of freedom can be seen as both the means and end to development. With this in mind, the project BRA/08/021—*Cooperation for International Exchange, Policy Development and Expansion of Transitional Justice in Brazil*, is implemented in partnership with the United Nations Development Programme. This publication is a strong union of the concepts of freedom and development.

The Amnesty Commission has the aim to strengthen the capacities of development and implementation through the exchange of experiences within the institutions of Transitional Justice and also the areas of education, science and culture. This project reflects the Ministry of Justice and its active position in affirming the goals of international cooperation.

Brazil understands the essentiality of international technical cooperation as a strategic partnership. This collective project represents an instrument capable of making positive impacts on people, raising standards of living, changing realities, promoting sustainable growth and contributing to social development. The programs implemented under its aegis can transfer knowledge, successful experiences and sophisticated tools, thus helping to train a workforce while strengthening institutions in collaboration with partner countries—which will ultimately help to create a collaborative push forward.

For over four decades Brazil has been establishing partnerships and maintaining fruitful dialogue with the international community in the field of development cooperation, with special emphasis given to partnerships with other developing countries. Initially this occurred through training from foreign visitors, and thereafter through technical cooperative projects, scholarships and cultural exchanges.

Sharing best practices and lessons learned, respecting cultural differences, and establishing social policies of our partner countries—in

favor of the full scope of human rights—has always been the motivator of policy and Brazil’s South-South cooperation.

Currently, Brazil has become an increasingly relevant actor in the process of international development and holds an integral place in the international community. As a middle income country, with one of the ten largest GDPs in the world, our country has been able to work on two fronts—as a participant, and as a leader in international cooperation. Thus, the present work—*Transitional Justice: Handbook for Latin America*—is a synthesis of these two roles.

By sharing our experience with the world, this publication features renowned authors and aims to be a reference material in the three languages of our region. This work is also a testament to Brazil and its commitment to contribute to building a future where freedoms, in their broadest terms, serve as the cornerstone to development.

**Marco Farani**  
**Minister**  
**Brazilian Agency for Cooperation**  
Ministry of External Relations  
Brazil

In recent decades, the region of Latin America has been implementing important transitional justice mechanisms that contribute decisively to the realization of human rights. As a way of addressing the legacy of past violence and consolidation of democracy, the region is actively demonstrating its ability to deal with these specific problems. Currently Brazil is establishing a Truth Commission; Argentina is charging the perpetrators of crimes committed during the military regime; Chile is actualizing the right to effective memory through the construction of memorials; Colombia is investigating paramilitaries and guerrillas as part of the process of Justice and Peace; Peru is executing programs for collective reparations; and Guatemala is seeking to compensate their victim—to name just a few.

In order to discuss and enhance the actions of transitional justice that have taken shape in these countries, the International Center for Transitional Justice along with the Amnesty Commission of the Ministry of Justice of Brazil; the Brazilian Cooperation Agency of the Ministry of Foreign Affairs; and the United Nations Development Programme through the project BRA/08/021—*Cooperation for International Exchange, Development and Expansion of Transitional Justice Policy of Brazil*—have produced this work, titled *Transitional Justice: Handbook for Latin America*.

Published in three languages—Portuguese, Spanish and English—the work seeks to cover all the concepts and debates on transitional justice; the legal measures adopted; the reckoning; the reparation programs; and the development and transformation of a post-conflict society. All while recognizing individual and collective experiences of Latin American countries in order to compose a theoretical basis that can aid both academics and industry professionals.

In addition to providing tools for reflection, this book can be used as teaching material that provides the discursive synergy between the actors involved through the strengthening of democratic institutions and those working to prevent human rights abuses. But preceding this, this book seeks to inspire its readers through the Latin American experience through the search for new solutions to contemporary social and political conflicts in the area of transitional justice.

**David Tolbert**  
**President**  
**International Center for Transitional Justice (ICTJ)**  
United States of America





## DEMOCRATIZATION AND HUMAN RIGHTS: SHARING THE LATIN AMERICAN EXPERIENCE

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*Paulo Abrão & Marcelo D. Torelly*

When presented with the introductions to this volume, certainly the reader can see the considerable size and principle objective of its production: together in one work, available in the three primary languages of the region, a set of theoretical and practical contributions on experiences of processes of justice in transition in Latin America. Like the Minister of Justice writes, comparing the region to a vibrant kaleidoscope where varied experiences make up a rich natural setting, this work seeks to capture these experiences from a current perspective while actively analyzing their historical contexts.

The proposal to use the image of a kaleidoscope in this work aims to bring together both the theoretical dimension of the contributions from academics to the concept of transitional justice, and examples of effective practice in the many countries of the region. Amidst this a major joint work is being carried out at the regional level by the Brazilian Ministry of Justice Amnesty Commission. In 2008, in partnership with the Brazilian Cooperation Agency and United Nations Development Programme, the project BRA/08/021 was signed. Focused on the exchange and policy development of transitional justice, the project over the last four years was made possible by professionals, activists and academics from across the region being in direct contact, effectively knocking down language and social barriers. It was in this particular exchange, focused primarily in the South and agencies and organizations targeted to them, that identified the need to work through such a scope and established the need to edit a multi-lingual handbook, enabling almost universal access of its content to citizens of every country in the region.

During the implementation of the project, several partnerships came to fruition. More than 30 consultants from different countries cooperated in the development of studies, surveys, public hearings, seminars and events of exchange. Premier academic institutions such as the University of São Paulo (USP); the State University of Rio de Janeiro (UERJ); the University of Brasilia (UNB). Several institutions of the Federal system, such as Rio Grande do Sul (UFRGS); Rio de Janeiro (UFRJ); Minas Gerais (UFMG); Paraíba (UFPB); Paraná (UFPR); Goiás (UFG); Pernambuco (UFPE); the Federal University of Latin American Integration (UNILA). Even major institutional/educational charities such as Pontifical Catholic University of São Paulo (PUC-SP); Goiás (PUC-GO); Rio Grande do Sul (PUCRS) among others, opened their doors to major events where the issue of transitional justice was addressed in comparative perspective. These collaborations also addressed important concrete actions to reparations and memory and truth, like the Caravans of Amnesty<sup>1</sup>. These events maintained the goal to reflect on the processes of democratization and justice with also a practical dimension, breaking the boundaries between teaching and research through an extension to the university environment.

By doing so, the cooperative project was a part of a state action of the critical formulation and production of knowledge, while also connected both to the political process of reparations and the production of knowledge ultimately creating a broad network of social action. More than 150 civil society organizations contributed to the success of the project. Together they established an international cooperation with educational activities for the democracy of the Amnesty Commission. These actions created a broader connection between institutions historically focused in the defense of victims of persecution and their families—such as the Never Again Torture groups, that are active in several states of Brazil—and other movements such as “Justice and Human Rights”. Also included was the participation of relevant institutional actors on the national scene, like the Bar Association of Brazil (OAB); National Union of Students (UNE); the Brazilian Press Association (ABI); and the National Conference of Bishops of Brazil (CNBB).

The development of this extensive network of contacts at local, regional and international levels leads the Commission and its cooperative project and outstanding contributions in the relevant area.

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1 To learn more about this initiative, please consult the Special Section of the *Revista Anistia Política e Justiça de Transição*, No. 02 (Jul./Dec. 2009), entitled “As Caravanas da Anistia: um mecanismos privilegiado da Justiça de Transição brasileira”.



This was accomplished through participation in the various editions of the International Tribunal for Restorative Justice in El Salvador, as well as combined visits to the most diverse countries in the region, including Argentina, Colombia, Chile, Venezuela and the United States; in Europe, with bilateral cooperation missions undertaken in Spain, France, Portugal and the UK. The international project allowed important spaces of academic formation and a Latin American reflection which opened up the project to forming strong partnerships with institutions of importance, like the Center for Social Studies, University of Coimbra (Portugal); the Center for Latin American Studies at the University of Oxford (United Kingdom); the Human Rights Program at the University Pablo de Olavide (Spain); and the Brazil Institute at King's College London (United Kingdom). As well as partnerships with large multilateral forums like the World Congress of Peace in Caracas (Venezuela, 2008), the World Forum of Human Rights in Nantes (France, 2008 and 2010) and the World Social Forum in Belém (Brazil, 2009).

In the formation of this network of cooperation, the International Center for Transitional Justice (ICTJ) took its place as an honored partner. Since 2008 the ICTJ, by that time working in Brazil in cooperation with the Federal Public Ministry at São Paulo, has began working with the Amnesty Commission, participating as a supporter of the *First Latin American Congress for Transitional Justice* and the *First Meeting of the Reparations and Truth Commissions in Latin America*—both held in Rio de Janeiro, in partnership with UERJ and the Latin American Council of Social Sciences (CLACSO). In 2009, the partnership between the ICTJ and the Amnesty Commission, made possible through the BRA/08/021, created the *First International Course on Transitional Justice*. The course brought together governmental and societal actors from fifteen countries for three days of intensive training, allowing the program to first coordinate with countries in Africa, with special emphasis on South Africa and Portuguese-speaking countries on the continent. The transfer of know-how produced by the activity enabled the subsequent implementation of two other editions of the course nationwide: one dedicated to civil servants and people in higher education held in Brasilia-DF in partnership with the University Centre of Brasilia (UniCEUB); and one for advocates of social causes held in Luziânia-GO in partnership with the National Network of Popular Lawyers (RENAP).

Continuing the success of this collective work, in 2010 we established new partnerships while seeking a broad set of goals, among them the

realization of the *Second Latin American Congress for Transitional Justice* taken last July in partnership with the Superior Court of Justice (STJ) and Catholic University of Brasilia (UCB). Ultimately this created an international observatory on Transitional Justice, in partnership with several universities and social organizations in Latin America, and the publication of a set of materials including this present work.

Divided into four parts, this *Transitional Justice: Handbook for Latin America* begins with the conceptualization of transitional justice, establishing a basic introduction to the subject. This concept presents some of the most relevant dilemmas to the field, such as the apparent conflict between political and legal measures, the difficulty of producing satisfaction and contentment with victims without violating the rights of the perpetrators, and the complexity arising from the dual nature—legal and moral—of many transitional measures, among others. Also, allowing the historical reconstruction of a normative framework that shapes the current understanding of the concept and extent of transitional justice, which qualifies the debate (greatly developed in the 1980s) on the processes of democratization.

The second part of the *Handbook* focuses on analyzing the problem of implementing justice measures, the challenges and potential for success. This was accomplished by focusing on different measures of accountability and examining the scope of local, international and humanitarian law. Together with the contribution of the Latin American experience, a leader in trials against human rights violations<sup>2</sup>, renowned international authors consider the region as a source of a true “justice cascade”<sup>3</sup>, both with regard to the development of theoretical and jurisprudential matters and regarding the issue of amnesties. Over the years, several amnesties were enacted in the region, with different levels of acceptance and legal recognition. The examination of the differences between those amnesty mechanisms allows the identification of significant patterns.

The third part of the work reflects the experiences in the area of memory and truth. The structure of the normative prescription of the “right to memory and truth” is a product of the Latin American political process.

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2 Olsen, Tricia; Payne, Leigh A.; Reiter, Andrew. “Equilibrando Julgamentos e Anistia na América Latina: perspectivas comparativa e teórica”. In: *Revista Anistia Política e Justiça de Transição*. Brasília: Ministério da Justiça, No. 02, (Jul./Dec. 2009).

3 See Sikink, Kathryn. *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*. New York: W. W. Norton & Company, 2011.

Whereas, in some subjects, the universality of human rights is confused with a supposed metaphysical foundation of law; in the field of truth and memory, a different model clearly shows a political process of social dispute around law. Here, therefore, a basic illustration of what Joaquín Herrera Flores defined as the social construction of a fundamental right<sup>4</sup>, allows us to understand—in a concrete context—the interrelationships between law, culture and politics. Each of which is evident in the processes underlying democratic consolidation of post-authoritarian countries.

Finally, the book develops the theme of reparations and institutional reforms. Here the connection that the Resident Representative to the UN in Brazil and the Chief Minister of the Brazilian Agency for Cooperation make between transitional justice and development is latent. Starting from a general structure of the connection between justice and reparation, the set of texts comes from the correlation between reparation and development through two specific studies: a comparative Latin American experience, and a deep understanding of the Brazilian reparations program.

As a final product, the entire work can function very well for both the policy makers and scholar who are approaching the subject for the first time. Between the thematic components of these four major sections it will become, globally, a major textbook that presents and discusses the current landscape of mechanisms undertaken to develop the set of democracies that O'Donnell & Schmitter in the 1980s ranked as “uncertain”<sup>5</sup> in the current Latin American kaleidoscope—with its successes, weaknesses and imbalances.

As a general perspective, the work draws on a broad concept of “democracy” incorporating the critiques from some scholars that understand democracy as a permanent process rather than a reachable end<sup>6</sup>. It is for this reason that this work avoids the idea of “ranking” the different forms of democratic political organization. The *Handbook*

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4 Herrera Flores, Joaquín. *La (re)invención de los derechos humanos*. Sevilla: Antrapasueños, 2007.

5 O'Donnell, Guillermo & Philippe Schmitter. *Transition from Authoritarian Rule: Tentative Conclusions about Uncertain Democracies*. Baltimore: The John Hopkins University Press, 1986.

6 See, for example, MacDowell dos Santos, Cecília. “Questões de Justiça de Transição: a mobilização dos direitos humanos e a memória da ditadura no Brasil”. In: Boaventura de Sousa Santos, Paulo Abrão, Cecília Macdowell Santos & Marcelo D. Torelly (org.). *Repressão e Memória Política no Contexto Ibero-Americano*. Brasília/Coimbra: Ministério da Justiça/Universidade de Coimbra, 2010.

analyzes the various political processes in the region while actively pointing out the positive aspects of each process. Reading the *generation of democratizing mechanisms as a democratic process itself*, allows us to understand the political genesis of and social processes. In this manner, it is possible to identify weaknesses and facilitate the choice of strategies to overcome them.

The Brazilian case is a fundamental example of the plurality of approaches to Transitional Justice in the region: the Brazilian dictatorship was a typical civil-military dictatorship with a system of repressive justice, leaving a model of “legalistic authoritarianism”<sup>7</sup>, in this model the number of victims of disappearance and death was significantly lower than neighboring countries<sup>8</sup>. However, other severe methods of coercion were widely used—institutional repression, with the annihilation of various political organizations in society through the illegal compulsion or exile of its members, plus a complex mechanism of repression in the student environment and workforce, immobilizing those involved through persecution, etc. This process reached its climax in the late 1970s and early 1980s, when the most violent period of repression eliminated a significant part of the armed resistance<sup>9</sup>, and the military regime turned radically against the struggle of the working-class movements. Eventually, those working-class movements, together with the pre-existing political resistance, and with a wide spectrum of social movements demanding an amnesty and opposing the dictatorship, created enough social pressure to guarantee the success of the democratization process.

In this scenario, despite the enormous efforts and achievements made by the families of hundreds that were either killed or disappeared for political reasons<sup>10</sup>, the greatest strength of the Brazilian transition was the trade union movement and its workers, who focused primarily

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7 See Pereira, Anthony. *Political (in)Justice: Authoritarianism and The Rule of Law in Brazil, Chile and Argentina*. Pittsburgh: Pittsburg University Press, 2005.

8 While in Brazil the number of politically dead and missing is estimated to be around 400, in Argentina the numbers range from nine to thirty thousand, and in Chile more than three thousand are estimated to have died.

9 This time period references the acts of violence that led to condemnation of the Brazilian state by the Inter-American Court of Human Rights in the case of *Gomes Lund & others vs. Brazil*, which is currently being executed.

10 It is the product of this pressure, for example, that gained the approval of legislation in 1995 specifically establishing the Special Commission to recognize the dead or missing due to political persecution, thus indemnifying the families.

on seeking reparation, truth and memory. It was with the development of the reparation process, however, that the numerous violations committed against tens of thousands of Brazilians came to light, allowing not only greater social mobilization so that the whole truth came to light, but that measures of justice were adopted. Additionally, it is this movement that began the reparations process, and created the guidelines that will allow historical claim for the relatives of the dead and missing to grow and gain greater social support. With greater visibility, given the scale of the violations, the expansion of the social acceptance of that version of history that which such movements advocated since the 1970s is correct. Hundreds who were persecuted, and who are still alive today, have had their stories recognized and have been able to begin the healing process (having been targets of torture and serious violations of human rights), and should thus lead to other rights that have been violated, to have the damages repaired and compensated.

The reading of such a process from a concrete perspective (and not from an ideal model) enables a strong differentiation from others, such as the Chilean case, where the struggle for memory and truth is the original vector that developed and generated the success of the demand for justice and redress. Or even the Argentine process, marked by a development that Zalaquett defines as a metaphoric “zigzag” standard<sup>11</sup>, where successive advances and retreats are showing the permeability between law and politics and the typical tensions amplified in transitional processes.

Surely these two archetypal examples from Argentina and Chile serve as the symbol of countries that have advanced transitional guidelines in the region. But they also allow us to identify the “input” for the transitional process, which is related to the type of offenses more routinely practiced by the regime, and the *modus operandi* of the social articulation of demand for transitional justice, and states’ ability to respond to such demands. The comparison between this model and the Brazilian one showed that different kinds of repression (i.e. “forced disappearance” vs. “institutional repression”) leads to different kinds of social mobilization for transitional justice, and that the number of death victims doesn’t made a repressive regime more “soft” (“*blando*”) than another: it simply illustrate that they had used different methods.

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11 See Zalaquett, José. “Verdade e Justiça em perspectiva comparada: entrevista à Marcelo D. Torelly”. In: *Revista Anisita Política e Justiça de Transição*. Brasília: Ministério da Justiça, No. 04 (Jul./Dec. 2010).

The various forms of social struggle in the face of different kinds of past violations and repressive methods are, therefore, highly relevant to the development of transitional justice. It is these struggles what make it possible in different countries, to strengthen and develop strategies to ensure the effectiveness of transitional justice, since the promulgation and effectiveness of such rights stems from concrete social processes. Hence the important role of international agencies and courts that define the minimum standards accepted in transitions. While also allowing a sharing of successes and supporting the development of a political struggle for the consolidation of different rights in different scenarios, favoring the action of social agents in pro-democratic struggle.

Believing in this dynamic, where the social struggles contribute to democracy and allow the structuring of new rights; where new “transitional rights” take place, and those “transition rights” can be shared consolidating new levels of human and institutional development; and believing that political processes and public policies taken in one country can, through a comparative analysis, produce reflections that generate learning; We’re sure that this *Handbook* will be useful not only for the intellectual exercise on transitional justice (which in itself would be of great value), but also for the sharing of concrete experiences, the improvement of current public policies and also the best foundation of normative standards. All of this has been developing in various national and international courts and governments, and today allows Latin America to be a leading region in the world, emerging as the locus of expansion and development of democracy and human rights, overcoming the tragic legacy of the historical process of years of authoritarianism.

We therefore hope the sharing of this work, as well as all the other results of our cooperative project, serves as an aid in both Brazil and other countries in the region offering a point of reflection, and ultimately strengthening a pluralistic process of democratic improvement.

Brasilia, November 2011

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Ministry of Justice

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Director of BRA/08/021  
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Since the beginning of the 1980s, Latin American countries have undergone various processes of political transformation. In general terms, this change has consisted of a transition from authoritarian to democratic regimes. In some specific cases, such as Guatemala and El Salvador, the transition consisted of peace processes after armed confrontations that had reached such proportions as to become known commonly as “civil wars”.

Political scientists have studied such transformations extensively. They have been interested specifically in understanding what the power plays are; what constellation of opportunities allows or determines the withdrawal of authoritarian or armed actors and opens the road to a restoration of a democracy or of peace<sup>1</sup>. Based on these questions, a broad wave of reflection has emerged regarding what conditions allow not only for political transitions, but also for consolidation of democracy in the region—with democracy understood as the point where a State’s rule of law becomes the only possible set of rules for the game<sup>2</sup>.

Without denying the importance of understanding these processes, it should be noted that the transitions referred to have a critical dimension that goes beyond, without negating, the horizons of negotiation and political competition. These farther horizons are the humanitarian problem and the challenges posed by building a rule of law based on the repressive character of authoritarian governments and on the abusive practices typically deployed against the people by the clashing parties to an armed conflict. In both cases, we can point to the accumulation

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1 The study conducted by Guillermo O’Donnell and Philippe C. Schmitter on transitions from authoritarian governments is emblematic of this body of work. See in particular: O’Donnell, Guillermo & Ph. Schmitter. *Transiciones desde un gobierno autoritario: conclusiones tentativas sobre las democracias inciertas*. (1989). Buenos Aires: Prometeo, 2010.

2 See Linz, Juan & Alfred Stepan. “Toward Consolidated Democracies”. In: Larry Diamond *et al.* (eds.). *Consolidating the Third Wave Democracies. Themes and Perspectives*. Baltimore: The Johns Hopkins University Press, 1997.

of human rights violations that are often the dubious legacy of military dictatorships, such as those of Brazil, Argentina and Chile, and of internal armed conflicts like those in Guatemala, El Salvador, Peru or Colombia.

Thus, the challenges and responsibilities that societies emerging from authoritarianism or armed violence face are not only those related to an effective transition in terms of political institutionalism; they are also, and centrally, tasks relating to the provision of measures of justice for the victims of human rights violations, to the clarification and collective critical recognition of past events, and, finally, to the creation of conditions for sustainable peace. These are the tasks of the field of transitional justice—or the justice of transitions—on which this publication, titled *Transitional Justice* and subtitled, figuratively, *Handbook for Latin America*, offers a set of descriptions, explanations, reflections and insights on various experiences.

This book's goal is to dialogue with the large and growing community of professionals, government officials, activists, and academics who are engaged in our region to promote the work of confronting the authoritarian or violent past of our countries. Latin America has become, in fact, one of the most dynamic areas in the search for routes to transitional justice in recent decades.

This is due not only to, stating the obvious, the unfortunate modern history of the region, marked by bloody dictatorships and multiple forms of collective violence; the dynamism of this field of demands, practices, and studies in the region is also due to a positive change in our conception of democracy: a more demanding and comprehensive understanding, which will not accept a definition of some abstract institutional stability, but rather demands the provision of a genuine experience of citizenship for the population. That is, it demands an experience of inclusion, an actual exercise of rights, and respect from the State and society. A central element of such a requirement is, of course, compliance with the debt of justice owed those who in the past have been victims of human rights violations and other forms of infringement of their fundamental rights by actions of the State or non-state organizations.

## 1. A Latin American Tradition

It has been suggested above that if transitional justice is in fervid demand in Latin America, this is because of this region's troubled contemporary political history. But to be fair, it must be remembered,

without forgetting the reality of authoritarianism and violence, that Latin America can also be considered the possessor of a tradition of truth and memory, through its pioneering experiences seeking justice through democracy and peace restoration processes.

The modern history of the region is, in fact, marked by recurrent authoritarianism and the multiple forms of inferno this triggered, and—in regard to the recent past—by the tension between revolutionary movements and counter-insurgency policies.

As for authoritarianism, throughout the 20th century, the region watched colorful and brutal individual dictatorships pass through, embodied by charismatic leaders in the model of institutional dictatorships, with a military mark. Those experienced in Brazil, Argentina, Chile, and Uruguay during the 1970s and 1980s are examples. Most effective and therefore most terrible in their organization of repressive policies, these dictatorships left their countries with an atrocious legacy of murders and massacres, forced disappearance, and various forms of torture—a legacy that still has not been wholly addressed in terms of justice and reparations. Other practices must not be left out of the description of these abuses, which were developed institutionally and largely blanketed by immunity: forced exile, arbitrary imprisonment and, last but significantly, sexual violence perpetrated mostly against women.

These dictators, who called themselves “reorganizers” and sometimes “saviors”, combined with another central fact of the last half century in Latin America: the armed, violent revolutionary wave that made a pass through the region beginning in the 1960s, under the influence, as is widely recognized, of the 1959 Cuban Revolution. Multiple forms of armed challenge to state order were unleashed in almost all of the region’s nations, running a gamut that ranged from guerrilla strategy to the practice of terror.

This diversity has expressed itself also in a weighty legacy of human rights violations and other forms of abuse. In some cases, it has been the State and its counter-insurgency strategies that bear the greatest responsibility for serious and rampant mass crimes, as in Argentina, Brazil, Chile, Guatemala and El Salvador. In other cases, such as Peru and Colombia, in addition to state action, it is also clear that non-state armed actors bear broad responsibility for committing atrocities against the population.

The recuperation of democracy and the peace processes gave way to an early surge of initiatives to confront the past in a way that later would become widely known by the name *truth commissions*. The National Commission on Disappearance of Persons (CONADEP) that investigated the crimes of the Argentinian military dictatorship of the years 1976-1983 can be considered an inaugural experience in the official search for truth, not only in Latin America, but also on a global scale. In its wake, a dozen official commissions cropped up in the region, as well as many other initiatives led by civil society.

Alongside this dynamism in the official and unofficial search for the truth, other forms of transitional justice have emerged in the region, among them various reparations programs for victims, such as those developed in Brazil and Chile, and the one that has begun in Colombia.

At the same time, memory, truth, and reparations are being combined, in terms of justice, with the maturation and strengthening of the regional system of human rights protection embodied in the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The robust case law that the IACHR has already produced on violations of human rights by State parties has begun to build a normative framework with legal force for addressing crimes and redress for victims.

This institutional development has not been easy, nor has it occurred in linear progression. As Argentina's experience has shown, the pursuit of justice is a rough road where moments that reveal truth cross paths with the exercise of criminal justice, mechanisms of impunity, and new regulatory and case law developments that sometimes pave the way to legal sanctioning of serious crimes. At the same time, experiences such as those of Brazil and Uruguay, to date, testify to the persistence of *de jure* and *de facto* obstacles to providing effective remedies for victims.

Still, it is appropriate to reiterate—since the purpose of this publication is strongly associated with it—that these institutional developments have also driven the expectations and demands for justice from within the heart of civil society. Non-governmental organizations, victims' associations, academic communities, political groups, and even specific agencies or entities within the States themselves are spokespeople for this demand, with the intermittent support of broader society and the mass media. So we have a renewed desire for transitional justice in Latin America. This publication aims to make its realization more viable.

## 2. Transitional Justice: Practice and Foundation

Of course, Latin American advances and demands for truth and justice have not occurred in isolation. Rather, they are interwoven with broad international experience that began with the Nuremberg trials and was solidified with the adoption of an extensive legal framework and conventions that outlaw the most serious international crimes: genocide, war crimes and crimes against humanity.

Indeed, while each society experiences the interaction of political transitions and the demands for justice in a different way, it is undeniable that—beyond just the individual cases—a *humanitarian paradigm* is emerging: a concern for the protection of and respect for human dignity as a universal value inherent to our species, the belief that this value may not be cast aside under any circumstances, and that it constitutes an ongoing civilizing force in world history<sup>3</sup>.

As explained in several of the texts included in this handbook, the seed of the criminal and legislative processes that followed the Second World War has sprouted, covering not only legal developments in the international prosecution of crimes but also other institutional and social practices that fertilize the field of transitional justice.

Truth commissions; national, international or combined courts; administrative reparations programs for victims and others affected, official commemoration projects, national or community reconciliation projects, state mechanisms to search for missing persons: these are some of the concrete manifestations of contemporary transitional justice. Parallel to these—and often creating new relationships among society, the national state, and the international community—a remarkable social movement has been triggered, which is dedicated to the practice of remembering, to the elaboration of proposals for adequate compensation for damages suffered, to claims regarding ethnic and gender diversity within the experience of horror and the resistance to it, and, finally, to the celebration and affirmation of dignity itself.

These are institutions, practices, policies, rules, and mechanisms with remarkable variety among them, both within each country, and externally, among the countries that have decided to confront their violent past. Not all of them can fit into a coherent unit, and there are still many

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3 See the broad panorama presented in Elster, Jon. *Closing the Books. Transitional Justice in Historical Perspective*. Cambridge: Cambridge University Press, 2004.

disruptions in the implementation of these policies. Thus, one of the first lessons to be learned is that there are no universally applicable recipes and that the comparison of diverse international experiences can offer lessons, guidelines, blueprints, and words of caution, but no finished, ready-to-apply formula or program.

However, a proper understanding of the field of transitional justice—and the opportunities and demands that come with it—requires going beyond the mere observation of its broad diversity. If the mechanisms that embody transitional justice are very different, and sometimes not entirely reconcilable, this does not mean the field is just open territory for trial and error or that it is completely dependent on circumstances or on institutional and political capacities.

Alongside the obvious constraints and political conditions that surround any attempt at justice, there is an axiological basis, an axis of principles and values, and a set of basic legal rules that define the legitimate minimum legal obligations that States must assume in a transitional context.

This fundamental basis of transitional justice arises on the one hand, from legal and regulatory developments in international law, and on the other, from the systematization and integration of standards and best practices developed by different countries to combat impunity and provide measures of justice to victims. The systematizations produced within the United Nations framework by Louis Joinet<sup>4</sup> and Diane Orentlicher<sup>5</sup> on ways to combat impunity, and by Theo Van Boven<sup>6</sup> on standards for reparation to victims, are fundamental reference documents in the field. Publications of this genre and others, which incorporate from among various sources the field's practices in the area of truth and justice, delimit and specify a regulatory, logical, and ethical structure for the confrontation

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4 UN - Commission on Human Rights. "Question of the Impunity of Perpetrators of Violations of Human Rights (civil and political rights)". Final Report by Louis Joinet, 1997.

5 UN - Commission on Human Rights. "Updated Set of Principles to Combat Impunity". Report of the Independent Expert Diane Orentlicher to the UN Human Rights Commission, 2005.

6 UN - Commission on Human Rights. "The Right to Restitution, Indemnification and Rehabilitation of Victims of Serious Violations of Human Rights and Fundamental Liberties". Final Report of Special Rapporteur, Mr. M. Cherif Bassiouni, 2000. See, in Annex, the document by Theo van Boven titled "Basic Principles and Directives on the Right of Victims of Violations of International Human Rights and International Humanitarian Law Standards to Lodge Complaints and Obtain Reparations".

of authoritarian or violent pasts. Perhaps the most concrete and effective formulation of this *underlying spirit* of transitional justice is the affirmation of the rights of victims to truth, justice, reparations, and guarantees of no repetition.

### 3. A Guide to Concepts, Standards and Practices

The goal of this publication—*Transitional Justice: Handbook for Latin America*—strictly adheres to this complex condition: it recognizes and highlights the diversity of ways to seek justice, but at the same time affirms a unity of purpose in the search, centered around clear legal and moral principles.

Not offered herein is an impossible recipe for practitioners and scholars of transitional justice in the various countries of the region. Moreover, the very nature of this publication precludes this possibility and invites readers to take a thoughtful, and therefore creative, approach to the tasks that derive from the agenda of truth and justice in Latin America. The work of the renowned scholars brought together in this document shows the conceptual and practical advances achieved in this field and thus offers the interested reader a diverse range of roads that the pursuit of justice may take.

On the other hand, the articles gathered here affirm the basic ethical, regulatory, and political core of the field, implicitly rejecting a loose conception of transitional justice that might concede too much to political realities and greed with regard to the expectations of victims.

To this end, the book unfolds in a simple structure, following the thread of victims' rights to truth, justice, reparations, and reforms to ensure non-repetition.

The first section—"Conceptions and Debates on Transitional Justice"—offers key definitions in the field, and a vision of the itinerary it has kept throughout its consolidation as a paradigm for addressing political transitions and national and international peace-affirming processes. This itinerary reveals the encounter between the first manifestations of transitional justice, as alternative or parallel efforts to the justice doled out by courts, and current conceptions, in which the fight against impunity and, therefore, an effective exercise of criminal prosecution, have assumed a central role. The work of Paul van Zyl, Paige Arthur, Ruti Teitel and Naomi Roht-Arriaza also offer an indispensable historical and conceptual framework for any discussion on this matter.

The second section is called “Prosecutions and Diverse Paths to Justice” and it emphasizes, in particular, compliance with the right to justice and the legal obligation that a State has to investigate and prosecute the most serious crimes. This obligation, and the ways it can be met, is closely associated with recent developments in International Human Rights Law, International Humanitarian Law, and regulatory bodies such as the Rome Statute of the International Criminal Court. It refers not only to the norms produced in these fields but also to doctrinal developments in the assigning and proving of criminal liabilities and to new ways of considering evidence sufficient, all to service a more effective fight against impunity. The articles by Juan Méndez, Elizabeth Salmón, Santiago Canton, Pamela Pereira and Jo-Marie Burt illustrate the strength of the obligation to prosecute, and the legal non-viability of the so-called “self-amnesties” and other instruments of *de jure* or *de facto* impunity.

Truth and memory are the logical starting point—and in many countries the chronological starting point—of efforts in transitional justice. The recognition of the truth regarding past criminal acts and the adoption of this truth in the public sphere is the platform from which victims’ demands can be made with a hope of success. Moreover, it is in the practice of truth and memory that groups of people who have been abused “discover” their status as victims, in the sense of being entitled to specific benefits from the State. These are, however, complex realities that combine philosophical definitions, legal prescriptions and social practices that, not infrequently, elude any normative pre-definition.

The third section of this book, “The Right to Truth and the Role of Memory”, offers three views on the subject in the works of Eduardo González, Félix Reátegui, and Ludmila da Silva. In them the reader will find an overview of the path followed by the now familiar mechanism of transitional justice that we call “truth commissions”, and the authors’ perspectives on the staying power and effectiveness of these commissions in the future. The section also shares reflections on the social meaning of practices of memory and on an issue of critical importance that is often neglected, the media for the reconstruction of truth and memory—in this case, files or records.

Finally, the book covers the other measures of justice, such as reparations to victims and guarantees that terrible past abuses will not be repeated. The last section of this *Handbook* is therefore titled “Reparations and Institutional Reform”. It shows the regulatory



framework for reparations and the forms that these should take in order to be considered true measures of justice; it explores the trajectory of national reparations programs in given cases, including that of Brazil; and it examines the crucial links between reparations and the broader objectives of social transformation such as those sought in the field of development. The works of Pablo de Greiff, Cristián Correa, Paulo Abrão, and Marcelo Torelly, as well as Naomi Roht-Arriaza and Katharine Orlovsky, are directed at these themes.

From a reading of these various works, it will be clear that the field of transitional justice—multiple, varied, and in an ongoing process of affirmation—also offers some certainties and presents some key commitments. Today we know better, by way of a comparison of different experiences, how to identify a truth-seeking process that is genuinely respectful of the rights of those affected and beneficial to society in general. Similarly, international core standards for the work of courts, and for the formulation and execution of reparations programs, have now been settled.

The existence of such standards, and especially civil society's awareness of them, make it harder for States or governments to reduce their actions to superficial commitments and requires them to implement effective policies. Knowledge of basic rules, access to diverse experiences, and the knowledge of being part of a universal trend can strengthen existing social mobilization in Latin America and help it transform a weighty legacy of violence into a new reality of sustainable peace and justice. It is the aim of *Transitional Justice: Handbook for Latin America* to contribute to this end.

**Félix Reátegui**  
Editor



**PART I**  
**CONCEPTIONS AND DEBATES ON TRANSITIONAL JUSTICE**



# PROMOTING TRANSITIONAL JUSTICE IN POST-CONFLICT SOCIETIES\*

*Paul van Zyl*

## 1. Introduction

Transitional Justice embodies an attempt to build a sustainable peace after conflict, mass violence or systemic human rights abuse. Transitional justice involves prosecuting perpetrators, revealing the truth about past crimes, providing victims with reparations, reforming abusive institutions and promoting reconciliation. This requires a comprehensive set of strategies that must deal with the events of the past but also look to the future in order to prevent a recurrence of conflict and abuse. Because transitional justice strategies are often crafted in situations where peace is fragile or perpetrators retain real power, they must carefully balance the demands of justice with the realities of what can be achieved in the short, medium and long term.

Over the past decade, the field of transitional justice has expanded and evolved in two important respects. First, the elements of transitional justice have moved from being aspirational to embodying binding legal obligations. International law—particularly as articulated by bodies such as the European Court on Human Rights, the Inter-American Court on Human Rights and the Human Rights Committee—has evolved over the past 20 years to the point where there are clear standards regarding state obligations in dealing with human rights abuse and correspondingly clear prohibitions regarding, for example, blanket amnesties for international crimes. This has been supported by the ratification of the International

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\* This article was originally published in Van Zyl, Paul. “Promoting Transitional Justice in Post-Conflict Societies”. *Security Governance in Post-Conflict Peacebuilding*, Alan Bryden & Heiner Hänggi (eds.), DCAF, Geneva, 2005. © 2005 Lit-Verlag. Reprinted with permission.

Criminal Court (ICC) by over 100 countries which has both reinforced existing obligations and created new standards, by requiring each signatory to respond appropriately to human rights abuse or face action by the court. A further important development occurred in October 2004, when the UN Secretary General submitted a report to the Security Council setting out for the first time the UN's approach to transitional justice issues. This is an extremely important development in both operational and normative terms. Second, the deepening of democracy in many parts of the world—particularly Latin America, Asia, and Africa—and the emergence of increasingly sophisticated civil society organizations with expertise in this area has contributed to creating both the institutions and political will required to deal with a legacy of human rights abuse and helped translate policy into action.

This increased attention and commitment to transitional justice issues has been mirrored by the allocation of greater resources and international attention to post-conflict peacebuilding. This requires sustained interventions by both national and international actors on several different levels. Each element has to be carefully coordinated and integrated and matched with appropriate political, operational and financial support from a range of stakeholders. Transitional justice strategies should be understood as an important component of peacebuilding in so far as they address the needs and grievances of victims, promote reconciliation, reform state institutions and reestablish the rule of law.

This article will explore in greater detail the many ways in which transitional justice can contribute towards post-conflict peacebuilding. It will start by outlining the key elements of transitional justice and discussing their purpose and impact. It will then outline the ways in which transitional justice can contribute towards peacebuilding. It should be noted that although transitional justice strategies will almost always significantly impact on such efforts, the relationship between these two endeavours both in theory and practice is surprisingly under-researched. This article cannot deal with all of these issues in any depth but will point to a number of ways in which postconflict peacebuilding and transitional justice are interrelated, in the hope of setting an agenda for future research. Finally, the article will articulate important lessons from various practical examples where transitional justice strategies have been implemented and on this basis set out several recommendations for policymakers as to how to develop more effective transitional justice

policies that in turn will make a constructive contribution to post-conflict peace building.

## 2. The Key Elements of Transitional Justice

As stated above transitional justice involves prosecuting perpetrators, revealing the truth about past crimes, providing victims with reparations, Promoting Transitional Justice in Post-Conflict Societies reforming abusive institutions and promoting reconciliation<sup>1</sup>. This section will discuss each element in greater detail.

### 2.1. Prosecution

The prosecution of perpetrators who have committed gross violations of human rights is a critically important component of any efforts to deal with a legacy of abuse. Prosecutions can serve to deter future crimes, be a source of comfort to victims, reflect a new set of social norms, and begin the process of reforming and building trust in government institutions<sup>2</sup>. It is important however to recognise that criminal justice systems are designed for societies in which the violation of the law is the exception and not the rule. When violations are widespread and systematic, involving tens or hundreds of thousands of crimes, criminal justice systems simply cannot cope. This is because the criminal justice process ought to demonstrate a scrupulous commitment to fairness and due process and this necessarily entails a significant commitment of time and resources<sup>3</sup>.

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- 1 This definition of transitional justice is largely derived from the articulation of a state's legal obligations following gross violations of human rights by the Inter-American Court of Human Rights in the *Velásquez Rodríguez* case, Inter-American Court Of Human Rights (Series C) (1988). It has largely been endorsed by the Report of the Secretary General on the rule of law and transitional justice in conflict and post-conflict societies (3 August 2004).
  - 2 See, for instance, Roht-Arriaza, N. (ed.), *Impunity and Human Rights in International Law and Practice*. (Oxford University Press: Oxford, 1995).
  - 3 The International Criminal Tribunal for the Former-Yugoslavia has a staff of over 1,100 persons and has spent more than \$500 million since its establishment in 1991. Since that date it has secured less than 20 final convictions. The International Criminal Tribunal for Rwanda has been in operation for approximately 7 years, has a budget of about \$100 million per annum and has secured less than 10 final convictions. It is unlikely that the Sierra Leone Special Court will be able to convict more than 30 people in its first three years of operations. The Serious Crimes Panels in East Timor have to date convicted 32 individuals (before appeals) and it is not likely that it will be able to more than double that number during it's remaining period of operations. See Van

It is important to emphasise that recognizing criminal justice systems' structural inability to cope with mass atrocity, should not be construed as a delegitimization of the role of prosecution or punishment in dealing with past crimes. Notwithstanding their high costs and slow progress the two *ad hoc* tribunals for the former Yugoslavia and Rwanda have made important contributions to the progressive development of international criminal law and the establishment of the International Criminal Court (ICC) would have been extremely difficult, if not impossible, without them<sup>4</sup>. The importance of the Nuremberg trials or the prosecution of Slobodan Milosevic should not be diminished solely on the basis that they represent only a tiny fraction of the total number of criminally responsible individuals. Trials should not be viewed only as expressions of a societal desire for retribution, they also play a vital expressive function in publicly reaffirming essential norms and values that when violated should give rise to sanctions. Trials can also help to reestablish trust between citizens and the state by demonstrating to those whose rights have been violated that state institutions will seek to protect rather than violate their rights. This may help to restore the dignity of victims and reduce their sense of anger, marginalization and grievance.

It is nevertheless important to recognise and accept the fact that prosecution can only ever be a partial response to dealing with systematic human rights abuse. The overwhelming majority of victims and perpetrators of mass crimes will never encounter justice in a court of law, and it is therefore necessary to supplement prosecutions with other complementary strategies.

## 2.2. Truth Seeking

It is important not only to establish widespread knowledge that human rights abuse has occurred, but also for governments, citizens and perpetrators to acknowledge the wrongfulness of this abuse. Establishing an official truth about a brutal past can help inoculate future generations

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Zyl, P. "Unfinished business: South Africa's Truth and Reconciliation Commission"; Bassiouni, C. (ed.), *Post-Conflict Justice* (2004).

4 See, Dieng, A. "International Criminal Justice: From Paper to Practice - A Contribution from the International Criminal Tribunal for Rwanda to the Establishment of the International Criminal Court", *Fordham International Law Journal*, vol. 25, No. 3 (March 2002), pp. 688-707; Hulthuis, H. "Operational Aspects of Setting Up the International Criminal Court: Building on the Experience of the International Criminal Tribunal for the Former Yugoslavia", *Fordham International Law Journal*, vol. 25, No. 3 (March 2002), pp. 708-716.



against revisionism and empower citizens to recognise and resist a return to abusive practices.

Commissions can provide victims with a voice in public discourse and their testimony can help rebut official lies and myths regarding human rights abuse. The testimony of victims in South Africa has made it impossible to deny that torture was officially sanctioned and that it happened in a widespread and systematic fashion. The commissions in Chile and Argentina rebutted the lie that opponents of the military regimes fled these countries or went into hiding. They conclusively established that opponents were “disappeared” and killed by members of the security forces as part of an official policy<sup>5</sup>. Giving victims an official voice can also help to reduce their sense of outrage and anger. While it is important not to overstate the psychological benefits of “speaking out” and it is inaccurate to claim that testifying about abuse is always cathartic, officially acknowledging victims’ suffering will enhance the prospects of dealing constructively with historical grievances.

Truth commissions can also help facilitate and add impetus to the transformation of state institutions. By demonstrating that human rights abuse in the past was not an isolated or atypical phenomenon, commissions can strengthen the hand of those inside and outside a new government who wish to implement real reforms to ensure the promotion and protection of human rights. Conversely, a failure to examine or identify abusive institutions can allow them to continue past practices and in the process entrench their power and deepen distrust and disillusionment amongst ordinary citizens.

### 2.3. Reparation

States bear an obligation under international law to provide reparation to victims of gross violations of human rights. This reparation can take many forms including material assistance (*e.g.* compensation payments, pensions, bursaries and scholarships), psychological assistance (*e.g.* trauma Promoting Transitional Justice in Post-Conflict Societies counseling) and symbolic measures (*e.g.* monuments, memorials and national days of remembrance). The formulation of a comprehensive

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5 CONADEP (National Commission on the Disappearance of Persons). *Nunca Más: Report of the Argentine National Commission on the Disappeared*. (Farrar Straus & Giroux: New York, 1986); *Report of the Chilean National Commission on Truth and Reconciliation*, translated by Berryman, P. E. (University of Notre Dame Press: Notre Dame, 1993).

reparation policy is often both technically complex and politically delicate. Those charged with formulating a just and equitable reparation policy will have to decide whether to differentiate between different categories of victims and amongst victims in each category. For example, they will have to decide whether it is possible or desirable to provide different forms and quantities of reparation to victims who have experienced different types and degrees of torture and whether to use means testing to differentiate between wealthy and poor victims. Each decision has significant moral, political and financial implications<sup>6</sup>.

A central question in the provision of reparation is the definition of victim hood. It is necessary to decide whether reparation should be paid only to victims of gross violations of human rights such as torture, killings and disappearances, or whether also to provide reparation to a broader class of victims, for example those who have suffered systematic racial discrimination or who have lost land or other property. A just and sustainable reparation policy should neither create nor perpetuate divisions amongst different categories of victims, and as well should be feasible and financially realistic<sup>7</sup>.

## 2.4. Institutional Reform

In responding to mass atrocity it is necessary, but not sufficient, to punish perpetrators, establish the truth about violations and provide victims with reparations. It is also necessary to fundamentally change, or in some cases abolish, those institutions responsible for human rights abuse<sup>8</sup>. Newly established governments have primary responsibility in

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6 See Gibney, M. "When Sorry Isn't Enough: The Controversy Over Apologies and Reparations for Human Injustice", *Human Rights Quarterly* (2001), p. 1.

7 See Pasqualucci, J. M. "Victim Reparations in the Inter-American Human Rights System: A Critical Assessment of Current Practice and Procedure", *Michigan Journal of International Law* (Fall 1996), pp. 1-58; Roth-Arriaza, N. "Reparations Decisions and Dilemmas", *Hastings International and Comparative Law Review*, vol. 27, No. 2 (Winter 2004), pp. 157-219; Roth-Arriaza, N. "Victims on Transitional Justice: Lessons from the Reparation of Human Rights Abuses in the Czech Republic", *Human Rights Quarterly*, vol. 27, No. 2 (May 2005), pp. 392-435; Mazrui, A. A. "The Truth Between Reparation And Reconciliation: The Pretoria-Nairobi Axis", *Buffalo Human Rights Law Review*, vol. 10 (2004), pp. 3-14; Magarrell, L. "Reparations for Massive or Widespread Human Rights Violations: Sorting Out Claims for Reparations and the Struggle for Social Justice", *The Windsor Yearbook of Access to Justice*, vol. 22 (2003), pp. 85-98.

8 Aolain and Campell speak of the need for such institutional change, 'In the post-transition context, human rights violations that were previously denied can now be recognized (a process that can be encouraged if formerly violent nonstate actors

this regard, but truth commissions can also play an important role. Truth commissions are usually empowered to make recommendations in their final reports regarding legal, administrative and institutional measures that should be taken to prevent the recurrence of human rights abuse.

Governments might also consider adopting vetting programmes, which seek to ensure that persons responsible for human rights abuse are either removed from public service or prevented from being employed in government institutions. The removal of human rights abusers from positions of trust and responsibility is an important part of establishing or restoring the integrity of state institutions. Vetting can also play a role in establishing non-criminal accountability for human rights abuse, particularly in contexts where it is impossible to prosecute all those responsible<sup>9</sup>. Vetting programmes should scrupulously protect the due process rights of persons under scrutiny and be used to target only those responsible for human rights abuse, rather than political opponents of the new regime or those who may hold different views and beliefs.

## 2.5. Reconciliation

Reconciliation is an important concept with a controversial pedigree. In some contexts victims oppose “reconciliation” because they associate the concept with enforced forgiveness, impunity and amnesia. In many countries in Latin America those responsible for human rights abuse, particularly military leaders associated with dictatorial regimes, have cynically invoked the concept of reconciliation in order to avoid responsibility for their crimes. If reconciliation is understood in this way then it should rightly be rejected.

There is however a different conception of reconciliation which is important to consider. Societies that emerge from periods of mass atrocity

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acknowledge their culpability). This move can be expressed as an “acknowledgment v. denial” antinomy. Acknowledgment of such failings paves the way for significant or “transformative” institutional change’. Aolain, F. N., Campbell, C. “The Paradox of Transition in Conflicted Democracies”, *Human Rights Quarterly*, vol. 27, No. 1 (February 2005), pp. 172-213.

9 See Szczerbiak, A. “Dealing with the Communist Past or the Politics of the Present? Lustration in Post-Communist Poland”, *Europe-Asia Studies*, vol. 54, No. 4 (June 2002), pp. 553-572; Flournoy, M. A. “Dealing with Demons: Justice and Reconciliation”, *The Washington Quarterly*, vol. 25, No. 4 (Autumn 2002), pp. 111-123. For examples of vetting see, Kritz, N. J. “Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights”, *Law and Contemporary Problems*, vol. 59, No. 4 (Autumn 1996), p. 139.

and widespread conflict often contain deep suspicions, grievances and animosities. These divisions almost always endure post-conflict and create the potential for a return to violence and a recurrence of human rights abuse. This is particularly true when conflicts have assumed an identity dimension in which categories such as religion, language, race or ethnicity have been used to sow division and justify human rights abuse. These divisions will not magically disappear under a new democratic order, nor will they necessarily heal with the passage of time. In some cases the electoral arithmetic of democracy can exacerbate these cleavages by delivering all political power to a majority ethnic group leaving a minority group feeling vulnerable and marginalized. If divisions are to be overcome, it will require a constitutional settlement that offers adequate protections and reassurances to vulnerable groups. Leaders inside and outside government will have to take proactive steps to demonstrate that democracy can serve all citizens that peace can yield substantial dividends for all and that diversity can be a source of strength rather than conflict<sup>10</sup>. If reconciliation is to be accepted it cannot amount to ignoring the past, denying the suffering of victims or subordinating the demand for accountability and redress to an artificial notion of national unity.

### 3. Transitional Justice in Post-Conflict Peacebuilding

It is somewhat surprising that so little analysis has been devoted to the intersection between transitional justice and post-conflict peacebuilding. Properly understood and implemented, transitional justice is as much forward-looking as it is backward-looking. One of the critical reasons we deal with past abuse is in order to ensure that it does not reoccur. The title of the Argentinean truth commission's final report was *Nunca Más (Never Again)*. However, a commitment to prevention is not the only rationale for dealing with the past. Such an instrumental approach to past atrocity would always subordinate the vindication of victims' rights to an examination of whether this would jeopardise the prospects of peace. This would not only be indefensible as a matter of law and ethics but as a practical matter it would provide perpetrators and

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10 See Boraine, A., *A Country Unmasked* (2000), pp. 340-378; Feher, M. "Terms of Reconciliation", Hesse, C., Post, R. (eds.), *Human Rights in Political Transitions: Gettysburg to Bosnia* (1999), pp. 325-288; Huyse, L., *Reconciliation After Violent Conflict: A Handbook* (International Institute for Democracy and Electoral Assistance, 2003), pp. 10-33; Huyse, L. "Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past", *Law & Social Inquiry*, No. 20 (1995), pp. 51-78.

tyrants who seek to avoid accountability with an incentive to hold peace processes hostage until they are provided with the necessary assurances.

It is important to accept that tensions exist between peace and justice in the short-term and that in some hard cases it is prudent and defensible to delay justice claims in order to achieve an end to hostilities or a transition to a democratic order. Nevertheless, justice claims should not be deferred indefinitely, not just because of the likely corrosive effect on efforts to build a sustainable peace, but because to do so would be to compound a grave injustice that victims have already suffered. Transitional justice strategies should be an integral part of any effort to build a sustainable peace, but in some circumstances peace and justice may not be completely compatible in the short-term. If justice is deferred, then every effort should be made to ensure that the prospect of achieving accountability in the medium- to long-term are preserved and that as much of the transitional justice agenda as can be achieved in the short-term is implemented.

The following section sets out a number of ways in which the fields of transitional justice and post-conflict peacebuilding intersect. It focuses on ways in which transitional justice strategies can reinforce peacebuilding efforts recognizing that in some circumstances these efforts are not perfectly complementary.

### **3.1. Diagnosing the Problem**

The development of a post-conflict peacebuilding strategy must be based on a rigorous examination of the causes, nature and effect of the prior conflict. Truth commissions are often well-placed to undertake this form of examination particularly because they pay special attention both to the testimony and present circumstances of victims of abuse but also because they scrutinize the individuals and institutions responsible for human rights violations. Most commissions gather extensive evidence from thousands of different sources and on this basis are able to generate a comprehensive account of human rights abuse during the period they are mandated to review. Truth commissions also examine the social, structural and institutional causes of conflict and human rights abuse and are able to clarify not only what happened in individual cases but also the broader context which enabled the violations to occur. This diagnostic function can help identify the root causes of conflict and examine the role that external actors and non-state actors have played in fuelling

and sustaining conflict. On this basis they can make more effective and informed recommendations as to measures that can be taken to deal with these root causes or reduce the capacity of disruptive actors to perpetuate conflict. The recommendations can be extraordinarily helpful to those involved in developing and executing post-conflict peacebuilding strategies.

### **3.2. State-Building and Institutional Reform**

Conflicts have devastating effects on state institutions and a careful process of rebuilding and reform is necessary once hostilities have drawn to a close. Truth commissions and vetting programmes can make an important contribution to state-building and institutional reform by recommending the following measures:

- Identifying institutions that should be reformed or eliminated;
- Making proposals to ensure that the mandate, training, staffing and operations of specific institutions are reformed to ensure that they function effectively as well as promote and protect human rights;
- Removing persons responsible for corruption or human rights abuse from state institutions. Through their public hearings, truth commissions can also focus governmental and public attention on particular institutions such as the media, prisons, health care institutions and the judiciary thereby canalizing a public debate about the role they played in the past and the measures that should be taken in the future to enhance their effectiveness and their capacity to promote and protect human rights.

### **3.3. Removing Rights Abusers from Political Office**

Transitional justice efforts allow citizens to better understand the causes, nature and effects of human rights abuse. They also illuminate and clarify responsibility for this abuse. A strong predictor for renewed or ongoing conflict is the presence of persons in high government positions who are either directly or indirectly responsible for widespread or systematic human rights abuse. Conversely the removal of such persons can make a vital contribution to post-conflict peacebuilding. In Afghanistan, a report issued by the Afghan Independent Human Rights Commission entitled, *A Call for Justice* that was based on the views of over 6000 Afghans,

both inside the country and in refugee communities, identified the fact that perpetrators of serious human rights violations continue to occupy important positions in regional and central government as a major threat to the promotion and protection of human rights<sup>11</sup>. The report has led to calls for an initiative to screen key Presidential appointees in order to assess both their competence and integrity. Integrity screening would determine whether a potential appointee has been responsible for either corruption or human rights abuse. While it is too early to tell whether this effort will succeed it would not have even been on the agenda had there not been a process of polling individuals regarding their attitudes to past human rights abuse. A transitional justice initiative put questions of political reform on the national agenda in way that increased the possibilities of successful post-conflict peacebuilding.

### 3.4. Dealing with Individual Victim Grievances and Forging Reconciliation

According to Bigombe, Collier and Sambanis<sup>12</sup>, war-induced grievances are a significant cause of a return to hostilities in post-conflict societies. Peacebuilding strategies should therefore seek to implement a set of policies immediately after conflict that attempt to address and reduce this sense of anger and grievance. Prosecuting those responsible for human rights abuse can reduce victims' desire for revenge—providing it is even-handed and complies with international standards. Truth commissions can provide victims with a safe space to articulate their anger while at the same time offering them an official acknowledgement of their suffering<sup>13</sup>. Reparation programmes can provide much-needed resources and services to victims who have experienced direct and indirect loss as a result of conflict and human rights abuse. The combination of these policies can help offset the sense of anger, neglect and marginalization experienced by victims and the communities in which they live.

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11 Afghan Independent Human Rights Commission. "A Call for Justice: A National Consultation on Past Human Rights Violations in Afghanistan" (2005). URL <[www.aihrc.org.af](http://www.aihrc.org.af)>.

12 Bigombe, B., Collier, P., Sambanis, N. "Policies for Building Post-Conflict Peace", *Journal of African Economies*, vol. 9, No. 3, p. 336.

13 See Stahn, C. "Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth and Commission for East Timor", *American Journal of International Law* (2001), pp. 952-966.

Prosecutions and truth commissions can also help dispel dangerous myths that serve to prolong grievances and fuel future conflicts. In many post-conflict situations, unscrupulous leaders attempt to invent and propagate ‘victim/perpetrator myths’ in which they claim that members of their group (ethnic/linguistic/religious, etc.) are innocent victims and that members of other groups are all culpable perpetrators. These myths are almost always historically inaccurate and serve to perpetuate acrimonious inter-group relationships. Courts can demonstrate for example that not all Serbs were Milosevic supporters or that some Hutus saved Tutsis during the Rwandan genocide. This can help to break down stereotypes that are exploited by ethno-nationalist politicians to gather support and that all too often lead to conflict.

### 3.5. Dealing with Group Dominance

A significant risk-factor in predicting the outbreak or resumption of conflict is the extent to which a homogenous group—ethnic, linguistic, religious, etc.—is willing and able to monopolise political and economic power. This may even be exacerbated by certain democratic systems which hand power to majorities without appropriate checks and balances. A successful postconflict peacebuilding agenda will have to include political, legal and social measures that guard against the exploitation of the minority by the majority<sup>14</sup>. Truth commissions can help generate national awareness of the insecurities, marginalization and victimization of minorities as well as offer policy proposals to ensure their rights are appropriately protected. The delivery of reparation to members of minority groups that have experienced human rights abuse can provide reassurance that the majority recognizes them as rights-bearing citizens. Similarly, the prosecution of perpetrators responsible for crimes against minorities can help increase trust in state institutions. Proposals for institutional reform made by truth commissions can refer to the importance of adequate minority representation in institutions such as the police, military and judiciary in order to instill minority confidence in these institutions.

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14 For an interesting discussion of intercommunal consensus and interethnic relations in the reconstruction of democracies see: Hislope, R. “Ethnic Conflict and the ‘Generosity Moment’”, *Journal of Democracy* (1998), pp. 140-53. See for instance Horowitz, D. L., *Ethnic Groups in Conflict* (University of California Press: 1985). See also Price, R. “Race and Reconciliation in the New South Africa”, *Politics and Society* (1997), pp. 149-178.



### 3.6. Security Sector Reform

The combination of targeted prosecutions of those who bear the greatest responsibility for human rights abuse, a carefully crafted vetting programme and a robust truth commission which meticulously documents human rights abuse, can assist enormously in reforming the police, military and intelligence services. The process of security sector reform was greatly enhanced in South Africa by revelations of abuse before the Truth and Reconciliation Commission and by the departure from office of many senior officers whose crimes had been revealed. The exit of these individuals was crucial in transforming the ethos in these institutions and in beginning to restore trust in them. The process of transforming the security sector from a source of oppression and conflict to a set of institutions that protect citizens and uphold rights was given added impetus by transitional justice institutions established after Apartheid<sup>15</sup>.

In stark contrast, the Indonesian military (and to a lesser extent sections of its police) have largely escaped any form of scrutiny or accountability for human rights abuse they have committed, starting in 1965/66 and enduring to this day. The shroud of secrecy that has surrounded the killings of hundreds of thousands of alleged Communists in the 1960's, the absence of any meaningful accountability for the crimes that occurred in East Timor (beginning in 1975 and culminating in 1999), and the ongoing violations elsewhere in Indonesia are all linked to a failure to hold the Indonesian Armed Forces (TNI) accountable for its crimes<sup>16</sup>. Until a genuine process of accountability and truth seeking is undertaken, the TNI will continue to serve as a source of conflict and instability in Indonesia.

In Haiti, a vital component of post-conflict peacebuilding remains the establishment of an effective, credible and legitimate police force. The dissolution of the Haitian military has meant that the police are indispensable to combating crime, the maintenance of public order and

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15 See for instance Vale, P., *Security and Politics in South Africa. The Regional Dimension* (Lynne Rienner: Boulder, 2002). See also Jackson, T., Kotze, E. "Management and Change in the South African National Defence Force: A Cross-Cultural Study", *Administration and Society* (2005), pp. 168-198.

16 See for instance Honna, J., *Military Politics and Democratization in Indonesia* (Routledge: 2003); Chandra, S., Kammen, D. "Generating Reforms and Reforming Generations Military Politics in Indonesia's Democratic Transition and Consolidation", *World Politics* (2002), pp. 96-136.

the protection of human rights. Unfortunately there are grounds to suspect that former members of the military, many of whom are responsible for corruption and human rights abuse, have infiltrated the Haitian National Police (HNP) and if this is situation is not rectified it will undermine the operational efficiency of the force as well as its credibility and legitimacy<sup>17</sup>. The United Nations Mission in Haiti (MINUSTAH) has in its mandate the authority to vet members of the HNP to ensure that those responsible for corruption, human rights abuse and other serious misconduct are removed. However the design of any vetting programme cannot focus solely on how to exclude persons responsible for human rights abuse. Those designing a system to remove individuals from critical institutions also need to consider the optimal mandate, composition and governance structure of that institution. In Haiti this has revealed the fact that there is considerable uncertainty as to the actual size of the HNP in part because of a failure to properly register and issue official identification to police officers. It has also highlighted the need to establish effective internal codes of conduct and oversight mechanisms. In this sense vetting has served as the leading edge of the institutional reform wedge. An effective vetting process may catalyze a more fundamental set of reforms which do not focus exclusively on the past conduct of current police officers, but also help to ensure that the police make an appropriate contribution to post-conflict peacebuilding<sup>18</sup>.

### 3.7. Implementing DDR Programmes

Disarmament, Demobilisation and Reintegration (DDR) programmes are an essential part of many post-conflict peacebuilding strategies, and transitional justice institutions, particularly courts and vetting schemes, will significantly impact most DDR programmes. If a court with jurisdiction over persons responsible for human rights abuse signals that it intends to prosecute vigorously all perpetrators, including participants in DDR programmes, then it could serve as a significant disincentive for persons contemplating laying down their arms. Conversely, if all participants in DDR programmes are offered full legal immunity then the chances of

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17 See Lane, C. “Cop Land [Haitian Police Remain Vulnerable to Influence of Corrupt Leaders]”, *The New Republic* (1997).

18 See Ahmed, S. “No Size Fits All: Lessons in Making Peace and Rebuilding States”, *Foreign Affairs* (2005), pp. 162-169; Galleguillos, N. “Re-establishing Civilian Supremacy Over Police Institutions: An Analysis of Recent Attempted Reforms of the Security Sector in Chile”, *Journal of Third World Studies* (2004), pp. 57-77.

them participating (all things being equal) will increase. Both of these scenarios are undesirable for different reasons. No court will ever be able to prosecute all persons responsible for widespread human rights abuse and it is therefore unwise to dissuade people from demobilizing based on a threat of prosecution that cannot realistically be fulfilled. On the other hand granting blanket amnesty for gross violations of human rights in order to encourage demobilisation is contrary to international law and will generate substantial resentment in victim communities. It will also instill a sense of impunity, which may contribute to a resumption of hostilities<sup>19</sup>. There are of course many more subtle ways to structure the relationship between DDR programmes and courts.

For example, the Commission for Reception, Truth and Reconciliation (CRTR) in East Timor utilized a particularly innovative approach to promoting the reintegration of low-level perpetrators by allowing them to come forward, disclose their crimes and agree to undertake an act of reconciliation (which often includes community service) as a precondition to escaping liability for their crimes<sup>20</sup>. By promoting reintegration, the CRTR is not only reducing the likelihood of conflict, it is also saving the new Timorese state the expense and effort of having to prosecute and imprison thousands of low-level offenders. Instead, these individuals are able to remain in their communities and continue to be economically active, and in some cases, are able to help to repair the damage they were responsible for. This DDR programme is explicitly limited to low-level perpetrators—persons responsible for serious crimes such as murder or rape are still liable for prosecution. In this way a balance is struck between encouraging the reintegration of individuals responsible for certain offences and achieving accountability for those bearing the greatest responsibility.

The relationship between the resources provided to demobilizing combatants and reparations provided to victims of human rights abuse requires careful consideration. In many instances, former combatants (a percentage of whom may be responsible for human rights abuse) are offered substantially more generous demobilisation packages than

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19 Young, G. K. "Amnesty and Accountability", *U. C. Davis Law Review* (January, 2002), pp. 427-482.

20 See Smith, C., *op. cit.*; Burgess, P. "Justice and Reconciliation in East Timor. The Relationship between the Commission for Reception, Truth and Reconciliation and the Courts", *Criminal Law Forum*, vol. 15, No. 1/2 (2004), pp. 135-158.

victims of human rights abuse are awarded in the form of reparations. This not only produces a morally asymmetrical result but will almost certainly generate a great sense of injustice amongst victims and cause them to be less receptive to the reintegration of former combatants.

Vetting programmes can also intersect with DDR programmes and may produce unintended and counter-productive results. For example, certain DDR programmes offer skills training programmes designed to facilitate the entry into certain kinds of government employment. Vetting programmes may subject these individuals to screening for involvement in abuses and if they are found to be responsible they could be precluded from obtaining a government job. This raises the prospect of one programme investing scarce resources into the training of an individual for a form of employment that another programme prevents him from accepting.

### **3.8. Restoring the Rule of Law and Confronting a Culture of Impunity**

The failure of national authorities in the Federal Republic of Yugoslavia (and until recently its successor state, Serbia and Montenegro) to take responsibility for the human rights violations that occurred during the 1990s has allowed war criminals to wield considerable influence within the country's security services. This allowed forces such as the notorious 'Red Berets' to collude with syndicates responsible for drug-running, human trafficking and organized crime. This network of criminal conduct culminated in the assassination of Serbian Prime Minister Zoran Djindjic—an event that convulsed the entire country. The lesson seems obvious: a failure to confront past abuse allows perpetrators to continue to commit crime thereby creating the prospect of continued conflict and instability. Proactively pursuing accountability and reconciliation will assist in eroding a culture of impunity and sending a signal about the importance of the rule of law.

### **3.9. Restoring Trust in State Institutions**

It is vital following a period of widespread conflict and massive abuse that steps are taken to reform state institutions so that the trust of citizens (both in them and government as a whole) is restored. The restoration of trust in government is essential if it is to fulfil many of its functions at optimal levels. Crime cannot be properly addressed if citizens do not trust the police and taxes will not be collected at sufficient levels without

some basic trust in the decency and efficiency of government. Similarly, international and domestic capital will not be attracted if investors are not convinced that a new regime is committed to good governance and the rule of law.

### **3.10. Consolidating Democracy**

The consolidation of democracy is a vital component of any post-conflict peacebuilding agenda. While the establishment of democratic institutions and the holding of free and fair elections are not guarantees that a country will not slide back into conflict, democracies are better placed to distribute resources and deal with internal grievances in a manner that avoids conflict and human rights abuse.

Truth commissions and courts can play a powerful role in promoting democracy. Commissions can demonstrate the consequences of repressive and undemocratic rule and create an official record of the human cost of dictatorship and war. By exposing hidden abuse and by documenting the full scale of human suffering that occurs during conflict, truth commissions can strengthen public support for democracy. The prosecution of those responsible for genocide, crimes against humanity, war crimes and other systemic violations can help establish not just individual criminal responsibility but also the breakdown of democratic and rights-respecting institutions that enabled this abuse. These processes can reduce support for undemocratic practices and forms of government and provide citizens with early-warning signals that empower them to resist a return to conflict or oppressive rule.

## **4. Lessons from Transitional Justice Processes**

A number of lessons can be derived from an examination of different transitional justice experiences as well as how they intersect with postconflict peacebuilding efforts. First, it is vital that transitional justice strategies emerge from an extensive process of local consultation and that they are based on local conditions. Second, a commitment to establish transitional justice mechanisms should only be incorporated into a peace process if this reflects a bona fide desire to deal with the past on the part of all parties. Peace processes should not overprescribe the exact form and nature of transitional justice processes. Third, transitional justice mechanisms should regard capacity building as a core part of their mandate and an indicator of success should be what they leave

behind, not just what they do during their period of operation. Fourth, transitional justice strategies should be as comprehensive as possible and not focus exclusively on only one component of transitional justice such as truth, justice, reparation, institutional reform, or reconciliation. Finally, successor governments should choose their projects wisely, and not pursue projects which they lack the capacity to implement. Each of these lessons are discussed in greater detail below.

#### **4.1. Local Ownership and Consultation**

There can be no doubt that local ownership and consultation are essential if transitional justice institutions are to be effective and lead to sustainable results. The expansion of the field of transitional justice combined with the proliferation of tribunals, Truth commissions and reparations programmes has generated significant opportunities and risks. The most glaring risk is that the establishment of these institutions is regarded as an operational, technocratic endeavour divorced from a careful process of assessing the political climate and consulting with key stakeholders. As a general rule, the most carefully crafted truth commission mandate will not be effective if sufficient political and popular support is not generated prior to its establishment. Likewise, the impact of a well-functioning court that renders fair justice in every case will be significantly reduced if it is viewed as an external imposition that does not draw on or respond to national conceptions of justice. The truth commissions established in South Africa and East Timor were the product of extensive local consultation and debate and their structure and mandate were strongly influenced by the views of local stakeholders. While local ownership is not in itself a sufficient condition of success, it provides transitional justice institutions with a vitally important advantage that can be leveraged into real results.

A commitment to local ownership should be distinguished from political or governmental support. The fact that the Cambodian government has belatedly and with considerable ambivalence decided to support the so called Khmer Rouge Tribunal does not mean that the tribunal was the product of extensive local consultation or that it enjoys popular support. In some cases it may be necessary to circumvent governments with poor human rights track records in establishing transitional justice institutions and instead seek support and legitimacy from other sources such as civil society organizations or victims' groups. The difficulties in establishing transitional justice institutions where the

government is either indifferent or hostile should not be underestimated. Nevertheless governments should not in every case be allowed to wield a veto in this regard. The truth commissions established in El Salvador and Guatemala were not the product of extensive local consultation and were also insulated in differing degrees from national ownership and control. Nevertheless they were able to achieve important results because they operated with independence and integrity and because they were able to conduct successful outreach to human rights and victims' groups.

In recent years truth commissions have been established in an increasing number of countries and settings as part of a truth-seeking strategy. While there is much to learn from the experience of other truth commissions, each commission should be based upon thorough local consultation and designed according to local needs. The uncritical transplantation of models from one context to another will simply not work. Truth commissions should also not be established for ulterior motives, such as attempting to discredit political opponents or meet conditionalities imposed on donor support without genuinely attempting to pursue justice or uncover the truth. Truth commissions should not serve as substitutes for justice or as politically convenient compromises between accountability and impunity.

## **4.2. Transitional Justice and Peace Processes**

Peace processes often provide ample opportunities to introduce commitments to pursue transitional justice into the national settlement. This is not true in all cases, particularly when all parties to a conflict and subsequent peace process have been implicated in human rights abuse. In such cases all actors may agree that it serves their purposes not to dwell on past human rights abuse and a peace agreement can result in both amnesia and impunity. In those occasions where parties decide to introduce transitional justice issues into the settlement a number of pitfalls should be avoided.

First, mechanisms such as truth commissions should not be introduced in order to offset decisions to grant amnesty or as efforts to salvage a degree of cosmetic acceptability in an agreement that essentially seeks to bury the past and deny victims their rights to justice, truth and reparation. This was the case in the Lomé Peace Accord that sought to bring an end to the internal armed conflict in Sierra Leone. The fact that the Sierra Leonean truth commission was able to achieve some results was at

least partially attributable to the fact that the blanket amnesty contained in the agreement was not respected and the Sierra Leonean Special Court was established to prosecute those bearing the greatest responsibility for human rights abuse. Had this not occurred then the Commission would have operated in a climate of complete impunity and it would have almost certainly been viewed as an inadequate attempt to disguise or compensate for this fact by the signatories to the Lomé Peace Accord.

A second pitfall is attempting to overprescribe the form and nature of a transitional justice institution in the provisions of a peace agreement. In both Liberia and the Democratic Republic of the Congo (DRC) peace agreements provided too much detail regarding the composition of truth commissions to be established in both these countries. The proposed membership of the commissions reflected the composition of the parties to the peace talks thereby subjecting these bodies to a political fragmentation where membership was decided not upon the basis of integrity, independence or a commitment to human rights, but rather loyalty to a particular political party. Peace talks may be essential in bringing a conflict to an end and producing a blueprint for sustainable peace but they are seldom the appropriate forum for deciding on the details of processes to deal with the past—precisely because these processes must not be politicized.

### 4.3. Capacity Building

An effort to develop and implement a transitional justice strategy must place emphasis on building the capacity of local actors and institutions. International donors contributed \$10 million annually for five years (1997-2002) following the genocide in Rwanda in order to support domestic prosecutions. In this period the government conducted almost 7,000 trials<sup>21</sup>. The credibility of these trials has been diminished because of inadequate due process protections, politicization and poor detention conditions. Some of these problems could have been remedied or alleviated with additional or properly targeted resources. During a similar period the ICTR was given close to \$400 million to conduct its proceedings, which resulted in fewer than 10 final convictions and

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21 For an account of the preparation and structure of domestic prosecutions in Rwanda see Sennett, P. H. *et al.* “Working with Rwanda Toward the Domestic Prosecution of Genocide Crimes”, *St. John’s Journal of Legal Commentary*, vol. 12, No. 2 (Spring 1997), pp. 425-447.



contributed almost nothing to building judicial and legal capacity in Rwanda<sup>22</sup>.

#### 4.4. Comprehensive Strategies

Five years ago there existed a general misconception that only one institutional initiative could or should be generated in response to mass atrocity. It is now almost universally recognized that prosecutions, truth commissions, vetting institutions and reparation programmes are in most cases complementary and could therefore be established simultaneously. It is therefore important to explore whether and in what ways these institutions should interact. Should truth commissions furnish courts with information to assist prosecutions? Should vetting programmes provide information to truth commissions to allow them to generate an overall picture of the causes, nature and extent of human rights abuse? How should reparation programmes relate to civil suits? This is an extremely important area of study<sup>23</sup>.

#### 4.5. High Moral Capital, Low Bureaucratic Capacity

Ackerman has coined the phrase that emerging democracies have ‘high moral capital but low bureaucratic capacity’. By this he means that postconflict regimes often enjoy a period of high levels of popular support and trust immediately after the transition. This often provides them with sufficient political capital to embark on major initiatives to deal with a legacy of abuse. However, in designing and implementing these strategies, new regimes should keep in mind not only what is desirable, but also what is possible. New regimes may lack the human and financial capacity to translate laudable policy objectives (robust prosecutions, full reparations, rigorous vetting) into reality. Moral capital can quickly evaporate and the old guard can regain the initiative if new regimes promise more than they can deliver.

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22 See Schabas, W. A. “The Rwanda Case: Sometimes It’s Impossible”, Bassinouni, M. (ed.), *Post Conflict Justice* (2002), pp. 499-522.

23 As mentioned earlier, the relationship between the Truth Commission and the Special Court in Sierra Leone present an interesting case study on the potential friction between a truth commission and other responses to past atrocities. For an interesting discussion on this topic see, Schabas, W. A. “Amnesty, the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone”, *U. C. Davis Journal of International Law & Policy*, vol. 11, No. 1 (Fall 2004), pp. 145-69; Schabas, W. A. “A Synergistic Relationship: the Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone”, *Criminal Law Forum*, vol. 15, No. 1/2 (2004), pp. 3-54.

## 5. Conclusion and Policy Recommendations

Based on a survey of the field of transitional justice and an examination of its link to post-conflict peacebuilding the following conclusions and policy recommendations can be drawn:

- A number of gaps exist between mechanisms of transitional justice and other aspects of post-conflict peacebuilding. The relationship between DDR programmes and transitional justice requires more rigorous analysis, not least because these programmes have the potential to either complement or undermine each other depending on how they are structured.
- In the past, advocates focused their energies on persuading governments that were not prepared to act to implement transitional justice policies. Today governments are far more likely preempt or respond to pressure by adopting half-measures (such as politicized courts or weak truth commissions) that may appear to be legitimate on the surface but are actually cynical efforts to evade responsibility for dealing with the past. This means that practitioners, governments and donors have to be in a position to provide a meticulous analysis of these efforts and undertake sophisticated advocacy efforts in order to ensure that only genuine efforts are supported or promoted.
- The strengthening of international legal obligations and a growing normative consensus that gross violations of human rights should be remedied has generally shifted the emphasis away from deciding whether to address the past, to questions of how this should be done. This creates extraordinary opportunities to examine the intersection between transitional justice and post-conflict peacebuilding in a number of different contexts and establish good practices based on comparative policy analysis. This process cannot simply transplant a successful model from one context to another but must explore the factors that made that model work and as certain whether they applicable in other circumstances.
- Truth commissions should devote more energy to ensuring that their recommendations are as detailed and specific as possible. Too often commission reports include general recommendations,

which are so broad and so obvious that they have little practical impact. Commissions should make recommendations that strengthen the link between dealing with the past and the prospective task of building a sustainable peace. Transitional justice strategies should be designed to provide added impetus and leverage to post-conflict peacebuilding efforts.

- Donors should view transitional justice strategies and post-conflict peacebuilding as complementary efforts. Both will require sustained and coordinated funding. Certain donors view peacebuilding as safer and less controversial than transitional justice initiatives and are therefore less willing to support the latter. This is a counterproductive approach because transitional justice efforts tend to reinforce postconflict peacebuilding.
- Approaches to both transitional justice and post-conflict peacebuilding should be as holistic and integrated as possible. An overemphasis on, or neglect of, any one aspect of either strategy will render the overall effort less effective.
- Transitional justice mechanisms should only be incorporated into peace agreements if they embody a genuine desire to deal with the past as opposed to a cosmetic effort to avoid accountability. Peace agreements that contain bona fide commitments to deal with the past should strike the right balance between signalling this commitment in the text of the agreement and not overprescribing details that should emerge from a subsequent process of national consultation.



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## THE NEED FOR MORAL RECONSTRUCTION IN THE WAKE OF PAST HUMAN RIGHTS VIOLATIONS: AN INTERVIEW WITH JOSÉ ZALAQUETT\*

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*Naomi Roht-Arriaza*

The following interview with José Zalaquett, a Chilean human rights attorney and professor of law at the University of Chile, took place in February 1995 on the campus of the University of California, Berkeley. Mr. Zalaquett is a member of the International Commission of Jurists and has been a board member of Amnesty International. He was a close adviser to President Patricio Aylwin of Chile and was instrumental in designing that country's policies for confronting human rights violations of the past military regime. He was a member of the Commission on Truth and Reconciliation appointed by President Aylwin to investigate and report on the fate of those killed or subject to forced disappearance under military rule (1973-89), and he wrote the introduction to the English-language version of the Commission's report. He is the author of a number of articles on the work of the Commission and the political, moral, and legal issues raised by the human rights violations of a past regime.

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\* This article was originally published in Roht-Arriaza, Naomi. "The Need for Moral Reconstruction in the Wake of Past Human Rights Violations: An Interview with José Zalaquett". *Human Rights in Political Transitions: Gettysburg to Bosnia*, Carla Hesse & Roberto Post (eds.), Zone Books, New York, 1999. © 1999 Zone Books. Reprinted with permission.

**Naomi Roht-Arriaza:** Chile is only one of a growing number of countries that have had to confront the existence of large-scale violations of human rights—killings, forced disappearances, widespread torture, imprisonment of dissidents—by regimes that are no longer in power. Incoming governments have taken a range of positions on the subject. In some, like Brazil, nothing official was done and the issue apparently receded<sup>1</sup>. In others, amnesties were passed foreclosing action against the perpetrators of past crimes. Uruguay, for example, ended up passing a *de facto* amnesty for the military<sup>2</sup>. Other measures have been tried. Argentina formed a commission to investigate the fate of the disappeared; it also tried and convicted a number of high-ranking military officers, only later to pardon them<sup>3</sup>. Eastern European countries have tried some former government officials, opened secret files, and passed “lustration” laws aimed at weeding out former secret police collaborators from positions of influence<sup>4</sup>. In El Salvador, the Philippines, Nepal, South Africa and Guatemala, “truth commissions” have been formed to write the history of past violations, identify the victims or the perpetrators, and recommend ways to make “never again” a reality. In many of these efforts, the Chilean

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- 1 On Brazil, where the Catholic Church eventually published a record of torture and other crimes committed by the military, see Lawrence Weschler, *A Miracle, A Universe*, (New York: Pantheon, 1990). In December 1995, President Fernando Enrique Cardoso promulgated a law granting compensation on the relatives of 136 people who disappeared during military rule. *Latin America Newsletter*, Dec. 14, 1995.
  - 2 See Weschler, *A Miracle*, and Americas Watch, *Challenging Impunity: the Ley de Caducidad and the Referendum Campaign in Uruguay* (1989). In Uruguay, the military relinquished power as part of a negotiated settlement that included at least implicit promises of nonprosecution of military officials. After a large number of private suits were filed, the government pushed through a law requiring dismissal of all pending cases and exempting the military from punishment for acts committed during the *de facto* period. Outraged citizens’ groups eventually forced a referendum on the amnesty law, which was narrowly upheld in the face of veiled threats of further instability.
  - 3 See Jaime Malamud-Goti, “Punishing Human Rights Abuses in Fledgling Democracies: The Case of Argentina”, in Naomi Roht-Arriaza, *Impunity and Human Rights in International Law and Practice* (New York: Oxford University Press, 1995), 160. Ethiopia is now trying former officials of the Menghistu regime. Roht-Arriaza, *Impunity*, 224-25; Bolivia and South Korea have also held trials of ex-dictators.
  - 4 Germany has tried several former high-ranking officials of the German Democratic Republic; trials of former military, police or government officials have also been held or announced in Hungary, Romania, Bulgaria, and Poland. In Czechoslovakia before its dissolution, laws provided that those who had been high-ranking party, members could not hold certain political or government employment. See Kathleen Smith, “Decommunization after the ‘Velvet Revolutions’ in East Central Europe”, in Roht-Arriaza, *Impunity*, 82.



experience is regarded as a model for more or less successfully managing such periods of transition and accounting. What can be universalized from the Chilean experience?

**José Zalaquett:** The Chilean experience exemplifies a general problem. Chile, like many of the other countries you name, has undergone a period of complete breakdown of any moral order worthy of the name. The notion of “moral order” or “just order” is at the core of social contract theories and of the concept of the rule of law. Such a notion gives ultimate meaning to democratic institutions. Transgressions of the laws created by these institutions are, to some extent, to be expected. But they do not necessarily undermine the underlying moral order. Rather, they trigger its defenses, chiefly the mechanisms of criminal justice.

When this edifice is broken down, the result is not simply a statistical increase in crimes, but something entirely different. Human rights violations and other politically motivated crimes now express the rule of force, the absence of a moral order. Situations may vary: perhaps there is a civil war; or the dismantling of a nation-state where ethnic or religious factions confront each other; or a military takeover; or the “Lebanonization” of a country. If a major breakdown occurs, the question is how the moral order and the values that were broken can be restored. In cases like South Africa, another, related, question arises: How do you construct a just order where there has been none in recent memory?

When one thinks about addressing past human rights violations as part of a process of moral construction or reconstruction, the first model that comes to mind, quite naturally, is the criminal justice model. After all, they are heinous and often massive crimes. But such a model is designed to enforce an existing just order not necessarily to reconstruct one after a period of breakdown. I am not arguing that criminal justice is useless in those situations. Prosecutions of major human rights violations is indeed one of the main elements to be considered when fashioning a policy for a period of political transition. But the real question is to adopt, for every specific situation, the measures that are both feasible and most conducive to the purpose of contributing to build or reconstruct a just order. Prosecutions and punishment certainly can play an important role, but so can forgiveness and reconciliation. These two avenues are not mutually exclusive. Often, what is required is a combination of both.

The argument about the importance of prosecutions and punishment has often been made and it is easier to comprehend<sup>5</sup>. Let me refer to the meaning of forgiveness and reconciliation as a possible major policy component for such situations. The theories of forgiveness that stem from major religious thinking and age-old doctrines about reconciliation emphasize several factors. First, forgiveness by a society is never an isolated or a gratuitous act. Forgiveness is a process designed to restore the moral order, to reaffirm the validity of the norm that has been violated. Second, reconciliation requires that the wrongdoer admit what he did or accept what others say about it, so that the truth can be known. Third, the wrongdoer must not just admit the crime, but must also acknowledge that it was wrong. The wrongdoer then atones for the act and resolves not to do it again. Fourth, he compensates those who were wronged.

If these four elements are in place, it is as if the keystone of the moral edifice that was removed, undermining the whole structure, is put back into place by the perpetrator himself.

In Chile we bore in mind the feasibility and appropriateness of measures of punishment as well as of measures of reconciliation as tools to advance the goal of moral reconstruction. The cornerstone of the whole policy was to reveal the truth about past crimes. The National Commission on Truth and Reconciliation set up by President Aylwin, of which I was a member, made known the truth about the violations that were denied, namely disappearances and killings<sup>6</sup>. At present there are no differences of opinion among reasonable people in Chile about whether disappearances did or did not occur. This was not the case before, when Chilean society was very much divided about such fundamental facts of

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5 See, e.g., Diane Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime", *Yale Law Journal* 100 (1991): 2537.

6 The Commission on Truth and Reconciliation was created by presidential decree on April 25, 1990. It had eight members, including both human rights activists and jurists with ties to the right wing and the military regime. The Commission's mandate was to establish "the most complete picture possible of these grave acts [carried out during the 1973-89 period], their background and circumstances", and "bring together evidence to identify individual victims and establish their fate or whereabouts". The report found 2,025 cases of fatal victims of human rights violations committed by state agents; 90 cases of fatal victims of violent opposition groups, and 164 cases involving political violence that could not be attributed to any side. See José Zalaquett, "Balancing Ethical Imperatives and Political Constraints: the Dilemma of New Democracies Confronting Past Human Rights Violations", *Hastings Law Journal* 43 (1992): 1425; Jorge Mera, "Chile: Truth and Justice under the Democratic Government", in Roht-Arriaza, *Impunity*, 171.

its recent history. Now, the findings of the Commission have been widely accepted as truthful by all political parties and social sectors that count in Chile. The only institutions on record as rejecting the report are the army, represented by Pinochet, and the navy, although the navy has since had a slight change of heart. Even the air force and the *carabineros* have obliquely acknowledged the report's validity. Not only did we produce detailed references to cases that we investigated, but we also set up a mechanism whereby pending cases could be seen by a successor commission whose mandate continues through 1995.

Torture could not be accounted for individually; we had to refer it as a phenomenon, and not a case-by-case basis. As we explained in the report, we estimate that about half the people who went through prison for at least twenty-four hours were either mistreated or tortured, giving rise to roughly one hundred thousand potential claims. These crimes had been committed fifteen or sixteen years before, and in most cases no traces were left. Individual accounting, particularly as grounds for compensation, would have been impossible to handle.

With regard to compensation from the state, we were also able to do quite a bit. For instance, pensions for all families of those killed or disappeared, based on the average income of a Chilean family, and scholarships for the children of victims, were approved by law. We also recommended a number of legislative changes, and while not all have been implemented, many have. There is a new law on violence against women, health benefits for survivors of torture, and creation of a successor commission to find the remains of the disappeared<sup>7</sup>. The government's success in pushing through some reforms contributed to the idea that the government took the Commission's work seriously.

We also paid close attention to the idea of atonement. Even though Aylwin himself had opposed the military regime and certainly was not in any way associated with its crimes, he appeared on national television when the commission's report was made public, and, in the name of the Chilean state, he atoned for the crimes that were committed. He sent a copy of the Commission's report to all the victims' families with a personal letter. More generally, President Aylwin decided to give this whole

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7 The Commission's recommendations regarding reparations led to the creation of the National Corporation for Reparation and Reconciliation, which was in charge of the benefit programs for the families of victims as well as continuing investigations into the fate of those who disappeared. Law 19.123 (Feb. 8, 1992).

process the proper ritual. Nationwide public television appearances marked the establishment of the Commission, receipt of its report, and communication of its results. After that, the report was circulated in newspaper supplements; it was published in book form; and it was news in the papers every day for four weeks. Four weeks later, it's true, the assassination of a right-wing senator pushed it off the front page, but that would have happened anyway, sooner or later. There was a great deal of discussion at the community level: in churches, annual meetings of professional associations, university campuses, and the like.

In addition, we paid great attention to the importance of symbols. A monument with all the names of those killed was built in the cemetery; the cemetery has become a place of public pilgrimage, full of flowers, a bit like the Vietnam Memorial in Washington D. C. A "peace park" is being built to commemorate those who died. We proposed other symbolic measures that were not enacted, but a lot was done.

To recapitulate, after a major breakdown of the existing moral order, that order must be put back in place. An enormous degree of forgiveness and magnanimity may be called for, provided that the process is genuine. The process is genuine if people tell the truth; they acknowledge the truth; and they then make reparations and atone. After these steps, communities that have wronged each other, whether in civil war or whatever, can reconcile, and go on living together. That's the theory.

However, the enormity of a crime against humanity doesn't fit within this theory. World War II, and awareness of what the enormity of crimes against humanity<sup>8</sup> may mean, brought about a qualitative change. It transformed the old debate between retribution and deterrence as the basis of punishment, superseding both. On the one hand, no one I

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8 The charter of the Nuremberg tribunal defined crimes against humanity as: murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious ground in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Charter of the International Military Tribunal, annexed to the London Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1946, art. 6(c), 59 Stat. 1544, 47, E.A.S. No. 472, 82 U.N.T.S. 279, 288. Thus, such crimes require both numerosity (civilian *populations*) and some element of state action on one of the specified grounds. They do not, however, according to many scholars, now require a link to war. See, e.g., Roger Clark, "Codifications of the Principles of the Nuremberg Trial on the Development of International Law", in *The Nuremberg Trial and International Law*, George Ginsburg & V. N. Kudriavtsev, Eds. (Dordrecht and Boston: M. Nijhoff, 1990), 195-97.

know who espouses a preventive approach (and I lean more toward that approach) accepts the argument that if it serves society better to forgive someone who commits a crime against humanity, he should be forgiven. There is no choice to be made about a crime against humanity; there is no need to calculate whether punishment is in fact preventative or not, because in these cases it is presumed to be an indispensable, preventative act. That was established in marble, engraved in the consciousness of humanity, after World War II. On the other hand, those who espouse retributive theories of punishment do not demand that everyone involved at whatever level in committing or abetting a crime against humanity receive their just desert. In some cases, the sheer number of people who would need to be punished would make such a task impossible. So these devices—retribution, deterrence—don't apply well to crimes against humanity. These crimes constitute an exception to a more general theory of forgiveness as well, in that there is a formal commitment on the part of the community of nations that crimes against humanity must be punished.

This observation brings us to South Africa. Did the South Africa regime commit crimes against humanity? Apartheid was pronounced a crime against humanity under international law. Conceptually, to call a system—rather than specified acts or omissions—a crime may have important symbolic value, but it does pose serious legal and practical problems. Thus, the South African community is not demanding that everyone who engaged in the practice of apartheid or sustained its policies—from the farmers of apartheid to any person in a decision-making position in the police or administration—should be prosecuted for crimes against humanity. It would be impossible, and it would make no sense.

Rather, the South Africans have concentrated on the crimes that apartheid itself considered crimes: killings in custody, assassinations abroad, and so forth. Those may not be crimes against humanity, but they are indeed atrocious crimes. Nonetheless, they are not beyond the scope of forgiveness. The government is asking for acknowledgment of these crimes, and they will not grant an amnesty until those responsible tell the whole truth about the. They are asking for individual acknowledgment that this was really a crime. For example, they seek the admission that Steven Biko did not slip on the floor of his cell and hit his head and die<sup>9</sup>.

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9 Steven Biko was a Black Consciousness Movement leader who was arrested and killed in his jail cell in 1976. His death became an international symbol of South African police brutality.

They are asking for individual acknowledgment only of the concealed crimes, because the others were all in the open. Everybody knows that the police arrested anyone caught holding hands with a person of another color. That is known, so the issue is not one of knowing but of declaring that such conduct was wrong.

Concerning apartheid itself, which was really the major evil fact at the base of the whole immoral order, they are asking for a larger acknowledgment. At the least, they want National Party, the party of apartheid, publicly to state that apartheid did not only outlast its usefulness, but what it was evil from the start. We are not in the realm of punishment here; we are in the realm of moral discourse, reconstruction, and atonement. If white people do no publicly acknowledgment the immorality of apartheid, there is never going to be a sense of fully having overcome the past. They have to say it.

**Naomi Roht-Arriaza:** There are two ways to look at the question of atonement or acknowledgment. One is the sincere, heartfelt recognition that your acts were wrong, that you were mistaken in thinking that your acts were justified, and so on. But it is possible to interpret the South African proposal to include the possibility of granting amnesty as part of the tasks of a truth commission, as simply a very practical scheme establishing a bargain, an exchange of information for lack of prosecution. Under this bargain, the South African Truth Commission will hear requests for amnesty from those members of the police, armed forces or liberation forces who come forward to provide details of the crimes for which they seek amnesty. Summaries of the crimes amnestied, and the names of those amnestied, will be made public<sup>10</sup>. But a bargain doesn't have the same moral quality as what you have been talking about.

**José Zalaquett:** No, of course not. But even if someone comes forward and admits a crime, declares they are sorry, and asks to be forgiven, there is no way that the law, administrative institutions, or the

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10 The South African parliament passed the bill authorizing a Truth and Reconciliation Commission on May 17, 1995. The Commission is composed of seventeen members appointed by the president in consultation with political parties. It is to prepare a report on past human rights violations, award reparations to victims or their survivors, and grant individual amnesties for political crimes committed before December 6, 1993. The cutoff date was earlier than some right-wing parties had desired. The Commission has held hundreds of hearings throughout South Africa. See Jeremy Sarkin, "The Trials and Tribulation of South Africa's Truth and Reconciliation Commission", *South African Journal on Human Rights* (1996): 617.

public may pierce the soul of that person and discover the genuineness of the contrition. Either the perpetrator acquired the required moral sense on his own and thus has been converted, or he has not, but has become merely resigned to demonstrating through external evidence that he has acquired it. So society, the law, and the process of reconciliation have to be satisfied that, at least, the external steps of contrition have been taken. Punishment, in that logic, is the mechanism that the community uses to subdue the contumacy or wilful contempt of a perpetrator who is not ready to restore the violated value himself. So at the same time one demands voluntary acceptance from a perpetrator, one can twist their arm, if necessary, to subdue their contumacy, by brandishing the threat of refusing amnesty if they persist. The nature of reality is very impure, everywhere! But that is the terrain where we have to tread.

This is an exercise in optimization. That sounds like a bloodless calculation, like maximizing profits. But in politics, and here I cite my beloved Max Weber, an ethics of responsibility is the only possible approach. Never insult Weber by interpreting his phrase to justify mere temporization, neglect, or cowardice. He was very courageous and he demanded courage. Always be mindful of the outcome of your actions, because by merely sounding more righteous, you may end up delivering worse than you started with to your people and your nation. Recognize your limitations, but don't believe they are there forever. The situation is always elastic, it's flexible, it's dynamic. Tomorrow you never know. But, nevertheless, there are limitations. If you don't recognize them, it's like not recognizing the laws of gravity—you may end up by crashing the plane.

In Chile, starting with the truth eventually opened the way for more prosecutions. We debated this issue of optimization very seriously. When the Aylwin government came into power, there were limits on what it could do in the area of criminal justice. An amnesty law was in place covering all crimes from 1973 to 1978, including crimes, like disappearances, that could be considered crimes against humanity. This was a problem with the amnesty law, because crimes against humanity cannot, under international law, be amnestied<sup>11</sup>. But the amnesty was also spurious even for other crimes, because it was a self-amnesty, and

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11 See Orentlicher, "Settling Accounts: The Duty to Prosecute in International Law", 2537, 2588-96; Roht-Arriaza, *Impunity*, 57-62.

amnesties that are designed to pardon those declaring the amnesty run afoul of the legal principle that no one can profit from their own malice<sup>12</sup>.

Amnesties can be legitimate, but not self-amnesties. Legitimate amnesties must be approved through accepted means that express the will of the people: through a congress or parliament, or through a referendum. In exceptional cases, the national will may be tacitly expressed in behavior, as it was in Spain and Brazil<sup>13</sup>. The granting of amnesties becomes problematic when crimes have been committed against a minority, and a majority approves an amnesty for those crimes through a referendum. So, for example, a self-amnesty approved by a majority of Iraqis for their crimes against the Kurds would be perfectly illegitimate. The amnesty must be approved by the people who are going to live with the consequences; it must reflect the will of the nation to overcome the past. And, finally, amnesties must be approved in knowledge of the truth. That self-amnesty in Chile was designed to conceal the truth rather than to reveal it.

Although the amnesty in Chile was problematic for all these reasons, it could not be repealed, because we did not have the votes in Congress. The government could have tried to repeal it, but was concerned that a sure defeat on the issue would undermine the government's standing and impede other initiatives. It became a question of political prudence and tact whether to seek such a testimonial defeat. President Aylwin felt that he should not play politics with this issue, and that a loss in Congress would have weakened his ability to accomplish other things.

Another option, which I favored but which was not acted on, was for the Chilean Congress to pass some kind of resolution declaring the amnesty illegitimate. Although without legal force, such a statement would have established an important matter of principle. Instead, Aylwin chose another course. He sent the report of the Commission on Truth and Reconciliation to the Chilean Supreme Court with an official letter indicating that he believed the amnesty could not preclude the courts from investigating what had happened in the cases named in the report.

Under the current situation, judges may continue to investigate these cases, because all that is known is that persons were taken into

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12 See Roht-Arriaza, *Impunity*, 57-88.

13 See Zalaquett, "Balancing Ethical Imperatives", and Zalaquett, "Confronting Human Rights Violations Committed by Former Governments: Applicable Principles and Political Constraints", *Human Law Review* 13 (1990): 623.



custody, but it is not known for certain when or they were subsequently killed. If they were killed within the period of the amnesty, as most of the victims were, the perpetrator would be amnestied. But if the victims were killed after that period, or if their abduction continued beyond that period, the crimes would not be covered by the amnesty. Until they can ascertain the circumstances of the abduction or homicide, courts must continue to investigate and to call people to testify. If soldiers or officers admit to homicide, they are amnestied if the homicide took place within the statutory period. But the military wanted in both ways: no punishment and no shame.

In addition to the many cases involving military officers testifying in court, a number of cases were prosecuted that did not fit within the amnesty. I believe this was due in large part to our actions in starting with the truth. The deliberate logic was that if we start with exposure of the whole truth, we may over time create a climate where prosecutions become possible. That is what happened in a number of cases<sup>14</sup>, including the convictions of General Contreras, the head of the secret police during the 1973-77 period, and of his deputy, for masterminding the killing of the former foreign minister Orlando Letelier and an associate<sup>15</sup>.

In several cases, there was a spate of judicial zeal, due in part to some judges who had a change of heart, but also to others who saw that the next step in their career would depend on the democratic government. Also, at the level of the Supreme Court, appointees of the civilian government

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14 These cases include the *Degollados*, a case involving the 1985 abduction, torture, and murder of three Communist Party members whose bodies were found outside Santiago with their throats slit. Three former police officers received life imprisonment, and another three shorter terms, for the murders. See “Chile Court Raises Cut-throat Sentences to Life”, Reuters, Sept. 30, 1994. In another case, the *Quemados*, two youths were doused with gasoline and set afire by soldiers in 1986; one survived. The soldiers were eventually convicted, although the court divided as to whether malice or gross negligence was involved.

15 Orlando Letelier and Ronni Moffit, an associate, were killed in 1976 by a car bomb in Washington D.C. After the U.S. threatened to cut off all aid to Chile, the Letelier killings were exempted from the amnesty law. See Inter-Am. C. H. R. 128 (1978), OEA/ser. L./V/II.47, doc. 13 rev. 1 (1979). The U.S. exerted continuous pressure on Chile to try those responsible and to compensate the families. In 1992, the Chilean government agreed to pay \$ 2.6 million in compensation to the families. See Barbara Crossette, “\$2.6 Million Awarded Families in Letelier Case”, *New York Times*, Jan. 13, 1992, p. A11. On November 12, 1993, Chilean Supreme Court Judge Bañados handed down convictions of Contreras and active-duty Brigadier General Pedro Espinoza of seven and six years, respectively. Don Podesta, “Two Generals Convicted in Killing of Letelier; Chileans to be Jailed for Washington Murder”, *Washington Post*, Nov. 13, 1993, p. A19.

have grown in number as older judges have retired or passed away. The majority of the court, however, supported the judiciary's inaction and complicity during the military government, and it is not about to reinterpret the amnesty law<sup>16</sup>.

Finally, in May 1994, less than a year before President Aylwin's mandate expired, the military became upset because of demands from judges summoning them to testify in pre-1977 cases covered by the amnesty. They staged a show of force dressed in fatigues outside the palace; the press magnified it in an alarmist way. President Aylwin was abroad, and some of his cabinet members began suggesting that perhaps the investigations should be curtailed. This would have undone the moral sustenance of the Aylwin policy. What was important was to stake out a position that was tenable, although perhaps less ambitious than many others would have preferred, and then to hold that position in order to provide sustenance, continuity, and a strong hand for the next government. It may have been an imperfect policy, but it was important that Aylwin never backed off from it nor broke his promises.

Toward the end of his mandate, President Aylwin offered a solution. He proposed legal reforms to accelerate the investigations, in exchange for an acknowledgment by the military as an institution that they had killed those who were missing, plus provision by the military of information on the whereabouts of their remains. This would have ended the investigations, but the acknowledgment of responsibility and the information on where the bodies were buried would have brought repose to the relatives. But the military never could bring themselves to consider an offer to closure on those terms<sup>17</sup>.

**Naomi Roht-Arriaza:** How would such an acknowledgment have worked, and why would it have been important? It would not have been a sincere means of acceptance and atonement, given that the army has

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16 The Chilean Supreme Court upheld the amnesty in 1990 against both domestic and international law arguments. *Insunza Bascuñán* case, Aug. 24, 1990, *Revista de Derecho y Jurisprudencia y Gaceta de los Tribunales*, 87, No. 2 (May-Aug. 1990): 64-86.

17 In May 1995, for the first time in Latin America's recent history, an Argentine army general admitted that the army was wrong to have participated in the torture, death and disappearance of thirty thousand political prisoners during that country's "dirty war". General Martín Balza declared on national TV that "the end does not justify the means" and that the military could not be excused on the basis of having followed orders. His admissions followed months of revelations by lower-ranking officers that they had thrown political prisoners out of airplanes. See Isabel Vincent, "The Military Murderers of Latin America", *San Francisco Examiner*, May 19, 1995, p. A23.

never recognized that it had done wrong, but continues to insist that its actions were entirely justified. So you would have been imposing a false acknowledgment on it.

**José Zalaquett:** Acknowledgment is key in the process of moral reconstruction. And, yes, you are imposing values by making people act publicly in certain ways. For example, were the Chilean army to acknowledge its crimes, the army spokesman would appear and announce that he had something to read to the press. Predictably, he would affirm that the army saved the nation from communism, adding that in doing so it had used unacceptable methods. He would read: “The army believes that we should never have done these things”. He may have been dragged kicking and screaming into the press room. He is not necessarily a sincere admission, but something imposed on him. But in a moral reconstruction, institutional recognition from the army as such would have been far more important than punishing ten or fifteen out of the hundreds of officers. The punished soldiers would soon be released, and they might not be repentant. But the army never chose the path of acknowledgment.

Ideally, perpetrators should understand and accept the moral code under which they are condemned. This ideal way arises from a theory of forgiveness, but it very seldom happens in practice. There are many situations in law and in morality, however, that begin with an ideal, although they seldom work in practice. Everyone violates the commandments that Moses brought down from Mount Sinai four thousand years ago, yet we insist on them as a moral standard. That tension is very important. A lot of people go through red lights, but you don’t abolish the traffic code.

In Chile it is important to start with the theory of reconstructing values. The very foundation of the law was broken and cracked. That foundation had to be restored, and it could be done in different ways. Some social or political actors will experience a genuine change of heart, and they will sincerely pledge allegiance to the values they had previously transgressed or whose violation they had condoned. Others, perhaps insincerely, will accommodate the changed political climate by admitting that they had done wrong. Still other political or military leaders will not admit wrongdoing, and with respect to these serious efforts must be made to subdue their contumacy.

**Naomi Roht-Arriaza:** Doesn’t that take you back to punishment, though?

**José Zalaquett:** Or it returns you to acknowledgment, even if it's forced politically. In the moral reconstruction we are discussing, punishment is of lesser importance. It's important, but acknowledgment is more important. At times you may threaten punishment in order to obtain acknowledgment. If they acknowledge what happened and their role in it, then you are more ready to forgive.

In this context, punishment is an instrument, an important one. I used to argue that the twin objectives of policy should be repairing past violations and preventing further ones. But the bigger objective, lurking behind and encompassing both, was this more comprehensive theory of moral reconstruction. It includes elements of shaming, truth telling, institution building, punishment, but also of forgiveness, to the extent that forgiveness is legitimate.

**Naomi Roht-Arriaza:** To the extent we are focused on moral reconstruction, we are talking about reasons for punishment, acknowledgment and shaming that are not instrumental, not preventative, not utilitarian. Nor are they backward-looking in the retributive sense. It's more a question of how a society constructs a common vision if what is right. But I return to the problem of moral relativity in constructing common values. The people with whom you're trying to reconstruct the moral order don't share your vision. They have an entirely different set of values, and as far as they're concerned they saved the nation from the scourge of communism, and they feel very good about that. They do not recognize that their values need reconstructing, and they have a very different view of history. How do you bridge that gulf?

**José Zalaquett:** It is really very hard in practice. I do not believe in the irredeemability of criminals—there may be some who are redeemable—but empirical evidence shows that people don't often spontaneously confess their guilt. In a given society, however, unrepentant criminals are not the only actors. Many people supported them, believed in them, and it was the existence of a whole system behind the individual criminals that made the breakdown of society possible. Now, any society has moral laws that it perceives and absorbs. Some of these moral laws make their way into the texts of constitutions, laws, and the like. But others are unwritten and are created by acts, acts having sacramental value. Acts, like public acknowledgments, having this kind of symbolic, sacramental value can become indelibly etched in the moral slate of the society and have a long-term effect. That was why, for example, it was so important

that the Chilean Truth Commission's report be presented in a sacramental manner, so that it entered into the annals of the nation and onto the slate of values.

Focusing on this impact on values insures that new values are carried forward to the next generation. Take the example of a cadet entering the military academy in Chile fifty years from now. Without acknowledgment and repentance, on that invisible slate of values he is going to read two contradictory and confusing messages. On the other hand, you should never kill prisoners, because it's against military honor and the Geneva Conventions. On the other hand, there are some extreme cases when you must save the nation and then you may do whatever you consider necessary. The existence of these contradictory messages creates a terrible risk for the future and can only be avoided if a clear, unambiguous message about right and wrong values replaces them. That's much more important than sending a few, or a few hundred, soldiers to jail.

But we're wrestling with something. Our instinct as lawyers and as human rights fighters tells us to punish them. But on reflection you sense that there is something more here that goes back many ages. It is important to get it right, and not just feel righteous. It is very hard to get it right, because we're applying these huge concepts to something new.

In sending moral messages it is also important to get the punishment part right, which is not always easy. To the extent that punishment is called for in a given situation, and within the existing restrictions concerning the practical possibilities of meting out punishment, efforts should be made to secure first and foremost the prosecution of the gravest and the main persons responsible for them<sup>18</sup>.

In practice it has not always worked that way, and the result may be ugly. For instance, Chile may end up by punishing middle level people, but not Contreras, the ex-head of the secret police, if the Supreme Court reverses his conviction<sup>19</sup>. And you may punish Contreras, but General

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18 See Jaime Malamud-Goti, "Punishment and a Rights-Based Democracy", *Criminal Justice Ethics* (summer/fall 1991): 7.

19 On May 30, 1995, the Chilean Supreme Court unanimously upheld the convictions of General Contreras and his deputy, although a week later they reduced the sentences by approximately one year to compensate for time already served in detention. General Contreras vowed not to go to jail (see "Chile Cuts Former Secret Police Chief's Sentence", Reuters, June 7, 1995) and only turned himself in October, after the civilian government built him a special prison, raised military pay, and set a cutoff date for most remaining

Pinochet, the head of the army, is still there, untouched. In Japan, for example, Hirohito remained emperor because of political considerations by the allies. In South Africa the same problem arises. There, police and military officers were receiving order from ministers and policies from the government, not acting as loose cannons. They have let it be known loud and clear that they are not prepared to be scapegoats for the white politicians.

**Naomi Roht-Arriaza:** A couple of other examples come to mind. In the former Yugoslavia, the danger is that no one prosecutes the “big fish”, either because they are in Geneva negotiating under the auspices of powerful states, or the United Nations Tribunal set up to try those responsible for genocide, war crimes and crimes against humanity<sup>20</sup> cannot obtain jurisdiction because the states involved do not want to turn over the defendants. The middle levels, in contrast, are more accessible, because, for example, they’ve fled to Germany and can be apprehended. Another example is the contrast between the aborted prosecution of Eric Honecker, ex-head of the German Democratic Republic, and the convictions of a number of border guards for shooting at people climbing over the Berlin Wall. The guards had no part in designing the “shoot to kill” policy, yet they were sentenced to jail for carrying it out<sup>21</sup>. But is this kind of unfairness avoidable in dealing with these types of crimes?

**José Zalaquett:** The cases you mention raise an important moral question: punishment requires us to consider whether in punishing we incur the additional immorality of creating scapegoats. The problem does not arise from an inability to catch all the fish, because those limitations were imposed by the fish themselves, and you catch whomever you can according to your legal powers and investigatory abilities. You work within your limitations, and your results may be scattered and quantitatively unimportant, but within those limitations you honestly

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human rights trials. “Forward Strides in Chile: President Frei, After Jailing Notorious General, Is Pushing for Reforms”, *Los Angeles Times*, Oct. 26, 1995, p. B8.

20 The United Nations Tribunal on Crimes Committed in the Territory of the Former Yugoslavia was created by Security Council Resolution 808 (1993). Its jurisdiction extends to those accused of committing war crimes, crimes against humanity and/or genocide in that territory from 1991 on. In 1994, the tribunal’s jurisdiction was extended to the genocide and related crimes committed in Rwanda in 1994.

21 See Suzane Walther, “Problems in Blaming and Punishing Individuals for Human Rights Violations. The Example of the Berlin Wall Shootings”, in Roht-Arriaza, *Impunity*, 99.

pursue everyone, starting with the most serious crimes and the higher-ups. It does not then matter that the convictions obtained may not cover all those responsible and may be exemplary or even, in a sense, random. But that does not condone a deliberate policy of pursuing only very small fish. It is unacceptable to target the subordinates and scapegoats simply to demonstrate that *some* action is being taken, while playing along with the big fish and letting them go free.

**Naomi Roht-Arriaza:** Is the problem perhaps the application of law to this problem? Sometimes law seems an inadequate instrument for the changing or teaching of moral values. Should we instead be writing plays, or making art or using other means to grab and influence the collective imagination more directly?

**José Zalaquett:** No, that is done by artist or playwrights. Law is the instrument for something that must be done not only in the theater but in the *agora*, the place where the city gets together. You need all these other things, but something has to be done in the civic temple itself, because it is the business of the *civitas*. And that's why President Aylwin's great intuition in presenting the Truth Commission's report publicly and personally was to give it a sacramental value. That intangible sacrament went farther to promote healing in Chile than practically anything else.

To end with the South African example we discussed earlier, applications of this idea would mean that President Mandela himself would publicly endorse the Truth Commission and its report, because this is too big, too central an issue to leave to anyone else, no matter how competent. It needs the sacramental aspect that only Mandela can supply. That was President Aylwin's advice to President Mandela.

It also needs to be done quickly. The timing is important in declaring your moral framework. Conflict solving, trials, prosecutions and all that can take place for decades within the framework you establish, but the framework itself must be quickly put into place. After World War II, once the framework was put in place by the Nuremberg trials, other trials could go on for a long time, some even up to four decades later. But had the Nuremberg trials taken place in 1949, the impact would have been far different. It is important to impress upon society that there is no more pressing business than going about rebuilding the very moral foundations of living together. That's a fundamental message.





**PART II  
PROSECUTIONS AND DIVERSE PATHS TO JUSTICE**



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## REFLECTIONS ON INTERNATIONAL HUMANITARIAN LAW AND TRANSITIONAL JUSTICE: LESSONS TO BE LEARNT FROM THE LATIN AMERICAN EXPERIENCE\*

Elizabeth Salmón\*\*

It is generally known that the scope of application of international humanitarian law (IHL) does not extend to situations existing before or after armed conflict. However, there is unquestionably a close link between the way the parties act during an armed conflict and the chances of achieving peace and reconciliation while restoring the rule of law once the hostilities have ended. Compliance with or violations of IHL will undoubtedly influence the conduct of the judiciary, the situation of the victims and the correlation of forces in the post-conflict society.

The term “transitional justice” has come to be used to refer to the various processes accompanying political transition by societies emerging from a period of violence that aim to deal with the serious human rights violations committed during the conflict and to achieve national reconciliation<sup>1</sup>. This analysis seeks to determine the influence of IHL on such a process.

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\*\* The author would like to thank Andrea Díaz Rosas and Jessica Maeda for their helpful research.

1 For the United Nations, the notion of transitional justice comprises the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms,

The possible relationship between IHL and the transition process can be considered with respect to two points in time. The first is the period before the outbreak of the conflict, when the preventive role of IHL comes into play. The state has an obligation to ensure national implementation of IHL<sup>2</sup>, which will contribute to preventing serious violations of its provisions during a conflict, making the transition process after the hostilities have ended much more viable. The second point in time is the period after the conflict has come to an end, that is, the transition phase. During this period, the focus is on the punitive provisions of IHL, which establish the obligation to suppress all violations of IHL and to search for and prosecute those who have committed grave breaches of IHL in international armed conflicts<sup>3</sup>. Arguably, there is also a duty under customary law to prosecute those persons who have committed serious violations of the laws and customs of war in non-international armed conflicts, based upon the criminalization of these acts in international customary law, as recognized in case law and statutes of international tribunals<sup>4</sup>.

This analysis examines the specific experience of certain Latin American states that have been deeply affected by serious violations of human rights and IHL. These Latin American states<sup>5</sup> have basically elected two dissimilar options from those available within the construct of transitional justice, the creation of truth commissions<sup>6</sup> and the passing of amnesty laws<sup>7</sup>, which in many cases have neutralized the effects of each other.

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with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reforms, vetting and dismissals, or a combination thereof. See “The rule of law and transitional justice in conflict and post-conflict societies”, UN Security Council, S/2004/616, 3 August 2004, p. 4.

- 2 Common Art. 1 of the four Geneva Conventions of 1949.
- 3 Articles 49, 50, 129 and 146 respectively of the four Geneva Conventions of 1949.
- 4 See ICTY, *Prosecutor v. Dusko Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, para. 134; Art. 4 of the ICTR Statute; Art. 3 of the SCSL Statute and Art. 6(1)(c) and (e) of the East Timor Special Panel Statute.
- 5 Diego García Sayán, “Amnistías y procesos democráticos”, in María Ángeles Siemens *et al.* (eds.), *Crisis humanitarias post-conflicto y reconciliación*, vol. 1, Siglo XXI de España Editores, Madrid, 2004, p. 91 ff.
- 6 Mark Osiel, “Respuestas estatales a las atrocidades masivas”, in Angelika Rettberg (ed.), *Entre el perdón y el paredón: preguntas y dilemas de la justicia transicional*, Corcas Editores, Colombia, 2005, p. 68.
- 7 Wilder Tayler, “La problemática de la impunidad y su tratamiento en las Naciones Unidas: notas para la reflexión”, *Revista Instituto Interamericano de Derechos Humanos (IIDH)*, No. 24, 1996, p. 197.

## 1. Implementation and the Eminently Preventive Focus of International Humanitarian Law

As Marco Sassòli points out, for a branch of law like IHL that applies in a fundamentally anarchic, illegal and often lawless situation such as armed conflict, the focus of implementing mechanisms is, and must always be, on prevention<sup>8</sup>. Implementation<sup>9</sup>, in the sense of adopting national measures to give full domestic effect to the rules of international law, is one of the oldest yet least used mechanisms for enforcing international law<sup>10</sup>. Therefore, implementation may be characterized as being a necessary step towards fulfillment of international obligations.

According to Georges Scelle's theory of role-splitting (*dédoulement fonctionnel*)<sup>11</sup>, states are both the creators and subjects of international law. Thus, as Antonio Cassese observes, "most international rules cannot work without the constant help, cooperation and support of national legal systems"<sup>12</sup>. The Inter-American Court of Human Rights also affirmed this relationship between implementation and enforcement in the case of *Hilaire v. Trinidad and Tobago*<sup>13</sup>. National implementation must be developed by adopting measures that meet the purpose of the norm in question. In the case of IHL, it is important to remember that implementation serves as a palliative for its institutional weakness and as a means to overcome the difficulties posed by the situations that it is

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8 Marco Sassòli, "State responsibility for violations of international humanitarian law", *International Review of the Red Cross*, vol. 84, No. 846, 2002, p. 401.

9 According to the *Oxford English Dictionary*, "implement" means "to complete, perform, carry into effect"; "to fulfil".

10 Antonio Cassese, *International Law*, 2nd ed., Oxford University Press, Oxford, 2005, p. 167.

11 Georges Scelle, *Précis de droit des gens (Principes et systématiques)*, CNURS, Paris, 1984, p. 35.

12 Cassese, above note 10, p. 9.

13 Inter-American Court of Human Rights, *Cantos v. Argentine Republic* (merits), Judgment of November 2002, para. 59: "112 (...) the Court has consistently held that the American Convention establishes the general obligation of States Parties to bring their domestic law into compliance with the norms of the Convention, in order to guarantee the rights set out therein. The provisions of domestic law that are adopted must be effective (principle of *effet utile*). That is to say that the State has the obligation to adopt and to integrate into its domestic legal system such measures as are necessary to allow the provisions of the Convention to be effectively complied with and put into actual practice."; *Hilaire, Constantine, Benjamin et al. v. Trinidad and Tobago*, Judgment of 21 June 2002, Series C, No. 94, para. 112. See also "*The Last Temptation of Christ*" Case (*Olmedo Bustos et al. v. Chile*), Judgment of 5 February 2001, Series C, No. 73, para. 87.

intended to regulate, by, for example, helping to establish the rule of law and respect for human dignity in all circumstances<sup>14</sup>.

The failure to develop national implementation in a particular domestic legal system reduces the likelihood of compliance with the rules of IHL, thus making the post-conflict reconciliation process more difficult. While reconciliation is not a specific objective of IHL, it is an indirect result of effective enforcement. The fact that the parties to a conflict have complied with IHL means that the rules of engagement established by this body of law have been observed and, as a general rule, that no serious human rights violations have been committed, and if they have, there are legislative mechanisms in place to take action against them. This fact alone leads to a situation entirely different from that of a society that has been subjected to a conflict in which breaches of IHL on both sides resulted in numerous violations of human rights, including the right to life, physical integrity and due process, and this difference highlights the full importance and positive effects of national IHL implementation.

The experience of Latin America in this regard is particularly interesting because it is a region wracked by a multiplicity of armed conflicts. Countries such as El Salvador, Nicaragua, Peru, Guatemala and Colombia are examples of societies in which efforts to achieve reconciliation and justice have involved the application of IHL or attempts to apply it. Yet implementation has not been a part of state policy in Latin American countries, although they are all bound by IHL, with the result that the compatibility of their domestic legal systems with the rules of IHL is haphazard. In the case of states that have experienced armed conflict and a post-conflict transition process, it can be seen that IHL implementation was inadequate. The point of this analysis is not to show that the lack of implementation constitutes a breach of IHL, but to establish that when implementation is inadequate there is a lesser likelihood of compliance with IHL, resulting in greater difficulties and wider divisions to be bridged when the conflict is over. Significantly, this inextricably close relationship has been highlighted in the reports issued by various truth commissions in the region, which in their final recommendations stress the need to make the domestic legal system consistent with international

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14 Cristina Pellandini, “Retos actuales en materia de adopción de medidas nacionales para la aplicación del Derecho internacional humanitario”, in Gabriel Valladares, *Derecho internacional humanitario y temas de áreas vinculadas, Lecciones y Ensayos*, No. 78, Lexis Nexis Abeledo Perrot/ICRC, Buenos Aires, 2003, p. 389.

norms, particularly the rules of IHL. Specifically, Guatemala's Historical Clarification Commission recommended that the government take the necessary measures "to fully incorporate into national legislation the standards of international humanitarian law and (...) regularly provide instruction regarding these norms to the personnel of state institutions, particularly the Army, who are responsible for respecting, and in turn ensuring respect in others for said norms".

## **2. The Punitive Role of International Humanitarian Law: Does It Limit the Chance of Reconciliation?**

Following analysis of the preventive role of IHL, it is necessary to examine the implications of incorporating IHL criteria into the transition. This is a very complex process, as the different parties involved often have seemingly irreconcilable interests. For example, the victims have non-negotiable moral and legal demands for the truth about violations and for justice, while the perpetrators are anxious to avoid prosecution<sup>15</sup>.

In the post-conflict period, the obligation to comply with the rules of IHL requiring perpetrators of violations to be punished could be regarded as an obstacle to the transition process, as groups retaining a share of power could see the application of these rules as a reason to make no compromises in the reconciliation process. The response of some Latin American states to this problem has been to pass what have become known as self-amnesty laws, tantamount to granting impunity for violations, and to set up truth commissions which, while clarifying the facts about violations, have not always succeeded in achieving reconciliation and justice. An analysis of these two mechanisms, the most commonly used in post-conflict situations in the region, provides an insight into the relationship between IHL and reconciliation efforts undertaken in these countries, showing, for example, how IHL is used by truth commissions to uncover the facts surrounding the violations they investigate or how the existence of IHL places constraints on amnesties.

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15 General Pinochet warned Chile's elected president as he handed over power in 1990: "No one is going to touch my people. The day they do, the state of law will come to an end". See *Chile in Transition*, Americas Watch, 1989, p. 73, cited by Geoffrey Robertson, *Crimes against Humanity: The Struggle for Global Justice*, The New Press, New York, 1999, p. 281.

### 3. Amnesty Laws

The amnesty laws<sup>16</sup> passed in Latin America cancel crimes and thus make acts that were criminal offences no longer punishable, with the result that “a) prosecutors forfeit the right or power to initiate investigations or criminal proceedings; and b) any sentence passed for the crime is obliterated”<sup>17</sup>. As Cassese observes, “(...) the rationale behind amnesty is that in the aftermath of periods of turmoil and deep rift, such as those following armed conflict, civil strife or revolution, it is best to heal social wounds by forgetting past misdeeds, hence by obliterating all the criminal offences that may have been perpetrated by any side. It is believed that in this way one may more expeditiously bring about cessation of hatred and animosity, thereby attaining national reconciliation (...)”<sup>18</sup>.

An amnesty law may have certain legitimacy if it promotes reconciliation as a firm and lasting basis on which to build a democratic society and does not simply grant impunity to those implicated. “Impunity” is the term used to refer to the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account—whether in criminal, civil, administrative or disciplinary proceedings—since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if convicted, sentenced to appropriate penalties and to make reparations to their victims<sup>19</sup>. Therefore, amnesties should not be used to serve the electoral interests<sup>20</sup> of the implicated agents or as a *realpolitik*

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16 It is interesting to note that the word amnesty has the same derivation as “amnesia”, namely from the Greek “*amnesia*”, meaning “forgetfulness” or “oblivion”. Antonio Cassese, “Reflections on International Criminal Justice”, *Modern Law Review*, vol. 61, 1998, p. 3.

17 Antonio Cassese, *International Criminal Law*, Oxford University Press, New York, 2003, p. 312.

18 *Ib.*, pp. 312-313.

19 “Updated Set of Principles for the protection and promotion of human rights through action to combat impunity” (hereinafter “Updated Set of Principles”). Report of the independent expert to update the set of principles to combat impunity, Diane Orentlicher, E/CN.4/2005/102/Add.1, 8 February 2005. Preserving impunity requires victims to relinquish their rights, without requiring those who violated them to do anything. See Juan Méndez, “Derecho a la verdad frente a las graves violaciones a los derechos humanos”, in Martín Abregú *et al.* (eds.), *La aplicación de los tratados sobre derechos humanos por tribunales locales*, CELS, Buenos Aires, 1997, available at: [http://www.aprodeh.org.pe/sem\\_verdad/documentos/Juan\\_E\\_Mendez.pdf](http://www.aprodeh.org.pe/sem_verdad/documentos/Juan_E_Mendez.pdf).

20 A good example of this is the recently proposed amnesty for the members of the Army who fought against *Sendero Luminoso* (Shining Path) rebels and the Túpac Amaru Revolutionary Movement in Peru, an initiative that coincided with the run-up to



response in which practical concerns and political expediency override ethical considerations<sup>21</sup>.

Amnesty is thus a formula to be applied in a particular context in compliance with certain requirements and without losing sight of the fact that the demands of the new society for justice must be satisfied. Evidently, this involves an element of opportunity (the amnesty is granted in a particular context, either during a post-conflict transition or a transition from dictatorship to democracy) and competence (the amnesty is a society-wide consensus, established on the basis of the work of a truth commission or some other transitional mechanism)<sup>22</sup>. Furthermore, the enactment of amnesty laws is no longer considered the exclusive purview of the state, as the requirements established in international human rights law and IHL must also be met, that is, amnesties are only valid when states comply with their obligations owing to all those individuals whose rights have been violated<sup>23</sup> and when they contribute to achieving national reconciliation. The jurisprudence of the Inter-American Court of Human Rights provides a clear example of this constraint on amnesties

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the elections and the battle for the votes that were granted to the members of the Army for the first time in the presidential elections. Regarding this issue, in his most recent Press Conference, on August 19th 2006 the Ministry of Defence [of the elected government] said that the government hasn't pronounced yet on granting amnesty to the members of the Army accused of human rights violations. Likewise, he said that rather than vengeance there should be justice avoiding impunity. Nevertheless he pointed out that the Truth Commission report was not legally binding for Peruvian state and that regarding the procedures and that regarding the procedures before our internal courts, rights such as presumption of innocence and right to defense should be preserved. See: [http://www.rpp.com.pe/portada/politica/47129\\_1.php](http://www.rpp.com.pe/portada/politica/47129_1.php).

- 21 Eduardo González Cueva, "Perspectivas teóricas sobre la justicia transicional", available at: [http://www.aprodeh.org.pe/sem\\_verdad/documentos/Gonzalez\\_Cueva.pdf](http://www.aprodeh.org.pe/sem_verdad/documentos/Gonzalez_Cueva.pdf). or [http://www.aprodeh.org.pe/sem\\_verdad/documentos.htm](http://www.aprodeh.org.pe/sem_verdad/documentos.htm).
- 22 Updated Set of Principles, above note 19. Principle 6 says: "To the greatest extent possible, decisions to establish a truth commission, define its terms of reference and determine its composition should be based upon broad public consultations in which the views of victims and survivors especially are sought". On the subject of the amnesty law in El Salvador, Boutros Ghali noted that "it would have been better if the amnesty had been taken after a broad degree of national consensus had been created in favor of it". Secretary-General expresses concern over amnesty law adopted by El Salvador legislative assembly, United Nations Press Release SG/SM 4950, 24 March 1993, cited by Jo M. Pasqualucci in "The whole truth and nothing but the truth: Truth commissions, impunity and the Inter-American human rights system", *Boston University International Law Journal*, vol. 12, 1994, p. 345.
- 23 Santiago Corcuera Cabezut, "Las leyes de amnistía a la luz del derecho internacional de los derechos humanos", available at: [http://www.aprodeh.org.pe/sem\\_verdad/documentos/Corcuera\\_Cabezut.pdf](http://www.aprodeh.org.pe/sem_verdad/documentos/Corcuera_Cabezut.pdf) or [http://aprodeh.org.pe/sem\\_verdad/documentos.htm](http://aprodeh.org.pe/sem_verdad/documentos.htm).

in Latin America. In the seminal case of *Barrios Altos v. Peru* concerning laws passed by the state of Peru granting amnesty to those involved in crimes against humanity, the court emphatically declared that:

43. The Court considers that it should be emphasized that, in the light of the general obligations established in Articles 1(1) and 2 of the American Convention, the States Parties are obliged to take all measures to ensure that no-one is deprived of judicial protection and the exercise of the right to a simple and effective recourse (...) Consequently, States Parties to the Convention which adopt laws that have the opposite effect, such as self amnesty laws, violate Articles 8 and 25, in relation to Articles 1(1) and 2 of the Convention. Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention.

44. Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible, nor can they have the same or a similar impact with regard to other cases that have occurred in Peru, where the rights established in the American Convention have been violated<sup>24</sup>.

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24 Inter-American Court of Human Rights, *Barrios Altos* case (*Chumbipuma Aguirre et al. v. Peru*), Judgment of 14 March 2001, available at: [http://www.corteidh.or.cr/seriecpdf\\_ing/seriec\\_75\\_ing.pdf](http://www.corteidh.or.cr/seriecpdf_ing/seriec_75_ing.pdf). In the Interpretation of the Judgment on the Merits, the court rules that given the nature of the violation that amnesty laws No. 26,479 and No. 26,492 constitute, the decision made in the judgment on the merits in the *Barrios Altos* case has generic effects. Judgment of 3 September 2001, operative para. 2, Interpretation of the Judgment on the Merits (Art. 67 of the American Convention on Human Rights), available at: [http://www.corteidh.or.cr/seriecpdf\\_ing/seriec\\_83\\_ing.pdf](http://www.corteidh.or.cr/seriecpdf_ing/seriec_83_ing.pdf). Previously, in the *Velásquez Rodríguez* case, the court ruled: “181. The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains”, Judgment of 29 July 1988, available at: [http://www.corteidh.or.cr/seriecpdf\\_ing/seriec\\_04\\_ing.pdf](http://www.corteidh.or.cr/seriecpdf_ing/seriec_04_ing.pdf). In the *Loayza Tamayo* case, Reparations, Judgment

Such laws are generally promoted by the regime that committed the violations so as to shield its own members from prosecution. Therefore, they are not the result of negotiation or consensus and are not passed in the context of a post-conflict transition or a transition to democratic government. On the contrary, they are purely self-amnesty laws, as the Inter-American Commission on Human Rights so rightly terms them<sup>25</sup>.

Regrettably, this is the model of amnesty law commonly adopted in Latin America, promoting impunity rather than reconciliation<sup>26</sup>. Many of the governments that passed such amnesty laws justified their action by alleging that no rule of international law expressly prohibits the granting of amnesties for international crimes<sup>27</sup>. One such case was Chile, where the Pinochet dictatorship passed Decree 2191 of 19 April 1978 granting a self-amnesty that benefited members of the armed and security forces and enabled the *Junta* and its agents to enjoy total impunity. This amnesty was upheld in 1990 by the Supreme Court of Chile, which ruled that it was valid<sup>28</sup>. Similarly, the Argentine armed forces granted themselves an amnesty in Act 22924 of 22 September 1982. At first, it seemed likely that

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of 27 November 1998, para. 168, the court said: “States (...) may not invoke existing provisions of domestic law, such as the amnesty law in this case, to avoid complying with their obligations under international law. In the Court’s judgment, the amnesty law enacted by Peru precludes the obligation to investigate and prevents access to justice. For these reasons, Peru’s argument that it cannot comply with the duty to investigate the facts that gave rise to the present case must be rejected”. Evidently, this type of violation not only arises as a result of the enactment and application of amnesty laws. *De facto* situations resulting from acts of commission or omission by the authorities to secure impunity for their members can have the same effects as an amnesty law that violates international law.

25 See Inter-American Commission on Human Rights, *Annual Report, 1985-86*, OEA/Ser.L/V/II.68, doc. 8, p. 193, cited by Pasqualucci, above note 22, p. 145. See also Report 34/96 on cases 11,228, 11,229, 11,231 and 11282 of 15 October 1996, in which the commission observes: “In the present case, the persons benefiting from the amnesty were not third parties from outside, but the very ones who had taken part in the government plans of the military regime. One thing is to uphold the need to legitimize the acts celebrated by society as a whole (to avoid falling into chaos), or those stemming from international responsibility, since the obligations assumed in those areas cannot be shirked; but to extend equal treatment to persons who acted in accord with the unlawful government, thereby violating the Constitution and the laws of Chile, is another matter entirely”.

26 Robert Norris, “Leyes de impunidad y los derechos humanos en las Américas: una respuesta legal”, in *Revista IIDH*, vol. 15, 1992, p. 47 ff. He observes that impunity laws proliferated after 1978 in Central and South American countries that had suffered long periods of political violence and systematic, state sponsored human rights violations.

27 Wilder Tayler, above note 7, p. 198.

28 Robert Norris, above note 26, p. 48 ff.

it would be repealed, but it was eventually reinforced some years later by further legislation, specifically the “Full Stop” Act (*Ley de Punto Final*) of 24 December 1986 and the Due Obedience Act (*Ley de Obediencia Debida*) of 4 June 1987<sup>29</sup>.

In Peru, Congress passed the General Amnesty Act (No. 26479) on 14 June 1995, which granted a “(...) general amnesty to military, police and civilian personnel, whatever their status (...) who face a formal complaint, investigation, criminal charge, trial, or conviction for common or military crimes (...) whether under the jurisdiction of the civil or military courts between May 1980 and the date on which this law is promulgated (...)”. Article 6 of the Act eliminates any possibility of carrying out investigations: “(...) all legal proceedings pending or in progress shall be closed”. When a judge decided not to apply the provisions of the Act, declaring it to be unconstitutional, Congress passed Act 26492 interpreting the General Amnesty Act, which in Article 2 barred judicial review on the grounds that the power to grant amnesty belonged solely to Congress, and in Article 3 stipulated that all judges must apply the General Amnesty Act.

A particularly illustrative case is that of El Salvador. As part of the Central American peace process, the Esquipulas II Accords granted unconditional blanket amnesties. Decree 805, enacted on 28 October 1987, granted amnesty to all those accused of involvement in political crimes or related common crimes perpetrated before 22 October of that year, when the number of perpetrators was no fewer than twenty. This was a sweeping amnesty covering crimes connected in any way with the armed conflict and committed by any person, regardless of what sector they belonged to. In Uruguay, the state passed Act 15848, published in the country’s official gazette on 31 December 1986, which was more of a statute of limitations than an amnesty law. It proclaimed that the power of the state to punish officers of the armed or police forces for political crimes committed on active duty before 1 March 1985 had expired. A motion was presented to have it declared unconstitutional, but was dismissed by the Supreme Court on 2 May 1988. A referendum held on 16 April 1989 showed 57.5% of the population to be in favour of the act, which remains in force today. An amnesty was also granted in Brazil by virtue of Act 6683 of 28 August 1979, covering the period from 2 September 1961 to 15 August 1979. This act granted amnesty to all those who had committed political crimes, politically related common

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29 *Ib.*, p. 71 ff.

crimes or electoral offences, those whose political rights had been suspended and public-sector employees, employees of government-related foundations, members of the military and trade union officials, and representatives convicted under the Institutional Acts and supplementary laws. This amnesty, which was the result of action taken by the legislature, stemmed from a popular initiative and remains in force to the present day.

It appears, then, that the amnesty laws passed in these Latin American countries do not comply with the requirements of IHL to prosecute those accused of war crimes and international human rights law to ensure the enjoyment of rights guaranteed and to provide an effective remedy in case of violation. Moreover, in most cases, they were amnesties granted by the abusive regime itself to benefit its own members. It should be noted, however, that in recent years a trend reversing this situation has begun to emerge. The most obvious example is Argentina, where the Supreme Court invalidated the two existing amnesty laws by its judgment of 14 June 2005. This ruling upheld the decisions of lower courts, which had declared the laws unconstitutional, and confirmed Act 25779 of 2003, which had declared them null and void. The judgment emphatically stated that the scope of the power of the legislature to grant general amnesties under the National Constitution has been significantly limited by the obligation to guarantee rights contained in the American Convention on Human Rights and the International Covenant on Civil and Political Rights, thereby rendering the amnesties unconstitutional and null and void. This meant that the amnesties could not present any legal obstacle to investigating and prosecuting cases of serious human rights violations. Consequently, the Argentine state cannot invoke the principle of non-retroactivity of criminal law to relieve it of its duty to investigate and prosecute gross human rights violations<sup>30</sup>.

In Chile, there have been a number of trials in recent years to prosecute crimes committed during the period covered by the amnesty. This was not because the law was repealed, however, but because certain crimes were classed as ongoing. One such example is the trial of the

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30 Judgment of 14 June 2005. “Recurso de hecho deducido por la defensa de Julio Héctor Simón en la causa Simón, Julio Héctor y otros s/ privación ilegítima de la libertad, etc., causa No. 17.768”, available at: [http://www.derechos.org/nizkor/arg/doc/nulidad.html#N\\_4\\_#N\\_4](http://www.derechos.org/nizkor/arg/doc/nulidad.html#N_4_#N_4).

former head of the secret police, Manuel Contreras, and four other people connected with the *Miguel Ángel Sandoval Rodríguez* case<sup>31</sup>.

In the case of Peru, the turnaround was not prompted by a state initiative but by the judgment handed down by the Inter-American Court on 14 March 2001, which declared that amnesty laws 26479 and 26492 were incompatible with the American Convention on Human Rights and therefore lacked legal effect<sup>32</sup>. This judgment led to the reopening of various cases in Peru, *inter alia* against members of the paramilitary group “Colina” who had committed serious violations of human rights and those accused of killing a university professor and twelve students (*La Cantuta* case), among others<sup>33</sup>. In countries where such laws have not been repealed and no efforts have been undertaken to expose the truth and administer justice, such as El Salvador, civil society has called for these issues to be addressed. The situation in that country has now changed, increasing the likelihood of the amnesty law being repealed<sup>34</sup>.

In conclusion, many countries in Latin America opted to implement exculpatory mechanisms, which did not always promote national reconciliation. These millstones continue to exist in some states, although

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31 Human Rights Watch. “World Report 2005. Chile”, available at: <http://hrw.org/english/docs/2005/01/13/chile9846.htm>. This is without prejudice to the need to repeal such laws, as asserted by the Committee Against Torture in its “Conclusions and recommendations on the third periodic report of Chile”, in which it remarks that this type of legislation has entrenched impunity for the perpetrators of serious human rights violations committed during the military dictatorship: “The self-amnesty was a general procedure by which the state refused to prosecute serious crimes. Moreover, because of the way it was applied by the Chilean courts, the decree not only prevented the possibility of prosecuting the authors of the human rights violations, but also ensured that no accusation could be brought, and that the names of the responsible parties would not be known, so that, legally, those persons were considered as if they had never committed any illegal act at all. The amnesty decree-law rendered the crimes legally without effect, and deprived the victims and their families of any legal recourse through which they might identify those responsible for violating their human rights during the military dictatorship, and bring them to justice”. “Conclusions and recommendations of the Committee against Torture: Committee against Torture reviews third periodic report of Chile”, *Anuario de Derechos Humanos 2005*, University of Chile.

32 See above note 24.

33 “(...) Six years later, in 2001, as a result of the *Barrios Altos* case brought against the state of Peru before the Inter-American Court of Human Rights, the “amnesty laws” were declared to lack legal effect, leading to the reopening of proceedings and investigations relating to the involvement of members of the security forces in violations between 1980 and 1993, Final Report, Truth and Reconciliation Commission, vol. VI, 1st ed., Lima, November 2003, p. 178.

34 Joaquín Villalobos, in *El Diario de Hoy*, Editorial, 30 March 2005, available at: <http://www.elsalvador.com/noticias/2005/03/30/editorial/edi4.asp>.

new trends emerging in the region and particularly in Argentina signal a move towards combating impunity, a process that has moved forward thanks not only to the efforts of international and regional mechanisms, such as the Inter-American human rights protection system, but also to the mobilization of civil society.

#### **4. International Humanitarian Law and Amnesty Laws**

In IHL, amnesties are regarded as having a useful contribution to make to national reconciliation. It could even be argued that amnesties serve a specific purpose in the case of armed conflict, insofar as “(...) amnesty is necessary to facilitate the reintegration of combatants in peaceful political life, and the pressure to grant a symmetrical amnesty for the members of the regular armed forces is very strong”, as Méndez observes<sup>35</sup>.

Beyond the question of whether an amnesty should or should not be granted, IHL also determines the material scope of application, namely which crimes the state can amnesty without breaching its obligations under international law. It has been posited that amnesty should cover offences of rebellion or sedition and comparatively minor infractions of the laws of war, such as arbitrary detentions or mild forms of ill-treatment<sup>36</sup>. Therefore, IHL imposes certain limitations, and the amnesties it promotes are not intended to cover war crimes. In fact, the provisions of international human rights law and IHL provide parameters to be taken into account in determining the contours of a legitimate amnesty in transition processes. These parameters can be deduced from the body of international law, of which IHL is a part<sup>37</sup>.

One of the fundamental constraints on amnesties is that states have the obligation to investigate and prosecute those who have committed serious crimes under international law. This obligation is not affected by the official position of the perpetrator or the desire of the victims to seek justice, since it is in the interest of the state to prosecute certain “violations

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35 Méndez, above note 19.

36 *Ib.*

37 Catalina Botero Marino, Esteban Restrepo Saldarriaga, “Estándares internacionales y procesos de transición en Colombia”, in Angelika Rettberg (ed.), *Entre el perdón y el paredón: preguntas y dilemas de la justicia transicional*, Corcas Editores, Colombia, 2005, p. 20. See also Updated Set of Principles, above note 19: Principle 24 on restrictions and other measures relating to amnesty says that: “the perpetrators of serious crimes under international law may not benefit from such measures”.

so serious that they are considered punishable by the international community as a whole”<sup>38</sup>. This principle is enshrined in Articles 49, 50, 129 and 146 respectively of the four Geneva Conventions of 1949 and Article 85 of Additional Protocol I, establishing that states have the duty to adopt the measures necessary to search for and prosecute those accused of grave breaches, or otherwise to extradite them to another state that has made out a *prima facie* case. Customary international law, together with Article 8(2)(c) and (e) of the Rome Statute of the International Criminal Court, confirms that there is individual criminal responsibility for war crimes committed in non-international armed conflicts, implying a duty to prosecute those offenders<sup>39</sup>. The fact that post-conflict processes and transitions from dictatorship to democracy normally unfold on a domestic scenario does not mean that these rules do not apply. On the contrary, they are part of customary international humanitarian law and as such also apply in these situations<sup>40</sup>.

Furthermore, Article 91 of Additional Protocol I stipulates that when a party to the conflict violates the provisions of IHL, it has to pay compensation for the injuries it has caused. Customary international humanitarian law also assigns this obligation to the state, but not solely in relation to international armed conflicts, implying that the state must undertake an investigation to establish the facts and the injuries caused<sup>41</sup>.

Reconciliation, while not expressly laid down as an objective of IHL, is an issue that was not overlooked by those who drafted the treaties, as a reading of Article 6(5) of Additional Protocol II reveals: “At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained”. The commentary of the International Committee of the Red Cross states that the purpose

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38 González Cueva, above note 21.

39 See also the preamble of the Rome Statute, which refers to: “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”.

40 The determination of the rules of IHL belonging to customary international law is based on a study undertaken by the ICRC at the request of the International Conference of the Red Cross and the Red Crescent: Jean-Marie Henckaerts, “Study on customary international humanitarian law”, in *International Review of the Red Cross*, vol. 87, No. 857, March 2005, pp. 175-212.

41 *Ib.*, p. 211, Rule 150: “A state responsible for violations of international humanitarian law is required to make full reparation for the loss or injury caused”.



of this provision is to “encourage gestures of reconciliation which can contribute to re-establishing normal relations in the life of a nation which has been divided”<sup>42</sup>. A systematic interpretation of this provision in light of the object and purpose of Additional Protocol II, leads to the conclusion that amnesty cannot be granted to individuals suspected, accused or convicted of war crimes.

This interpretation is bolstered by the drafting history of Article 6(5) which indicates that “the provision aims at encouraging amnesty, *i.e.* a sort of release at the end of hostilities, for those detained or punished for the mere fact of having participated in hostilities. It does not aim at an amnesty for those having violated international law (...)”<sup>43</sup>.

In the same vein, the United Nations Human Rights Committee, on the subject of torture, has stated that: “Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future”<sup>44</sup>. For its part, the Inter-American Commission on Human Rights asserts that it is necessary to: “(...) ensure compatibility of recourse to the granting of amnesties or pardons for persons who have risen up in arms against the State with the State’s obligation to clarify, punish, and make reparation for violations of human rights and international humanitarian law (...)”<sup>45</sup>.

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42 Sylvie-Stoyanka Junod, “Commentary on Protocol II relative to non-international armed conflicts”, in *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva/Martinus Nijhoff Publishers, Dordrecht, 1987, para. 4618. For Robertson, above note 15, pp. 280-281, the drafting history of the subsections shows that it contemplates an Abraham Lincoln style amnesty (“to restore the tranquility of the commonwealth”) for combatants who have fought on opposite sides according to the laws of war, “a sort of release at the end of hostilities for those detained or punished for the mere fact of having participated in hostilities. It does not aim at an amnesty for those having violated international law”.

43 This was recounted in a letter of the ICRC Legal Division to the ICTY Prosecutor of 24 November 1995 and to the Department of Law at the University of California of 15 April 1997 (referring to CCDH, Official Records, 1997, vol. IX, p. 319). See also Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Geneva, 1974-1977, vol. 9, Berne, 1978, p. 319; Report on the demobilization process in Colombia. OAE/Ser.L/V/II.120. Doc. 60. 13 December 2004, para. 25.

44 UN Human Rights Committee General Comment No. 20, 1992, para. 15.

45 Inter-American Commission on Human Rights, “Report on the demobilization process in Colombia”, OEA/Ser.L/V/II.120, Doc. 60, 13 December 2004, para. 11, available at: <http://www.cidh.org/countryrep/Colombia04eng/toc.htm>. With regard to individual cases, it has reiterated this view in Report No. 25/98 on cases 11505, 11532, 11541, 11546,

The Special Representative of the UN Secretary-General attached a disclaimer to the 1999 Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone stating that: “The United Nations interprets that the amnesty and pardon in article nine of this agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law”. Along similar lines, in the *Furundzija* case, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia ruled that whenever general rules prohibiting specific international crimes come to acquire the nature of peremptory norms (*jus cogens*), they may be construed as imposing, among other things, the obligation not to cancel by legislative or executive fiat the crimes they proscribe<sup>46</sup>.

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11549, 11569, 11572, 11573, 11583, 11585, 11595, 11652, 11657, 11675 and 11705 of 7 April 1998. In this report, it said: “41. The problem of amnesties has been considered by the Commission on various occasions, in claims made against states parties to the American Convention which, seeking mechanisms to foster national peace and reconciliation, have resorted to amnesties. By so doing, they 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 acts of barbarity against them”. It concludes: “45. The denounced acts result, on the one hand, in the non-fulfilment of the obligation assumed by the Chilean state to bring the provisions of its domestic law in line with the precepts of the American Convention, in violation of Articles 1(1) and 2, and, on the other hand, in non-application, leading to the wrongful denial of the right to due legal process for the disappeared persons named in the claims, in violation of Articles 8 and 25 in connection with 1(1)”. In Report No. 37/00 on case 11481, *Monsignor Oscar Arnulfo Romero and Galdámez v. El Salvador*, 13 April 2000, the Commission said: “126. The Commission has indicated repeatedly that the application of amnesty laws that impede access to justice in cases of serious human rights violations renders ineffective the obligation of the states parties to the American Convention to respect the rights and freedoms recognized therein, and to guarantee their free and full exercise to all persons subject to their jurisdiction with no discrimination of any kind, as provided in Article 1(1) of the Convention. In effect, the amnesty laws eliminate the most effective measure for the observance of human rights, *i.e.* the trial and punishment of those responsible for violations of human rights”. See also Report No. 28/92 (2 October 1992), Argentina; Report No. 29/92 (2 October 1992), Uruguay; No. 36/96, Chile; Third Report on Colombia, 1999, para. 345.

46 *Prosecutor v. Anto Furundzija*, Trial Chamber, Judgment of 10 December 1998, at para. 155: “The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally delegitimize any legislative, administrative or judicial act authorizing torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorizing or condoning torture or absolving its perpetrators through an amnesty law”.

In conclusion, granting an amnesty is contrary to a state's obligations under IHL, which means that only political crimes or related minor common crimes can be amnestied. This is the only kind of amnesty compatible with the need to establish the truth and administer justice<sup>47</sup>. However, the fact that an amnesty complies with the obligations established in IHL does not automatically mean that it can be considered to be valid and to fulfil the objectives of reconciliation, since other factors also come into play, as seen above. In short, amnesty laws should only be passed when it is clear that this is the only possible way of facilitating the transition process<sup>48</sup>, in other words, when the political and social situation of the nation prevents the authorities from advancing the reconciliation process by other means more consistent with the demands of truth and justice called for by transitional justice.

As Theo Van Boven observes: "it is hard to perceive that a system of justice that cares for the rights of victims can remain at the same time indifferent and inert towards gross misconduct of perpetrators"<sup>49</sup>. Moreover, the pernicious effects of impunity are also felt at the time and place in which it is permitted<sup>50</sup>, because the absence of punishment encourages human rights violators to continue committing such crimes, thereby undermining the rule of law doctrine. In the long run this could have a more destabilizing effect than prosecuting the culprits would<sup>51</sup>. In the opinion of Nino, this failure to investigate and prosecute may even be categorized as a passive abuse of human rights if it places those rights in future peril<sup>52</sup>. Therefore, while amnesty laws may also "contribute to the

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47 *Ib.*

48 Marino Saldarriaga, above note 37, p. 29.

49 Theo Van Boven, "Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms", UN Human Rights Committee, UN Doc E/CN.4/Sub.2/1993/152, cited by Pasqualucci above note 22, p. 348.

50 Pasqualucci, above note 19, pp. 352-353. The practice of systematic disappearance, for instance, which was used so effectively by the Argentine military, had previously been a policy of Nazi Germany during World War II. Several Nazis who escaped punishment after World War II fled to Argentina and Paraguay where some of them are rumoured to have been involved in government. A victim who survived torture at the hands of the Argentine military during the "dirty war" testified that there was a picture of Adolf Hitler in the chamber of the clandestine detention centre where he was tortured.

51 *Ib.*, p. 9.

52 Carlos Nino, "The duty to punish past abuses of human rights put into context: The case of Argentina", *Yale Law Journal*, No. 100, 1991, pp. 2619 and 2639.

present assurance of human rights in a particular State, their long term effects on the assurance of human rights is in question. A State's duty to ensure human rights must be considered from a global, as well as a domestic, perspective"<sup>53</sup>.

While it is true that punishment is not the only means of ensuring reparation, in practice, by dint of dispensation of justice, victims are likely to be more prepared to be reconciled with their erstwhile tormentors because they know that the latter have now paid for their crimes<sup>54</sup>. Moreover, without punishment it would be difficult to ensure other forms of reparation. Both theory and experience would seem to show that the coexistence of impunity and reconciliation is a fallacy. As a United Nations report so rightly observes: "experience in the past decade demonstrated clearly that the consolidation of peace in the immediate post-conflict period, as well as the maintenance of peace in the long term, cannot be achieved unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice"<sup>55</sup>.

## 5. Truth Commissions

It is now widely believed that the right to information extends beyond the private right of each direct victim or his or her relatives to know the truth about what happened, and that society as a whole has a "right to truth" or a "right to know" all there is to know about its history. The Inter-American Commission on Human Rights defined it as "a collective right that ensures society access to information that is essential for the workings of democratic systems, and it is also a private right for relatives of the victims, which affords a form of compensation, in particular, in cases where amnesty laws are adopted"<sup>56</sup>. Similarly, the Updated Set of

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53 Pasqualucci, above note 22, p. 353.

54 Cassese, above note 17, p. 6.

55 "The rule of law and transitional justice in conflict and post-conflict societies", UN Security Council, S/2004/619, 3 August 2004, p. 3.

56 Inter-American Commission on Human Rights, *Ignacio Ellacuría et al.* case, Report 136/99 of 22 December 1999, para. 224. This right to truth cannot be considered as separate from the "right to justice". This is also established in international doctrine: "the right to truth is an integral part of the right to justice", and it is not possible to give effect to one without the other. Available at: [http:// eaf.typepad.com/pdf/2002/17RightToTruth.pdf](http://eaf.typepad.com/pdf/2002/17RightToTruth.pdf). Juan Méndez expresses the same view: "not only is the right to truth an integral part of the right to justice, in certain circumstances, it is

Principles for the protection and promotion of human rights through action to combat impunity, set forth in the report of independent expert Diane Orentlicher, observes that “full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations”<sup>57</sup>.

According to Méndez, this coexists with an emerging principle in international law that holds that states have the obligation to investigate, prosecute and punish the perpetrators of violations and to disclose to victims and society everything that can be reliably established about the facts and circumstances surrounding them. This right is not enshrined in international human rights treaties<sup>58</sup>, but it is an “appealingly consistent and peaceful way of interpreting such rules for situations that were not envisaged when they were drafted”<sup>59</sup>. The Inter-American Court of Human Rights echoes this view, finding that it is a “(...) a right that does not exist in the American Convention, although it may correspond to a concept that is being developed in doctrine and case law, which has already been disposed of in this Case through the Court’s decision to establish Peru’s obligation to investigate the events that produced the violations of the American Convention”<sup>60</sup>.

The obligation corresponding to this right is the state’s “duty to preserve memory”. The Updated Set of Principles to combat impunity says:

A people’s knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State’s duty to preserve archives and other evidence concerning

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through transparent criminal proceedings respecting all fair trial guarantees that it is given fullest and most satisfactory effect”. Méndez, above note 19.

57 Updated Set of Principles, above note 19. Principle 2 says: “Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes”.

58 In this regard, the Inter-American Commission on Human Rights found that the obligation arises essentially from the provisions of Articles 1(1), 8(1), 25 and 13 of the American Convention on Human Rights in the *Ignacio Ellacuría et al.* case, Report No. 136/99, Case 10488, Ignacio Ellacuría, S. J.; Segundo Montes, S. J.; Armando López, S.J.; Ignacio Martín Baró, S. J.; Joaquín López y López, S. J.; Juan Ramón Moreno, S. J.; Julia Elba Ramos; and Celina Mariceth Ramos, El Salvador, 22 December 1999, para. 221, available at: <http://www.cidh.org/annualrep/99eng/Merits/ElSalvador10.488b.htm>.

59 Méndez, above note 19.

60 Inter-American Court of Human Rights, *Castillo Paéz* case, Judgment of 3 November 1997, para. 86.

violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments<sup>61</sup>.

The commissions of inquiry set up to give effect to this right must be established with certain guarantees, including:

- independence and impartiality;
- clearly defined terms of reference, expressly excluding acting as substitutes for the courts;
- guarantees for the accused, the victims and the witnesses testifying on their behalf;
- testimony given on a strictly voluntary basis and protection and assistance for those testifying;
- preservation of records and evidence relating to human rights violations;
- dissemination of reports<sup>62</sup>.

Truth commissions are bodies created to investigate a history of violations and to help societies that have suffered political violence or internal conflict to come to terms with the past, with a view to healing the deep rifts and wounds that violence causes and preventing such atrocities from ever happening again<sup>63</sup>. The theory is that the truth will make people aware, and this awareness will ensure human rights in the future by minimizing the possibility that such horror will be repeated<sup>64</sup>.

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61 Updated Set of Principles, above note 16, Principle 3. See also Michael Frühling, “Derecho a la verdad, a la justicia y a la reparación integral en casos de graves violaciones a los derechos humanos”, available at: <http://www.hchr.org.co/publico/pronunciamientos/ponencias/po0435.pdf>, p. 3.

62 *Ib.*

63 As used in the Updated Set of Principles, the term “truth commissions” refers to “official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law, usually committed over a number of years”, above note 19

64 *Annual Report 1985-86*, Inter-American Commission on Human Rights, pp. 192-193; Carlos Nino, above note 51, pp. 237-240, cited by Jo M. Pasqualucci, above note 22, p. 352.

Truth commissions seek to establish the causes of the violence, identify the elements in conflict, investigate the most serious violations of human rights and IHL and sometimes determine legal accountability and reparations<sup>65</sup>. The work of a truth commission also contributes to identifying the structures of violence, its ramifications in different sectors of society (armed forces, police, judiciary and church) and other relevant factors.

Truth commissions can therefore make a useful contribution in different ways<sup>66</sup> by: a) promoting discovery and official acknowledgement of previously ignored facts (revealing a censured, indifferent and terrorized Latin American people); b) identifying sectors involved in committing human rights violations, a finding which, in the case of El Salvador and Guatemala, helped to reorganize training for police and security forces, often trained to carry out acts prohibited under international human rights laws; c) personalizing and humanizing victims, contributing to the important task of ensuring recognition for victims of violations and restoring their dignity; d) providing a measure of reparation for the injuries suffered, establishing policies to provide redress for victims and their relatives, such as constructing commemorative parks, museums and monuments, launching programmes to provide monetary compensation, etc.; e) implementing measures to prevent the recurrence of human rights violations in the future, such as retraining for police and military forces, educational programmes, use of police report records, etc.; and f) promoting reconciliation through truth and justice<sup>67</sup>. The

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65 In some cases, truth commissions are created as a result of the efforts of human rights organizations and work almost secretly to investigate serious cases of state-sponsored violence. This was the case in Brazil, where the Sao Paulo Archdiocese, under the direction of Cardinal Evaristo Arns, produced the report entitled *Brasil Nunca Mais* (Brazil Never Again). In Paraguay, the Comité de Iglesias para Ayudas de Emergencias (CIPAE) also published a series of investigations into the Stroessner dictatorship entitled *Paraguay Nunca Más*. Other similar efforts include those of the Servicio de Paz y Justicia in Uruguay, with its report entitled *Uruguay Nunca Más*, and the group of Colombian and foreign organizations that published the valuable report entitled *“El terrorismo de Estado en Colombia”* (State Terrorism in Colombia).

66 Esteban Cuya, “El impacto de las comisiones de la verdad en América Latina”, available at: [http://www.aprodeh.org.pe/sem\\_verdad/documentos/Esteban\\_cuya.pdf](http://www.aprodeh.org.pe/sem_verdad/documentos/Esteban_cuya.pdf).

67 On this subject, Méndez observes that “true reconciliation cannot be imposed by decree”. He also agrees with the investigative role of truth commissions, provided that their work is not disregarded and that it is not carried out in the belief that the mere fact of gathering information will lead to reconciliation. He remarks that: “The value of the more successful truth commissions is that they are created not with the presumption that there will be no trials, but to constitute a step towards knowing the truth and, ultimately, making justice prevail”. Méndez, above note 19.

work of a truth commission can prevent or render superfluous long trials against thousands of alleged perpetrators. This is particularly important when the country has a weak judicial system, incapable of effectively prosecuting those accused of violations. In conclusion, as Cassese observes, these commissions promote “further understanding in lieu of vengeance, reparation in lieu of retaliation, and reconciliation instead of victimization”<sup>68</sup>.

Latin America is no stranger to the phenomenon of truth commissions. In fact, setting up such bodies has become common practice in the region. Some of the truth commissions were created by domestic instruments<sup>69</sup> while others were set up as part of international agreements mediated by the United Nations<sup>70</sup>. On the whole, these commissions investigated cases of human rights violations, although in some countries, such as Chile, El Salvador and Peru, the application of IHL was also required for a full analysis<sup>71</sup>. In Ecuador and Peru, the truth commissions were set up to investigate crimes committed under democratic governments, while commissions and reports conducted in other Latin American states investigated events that had occurred under dictatorships or during internal armed conflicts. Only the truth commissions of Chile and Peru refer explicitly to reconciliation as one of their goals. The tasks and functions of such truth commissions have undoubtedly increased and become more complex over the past two or three decades, and while there is no standard model, the emerging trend is a shift towards increasingly comprehensive official investigations.

In Argentina, Decree-Law No. 187/83 of 15 December 1983 created the National Commission on the Disappearance of Persons (CONADEP) to investigate forced disappearances in the country. Over a period of nine months, it investigated human rights violations committed under

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68 Cassese, above note 17, p. 10.

69 As in the case of the truth commissions set up in Argentina (Decree No. 187 of 15 December 1983), Chile (Supreme Decree No. 355 of 24 April 1990) and Peru (Supreme Decree No. 065-2001-PCM of 4 June 2001).

70 As in the case of the El Salvador truth commission, created by the UN-brokered Mexico Agreement of 27 April 1991 between the government of El Salvador and the Farabundo Martí National Liberation Front. Similarly, Guatemala’s Historical Clarification Commission was created by the UN-brokered Oslo Agreement of 23 July 1994 between the government and the *guerrillas*.

71 In this regard, certain acts of violence against the population (such as the massacre of Mayan people in the conflict in Guatemala) constitute a violation of the principle of distinction under IHL.



the military dictatorship between 1976 and 1983. The failure of its economic policy, defeat in the Falklands/Malvinas War and international condemnation of its human rights record forced the military dictatorship to hand power over to a civilian government at the end of 1983. A policy of systematic state-sponsored terror in Argentina had resulted in human rights violations against thousands of people; repression was exercised by the armed forces using “technology from hell”, as revealed in the thousands of complaints filed and testimonies given by the victims of such violations. As President Raúl Alfonsín said on one occasion after this period of terrible violence, “(...) there must be no veil of secrecy. No society can begin a new era by shirking its ethical responsibilities”. One of the first constitutional acts carried out by President Alfonsín on coming to power was therefore to create the CONADEP commission.

After nine months of work, CONADEP had gathered more than 50,000 pages of evidence and complaints, and in November 1984 published its report, *“Nunca Más. Informe de la Comisión Nacional sobre la Desaparición de Personas”* (Never again: Report of the National Commission on Forced Disappearances). It disclosed facts relating to the disappearance of 8,960 people, based on duly documented, corroborated complaints, and reported that 80% of the victims who had suffered at the hands of the Argentine military were aged between 21 and 35. The report stated that there were 340 clandestine detention centres in Argentina, run by top-ranking officers from the armed and security forces, where detainees were held in inhumane conditions and subjected to all manner of humiliating and degrading treatment. CONADEP discovered that senior officers in the armed and police forces had established a “blood pact”, involving them all in human rights violations. The commission presented recommendations to various state authorities “with a view to providing reparation and ensuring that such a curtailment of human rights never reoccurs”. The proposals made by CONADEP included continuing its work with judicial investigations, providing monetary assistance, scholarships and employment for the families of people who had disappeared and passing legislation to make forced disappearance a crime against humanity. It also recommended that human rights should be taught as a compulsory subject at civilian, military and police education establishments of the state, that support should be given to human rights organizations and that all repressive legislation in force in Argentina should be repealed. Many of these recommendations have yet to be implemented.

In Chile, Supreme Decree 355 of 24 April 1990 created the National Truth and Reconciliation Commission. Following the moral and political defeat of Pinochet, the people of Chile elected Patricio Aylwin to the presidency. He set up the commission to establish the truth about the most serious human rights violations committed in recent years and to achieve the reconciliation of all Chilean people. The commission was mandated to: i) provide as complete a picture as possible of the gross human rights violations committed in the country, providing background information and establishing the facts and circumstances surrounding them; ii) gather evidence that would make it possible to identify individual victims by name and determine their fate or whereabouts; iii) recommend measures to provide fair and adequate reparation and vindication for victims and their families; and iv) recommend legal and administrative measures that should be adopted to prevent the recurrence of further human rights abuses in the future. It investigated deaths and disappearances that occurred between 11 September 1973 and 11 March 1990 in Chile and elsewhere. It is worth noting that although this commission did not investigate cases of alleged torture, almost fifteen years later the National Commission on Political Imprisonment and Torture was created as an advisory body to President Ricardo Lagos. Following a year of investigations, it presented its report on 10 November 2004. The commission compiled information on people who had been deprived of their freedom or tortured for political reasons in the period between 11 September 1973 and 10 March 1990 by agents of the state or by people in their service. The report contains the testimonies of 27,255 people acknowledged as victims, an account of how political imprisonment and torture were carried out, and criteria and proposals for providing reparations to recognized victims<sup>72</sup>.

The legal framework used by the commission as a basis for analyzing the violations included national and international human rights norms and rules of IHL. On the basis of its thorough investigation into cases of people who had disappeared or been killed at the hands of the security forces, the commission recommended public reparation to restore the dignity of victims, in addition to social welfare benefits, monetary compensation in the form of a lifelong pension, special attention from the state with regard to health care, education and housing, assistance with debts and exemption from compulsory military service for the sons of victims. The

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72 See: <http://www.comisiontortura.cl/index.html>.

commission also presented recommendations on legal and administrative aspects, such as expedited procedures to declare a presumption of death in the case of missing people, making domestic legislation consistent with international human rights law, and ratification of international human rights treaties. It proposed measures aimed at reforming the judiciary and the armed forces and continuing investigations into the fate of missing people. It further recommended that withholding information about the location of illegally buried remains be declared a criminal offence, as there were many families still waiting to claim the remains of their loved ones. In January 1992, the Chilean government passed Act 19123 creating the *Corporación Nacional de Reparación y Reconciliación* (National Reparation and Reconciliation Corporation) to implement the recommendations made by the commission.

The Truth and Justice Commission was set up in Ecuador by Ministerial Decision on 17 September 1996. Its duties and functions included: i) recording complaints relating to human rights violations, particularly forced disappearances, torture and other acts endangering life or physical integrity committed in Ecuador from 1979, whether by agents of the state or individuals; ii) investigating the complaints, using all the means at its disposal; iii) preparing the “Truth and Justice” report over a one-year period to record all the facts, complaints and investigations, in addition to providing background information, conclusions and recommendations.

The creation of this commission was particularly significant, as it was set up to investigate events relating to human rights violations committed under “democratic” governments. Its work involved systemizing the complaints with a view to passing them on to a team of lawyers who would prepare reports to be submitted to the country’s Supreme Court. Many of the complaints referred to the existence of secret burial places in police and military enclosures and remote areas, although it was very difficult to establish the truth of these allegations<sup>73</sup>. Various national and international human rights organizations, therefore, called for the creation of another commission to investigate cases relating to forced disappearances, killings and torture during the period under consideration (1985-1989). On 2 December 2004, Ecuador’s President Lucio Gutiérrez announced that he would issue

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73 For information on the process undertaken to create this commission, see Elsa Curbelo, “Comisión Verdad y Justicia del Ecuador: la impunidad en democracia”, paper delivered at the International Seminar on Impunity and its Effects on Democratization Processes, Santiago de Chile, 14 December 1996, available at: <http://www.derechos.org>.

a supreme decree to set up a truth commission to examine human rights violations committed under previous governments, which would be formed by courageous, reputable people.

The Truth Commission set up in El Salvador undertook an eight-month investigation, resulting in a report entitled “*De la locura a la esperanza: la guerra de 12 años en El Salvador*” (From madness to hope: The twelve-year war in El Salvador). The commission was created as part of the El Salvador peace accords negotiated between the government and the Farabundo Martí National Liberation Front over more than three years (1989-1992), during which time they were engaged in hostilities. The negotiations were mediated by the United Nations, with the collaboration of Colombia, Mexico, Spain and Venezuela, and culminated in the signing of the Chapultepec Peace Agreement in Mexico on 16 January 1992. It determined that an eight-month investigation would be carried out into abuses committed during the violence from 1980 onwards. In addition to the powers granted to it in the peace agreement in relation to impunity and the investigation of violations committed during the violence, the commission was also mandated to make recommendations of a “legal, political and administrative nature, including measures to prevent such atrocities from ever happening again and initiatives aimed at achieving national reconciliation”.

The commission defined the legal norms that it would use for its analysis, determining that during the conflict in El Salvador both parties were bound to comply with rules of international law, including provisions contained in international human rights law or IHL or both. The commission also established that during the internal armed conflict, the state of El Salvador had the obligation to implement the measures necessary to ensure that its domestic legislation was consistent with the provisions of international law. Finally, the commission presented a series of recommendations to: i) reform criminal legislation and the judiciary; ii) purge the armed forces, police force and public authorities; iii) bar people involved in violations of human rights and IHL from public office for at least ten years; iv) investigate and disband illegal groups (death squads); and v) provide material and moral reparations to victims of violence and their immediate families.

The Historical Clarification Commission was created in Guatemala by the Oslo Agreement on 23 June 1994 to establish the facts about cases of human rights violations and acts of violence committed during thirty-four years of internal armed conflict waged in the country, and to

formulate recommendations to promote peace. The report produced by the commission describes the causes of the armed conflict, the strategies used during the conflict by both sides, human rights violations and acts of violence. It also provides details of the consequences of the hostilities and presents the commission's final conclusions and recommendations. The commission further recommended that a national reparations programme be launched for victims of human rights violations and acts of violence connected with the armed conflict and for their families. The programme would establish individual and collective measures based on principles of equity, social participation and respect for cultural identity, which would include: i) material reparations to restore the situation as it was before the violation was committed, particularly in the case of land; ii) monetary compensation for the most serious injuries and damages directly caused by violations of human rights and IHL; iii) psycho-social rehabilitation and reparations, including community health care, psychiatric treatment and legal and social services; and iv) restoration of individual dignity and satisfaction, including action to ensure moral and symbolic reparation.

The Truth Commission created in Panama by Executive Decree No. 2 of 18 January 2001 was set up to establish the facts about human rights violations, particularly forced disappearances, committed under the military regime from 1968 and covering two decades. The commission is still in operation, although its effectiveness has been questioned because it lacks a clear mandate from the government and because other institutions interfere with its work. With the passing of time, Panamas collective memory seems to have faded and, in recent times, there have been clashes between the commission and the judiciary. A series of unfortunate incidents, including the falsification of evidence, has tainted the credibility of the work carried out to date. The families of the victims have therefore been forced to take their cases to the Inter-American Court of Human Rights to seek the justice denied to them by the state<sup>74</sup>.

Valentín Paniagua, president of the transitional government in Peru, created the Truth and Reconciliation Commission there by virtue of Supreme Decree 065-2001-PCM of 2 June 2001. The report produced by the commission is the most important and comprehensive document in the history of Peru on the internal armed conflict waged between 1980 and November 2000. The self proclaimed Communist Party of Peru,

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74 For more information on this, see: <http://www.comisiondelaverdad.org.pa>, or <http://www.cverdad.org.pe/comision/enlaces/index.php>.

Shining Path (*Sendero Luminoso*), started the hostilities in May 1980 and was joined four years later, initially with a different approach, by the Túpac Amaru Revolutionary Movement. The conflict engendered large-scale violence and terror, resulting in a death toll of more than 69,000 (22,507 documented by the commission). There were thousands more cases of forced displacement, torture and forced disappearance, and the destruction of production and transport infrastructures, etc., resulted in material damage amounting to thousands of millions of soles.

This commission differed from those of other Latin American countries in that the mandate given to it by the state focused on analyzing the counterinsurgency operations carried out under democratic governments, extending beyond the coup of 5 April 1992 until the then President Alberto Fujimori fell from power. This was the first truth commission to conclude that insurgent groups had committed gross violations of human rights, although it also acknowledged wrongdoing on the part of members of the security and police forces. More specifically, the commission concluded that *Sendero Luminoso*, the Peruvian Communist Party, was to blame for causing more deaths than any other party in the conflict and was primarily responsible for the violence, because it had started the fighting and resorted to terrorist methods from the outset. It also reported that both the insurgent groups and the state armed forces had, at some time, committed widespread and/or systematic violations of human rights. The commission's terms of reference also included naming the individuals who had committed human rights violations. Although the decree issued to create the commission did not refer specifically to IHL, this was considered essential to preparing the report. The commission recommended that individual and collective reparation programmes be implemented, including measures for health care, psychiatric treatment, education, symbolic reparations, and monetary compensation and identity documents. In February 2004, a top-level, multisectoral commission, formed by government representatives and human rights organizations, was set up to plan and supervise the implementation of these recommendations<sup>75</sup>.

In September 2004, Bolivian Attorney General César Suárez announced his intention to contact his counterparts in Argentina and Chile with a view to opening the files on Operation Cóndor to establish the facts surrounding the forced disappearance of a number of Bolivian,

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75 Esteban Cuya, "Las Comisiones de la Verdad en América Latina", in: <http://www.derechos.org/koaga/iii/1/cuya.html>.

Argentine and Chilean citizens between 1971 and 1976 under the dictatorship of General Hugo Bánzer (1971-1977)<sup>76</sup>. Suárez declared that: “The Ministry of Public Prosecution has opened its doors to help resolve this issue, using documentation provided by the families of missing people”. It was in this context that Act 2640 concerning reparations for victims of political violence was passed. It established the procedures to be implemented to compensate people who had suffered political violence at the hands of the agents of unconstitutional governments who had committed human rights violations and abuses, and had failed to maintain the guarantees enshrined in the state’s Political Constitution and the International Covenant on Civil and Political Rights ratified by the state of Bolivia. Entitlement to compensation was laid down for acts of political violence committed between 4 November 1964 and 10 October 1982, including arbitrary detention and imprisonment; torture; forced exile; documented injuries or incapacity; politically motivated killings in Bolivia or elsewhere; forced disappearances; and persecution of trade union and political activists, as established in implementing regulations.

## **6. Truth Commissions and International Humanitarian Law**

All these countries, and particularly Argentina, Chile, El Salvador, Guatemala and Peru, had ratified the four Geneva Conventions of 1949<sup>77</sup>. Since none of the foregoing cases involved an international armed conflict, the provisions that apply in all of them are those of Article 3 common to those conventions. In fact, Article 3 would apply even if those states had not ratified the Geneva Conventions, because it is considered to be part of customary law in that it protects fundamental rights and contains protections relating to *jus cogens* norms, and must therefore be respected by all states<sup>78</sup>. This is not true, however, of Additional Protocol II, which was ratified by the said states during or after the violence and moreover only applies to some of the conflicts (in El Salvador, for example). The

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76 Operation Cóndor was the code name given to the intelligence and coordination plan implemented by the security services of the Southern Cone military dictatorships (Argentina, Chile, Brazil, Paraguay, Uruguay and Bolivia) in the 1970s.

77 Argentina ratified the four Geneva Conventions on 18 September 1956; Chile on 12 October 1950; El Salvador on 17 June 1953; Guatemala on 14 May 1952; and Peru on 15 February 1956. See: [http://www.icrc.org/IHL.nsf/\(SPF\)/party\\_main\\_treaties/\\$File/IHL\\_and\\_other\\_related\\_Treaties.pdf](http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf). (Last visited on 13 November 2005).

78 Elizabeth Salmón, “El reconocimiento del conflicto armado en el Perú”, in *Revista Derecho PUC*, Pontifical Catholic University of Peru, MMIV, No. 57, p. 85.

hostilities in the other countries do not fall within the scope of application of the protocol<sup>79</sup>, because they do not meet its definition of armed conflict, that is, fighting between the state's armed forces and dissident armed forces or other organized groups "under responsible command", which "exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations".

Not all of the commissions acknowledged the existence of an armed conflict, which constituted an obstacle to the application of IHL. The mandate given to CONADEP, the earliest of these commissions, was limited solely to investigating cases of people who had been detained, which meant that it only looked into violations committed by the state. Later truth commissions went further by acknowledging the existence of a conflict between insurgent forces and the armed forces of the state and therefore the applicability of IHL.

The Chilean Truth and Reconciliation Commission admitted that violations could be committed by the insurgent forces as well as by the state, thus acknowledging the obligation of all the parties to the conflict to comply with IHL. In Part 1, Chapter II of its report, the commission sets forth the norms, concepts and standards on which it based its deliberations and conclusions, which include the rules of IHL:

The norms of international humanitarian law do not consider the question of when it is lawful to resort to war or armed rebellion (...) Indeed, whether having recourse to weapons was justified or not, there are clear norms forbidding certain kinds of behavior in the waging of hostilities, both in international and internal armed conflicts. Among these norms are those that prohibit [sic] killing or torturing prisoners and those that establish fair trial standards for those charged with a criminal offence, however exceptional the character of the trial might be (...) Such transgressions, however, are never justified (...)<sup>80</sup>.

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79 Art. 1 of Additional Protocol II provides that it applies only to internal armed conflicts in which governmental authorities are one of the participants. Furthermore, the armed groups must "exercise such control over a part of the territory as to enable them to carry out sustained and concerted military operations" and have a system of "responsible command" and be able to implement the obligations under the protocol.

80 Report of the Truth and Reconciliation Commission of Chile, Part 1, Chapter II, available at: [http://www.usip.org/library/tc/doc/reports/chile/chile\\_1993\\_toc.html](http://www.usip.org/library/tc/doc/reports/chile/chile_1993_toc.html).



The Truth Commission of El Salvador not only acknowledged the existence of an armed conflict and that the rules of IHL were binding on all the parties to the conflict, but also specifically states that common Article 3 and Additional Protocol II apply in this particular case:

The principles of international humanitarian law applicable to the Salvadorian conflict are contained in Article 3 common to the four Geneva Conventions of 1949 and in Additional Protocol II thereto. El Salvador ratified these instruments before 1980.

Although the armed conflict in El Salvador was not an international conflict as defined by the Conventions, it did meet the requirements for the application of common Article 3. That article defines some fundamental humanitarian rules applicable to non-international armed conflicts. The same is true of Additional Protocol II, relating to the protection of victims of non international armed conflicts. The provisions of common Article 3 and of Additional Protocol II are legally binding on both the Government and the insurgent forces<sup>81</sup>.

Furthermore, the recommendations made by the Truth Commission of El Salvador to achieve the longed-for reconciliation include measures to protect subordinates who refuse to obey illegal orders<sup>82</sup>. This reform to be implemented in the armed forces, police and intelligence services is clearly anchored in the enforcement of IHL, which foresees no defence of superior orders where orders are manifestly illegal. Despite acknowledging the important role of IHL<sup>83</sup>, Guatemala's Historical Clarification Commission, unlike the Truth Commission of El Salvador,

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81 “From madness to hope: The 12-year war in El Salvador”, Report of the Commission on the Truth for El Salvador, UN Doc. S/25500, 1993, available at: <http://www.derechos.org/nizkor/salvador/informes/truth.html>.

82 “Cuadro 5: Recomendaciones de anteriores Comisiones de la Verdad, Lista seleccionada”, available at: [http://www.aprodeh.org/sem\\_verdad/documentos/Hayner\\_cuadros.pdf](http://www.aprodeh.org/sem_verdad/documentos/Hayner_cuadros.pdf) or [http://www.aprodeh.org.pe/sem\\_verdad/documentos.htm](http://www.aprodeh.org.pe/sem_verdad/documentos.htm).

83 “ (...) [IHL] seeks to ensure compliance with certain minimum standards and respect for certain non derogable rights. In armed conflict situations, it seeks to civilize the conduct of hostilities by establishing certain principles, such as respect for the civilian population, care of the wounded, humane treatment of prisoners and the protection of property essential to the survival of the population. These norms create a space for neutrality, in that they seek to reduce hostilities, minimize their effects on the

did not acknowledge the applicability of Additional Protocol II, although this does not mean that the rules of IHL were not applied. On the contrary, the Historical Clarification Commission did investigate violations of IHL, but only in connection with the “minimum protections established under common Article 3”<sup>84</sup>.

Lastly, the Truth and Reconciliation Commission of Peru acknowledged the obligation of both parties to respect IHL and that common Article 3 applies in the case of Peru’s armed conflict, while adding that: “This shall in no way be an obstacle to applying the provisions of Additional Protocol II, where compatible and relevant”. As contended elsewhere<sup>85</sup>, the internal conflict in Peru does not qualify as an armed conflict according to the definition established in Additional Protocol II, in that the insurgent forces do not meet the criteria of exercising control over a part of the state’s territory and being capable of carrying out sustained and concerted military operations. Nonetheless, the Truth and Reconciliation Commission rightly cites principles of IHL applicable to all armed conflict<sup>86</sup>.

The effectiveness of truth commissions in terms of their contribution to reconciliation of these societies will be determined in the coming years. According to Geoffrey Robertson, for example, “what the history of “transitional justice”—or the lack of it—in Latin America demonstrates in the long term is that the emergence of any measure of truth is not a basis for reconciliation. Quite the contrary, since revelation of the details of official depravity only makes the demands for retribution by victims and their sympathizers more compelling”<sup>87</sup>. However, the work of the truth

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civilian population and its property and ensure humane treatment for combatants, the wounded and prisoners”.

84 Jan-Michael Simon, “La Comisión para el Esclarecimiento Histórico, Verdad y Justicia en Guatemala”, paper delivered at the international colloquium “Rule of Law and State Crime in Latin America: Comparative Insights into Transitional Processes”, held on 22-24 February 2002, in Sao Paulo, Brazil, available at: <http://www.juridicas.unam.mx/publica/librev/rev/boletin/cont/106/art/art6.pdf>.

85 Elizabeth Salmón, above note 77, pp. 84-85.

86 Final Report of the Truth and Reconciliation Commission of Peru, vol. I, Ch. 4, p. 211: “(...) In addition to the above-mentioned norms, there are also certain non-derogable principles of IHL established in the 19th century (Martens clause), which apply to armed conflict of any kind. Protection of the civilian population is guaranteed by the “principles of humanity”, including the principle of distinction between combatants and non-combatants and the principle of proportionality, which requires that incidental harm to civilians not be excessive in relation to the anticipated military advantage”.

87 Robertson, above note 15, p. 288.

commissions in the region has had the irreversible effect of bringing victims of violence into the spotlight and ensuring that their voices are heard. In fact, a shocking truth has emerged from the truth commission reports: governments intentionally used gross and systematic violations to intimidate the populations and thus maintain their control. The reports establish that the human rights abuses perpetrated by certain Latin American governments were not necessarily attacks directed at those who engaged in violence against the state, or even an unfortunate overzealous response to such violence. Rather the reports document a conscious state policy of using human rights violations to achieve governmental objectives<sup>88</sup>.

When commissions did consider IHL, they focused mainly on indicating violations of its provisions, that is, they used it as an additional element, together with international human rights law, to analyse the validity of the acts of violence being investigated. Analysis, in this regard, was therefore limited to acknowledging the existence of an armed conflict and specifying the violations of the provisions of IHL that had been committed. The reports do not, however, provide any examples of compliance with IHL, and it is only possible to infer some such cases from the information given<sup>89</sup>. The commissions therefore concentrated much more closely on

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88 Pasqualucci, above note 22, pp. 324-325.

89 *The Final Report of the Truth and Reconciliation Commission of Peru*, in vol. VII, Ch. 2, includes an account of the extrajudicial executions at Ayacucho Hospital (1982), when *Sendero Luminoso* rebels rescued fellow members imprisoned in the jail in Ayacucho, which was the town that suffered the greatest loss of life in the conflict. However, it provides only a brief analysis of the case, simply indicating that there was a violation of Article 3 common to the Geneva Conventions, without citing specific provisions of IHL or acknowledging that Huamanga Prison was considered a military target. On the other hand, the report issued by Guatemala's Historical Clarification Commission contained the encouraging testimony of a commander of the revolutionary armed forces, who stressed the importance of respect for the rules of IHL (see: <http://shr.aaas.org/guatemala/ceh/mds/spanish/cap2/vol4/hech.html>). According to EGP (Guerrilla Army of the Poor) leaders, although humanitarian law was not included in the training it provided for its combatants, there was an awareness of how prisoners of war should be treated and other notions established in these norms: "(...) as part of the political training, as part of revolutionary thought, there was always an awareness that prisoners must be respected, and much of this is based on the experience of other revolutionary movements. The writings of Commander Ernesto Guevara and what is known about his involvement in the guerrilla movement in Cuba highlight this respect for the enemy, sharing food and what little medicine is available, treating the wounded when necessary and ensuring that prisoners are not ill-treated. We were very much aware of these issues from the outset (...) In the recruitment, instruction and training processes, the aim was to promote respect for people in the community (...) this was made part of political discipline; there was also military discipline, the

the punitive or sanctioning aspects of IHL than on the rules governing the conduct of hostilities and the protection of the victims of armed conflict.

In any event, truth commissions in Latin America have gradually come to recognize the importance of respecting international humanitarian law in achieving longed-for reconciliation and preventing such atrocities from ever happening again<sup>90</sup>. After an armed conflict, it is obviously easier to achieve reconciliation when the parties to the conflict have complied with the rules of IHL. Reconciliation can therefore be regarded as a non-legal benefit of IHL. In this vein, Marco Sassòli and Antoine Bouvier observe: “Finally, the end of all armed conflict is peace. At the conclusion of an armed conflict there remain territorial, political and economic issues to be solved. However, a return to peace proves much easier if it is not also necessary to overcome the hatred between peoples that violations of IHL invariably create and most certainly exacerbate”<sup>91</sup>.

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core tenet of which was that weapons were to be used for warfare and never for other purposes (...) At some point, all this became bound up with the essence of combatant training (...) a spirit of respect for certain norms, which we had not seen in black and white, but which became a part of our training based on experience”. Similarly, the Handbook of the Good Combatant (*Manual del buen combatiente*), published by the ORPA (Revolutionary Organization of the People in Arms) in 1984, contains a section on this subject, although it focuses on respect for the civilian population and its property: “Guerrillas, as good sons of the people, must always respect, look after and defend the people (...) We must ensure absolute respect for the property of our fellow men, their homes, food, crops and livestock”. ORPA, *Manual del buen combatiente*, campaign material, 1984, pp. 53 and 58.

90 See also Principle 38 of the “Updated Set of Principles for the protection and promotion of human rights through action to combat impunity” contained in the Report of the independent expert to update the set of principles to combat impunity, Diane Orentlicher, E/CN.4/2005/102/Add.1, 8 February 2005, which supports this view of IHL implementation as a means of guaranteeing non-recurrence. It proposes that during periods of restoration of or transition to democracy and/or peace, noting that Status “should undertake a comprehensive review of legislation and administrative regulations”.

91 Marco Sassòli, Antoine Bouvier, *How Does Law Protect in War?*, vol. I, ICRC, Geneva, 2003, p. 340.

## AMNESTY LAWS\*

Santiago Canton\*\*

“El fin del eufemismo”—the end of the euphemism—declared the headline in the Buenos Aires daily newspaper *Página 12* on March 6, 2001. The article by Argentine journalist Horacio Verbitsky reported federal judge Gabriel Cavallo’s judgment declaring the Due Obedience and Full Stop laws invalid, unconstitutional, and irremediably null and void. With their euphemistic references to fulfilling one’s duty, the two amnesty laws had sought to ensure ongoing impunity for the crimes against humanity committed by the Argentine dictatorship.

Unfortunately, such euphemisms are commonplace in many countries of the region. States routinely have sought to enshroud the most brutal human rights violations in the cloak of honorable intentions—defending democracy, protecting Western culture—even as tens of thousands of people were murdered, tortured, raped, and disappeared.

The constitutional breakdowns and internal conflicts that swept Latin America in the 1970s, 1980s, and 1990s left deep wounds that have yet to heal. Wars and dictatorships had damaging repercussions at many levels in the political, social, economic, and legal spheres. As democracy was restored in one country after another, a search began for mechanisms to address the devastating legacy of the dictatorship era. One of the most pressing needs was to ensure justice for past human rights violations so that the new democracies could be built on stronger foundations than the past.

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While the response varied by country, in all cases the stiffest challenge for the nascent democracies was to confront opposition from still-powerful sector who did not want to see justice done. The principal legal responses to this challenge have evolved over the past 20 years. The experiences associated with the restoration of democracy in Latin America are among the earliest contributions to universal jurisprudence in this area.

In the cases discussed here—El Salvador, Uruguay, Argentina, and Peru—each state reacted differently to the demand for justice for human rights violations. All four countries, however, passed laws that curtailed the scope for investigations, prosecutions, and convictions, as well as for making reparations to the victims<sup>1</sup>.

When human rights groups and organizations representing victims or their relatives failed in their attempts to secure justice in their own countries, they turned to the Inter-American Commission on Human Rights (IACHR) as a last resort. By then, amnesty laws had become a topic of political and legal debate at the national and international levels. On one side were those who argued that amnesty laws were necessary for national reconciliation and that the failure to enact such laws would seriously jeopardize the continuity of the democratic system and the possibility of lasting peace. On the other side were those who contended that justice is an essential pillar of democracy and that democracy could not be built on a solid foundation in the absence of redress for cases of serious human rights violations. Despite considerable progress in addressing this dilemma at the level of international doctrine and jurisprudence, the debate in many countries remains as heated as in decades past.

This article examines the Inter-American Commission's response to petitions alleging that the amnesty laws enacted in the region violated

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1 Chile is not included here, since at the time this article was written the Inter-American Court of Human Rights was deciding a case on the self-amnesty law in Chile that could substantially alter the Chilean government's policy regarding such laws. It should be noted, however, that in cases involving Chile, just as with Argentina, Uruguay, El Salvador, and Peru, the Inter-American Commission on Human Rights has consistently found the amnesty laws to be in violation of the American Convention on Human Rights. In the cases before the IACHR, the government of Chile has mainly argued the need for the Commission to take into account the historical context and the impossibility of repealing the self-amnesty law imposed by the de facto Pinochet government.

the American Convention on Human Rights<sup>2</sup>. It also discusses the governmental response to the Commission's actions.

Similarities as well as differences can be observed in the political circumstances surrounding the enactment of amnesty laws in the four cases examined here. In Uruguay and Argentina, the laws were passed in the early years of the first democratic government to take power following a dictatorship. In Uruguay, democracy was restored through a negotiation process with the civilian-military authority responsible for disrupting the public order. When the incoming democratic administration of Julio María Sanguinetti initiated legal proceedings to determine responsibility for human rights violations, intense military pressure was brought to bear just days before the accused military officers were to appear in court. In response, and at the president's urging, the Uruguayan Parliament passed the Law of Expiry of the Punitive Power of the State (*Ley de Caducidad del Poder Punitivo del Estado*) on December 22, 1985.

In Argentina, the civilian-military regime had been seriously discredited, mainly because of the failure of the "national reorganization" process and the military defeat in the war over the Malvinas islands. Although the armed forces attempted to avoid trials for human rights crimes by approving a self-amnesty law, the law was declared unconstitutional shortly after the Raúl Alfonsín administration took office<sup>3</sup>. The newly installed government acted immediately to try members of the military *juntas* that had governed the country from 1976 to 1983. It also created the National Commission on the Disappearance of Persons (CONADEP), which conducted an exhaustive investigation before publishing its report *Nunca Más* (Never Again). Shortly thereafter, however, at the urging of the executive and bowing to the pressure of the armed forces, the Congress passed the amnesty laws known as Due Obedience (*Obediencia Debida*) and Full Stop (*Punto Final*).

The government of Alberto Fujimori in Peru, which had little or no democratic legitimacy in terms of its origins or actions, issued

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2 The term "amnesty" is used as a general description of the laws under discussion. Strictly speaking, however, some of these laws do not fit neatly into the typology of amnesty laws. For the purposes of this article, amnesty laws are those that preclude the investigation, prosecution, and punishment of persons responsible for human rights violations.

3 The self-amnesty law was passed on September 27, 1983, one month before the elections that put Alfonsín in power. The National Pacification Law (22.924) was repealed on December 22, 1983, pursuant to Law 23.040.

amnesty laws 26.479 and 26.492 in June 1995. These laws were intended to grant amnesty to military, police, and civilian personnel implicated in human rights violations committed between 1980 and the date the laws were enacted. A high-level bribery scandal, international pressure, and civil society mobilizations combined to hasten the fall of the Fujimori-Montesinos regime. A parallel can be drawn between the discredited civilian-military sector in Peru and the similarly disgraced Argentine armed forces. In contrast, the outgoing Uruguayan dictatorship retained greater negotiating power, which enabled it to reserve certain privileges for itself in the future.

Finally, the situation of El Salvador stands in sharp contrast to the three just described. A decades-long civil war was brought to a close through a peace accord in which the international community, and the United Nations in particular, played a critical role<sup>4</sup>. The peace accord provided for the establishment of a Truth Commission to investigate serious human rights violations and recommend legal, political, and administrative measures. However, just five days after the publication of the Truth Commission's report, *From Madness to Hope*, the Salvadoran Legislative Assembly passed the Amnesty Law for the Consolidation of Peace (Law 486). The elite that successfully lobbied for passage of the amnesty legislation, against the recommendations of the Truth Commission, remains in power today. Its members have not modified their position regarding the legislation.

Argentina and Peru provide the best examples of the positive impact that the Inter-American human rights system can have. In both cases, the IACHR, the states, and civil society engaged in an interchange that provided a space in which the victims and their relatives could be heard. The states enjoyed the backing of the Inter-American human rights organs in implementing decisions to strengthen the rule of law, a task complicated by internal politics. The Commission, in turn, was able to make a significant contribution to Inter-American and universal jurisprudence by restoring the human dignity that had been stripped

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4 The El Salvador peace accord, also known as the Chapultepec Agreement, was signed on January 16, 1992. Prior to that date, four previous agreements had been signed by the parties in Caracas, San José, Mexico City, and New York. See Benjamín Cuéllar Martínez, "Los dos rostros de la sociedad salvadoreña", in *Verdad, justicia y reparación: desafíos para la democracia y la convivencia social* (Stockholm: International Institute for Democracy and Electoral Assistance; San José: Instituto para la Democracia y la Asistencia Electoral, 2005).



away by repressive states and by focusing attention on impunity, a serious threat that continues to undermine the region's democracies today.

The example of El Salvador illustrates the other extreme. In that country the Inter-American system has not succeeded in changing the policy of the successive democratic governments in power since the end of the armed conflict. Uruguay is situated somewhere in the middle. While the Inter-American system has not had as great an impact in that country as in Peru or Argentina, significant progress over the past year has led to gradual shifts in human rights policies that had remained unaltered over the past several decades.

Perhaps the greatest political, economic, and legal challenge of recent decades in Latin America has been how to deal with the consequences of the massive, systematic human rights abuses committed in the region. Here the organs of the Inter-American human rights system have not remained on the sidelines. Removed from the heated national debates, the IACHR and the Inter-American Court of Human Rights have made significant contributions that have shed light on an issue that has traditionally been approached from a political rather than a legal standpoint.

## **1. The Doctrine And Jurisprudence Of The Inter-American Commission**

The Inter-American Commission on Human Rights has taken up the issue of amnesty laws and their incompatibility with the American Convention in its reports on individual cases, as well as in its annual and country reports. The Commission's first ruling on these types of laws appeared in its 1985-86 annual report. At that time, democratic transitions were underway in some countries in the region and barriers to the investigation of serious human rights abuses were already becoming apparent. In the 1985-86 report, the Commission tries to strike a difficult balance between demanding that states fulfill their obligation to investigate and punish the perpetrators and ensuring that "neither the urgent need for national reconciliation nor the consolidation of democratic government will be jeopardized"<sup>5</sup>.

Following that annual report, the IACHR continued to develop its jurisprudence in relation to amnesty laws in its reports on individual

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5 *IACHR Annual Report 1985-86.*

petitions. The first three of these to find that the amnesty laws contravened the American Convention were approved at the Commission's regular session of September-October 1992. In the *Las Hojas* case from El Salvador, the Commission concluded based on a very narrow legal analysis that an amnesty law in effect in that country violated the American Convention<sup>6</sup>. In the other two cases, from Uruguay and Argentina, the Commission offers a more in-depth analysis<sup>7</sup>. It concludes that the amnesty laws violate the judicial guarantees and protections embodied in Articles 8 and 25 of the American Convention by depriving the victims of their right to an effective investigation and prosecution of the responsible parties. These decisions by an international entity with jurisdictional powers were perhaps the first to find that amnesty laws constitute a violation of international human rights law. The Commission relied on the same legal arguments in 12 other cases that establish the incompatibility of amnesty laws with the American Convention<sup>8</sup>.

In addition to its annual and individual case reports, the Commission examined this subject in its special country reports, essentially basing its arguments on the jurisprudence from its 1992 reports on the petitions from Argentina and Uruguay<sup>9</sup>.

The simplicity with which the Commission has decided such cases contrasts sharply with the thorny debates over amnesty laws that

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- 6 IACHR Report 26/92, Case 10.287, *Las Hojas Massacre* (El Salvador), September 24, 1992.
- 7 IACHR Report 29/92, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, and 10.375, Uruguay, October 2, 1992; Report 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309, and 10.311, Argentina, October 2, 1992.
- 8 IACHR Report 26/92, *Las Hojas Massacre* (El Salvador); Report 28/92 (Argentina); Report 29/92 (Uruguay); Report 34/96 (Chile); Report 36/96, *Héctor Marcial Garay Hermosilla et al.* (Chile); Report 25/98, *Mauricio Eduardo Jonquera Encina et al.* (Chile); Report 1/99, *Lucio Parada Cea et al.* (El Salvador); Report 133/99, *Carmelo Soria Espinoza* (Chile); Report 136/99, *Ignacio Ellacuría et al.* (El Salvador); Report 37/99, *Monseñor Óscar Arnulfo Romero y Galdámez* (El Salvador); Report 61/01, *Samuel Alfonso Catalán Lincoleo* (Chile); Report 28/00, *Barrios Altos* (Peru); Report 30/05, *Luis Alfredo Almonacid* (Chile).
- 9 This includes the reports on El Salvador (1994), Peru (2000), and Colombia (2004), among others. In its Colombia report, the Commission stated: "While the adoption of provisions aimed at granting an amnesty to persons responsible for the crime of taking up arms against the state may be a useful tool in the context of efforts to achieve peace, amnesty laws as well as similar legislative measures that impede or consider concluded the investigation and prosecution of crimes of international law impede access to justice and render ineffective the obligation of the states party to respect the rights and freedoms recognized in the Convention and to ensure their free and full exercise".

occurred in several countries of the region. For the most part, the debates at the national level were informed by political arguments, mainly the need for national pacification and the obstacles that the search for justice might pose to the restoration or continuity of democracy. It was very difficult to shift the focus to the rights of the victims. The Commission was acutely aware of these debates; its *in loco* visits, correspondence with states and petitioners, and internal discussions in the political organs of the Organization of American States (OAS) all reflect the problems that governments and societies faced in seeking justice for past violations. Still, in its individual case work, far from the tumult of national politics, the Commission was able to adhere strictly to the language of the American Convention and never wavered in finding amnesty laws to be in violation of that instrument.

While the Commission's 1992 decisions were a first, they occurred in the context of an evolving body of international human rights law that buttressed the IACHR's position on the amnesty laws. Today, owing to recent developments such as the statutes of the international tribunals for Rwanda and the former Yugoslavia, as well as the International Criminal Court, there is more clarity in terms of the types of crimes that cannot be subject to amnesty.

In principle, international law prohibits general amnesties in cases of serious violations of international law. This includes serious violations of the Geneva Conventions of 1949 and its first Additional Protocol, as well as other violations of international humanitarian law, genocide, and crimes against humanity. Progress has also been made in recent years in defining what constitutes a crime against humanity; the statutes of the aforementioned tribunals and the International Criminal Court include murder, extermination, slavery, deportation, deprivation of liberty, torture, and rape, when they are systematic, generalized, and target the civilian population<sup>10</sup>.

Neither the Commission's decisions nor the recent developments in international law preclude the use of amnesty as a mechanism for achieving peace in conflict situations or for resolving conflicts that jeopardize normal democratic functioning. In such situations, amnesties

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10 For a current analysis of violations that do not qualify for amnesty, see "Dealing with the Past: Amnesties and Accountability", chap. 5 in *Negotiating Justice? Human Rights and Peace Agreements* (Versoix, Switzerland: International Council on Human Rights Policy, 2006).

continue to be a valuable political negotiating tool that can be used by states to resolve conflicts that impinge upon the rule of law. Amnesty laws, however, must adhere rigorously to international standards lest they be declared invalid by domestic and international tribunals. The core objective of these important developments in international law is to restore human dignity, which entails recovering an essential component of the rule of law: the fight against impunity.

## 2. Country Case Studies

### 2.1. El Salvador

El Salvador is the country that has complied least with the Commission's recommendations. Despite the Commission's visits and approved case reports, and the petitions brought before it by national and international civil society organizations, it has been difficult to achieve a sustained dialogue with the Salvadoran government on compliance with recommendations concerning the amnesty laws.

Some historical background is useful in understanding Salvadoran policies with respect to the IACHR and the amnesty laws. Prior to the signing of the historic El Salvador peace accord in 1992, the government of El Salvador and the guerrillas of the FMLN had signed an agreement in Mexico on April 27, 1991, establishing the Truth Commission. The Truth Commission was to carry out the task of "investigating serious acts of violence that have occurred since 1980 and whose impact on society urgently demands that the public should know the truth"<sup>11</sup>.

In its report *From Madness to Hope: The 12-Year War in El Salvador*, the Truth Commission underscored the need for justice in cases of human rights abuses that it had documented: "Public morality demands that those responsible for the crimes described here be punished". However, the Truth Commission saw this as unlikely, noting that "El Salvador has no system for the administration of justice which meets the minimum requirements of objectivity and impartiality so that justice can be rendered reliably". Finally, the Commission expressed its hope that the

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11 United Nations, *El Salvador Agreements: The Path to Peace* (DPI/1208, 1992). See also Cuéllar Martínez, "Los dos rostros", p. 158.

judicial system would be restructured so as to “administer justice in a full and timely manner”<sup>12</sup>.

The authorities lost no time in reacting to this report. Five days after its publication, the Legislative Assembly passed the Amnesty Law for the Consolidation of Peace (Law 486), which guaranteed impunity for human rights abuses. United Nations Secretary General Kofi Annan summed up the import of this move: “The speed with which this law was approved in the Legislative Assembly exposes the lack of political will to investigate and ascertain the truth through legal means, and to punish the perpetrators”<sup>13</sup>.

The Inter-American system’s impact in El Salvador should be examined in this context. The legislature passed the amnesty law just five days after the Truth Commission, made up of individuals of considerable international prestige, had recommended the punishment of those responsible for serious human rights violations<sup>14</sup>. The political will reflected in the government’s action has not wavered in the least since then. Successive Salvadoran governments have insisted that it is impossible to repeal the amnesty laws because they represent the “cornerstone” of the peace accords<sup>15</sup>.

As noted above, before Law 486 was enacted the IACHR had ruled in a case concerning a previous amnesty law passed during the Napoleón Duarte administration. In Report 26/92, the IACHR found the Salvadoran state responsible for the massacre at Las Hojas, where government security forces murdered approximately 74 people in February 1983.

The Legislative Assembly passed an amnesty law in October 1987, after a criminal proceeding was initiated and it appeared possible that a colonel implicated in the massacre might be charged. As a result, the Salvadoran Supreme Court definitively closed the case, thus ensuring that the material and intellectual authors of this massacre would not

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12 *From Madness to Hope: The 12-Year War in El Salvador: Report of the Commission on the Truth for El Salvador*, part V, “Recommendations” (San Salvador: Editorial Universitaria, Universidad de El Salvador, 1993). See also Cuéllar Martínez, “Los dos rostros”, p. 158.

13 “Report of the UN Secretary-General Kofi Annan to the 51st Session of the General Assembly”, Document A/51/149, July 1, 1997.

14 The three members of the Truth Commission were Belisario Betancur, Thomas Buergenthal, and Reinaldo Figueredo Planchart.

15 Statements by President Francisco Flores at an October 18, 2002 press conference, cited in Cuéllar Martínez, “Los dos rostros”, p. 170.

be punished. During the subsequent process before the Inter-American Commission, the government of El Salvador did not respond to a single request for information issued by that entity.

In the *Las Hojas* case, which relied on a narrower analysis than the individual reports from Argentina and Uruguay issued during the same regular session, the IACHR found that by approving the amnesty law, the government of El Salvador had “legally eliminated the possibility of an effective investigation and the prosecution of the responsible parties, as well as proper compensation for the victims and their next-of-kin by reason of the civil liability for the crime committed”<sup>16</sup>.

The Inter-American Commission ruled in three other cases associated with this amnesty law. Two of these, Report 136/99, *Ignacio Ellacuria*, and Report 37/99, *Archbishop Óscar Arnulfo Romero y Galdámez*, were of obvious symbolic value (the third is Report 1/99, *Lucio Parada Cea et al.*). In these three cases the Commission confined its discussion to the various stages of the domestic proceeding that in each case resulted in the freedom of the accused pursuant to the amnesty law.

The crux of the state’s argument was that an amnesty law was needed to “pacify” the country and strengthen democracy. The state’s response to the IACHR in the case of Archbishop Romero exemplifies this position:

The historical signing of the Peace Accords on January 16, 1992, put an end to the fratricidal conflict that took the lives of thousands of victims and affected and polarized Salvadoran society, thereby establishing the bases of peace, so as to seek the long-desired national reconciliation and reunion of the Salvadoran family.

Peace was achieved in El Salvador with endeavor and great sacrifice, and in the viable and effective course for trying to secure it, improve the human rights situation, and build

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16 In its reports on the amnesty laws in Argentina and Uruguay, the Commission provides a more detailed analysis of the violations of Articles 8 and 25 of the American Convention. In the *Las Hojas* case, however, it does not discuss the incompatibility of the amnesty laws with those articles of the Convention. While it does find violations of Articles 8 and 25, it chose to base its conclusions on Article 27 of the Vienna Convention on the Law of Treaties, which prohibits a state from unilaterally invoking a domestic law to justify the failure to comply with its obligations. Inter-American Court, *Masacre Las Hojas v. El Salvador*, Case 10.287, Report No. 26/92, OEA/Ser.L/V/II.83 Doc. 14 at 83 (1993).

democracy, necessary measures were agreed upon based on the new national consensus and the political will of those who signed the Peace Accords, which were aimed at stabilizing the conditions of the Nation's spirit, with a view to the much-sought reconciliation.

In due course, a series of violent events were revealed that had taken place throughout the bloody years of the armed conflict, and it was part of a mechanism agreed upon to highlight the major events of the conflict, and for the purpose of ensuring that history not repeat itself in El Salvador, by making known what had happened.

This mechanism, unprecedented in El Salvador, and with United Nations verification, reviewed a part of the violence of the armed conflict, and made clear the need to close a tragic chapter of our history and in so doing avoid opening wounds just recently beginning to heal, or, in the worst of cases, forestall a chain of acts of revenge that could have led to a new polarization of Salvadoran society.

The Truth Commission Report represented a very important and necessary step in the peace process in El Salvador. In this regard, the Procuraduría para la Defensa de los Derechos Humanos (Office of the Human Rights Ombudsman), an institution created by the Peace Accords, in a public message of March 27, 1993, concluded with a "call to the Government of the Republic, to the different political sectors, the Armed Forces, and the institutions of the Republic, so that the conclusions and recommendations of the Truth Commission Report may be processed from an ethical and historical perspective, as a necessary option for affirming peace, as an essential step towards effective reconciliation and as part of a common search for a democratic society", adding that "the measures adopted in relation to its provisions should preserve one of the most important accomplishments of peace processes: the vocation for and commitment to

conciliation, national consensus-building and engagement of all the political and social forces”.

In El Salvador the truth was made known, it was not covered up, and the measures taken afterwards were aimed at ensuring the existence of a democratic state at peace as the only way to preserve human rights. The “Law on General Amnesty for the Consolidation of Peace” had precisely these aims (...)

Evidence of the success of the effort in El Salvador on behalf of national reconciliation is plain to see<sup>17</sup>.

Some nongovernmental human rights organizations in El Salvador continue to pursue avenues for the investigation and prosecution of the perpetrators of human rights violations. In doing so, they have relied on the decisions of the Inter-American system, among other sources. In March 2000, the Human Rights Institute of Central American University (IDHUCA) filed a complaint before the attorney general of the Republic requesting the prosecution of several Salvadoran military officers, including those who were minister of defense and president of the Republic at the time the violations occurred. The complaint includes as attachments the Truth Commission report and the Inter-American Commission’s report, arguing that the Inter-American system already had established the incompatibility of the amnesty laws with the American Convention on Human Rights<sup>18</sup>.

Unfortunately, the Truth Commission’s prediction about the unlikelihood of justice being done in El Salvador has been borne out. The Inter-American Commission has held follow-up hearings and the state has refused to modify its position: it refuses to entertain any possibility of complying with the IACHR’s recommendations.

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17 IACHR Report 37/00, Case 11.481, *Monseñor Óscar Arnulfo Romero y Galdámez*, El Salvador, April 13, 2000.

18 In its brief, the IDHUCA argued that “the conclusions and recommendations of the Inter-American Commission on Human Rights reaffirm what is already stated in the law: the fact that it is perfectly lawful and appropriate to initiate the respective criminal proceeding against those now accused in this complaint, based on a determination that it is illegal to apply the amnesty law provisions in contravention of the Convention”.



## 2.2. Uruguay

Uruguay is one of the countries where the Inter-American system's presence is nominal in the governmental arena as well as in civil society. The IACHR has never conducted an *in loco* visit to Uruguay. Together with the Dominican Republic, Uruguay has the fewest complaints in process before the IACHR. It comes as no surprise, then, that the Commission's decisions concerning amnesty laws have had little or no legal or political impact in the country.

The Law of Expiry of the Punitive Power of the State was passed on December 22, 1986 and extended on April 16, 1989 by means of a public referendum. This law shielded from prosecution and conviction all military and police personnel who had engaged in kidnapping, torture, rape, murder, and the clandestine disposal of corpses during the *de facto* government.

Just as in Argentina and Chile, during the Uruguayan dictatorship the Commission received complaints of human rights abuses. In case 2155 on the detention, imprisonment, and torture of Enrique Rodríguez Larreta Piera, the Commission issued Resolution 20/81 in which it concluded that the Uruguayan state had violated Articles I (right to life, liberty and personal security) and XXV (right of protection from arbitrary arrest) of the American Declaration of the Rights and Duties of Man. The Commission called on the government of Uruguay to “order a complete, impartial investigation to determine responsibility for the events denounced” and “punish those responsible for such acts in accordance with Uruguayan law”<sup>19</sup>. These decisions were taken during the dictatorship and there was no response or compliance from the Uruguayan government.

Enrique Rodríguez Larreta Piera appeared before the Commission during the first democratic government following the dictatorship, after the passage of the Law of Expiry as well as Uruguay's ratification of the American Convention on Human Rights. In light of the government's failure to comply with the Commission's recommendations of 1981, he requested that the IACHR “urge the Government of Uruguay to adopt the necessary measures to comply, without delay, with the Commission's 1981 resolutions”. The Commission decided to take up the request and combine it with seven other cases for a total of 17 victims of human rights violations.

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19 Resolution 20/81, Case 2155 (Uruguay), approved by the Commission in its 698th Session on March 6, 1981, OEA/Ser.L/V/II.52 doc.30.

The Commission approved the report in October 1991, finding that the Uruguayan state had violated Articles 1, 8, and 25 of the American Convention by not allowing the investigation and punishment of those responsible for human rights violations pursuant to the Law of Expiry.

Uruguay's responses are harshly critical of the Commission, and its defense is premised mainly on the need to strike a balance between justice and peace to maintain the democratic system. The government expresses its most "profound and vigorous disagreement, inasmuch as the Commission has blatantly ignored the efforts of the government and people of Uruguay to restore—as they have—the full effect of the rule of law in the Republic". The state also accused the Commission of "incomprehension, ignorance, irritability, and insensitivity". In view of these responses, which left no doubt that the government did not intend to comply with the recommendations, the Commission decided to publish Report 29/92 in October 1992.

The government of Uruguay clung stubbornly to this position for several years, through several changes in administration and in dominant political parties. At its first follow-up hearing on October 6, 1997, the government kept to its policy of not recognizing the Commission's recommendations, based primarily on the constitutionality of the amnesty law and the fact that it had been extended through a national referendum.

On March 1, 2005, Dr. Tabaré Vázquez was sworn in as president of Uruguay. In his inauguration speech before the General Assembly of the legislature he expressed his "commitment to promote an active human rights policy" and acknowledged that "20 years after the restoration of institutional democracy, dark areas persist in the area of human rights". He also announced that the Law of Expiry would not be modified: "We should also recognize that for the common good it is necessary and possible to clarify [the human rights violations] in the framework of the legislation in force, so that peace can take root permanently in the heart of all Uruguayans". The new government's policy has been to move forward in the search for truth and justice, but within the confines of the severe restrictions imposed by the Law of Expiry.

The government's stated willingness to pursue an active human rights policy opened the door for human rights groups to revisit the possibility of promoting compliance with the recommendations in Report 29/92. The Institute of Legal and Social Studies of Uruguay (IELSUR)

requested a hearing before the IACHR, which was granted on October 17, 2005. A second hearing was held on March 10, 2006. At both hearings the government modified considerably its policy of rejecting the conclusions of Report 29/92. The Uruguayan ambassador to the OAS stated that he had accepted the invitation to the hearing “for the essential purpose of highlighting information on significant developments in relation to compliance with the recommendations issued to the government of my country in Report 29/92”. The new government was also seeking to bring about a “fundamental change of direction” and an “unprecedented turnaround” in Uruguay’s policy in this area<sup>20</sup>.

These declarations from the new government were accompanied by several measures to examine human rights violations committed during the dictatorship. They included the search for human remains at military posts and steps to limit the scope of the Law of Expiry. Despite these unprecedented achievements, however, the Law of Expiry remains an insurmountable barrier to the search for justice for human rights violations committed under the dictatorship.

### **2.3. Argentina**

The IACHR’s mandate to receive complaints of human rights violations has enabled it not only to take up individual cases but also to acquire a detailed understanding of situations involving large-scale human rights abuses. It can then take swift action to alert the international community about these situations. Known as “early warning”, this is perhaps the most important function of the IACHR, as it provides an avenue for timely intervention by the international community to prevent the continuation of massive violations of human rights.

In this context, an analysis of the Commission’s impact in Argentina must take into account its actions in the 1970s, which included receiving complaints as well as an *in loco* visit in 1979. Few situations so clearly illustrate the impact of the Inter-American system in protecting human rights. The IACHR played an important role in Argentina from the onset of massive and systematic violations in the 1970s up to the final decision handed down by the Supreme Court in 2005. For 30 years, the Commission, the Court, human rights groups, and the state were engaged in an interchange—not always amicable—regarding a situation that struck at

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20 Presentation by Ambassador Juan Enrique Fischer at the public hearing before the IACHR held in Washington D. C., on October 17, 2005.

the very heart of the rule of law. This interaction allowed the situation to be resolved based on solid, internationally recognized legal standards.

The vast number of complaints received by the Commission in the mid-1970s, and the serious nature of the violations reported, provided the rationale for the September 1979 in loco visit to Argentina. That visit had a significant impact on the dictatorship, which began to realize that there might be limits to the impunity it enjoyed. It had an impact as well as on thousands of Argentines who viewed the Commission's visit as an opportunity to air their complaints, given that all doors had been closed to them in the domestic venue. The Commission's report of that visit alerted the international community to the massive and systematic violations that were being committed by the dictatorship and compelled the military government to answer internationally for human rights abuses.

Through the complaints and petitions received and its in loco visit and report, the Commission acquired detailed knowledge of the agonizing situation in Argentina. It also established substantial credibility in the eyes of the international community, subsequent Argentine governments, and, most importantly, millions of Argentines. Thus it is not surprising that years later, Argentine victims of human rights violations once again turned to the Commission to request that it consider the compatibility of the amnesty laws with the American Convention.

Beginning in 1987, the Commission began to receive petitions arguing that the Argentine amnesty laws, commonly known as the Due Obedience and Full Stop laws<sup>21</sup>, violated the American Convention. The petitions alleged in particular violations of the right to judicial protection enshrined in Article 25 and the right to a fair trial embodied in Article 8 of that instrument.

In its response, the government hoped to prevent the Commission from finding the "nascent democracy" in violation of human rights, yet it chose not to confront the Commission, mainly because of the tremendous prestige that the latter enjoyed in Argentina. The government, then led by President Carlos Menem, argued that Argentina was the country that had been most effective in dealing with the "difficult problem" of finding solutions to past human rights violations. It further contended that it was the country's democratic institutions and "the affected national sectors themselves" that had come up with solutions based on the urgent need

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21 Respectively, Law 23.492 enacted on December 24, 1986 and Law 23.521 enacted on June 8, 1987.

for national reconciliation and consolidation of democratic government. The government went on to describe all the activities carried out under its mandate, as well as those of the previous administration of Raúl Alfonsín. It mentioned, among other things, the National Commission on the Disappearance of Persons (CONADEP) and various laws and decrees on reparations for the victims of past serious human rights abuses and their relatives, including monetary compensation, benefits, and pensions.

After first acknowledging the important efforts of the post-dictatorship administrations to address past violations, the Commission approved Report 28/92, which found Argentina in violation of Articles 1, 8, and 25 of the American Convention. It recommended that the Argentine government clarify the facts and identify those responsible for the human rights violations committed under the military dictatorship<sup>22</sup>.

One of the main challenges faced by the Inter-American human rights system in general is the lack of political will to comply with the recommendations and decisions issued by the Commission and the Court. The Commission's capacity to follow up on its own reports in order to demand compliance is likewise quite limited, mainly due to budgetary constraints. Report 28/92 was no exception to this, and the Argentine state did not comply with the Commission's recommendations.

Three years passed before the process began that would not only have a powerful impact in Argentina but also bring about changes to the follow-up procedures for cases before the Commission. This process owed much to the efforts of individual petitioners in conjunction with Argentine and international human rights groups, the Inter-American system, and the Argentine state. On June 19, 1995, the Commission received a petition requesting the reopening of Report 28/92 based on new events that had taken place in Argentina<sup>23</sup>. These new events were public statements by military officers acknowledging the violations committed during the

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22 Possibly taking into consideration the similarity of the circumstances reported, the articles of the Convention violated, and the political impact that its decisions could have on governments, the Commission approved Report 28/92 in tandem with Report 29/92 against Uruguay and Report 26/92 against El Salvador. Each of these reports found violations of the American Convention based on the application of amnesty laws.

23 The initial presentation was forwarded by Drs. Rodolfo María Ojea Quintana, Tomás María Ojea Quintana, and Alicia Beatriz Oliveira. Subsequently Dr. María Elba Martínez, Human Rights Watch/Americas, the Center for Justice and International Law (CEJIL), the Center for Legal and Social Studies (CELS), and Servicio Paz y Justicia (SERPAZ) joined the complaint.

dictatorship. Although the Commission initially was reluctant to reopen the case, the petitioners reiterated on several occasions their request for a hearing to explain the new circumstances. Finally, on October 9, 1996, the Commission granted a follow-up hearing<sup>24</sup>. After that initial experience, the Commission continued to hold follow-up hearings related to Report 28/92, and in so doing it provided an important forum for dialogue between civil society and the state.

The dialogue between the Argentine state and the human rights groups did not end there. In October 1998, Carmen Aguiar de Lapacó and nine human rights organizations lodged a petition before the Commission contending that the Argentine authorities had rejected Lapacó's request that they determine the whereabouts of her daughter, Alejandra Lapacó<sup>25</sup>. Upon finding the petition admissible, the Commission offered its good offices to the parties to initiate a friendly settlement process<sup>26</sup>.

In February 2000, the Argentine government signed a friendly settlement agreement with Carmen Lapacó in which it committed to accept and guarantee the right to truth, understood as the exhaustion of all available means to obtain information on the whereabouts of the disappeared persons<sup>27</sup>. Second, the Argentine government pledged that the national federal criminal and correctional courts throughout the country would have exclusive jurisdiction in all cases to determine the truth regarding the fate of disappeared persons. This would lend greater consistency to decisions in such cases, which until that time had been dispersed among different courts. Third, the Argentine government pledged to assign a group of ad hoc prosecutors in the Public Ministry to act as third parties in all cases involving inquiries into the truth about the fate of disappeared persons. This would not only increase support for investigations but would also enable a group of prosecutors to become specialized in such matters and facilitate investigations.

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24 During that session, the Commission also granted a follow-up hearing on the case of Colombia. This was the first time that the Commission had used such hearings as a means of case follow-up.

25 On March 16, 1977, 12 armed men broke into the home of Carmen Aguiar de Lapacó and took her along with Alejandra Lapacó, Marcelo Butti Arana, and Alejandro Aguiar Arévalo to a place known as the Club Atlético. Lapacó and her nephew, Alejandro Aguiar, were released on March 19, 1977. She pursued a number of inquiries to find Alejandra, all to no avail.

26 IACHR Report 70/99, Case 12.059, *Carmen Aguiar de Lapacó*, May 4, 1999.

27 IACHR Report 21/00, Case 12.059, *Carmen Aguiar de Lapacó*, February 29, 2000.

In addition to the presentations and hearings before the IACHR, human rights groups filed suits in Argentine courts claiming the invalidity of the amnesty laws. Their arguments include the decisions issued by the Commission, in particular Report 28/92 and, after 2001, the decision of the Inter-American Court in the *Barrios Altos* case in Peru.

All of these efforts bore fruit. On June 14, 2005, in a case litigated by the Center for Legal and Social Studies (CELS) on the disappearance of a couple with the surname Poblete, the Argentine Supreme Court of Justice ruled that the Due Obedience and Full Stop laws were “inapplicable as they do not extend to such crimes or, if they were applicable, would be unconstitutional because by extending to such crimes they violated international customary law in force at the time of their passage”. The Due Obedience and Full Stop laws, it continued “are inapplicable to crimes against humanity or, if they are applicable to crimes of that nature, are unconstitutional. Under either of these hypotheses, they are inapplicable”<sup>28</sup>.

In order to reach this decision, which has had and will continue to have repercussions for Argentina and for the region, the Supreme Court based its ruling in large part on the decisions handed down by the Inter-American Commission and Court<sup>29</sup>. A simple figure illustrates the extent of the Inter-American system’s influence on the Supreme Court ruling: 63 of the 125 pages that make up the main body of the ruling include references to decisions by the Commission or the Court.

The ruling begins by alluding to IACHR Report 28/92. With that report, the ruling states, it was established that the amnesty laws violated the American Convention, and therefore the Argentine state should have adopted “all necessary measures to clarify the facts and identify those responsible”. However, continued the Supreme Court, the Commission’s recommendation did not make clear whether successfully “clarifying” the facts was sufficient in trials or whether it was necessary, in addition, to completely invalidate the laws. In the opinion of the Supreme Court, the Inter-American Court filled this gap in the *Barrios Altos* case, where it explicitly stated that “all amnesty provisions (...) designed to eliminate responsibility [for serious human rights violations such as torture, forced

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28 *Julio Héctor Simón et al.*, Case 17,768, Argentine Supreme Court of Justice, June 14, 2005.

29 In the aftermath of this decision, several cases of crimes against humanity were brought against individuals who had benefited from the amnesty laws.

disappearance, and extrajudicial, summary, or arbitrary execution] are inadmissible”. Based on this Supreme Court ruling, several cases have been opened against individuals accused of serious human rights violations during the dictatorship<sup>30</sup>.

## 2.4. Peru

Peru and Argentina are the two cases in which the Inter-American human rights system, both the Commission and the Court, played a key role in overturning laws that shielded human rights violators. Peru is particularly important because it produced the first case on the compatibility of amnesty laws with the American Convention to reach the Inter-American Court.

The IACHR was a relevant actor at critical moments in the history of both Argentina and Peru. The Commission’s landmark visits to Argentina in 1979 and to Peru in 1998 changed the course of events in those countries. First, the visits allowed the international community to hear directly from the main human rights organ of the OAS about events in those countries that their respective regimes were attempting to cover up. Second, the visits strengthened the position of local human rights groups, creating an important space for them to present and legitimize their complaints in the international arena at a time when their governments were actively trying to discredit them. And finally, the visits gave hope to the victims of human rights violations and their relatives that their efforts to make known the truth and obtain justice were not in vain. The Commission provided them a last recourse that had been denied them in their own countries.

In the early 1990s, the Commission began to receive complaints about extrajudicial executions and forced disappearances in Peru. Among them, the cases of *La Cantuta* and *Barrios Altos* stand out as the most significant for the Inter-American system. This is true not only because of the serious nature of the events, but also because of their impact on internal politics in Peru. Amnesty laws 26.479 and 26.492 were passed to preclude the prosecution of those responsible for the grave violations that occurred in *La Cantuta* and *Barrios Altos*.

In July 1992, the Commission received a petition reporting the torture and extrajudicial execution of a professor and nine students

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30 At the time of this writing in 2007, 261 people are in detention for crimes against humanity.



from the National Education University “Enrique Guzmán y Valle” in the La Cantuta section of Lima. After a number of parallel processes in Peruvian criminal and military courts, proceedings that were rife with irregularities, the prosecution went forward in the military venue. On May 3, 1994, the Supreme Council of Military Justice (CSJM) handed down a judgment of conviction against several members of the Peruvian army.

A little over a year later, in a surprise move, the Congress passed Law 26.479, granting amnesty to military, police, and civilian personnel implicated in human rights violations committed from 1980 up to the date of the law’s passage on June 14, 1995. Two weeks later, on June 28, the Congress passed Law 26.492, an “interpretation” of the June 14 amnesty law that broadened its scope and prohibited any judicial review. Finally, on July 15, 1995, the CSJM released all of those convicted for the La Cantuta massacre.

From that moment on, the Peruvian government’s defense before the IACHR was based on arguments that the two amnesty laws were consistent with the Peruvian Constitution, that the Commission did not have the power to request the repeal of those laws, and that both laws had been approved by the Congress in the exercise of its constitutionally mandated duties in the context of the pacification policies undertaken by the Peruvian state.

The *Barrios Altos* case provides an excellent opportunity to visualize the way the Inter-American system as a whole operates. An examination of the evolution of the case reveals how civil society, the states, the Commission, and the Court can engage in a dialogue that ultimately not only benefits the victims or relatives who brought the case, but also serves to strengthen the rule of law throughout the region.

On June 30, 1995, following the passage of the amnesty laws in the Peruvian Congress, the National Human Rights Coordinating Committee, known as the Coordinadora, presented the *Barrios Altos* case before the Inter-American Commission. The complaint referred to the execution of 15 people by an “elimination squad” known as the Colina Group, made up of members of the Peruvian army with ties to military intelligence.

Cognizant that the rule of law in Peru had been severely weakened under the Fujimori government, the Commission forwarded to the Inter-American Court a number of cases directly related to certain structural deficiencies in Peru’s democratic institutions. They included cases involving extrajudicial executions and forced disappearances, as well as

those related to military tribunals, freedom of expression, due process, and the administration of justice. The *Barrios Altos* case, which sought a ruling on the incompatibility of amnesty laws with the American Convention, reaffirmed and deepened the Commission's existing jurisprudence. The Court ultimately resolved that

all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law<sup>31</sup>.

As a result, the Court found that the amnesty laws 26.479 and 26.492 “are incompatible with the American Convention on Human Rights and, consequently, lack legal effect”. It called for the state to investigate and punish those responsible for the *Barrios Altos* violations.

While the Court refers to the amnesty laws in some parts of its judgment and to self-amnesty laws in others, it is clear that the finding of incompatibility with the American Convention applies in either case, as long as the laws meet the condition of curtailing the investigation and punishment of persons responsible for serious human rights violations. The concurring votes of Judge Sergio García Ramírez in the judgment on reparations in the *Castillo Páez* and *Barrios Altos* cases and of Judge Antônio A. Cançado Trindade in *Barrios Altos* support that interpretation<sup>32</sup>.

But the Fujimori government had no intention of complying with the Commission's recommendations or the decisions of the Court. Its responses to individual cases, its presentations during hearings before the Commission, and its discourse before the political organs of the OAS always sought to limit the capacity of the Inter-American system to fulfill its mandates to protect the human rights of the hemisphere. This policy was taken to an extreme with a July 1999 legislative resolution to

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31 Inter-American Court, *Barrios Altos v. Peru*, Judgment of March 14, 2001, Ser. C, No. 75, par. 41.

32 The Argentine Supreme Court of Justice issued a similar interpretation in its ruling on the disappearance of the Poblete couple mentioned above.

withdraw Peru from the contentious jurisdiction of the Inter-American Court of Human Rights. In response to this move by the Fujimori government, the Court ruled two months later that “Peru’s purported withdrawal, with immediate effect, from the declaration recognizing the contentious jurisdiction of the Inter-American Court of Human Rights is inadmissible”<sup>33</sup>.

The collapse of the Fujimori government quickly gave rise to a fruitful dialogue with the Inter-American system, and this dialogue has continued even though the country has not complied fully with all of the recommendations and decisions emanating from the system. The Valentín Paniagua and Alejandro Toledo administrations have engaged in constant dialogue with the Commission and with civil society with a view to carrying out the Inter-American recommendations.

With regard to the amnesty laws and the Court judgment in the *Barrios Altos* case, the Peruvian government chose to comply by approving a “resolution of the attorney general of the nation” which provides that all prosecutors who participated in cases in which the amnesty laws were applied should request that their respective courts carry out the Inter-American Court judgment. Finally, on September 22, 2005, the Inter-American Court announced that the obligation to give general effect to its ruling that the laws 26.479 and 26.492 were null and void had been fulfilled by the state<sup>34</sup>.

### 3. Conclusions

The 1970s and 1980s, and in some countries the 1990s as well, have left a daunting legacy. The tens of thousands of people who died as a result of state repression can never be brought back. We must address this recent history if we aspire to a peaceful and democratic future for Latin America. When the trend toward the restoration of democracy began in the 1980s, many voices were raised to suggest alternatives for

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33 Inter-American Court, *Ivcher Bronstein v. Peru*, Judgment of September 24, 1999, Ser. C, No. 54; Inter-American Court, *Constitutional Court v. Peru*, Judgment of September 24, 1999, Ser. C, No. 55.

34 Inter-American Court, *Barrios Altos v. Peru*, Resolution on Compliance with Judgment, September 22, 2005. It is open to debate whether the attorney general’s resolution can constitute, as the Court stated, compliance with the recommendation declaring the amnesty laws without effect. While those laws may be left without effect temporarily, they have not been repealed and therefore remain in force, in contravention of Article 2 of the American Convention.

dealing with that tragic past. For reasons beyond the scope of this work, the voices that prevailed were those arguing that the search for justice for serious human rights violations could jeopardize the transition to democracy. As a result, the political debate revolved around the need to choose between democracy and justice, on the assumption that it was impossible to obtain justice without causing the nascent democracies to crumble.

But the voices of the victims and their families were not so easily silenced. In their tireless search for justice, they banged on every door and traveled down every path; where they found no path, they forged their own.

The Commission provided one such avenue. From the 1970s to the present, the Inter-American Commission on Human Rights has been a critical actor, working together with the people of the Americas to protect human rights. At certain times this meant exposing abuses and facing up to dictatorships that violated human rights by virtue of their very existence. Once democracy was restored, the Commission engaged states and societies in dialogue to find ways to address the legacy left by the dictatorships.

The amnesty laws represented, and continue to represent, one of the most difficult challenges to democracy in Latin America. For the countries examined here, those laws exemplified the denial of justice and the guarantee of impunity. Beginning with its earliest reports, the Commission has made clear that justice is an essential component of the rule of law. In hundreds of petitions processed by the Commission, and beginning with the first judgment handed down by the Court, the organs of the Inter-American human rights system have found Articles 8 and 25 of the American Convention to be a pillar of the rule of law. Serious violations of human rights could not be exempted from that test.

In each of the cases examined here, the state response to the Commission was eminently political. The government of Argentina asserted that it had found “solutions based on the urgent need for national reconciliation and for the consolidation of democratic government”. Peru indicated that both its amnesty laws were approved by the Congress “in the discharge of duties entrusted to it by the Political Constitution in the context of the pacification policies undertaken by the Peruvian state”. El Salvador insisted that its amnesty law was “aimed at ensuring the existence of a democratic state at peace as the only way to preserve

human rights”. For its part, Uruguay argued that “justice is a value, but so is peace. It is not possible to sacrifice peace for the sake of justice”.

The debate that centers on choosing between justice or peace, and between justice or reconciliation, is far from over. Indeed it remains very relevant in the region. The Inter-American Commission made an invaluable contribution to this debate by insisting on the need for justice for serious human rights violations. From that moment on, justice was no longer something that could be sacrificed in the name of achieving peace and democratic stability. This is not to say that amnesty cannot be a useful legal and political tool in the context of agreements leading to democratic consolidation and peace. Amnesties will continue to be a valuable instrument in political negotiations. But those responsible for negotiating amnesties must take into account the standards of international human rights law as they have evolved in recent decades. The Inter-American Commission made a substantial contribution to the development of these standards by ensuring that essential issues such as the right to truth and a legal remedy cannot be disregarded.

Much more remains to be done. While the IACHR played an important role in the repeal of the amnesty laws in Argentina and Peru, it is also true that this was only achieved in Argentina 13 years after the approval of the Commission’s report on the subject. In the case of Peru, moreover, had it not been for the collapse of the Fujimori-Montesinos government, it is hard to imagine that any change whatsoever would have come to pass. Meanwhile, Uruguay and El Salvador are far from carrying out the IACHR’s decisions.

At present, compliance with the decisions of the Commission and the Court is contingent upon the political will of governments to fulfill their international obligations. One can only hope that the day will come when these obligations will be fulfilled regardless of the existence of political will. This is going to require a more fluid dialogue between international and domestic law as two integral parts of a single body of law. If such an interchange were to occur, the decisions of international organs would be implemented through domestic legal provisions, regardless of the will of the government in office at the time. As long as compliance is contingent upon political will, any advances inevitably will be as ephemeral as the governments promoting them.

The cases discussed here also show that political will must be galvanized by civil society. In some of the cases analyzed, human rights

organizations played a pivotal role in the search for justice for human rights abuses. The cases of Peru and Argentina illustrate the process by which the interchange between the state, civil society, and the IACHR led to the repeal of the amnesty laws. Conversely, in the cases of Uruguay and El Salvador, there is a notable absence of political will on the part of states to comply with their international obligations, along with a less active civil society, or some combination of the two.

From the time it received the first complaints of human rights violations in the early 1970s up to the recent decision of the Argentine Supreme Court on the invalidity of that country's amnesty legislation, the IACHR has strengthened the rule of law in the region through its steadfast insistence that states have the obligation to ensure justice for past human rights violations.

## THE PATH TO PROSECUTIONS: A LOOK AT THE CHILEAN CASE

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*Pamela Pereira*

The military coup of September 11, 1973 served to reestablish Chilean society by installing a neoliberal societal model that modified the existing institutions and economic structures, which came under the rules of the market. The *de facto* military government that overthrew the government of president Salvador Allende made unilateral policy decisions to minimize the State in the economic, social, and educational spheres, among others. It also dissolved parliament and prohibited political parties, unions, and other social organizations.

In order to eliminate all traces of the ousted government and to impose its will and make very structural changes, the military government immediately implemented a societal control policy which was manifested in myriad measures to harshly coerce the entire society. These repressive measures, which had an impact on the entire population, included the years-long curfew, raids on broad sectors of the population, mass dismissal of workers without cause, absolute control over the press, imprisonment of thousands of people who were taken to stadiums and other sites that had been adapted for this purpose, places where the detainees were interrogated and tortured, and the installation of other secret centers of detention and torture. This situation led thousands of people to seek asylum or leave the country seeking refuge. From the first moment of the *coup d'état* there was news of executions and the families of others who were arrested gradually confronted the reality that the detentions were not being acknowledged and that the persons they were looking for became “disappeared persons”.

## 1. The Law Applied by the Dictatorial Regime: State of Siege and Military Tribunals

A “State of Siege” was decreed throughout the country on September 11, 1973, on the basis of the declaration of “internal commotion” in accordance with Article 72 No. 17 of the 1925 Political Constitution of Chile. Since Parliament had been dissolved, the commanders of the three branches of the armed forces and the Carabinero police formed a Military Junta, which took over the Constitutional, Executive and Legislative powers. The president of the Military *Junta*, Augusto Pinochet, then took office as President of Chile.

The *de facto* government, through the Military *Junta*, immediately began to issue decree-laws. Article 1 of Decree-Law (DL) No. 5, issued on September 12, 1973, declared that “by virtue of Article 418 of the Military Justice Code, the state of siege decreed for reasons of internal commotion, due to the situation in the country, should be understood as a state or time of war for the purposes of applying the penalty of such time period as established by the Military Justice Code and other criminal laws and, in general, for all other purposes of said legislation”.

Article 418 of the Military Justice Code established that “the existence of the state of war or time of war is understood not only when war or a state of siege has been officially declared, in accordance with the respective laws, but also when war in fact exists or mobilization for war has been decreed, although it has not yet been officially declared”.

Article 2 of DL No. 5 amended Article 281 of the Military Justice Code and added a subsection: “when the security of the attackers so demands it, the perpetrator (s) may be killed”.

Thus, as soon as the Military *Junta* took power after overthrowing the constitutional government of president Salvador Allende, it assumed command with the logic of internal warfare, although the truth was that there were no militarily organized rebels to fight against.

The Military *Junta* declared the state of siege for reasons of internal commotion, which is equivalent to the state or time of war, until September 10, 1975, after which time it decreed the state of siege for reasons of national security because of the continued existence of “unorganized seditious rebel forces”. This extended the application of time of war legislation until September 10, 1977, enabling the jurisdiction, procedures, and penalties in time of war to be applied in multiple cases until this date.



Under this legal order, many people were tried by Military Tribunals, and sentenced to death or imprisonment for many years. Even more people were detained and interrogated under torture and imprisoned by administrative decree, for an undetermined amount of time and, in most cases, subsequently expelled from the country, also by administrative decree.

The extreme cases were those of the disappeared detainees, who after their arrest were never brought to court, and their detention was never even acknowledged by the military or the political authorities. Subsequent investigations have revealed the location of the different secret detention centers where state agents implemented their repressive policies, the methods of interrogation, and the final destination of many people, whose remains were subsequently removed and thrown into the sea.

## **2. Amnesty Decree Law No. 2191**

In 1978, the military regime issued Amnesty Decree Law No. 2191. By virtue of Article 1 of said law, “an amnesty is granted to all persons who committed criminal acts either as authors, accomplices or accessories during the period when the state of siege was in force, between September 11, 1973 and March 10, 1978, provided that they are not already indicted or serving a sentence”. This reference to those “who are not already indicted or serving a sentence” was intended to prevent any benefits for political prisoners imprisoned by military tribunals who were at that time indicted or sentenced.

This amnesty excluded certain proceedings related to common crimes but applied to homicide, kidnapping, illegal detentions and other crimes. These acts had been performed and continued to be carried out by state agents in the context of an institutional policy of massive and systematic violations of human rights.

This amnesty clearly sought to protect the perpetrators from any future criminal investigation. The government apparatus of repression was extremely concerned about the discovery of the remains of a group of victims found in the “Lonquén ovens”, in an abandoned coal mine in a sector near Santiago. This discovery led to the initiation of a criminal investigation and the designation of a minister of the Appeals Court of Chile to investigate these acts, which were overtly censurable. It was thus necessary for them to issue laws that would guarantee impunity and cover up the facts.

As far as it has been possible to determine in the judicial sphere, it was during this period that Augusto Pinochet decided to order operation “removal of televisions”. During this operation, military officials of the Army’s aviation division, among others, travelled to the places where “disappeared” victims had been murdered and buried, either in the desert to the north or the foothills or in the countryside or forests to the south, disinterred them and moved the remains by helicopter and threw them into the ocean.

### 3. The Geneva Conventions

Since the four Geneva Conventions had been signed, ratified, promulgated, and published in the official diary in April 1952, they were fully in force when the military coup took place in Chile.

Common Article 3 of these Conventions stipulates that in the case of “armed conflict not of an international character” all persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely”. It specifically prohibits violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture against such persons.

Article 148 of the fourth Convention, which protects civilians in times of war even in occupied territories, and Article 131 of the third Convention, which applies to prisoners of war, establish that “no High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of grave breaches”. Grave breaches include willful killing, torture or inhuman treatment, unlawful deportation, unlawful confinement, etc. These Conventions do not allow impunity to be protected.

Hence, bearing in mind the principle of the supremacy of international law, and of treaties in particular, it is important to understand that the provisions of the Geneva Conventions prevail over the provisions of the Amnesty Decree Law and those of the Criminal Code that refer to the prescription of criminal acts.

## 4. Supreme Court Jurisprudence with Regard to Cases of Human Rights Violations

Between 1973 and 1990, when the military dictatorship was in force, the Supreme Court, with very few exceptions, clearly expressed its ideological adherence to the military regime. In the judicial sphere, this was manifested by the systematic rejection of the recourse to *amparo* and the generalized enforcement of the Amnesty DL in cases of human rights violations.

After the transition to democracy in 1990, President Patricio Aylwin issued DS No. 355 creating the National Truth and Reparations Commission, with the purpose of “(...) achieving, in a relatively short time, an overall understanding of what happened (...) delays in reaching a serious collective opinion in this regard will disturb the peaceful coexistence of the nation and conspire against the desire to peacefully reunite Chilean society”.

This report was delivered to the Chilean people on February 1991 during a solemn ceremony and is considered an important milestone for the clarification of the truth. It is important to recognize the importance of this report even though it did not include information which was known at the time about the identity of the actors of repression.

During this time, most of the cases were virtually closed or temporarily or permanently dismissed, others were in the military courts and the Amnesty Decree Law was fully in force. This prompted President Aylwin to send a letter to the President of the Supreme Court, stating “(...) my conscience would not be at ease if I did not express my opinion to the High Court that the amnesty in force, which the government respects, cannot and should not be an obstacle to performing the relevant judicial investigations to establish responsibilities, especially in the cases of disappeared persons”.

In this letter, which was the source of controversy within the judicial branch and debate within Chilean society, President Aylwin makes it clear that the existence of the DL did not prevent investigations or the establishment of individual criminal responsibility.

Without prejudice to the foregoing, and only when the composition of the criminal chamber of the Supreme Court was modified in 1998, did modification begin of the jurisprudence regarding cases of disappeared detainees subsumed within the crime of kidnapping.

Thus, Recital 6 of Supreme Court Decision Rol No. 269-98, in the case of Pedro Poblete Córdova, with regard to a dismissal with prejudice, states that “although a dismissal may be ordered at any stage of the investigation, special requirements apply to such a dismissal because it will result in the termination of the investigation (...) in the case of dismissals at hand the investigation has not yet concluded, which requires that inquiries continue to determine how the events occurred and the identity of those who unlawfully participated in such events, for this reason magistrates who decide to the contrary commit an error of law (...)”<sup>1</sup>. At the same time, Recital 8 states “(...) that in order for amnesty to apply, it is also necessary to establish the identity of the suspect clearly and beyond doubt, which is the only way to dismiss the corresponding punishment for their participation in the events under investigation (...)”. Recitals 9 and 10 refer to the validity of the Geneva Conventions in Chile, stating “that, consequently, the Chilean State imposed upon itself the obligation to guarantee the security of persons who may have participated in armed conflicts within its territory, especially if they had been detained, prohibiting the use of measures that tend to protect the crimes committed against certain people or achieve impunity for the perpetrators, particularly bearing in mind that international agreements must be fulfilled in good faith”. Moreover, Recital 11 confirms the permanent nature of the crime of kidnapping when it states “from another perspective, it is necessary to consider the fact that the events were perpetrated on July 19, 1974, and that the whereabouts and destination of Pedro Poblete Córdova remain to date unknown, which is why it is possible that the crime or crimes which are yet to be established may exceed in time and substance the application of Decree Law No. 2191” (Amnesty Law).

In addition to the above-mentioned decision, another known as the “Parral Case”, Supreme Court Rol No. 248-98, also revoked a dismissal resolution upon holding that the Amnesty Decree Law should not apply in the case of illegal detention or kidnapping under the Criminal Code, because in both cases these are continuous crimes.

## **5. Detention of Augusto Pinochet, in London, in October 1998**

The detention of Augusto Pinochet in London was carried out by judicial order issued by the magistrates of the National Audience of

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1 This Court Decision and the other ones quoted in this text can be found at the official website of the Poder Judicial of Chile. See: <http://www.pjudicial.cl>.

Spain, Baltasar Garzón and Manuel García Castellón. It was the result of complaints filed by the families of victims against Augusto Pinochet in both Chile and Spain, and invoked the principle of universal jurisdiction of criminal law in cases of crimes against humanity.

A Dialogue Round Table was also created during this period. This space for dialogue and not for negotiation (an important distinction) was formed by four human rights lawyers and four generals representing the three branches of the armed forces and the *Carabineros* of Chile and a group of civil society experts and intellectuals. The round table participants met to discuss the human rights violations that had occurred during the dictatorship.

This decision to have renowned human rights lawyers and officials with the rank of general and an institutional mandate sit down to talk about what had happened and how the problem should be addressed also caused a great impact in the country. It caused tension between families of the victims, some of whom rejected, while others agreed with, the initiative. Debate on this issue abounded.

The fate of Pinochet in London also provided a more complex scenario for these debates, which contributed to the understanding, although not explicit, by military officials that it was inevitable that the cases of murder, kidnapping, and torture could only be handled by the courts. They understood that international law was not merely a topic to be discussed in the classrooms, but that it was also a reality.

As a direct participant in the installation and development of this dialogue, I consider that the round table discussions revealed truths that went beyond the specific topic for which we had been convened. I believe that civil society should also have an interest in military training processes, in the way that they exercise command, in the role that the military currently plays in globalized societies: Should they be assumed as a burden or are they a part of the country's development process?

To ensure that expressions such as “never again” do not become mere discourse, it would be necessary to conceive of the military as a part of the rule of law in a relation to the civil society that should be different from the already known, a previous relation that, in the case of Chile, meant the “declaration of war” against its own people, the bombing of the Government Palace and of the national flag.

In the context of the Dialogue Round Table, the military officials provided information about the fate of approximately 200 victims,

although with errors in some of the data, and revealed that the bodies of many of the victims had been thrown into the ocean. By that time very few former members of the repressive apparatus had begun to provide evidence of this to the magistrates.

Moreover, the military officials also agreed to accept the opinion of the human rights lawyers that the courts of justice were the only venue for resolving cases of human rights violations in terms of clarifying the truth and establishing criminal responsibility. For this purpose, “judges dedicated exclusively” to human rights cases were to be assigned. (According to the existing inquisitorial criminal system, at that time a magistrate played the dual role of investigator and judge).

This was finally realized in 2001 when the Ministry of Justice petitioned the Supreme Court to designate Ministers of the Court of Appeals as first instance magistrates “dedicated exclusively” to investigating human rights cases. These designations led to a qualitative improvement of the ongoing investigations, reopening of processes and extension of the nominations. Moreover, in 2005 this task was reorganized and the regional Courts of Appeal were empowered to designate investigating ministers.

Much has happened since then in the area of justice. In the summer of 2011, the Supreme Court officially opened a criminal investigation of about 700 cases that had not undergone judicial investigation. One of these cases was the investigation of the cause of death of President Salvador Allende.

Notwithstanding the fact that the role of the courts of justice, as the entities in charge of investigating the facts and establishing the criminal responsibility of the perpetrators, is no longer in question, the jurisprudence of the Supreme Court has been erratic and benevolent in the application of criminal sanctions.

However, in this new political context, a decision was handed down on November 17, 2004 in the case of the disappeared detainee Miguel Ángel Sandoval Rodríguez, condemning the state agents for their participation in the kidnapping. Of interest is Recital No. 31 of the decision, which states the following “(...) bearing in mind that these court files established that a kidnapping occurred and that it lasted for over 90 days and that there is still no news as to the whereabouts of Miguel Ángel Sandoval Rodríguez, which is a sufficient basis for classifying the kidnapping under investigation in these proceedings, which is a continuous offense,

since the act itself created a criminal state that persisted over time, and damages were caused to an affected legal interest, and the action and the result have persisted in this state”.

Recital 33 continues by specifying a fact of great legal significance that has been the object of much debate, “It has been repeatedly argued that the crime committed against Sandoval Rodríguez cannot be that of kidnapping, because no one believes that he is still alive or imprisoned, but rather, on the contrary, everyone believes that he is dead. However, although this assumption may be true, it says nothing about the possibility of establishing the crime of kidnapping, because what has not been proven in the court files is that Sandoval Rodríguez died immediately after being unlawfully detained and imprisoned, and more important still, that his death, if it in fact occurred, was prior to the date stipulated in DL 2191, the Amnesty Law, which is the only case in which this decree law could be invoked by the defendants”.

The decision then refers to the Geneva Conventions, which were in force in Chile. In this regard, Recital 35 concludes that “And since the Convention seeks to guarantee the fundamental rights that are the birthright of all human beings, its application is preeminent, since this Supreme Court in different decisions has repeatedly recognized that the internal sovereignty of the Chilean State is limited with regard to those rights that derive from human nature. These values are superior to any law that may be enacted by state authorities, including the constituent power, which prevents their non-recognition”.

The decision goes on to refer to continuing offenses, mentioning doctrine and delimiting the concept by stating that “continuing offenses, however, are those in which the act persists over time. There is also an instant in which the typical conduct is completed, but gives rise to a state or situation susceptible of being prolonged in time, which constitutes the persistence of this conduct”, as in the case of kidnapping. The decision adds that the prescription of the criminal act does not apply “from the time in which it appears proven in the court file that the crime has ceased to be committed, either because the victim has been released, because there is positive and trustworthy information about the site where the remains can be found and on the circumstances of the death, if this occurred (...)”.

In its Decision Rol No. 559-2006, which deals with the case of two young militants who were executed by *carabineros* on September 23,

1973, the Supreme Court analyzes whether the country at that time was experiencing “a situation similar to that of armed conflict, not international in nature, which would allow the application of International Humanitarian Law, where appropriate”, and then analyzes the provisions of the Geneva Conventions, as part of International Humanitarian Law. The decision, referring to the fact that the Court has already recognized the application of IHL, reiterates that: “(...) International Conventional Law, noting that the application of domestic law governing the prescription of ordinary crimes to war crimes and crimes against humanity is of grave concern to international public opinion because it may prevent the prosecution and punishment of those responsible for those crimes, found it necessary to legislate at this level, establishing the principle of non-applicability of statutory limitations of these categories of despicable crimes through the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity (...)”. Chile has not signed this Convention, but in this regard the Court noted that “nothing would obstruct the recognition of customary law or similar law that could implicate the State, to the extent that elements exist to prove the existence of international customary law (...)”.

The Court states that the Convention on Non-Applicability “did not simply state this rule but confirmed it through its positivization, as it had been functioning as international customary law (...)”.

“Whereby, in accordance with the formula recognized by the United Nations International Law Commission, Conventional Law can have a declaratory, crystalizing or generating effect on customary law. The first of these effects is generated when the treaty acts as a formal expression of pre-existing customary law on the matter, which therefore limits its role to confirming the existence of the law and establishing its content. The conventional provisions that conform to the described formula are internationally binding, regardless of the entry into force of the text that contains such provisions and even with respect to States that are not part of the treaty. It is by virtue of this declarative effectiveness that the aforementioned Convention on Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which refers to this characteristic, which also justified the condemnation of the abominable crimes committed by the Nazi authorities even before the Charter of the International Military Tribunal at Nuremburg was defined in 1945, represents a binding international custom applied for almost 30 years now, before the events being investigated in this trial, which



confers on said source of international law the duration that supports it as a sufficient material element of the same”.

In the following recital, the Court adds that “with regard to the psychological or spiritual element of international customary law—*opinio juris*—necessarily convergent with its material component, mentioned above, the continuing practice of which it consists must have been carried out with the conviction that it constituted a legal obligation, as upheld by the doctrine and jurisprudence of the International Criminal Court in The Hague, which coincides in pointing out that the decisions of national courts, the practice and resolutions of international organizations and, of course, the specialized knowledge summarized in doctrine are suitable evidence to this effect”. The decision then refers to similar conclusions expressed in a series of Inter-American Court decisions, and states that the “Permanent International Justice Court has ruled that a generally recognized principle of the Law of Nations is that, in the relations between contracting parties, domestic laws cannot prevail over treaties”.

Finally, the Court refers to national jurisprudence on this same subject, noting that several rulings have stated that “the creditable story of the establishment of the constitutional provision contained in Article 5 of the Constitution clearly establishes that the internal sovereignty of the State of Chile recognizes its limits with regard to rights deriving from human nature, values that prevail over any norm that may be stipulated by state authorities, including the constituent power, which prevents these rights from being ignored”.

The decision classifies the homicide of these two young men in late 1973 as a crime against humanity, and specifically states that this “is not contrary to the principle of criminal legality, because the alleged conduct was already a crime under domestic law—homicide—and under international law, as a crime against humanity (...)”.

The decision concludes by noting that while the national law expressed in the Criminal Code allowed for the prescription of the criminal act in this specific case, this “is contrary to the principle of the imprescriptibility of crimes against humanity, as set forth in Article 1 of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. This provision merely states the validity of a preexisting customary norm on the matter, which is distinct from the entry into force at the domestic level of the treaty containing this norm and that is binding even on states that are not a party to the

treaty, such as ours, because it has the same obligatory nature”. It is also contrary to Articles 1, 3, 147, and 148 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War and Article 2 of the American Convention on Human Rights.

Another decision of 2007, Rol No. 3452-2006, handed down in a kidnapping case which was also classified as a crime against humanity and, therefore, imprescriptible, states that “the progressiveness of international law no longer authorizes the state to make decisions which result in the waiver of criminal prosecution of crimes against humanity. That such waiver is not justifiable in pursuit of peaceful coexistence supported in the forgetting of the events that occurred and which, due to their organization and meaning for humankind, are not experienced as any less serious after the passage of time by those affected or by society as a whole”.

The progress made by mid-2007 in the legal sphere suffered a setback when the Supreme Court decided that the crimes declared to be imprescriptible may be gradually declared prescribed under Article 103 of the Chilean Criminal Code.

This occurred because the Supreme Court understood prescription and gradual prescription to be two different legal institutions. The first is based on the alleged forgetting of the crime. In contrast, the latter would be an attenuation of the criminal liability, which affects the amount of the penalty. And “that is based on how ridiculous a harsh sentence would be for events that occurred so long ago, but that must be repressed (...)”.

In order to justify the above, the Court in its decision Rol No. 5789 of September 2009 stated that “the application of different international human rights treaties has emphasized that kidnapping must be considered to be a ‘crime against humanity’ and, as such, imprescriptible. However, these treaties make allowances for cases that allow more benign and balanced sanctions to be handed down, that is, that encourage the victims to accept that true justice has been served, and encourage the accused to accept that they are receiving a more humanized sanction after the lapse of so many years without a definitive decision”.

This concept is not supported by a legal basis, but it has been applied in a sustained manner, which has allowed for attenuated sentences to be handed down.

In one case of torture, two members of the Air Force were convicted of the crimes of torture or unnecessary rigor causing serious injury to

17 people who were deprived of liberty and tortured for long periods of time. In Recital 5, the Supreme Court states “That the non-applicability of DL 2191 of 1978 in cases of human rights violations is a topic that has been widely studied and resolved by this Court”.

The Court later conceptualizes on crimes against humanity in Recital 11 “(...) considering the nature of the acts investigated and in accordance with the evidence gathered during the investigation, it is appropriate to conclude that we are in the presence of what the legal conscience has decided to term crimes against humanity (...) this unlawful act was carried out by state agents in a context of serious, massive, and systematic human rights violations, constituting an instrument of a generalized policy of exclusion, harassment, persecution or extermination of a group of numerous citizens”. The following recital adds, “(...) crimes against humanity are those criminal acts that are not only contrary to the legal interests that are normally guaranteed by law, but at the same time constitute the negation of man’s moral character, which in extreme cases is manifested by viewing an individual as a thing. Thus, the classification of this crime requires the existence of an intimate connection between common crimes and the added value that results from the disregard and contempt for the dignity of a person, because the primary characteristic of this crime is the cruelty with which the different illegal acts are perpetrated, which are evidently and manifestly contrary to the most basic concept of humanity. Also evident is the cruelty towards a special class of individuals, thereby including an obvious element of intent, reflecting an inner tendency of the will of the agent”.

In short, these crimes constitute an affront to human dignity and a serious and manifest violation of the rights and liberties proclaimed in the Universal Declaration of Human Rights, reiterated and developed in other relevant international instruments. The Court continues with, “crimes of this nature cannot be declared prescribed or amnestied, and with respect to these crimes it is impossible to authorize exclusions of responsibility with the intention of preventing the investigation and punishment of those responsible, precisely because these are actions that constitute serious violations of fundamental rights, such as torture (which corresponds to the events in this case), summary, extrajudicial or arbitrary executions, and forced disappearances, all prohibited under international human rights law”. It then refers to the supremacy of principles, pacts and treaties over domestic law, and to the fact that the Constitution itself stipulates their prevalence over domestic law,

and states that the sentence against the perpetrators is confirmed by majority vote.

In brief, a look at the way Chilean society has dealt with cases of human rights violations that occurred during the dictatorship shows that more progress has definitely been made in the judicial sphere. The criminal investigations have made it possible to advance in the clarification of the events, since their decisions, which may be coercively imposed, required the declaration of victims and perpetrators. And more information emerges that goes beyond the will to cooperate with or reject an investigation. Even though the armed forces continue to oppose these investigations, much information is available in the state archives, in the newspapers of that period, although this information may have been distorted by censorship. It is definitely necessary to make additional efforts to uncover this information. The role of the Police Investigations Unit in charge of complying with the magistrate's orders to investigate has been crucial. These judicial investigations have exceeded those of the truth commissions, and this is the way it should be, even though it was through these commissions that society was informed of the dimensions of what had occurred.

There has also been progress in terms of criminal sanctions, but there have been many difficulties, which can be explained by the different ministers that were assigned to the criminal chamber in each case.

Finally, one reflection about the area of communications is in order. The dominant press was in favor of the military coup and while it is true that on several occasions it was obliged to report on these events, the policy of silence and forgetting prevailed over the communications policy. The clarification of the facts, the debate over criminal sanctions for the perpetrators, and how this will be conveyed to future generations are important topics which must be addressed. A mere slogan is not enough, nor is the unilateral and pre-established view that is not continuously adjusted in light of new evidence or realities.

## CHALLENGING IMPUNITY IN DOMESTIC COURTS: HUMAN RIGHTS PROSECUTIONS IN LATIN AMERICA

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*Jo-Marie Burt*

In April 2009, the Peruvian Supreme Court convicted former president Alberto Fujimori (1990-2000) of grave violations of human rights and sentenced him to 25 years in prison. In 2010, former Uruguayan president Juan Maria Bordaberry was convicted to 30 years in prison for violating the constitutional order and for a number of murders and forced disappearances that occurred during his government (1973-76). In Argentina, after the Supreme Court declared the amnesty laws of the 1980s to be unconstitutional, a new wave of trials opened up, resulting in the convictions of several hundred former state agents for rights abuses and crimes against humanity, including forced disappearance, torture, and rape.

These successful prosecutions for cases of grave human rights violations illustrate a remarkable shift in a region long characterized by institutionalized impunity, that is, formal or informal mechanisms imposed or supported by state policies that guarantee that those responsible for grave violations of human rights go unpunished. These prosecutions are remarkable also because of the historic weakness of Latin American judiciaries, the notorious absence of political will on the part of ruling elites to hold those responsible for such crimes accountable, and the belief, even among some progressives, that human rights prosecutions were not viable, perpetuated conflict, or undermined the opportunity for reconciliation. Yet the combination of a global shift in norms in favor of accountability and persistent grass-roots activism in pursuit of truth and justice oftentimes in spite of tremendous odds and unlikely victories, has opened new spaces, at least in some parts of Latin

America, for renewed efforts to prosecute those accused of ordering or carrying out grave violations of human rights.

Latin America is indeed at the forefront of the “justice cascade” identified by Ellen Lutz and Kathryn Sikkink a decade ago—the global trend toward the promotion of accountability for those who perpetrated, ordered, or otherwise authorized grave violations of human rights, war crimes, and crimes against humanity<sup>1</sup>. This article will review the trajectory of four countries that have made significant advances in human rights prosecutions in the past decade: Argentina, Chile, Uruguay and Peru.

However, it is important to note that the record of human rights prosecutions in Latin America is mixed at best. Some countries such as Argentina and Chile have moved forward significantly in recent years, while other processes that seemed to be promising, such as that of Peru, have stagnated. Still other countries, such as Brazil and El Salvador, remain seemingly impermeable to the justice cascade.

## 1. Transitional Justice: The Latin American Experience

In an important article outlining the evolving phases of transitional justice since World War Two, international law scholar Ruti Teitel suggests that this diffusion of human rights norms and the resulting shifts in global responses to atrocity has generated a new phase of transitional justice distinct from the two earlier phases she identifies<sup>2</sup>. The first phase, associated with the Nuremberg and Tokyo trials after the end of the war, saw the establishment of international tribunals to prosecute Nazi and other Axis power officials for crimes against peace, war crimes, and crimes against humanity. The conditions that led to these postwar prosecutions were not easily replicable, Teitel argues, and in the following years, criminal prosecutions for grave violations of human rights or other crimes against humanity did not become standard practice in the face of violent or abusive regimes, at least partly due to the advent of the Cold War. While there were a few instances of prosecutions—newly democratic governments in Greece and Argentina successfully prosecuted the

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1 Ellen Lutz and Kathryn Sikkink, “The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America”, *Chicago Journal of International Law* 2(1) (2001): 1-34. See also Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in the Age of Human Rights* (Pittsburgh: University of Pennsylvania Press, 2005).

2 Ruti Teitel, “Transitional Justice Genealogy”, *Harvard Human Rights Journal* 16 (2003): 69-94.

generals who ruled over those nations for long periods in the 1970s and 1980s—the more common response was either to ignore past abuses and move forward, often after the establishment of sweeping amnesty laws (as Brazil and Uruguay sought to do following long periods of military rule in the 1970s and 1980s), or to establish truth commissions to investigate abuses but without any accompanying effort to prosecute (as in Chile, El Salvador, Guatemala in the 1990s). In either case prosecutions were eschewed as a policy option, presumably because the negotiated nature of the transitions from military rule made such prosecutions difficult if not impossible (as in Chile, El Salvador or South Africa in the 1990s). Pragmatism was the general rule in such transitional democracies, as denoted by the now well-known phrase of Chilean truth commissioner José Zalaquett, whose famous formulation urging political rulers in such tentative situations to seek justice “within the realm of the possible” fueled a binary construction holding that truth was an acceptable alternative form of justice<sup>3</sup>. Indeed, for some practitioners and scholars, truth was touted as a *preferred* form of justice since it presumably reduced conflict and promoted reconciliation<sup>4</sup>.

Such formulations were sometimes disrupted, however, by actions taken independently of state actors to promote accountability through other means, often in arenas that transcended the nation-state. Prompted by globalization, the diffusion of human rights norms, local and transnational human rights activism, and evolution in international law, the 21st century has seen the rise of a new phase marked by the massification and normalization of transitional justice mechanisms<sup>5</sup>.

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- 3 José Zalaquett, “Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Human Rights Violations”, in Neil Kritz, Ed., *Transitional Justice: How Emerging Democracies Reckon with the Past* (United States Institute of Peace, 1992). As Teitel (2003, *Ibid.*) notes, the feasibility of prosecutions was limited by the political context of the transitions; for example, the still powerful military and the ongoing political role played by Pinochet in Chile’s transition made it extremely risky to attempt trials for human rights abuses. In the face of such dilemmas many countries opted to forgo prosecutions in favor of other mechanisms of transitional justice, including truth-seeking and reparations. These were often accompanied by amnesty laws which in some cases were put in place by the previous regime, as in Chile and Brazil, and in others were put in place by the transitional democratic regime, as in Uruguay and El Salvador. Roht-Arriaza (*Ibid.*) explores some of these cases in detail.
  - 4 Robert I. Rotberg & Dennis Thompson, Eds., *Truth v. Justice: The Morality of Truth Commissions* (Princeton University Press, 2000).
  - 5 T. Risse, S. C. Roppe, & K. Sikkink, Eds., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge, UK: Cambridge University Press, 1999).

While criminal prosecutions are by no means the norm in this new and third phase of “globalized justice”, to use Teitel’s phrase, they are more frequent than they have been in the past, as Lutz and Sikkink have argued<sup>6</sup>. A new international regime recognizing the obligation of states to investigate and punish human rights violations has been enshrined through the work the International Criminal Tribunals for the former Yugoslavia and Rwanda<sup>7</sup>; the detention of Chilean dictator General Augusto Pinochet in London in 1998 and the affirmation of the principle of universal jurisdiction that the extradition process entailed<sup>8</sup>; and the signing, also in 1998, of the Rome Treaty that led to the creation in 2002 of the International Criminal Court<sup>9</sup>. The result has been energized efforts across the globe—at the international, national, and local levels—to devise mechanisms to secure accountability for war crimes, crimes against humanity, and grave violations of human rights.

In Latin America, in the face of the unresponsiveness of domestic judicial institutions to investigate and punish grave violations of human rights committed during authoritarian governments and/or in the context of internal armed conflicts, human rights organizations, survivors and relatives of victims of human rights abuses, and other civil society groups sought to use international entities, especially the Inter-American system of human rights protection, to challenge amnesty laws, push regional governments to investigate, prosecute and punish grave human rights violations, and provide reparations to victims<sup>10</sup>. The growing responsiveness of the Inter-American system, particularly of the Inter-American Commission for Human Rights (IACHR) and the Inter-American Court for Human Rights, which began to hand down decisions upholding the state’s duty to prosecute grave violations of human rights, the right of

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6 Lutz and Sikkink, “The Justice Cascade”, *Ib.*

7 See for example William Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press, 2006). Other discussions take a more critical vis-à-vis these *ad hoc* institutions *cf.*, Mark Drumbl, *Atrocity, Punishment and International Law* (Cambridge: Cambridge University Press, 2007).

8 Roht-Arriaza (*Ib.*) provides a thorough account of the Pinochet arrest and its impact.

9 See for example, Benjamin Schiff, *Building the International Criminal Court* (Cambridge: Cambridge University Press, 2008).

10 An excellent overview of such efforts in the region is provided in the edited volume, *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin America* (Washington D. C.: Due Process of Law Foundation, 2007).



access to justice for victims, as well as the right to truth, was especially important in supporting local efforts in the region to prosecute and punish perpetrators of grave violations of human rights<sup>11</sup>. In particular, as we shall see, the 2001 decision in the *Barrios Altos* case in which the IACHR determined that amnesty laws whose purpose was to shield perpetrators from prosecution violated the American Convention on Human Rights and were therefore null and void helped galvanize domestic efforts to challenge such laws, opening possibilities for criminal prosecution in many parts of the region. But, as will be argued in the sections below, it was the decided efforts of civil society groups to push forward a pro-accountability agenda, often at great risk and in the face of enormous odds, that helped create conditions for human rights prosecutions in the cases under study. Certainly the larger political context plays an important role, as will be discussed below: variations in political support for criminal prosecutions of human rights cases can play a fundamental role, but as the cases here suggest, elite efforts to terminate accountability prosecutions were challenged domestically and internationally by domestic civil society groups whose advocacy on behalf of truth and justice has powerfully reshaped debates about accountability and human rights practices in Latin America.

## **2. Argentina: From Accountability to Impunity and Back Again**

Today Argentina is leading the world in domestic human rights prosecutions. Since the Argentine Supreme Court declared the amnesty laws of the 1980s were unconstitutional, dozens of trials have gotten underway, and to date more than 300 perpetrators have been convicted, including iconic figures of military repression such as Alfredo Astiz. But there have been dramatic shifts in Argentina in the state's criminal prosecutions policy—from full state support for the trial of the military *juntas* in the early to mid-1980s; to the backtracking on this policy and the promulgation of amnesty laws and pardons to stop the prosecutions process and placate those opposed to it, primarily the military; to the relaunching of criminal prosecutions primarily after 2005, when the Supreme Court upheld previous rulings declaring that the amnesty

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11 Douglass Cassel, "The Inter-American Court of Human Rights", in *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin America* (Washington D. C.: Due Process of Law Foundation, 2007).

laws and pardons were unconstitutional. How can we understand these dramatic policy fluctuations?

Prompted by the massive social protests led by the Mothers of the Plaza de Mayo against the military regime for its systematic policy of forced disappearances, the new democratic government of Raúl Alfonsín established one of the world's first truth commissions. The Sabato Commission, as it came to be known, had the express purpose of gathering evidence that would then be used in trials against the principal architects of the military's systematic policy of repression. Truth-seeking was inextricably linked to the search for justice, a remarkable departure from the policy adopted by Argentina's neighbors, Brazil and Uruguay, who were engaged in transition processes at around the same time. In those two countries, the official policy was denial and silencing, accompanied by sweeping amnesty laws protecting rights abusers from criminal prosecution<sup>12</sup>.

Alfonsín and his advisors deemed that some form of accountability was necessary, not only from a human rights standpoint, but also to affirm the core tenets of liberal democracy<sup>13</sup>. By affirming the rule of law and the principle of equality before the law, trials would help reestablish the credibility of Argentine state and consolidate democratic institutions<sup>14</sup>. At the same time, Alfonsín and his advisors believed that it was impossible to hold to account all those responsible for such acts, since torture and disappearance were not the work of a small, specialized unit (as it had been in Nazi Germany) but rather was spread widely throughout the armed forces. It was determined that the top generals of the *juntas* who ruled during the military government would be tried as the intellectual authors of a systematic policy of repression that resulted in massive human rights violations<sup>15</sup>. In 1985, after the truth commission finished its

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12 There were important societal efforts to achieve truth and justice in Brazil and Uruguay as documented in Lawrence Weschler, *A Miracle, A Universe: Settling Accounts With Torturers* (Chicago: The University of Chicago Press, 1990).

13 Carlos Santiago Nino, *Radical Evil on Trial* (New Haven, CT: Yale University Press, 1998).

14 See also Jaime Malamud-Goti, *Game without End: State Terror and the Politics of Justice* (University of Oklahoma Press, 1996) and Elizabeth Jelin *et al.*, *Vida cotidiana y control institucional en la Argentina de los 90* (Buenos Aires: Nuevohacer, 1996). Jelin finds that the presumption of Alfonsín and his advisors was correct: the trial of the members of the military *juntas* contributed to building legitimacy for the judiciary as institution.

15 This policy reflects the notion put forth by Hannah Arendt in her study of the trial of Adolph Eichmann, in which she suggests that in cases of massive and coordinated

work and documented nearly 9,000 disappearances, the government held trials against nine of the *junta* leaders, five of whom were convicted and given lengthy prison sentences<sup>16</sup>. Some human rights organizations were critical of this policy, arguing that all perpetrators should be put on trial and held accountable before the law.

These convictions, along with the growing number of civil suits that were being brought against mid- and low-ranking members of the armed forces by Argentine citizens and human rights organizations, prompted a series of military uprisings. Alfonsín—also under assault by a ballooning economic crisis marked by massive hyperinflation—backed down from his maverick human rights policy, passing a series of decree laws that granted effective immunity from prosecution to mid- and low-ranking officers (the Full Stop Law, followed by the Due Obedience Law). This was followed by a sweeping amnesty law passed by Alfonsín’s successor, Carlos Menem, as well as the pardoning of the five *junta* leaders who had been tried and convicted in 1985<sup>17</sup>.

Despite the amnesty laws, human rights organizations continued to press the accountability agenda, in some instances turning to international bodies to support their claims. In 1995, Carmen Lapacó, Emilio Mignone and Marta Vázquez presented a legal complaint demanding to know the truth about what happened to their children, who had been disappeared during the dictatorship. Given that the cases could not move forward in the Argentine judiciary, they brought their case to the Inter-American system, eventually leading to an amicable agreement in which the Argentine state acknowledged the relatives’ right to truth, and promised to convene “truth trials” to that effect in federal courts. The public “confessions” of a few perpetrators also contributed to intensified public debate over these issues as well<sup>18</sup>.

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state violence, the farther one moves from the hand of the individual who actually committed the crime, the more likely one was to find the individual(s) truly responsible for the crime. See Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Penguin Books, 1994).

16 Initially the government had proposed to hold the trial of the *juntas* in military courts, but their stalling resulted in the transfer of the trial to a civilian court.

17 See Nino, *Radical Evil on Trial*.

18 This was particularly the case with the public ‘confession’ of navy captain Adolfo Scilingo, which was published in interview form in Horacio Verbitsky’s *The Flight*. For a gripping comparative analysis of the impact of public confessions by perpetrators, see Leigh Payne, *Unsettling Accounts: Neither Truth nor Reconciliation in Confessions of State Violence* (Durham, NC: Duke University Press, 2008).

In the meantime, survivors, relatives of victims and human rights lawyers had sought tirelessly to find ways around the amnesty laws. In early 1998, a judge accepted the argument put forth by human rights lawyers that the amnesty laws and presidential pardons did not cover the crime of baby kidnapping, and ordered the arrest of General Jorge Videla, one of the leading *junta* leaders who had been convicted in 1985 and pardoned in 1990, and others. As we shall see, this would have a transformative effect on accountability debates in Argentina that would reverberate throughout the region, especially in the Southern Cone. So too would the arrest, several months later, of former Chilean dictator Augusto Pinochet in London.

Human rights lawyers had a clear vision of the need to overturn the amnesty laws in order to allow criminal trials in cases beyond baby kidnapping to move forward<sup>19</sup>. In 2000, lawyers from the Center for Legal and Social Studies (CELS) presented a criminal complaint before the courts soliciting the repeal of the amnesty laws in an ongoing trial involving the illegal kidnapping of an eight-month-old girl, Claudia Victoria Poblete. Two members of the Federal Police, Julio Héctor Simón and Juan Antonio del Cerro, were being prosecuted for this crime. CELS argued that the trial was based on a fundamental contradiction: the judges could investigate and punish the crime of the girl's kidnapping, but not the disappearance of her parents, since the perpetrators were protected by the amnesty laws in the case of the latter crime but not the former. CELS argued that based on international law—which according to the Argentine Constitution was part of domestic law—these were crimes against humanity and therefore were not subject to statutes of limitation, could not be amnestied, and should be prosecuted according to Argentine law<sup>20</sup>. The judge presiding over the case, Gabriel Carvallo, ruled in favor of CELS, declaring that the amnesty laws were invalid and not applicable in this case. Carvallo noted that the amnesty laws interfered with the Argentine state's international duty to investigate and prosecute crimes against humanity<sup>21</sup>. Two years

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19 Interview with author, Gastón Chillier, Director, Centro de Estudios Legales y Sociales (CELS), Buenos Aires, June 2007.

20 CELS, “Pedido de inconstitucionalidad de las leyes de punto final y obediencia debida - Caso Poblete”, <http://www.cels.org.ar/agendatematica/?info=detalleDocF&ids=11&lang=es&ss=41&idc=592>, no date.

21 Valeria Barbuto, “Procesos de justicia transicional: Argentina y el juzgamiento de graves violaciones a los derechos humanos”, Informe para la Fundación para el Debido Proceso Legal. On file with author.

later, in 2003, the Argentine Congress declared that the amnesty laws were unconstitutional.

That same year, Néstor Kirchner, a member of the Peronist party, was elected president. Kirchner inherited a country devastated by economic collapse and a deep rift in public confidence vis-à-vis politicians and the political system in general. In his efforts to rebuild citizen confidence in public institutions, Kirchner, of the generation of Peronists who had been savagely repressed during the military dictatorship, adopted a strong pro-accountability stance. He pushed quickly for a new government policy on human rights that incorporated human rights prosecutions as its centerpiece, but also included other initiatives such as the recuperation of former detention centers and their transformation into memory spaces and the vetting of government officials linked to the dictatorship. While Kirchner's leadership was important, the prior mobilization of human rights and other civil groups challenging impunity domestically and at the international level, and the growing responsiveness of Argentine institutions to these demands, was at the core of these shifts.

The watershed moment came in 2005, when the Supreme Court declared the amnesty laws unconstitutional, thus opening the doors for renewed efforts to achieve retributive justice in Argentina. (In 2007 the Supreme Court also declared the presidential pardons unconstitutional, leading to the re-arrest of several military officers who had been prosecuted in the 1980s and then freed by Menem's presidential pardon). More than 1,500 alleged perpetrators are facing prosecution, with 229 convictions to date<sup>22</sup>. Though human rights advocates have criticized the absence of a coherent state policy vis-à-vis criminal investigations, there have been notable improvements. For example, the first trial to lead to a conviction (in 2006) focused on just two murders, when the accused perpetrators were allegedly responsible for hundreds of killings and forced disappearances. Increasingly prosecutors are accumulating cases so that multiple victims and perpetrators are encompassed in the same legal process<sup>23</sup>. For example, in the trial that recently culminated in the paradigmatic case of the ESMA (a military school that was used during

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22 Data from the online blog maintained by the Center for Legal and Social Studies (CELS): <http://www.cels.org.ar/wpblogs/>, accessed on November 4, 2011. Several of the sentences handed down since 2005 are available on the Argentine Judiciary's website, Centro de Información Judicial: <http://www.cij.gov.ar/lesa-humanidad.html>.

23 Personal communication, Gastón Chillier, Lima, Peru, July 22, 2011.

the dictatorship as clandestine military detention center, which held an estimated 2,000 political prisoners, most of whom were disappeared), the case incorporated 85 victims and 18 defendants. The 5th Federal Oral Court emitted its sentence in October 2011, issuing convictions for 15 of the 18 defendants for the crimes committed at ESMA, which the judges characterized as crimes against humanity<sup>24</sup>. Among those convicted were iconic figures of the dictatorship's repressive apparatus including Alfredo Astiz and Antonio Pernias, who along with ten others were sentenced to life in prison (three others were sentenced to 18-25 years in prison, while three were absolved, though they remain in prison as they have indictments in other cases).

A confluence of factors contributed to the advance of criminal prosecutions for human rights violations in Argentina. Reforms at the level of the judiciary were clearly important, as was the ability of lawyers, prosecutors and judges to use international law as well as rulings by the Inter-American Court of Human Rights in their legal judgments. The political support of criminal trials by the Kirchner administration was also of fundamental importance. But it is arguable that none of these factors alone would have propelled human rights prosecutions forward. Without the determined efforts of survivors, relatives of victims, and human rights organizations to hold accountable those responsible for grave human rights violations via domestic criminal trials, it is unlikely that this would have been the outcome of the accountability debate in Argentina. Victims' associations and human rights groups sought out alliances with a gamut of international actors and organizations, and turned to international bodies such as the Inter-American system for human rights protection, to support and advance this agenda. But it was the domestic efforts, which remained fairly constant over time, and which adapted to new challenges and circumstances, that drove the process. No doubt their success and failure in promoting an accountability agenda also coincided with shifts in the political opportunity structure: a relatively favorable scenario for prosecutions at the time of transition, given the military in disgrace after its defeat in the Malvinas conflict; to an unfavorable scenario throughout the 1990s as conservative political, economic and military sectors regrouped to resist accountability efforts and successfully imposed mechanisms of impunity; and then, to a new moment of accountability

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24 For information on this case, see the CELS website: <http://www.cels.org.ar/esma/>.

after the election of the Kirchners (Néstor Kirchner in 2003 and his wife Cristina in 2007 and 2011)<sup>25</sup>.

### **3. Chile and Uruguay: Impunity and “Late Accountability”**

#### **3.1. Chile**

In Chile, after 17 years of dictatorial rule under General Augusto Pinochet (1973-1990), the new democratic government of Patricio Aylwin created a truth commission to investigate the abuses that occurred under the military dictatorship. Fearful of a military backlash, the Aylwin government did not challenge the 1978 amnesty law decreed under Pinochet’s rule to prevent punishment for the worst crimes of the dictatorship. The Rettig commission, as it was known, investigated extrajudicial killings, disappearances, and cases of torture leading to death (but not torture on its own). It produced a report documenting the murder and disappearance of some 3,000 Chilean citizens, and recommended the implementation of monetary and symbolic reparations programs for survivors of the dictatorship. Impunity, however, remained in tact. Though there were trials investigating cases of forced disappearance and murder, the amnesty law was routinely applied, shielding perpetrators from effective punishment. The one trial that did culminate in a successful conviction—that of the head of Pinochet’s secret police Manuel Contreras for the 1976 car-bombing murder of Orlando Letelier in Washington, D. C.— was due largely to U.S. pressure<sup>26</sup>.

While the arrest of Pinochet in London in October 1998 would play a galvanizing role in Chile’s accountability process, there were important shifts in local dynamics that reveal ongoing efforts by human rights and victims’ groups to promote an accountability agenda in 1997 and early 1998. Cath Collins describes the work of Chilean human rights and opposition groups toward this end in relation to what they perceived

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25 During interviews conducted in 2007 and 2010, several informed observers suggested that Kirchner supported the human rights agenda in an effort to build new constituents after the devastating economic meltdown of 2000 and the extreme political instability that followed. In any case, both Néstor and Cristina Kirchner have been staunch supporters of the criminal justice process.

26 Orlando Letelier, a former Chilean Foreign Minister under Salvador Allende, who was killed, along with his American colleague, Ronni Moffit, in the suburbs of Washington, D. C. in a car bomb planted by Pinochet regime operatives. Manuel Contreras, head of Pinochet’s secret police, was tried and convicted of this crime.

as unique opportunity to challenge Pinochet just as he was retiring as commander in chief of the armed forces and was about to take up his seat in the Senate as senator for life<sup>27</sup>. In early 1988, two different criminal complaints were lodged against Pinochet. The first, in January 1998, was presented by family members of the victims of “Caravan of Death” military operation<sup>28</sup>, followed a few weeks later by a complaint lodged by the Communist Party for the murder of party leaders during the dictatorship. The tactic, as Collins notes, was more political than legal in intent, and its promoters doubted its effectiveness. They were especially concerned upon learning that both cases had been assigned to Juan Guzmán, a conservative judge who, by his own admission, had toasted with champagne the 1973 *coup d'état* that put Pinochet in power with friends and family<sup>29</sup>. Guzmán surprised all parties when he allowed the complaint and launched an investigation. A few months later, in September 1998, a Supreme Court ruling was handed down accepting the thesis put forth by human rights lawyers that in the case of forced disappearance, since no body had yet been found or identified, amounted to an ongoing, continuous crime and that as a result, the 1978 amnesty law is not applicable. This ruling was subsequently upheld in another case and became key to forward movement in human rights prosecutions in Chile<sup>30</sup>.

The arrest of Pinochet in London in October that year, and the efforts to extradite him to Spain to stand trial on charges of crimes against humanity, electrified efforts to bring those responsible for human rights violations to justice in Chile<sup>31</sup>. Collins reports that between October and December 1998, over 300 criminal complaints were lodged against Pinochet and others. Judge Guzmán successfully processed Pinochet three times for various human rights crimes, though Pinochet and his lawyers ably manipulated the legal system resulting in long delays. In the end, Pinochet died, in December 2006, without having stood trial for the crimes of which he stood accused<sup>32</sup>. Nevertheless the Pinochet affair

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27 Cath Collins, “Human Rights Trials in Chile During and After the ‘Pinochet Years’”, *International Journal of Transitional Justice* 4:1 (2010), pp. 67-86.

28 See Patricia Verdugo, *Chile, Pinochet, and the Caravan of Death* (Lynne Reinner, 2001).

29 See Guzmán’s declaration in the documentary film, *The Judge and the General* (2008) produced by Elizabeth Farnsworth & Patricio Lanfranco.

30 This draws on the insightful analysis presented in Collins (2009), *Ib*.

31 See Roht-Arriaza, *The Pinochet Effect*, and Collins, “Human Rights Trials in Chile”.

32 Interview with author, Judge Juan Guzmán, Lima, August 18, 2008.



forced open the issue of ongoing impunity for human rights violations in Chile, despite the efforts of successive governments to lay the issue to rest. As a direct result of this, the government created new spaces of discussion with civil society groups and the armed forces, including the *Mesa de Diálogo*, and later established a second truth commission (the Valech Commission) to examine cases of political prisoners and torture, which had not been included in the first truth commission's mandate.

The international attention the Pinochet affair brought to Chile's failure to prosecute perpetrators of grave human rights violations made it increasingly difficult for the Chilean government to ignore civil society's growing demands for accountability. But, as Collins notes, it was the prior work of human rights groups that laid the groundwork for the opening of criminal prosecutions in Chile<sup>33</sup>. The election of Michele Bachelet to the presidency—a former political prisoner whose father, a member of the Chilean armed forces, was killed by the Pinochet dictatorship—also generated a new set of opportunities for criminal trials of those accused of human rights violations. Though the Bachelet government did not promote trials as state policy, it was also more receptive to the accountability agenda. Though the 1978 amnesty law remains on the books, judges have stopped applying it in cases involving crimes against humanity. More than 1400 criminal prosecutions are underway or have been completed in Chile, the majority involving crimes of forced disappearance or extrajudicial execution. Between 2000 and May 2011, 773 members or former members of the state security forces have been processed and/or sentenced for human rights crimes, with 245 firm sentences (confirmed by the Supreme Court) to date<sup>34</sup>.

### 3.2. Uruguay

After twelve years of military rule, Uruguay returned to democracy in 1985. Like Chile, Uruguay's transition from authoritarianism was

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33 Cath Collins, "State Terror and the Law: The (Re)Judicialization of Human Rights Accountability in Chile and El Salvador", *Latin American Perspectives* 35:5 (2008): 20-37.

34 Boletín Informativo No. 14 del Observatorio de Derechos Humanos, Universidad Diego Portales (June/August 2011), pp. 2-3. Rights observers note, however, that the Supreme Court has applied a number of "attenuating circumstances" that result in the effective reduction of sentences and sometimes means that those convicted of human rights violations actually never serve a day in prison. See *Informe Anual Sobre Derechos Humanos en Chile 2011*, Observatorio de Derechos Humanos, Universidad Diego Portales, <http://www.derechoshumanos.udp.cl>

a negotiated one. The armed forces remained powerful, and the conservative government that took power in 1985 promoted a policy of “forgive and forget” regarding past atrocities committed by state actors. Unlike neighboring Argentina, whose new government adopted the human rights agenda as its own and promoted both a truth commission and criminal trials against the members of the *juntas* that ruled during the military dictatorship, the conservative government that led Uruguay’s transition did not consider a truth commission desirable. In the face of the absence of a state policy on human rights, individual survivors and relatives of victims and human rights organizations began filing complaints in court. In 1986, as the first trial of a military officer accused of human rights abuses was to begin, the then minister of defense, retired General Hugo Medina, announced that the accused officer would not appear before the court. Presumably to avert a constitutional crisis, the Uruguayan Parliament passed the *Ley de Caducidad de la Pretensión Punitiva del Estado*, known as the Expiry Law, which ended the state’s efforts to criminally prosecute members of the security forces accused of human rights violations<sup>35</sup>. Critics charged that the law was essentially a blanket amnesty law designed to shield perpetrators of human rights abuses from criminal prosecution and called for its repeal. Government leaders argued instead that the Expiry Law was the moral equivalent of the amnesty that had been granted to political prisoners, including former *guerrilla* leaders, just after the transition to democracy (many of whom had been arbitrarily detained, held without due process, and brutally tortured for many years), and was essential to securing democratic stability<sup>36</sup>.

Almost immediately a group of legislators presented a bill challenging the law’s legality, but it did not prosper. Human rights groups presented a recourse of unconstitutionality to the Supreme Court, but the Court upheld the law’s legality by a split vote of 3-2 in 1988. In the meantime, a broad coalition of left-wing politicians, social movement and labor leaders, human rights activists, survivors of the dictatorship, and family members of victims joined forces to challenge the amnesty law through a referendum. After a massive grass-roots effort to obtain the

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35 The law’s full title is the *Ley de Caducidad de la Pretensión Punitiva del Estado*.

36 These debates are outlined by Lawrence Weschler, *A Miracle, A Universe: Settling Accounts with Torturers* (University of Chicago Press, 2nd ed., 1998).

signatures of 25% of registered voters, the referendum was held in April 1989. The initiative lost by a slim margin<sup>37</sup>.

With the path to seeking accountability for human rights violations thus closed domestically, human rights organizations lodged a complaint to the Inter-American Commission of Human Rights (CIDH). The Commission stated in its 1992-3 report that Uruguay's Expiry Law violated a series of human rights treaties and obligations and should be repealed<sup>38</sup>. The Uruguayan state ignored this recommendation. In the meantime, the vote upholding the amnesty law seemed to paralyze Uruguay civil society, and there was little movement on the issue in the following years.

This began to change however towards the end of the decade, partially in response to the new wave of efforts to achieve justice and accountability in neighboring Argentina. Uruguayan civil society, especially survivors, relatives of victims, human rights organizations, trade unions, and some sectors within the Frente Amplio, a coalition of left-wing parties, began to mobilize again around the issue of impunity. Senator Rafael Michelini (son of slain Senator Zelmar Michelini) and the Association of Mothers and Relatives of the Disappeared convoked a March of Silence on May 20, 1996 to demand truth, justice, and memory, to massive response.

At around the same time, one case in particular galvanized public opinion: that of the missing granddaughter of Argentine poet Juan Gelmán. Gelmán's son and daughter-in-law were among those disappeared in the 1970s during the Argentine military dictatorship, but there was credible evidence that Gelmán's daughter-in-law, who was pregnant at the time of her detention, had been illegally brought to Uruguay and gave birth there to a baby girl. The baby was handed over to a military family and her mother was killed. Gelmán's public search for his missing granddaughter,

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37 Jo-Marie Burt, *"El pueblo decide": A Brief History of the Referendum Against the Impunity Law in Uruguay* (Montevideo: Servicio Paz y Justicia, 1989).

38 Comisión Interamericana de Derechos Humanos, *Informe Anual de la Comisión Interamericana de Derechos Humanos 1992-1993*, Informe No. 29/92, March 12, 1993. It would be nearly a decade before that the Inter-American Court of Human Rights ruled on the question of amnesty laws. In 2001, in the *Barrios Altos* case, the Court ruled that amnesty laws whose intention is to prevent criminal prosecutions for grave violations of human rights violate the American Convention on Human Rights and lack legal effect. In a subsequent ruling the Court determined that this determination was valid universally. See Douglas Cassel, "The Inter-American Court of Human Rights", in *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin America* (Washington, D. C.: Due Process of Law Foundation, 2007).

Macarena, captivated Uruguayan society, contributing to the decision of then-President Jorge Battle to establish a governmental body to investigate the fate of the disappeared.

The Peace Commission, as it was named, was controversial: some were satisfied that the state had finally acknowledged responsibility for the disappearances, while others remained critical of its limited reach (it did not investigate other crimes including assassinations, arbitrary detention, and the widespread use of torture of political prisoners) and challenged some of its findings<sup>39</sup>. Nevertheless, there were some important breakthroughs. In 2000, Macarena Gelman was identified, to great public impact, particularly since President Sanguinetti had earlier denied her existence. The discovery of another missing child, Simón Riquelo, who had been taken away from his mother Sara Méndez when he was a month old when she was detained in Argentina, gave further impetus to demands for truth and justice in Uruguay.

In the meantime, Uruguayan lawyers, taking their cue from their counterparts in Argentina and Chile, began to seek out loopholes in the Expiry Law<sup>40</sup>. In 2000, lawyer Pablo Chargoña brought a writ of *habeas data* before the courts in the case of Elena Quinteros, a teacher who was forcibly disappeared in 1976, arguing that international law gave victims and their family members the right to know the truth about the fate of the victims and demanding a full investigation<sup>41</sup>. For the first time, a judge, Estela Jubette, ordered the Executive to carry out an investigation in this case, based on the contents of Article 4 of the Expiry Law. This ruling was upheld on appeal, and on October 19, 2002, judge Eduardo Cavalli formally charged former foreign minister Juan Carlos Blanco with the kidnapping and disappearance of Elena Quinteros based on

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39 In key cases, the Peace Commission had issued false information, as later discovered through the investigative reporting of journalist Roger Rodríguez. For example, the Commission reported that Simón Riquelo, the son of Sarah Méndez who was kidnapped at the age of one month when his mother was detained, was dead; in March 2002 he was identified living with his adopted Argentine parents (the father was a retired police officer). The Commission repeated the military's assertion that all the disappeared had been thrown into the sea and thus there were no remains to be exhumed, yet in 2005, the remains of two bodies were discovered after a new left-wing president ordered exhumations in a military base. Interview with author, Roger Rodríguez, Montevideo, June 1, 2007. Interviews with family members of the disappeared and survivors of the dictatorship conducted in May and June 2007 revealed mixed reviews of the Peace Commission.

40 Interview by author, Pablo Chargoña, Montevideo, June 4, 2007.

41 *Ib.*

Chargoña's argument that the Expiry Law did not protect civilians (or high-ranking military officers) from criminal prosecution and that disappearance was an ongoing crime and therefore the Expiry Law was not applicable). Blanco was detained, the first time anyone in Uruguay had been arrested and charged with human rights violations committed during the military regime. In 2001, lawyers brought the first petition against former dictator Juan María Bordaberry, arguing that the amnesty law only provides immunity to military and police officials but not to civilians or military leaders who may be responsible for human rights violations<sup>42</sup>. A handful of state prosecutors, most notably Mirta Guianze, agreed to reopen some of these cases. This renewed legal activism, along with the 2005 election of Tabaré Vázquez of the Frente Amplio, opened new possibilities for prosecutions.

Though Vázquez explicitly stated in his campaign that he would not repeal the Expiry Law (presumably to avoid conflict with the armed forces and also for electoral reasons), he did say he would enforce the application of article 4, which called for a full investigation into the disappeared, a promise he fulfilled<sup>43</sup>. Moreover, in practice, as human rights lawyers brought cases before the judiciary, Vázquez applied a different interpretation of the Expiry Law than his predecessors<sup>44</sup>. The Expiry Law establishes that when a case involving accusations of human rights violations by military or police personnel appears before the judiciary, it should be derived to the Executive, who is to determine whether the judicial process should continue or not; since the law's creation the Executive routinely ruled to terminate judicial investigations. For the first time, Vázquez authorized investigations into a number of cases: those involving detained-disappeared, those involving children, and those that occurred outside Uruguayan territory. Also, the courts

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42 Interview by author, Walter León (one of the lawyers in this case), Montevideo, June 5, 2007.

43 The investigation, carried out by an interdisciplinary team of researchers, was under the coordination of Álvaro Rico of the University of the Republic of Uruguay: *Investigación histórica sobre la dictadura y el terrorismo del Estado en el Uruguay (1978-1985)* (Universidad de la República Oriental del Uruguay/Comisión Sectorial de Investigación Científica, 2008).

44 Critics noted however that the Frente Amplio had sufficient votes in Congress to repeal the Expiry Law and failed to do so. As a result a broad front of civic groups launched a campaign to overturn the law in a plebiscite, which took place in 2009 in tandem with presidential elections. The plebiscite lost by a slim margin. However, a week before the vote, the Supreme Court—reversing its 1988 ruling—ruled that the Expiry Law was unconstitutional.

determined that civilians and the commanders of the military or police are not covered by the amnesty law and can be prosecuted.

A handful of state prosecutors have vigorously sought to move cases forward, complementing the work of human rights lawyers and activists<sup>45</sup>. As a result, some 25 cases have moved forward in the Uruguay courts between 2006 and 2011. In 2006, former president Juan María Bordaberry, who was elected under questionable circumstances in 1973 and then suspended democratic institutions and ruled with the backing of the armed forces until he himself was deposed in 1976, was arrested for a series of political murders, including the assassination of opposition legislators Zelmar Michelini and Héctor Gutiérrez Ruiz in 1977 while in exile in Argentina. In 2010 he was convicted and sentenced to thirty years in prison for violation of the constitutional order, and for two politically motivated murders and nine disappearances. Juan Carlos Blanco was also found guilty in 2010 of being the co-author of a number of politically motivated murders. In 2009, a Uruguayan court found eight high-ranking members of the armed forces, including one of the leaders of the military dictatorship, General Gregorio Álvarez, guilty of 28 politically motivated assassinations and sentenced them to 20 to 25 years in prison. The sentence against Álvarez was upheld on appeal in 2010. The sentence against Bordaberry had not yet been confirmed before his death in July 2011.

Despite these significant steps forward, the Expiry Law continued to represent an obstacle to investigation and prosecute hundreds of other cases. Civil society efforts to have the law nullified through a second plebiscite in 2009 failed. However, the week before vote, the Supreme Court, in a reversal of its 1988 decision, ruled that the Expiry Law was unconstitutional<sup>46</sup>. This was a dramatic development, but its effect was muted since such rulings only apply to the specific cases under review and so did not have a more general effect.

The decision handed down by the Inter-American Court of Human Rights in March 2011 shifted fundamentally the dynamics in Uruguay. In 2006, Juan Gelman and his granddaughter Macarena brought their case to the Inter-American Commission for Human Rights, arguing that

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45 See the essays in Gabriela Fried & Francesca Lessa, Eds., *Luchas contra la impunidad: Uruguay 1985-2011* (Montevideo: Trilce, 2011).

46 “Ley violó separación de poderes”, *La República* (October 20, 2009); “La justicia uruguaya declara inconstitucional la amnistía a la represión militar”, *El País* (October 20, 2009).

the Expiry Law prevented the investigation of Macarena's parents and sanction of those responsible. Ultimately the case went to the Inter-American Court, which, following earlier jurisprudence that amnesty laws designed to give impunity to state agents responsible for human rights violations violated the American Convention on Human Rights, ruled in favor of the Gelmans. The Court determined that the Expiry Law was illegal and ordered the Uruguay state to ensure it no longer inhibits judicial inquiry and prosecution of human rights violations. Though it took months of negotiation, the Uruguayan Parliament passed a law in October 2011 that not only nullifies the Expiry Law but also establishes that the crimes committed during the dictatorship are crimes against humanity and therefore statutes of limitation do not apply.

As this article goes to press, media reports suggest that dozens if not hundreds of complaints are being lodged in Uruguay courts involving crimes that until now could not be prosecuted because of the Expiry Law. After years of complete impunity, and several years of seeking ways to investigate and prosecute human rights violations by circumventing the Expiry Law, Uruguay has thus taken a major step forward in anti-impunity efforts that will certainly reverberate throughout the region. The role played by civil society actors and lawyers challenging the Expiry Law through domestic and international courts was fundamental to these new developments, though their efforts may have had less success in a different political context. As in previous cases, it was the confluence of civil society action on both the political and legal fronts demanding an end to impunity; the presence of receptive legal operators in the Uruguay judiciary; and a left-wing government willing to revisit the issue of impunity, that resulted in this dramatic shift in Uruguay.

#### **4. Peru: Partial Accountability**

On December 30, 2009, the Peruvian Supreme Court ratified the conviction of former president Alberto Fujimori and his sentence of 25 years in prison for his role in several grave violations of human rights<sup>47</sup>. The Fujimori trial and verdict has been hailed by international law and human rights experts as an unimpeachable legal process that marks a watershed in anti-impunity efforts in Peru and around the globe. The

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47 On the Fujimori trial, see J. Burt, "Guilty as Charged: The Trial of former Peruvian President Alberto Fujimori for Grave Violations of Human Rights", *International Journal of Transitional Justice* 3:3 (November 2009), pp. 384-405.

Fujimori trial not only set new precedents in human rights jurisprudence; it also established that the Peruvian Truth and Reconciliation (CVR) report and declassified government documents could be used as evidence; and sustained the argument that in complex human rights cases such as this, where direct orders and evidence may have been destroyed or may have been only verbal in nature, circumstantial evidence may be sufficient in determining criminal responsibility. While the judges relied on domestic law to prosecute Fujimori of the crimes of aggravated homicide, assault and kidnapping, they noted that these were part of a generalized pattern of human rights violations that constituted a state policy, and that in international law these constitute crimes against humanity. However, the anticipation that the Fujimori trial would energize Peru's accountability efforts was tempered by the awareness that justice in other human rights cases is proving increasingly elusive in Peru. Even so, in Peru the significant achievements to date cannot be understood without reference to the important role played by civil society actors and their dedicated efforts to promote accountability for grave human rights violations.

During Peru's internal armed conflict (1980-2000), human rights organizations and survivors and relatives of victims pressed tirelessly and often at great cost in favor of criminal prosecutions for human rights violators. They documented rights abuses, presented writs of *habeas corpus*, litigated human rights cases, and defended victims, but the norm was impunity for violations committed by state agents<sup>48</sup>. While many cases were brought before the courts during the 1980s and early 1990s, the military justice system would interpose jurisdictional claims, which the Supreme Court almost universally accepted; the result was impunity for state-sponsored rights abuses. In 1995, two amnesty laws were passed that institutionalized impunity for human rights abuses in Peru.

With the collapse of the authoritarian regime of Alberto Fujimori (1990-2000), the human rights community lobbied the interim government of Valentín Paniagua (2000-2001) for a truth commission to investigate human rights violations committed during the 1980s and 1990s. Paniagua created the Peruvian Truth Commission in June 2001, and the body was ratified by newly elected President Alejandro Toledo (2001-2006) and renamed the Peruvian Truth and Reconciliation Commission (CVR). The

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48 According to Peru's Truth and Reconciliation Commission, the *Sendero Luminoso* (Shining Path) insurgent movement was responsible for the largest percentage of deaths due to violence (54%), while state security forces were responsible for approximately 34% of all deaths.



Peruvian human rights movement played a crucial role in pressing for a truth commission that would adopt an integral vision of transitional justice, meaning that it would not simply investigate the horrors of the past, but also attempt to identify those responsible and hold them accountable for their crimes, as well as to propose individual and collective reparations to victims and their family members. When the CVR presented its final report in 2003, it also handed over 47 cases to the Public Ministry for criminal prosecution<sup>49</sup>. The majority of these cases involved members of government security forces, since most of the crimes committed by *Sendero Luminoso* had already been prosecuted, and those responsible, including the organization's principal leaders, were either in prison or had been killed<sup>50</sup>.

Even before the truth commission was created, however, the efforts of the human rights community to promote an accountability agenda fundamentally set the tone for this process. In the face of obstacles to justice within Peru, human rights organizations began bringing key cases before the Inter-American system of human rights. Dozens of cases made their way to the Inter-American Court of Human Rights, and in many the Court found the Peruvian state responsible and ordered criminal investigations. The watershed mark came in March 2001, when the Inter-American Court handed down its decision in the *Barríos Altos* case. The Court found the Peruvian state responsible for the 1991 massacre, in which 15 Peruvian citizens, including an eight-year-old child, were murdered by a state-sponsored death squad and four others were gravely wounded, and ordered the Peruvian state to investigate and punish those responsible and to provide reparations for the survivors and relatives of the victims. The Court also established that the amnesty laws passed by the pro-Fujimori Congress in 1995 violated Peru's obligations under the American Convention on Human Rights and declared the law devoid

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49 Javier Ciurlizza & Eduardo González, "Verdad y justicia desde la óptica de la Comisión de la Verdad y Reconciliación", in *El legado de la verdad. La justicia penal en la transición peruana*, Lisa Magarrell & Leonardo Filippini, Eds., (Lima: International Center for Transitional Justice/IDEHPUCP, 2006).

50 After an Inter-American Court ruling that the military courts violated due process rights, hundreds of terrorism suspects, including Abimael Guzmán, were subsequently retried. See Luis E. Francia Sánchez, "Los procesos penales contra las organizaciones terroristas", in *El legado de la verdad. La justicia penal en la transición peruana*, Lisa Magarrell & Leonardo Filippini, Eds., (Lima: International Center for Transitional Justice/IDEHPUCP, 2006).

of legal effect<sup>51</sup>. This ruling has since been upheld in various legal proceedings in Peru, including in a ruling by the country's Constitutional Tribunal, which has made criminal prosecutions for human rights violations possible.

Between 2004 and 2005, a special criminal system to prosecute human rights cases was established, as recommended by the CVR. Human rights activists hailed this as a positive development because it was meant to ensure specialization of prosecutors and judges in human rights cases while also allowing them to dedicate their time exclusively to human rights cases so as to ensure celerity in the adjudication process. While there are signs of progress, there are also a number of concerning trends particularly in recent years that raise issues about Peru's accountability efforts.

The first sentence to be handed down was in 2006, in the case of the forced disappearance of university student Ernesto Castillo Páez. Four police officers were convicted for up to 16 years for this crime, and for the first time Peruvian courts referred to forced disappearance as a crime against humanity. A number of other convictions were handed down between 2006 and 2008 in emblematic cases, including the disappearance of communal authorities in Chuschi and the disappearance of journalist Hugo Bustíos. In 2008, former head of the National Intelligence Service (SIN), Julio Salazar Monroe, was convicted for his role in the 1992 disappearance and killing of nine students and a professor from La Cantuta University. Fujimori was convicted the following year for his role in this and other human rights cases, including the Barrios Altos massacre.

However, enthusiasm over human rights prosecutions in Peru was tempered by the growing reality of serious problems in Peru's criminal justice process, including the sluggish pace of investigations in the Public

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51 Inter-American Court, *Barrios Altos* case, Judgment of March 14, 2001, Ser. C, No. 83, Par. No. 1. Peruvian human rights NGOs, represented by the National Human Rights Coordinator, litigated this case before the Inter-American Court, and specifically requested the Court to make specific recommendations beyond the investigation and sanction of those responsible for the Barrios Altos massacre in order to dismantle the mechanisms that had guaranteed impunity in Peru. In response the Court ruled that the amnesty law violates the Peruvian state's obligations and declared it without legal effect. Personal communication, Ronald Gamarra, one of the lawyers involved in this case, Lima, May 2008. In a subsequent sentence, the Court argued that this ruling is valid for the entire region; Inter-American Court, *Barrios Altos* case, Judgment of September 3, 2001, Ser. C, No. 83, par. 18.

Ministry; weak formulations of indictments and evidence collection by state prosecutors; persistent refusals by government and military officials to provide access to information necessary to identify alleged perpetrators and advance criminal investigations; and the application of questionable legal concepts have conspired to undermine the early success of Peru's efforts to hold perpetrators of human rights violations accountable. This scenario has been further complicated by a hostile political environment for human rights prosecutions under the previous government of Alan Garcia (2006-2011).

Public Ministry officials register approximately 1700 complaints of human rights violations under investigation registered by the Public Ministry<sup>52</sup>. Less than two percent of cases have been sentenced (28) and of these, a large number are acquittals. Only four percent of cases are in advanced stages of the judicial process (*e.g.* have formal indictments and are either undergoing judicial investigation prior to formal setting of public trial date, or are currently in public trial). Approximately 45% of cases have either been closed due to lack of sufficient evidence or inability to identify perpetrators. (During Peru's internal armed conflict, soldiers often used pseudonyms to protect their identity, and Defense Ministry officials have steadfastly refused to release information such as personnel files to help prosecutors identify the perpetrators.) Nearly half of the total cases remain under investigation in the Public Ministry. Despite the large number of cases, the special sub-system created to investigate and adjudicate human rights cases has seen its mandate expand to include cases of drug trafficking, money laundering, kidnapping, and other crimes, diluting the effectiveness of the specialized sub-system and generating significant delays in the judicial process at all levels. Finally, while Peru's Constitutional Tribunal has stated that international law should be considered by Peruvian courts in trying human rights cases, and has been used by judges to support verdicts condemning perpetrators of human rights crimes in several cases, in a number of recent cases judges have ignored these precedents or revised them in such ways that result in the acquittal of alleged perpetrators. A brief comparison might help put this in perspective: in 2010, in Argentina 110 defendants were convicted

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52 Jo-Marie Burt & Carlos Rivera, *El proceso de justicia frente a crímenes contra los derechos humanos* (Instituto de Defensa Legal, forthcoming).

of human rights violations and nine were acquitted; in the same year in Peru, 21 were convicted and 27 were absolved<sup>53</sup>.

These trends are not isolated incidents, but occurred in the context of political interference in the judicialization process during the García administration that seem designed to halt accountability efforts in Peru. Shortly after García's inauguration in 2006, the state announced that it would provide legal defense to all state agents accused of human rights violations, even though many victims lack legal representation as well as adequate measures of protection for witnesses. Successive defense ministers have made generic accusations that these trials constitute 'political persecution' of the armed forces, and routinely attack human rights organizations in the press. In addition, there have been repeated efforts to pass amnesty laws that would end human rights prosecutions. In 2008 when a leading APRA congresswoman proposed a law that would provide for a general amnesty for military and police officials accused of human rights violations, but the initiative did not prosper. In September 2010, President García passed Decree Law 1097, which critics charged was a veiled amnesty law designed to halt human rights prosecutions. Domestic and international outcry forced García to revoke the decree law, but calls for general amnesties continue to be heard inside and outside the halls of Congress. Prosecutors and judges note in private conversations that they have been subjected to different forms of political pressure by the sectors of the armed forces eager to see criminal trials for human rights violations ended. During the García government, the president, vice-president and former navy officer Luis Giampetri, and successive defense ministers have accused human rights organizations and state prosecutors of "persecution" of the armed forces. In effect, despite significant progress achieved by pro-accountability actors, the reduced political space for accountability efforts under the García government has presented a fundamental challenge for accountability efforts in Peru.

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53 Statistics for Argentina from the Centro de Estudios Legales (CELS), March 24, 2011. In the case of Peru, 19 of the 21 convicted in 2010 were convicted in the same legal process for the accumulated cases of the Barrios Altos massacre, and the disappearances of nine peasant leaders from Santa and journalist Pedro Yauri. Only two state agents were convicted by the primary human rights tribunal, the Sala Penal Nacional, in 2010. Data from research on human rights prosecutions conducted in Peru by author; for project research findings see [www.rightsperu.net](http://www.rightsperu.net).

In July 2011 President Ollanta Humala was inaugurated president of Peru. A former military officer, in 2006 Humala himself faced charges of responsibility for human rights violations committed when he was a commanding officer in Madre Mía. His case was closed after two witnesses recanted their testimony. Despite concerns about Humala's past record, human rights observers note that he was the only presidential candidate to support the post-CVR agenda in favor of truth, justice and reparations, and he recently stated that his government would not support an amnesty law for human rights violators. However, the problems within the Public Ministry and the Judiciary noted here remain unresolved and without substantive reforms it is likely that few cases will ever come to trial, and many of these may end in acquittals. Thus, despite significant advances, there remains considerable impunity in Peru and growing concerns that the progress made to date will be reversed.

## **5. Conclusion: Lessons from Latin America's Experiment with Accountability**

This review of recent accountability efforts in Latin America highlights the fundamental role played by civil society groups, particularly human rights organizations and groups of survivors and relatives of victims, in pursuing truth and justice in the region. However, cases examined here also suggest that these efforts operate in a broader political context that must also be examined. In other words, there is a complex dynamic between state and civil society actors that contributes to the expansion or contraction of opportunities for domestic human rights prosecutions in the region. Each case suggests that even when accompanied by substantive judicial reform, the accountability agenda is vulnerable to shifts in the political winds. At the same time, the cases examined here highlight the way civil society pro-accountability actors respond to contractions in domestic opportunities for human rights prosecutions by going outside the boundaries of the nation-state to international tribunals and arenas where they can press their demands and seek redress on behalf of victims.

The processes that have taken place or are underway in Argentina, Chile, Uruguay, and Peru represent the promise of criminal trials in cases of grave human rights violations. They affirm central tenets of democratic rule: equality before the law; punishment of perpetrators of rights violations restores rule of law, particularly in instances of state repression

or terror, as it symbolizes the dismantling of structures of repression that benefitted from the power of the state; reparations to victims; and in some cases, additional knowledge about the fate of victims. There is also educational value to society in hearing the testimony of survivors, relatives of victims, and other witnesses to the horrors of the past; in many ways these trials are contributing to rewriting the history of the recent past in Latin America to more fully incorporate the voice of those silence by years of military rule and authoritarian government.

Nevertheless, the picture is far from perfect. Criminal trials in cases of grave human rights violations are slow by nature. In Argentina one estimate suggests that at the current pace it will take 100 years for the current trials in progress to be complete; in Peru, as we have seen, things move at an even more sluggish pace, threatening to undermine the very credibility of the process. In addition, legal processes are subject to all kinds of manipulations: defendants often successfully maneuver the legal process to avoid prosecution or delay proceedings; prosecutors are (perhaps by necessity) selective about which trials to try, which ones must be forgone. Human rights cases are by definition complex cases, as they involve crimes that are often carried out in secrecy, many years ago. Witnesses die or, as in the case of Julio López in Argentina, face reprisals for speaking out in trials. And as we have noted already, prosecution efforts also clearly prove vulnerable to shifts in the political context. There are also tensions within human rights organizations about whether prosecutions are the top priority given other pressing needs, whether this may be the demand for truth via exhumations, as is evident in Argentina and Peru, or current forms of violence and organized crime, as is the case in Central America.

In addition, the sustainability of these processes remains an open question. In some cases, as in Argentina, there is little vocal public support for the military and police officials who are being prosecuted; indeed, as Gastón Chillier from CELS has noted, virtually no one in Argentina contests the legitimacy of the human rights trials<sup>54</sup>. This is not the case in other places, such as Peru, where powerful alliances have been reformed to reduce the scope of human rights prosecutions. In theory trials uphold democratic ideals that are central to the rule of law, including equality before the law and the duty of the state to hold all those accountable for the crimes they have committed regardless

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54 Chillier, *Ib.*

of privilege or position. But how are trials understood by the broader public? How do people talk about trials, criminal justice, and related issues in relation to existing political struggles? How do we assess the relationship between trials for human rights violations and broader questions of public support, public apathy, as well as organized political support for or resistance to such trials?

Striking shifts have occurred in Latin America in the past decade in favor of accountability. But the gains made are not assured, and elsewhere in the region, impunity remains the name of the game. While the progress seen to date should be celebrated, it can only be tempered by the ongoing reality of impunity that continues to characterize most of the region.





**PART III**  
**THE RIGHT TO TRUTH AND THE ROLE OF MEMORY**



## WHERE ARE TRUTH COMMISSIONS HEADED?

*Eduardo González Cueva*

Three decades after the work of the National Commission on the Disappearance of Persons (CONADEP), in Argentina<sup>1</sup>, it seems evident that while truth commissions arose as an *ad hoc* response to transitional situations, they are increasingly seen as a new instrument of justice. Their legitimacy is now independent of moments of political transition, and they are seen as neither a replacement, nor an alternative, to criminal justice systems.

Commissions are still being created after long periods of authoritarianism and armed conflict, but they are also set up after brief, intense political rioting that has not resulted in regime change, or to examine the behavior of institutions that have committed abuses within democratic governments during times of peace.

At the same time, though truth commissions still have great flexibility to adapt to the specific situations of each country, there is now a systematization of best practices and an identification of legal standards applicable to their operation. This standardization has the advantage of putting the breaks on inauthentic commissions created to disguise a lack of political will to conduct judicial prosecutions. At the same time, however, standardization carries the risk of limiting creativity or imposing overly general formulas that may be inadequate for specific situations.

This paper examines how truth commissions arose in a process that combined creativity and pragmatism; it describes the evolution of international standards related to their practice; and finally, it offers a hypothesis on their future development.

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1 Republic of Argentina - Office of the President of the Republic. Executive Order 187 of December 15, 1983: "National Commission on the Disappearance of Persons - Formation - Staffing and Functions".

## 1. The Beginnings: Between Political Priorities and Legal Demands

The political transitions experienced in Latin America during the '80s shared a common feature of an awareness among democratic groups that once the military returned to its barracks, it would still wield a significant share of political power—in some cases, enshrined in the new constitutional order. At the same time, the transitions of the '80s were driven by a significant development: the emergence of a social movement favoring human rights, and the growing importance of these rights in the speech and legitimacy of the opposition to military dictatorships.

As a result, democratic political factions, taking the baton from the government, knew that their legitimacy depended in part on their effective commitment to human rights. To not seek justice for the crimes committed by dictatorships would have caused serious rejection by citizens. However, it was also clear that seeking full justice against the perpetrators would create severe tensions with the still powerful military sectors. The philosopher Carlos Nino, an advisor to Argentine President Raúl Alfonsín, explains the need they had to find a safe route between these two risks, since the opposition's victory had not been overwhelming, nor the military establishment so weakened:

Unlike Germany or Japan after the Second World War, in Argentina there was no invading army or domestic armed force that would support trials. And, unlike Greece, where some military factions did not oppose trials, the army in Argentina was united in its rejection of these<sup>2</sup>.

While the civilian regimes were undertaking this tactical evaluation, they were also convinced that the criminal justice system was an inadequate instrument, or at least an extremely limited one, given the concrete conditions in their respective countries. Unlike the war-torn countries, Argentina and Chile had judicial apparatuses that had survived the dictatorships, but it seemed obvious that these offered no realistic chance of doing justice. Their challenge was to bring massive lawsuits involving the entire chain of command of complex institutions, with all the attendant guarantees of due process: the national judicial

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2 Nino, Carlos. "Response: The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina". In Kritz, Neil (ed.). *Transitional Justice. How Emerging Democracies Reckon with Former Regimes*, p. 421.

systems were simply not up to this demand, and the possibility of using international courts was nonexistent in the '80s.

The order establishing the Truth and Reconciliation Commission in Chile (the first to bear this name) was explicit about the immediate unavailability of judicial functions: "(...) the prosecution of each private case to prove the crimes that may have been committed, individually identify those responsible, and impose appropriate sanctions" was not in question, but it was noted that "the use of lawsuits for such purposes would not allow hope for the country to achieve a global assessment of the occurrences within a more or less brief timeframe"<sup>3</sup>.

The potential delay would conspire against national reconciliation, presumably because it would not let the truth be made public for a long time, and would keep the country mired in a long court process with no foreseeable end.

Civilian governments, then, who had come to power through the military dictatorships' crisis of legitimacy, could hardly risk their own reputations over atrocities committed by the repressors. However, at the same time, they saw that judicial proceedings were not a perfect answer and believed that these could even be dangerous.

It is worth remembering that the Latin American transitions of the '80s occurred under the intellectual and political influence of the Spanish transition of the late '70s. The Spanish model, of a negotiated transition, which banished from the political scene any claim for justice, was the only available benchmark for the civilian democrats navigating these shifts. Pulled between a model that kept silent on the issue of justice and the demands of civil society, civic leaders had to cut a path of their own.

The commission that emerged in El Salvador in 1991 was also a response that combined political pragmatism with the realization that the court system would have insufficient ability to act. Indeed, the parties to the conflict decided not to address the issue of transitional justice directly in their negotiations, but created the Truth Commission as a tool to channel what they did think was possible: an establishment of the facts regarding the mutual accusations launched during the war.

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3 Executive Branch of the Republic of Chile: High Executive Order 355 of 1990, "Creating the Truth and Reconciliation Commission".

The Salvadoran Truth Commission, like that in Chile, was proposed as a tool for settling the facts, without prejudice to the legal obligations of the State, but with a speed that the courts would be incapable of rivaling<sup>4</sup>.

The truth commissions arose, then, as part of a creative response to substantive demands for justice that could not be satisfied within the normal procedures of the judicial system. In this first phase, the essential elements of these new institutions were:

- Pragmatic justification: The commissions did not deny the rights of victims to obtain an effective remedy, but tacitly assumed that the judiciary would be unable to provide such remedy. Access to the truth seemed to be conceptualized, in these early experiences, as one of the products of the judicial process, but which could also be obtained in other, less complex and more expeditious ways than a trial.
- Limited mandate and powers: The first commissions focused on those facts that their creators, interpreting public opinion, considered most urgent or rather most likely to be effectively investigated. The Argentine commission focused solely on forced disappearances, and the Chilean commission of 1990 addressed those violations that resulted in the death of the victim. The Salvadoran commission received a mandate to work for six months only, despite the magnitude of the conflict.
- Lack of attention to societal participation in the investigations: The commissions were created as specialized groups, which were entrusted with discovery of the facts, and to later disseminate these facts in written reports. Neither the mandates nor the practice of the first Latin American commissions revealed a particular interest in building alliances or channels of communication between the commissioners and civil society. The work of these commissions was conducted in private.

It is worth noting that the initial Latin American commissions can be seen as an adaptation, or a chance discovery, of an existing institution in the Anglo-Saxon political and legal tradition: the *commission of inquiry*, with parliamentary mandate. Indeed, the United Kingdom and

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4 El Salvador - Mexican Peace Accords, April 27, 1991. Provisions referring to the formation of a truth commission.

the countries that share its legal system and government have long known the institution of a commission that is not judicial in nature, but that is placed under the direction of a distinguished jurist who is granted investigative powers similar to those of a judge or prosecutor.

It does not seem that Latin Americans have “imported” the British model, but it is interesting that their application of a similar instrument, in a post-conflict context, has enjoyed such shining visibility and inspired policy makers in diverse regional settings. Such coincidence may also have important consequences when discussing whether the existence of such a national practice supports the emergence of a right to the truth.

## **2. A Qualitative Leap: Guatemala and South Africa**

The initial commission models experienced a significant qualitative leap with the creation of two commissions in the mid-’90s: The Commission for Historical Clarification in Guatemala (known as the CEH for its acronym in Spanish), and the Truth and Reconciliation Commission (TRC) in South Africa.

Both represented a qualitative shift because—in addition to expanding the depth and coverage of commission mandates and powers—these new institutions proposed explicitly that the quest for truth has a value independent of the judicial process, suggesting that it is possible to imagine a concept of justice broader than one focused merely on legal proceedings.

The CEH was established in the Oslo Peace Accords between the government of Guatemala and the armed opposition, grouped into the Guatemalan National Revolutionary Unity (URNG). The specific agreement creating the commission states that the people of Guatemala have a “right to know the truth” about the most serious human rights violations, a notion that had been absent from the mandates of earlier commissions<sup>5</sup>.

At the same time, the CEH was conceived as an institution that would not determine the responsibilities of any individuals, and its report would have no legal consequences. In explaining its non-criminal-law nature, the CEH mandate simply repeated what had already been clear in former commissions, but at the same time it emphasized that this new

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5 Guatemala - Oslo Peace Accords, June 23, 1994. “The Agreement for the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence that have Caused the Guatemalan Population to Suffer”.

mechanism ran on a separate track from the judicial system: in parallel and non-invasive, but independent.

Though headed by a lawyer, the German Christian Tomuschat, the CEH developed its work with a multidisciplinary approach that combined a legal determination of the facts with an assessment of the experience of the victims, and of the indigenous communities in particular. This methodology placed the commission on territory for which it was specially qualified—as opposed to the courts, which typically focus on merely finding proven facts.

The South African TRC also underscored—if not in its mandate, at least in its final report—the fundamental value of truth, independent of litigation, as a social construction with curative power, both for individual victims and at the societal level. The South African TRC was very “self-aware” and made its epistemological framework explicit, enriching the concept of “truth”, which—up until that point—had been limited to a factual description of events<sup>6</sup>.

The South African TRC, which arose out of a comprehensive political agreement, had the task of administering a conditional amnesty mechanism; a specialized agency of the Commission received individual requests for amnesty from persons convicted, under investigation, or liable to be accused of having committed serious crimes during the conflict. No previous commission had had this function. The terms of the amnesty were highly onerous, and ensuring compliance with them required sophisticated legal management: the applicant had to tell the whole truth about the facts, and prove that the crime had been politically motivated and proportional to its intended objective. The process for administering this amnesty mechanism turned out to be complex and inconsistent. The Commission’s difficulties in this regard may explain why no later commissions have tried to include a similar mechanism since.

The South African TRC conducted a good part of its activities in public hearings. It is possible that the decision to proceed with public hearings was the result of previous experience with the quasi-judicial commissions of inquiry of the Anglo-Saxon legal tradition. It is also possible that this was the unexpected result of pressure from victims seeking to exercise their right to object to amnesty procedures for the perpetrators of the most serious crimes. Either way, the fact is that the South African TRC

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6 Truth and Reconciliation Commission of South Africa. *Final Report*, vol. I, Chapter 5, 1998.



launched a form of public truth inquiry that would have been unexpected or considered extremely bold by previous commissions.

Another important innovation was that the South African mandate had the validity of a law passed by parliament—unlike previous commissions, which were established by executive orders—and benefited from the authority of having been included in special constitutional provisions. A legislative mandate grants special powers such as the power to subpoena, which cannot be granted by the executive through an order.

Both commissions, the Guatemalan and the South African, expanded the mandate of previous commissions very broadly. Although the text of the peace agreement that established the CEH is concise, its formulation allowed for a wide interpretation because it focused on all the events that had “caused suffering” to the population. On the other hand, the South African commission had a very detailed legal mandate, which included various types of crimes in its investigative mission.

The visibility of both committees, but particularly that of the South African TRC, and a perception of its success in dealing with a difficult dilemma, led in the following years to an expansion of the practice. In the decade since the closure of the primary operations of the South African TRC in 1998, twenty commissions were created, many with the name “truth and reconciliation commission” and many sponsored by international organizations such as the United Nations.

### **3. Identification of Best Practices and Standards**

The multiplication of new commissions led to an urgent need to build technical capacity within the international bodies responsible for the promotion and construction of peace, rule of law and human rights. The field of “transitional justice” emerged in this period as an effort to critically systematize the lessons learned in different countries and to develop minimum standards consistent with the tenets of international law.

Some examples of this race to develop standards are the articulation of principles in international institutions, and the emergence of case law and jurisprudence on the topics within individual countries’ legal systems.

In 2004, the United Nations Secretary General issued a report on transitional justice, which began to be used as a guideline for the organization’s special representatives and mediators and their actions. The report included specific recommendations on the creation of truth commissions: they

must be supported with the highest possible political consensus, inclusive consultation with diverse social sectors, and consistency *vis-à-vis* other justice challenges, such as criminal justice processes, reparations and institutional reform to prevent a recurrence of violence<sup>7</sup>.

At the same time, fundamental principles in the fight against impunity began to be systematized, first by the independent expert Louis Joinet<sup>8</sup> in 1997, and later by independent expert Diane Orentlicher<sup>9</sup> in 2005. Joinet's contribution was made by analyzing the still tentative experience of transitional justice through the mid-'90s, with a focus informed by the Latin American experience; he called truth commissions "extra-judicial investigative commissions". It is significant that less than one decade later, thanks to the multiplication of such experiences, the UN decided that the principles needed updating. It is also interesting to note that the term used in this update was "truth commissions".

Following up on these initiatives, the High Commissioner for Human Rights adopted a series of "tools" or practice guidelines for implementing rule of law in post-conflict states, which include one on "truth commissions", written in 2006 by the expert Priscilla Hayner and the International Center for Transitional Justice<sup>10</sup>.

From these rule-making efforts and analysis of best practices, a series of elements emerged that has generated what could be called a "canon" of truth commissions. Among its principles and lessons learned are:

- The integral nature of transitional justice measures and their internal consistency. Although the South African experience encouraged a "restorative justice" discourse that some believed would render criminal justice and the fight against impunity secondary, international standards do not pretend that the restorative element of the search for truth is in any way

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7 UN - Secretary General. "Rule of law and transitional justice in societies suffering or who have suffered conflicts", Report of the Secretary General, August 3, 2004.

8 UN - Commission on Human Rights. "Question of the impunity of perpetrators of violations of human rights (civil and political rights)". Final Report by Louis Joinet, 1997.

9 UN - Commission on Human Rights. "Updated Set of Principles to Combat Impunity", Report of the Independent Expert Diane Orentlicher to the UN Human Rights Commission, 2005.

10 UN - Office of the High Commissioner for Human Rights. "Rule of law tools for post-conflict states. Truth Commissions", 2006.

transferable or interchangeable with the right of victims to seek remedies through courts. No truth commission after the South African one has applied the controversial mechanism of amnesties conditioned on the provision of information.

- The need for the commissions to have political and operational independence. International standards require that commissions be created with clear guarantees of independence, in order to preserve their credibility and legitimacy. Commissions ideally are formed as functionally autonomous institutions, *i.e.*, they are able to design and implement their own work plan without political interference, control their finances and manage themselves, with the minimum state control required in any given instance to avoid improper management.
- The necessity of high political and social consensus. The current formulation of lessons learned identifies the consensus among political actors as a *sine qua non* to the success of truth commissions. Without favorable political will, the effective establishment of an independent commission and the collaboration of state bodies to obtain access to needed information are impossible. The emphasis on political will can be seen in the fact that most of the commissions established after South Africa have taken a legislative route. Likewise, the search for political consensus places high value on extensive consultation processes with society, to ensure that the commission develops partnerships that will allow it to carry out its work.
- The application of international principles of non-discrimination and protection to ensure that the experience of all victims is adequately addressed. This means that the material mandate of the commissions—*i.e.*, the list of acts they must investigate—has expanded considerably, to guarantee that the experience of some victims does not remain invisible. For example, today it would probably be unacceptable for a commission mandate not to explicitly mention violence against women, children and other marginalized or particularly vulnerable sectors of society. At the same time, this commitment to diversity expands the technical capabilities desired of commission members and staff.

The systematization of best practices has taken place in connection to a greater legal acceptance of the independent value and special nature of the “right to truth”. Indeed, though the contours of this right are not yet clearly delineated, there is a minimum consensus that—either as a corollary to other fundamental rights or an evolution of international customs—one can speak of an emerging principle that recognizes the right of victims of the most serious violations to know the circumstances and to identify who holds blame for the crimes they have suffered.

The United Nations Human Rights Commission passed a resolution in 2005 recognizing the “right to truth”, which it reiterated throughout subsequent years, including in the mandate for the Office of the High Commissioner for Human Rights to issue reports on the nature and application of this right<sup>11</sup>.

The Inter-American Court of Human Rights has affirmed the independent nature of victims’ “right to know” in various sentences, in particular relating to cases of forced disappearance<sup>12</sup>, and later in relation to the unacceptability of amnesties that block investigation of the most serious human rights violations in cases from Peru<sup>13</sup>, Chile<sup>14</sup> and Brazil<sup>15</sup>. Constitutional or Supreme Courts of countries such as Peru<sup>16</sup>, Argentina<sup>17</sup> and Colombia<sup>18</sup> have made similar pronouncements. However, it is important to note that the Inter-American Court does not consider states’ duty to provide effective remedy to be satisfied with an extra-judicial

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- 11 UN - Commission on Human Rights. “Right to the Truth”. Resolution 2005/66. April 20, 2005.
  - 12 Inter-American Court of Human Rights. *Velásquez Rodríguez vs. Honduras*. Judgment July 29, 1988 (*Substance*).
  - 13 Inter-American Court of Human Rights. *Barrios Altos vs. Peru*. Judgment March 14, 2001 (*Substance*).
  - 14 Inter-American Court of Human Rights. *Barrios Altos vs. Peru. Almonacid Arellano et al. vs. Chile*. Decision September 29, 2006. (*Preliminary Exceptions, Substance, Reparations and Costs*).
  - 15 Inter-American Court of Human Rights. *Barrios Altos vs. Peru. Gomes Lund et al. (“Guerrilha do Araguaia”) vs. Brazil*. Decision November 24, 2010. (*Preliminary Exceptions, Substance, Reparations and Costs*).
  - 16 Constitutional Court of Peru Exp. No. 2488-2002-HC/TC Piura: Genaro Villegas Namuche. Decision March 18, 2004.
  - 17 Supreme Court of the Republic of Argentina. *Simón Julio et al.* Legal Invalidation of Due Obedience and Full Stop. Opinion June 14, 2005.
  - 18 Constitutional Court of Colombia. Law on Justice and Peace. Challenge to constitutionality. Decision May 18, 2006.

investigation: the Court requires that investigations not be constrained by amnesties or other obstacles in fact or in law. In this regard, it should be emphasized that, at least in Latin America, while the specific value of truth commissions is appreciated, their contribution to justice is seen as complementary to criminal proceedings.

#### **4. Truth Commissions *Vis-à-Vis* the Standards**

The emergence of these standards has generated, on one hand, a healthy safeguard against the possibility of creating a commission thoughtlessly or without the conditions necessary to its success. Indeed, at the current level of knowledge and normative development, it is not acceptable to merely announce the establishment of a truth commission to get a positive reaction from the international community or human rights defenders in a given country. Immediately, people ask questions about the specifics of the undertaking and offer to cooperate in advancing the commission formation process in a manner consistent with international standards.

Several truth commission formation processes have encountered serious difficulties, or have failed, when they have been unable to demonstrate a genuine commitment to the highest standards. For example, in Indonesia in 2005, the government passed a law establishing a truth commission after six years of negotiations in parliament. However, as a result of political negotiations with sectors linked to the old authoritarian regime, the law included a mechanism for “reparations for amnesty”—similar to the South African “truth for amnesty” provision—which was opposed by the victims. When a constitutional challenge was lodged, the Indonesian Constitutional Court reviewed up-to-date international norms and determined that the law violated the rights of victims and that it was, therefore, unconstitutional<sup>19</sup>.

In the Democratic Republic of Congo, a truth commission was set up with the direct participation of the various armed factions who had participated in the civil wars of that country and in the peace process in Sun City. The inclusion of commissioners perceived as representatives of groups responsible for serious violations generated enormous distrust, and—though it belatedly integrated some representatives of civil

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19 Constitutional Court of Indonesia, Decision 006/PUU-IV/2006, December 7, 2006.

society—the victims declined to participate and give testimony before this commission<sup>20</sup>.

In Honduras, in the context of the polarization generated by the coup against President Mel Zelaya in 2009, a commission was created to comply with the terms of the agreements signed by the parties. Unfortunately, the commission was established in such a way that civil society perceived it as hardly independent, which led to the establishment of a parallel, civil society commission. The publication of the official commission report in 2011 has not been able, at least in immediate terms, to overcome people's initial doubts<sup>21</sup>.

The establishment of solid standards and dissemination of best practices can improve a truth commission's chances of success, alerting policy makers to possible errors of substance or procedure. It is expected that as more comparative information becomes available, practitioners will continue to identify useful lessons.

However, the identification of good practices should not result in the creation of a single, generically applicable model. The automatic use of a template to define aspects such as the material mandate, powers and functions of a commission may reduce the margin of creativity needed to give life to a meaningful process. Another danger is that the automatic application of a canon ends up imposing very high technical requirements on countries where local resources, after a catastrophic war or a prolonged dictatorship, are very limited.

The recent Commission on Truth and Reconciliation in Liberia seems to provide an example of a situation of standardization on the other hand, where its effect has led to a loss of opportunities and presented technical difficulties that are difficult to address with local capacities. Liberia established a commission in 2005, in keeping with a very comprehensive law, which included an extensive mandate that covered the most serious human rights violations and breaches of international humanitarian law over a period of almost a quarter century. The mandate included an investigation into individual and institutional fault, as well as an analysis of the social and political contexts that made such violations possible. Similarly, using international lessons learned, Liberia corrected the initial

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20 Borello, Federico. "A First Few Steps. The Long Road to a Just Peace in the Democratic Republic of the Congo", ICTJ - October 2004.

21 Honduras - Final Report on the Truth and Reconciliation Commission "So events will not repeat themselves".

appointment of commissioners and conducted a consultation process to select commissioners who represented the various sectors of society<sup>22</sup>.

Unfortunately, this approach, in keeping with the canon, resulted in a commission with an extremely broad mandate, endowed with powers and functions that were significant on paper, but very weak in reality. At the same time, a committee constituted in this manner did not appear to reflect Liberia's own cultural specificities: it assumed a model of a large institution, set out to obtain massive amounts of testimony and produce a written report. In a society where traditional performance and narrative practices are primarily oral, and where literacy rates are low, openness to these alternative forms of communication proved necessary.

In addition, after an extremely destructive war, it was difficult for the commission to recruit local personnel with the necessary experience to handle such a broad mandate and transform it into an appropriate process of investigation and social mobilization. The Liberian TRC—under these conditions—required significant levels of international support, which ended up creating a permanent source of tension among the commission, donors, specialized institutions and victims. Eventually, the Liberian TRC published a final report that has been consistently criticized for manifesting serious technical weaknesses. This case should serve as a warning of the limitations of an approach that neglects creativity.

## 5. The Future of Truth Commissions

This brief historical overview of truth commissions reveals significant development in policy, norms, and practice. For one thing, commissions are no longer seen as an emergency political response to an unsolvable judicial dilemma, but rather as instruments that guarantee access to effective legal remedy and affirm a right to the truth. In addition, commissions are not exotic, *ad hoc* tools, adaptable to the characteristics of a single region, but instead they are flexible instruments with a global reach.

Significant tensions remain regarding the balance that commissions should strike between standardization and innovation in practice. On the one hand, a progression of standards allows the formation of increasingly sophisticated commissions, which are better able to make significant contributions to the fight against impunity. On the other, the temptation

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22 Liberia - National Transitional Legislative Assembly. "Act that establishes the Truth and Reconciliation Commission of Liberia". May 12, 2005.

to automatically apply a standard model can weaken the creative impulse, which is still very much necessary for an institution so young.

It is not of course prudent to make predictions about an institution that is evolving, but it is possible to identify—in concrete practice—certain current tendencies that could be part of its future, and which can serve as a call to creativity and innovation among policy makers and civil society.

The following trends appear to be the most significant to the future development of truth commissions:

*a) Expansion and increasing complexity of mandates*

If the current trends continue, new truth commissions that are formed will be entrusted with an ever-expanding list of conduct to investigate. Another possibility is that new commissions will be set up in countries that have already had one, to carry out additional investigations of acts not covered by the first.

In countries such as Liberia and Kenya, commissions established have included a very broad spectrum of possible violations, including crimes of the most serious concern to the international community, as well as a wide variety of war crimes and crimes against humanity. However, it is also expected that new commissions will include, in an increasingly systematic way, other criminal conduct considered important, such as child abuse in institutions, corruption, environmental violations, human trafficking and more. In fact, the Truth and Reconciliation Commission of Canada is concerned exclusively with the experiences of students who were abused in boarding schools, and similar initiatives have been carried out in Belgium, Ireland and Germany to identify cases of child abuse in Catholic schools.

Within this extended framework of the mandates, it should be noted that it is possible the mandates will also become more complex. They may go beyond a mere finding of facts to include the tasks of explaining the historical and structural roots of abuses, and the differentiated way in which vulnerable groups such as women, children, indigenous peoples and other have suffered them.

*b) Higher technical resources for commission operations*

In direct relation to the previous trend, it is to be expected that new truth commissions will require ever larger and more sophisticated



human and material resources, as well as more complex administrative structures.

The expansion of the conduct covered by commissions' mandates will require the commissions' legal teams to have extensive training, probably through increased cooperation among experts from around the world. However, while the greater legal complexity of the commissions' tasks will require more legal experts, it is also to be expected that there will be a greater need for interdisciplinary cooperation between law, the historical and social sciences, psychology and other fields.

As a result, the creation of commissions will continue to generate serious challenges in countries with severe shortages of human and material resources; their establishment will require better modes of coordination with the international community to channel technical and financial support to them more efficiently.

*c) Emergence of regional variations*

It is also possible—as truth commissions respond to ever increasing legal demands—that they will adapt their mandates and operations to the legal and philosophical traditions of each region and evolve into various, diverse “models”.

For example, since the South African commission, a consistent focus can be observed in several countries on community-level reconciliation and on processes for reintegrating low-level perpetrators back into their communities. Commissions established in Africa—Sierra Leone, Nigeria, the Democratic Republic of Congo, Liberia and Kenya—have all included various forms of amnesty or a facilitation of perpetrators' participation in the search for the truth.

In contrast to this trend, Latin American countries, which share similar judicial systems and relationship to instruments such as the Inter-American human rights system, have a much weaker focus on systems with legal rewards, and a stronger focus on criminal justice. No Latin American commission, not even those located in countries with amnesties in force, has set up mechanisms to exempt persons from criminal investigation. In some cases, such as Brazil, Peru and Paraguay, some sectors of civil society have displayed deep distrust and resistance to any reconciliatory approach.

There are other significant possibilities for the evolution of truth commissions, related to particular cases, which could result in important

innovations. However, such developments are subject to unpredictable national contingencies, for which reason they are listed below as questions in recognition of their speculative nature:

To the extent that these commissions expand beyond societies historically linked to Christian religious paradigms and the attendant philosophical conceptualization of forgiveness and punishment, will new approaches emerge to the dilemmas posed by the need for justice and reconciliation? This question may deserve attention if transitional powers in the Middle East and North Africa decide to use truth commissions.

As transnational crimes, which are difficult to repress at the national level, gain more attention or, objectively, require international cooperation, is it possible that binational or multinational commissions will be created? East Timor and Indonesia established a joint commission to investigate the violence surrounding the referendum on independence for East Timor in 1999. In another region, hundreds of civil society organizations of the successor countries to the former Yugoslavia have led an initiative for a “regional commission” to be established by all the region’s countries. It is conceivable that issues like human trafficking, environmental depredations, or the violence unleashed by trafficking in illegal substances might generate interest in such specific mechanisms in the search for the truth.

If very long and stable conflicts, affecting societies with relatively robust judicial systems, come to an end, what type of cooperation or convergence will occur between future truth commissions and judicial systems? Conflicts such as those in Colombia, Israel-Palestine, and the Basque Country, and situations such as the tensions between Cuba and the United States, or between the two Koreas, raise acute issues in this regard. In Colombia, it has already been made clear from the paramilitary demobilization that Colombian society assigns a very high value to uncovering the truth, even if this occurs as a result of atypical legal processes.

To summarize, truth commissions show strong tendencies towards further consolidation within the repertoire of justice and protection of human rights, but they still have significant challenges to face insofar as their use requires them to respond to new situations around the world. The field of transitional justice and the international human rights community must be prepared.

## THE VICTIMS REMEMBER. NOTES ON THE SOCIAL PRACTICE OF MEMORY\*

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*Félix Reátegui*

During the 2000s, the organized efforts of victims of violence to reconstruct their histories and make them known to the rest of the country have become more visible. Spontaneous, transitory, orphans of official support, lacking material resources, and besieged by unceasing violence, numerous communities in diverse regions have for years displayed amazing courage and imagination in trying to make memories of suffering and atrocities that the voices of official power would like to forget. It is not easy to predict the long-term impact and sustainability of these initiatives, since the development of a process of social memory depends on many factors. However, it is possible to affirm that at this point these multiple and heterogeneous efforts have already irreversibly transformed the imaginary map of violence in Colombia. There might be various and distinct institutional responses to the contemporary cycle of violence in the country, but what is certain is that today none of them can be implemented without providing truth and memory and, therefore, complying with certain basic substantive standards and including the multiple voices of the victims. One could say of the unofficial memory initiatives that are thriving today in Eastern Antioquia, on the Atlantic Coast, in Valle del Cauca and in many other regions, what Michael Ignatieff has said is the elemental contribution of truth commissions: they have

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narrowed the margin of lies that can exist without being questioned in this society<sup>1</sup>.

This brief text will present some reflections on the meaning of the social practice of memory by populations that have been victims of different armed actors in Colombia. Rather than examine some unofficial memory initiatives in particular, the purpose of this reflection is to provide some general ideas about the actual or potential social and political implications of this activity, which is thriving in the country today in the midst of ongoing violence. This text is divided into two sections. The first will discuss, on a rather abstract level, the relevance of victims' memories for *social reproduction*, that is to say, for the institutional and social processes by which the organization of collective coexistence is maintained or transformed. The second part will cover some complexities of the production of social memories, and in particular the memories of victims, addressing issues such as the functions performed by such practice for the involved communities and the relationships among these memories, which, though inevitably partial are vivid and full of social legitimacy, and other overarching narratives or interpretations of the violence.

The two sections of this text are, in fact, motivated by a common question: what are victimized populations *doing* when they *make* memory? This question can be understood in at least two different ways, which justify the internal division of this reflection. The social task—individual or collective—can, according to a certain classic distinction in social theory, have two kinds of effects or functions<sup>2</sup>. It can have an objective, latent function, which operates regardless of the explicit intentions of the people and that, to a certain degree, is associated with the systemic organization of society. This is what we refer to when we ask ourselves about the potential effects of memories on social reproduction. At the same time, no view of the large, anonymous institutional processes that are carried out in a society can ignore the fact that the people always

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1 Ignatieff, Michael. *The Warrior's Honor. Ethnic War and the Modern Conscience*. New York: Henry Holt, 1998, p. 173.

2 See the now *canonical* treatment of this problem from American structural functionalism in Merton, Robert K. *Social Theory and Social Structure*. (1949). México D. F.: Fondo de Cultura Económica, 1980. Chapter III: "Manifest and Latent Functions". Renewed versions of this distinction can be found in the theoretical work of Jeffrey Alexander. See Alexander, Jeffrey (ed.). *The Micro-Macro Link*. Berkeley: University of California Press, 1987.

*know what they are doing.* The task of memory is also, and mainly, an act of volition, a concrete decision by specific people to set goals and objectives. Moreover, the task of memory is, fundamentally, a display of subjectivity and a weaving of inter-subjectivities. Corresponding to this prominent dimension of memory as a deliberate practice of individuals is a broader inquiry about memory as *social action*, which will only be touched upon in these pages.

## 1. Memory and Society

The current vivacity of the memory of violence in Colombia is occurring not in a vacuum, but rather in a particular national context, one marked by different initiatives of successive governments designed to deactivate the focal points of armed action through political arrangements. None of these efforts has escaped criticism or been free from flaws and gaps. Many of the objections to these initiatives—whether we are speaking of the Pastrana administration’s failed negotiations with the FARC in the Caguán Valley or the current process of disarming paramilitarism by means of Law 975—have been made in the name of efficiency. From the perspective of a strategic and tactical evaluation of the processes, and analyzing the rationality of the armed actors and the incentives that they might have to truly demobilize, the State’s offers and concessions have been seen as a series of miscalculations. However, the concerns that resonate most strongly today in public opinion are of a different nature. These concerns are related to the moral imperative of enforcing the rights of victims—rights that would not have been fully guaranteed in the negotiation schemes that have been tested thus far—as a horizon of basic legitimacy for any pacification experience. It is in this new horizon of expectations that a true social desire for memory has found fertile ground in which to propagate.

The rights of victims to truth, justice and reparations are, in fact, a new continent in the international discussion about transitions from authoritarianism to democracy and from violence to peace. It could be said that the position of these rights in the core of the contemporary public imagination derives from a vigorous transformation of the cultural order, even before a transformation in the spheres of law and politics. This is the latest advance of *humanitarianism*, that revolution of worldwide moral sensibility whose point of departure is identified, in the legal world, with the Nuremberg Trials, but which is, in reality, situated in a broader

and older horizon: that of the modern philosophical conception of the universality of humanity and its inherent dignity<sup>3</sup>.

*Humanitarianism*, as a set of premises and postulates that underlie a certain moral order, forms part of the contemporary history of ideas but at the same time it has been infrequently employed by the majority of systems of thought: it has been embodied in common sense and has for decades been expressed in the form of a wide range of legal norms. It involves, then, a value system that has acquired an institutional existence and that has ended up taking root as well in the political order. Although the coercive force of the State and the existing powers can always be imposed, in the long term their legitimacy—that is, their ability to exist as authority in the absence of a constant threat—is subordinated to the respect for these values.

It could be maintained that the affirmation of such values institutes a paradigm of social legitimacy—that of the ideology of human rights—which coexists in tension with the earlier paradigm centered on the reason of state. The theater of these tensions today is globalization. This is usually viewed, mainly, as the global expansion of certain systems of administration and management, above all those of an economic nature. But it is also a cultural phenomenon, in the sense that it is woven into the ways in which we imagine life in society: the legitimate ties between individuals and the forms of subjectivity that correspond to an individual in our time. In recent years, an extensive sociological and anthropological literature has highlighted this cultural dimension of globalization<sup>4</sup>, which is expressed, ultimately, in the demand for new standards for interstate relations and multilateral coexistence. An important place among such demands is political and legal humanitarianism, which was born following the horrors of the Second World War.

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3 See a condensed review of this development of the humanitarian idea in Todorov, Tzvetan. *La vida en común. Ensayo de antropología general (Life in Common: An Essay in General Anthropology)*. Madrid: Taurus, 1995.

4 On globalization as an exacerbation of the cultural matrix of modernity, see Giddens, Anthony. *Un mundo desbocado. Los efectos de la globalización en nuestras vidas (Runaway World: How Globalization is Reshaping Our Lives)*. Madrid: Taurus, 2000, and Giddens, Anthony. *The Consequences of Modernity*. (1990). Cambridge: Polity Press, 1991. See also Bauman, Zygmunt. *La globalización. Consecuencias humanas (Globalization: Human Consequences)*. México D. F.: Fondo de Cultura Económica, 1999. Bayart, Jean-François. *Le gouvernement du monde. Une critique politique de la globalisation*. Paris: Fayard, 2004.

The Colombian society and State, confronted by decades of armed violence, constitute an interesting scenario for this political-cultural tension that inhabits globalization. For a long time, throughout the twentieth century, the discussions about peace in Colombia have centered on an institutional scheme of negotiations and agreements. There are living signs of this approach in such legal concepts as *political crime*, which is uncommon in other Latin American societies. This scheme, which has not entirely disappeared, now coexists uncomfortably with the international language of humanitarianism, centered on the impossibility of impunity for certain heinous crimes and on the central place that the rights of victims should occupy in any peace-making option<sup>5</sup>. This tension has still not been resolved, and it encompasses the dialogue and confrontation among official powers and institutions, different armed actors, the voices of public opinion, the wide network of groups that make up civil society and, of course, members of the international community. Joining this cast with growing prominence, certainly, are the victims, who themselves comprise a diverse population with very dissimilar grievances to be redressed. Though differentiated and even divided on the basis of the type of armed actor who victimized them, the type of abuse to which they have been subjected, how long ago the crimes occurred, and the different degrees of attention received from the State, the victims appear to agree on one central idea: the exercise of memory is an inescapable precondition of any peace process that can be legitimately undertaken in the country.

Thus, in the social practice of memory in Colombia several criss-crossing roads must be traveled to arrive at a peace with a gloss of legitimacy. First, the voices of those directly affected express a moral conviction and a desire for recognition. Second, a challenge is posed to society's political imagination—the challenge of inclusion—which must be taken into account for the validity of any peaceful settlement. Third, the growing emphasis on the right to truth, justice and reparations requires necessary links between peace, democracy and citizenship. Fourth, the very exercise of memory and the collective actions that

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5 See the discussions on the issue in Orozco, Iván. *Combatientes, rebeldes y terroristas. Guerra y derecho en Colombia (Combatants, Rebels and Terrorists: War and Law in Colombia)*. Bogotá: Temis, 2006, and Orozco, Iván. *Sobre los límites de la conciencia humanitaria. Dilemas de la paz y la justicia en América Latina (On the Limits of Humanitarian Consciousness: Dilemmas of Peace and Justice in Latin America)*. Bogotá: Temis, 2005.

such an exercise implies provide civil society with a different dynamic, a weaving of associations that, little by little, contest elements of State action, although not to supplant the State, but rather to instruct it in the practice of democracy and the responsible use of power. It is no exaggeration to suppose, therefore, that the social deployment of memory through unofficial initiatives pursued mainly by victims is something more than just an emergency response—a refuge of the helpless—to the sieges of violence. It is also, potentially, part of a broader and longer-term phenomenon, such as the possible transformation of a political society. It is therefore necessary not only to mobilize resources to promote these initiatives, but also to understand their specific nature. What does it mean for the victims to *make memory*? What kind of social interactions sustain the practice of memory and are triggered by it? What kind of social product is memory and what place does it occupy in our daily lives and public spaces?

### 1.1. Memory and Social Production

In order to answer these questions, we first need to recognize the omnipresence of memory. Only in a metaphorical sense is it possible to speak of forgetfulness as a social means of confronting the past. In fact, all representations of the present and the aim of all individual and collective actions are sustained by a certain organized perception of the past. This perception is sometimes manifest and explicit, formed by statements and specific interpretations and assessments about past events. On other occasions, memory appears more abstractly in the form of “inherited structures of perception”, as maintained by a certain school of sociology of the subjective life<sup>6</sup>. In other words, memory is not necessarily a set of statements about specific events, but rather a set of views established in a group that guides people to perceive events in a certain way. In the realm of armed violence and mass human rights violations, this would be the difference between a memory that describes specific events and responsibilities, and a general perception of the past that views violence as inevitable. When we affirm the need for

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6 Fundamentally, the research of Alfred Schütz. See “Conceptos fundamentales de la fenomenología” (“Fundamental Concepts of Phenomenology”). (1944). In Schütz, Alfred. *El problema de la realidad social (The Problem of Social Reality)*. Buenos Aires: Amorrortu, 1974. A powerful re-creation and projection of this theoretical framework on the subject of memory is found in Ricoeur, Paul. *La mémoire, l'histoire, l'oubli*. Paris: Seuil, 2000.



memory (concrete and specific) to avoid the *normalization* of violence in Colombia, we are speaking precisely about combating these inherited structures of perception, which, by presenting violence as an inescapable fate, almost a historical destiny, constitute fertile ground for the impunity of the perpetrators and the neglect of the victims. But never, in any case, do we face a memory vacuum with respect to the past. The territory of the past, like the territory of political power, never allows for vacuums: a memory is always occupying it, taking charge of it, giving it form and meaning and, of course, conditioning the present on the basis of a certain perception of the past. From this perspective, forgetfulness is nothing other than a memory of whose sources or origins we are not entirely conscious because it has been successfully presented as a natural version of the past.

Second, note should be taken of the role that memory has historically played in the institutional organization of power. The recognition of the symbolic—the sphere in which memory as a social object must be situated—in the reproduction of a society is something recently accepted in the social sciences. In recent decades, explanations centered on economics or politics or a combination of the two predominated among the best attempts to understand the creation of modern states or certain political regimes such as democracy<sup>7</sup>. The focus on the organization and configuration of societies, in our more widespread scientific understanding, was based on the dispute and the institutional administration of power, whose nucleus is the State, and on the mechanisms of production and distribution of goods, whose platform is the market. It has slowly been recognized that power and the allocation of resources are also, in a very important sense, cultural phenomena, that is to say, symbolic processes that are supported by collective beliefs, among them the social means of remembering the past. One of the most influential works to recognize memory as a matrix of a society's political organization was the innovative reflection of English historian Benedict Anderson on the phenomenon of nationalism. The idea of the nation as an “imagined community” and the role of the State in the institutional production of memory as a means for the foundation of such

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7 See, for example, outstanding work, such as the explanation for the emergence of modern states given by Charles Tilly, or the explanation for the emergence of democracy given by Barrington Moore Jr. Tilly, Charles. *Coercion, Capital and European States: AD 990 - 1992*. (1990). Oxford: Blackwell, 1992. Moore, Barrington, Jr. *The Social Origins of Democracy and Dictatorship. Lord and Peasant in the Making of the Modern World*. (1966). Boston: Beacon Press, 1993.

community are the currency of all contemporary political reflections<sup>8</sup>. The institutional development of versions of the past appears not only as a source of the legitimacy of the State—which functions as a sort of administrator and programmer of the social imagination—but also as a platform for the various forms of social *power*: for example, the type of power that mediates among social classes, or that is diffusely projected by religious organizations, or that is exercised by a society's cultural institutions. Inequalities among members of a society and the capacity of one sector of society to influence the life of other sectors are never phenomena of naked force. Rather, they are always based on a certain collective memory, a certain general way of perceiving the past<sup>9</sup>.

Based on such a reflection, it is impossible to understand memory as solely a private activity (individual and collective) with repercussions in the domestic sphere. In our current state of sociological understanding, memory is a constituent factor of the public space, *i.e.*, the territory that connects the social with the political. It is a social substance that can be effective in consolidating power as well as in challenging, transforming and destabilizing it. Memory is an important ingredient of the symbolic web that supports our social orders, whether we are speaking about official institutions or daily interactions between individuals and groups.

This relevance of the symbolic has not yet been recognized with sufficient force in the domain of the formal discussion of political transitions and the consolidation of democracy. Even when speaking about *political culture* as an important element for the establishment of democracy, such political culture is understood in a discrete sense as a set of provisions relating to the individual's relationship with the political system, not as a general representation of the society and its past by individuals. Thus, for one of the most creative thinkers in the political

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8 Anderson, Benedict. *Imagined Communities. Reflections on the Origin and Spread of Nationalism*. (1983). London: Verso, 1991. See especially Chapter 9: "The Angel of History", and Chapter 11: "Remembering and Forgetting".

9 In this paper, social power is understood as a phenomenon that is distinct from political power, in the sense that it is not founded on formal *authority*. This is a basic distinction in the political sociology of Max Weber (1867-1919), but it can also be traced to the social reflections of Alexis de Tocqueville (1805-1859). With regard to the latter, see Tocqueville, Alexis de. *L'ancien régime et la révolution (The Old Regime and the Revolution)*. (1856). Folio Collection. Paris: Gallimard, 1967. The First Book is relevant to this subject. On the understanding of power as a web of social networks, see Mann, Michael. *The Sources of Social Power*. Volume 1: *A History of Social Power from the Beginning to AD 1760*. Cambridge: Cambridge University Press, 1986.

sciences, Larry Diamond, political culture would be made up of beliefs, attitudes, values, ideals, feelings and evaluations about the political system of a country and the role of the individual in that system<sup>10</sup>. This conception is far from the more comprehensive view of the role of the symbolic in the definition of a political society as, for example, expressed in Alain Touraine’s now outmoded reflections on social movements—and it is reasonable to see a form of social movement in the social promotion of memory in Colombia—as a struggle related to *historicity*, understood as the cultural models that define a certain collective order<sup>11</sup>.

Thus, we should not lose sight of the fact that a certain societal cultural production is always being developed by all national groups. At the same time, however, in an effort to properly locate the peculiar meaning of the current social process of memory, it is necessary to identify an important change that has occurred on a global scale in recent decades. This involves the progressive loss of the monopoly of the State and privileged sectors—prestigious castes or classes—on the production of symbols. This change is part of a general transformation by which the State has lost its power to effectively direct social processes, while organized society has expanded and branched out into networks of action and public intervention (demands, proposals, participation, execution, oversight), which makes the whole process of government much more complex than it was a few decades ago<sup>12</sup>.

Indeed, if we first recognize that the political direction of a society is always based to some relevant extent on a certain cultural order in which memory plays a central role, we must then remember that the production of this cultural order has until recently been strongly hierarchical in Latin American. From official institutions and the prevailing social hierarchy codes, the production of national memory was in the hands of an elite group that exclusively monopolized national prestige. This

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10 See Diamond, Larry. *Developing Democracy. Toward Consolidation*. Baltimore: The Johns Hopkins University Press, 1999, p. 163.

11 This nuance in considerations of culture and politics is relevant if one seeks to question the impetus of memory as a potential factor in a more important social change that transcends the issue of peace. See Touraine, Alain. *La voix et le regard. Sociologie des mouvements sociaux*. Paris: Seuil, 1978.

12 See in particular Lechner, Norbert. “Tres formas de coordinación social” (“Three Forms of Social Coordination”). *CEPAL Review*, No. 61, 1997. Also, Messner, Dirk. *The Network Society. Economic Development and International Competitiveness as Problems of Social Governance*. London: Routledge, 1997.

does not in any way mean that other social classes or strata did not have memory practices or did not develop narratives about the past; rather, these strata were excluded from what the Uruguayan cultural critic Ángel Rama called *the lettered city*, a “protective ring of power” comprised of “a pleiad of religious leaders, administrators, educators, professionals, writers and multiple intellectual servants (...)”<sup>13</sup>. There is an interesting reverse side to the idea of the lettered city as a force from which power radiates symbolically over the entire social body. This exclusive haven of erudition and high culture is also, in its way, a refuge—almost a prison—in which the elites resist the siege of the masses.

In the case of Colombia, the association between political power, social order and learned culture had a singular force from the nineteenth century and through the middle of the twentieth century, which has been highlighted by, among others, the British historian Malcolm Deas<sup>14</sup>, who reflects on the cultivation of philology and grammar among public men (and on a broader plane, the cult of native linguistic norms) and their connection to social prestige and the legitimacy of power. This would thus be a peculiar form of manifesting the symbolic basis of political power: the expert mastery of the cultured Castilian standard would have been a radiating source of not only social status and prestige, as is common, but also of political legitimacy, that is, the tacit foundation of institutional authority. This historical background is particularly relevant when assessing the meaning for contemporary Colombian society of this irruption of the memory of victims—and of their testimony, and their non-academic, non-erudite way of rendering versions of the past—in the public sphere<sup>15</sup>.

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13 Rama, Ángel. *La ciudad letrada (The Lettered City)*. Hanover: Ediciones del Norte, 1984, p. 25.

14 See Deas, Malcolm. *Del poder y la gramática y otros ensayos sobre historia, política y literatura colombiana (On Power and Grammar and Some Other Essays on Colombian History, Politics and Literature)*. Bogotá: Norma, Taurus, 2006. See also Palacios, Marco. *La clase más ruidosa y otros ensayos sobre política e historia (The Noisiest Class and Other Essays on Politics and History)*. Vitral Collection. Bogotá: Norma, 2002. This bias is also noted in Braun, Herbert. *Mataron a Gaitán. Vida pública y violencia urbana en Colombia (They Killed Gaitán. Public Life and Urban Violence in Colombia)*. (1985). Bogotá: Aguilar, 2008.

15 The concepts of *public space* and *public sphere* are in daily use today, but their meaning is complex and elusive. Here these concepts should be understood from the perspective of Hannah Arendt, in the sense of a “world in common” recognized as such by the residents of a broad social community, and at the same time as a space that mediates—in the sense of building a bridge—between “the social” and “the political”.

What is happening in Colombia, moreover, is not unique to this country. This process maintains continuity with a regional trend toward the opening of public spaces to accommodate the voices of the excluded as an important ingredient for the development of national images of the past. It is thus possible that, in a obscurely paradoxical way, the heat of the process of violence is accelerating another form of democratization in Latin American societies, an opening of symbolic systems—analogue to the openings of political systems that put an end to oligarchies—in such a way that they are now more permeable to the entry of heterogeneous memories that compete with the cultured or elitist versions that previously reigned supreme in each country. Furthermore, the idea of heterogeneous memories must be taken seriously. What is true is that the idea of *other memories* refers to several completely different things: memories of different actors; memories with divergent contents about the same events; memories structured in a different way and with different horizons of historicity, and even different conceptions of time; memories that do not favor verbal (much less written) expression, but that are better expressed in action and *performance*; memories based on different assumptions about the relationship with power and the State.

In fact, local, community, non-erudite memories have always been produced at the margin of institutional power and, on many occasions, have been formally subordinated to these powers, without the possibility of winning any degree of visibility and recognition beyond the borders of the immediate community. The phenomena of exclusion are also developed, secularly, in the symbolic plane of the society. What has now changed—and here we must again consider the connection with the new victim-centered humanitarian consciousness—is the degree of attention that is being paid to these memories as an ingredient of peace or political transition processes. In short, and in relation to the matter that concerns us, the phenomenon that is sometimes described as an *explosion of memory* should be understood not as the emergence of an unprecedented social practice in the heart of the excluded or victimized social sectors, but rather as the incursion of their memories in the public space with a political effectiveness that was previously unthinkable.

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See Arendt, Hannah. *The Human Condition*. (1958). Barcelona: Paidós, 1993. See also Patrón, Pepi. *Presencia social, ausencia política. Espacios públicos y participación femenina (Social Presence, Political Absence. Public Spaces and Female Participation)*. Lima: Agenda: PERÚ, 2000.

## 2. Functions of Memory

An initial distinction should be made among the ways in which victims' memory initiatives are adopted. One of these ways is best suited to the idea of *commemoration*, meaning specific acts of remembrance of people or events, occasions of ritual meaning or instances of collective gatherings. Elizabeth Jelin has written that commemorations linked to the dictatorships of the Southern Cone involve dates on which the past becomes present in public rituals, on which feelings are activated and meanings are questioned, on which memories of the past are constructed and reconstructed<sup>16</sup>. It is, however, acceptable to propose one difference—although for strictly analytical purposes—between these practices and the exercise of memory understood as the development of a structured account of past events and processes; this is memory as *narrative*. Not all commemorative acts have this vocation of narration and of the structuring of memory in broader time units or of the provision of explanatory or interpretative frameworks for what happened. A commemorative act can be satisfied in the strict experience of justice and recognition, or it can be sufficiently justified as an instance for the expression and renewal of a type of community solidarity. This distinction, however, does not signify opposition, but rather represents two possible configurations of remembering. Elizabeth Jelin once again highlights the “historical dimension of memories” and states that “the operations of remembering and forgetting occur in the present moment, but with a subjective temporality that refers to past events and processes, which in turn take on meaning in being linked to a future temporality”<sup>17</sup>. In other words, commemorative acts, as understood here, can be inserted into narrative development processes or, in fact, they can be the factors that trigger this narrative form of memory. In any case, the distinction is interesting if it delves into the objective of the remembrance activities and what they mean for the communities involved.

Nevertheless, underlying these possible differences is a substratum that is common to all memory initiatives: the weaving of an intersubjective reality which responds to a state of hurtful and *destructuring* things. The disruptive nature of violence has been revealed: it cancels the rules of the

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16 Jelin, Elizabeth (comp.). *Las conmemoraciones: las disputas en las fechas “in-felices”* (*Commemorations: Disputes on “Unhappy” Days*). Memories of Repression Series. Buenos Aires: Siglo Veintiuno Editores and Social Science Research Council, 2002, p. 1.

17 Jelin, Elizabeth (comp.) *Op. cit.*, p. 2.

game of everyday life, disrupts the meaning of institutions, introduces a realm of distrust and distorts perceptions of reality and one's own identity<sup>18</sup>. In the face of these disruptions, the *social practice* of memory by itself serves a restorative function. It is an intersubjective construction of the world through which agreements are created to give meaning to painful events. In fact, the collective memory activity socializes the pain and, in this way, a transmutation into public reality of that which is, in the first instance, private and incommunicable. It could even be said that this collective practice creates the conditions that permit, in the words of Tzvetan Todorov, the transcendence of the plane of *literal* memory—which imprisons the individual in the past, in suffering and in vengeance—and the attainment of the plane of *exemplary* memory. The latter, says Todorov, opens memory “to analogy and generalization” and, by this means, “our conduct ceases to be purely private and enters the public sphere”<sup>19</sup>.

There are, then, functions of social integration around the collective exercise of memory. However, as is known, social integration should not always be understood in a harmonious or consensual sense. Integration also means social control, oversight, requirements for adapting and conforming to the group<sup>20</sup>. Thus, even if collective memory initiatives possess this cohesive and restorative character, there is also the residual possibility of latent conflicts involving power relationships within the community. It has been detected, for example, that gender inequality in the social memory of violence in the Peruvian Andes molds the collective versions of the past in such a way as to subordinate, disregard or manipulate the female experience of the war<sup>21</sup>.

Notwithstanding the foregoing, it is interesting to note that because of their typically collective nature, unofficial memory initiatives give rise

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18 Benyakar, Mordechai. *Lo disruptivo. Amenazas individuales y colectivas: el psiquismo ante guerras, terrorismos y catástrofes sociales (The Disruptive. Individual and Collective Threats: the Psyche of War, Terrorism and Social Catastrophes)*. Buenos Aires: Biblos, 2003. pp. 60-61.

19 Todorov, Tzvetan. *Les abus de la mémoire*. Paris: Arléa, 2004, p. 31.

20 On social integration, there is still interest in the old writings of Edward Shils, who developed his sociology on the basis of the framework of structural functionalism. Shils, Edward. *The Constitution of Society*. Chicago: The University of Chicago Press, 1982. See in particular Chapter 1: “The Integration of Society”.

21 Theidon, Kimberly. “Género en transición: sentido común, mujeres y guerra” (“Gender in Transition: Common Sense, Women and War”). *Memoria. Revista sobre cultura, democracia y derechos humanos (Memory. Journal on Culture, Democracy and Human Rights)*, No. 1, 2007. Lima: IDEHPUCP.

to symbolic re-creations of the past<sup>22</sup>, which contend with versions of the past that have been transmitted or imposed by the most powerful social sectors or the society's cultural institutions, such as public schools or the mass media. They are thus erected in mechanisms for the criticism of what phenomenological sociology would call the *preconstituted world*<sup>23</sup>, that is, preexisting interpretations of the past that tend to present the past as a natural event and are, therefore, not subject to questioning. We are thus speaking about the expression of a critical attitude toward the public space and its prevailing relationships of power, authority, hierarchy and social precedence. The *denaturalization* of the social order, the revelation (or, rather, the *denunciation*) of its conventional nature, are, historically, features of the passage of traditional societies to modern democracy. From this point of view, it is reasonable to wonder about the connections between the development of a critical attitude toward the social world, on the one hand, and the cultural substrate conducive to the exercise of citizenship, on the other<sup>24</sup>.

The combination of memory and citizenship is, certainly, a very plausible one, given that another direction of collectively developed memory—that is, memory initiatives such as those reviewed in this paper—is that of the gestation of an awareness of rights. Those affected by violence do not always perceive themselves as victims who have the right to truth, justice and reparations. In many cases—and this has special significance for Colombian society—the identity of victims is *invaded* or *saturated* by another preexisting or concurrent social feature, such as poverty, socioeconomic exclusion or even ethnic marginalization. The history of the forcibly displaced population in Colombia throughout

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22 This assertion is based on a certain tradition of social theory for which collective acts of interpretation give rise to symbolizations of the world, understood as certain *social representations* that acquire constancy, objective consistency and the capacity to be imposed on individual consciousness. The entire repertoire of memory is a symbolization which offers and imposes keys for interpreting not only the past, but also the present. It is because of this that the so-called “battles for memory” have long-term political importance that is sometimes not perceptible to their protagonists. On social interpretation and symbolization, see, among many possible sources, Blumer, Herbert. *Symbolic Interactionism. Perspective and Method*. Berkeley: University of California Press, 1969. Chapter 3: “Society as Symbolic Interaction”.

23 Alfred Schütz. “Conceptos fundamentales de la fenomenología” (“Fundamental Concepts of Phenomenology”).

24 On memory as a brake on the naturalization or normalization of violence in Colombia, see Pécaut, Daniel. *Violencia y política en Colombia. Elementos de reflexión (Violence and Politics in Colombia. Elements of Reflection)*. Medellín: Hombre Nuevo Editores, 2003.



several cycles of violence is one example of this. While the organization of the displaced population is not new in the country, what is relatively new is the self-definition of those affected as victims with specific rights beyond those that they possess as a population impoverished by exile.

The social practice of memory as an *exercise of citizenship* or as a platform for the achievement of advances in equity has other interesting derivations, such as those concerning gender relations. The risk that the collective exercise of memory will subordinate the female experience has already been mentioned. At the same time, it is necessary to note the protagonism of women in community memory efforts, above all in urban contexts. There is, of course, a circumstantial explanation for this female protagonism: because men tend to be the main targets of armed actors in a cycle of violence, it is their female relatives—widows, mothers, sisters, daughters—who are left to painfully recount what happened. This explanation, though not erroneous, may be insufficient and could benefit from a reflection that is linked more to the specific characteristics of gender identity. The differentiated development of the moral consciousness of men and women, the prevailing focus of the female conscience on *others*, or the importance to the female conscience of the preservation of specific emotional ties<sup>25</sup>, are some of the issues that could be examined more thoroughly in an inquiry into gender and memory. Such an inquiry could be helpful in understanding some broad issues concerning the complex relationship between unofficial memory initiatives—direct memories of victims and collective social actors—and the official and institutional initiatives that seek the reconstruction of a national memory to be inserted in a public space.

## 2.1. Memory, Collective Action and Social Movement

The issue of the public space as the destination for social memory exercises is still a matter of debate. What objective do victims and their relatives seek when they become involved in collective memory efforts? Is memory a platform for a socio-political agenda, or is it a social action that is satisfied by the restorative act of remembering and dignifying?

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25 For the subject of this paper, this would refer to the fact that, for a certain moral rationality, the specific recollection of the missing could not be substituted by a more general political agreement. It must be noted that the issue of differences in the development of moral consciousness and other related topics is still the subject of debate in field of psychology. Accordingly, these reflections should be understood only as a suggested hypothesis or lines of inquiry for further consideration.

Experience teaches that what is required is not an exclusive choice between these two possibilities, but rather a differentiation between immediate and possible intermediate objectives. The political or public agenda potentiality of memory lies within the orbit of intermediate objectives, and even within the plane of tacit, unintentional and, perhaps, unwanted objectives.

The truth is that the collective exercise of memory is both a precondition and an effect of the existence of a certain capacity for group coordination, which contemporary sociology refers to as *social capital*. This can be understood as the ability of individuals to act in concert in pursuit of a shared goal, but it is also defined as the networks available to individuals to support the achievement of their goals<sup>26</sup>. This second concept of social capital is highlighted more frequently in unofficial memory initiatives, in the sense that victims greatly value the ability to share their memories with others and to rely on others to overcome the consequences of the abuse that they have suffered. One could say that this is a manifestation of social capital *within* the group that has opted for the cultivation of memory. In some cases, however, the group will devise and carry out projects and intentions directed *outward*, that is, toward the surrounding society, from which it hopes to obtain diverse goods, from intangibles such as *recognition*, to the adoption of specific public decisions regarding the conduct of the national state (wide-ranging institutional reforms), to, of course, the execution of reparations programs. For the attainment of these goals or objectives, it is useful to consider the first meaning of the notion of social capital: unofficial memory initiatives are forms of collective action that *may become* social movements<sup>27</sup> with full existence and relevance in the public and official political arenas. This potential derivation of the exercises of memory have particular circumstantial importance in Latin America today, in which the termination or severe weakening of political party systems require civil society to seek new ways to interact with the state. (At the same time, one has to recognize that this very weakness of party systems may potentially restrict the projection and public gravitation of memory efforts, since it

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26 See the fundamental references to this issue in Coleman, James. *Foundations of Social Theory*. Cambridge: The Belknap Press, 1990, and in Bourdieu, Pierre. "Le capital social" ("Social Capital"). *Actes de la Recherche en Sciences Sociales*, No. 31.

27 For an extensive bibliography of social movements, see the classic work of Tarrow, Sidney. *Power in Movement. Social Movement and Contentious Politics*. New York: Cambridge University Press, 1998.

deprives them precisely of the bridges necessary to convert what is born in a particular local group into a national public cause).

As noted above, social capital can be seen, alternatively, as either a precondition or an effect of collective memory exercises. It is worth pausing on this point. The most frequently mentioned effects of local violence are the erosion of interpersonal trust, the establishment of a reign of fear, and the precariousness of social coexistence<sup>28</sup>. Under these circumstances, the first task of a collective memory effort would be the creation of bonds of trust that would enable those affected by violence to participate in such an endeavor. It is often said that the first requirement in these cases is the creation of social capital. At the same time, however, trust is a social phenomenon that reproduces itself. It is the concurrence in an effort—above all when it concerns matters as intimate as pain—that triggers processes for the creation of ever more vigorous trust and security.

Thus far, we have discussed some ideas about the task of the memory of victims from a particular angle: we have sought to highlight the fact that it involves a collective social action that generates certain internal bonds within the group and that may have certain effects on the broader society. To conclude these reflections, we should now turn to the task of the *production* of memory. We are interested in addressing this issue from the point of view of the scope of the production of these memories and, tangentially, their relationship with other more institutionalized, official or academic forms of memory.

## 2.2. The “Frame” of Memory Initiatives

As mentioned above, the recognized diversity of memories must be understood in a very broad sense. This refers not only to the heterogeneity of the content of memory—what it says about past events—but also, and perhaps more importantly, to the diversity of the forms of memory—that is, its manifestations, supports, and its manner of existing as a social practice. The clearest distinction is that between written, textual

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28 See in this regard the above-cited work of Benyakar, Mordechai. *Lo disruptivo. Amenazas individuales y colectivas: el psiquismo ante guerras, terrorismos y catástrofes sociales*. From a political sociology perspective, it is useful to mention Lechner, Norbert. *Las sombras del mañana. La dimensión subjetiva de la política (Shadows of the Morning. The Subjective Dimension of Politics)*. Escafandra Collection. Santiago: LOM. In this book, Lechner emphasizes the gravitation of social fears as disruptors of social coexistence and as one of the greatest problems unleashed by the termination of classical institutions of political mediation.

and narrative forms of memory and those that are usually referred to as *performative* forms. An initial way of reading this distinction could be in terms of the existence of greater or fewer resources for producing memory. A superficial, and perhaps prejudiced, reading would be that it is the lack of victims' *intellectual capital* (formal instruction) that inclines them to prefer to cultivate ritual or *performative* forms of memory. The ritual would provide an emergency refuge or solution. Fortunately, we are now able to recognize the substantial value of unofficial memory initiatives in their particular manifestations as genuine and sophisticated social expressions of the need and decision to remember. Moreover, we now know that there are certain types of experiences—one of them being appalling violence—that need to exist socially as a condition of their effectiveness, that is, of their collective relevance, in the form of performance rather than in the form of an archive or catalogue<sup>29</sup>.

Notwithstanding the foregoing, it can also be assumed that even these *performative*, ritual or iconic memory practices have a tendency to piece together the fragments of the past in a broader elaboration. More than one of the initiatives discussed in this paper show this inclination: the display of photographs of missing relatives, or the participation of victims in remembrance workshops, or discussions leading to the installation of a commemorative monument, all activate a memory and an interpretation of a collective experience. Elizabeth Jelin makes this point when she speaks about the production of memory around “unhappy dates”<sup>30</sup>. It is therefore pertinent to consider some of the features of this production.

This consideration should take account of several issues. From the point of view of their spatial breadth, these unofficial initiatives tend to produce local memories rather than memories of national or regional scope. Because of their chronological breadth (and, by derivation, because of the arc of the issues that they deal with) they tend to be memories about cases circumscribed by a very localized time or a particular incident or event.

However, it is necessary to somewhat attenuate the importance of the two statements made here. What is shown by exercises such as those reviewed in this paper is that as the initiatives mature, they evidence an

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29 See Taylor, Diana. *The Archive and the Repertoire: Performing Cultural Memory in the Americas*. Durham, NC: Duke University Press, 2003. See in particular Chapter 3: “Memory as Cultural Practice: Mestizaje, Hybridity, Transculturation”.

30 Jelin, Elizabeth. *Op. cit.*

intention to construct broader narratives, precisely in order to obtain a more explanatory memory, that is, inserting the events into a more comprehensive process. In some cases this intention may even be directed toward a historical horizon that does not allow for very clear distinctions between social history and the history of specific violence. This is visible, for example, in the initiatives pursued by the Afro-Colombian population for recognition of the continuity between contemporary abuses and their particular story of insertion into the country's history, first through slavery, and later through marginalization.

An interesting change may also occur when one considers the agents who are the protagonists of these memory initiatives. First, their memories are directed toward victims in a very dense community activity. This, however, does not prevent the gradual development of a perspective that the victims define as “reconciling”, which leads to the opening of the way to the fruits of recollection, or to an invitation to neighbors who are not direct victims to remember, and, in some cases, to the development of a discourse addressed to the perpetrators themselves.

Another relevant line of analysis is related to what we may call the content of the memory practiced by the victims, that is, what does this memory deal with? On the one hand, we can say that the memories are situated between two extremes, that of an episodic memory and that of a historical memory. This difference does not necessarily affect the content of truth or the social legitimacy that it might have; rather, it affects its projection and the type of knowledge about the past that the victims seek to provide. On this latter point, it is worth considering the questions posed by Daniel Pécaut about how to position the necessary and legitimately partial memory of victims in a broader and more inclusive perspective with some themes that foster it. While the insertion of local memory into a national memory poses the risk of *expropriating* the victims' particular history, at the same time it serves as a way to give the victims a greater public projection and potential political effectiveness and, at the same time, to provide broader meanings and interpretations that enable—again in the words of Todorov—the passage from literal memory to exemplary memory.

National memories can thus have the function of what Henri Rousso calls “framing” particular memories<sup>31</sup>. This does not mean a delimitation

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31 See, among other works that address this issue, Rousso, Henry. *Histoire, critiques et responsabilité*. Collection Histoire du Temps Present. Paris: Complexe, 2003.

or demarcation of memories produced by those who have directly experienced the events, but rather a potentiation of the same. Through their relationships with national memory, local or particular memories form a relationship with a minimum of necessary truth, and position their recovery of events in a more comprehensive interpretive perspective. This also implies an axiological framework, and that is where memory, in transitional contexts, ceases to be a strictly *grass-roots* social activity, in the case of unofficial initiatives, or a scientific or legal investigation, in the case of official initiatives: memory is ultimately centered on a basic structure of values associated with the rule of law and certain tacit or explicit political-moral agreements, such as those of a democracy.

On the other hand, these memories have a specific value in that they are formed by direct subjective memory and intersubjective relationships, and in that they are impregnated with emotion, which is always a central component of the past, and, above all, with links between the past, present and future. This element of subjectivity is part of what is collected by an official exercise of memory—a truth commission, for instance—when it is methodologically focused on the victims, that is, when the taking of testimony is the central component in its empirical investigation. However, as pointed out above all by those who observe the process from an anthropological perspective, the receiving of victims' testimony already includes a sort of *epistemological agreement*: the testimony is received in order to be framed within a broader, national history, and in order to fulfill this condition it must first be adapted to a certain format. The official truth-seeking mechanisms imprint an *expressive norm* on the voice of victims, which is not necessarily the case with unofficial memory initiatives.

At this point, the following might be clear. Exercises of memory tend to be ungovernable (fortunately) in several respects. No institution can, by itself, open and close an exercise of memory. At the same time, the inharmonious nature of memory initiatives should not be forgotten. This is not a problem that is going to be, or that *has to be*, resolved. In the final instance, it could be said, taking the argument to its extreme, that the profusion of situated particular, local and partial memories is an indicator of the success of the process. If it can be said that memory processes are also processes of building citizenship and, in a certain sense, civilization, of strengthening social *agencies*, then this needs to happen. We should not aspire to a narrative that commands social memory in all its details.

This is neither possible nor desirable. The social act of memory is one that promotes diversity and, we would say, that is justified by diversity. What happens in a society in transition or that seeks a transition, after all, is that official developments of memory, with their claims of being systematic and exhaustive, coexist with local and direct impulses of memory, exercises in which the sometimes tense relationship between truth and reconciliation, in a strong sense of the term, is more direct: memory to mend the ties of coexistence versus memory for the realization of criminal justice and institutional reform. One current problem is that of finding the balance, or better yet, the bridges of communication between the two. For now, as attested to by the unofficial initiatives taking place in Colombia and other countries in the region, what we have is a social memory in motion. And that is enough to maintain the drive toward a process of self- and mutual recognition and to banish the idea of violence as inevitable.





## THE WORLD OF ARCHIVES\*

Ludmila da Silva Catela\*\*

In 1882 and 1892, several Kalina families were taken from French Guiana to Paris to be exhibited in the Zoological Garden of the *Aclimatation*. They lived for months in a pavilion reconstructed as an indigenous village. *Les indiens* were exhibited there like animals. This macabre exhibit, justified in the name of science and profitable for the popular exotic trade business, was systematically recorded on the two continents. In Europe through photographs and in America through oral tradition that kept these episodes alive in the collective memory of the Kalina. In 1994, the *Association des Amérindiens de la Guyane Française* (AAGF, Association of American Indians of French Guiana) wanted to present an exhibit of these photographs. The French Photo Library, located in the *Musée de L'Homme*, coldly (“with history”, to use the analogy of Levi Strauss) requested payment to loan the photos. This offended the honor of the AAGF, which then declared that it would not pay for using the photographs of members of their families. The Kalina argued that their ancestors had been forced into the colonial spotlight and had thus been stripped of their own image. The incident allowed the Kalina community to take a stand on principle and incite indignation over the possibility that these photographs could have been used without their consent for exhibits and publications. Although over one hundred years have passed, many Kalina can still recognize their relatives in these images, and remember their testimonies gave when they returned from the absurd journey to *Civilization*. According to Collomb, who recovered this history,

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\*\* My thanks to Elizabeth Jelin, Gustavo Sorá and Aldo Marchesi, who read, commented on and made suggestions on this text.

“this inscription in the present, which makes it possible to transmit the testimonies gathered by these dislocated people, makes the photographic documents particularly valuable, which today are much more than mere documents, as precious as they may be in the eyes of the researchers. The Kalina did not know these portraits existed; they discovered them during the preparations for the commemorative exhibits (in 1991 and 1992) of the trip to Paris 100 years before “(...) Passionately viewed and commented on in the [Kalina] communities, these photographs became the buttress of a family and collective memory for the Kalina of Guiana and Surinam, who are currently searching for traces of their history and the roots of their ethnic identity. In the eyes of the Kalina these documents, conserved in Europe as documentary collections, were valuable patrimony that they believed belonged, above all, to them”<sup>1</sup>.

This example describes the relationships between an indigenous community and its past and the institutions of the West that impose their supposedly universal values on the basis of their specialization and power over the preservation of documents and patrimony. It also demonstrates the value given to 100-years-old documents, the relationship between memory and identity, as well as the tension between the “owners” of archival collections and the “owners” of the memory<sup>2</sup>. The Kalina’s symbolic-legal battle is exemplary for studying archives as an institution, the systems of agents who give order and meaning to and classify their value in modern society (attributed primarily to the people who use them), the disputes between official memory and collective memory, between private feelings that build identity, between public interests that stand in the name of national, provincial, and local heritage, and scientific ends. On the other hand, it reveals the difficulties related to conservation and unity of the archival collections and the means of access, the selectivity and safeguarding of those considered suitable for historicizing or recording, what becomes history or memory. In short, the conflict over ownership of the photos reflects the difference between memory (for the Kalina) and history (as a scientific discipline and as undertaking to create archives and recover the documentary records).

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1 Collomb, Gérard. “Imagens do outro, imagen de si”. *Cadernos de Antropologia e Imagen*, No. 6, 1998, p. 78.

2 To delve further into the need to problematize the action and properties of those who have the power over the definitions of memory, see the concept of “memory entrepreneurs” coined by Jelin, Elizabeth. *Los trabajos de la memoria*. Madrid and Buenos Aires: Siglo XXI Editores, 2002.

By exploring the world of the archives, this text seeks to associate the meanings attributed to the objects, the memories, the archival collections, images and traditions, according to the class of agents (not the communities so much as a whole) that perceive them, puts them into practice, uses them, interprets them. To this end, I define an ethnographic viewpoint, a form of knowledge which turns the exotic into something familiar and, on the basis of this surprising familiarity, offers unique possibilities for bestowing complexity to the world of archives and the archives as a representation of the world. At the same time, this perspective clarifies the fact that the archives, the archival collections and the traditions are not a given, neutral or static entities, but that, even in those cases where they have great power of representation (such as, for example, the national archives in France, of the Archives of the Indias in Spain), they are composed of groups of specific social relationships. “To doubt”, to inquiry into the archives as institutions with tensions, hierarchies, and struggles, is to restore their historical and cultural nature and see them in their capacity as complex spaces that should be understood as objects of reflection on the basis of analytical problems and points of view.

### **1. An Arbitrary Product**

What are we talking about when we speak of archives? In general the most common representation of archives is that which we associate with dark, cold places full of dust, where we can find old and damp papers. They are also associated with libraries or places where people spend hours reading. To a lesser degree they are recognized as a space that some administrative institutions reserve for keeping files, cards, protocols, papers that will someday be requested for some procedure or simply as an institutional record of their actions. Birth certificates, medical histories, course files, death records, personal factsheets, receipts, church records, just to name a few, when requested or received, become a chart of papers with constantly changing borders. In the private sphere, many people keep their papers, and the word archive can be associated with a box, drawer or shelf in a piece of furniture where we keep our histories, or someone in the family keeps photos or other testimonial objects: birthday cards, letters, personal diaries, images and other objects-witnesses of the different stages of life, etc.

In short, we can say that an archive is the space that safeguards the production, organization and preservation of objects (for the most

part handwritten or printed papers) that record, document, illustrate the actions of individuals, families, organizations and State institutions<sup>3</sup>. An archive means a set of collections or documentary, sound or visual records located in a locale or building, produced, and classified by agents who watch over their existence and consultation. The triple relationship collections-physical space-agents will always be present and characterizes the type of archive, its uses and ends.

Not all archives are the same. In the public-official sphere it is possible to distinguish between those that produce documents for daily use that serve for administrative procedures, as informational support and have probative value before the law. These include an enormous variety of files in ministries, hospitals, the justice sector and the police, among others. In varying proportions, this type of document can be selected to be a part of the General Archive (national or provincial) where it may be used for a purpose that is not necessarily its originally intended use.

At the other extreme are those files kept in private spaces. The reasons for accumulating these documents range from a personal desire to sporadically keep things to a more systematic accumulation when a family member plays the role of guardian of the family memory.

Between both extremes there are variations to the archives, defined by area of specialized activity: science, politics, religion, etc. These contain files that are donated, purchased or collected by the specialists themselves. The use of these files will depend on the degree to which the receiving or accumulating institution is open to the public, in accordance with the interests of action of a community, and may be restricted or expanded to the “general” public<sup>4</sup>.

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- 3 If we look for a “definition”, from the perspective of the archivist, an archive is “the group of documents, regardless of the nature of the document, that are gathered through a process of accumulation during the activities of public or private individuals or legal entities, and are considered in relation to their worth” (Associação dos Arquivistas Brasileiros. *Dicionário brasileiro de terminologia arquivística*. São Paulo: CENADEM, 1990, p. 16). As we can see here, the concept of archive is addressed merely from the perspective of a space to keep documents, leaving aside its agents, conflicts and litigations, for example, with regard to what is considered “valuable” enough to keep.
  - 4 The numbering and typologies of archives can be extended to many other dimensions. For a more in-depth discussion of this topic from the perspective in this document, see Esposel, José. *Arquivos: uma questão de ordem*. Niterói: Muiraquitã, 1994; Fugueras, Ramón & Mundet, José. ¡Archívese! Los documentos del poder. El poder de los documentos. Madrid: Alianza Editorial, 1999; Lopes, Zélia da Silva (comp.). *Arquivos, patrimônio e memória. Trajetórias e perspectivas*. São Paulo: UNESP, 1999.

As civilization evolved, other different documents appeared (writing, photography, images, internet) to secure those events, activities and memories that an individual, group or institution for different reasons (bureaucratic, scientific, journalistic, affective, etc.) believes should be kept, classified, organized.

Beyond these places and collections, to understand the world of archives we should focus on the actions of the specialized agents who are interested in them, and on the disputes that, beyond the papers, decide what to keep and what to transmit—in other words, the contours of the historical perspective of culture. Between the person who produced the text or image and the person who used these goods through an archive is a broad spectrum of specialists on the documentation of a culture. The historian, the archivist, the expert in preservation, the educator, the communicator, the director of the preservation entity, and other bureaucratic agents transform the properties, the possible uses, and the meaning of these objects by establishing sets of rules, provisions, and limitations. The objects themselves do not contain any *essential* interest for their legacy to posterity through archives, libraries or museums. These interests are attributed as a result of bitter disputes whose decisive power is sublimated when the objects become “collection documents”.

Archives that have been long ignored may suddenly become unexpectedly attractive, due to the historical moment, religious, secular, economic, political pressure, fears or taboos, or trends that come and go. Inversely, others that had their moment of glory may pass into oblivion. For example, for many years the General Archives of each country were particularly interested in the papers belonging to “statesmen”. Today, the private documents of anonymous individuals increasingly acquire values that foster the creation of different spaces in which to keep them. In Canada, for example, the “concept of ‘total archives’ has been implemented, whereby the country’s archival institutions (...) will acquire in basically equal proportions (...) the official archives of the producer entities and the manuscripts or other personal means of individuals, families and particular groups”<sup>5</sup>. While Canada is an exception with regard to the archival policies of other countries, we can observe a progressive trend to receive personal papers in addition to official documents. There is

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5 Cook, Terry. “Arquivos pessoais e arquivos institucionais: para um entendimento arquivístico comum da formação em um mundo pós-moderno”. *Estudos Históricas*, vol. 11, No. 21, 1998, pp. 130-131.

also the tendency to create new archives “exclusively” for keeping the papers of anonymous individuals. This is the case of the *Association pour l'Autobiographie* in Ambérieu-en-Bugey (France), which keeps and receives manuscripts of life stories, significant events, family histories as well as the diaries of children and adolescents, adult diaries, and agendas. These include the 26 notebooks written since 1938 by a 75-years-old woman who decided to donate them to the Association<sup>6</sup>.

The change in status of a set of documents can be traced by the efforts and disputes between different agents to obtain them, purchase them or receive them as a donation. The division or separation of documentary collections towards other physical spaces also indicates a change in the interest in its content. For example, the General Archive of the Spanish Civil War was created in 1999. Originally the documents it contained came from only a section of the National History Archive created in 1979 called the “Civil War”. The reason for creating a section in a separate archive, which can be found in the introduction, was “the importance of the civil war in Spanish history, which demanded greater attention” and a larger space to gather all of the information related to the period, which had previously been dispersed<sup>7</sup>.

During this activity in which archivists, directors, journalists, scientists, bureaucrats and others select and classify documents, an enormous amount of other products and objects are discarded and destroyed. The inevitability of this process of reproduction of modernity, and the conflicts that arise when the reasons for selection/accumulation/transmission are questioned, make archives very interesting places for understanding the social and historical arbitrariness of cultural production. But how and why do archives and their documents acquire a distinctive value, to the point that institutions are created to safeguard them from destruction and oblivion?

## 2. The Power of Documents

In the tension between the use of memory support material, such as photographs, and the collective memories created by oral narratives, the conflict between the Kalina and the French shows the importance of

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6 For more information on the history and activities of this Association, see Lejeune, Philippe. “O guarda-memória”. *Estudos históricos*, vol. 10, No. 19, 1997, pp. 111-119.

7 More information available at: <http://www.mcu.es/archivos/CE/ArchivosCentros.html>.

the document, the image and the written word in modern societies versus oral tradition, which has been the creator of memory par excellence in pre-writing communities. Writing brought with it records and this in turn created the need for preservation as well as the power of proof. According to Goody “(...) writing created a new means of communication between men. Its essential function was to objectify speech, provide a material equivalent to language, a set of visible signs. Thus, speech can be transmitted through space and preserved through time, what people say and think can be rescued from the temporary nature of oral communication”<sup>8</sup>. In view of the vertiginous waves of change in our societies, the recording and preservation of events as proof of the passage of time became a serious problem. The different forms of recording (writing, images, internet, etc.) create a system of support that does not supplant or eliminate the traditions based on orality, but instead overlaps them and creates these tensions. It appears as if the profound need to record and safeguard of those societies that developed what Goody called “intellectual technologies”, was at the core of a struggle against forgetting. In these societies, intellectual technologies, such as writing (and here I would add the archives), are factors that form experts that specialize in instruments to record the passage of time (historians, archivists, geologists, archeologists, etc.). Through calendars and maps, documents and monuments, these specialists—with their technologies in institutions—guide the senses and the experiences, although not by mechanical means.

In the private sphere, documents, letters, loose papers and photographs bring memories and vestiges of those people, events, and things that are no longer with us. If we consider the everyday actions of the State (in the case of Western nation-States), institutions, groups (associations, clubs, families), and individuals, it is hard to imagine any event that does not leave a trace. A large part of behavior is trapped (or trappable) in paper, agendas, letters, recipes, printed matter, images or any other support “(...) on which are engraved, with different speed and techniques, which will vary according to the place, hour or mood, the different elements of daily life. However, only a very small part of these vestiges are preserved”<sup>9</sup>.

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8 Goody, Jack (comp.). *Cultura escrita en sociedades tradicionales*. Barcelona: Gedisa, 1996, p. 12.

9 Artières, Philippe. “Arquivar a própria vida”. *Estudos Históricos*. Rio de Janeiro: CPDOC/FGV, 1998, p. 10.

The original worth and power of documents changes with the passage of time. Time gives documents historical value, which turns them into objects desired by researchers and collectors, as well as for the general public. It also endows them with identity, enabling individuals and institutions to create fragmented or damaged memories. The Kalina reconstructed their group identity when they saw the pictures of their ancestors, recreated their traditions, and vindicated their ownership rights.

Access to documents that had been hidden, negated, and silenced for many years in the archives of repression, presented in the different chapters of this book<sup>\*\*\*</sup>, made it possible to conduct research and write about the history of the repressive years. Moreover and just as strongly, it enables the reconstruction of memories that were “wounded” by the torture, the secrecy, and the violence<sup>10</sup>. In other words, it provides tools and information to historians but also gives victims and those affected instruments to legitimize memories and reconstruct identities.

Once an archive is opened for different uses (historical, identity, revealers of secrets and lies, proof and truth), the acts that originated and reproduced these events are erased and these institutions become a system of relationships that are not only documentary but also, and primarily, social. Hence, besides putting the documents in order, it is necessary to understand the challenge faced by planners and classifiers to reconcile the impulse to preserve and the fatality of reducing, selecting, and approving what should be kept. The complex decisions, provisions, and opposition to what to keep and what to throw away, on the limits to access and safeguarding by individuals, on the need to understand and maintain the unity of the dispersed papers that comprise the files within the archives, is for me a topic for analysis that expands the meaning of the study of the world of archives. This world includes a variation of the “classic” category that traces the relationship between the forms of classification and the social structures, the tension between the private and public spheres, between the custom of homes preservation based on emotions and individual-family experiences, and the collective traditions that are transmitted and revered in monuments, libraries, and archives.

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\*\*\* NT: the author refers to the book where this article was originally published: Da Silva Catela, Ludmila. “El mundo de los archivos”. In: Ludmila da Silva Catela & Elizabeth Jelin (eds.). *Los archivos de la represión: documentos, memoria y verdad*. Madrid: Siglo XXI Editores, 2002.

10 Pollak, Michel. *L'expérience concentrationnaire. Essai sur le maintien de l'identité sociale*. Paris: Métailié, 1990.



### 3. Archives as Places for Memory and History

The debate about the links between archives, memory and history is a branch of the theorization about the *document* in the field of history. Without appearing to be an outsider and abusing of such a jealously guarded area of theoretical interests, it is not possible to avoid the reference to the analytical rupture introduced by the Annales school of history: faced with the positivist views of history whereby the document is everything and *sine qua non* condition for the development of the field, Lucien Febvre and Marc Block systematically criticized the positivist relationship of history with documents and launched an intellectual agenda where the forms of writing history, the document and, therefore, the archives as places to store these materials, begin to gradually lose their totalizing power (the world in an archive)<sup>11</sup>.

In addition, and sociologizing the history's sources of reflection, one of the main characteristics of the memory studies begun by Halbwachs is the assertion that collective memory cannot exist without the reference to a specific spatial space. The precursor of memory studies analyzes the tense relationship between memory and history. One of his first assertions is that "historical memory" is an unfortunate expression, because it links two terms that are opposing in more than one way. Halbwachs believed that history began at the point at which collective memories are erased or disrupted. At this point, several elements are evident that should be kept in mind: the basis of memory are the individuals and groups themselves, situated in a specific space and time, that conserve it and express it their memory. History is already supported by writing and reference to events that are not necessarily linked to collective memories and that should be consistent with chronological and spatial structures. History examines the groups from the outside, at a distance; collective memory is produced and observed from within. For Halbwachs "collective memory is different from history, because it is a constant current of thought, of continuity that is not at all artificial, because it retains from the past only that which is still alive or is capable of living in the groups that maintain it. History works in time-space sequences and obeys a didactical need

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11 Here I describe some of the perspectives of the debate on the transformation of the sources of history, described by French academia. Although it is of course not the only one, I find it to be paradigmatic and effective for connecting the type of problems discussed herein. In other words, without exhausting the theoretical debate, I selected a set of useful and generalizable references from the French debate.

for schematization”. He adds “history is the compilation of events that occupy the greater space in the memory of men but are read in books, taught and learned in schools”<sup>12</sup>. His ideas about the division between memory, associated always with groups, and history, closely linked with events, give us clues to understanding the relationship between these two spheres and archives as a dual space of memories and history.

In the eyes of Europeans, the Kalina photographs are a series, a source or collection for consultation by researchers, who frequently publish their works without any concern for the current existence of these communities. The Fototeca can lend the photos to other archives, museums, universities or to different agents for organizing showings and exhibits without consulting the Kalina community. For the Kalina, these images are linked to their group, ensure the continuity between past and present, are part of a narrative that is updated and reconstructed through the exercise of their memory. The photos are part of their identity and serve to reaffirm and produce this identity.

The distinction between history and memory is not just an analytical arbitrariness, an exercise in method, it differentiates between worlds of representations and practices related to the way in which the relationships between past and present function. Documentary archives are thus the perfect means to study these relationships.

For Pierre Nora, archives occupy a prominent place among *memory sites*. These institutions and their “memory men”<sup>13</sup>, as he refers to their founders and directors, reveal and materialize the dual relevance of memory and history<sup>14</sup>. According to Nora, not very different from Halbwachs, memory is alive, is transported by groups, and is susceptible to revitalization or suspension. History is already a problematic and incomplete reconstruction of what no longer exists. It is in this type

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12 Halbwachs, Maurice. *A memória coletiva*. [1950]. Rio de Janeiro: Vértice, 1990, p. 88.

13 Nora, Pierre. *Les Lieux de Mémoire*, I, II y III. [1984-1992]. *Presentation*. Paris: Gallimard, 1997, p. 576.

14 In the debates on *memory sites*, the volume on *Les Frances* dedicates a significant amount of space to archives, where the focus is not so much on the sites but on the content of the memory (Krakowitch, Odile. “Les archives d’après *Les lieux de mémoire*, passage obligé de l’Historia à la Mémoire”. *La Gazette des Archives*, No. 164, 1994). In the introduction to the volume on *Les Frances*, Nora focuses particularly on the key to interpretation “of the sign of memory” for understanding the diversity and the distinction. He examines the differences, fractures, identities, conflicts implied in the discussion of *Les Frances*, where knowledge of the content of memory becomes more important than knowledge of the memory sites.

of interpretation that the archive as a place of memory and history is located. Pomian, in charge of the text on archives within the collective work, identifies essential levels for transforming this distinction into two analytical pairs: *archives-documents* and *archives-monuments*<sup>15</sup>. Here we find a dual definition of archive: “There is no distinction between the monument and the document. They are two poles on the same continuum and one defines the other. A monument is produced to generate an impact on the spectator and guide his imagination and thoughts towards something that is invisible, especially towards the past. A document is produced as a thing to be deciphered by a person with certain skills and to be placed among the group of visible or observable events. Designed to be seen and directly evoke the past, the monument is linked to the collective memory. When the events transmitted no longer exist and are part of the past, the document serves as an intermediary for their reconstruction; it is an instrument of history. The first is conceived to last as an object of admiration to remember or evoke the past. The second is produced for a specific purpose. When this purpose is lost and if it is not destroyed, it becomes an object of study. We thus reencounter the opposition present in the etymology of the two terms: *monumentum*, associated with *monere* or “to remind”, and *documentum*, associated with *docere* or “to teach, to instruct”. We can thus understand why the archetypical monument is always a building, with features that make it stand out from the surrounding buildings, while the archetypical document is nothing but a modest written text”<sup>16</sup>.

An archive can be considered a *memory site* when it specifically refers to events that are in the realm of a historian’s work. The documentary supports in this case are instruments of knowledge, they *teach*, just like monuments are *memory sites* when they make an explicit reference that directly *evokes* the past. Rather than teach, the monument *makes us remember*.

Continuing with Pomian<sup>17</sup>, the nature of a monument encompasses both the places themselves as well as the documents, which share the features of the former when they refer to events that are no longer visible. There are also documents that have been produced or are exhibited as

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15 Pomian, Krzysztof. “Les archives Du Trésor des chartes au Caran”. In: *Les Lieux de Mémoire*, III. Paris: Gallimard, 1997, p. 4004.

16 *Ib.*, p. 4004.

17 *Ib.*, pp. 4005-4006.

monuments. The dual nature of archives as a place of history and memory is reinforced by the fact that they are now considered to be institutions that are no longer passive intermediaries for the production of history, but that they are also active creators of memories.

Without pretending to exhaust the classic topics in the debates on history, memory, and archives<sup>18</sup>, I believe it is essential to go back to the intersection of the three overlapping planes: the logic of classification, the limits of the use of the archives, and the agents that intermediate in the production of memory, particularly the archivists. From the moment in which someone entrusts a collection to an institutions, its agents (re) classify and organize, and users demand and use. These planes highlight the fact that the act of constituting the archives entails acts of production and reception. The act of transferring between the donation and the legacy is what makes it possible to share and collectivize the processes of remembering, the (re) construction of collective memories, and the (re) writing of history (or histories). Different agents are involved in the trajectory and circulation of documents. They are differentiated according to their location and specific relations: archivists, collectors, family members, State, scientists, teachers, students, readers, librarians, intellectuals, journalists. From the hierarchal interaction between these actors we can discover the sanctioning of rules and laws that, in different places and different times, stipulate and define what an archive is, what is included in the group of documents that represent the memory of the community (local, provincial, national, etc.), and what will be discarded because it lacks “value”. From this peak of the hierarchal structure of the world of archives downwards, whatever is discarded by the powers that be can provide the opportunity to open other alternative spaces: documentation centers, university or private archives, etc. Thus, the description of an archive is enriched by distinguishing the place where it is stored, between the large institutions and the small private collections,

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18 In addition to classical references, Halbwachs and Nora, other researchers have also delved into this debate between memory and history. See, among others: Burke, Peter. “História como memória social”. In: *Variiedades de história cultural*. Rio de Janeiro: Civilização Brasileira, 1997; Connerton, Paul. *Como as sociedades recordam*. Lisboa: Cetal Editora, 1993; Jelin, Elizabeth. *Op. cit.*; Pinto, Júlio. “Os muitos tempos da memória”. *Projeto História*, No. 17, 1998, pp. 203-211; Pomian, Krzysztof. “Les archives Du Trésor des chartes au Caran”; *id.* “Prefacio”, *Los males de la memoria. Historia y política en la Argentina*, Diana Quattrocchi-Woisson. [1955]. Buenos Aires: Emecé Editores, 1998; Thomson, Alistair; Frisch, Michael & Hamilton, Paula. “Os debates sobre memória e história: alguns aspectos internacionais”. In: Ferreira & Amado (org.). *Usos e abusos da história oral*. Rio de Janeiro: FGV, 1996.

between archives and simple collections of anonymous objects that are not necessarily legitimized. This series of decisions is intensively “positive”. It is based on the classification, ranking, and discarding of the existing documents, of whatever there is. What has been destroyed, hidden, what does not exist or has not been documented is a part of history and of memory—especially when we speak of memories of the repression—the absence of which is also “information”. The pauses, silences, and gaps are also found in archives, we just have to learn to recognize and interpret them.

When a collection of documents is accepted into an archive, the arbitrary classification process begins, which depends not only on the particularities of its documentary content but also on the set of representations and norms that filter the public access. A hierarchy of the access to memory<sup>19</sup> is thus established. The institutional archive, just as any other space that produces memories, is selective. The forms of classification are objectified into catalogues, card files, and computers that guide and delimit access: there is free access to some documents (generally those that do not imply any “violation of privacy” of persons or of their image); access to others is limited by certain clauses (e.g. authorized use for scientific studies), and certain groups of documents can be closed to the public for pre-established periods of time. The fundamental opposition between memory and history reveals the tension that regulates the rules of access.

When Pomian states that the “allowing total and free access to a document marks the passage between the record of memory to the record of history”<sup>20</sup>, we observe that the number of years that must pass for access to be open and free (in some cases rapidly, in others, 50 or 100 years) marks a boundary between memory and history. On the one hand, these decisions are permeated with political and “security” considerations, which promote secrecy and deny access to the public. On the other hand, the more the documents deal with the personal life of individuals, the more time restrictions are usually established<sup>21</sup>. The more a topic

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19 Namer, Gerard. *Mémoire et société*. Paris: Meridiens Klincksieck, 1987.

20 Pomian, Krzysztof. “Les archives Du Trésor des chartes au Caran”, p. 4010.

21 Between the need to keep “secrets” and respect a person’s private life and the right to information, on one hand, and the decisions about public use of a document, on the other, the disputes and differences in archive regulations are in play (Pomian, Krzysztof. “Les archives Du Trésor des chartes au Caran”; Krakowitch, Odile. “Les archives d’après *Les lieux de mémoire*, passage obligé de l’Historia à la Mémoire”;

produces moral censure, even in the case of State documents, the longer it takes for access to be granted. For example, in Argentina documents on the military regime that rest in the archives of the Catholic Church will not be available for public consultation until 30 years have passed. On the contrary, those documents that are older and are of less interest (e.g. the “dead” documents that arrive from institutions) will be available for consultation more rapidly. Like life, archives have cycles, ages, and times.

#### 4. The Repression and Its Documents

In this section we refer to “repression files” as all those objects taken from the victims or produced by security forces (police, intelligence services, armed forces) through repressive actions (raids, persecution, kidnapping, torture, disappearance, murder, etc.) committed during the most recent military dictatorships in the countries of the Southern Cone. Frequently included in this category are the files produced by human rights organizations as a result of their denunciations and search for information about the repression (Jelin, in this volume)<sup>\*\*\*\*</sup>. How are repression files different from other documentary files? Why do they interest us?

Repression archives, with their characteristics and singularities, are a paradigmatic case in the world of archives. First, because they affect a large part of the societies where they were recovered: the State and State agents (dictatorial presidents, members of security forces, judges, coroners, jailers, etc.), the victims (political, union, neighborhood activists and all those included in the broad definition of “enemy” by the State and its agents), the victims’ families and friends, human rights organizations, entire communities (which is reflected in the actions and practices of its citizens in the face of repressions: betrayal, solidarity, fear, etc.).

The attraction and repulsion that these papers produce is due to the fact, among other things, that most of those involved, victims and perpetrators, or direct family members, are still alive, live together in cities, file legal suits, create spaces for denunciation and remembering,

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Da Silva Catela, Ludmila. “De la expropiación a la verdad. Dilemas entre la democratización de la información y el resguardo de la vida privada en los archivos de la represión en Brasil”. In: Cristina Godoy (ed.). *Historiografía y memoria colectiva. Tiempos y territorios*. Madrid: Miño y Dávila, 2002).

<sup>\*\*\*\*</sup> NT: the author refers to the book where this article was originally published: Da Silva Catela, Ludmila. *Op. cit.*

tirelessly defend their positions and vindicate their rights (especially in the case of victims of the repression), activate the memory. This gives each document more than just historical or legal value; the documents represent a value/memory and a value/identity that accompanies and supports the militant actions, although not always, legitimizes the hurt memories of those who suffered from persecution, imprisonment in secret detention centers, torture, death, and disappearance.

Each time that thousands of files, papers, photos, pamphlets, and letters are publicized with the name of “repression archives”, a series of agents are put on the alert. The terror archives in Paraguay or the archives of the political police of Brazil or the police of Buenos Aires in Argentina, or the religious archives, such as Clamor in Brazil and the Vicaría de la Solidaridad in Chile, awakened and awaken the curiosity of journalists, the thirst for revenge of victims, human rights organizations and lawyers, the investigative interest of historians, political scientists, sociologists and, of course, the desire of different institutions and their agents to be the guardians and custodians of these archives.

In each case we can identify the particularities that differentiate them and the agents and events that endow them with the status of being of “public interest”. In Paraguay, the fact that the documents had revealed the existence of a regional plan to kidnap prisoners became one of the core features of its international recognition. In the case of Argentina, while the content was not very extensive and was limited to a sector of the police, what made the collection important and “necessary” was that it was one of the few discovered in the country<sup>22</sup>. The archive of the Military Supreme Tribunal in Brazil stands out more for the story of “theft” surrounding its transit into the public space than the value of its content. Moving beyond the initial and distinctive features, the search for and safekeeping of all documents from the dictatorial regimes in the Southern Cone was done with the conviction that they hid *the truth* about the dictatorship. This idea leads to the complementary belief that they hold an extraordinary power of revelation. This notion can be found in

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22 The case of the Argentine documents on the period of repression is quite unique. While there is a constant demand to recuperate the “Armed Forces archives”, little visibility and, therefore, interest has been given to other archives that have been found and classified, such as, for example, the collection of the documents on “Operation Clarity”, tasked with the ideological *purging* of the culture (*Clarín*, 24 March 1996), or the local police archives, such as those found in Rosario, as well as the those belonging to the different university campuses in the country, such as those found in a closet in the Faculty of Medicine of Cordoba (*Page 12*, 13 November 1997).

both the narrative of those who found them and the news stories: “Behind a gray door was *the whole truth*”, wrote an Argentinian newspaper in November 1999 when it “discovered” the archives in Buenos Aires; “Documents in State archive are proof of Operation Cóndor”, was the May 2001 headline in a Brazilian newspaper. Journalists, as the primary intermediaries in the publication of the documents, begin to construct representations about the “truths” being revealed by these papers. Then, when the persistent work of lawyers and human rights organizations begins, the facts are generally only confirmed on the basis of the victims’ testimonies, although this time they are “documented” and, therefore, they have are endowed with greater legitimacy, credibility, and authority to be used as trial evidence. They generally reveal little information about the whereabouts of the disappeared or dead.

In contrast to the more pragmatic uses, considering that these collections to be susceptible to historical, sociological, anthropological analysis enables us to discover truths, lies, mistakes, ambiguities, contradictions. Gradually we discover that much of what the police and military personnel kept were materials that they themselves had stolen and sequestered. The booklets, books, letters, notes, diaries, photos that each policeman carried around like a trophy to the archive boxes and files, as a form of evidence against the “enemy”, makes these archives an inexhaustible source for reconstructing the history of political parties and resistance movements, student and union movements, etc. Today these papers, created for the repression, serve to reconstruct the fragmented history of its victims.

Among the documents that can be found in the repression archives are, for example, statements made under torture, or documents implicating others, attributed to specific persons but frequently with false signatures. Truth or lies are given a differential value when they refer to specific names, when they include opinions or judgments of individuals, of persons that are registered therein. They go from being mere comments or journalistic notes or research notes to being an invasion of privacy. Making this type of documents public necessarily raises a serious debate about lack of differentiation of these documents, about the need to preserve the honor and privacy of individuals and impose longer time limits for publicizing them or control access to these documents<sup>23</sup>.

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23 Brazil is where more progress has been made with respect to the laws and terms of responsibility that should be assumed by the users of the repression archives, in



Some of the interests and arguments used when searching for repression documents and when they are finally found are: opening these archives to the public and recuperating elements that enable strengthening democratic processes, democratizing information, revealing truths, fighting against forgetting, preserving them as a legacy for future generations. However, the question of safeguarding privacy is not always discussed and generates conflict and disagreement. As discussed above, this is the boundary between memory (associated to the groups and individuals that possess them, defend them, and transmit them) and history (which is distant in time from the groups and individuals).

On the basis of these characteristics of the repression archives, we can identify at least four main elements of their existence, organization, conservation, and dissemination. First, the documents contained in the collections of repressive forces now serve a purpose that is diametrically opposite to its original intention: while they were produced to lay blame, they can now be used to provide redress to the victims for the arbitrary acts and human rights violations committed during the military dictatorships. For the victims, *these documents serve as keys to memory*, because they allow a fragment of their lives to be reconstructed and can frequently rebuild the identities that had been destroyed by the extreme conditions under which they lived during the years of political repressions. Second, these documents serve to assign responsibility to those tortured, killed, kidnapped, disappeared, as well as to those who gave the orders and implemented repressive policies. In the legal sphere, *these documents constitute proof*. Third, *these documents are a source of information for historical research* about what happened. And, finally, these collections of documents *are an educational tool* for teaching about intolerance, torture, political totalitarianism, etc.<sup>24</sup>

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terms of respecting the privacy of the individuals whose lives are documented in the archives. See the special edition of the *Quadrilátero* magazine, organized by Pereira da Silva, Hamilton. *Quadrilátero*, special number on “Arquivos da Repressão”, vol. 1, No. 1, 1998, pp. 1-130; see also Mendonça, Eliana (org.). *Os arquivos das polícias políticas*. Rio de Janeiro: Arquivo Público do Estado, 1994; Mendonça, Eliana. “Documentação da polícia política do Rio de Janeiro”. *Estudos Históricos*, vol. 12, No. 22, 1998, pp. 379-389; and Camargo, Ana Maria. *Os arquivos da polícia política como fonte*. São Paulo: Mimeo, 2001. For a broader perspective in favor of international regulations, see González Quintana, A. “Archives of the Security Services of Former Repressive Regimes”. *Janus*, No. 2, 1998, pp. 7-23.

24 According to González Quintana, A. *Op. cit.*, “the repressions funds are the patrimony of an entire People; they should be preserved as completely as possible. As a whole

When they erupt into the public space, the repression archives open a new cycle of producing feelings about the actions and consequences of the military dictatorships. They are combined with other practices developed in the countries of the Southern Cone, such as protests, acts, commemorations, rituals, construction of monuments and museums. They are also complementary to the construction of institutions when used as evidence in different arenas of demands for justice (truth commissions, truth-seeking trials, proceedings to deny public functions to those who tortured). They provide order and activate new sources of memory.

Just as the photos to the Kalina and the public exhibition which their ancestors experienced in flesh and blood, the repression documents arise with greater intensity in the references to national identity made by different groups in those countries that experienced and produced dictatorships, totalitarianism, and genocide.

## 5. The Ethnography of Archives

When I went for the first time to the Public Archive of the State of Rio de Janeiro to begin my research on the repression archives, I wasn't sure where to begin. Accustomed as I was to ethnography research methods, such as participant observation, recording of life stories, participation in rituals with the groups being studied, in the archive I asked for files and papers in no particular order and was unable to adjust the questions that would guide the construction of a coherent object of analysis. I got lucky. One simple paper provided a series of clues: it was the story of a policeman who had infiltrated the anthropology classes of a faculty in Rio de Janeiro. To my surprise, the professor under surveillance in the 70s had been a professor of mine in the 90s. When I met with her again I overwhelmed her with questions. Reconstructing the events on the basis of this single paper carried her back to her life during the "years of lead" (*anos de chumbo*). At the end of our talk, she said: "I hadn't thought about these things in a long time (...) I had no idea that those papers were in a public archive". This made it perfectly clear to me that it was possible to consider archives as spaces of memory.

Having overcome the initial methodological limitations, ethnography broadened the horizons for observing the past. It motivated me to move

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and by extension, they are global heritage in that they can reinforce memory and shield against the dangers of intolerance, racism and totalitarian politicians".

“beyond the document” and build relations with people, with experiences, with conflicts—in short, with memory. In this sense, one of the virtues of the chapters of this book<sup>\*\*\*\*</sup> is that it shows the different path taken by each author to investigate the archives that they visited, studied, used. With varying intensity, each narrates the forms in which they approached the documents, the feelings produced by finding the letters or papers of people they had known, the relationships that were triggered by a piece of paper or a photo; the disputes that this set of documents, at times ignored, at times revalued, caused at different points in time. By highlighting the paths to discovery, the systematization and use of the repression archives in the Southern Cone countries, the variable tension between memory and history is underscored.

The dispute over memory that I mention in the introduction clarifies the three social units that should be enumerated in the study of an archive: the Kalina, through their representative association; the French state, through the Fototeca; and an ethnographer who revitalized the connection between both worlds. An archive can appear to be a dark place where little happens until a random event reveals the most profound meaning of its existence. The communication of the senses that is channeled by the archives directly affects the forms of reconstructing memory and the assertion of social, collective, national, and community identities. But these feelings are not timeless nor are they visible at any moment and to any observer.

If an archive is a *laboratory* to a historian, to an ethnographer it can be an *observatory*. With its location, history, population, instruments, events, and rituals, each archive is an entire social system, a world in itself. Interest in the archive does not exhaust its description as a place with hierarchal links to the structures that generate symbolic power. In the words of Mary Douglas<sup>25</sup>, systematic ethnographic observation can discover the extent to which the institutions direct and control memory. For an ethnographer, the fact that an archive is such a sacred place *for the* historian makes it easier to denaturalize it and approach it on the basis of the characterization of the neighborhood and the building where it rests, its spatial structure, of the people who go there, their attitudes, opinions, etc.

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\*\*\*\* NT: the author refers to the book where this article was originally published: Da Silva Catela, Ludmila. *Op. cit.*

25 Douglas, Mary. “As instituições lembram-se e se esquecem”. In: *Como as instituições pensam*. São Paulo: EDUSP, 1998, pp. 78; 83.

In an ethnographic description of an archive, the director, the archivists, and the users are not only points between the documents; they are individuals with hierarchical relationships: the director and the enforcement of archive access policies, the archivist with the attitude of custodian, the users and their unequal expertise in using the resources offered by the institution. Their positions are also shaped by the relations of affinity, tension or partnership that are woven among them and with other memory institutions, but above all with regard to the historical moment in which the ethnography observes and “is in the field” of the archive under study. This point in time will define the possible interpretations of this reality and will be linked to prior social processes. The circulation of documents triggers a circuit of production and reception, where memory and history become comprehensible in their development. In other words, archives (the history and memory that they can potentially safeguard) do not occupy spaces by chance: a country’s General Archives are a specific manifestation of this. They are usually in the center of the capital cities, such as the National Archive of Argentina, located in Buenos Aires between 25 de Mayo Street and Paseo Colón, or in the archive in Rio de Janeiro, located in the old part of town, in front of Republic Square (*Praça da República*). These old and/or majestic buildings directly evoke the basic symbols of nationality and the State. In those cases in which the importance of the archives led to the construction of modern buildings filled with cutting edge technology, the displays always return to the old constructions and emblems of the key institutions of national identity. The monumentality is transferred from the building to a collection of documents that include constitutions, early maps, royal charters, war diaries, census, etc. and that condense an undisputed, sacred core of forms of identifying the national community.

What is considered central or peripheral enough to occupy a place in a national general archive or simply be kept in a garage in a remote province or neighborhood, will depend on a group of experts (historians and renowned researchers) that seek to define the selection, order and destination of the documents. The order of an archive is never definitive. These institutions are always evolving. The documents themselves do not contain any essence of the value for which they are being archived. For example, what is the significance of the fact that the “Alberdi Archive” is not *kept* in the General Archive of Argentina but is instead safeguarded in a library in the *pampas*? The content of the archives definitely becomes an element among the places, individuals,

institutions that have recently expanded into the labyrinths of the internet<sup>26</sup>.

This means accepting that the documents, the images, the objects that comprise the collections are not vestiges of the past but products of a society that “manufactures” them according to relationships of power (between archivists, archive directors, and the multiple users and forms of use) and that powers are created around them<sup>27</sup>. This is reflected in the antiquity and prestige of the archive, in the shaping of the public user, in the books, exhibits, prizes, etc. generated by the use of their collections.

On the other hand, archives as worlds of meaning are evidence of the transactions of human life<sup>28</sup> where there may be desires to intentionally perpetrate a certain image, a conceived purpose which is ultimately destined to monumentalize an “archived” individual, group, or institutions. Or they are simply the accumulation of papers that were originally preserved by institutions for administrative purposes and whose principal objective is not to create an image but to execute administrative tasks and provide order to those things that affect them. These two forms come together when the moment comes to classify them and put them in order, not in their places of origin but in the institutions where they will be kept. There the documents will acquire new meaning depending on the historical moment, the forms and manners of use, as well as the importance that they will come to legitimize and give visibility to the space where they were placed. Finally, in this chain of production and reception, the ways to use an archive will result in different products or benefits that will grant them greater visibility, legitimacy or simply cast them into oblivion and silence.

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- 26 There are several internet sites where you can find documents that were recently considered “secret”, like those declassified by the United States on the dictatorships in Latin American, and some Russian and Eastern Bloc country archives. The archives on Latin America involve several countries and historical monuments. For example, documents on Chile and the overthrow of Allende can be consulted at: <http://www.foi.state.gov>. Also on the internet is UNESCO’s ambitious Memory of the World project, which seeks to preserve and promote the world’s cultural heritage, considering that preserving and improving access to the documentary heritage are two complementary aims. To this end, the Memory of the World Program seeks to raise awareness of member states about their documentary heritage, in particular those aspects of this heritage that have world significance. This Program can be found at: <http://www.unesco.org/Webworld/memory/>.
- 27 Le Goff, Jacques. *Documento-Monumento*. Lisboa: Imprensa Nacional, 1984; Foucault, Michel. “El enunciado y el archivo”. In: *Arqueología del saber*. México D. F.: Siglo XXI Editores, 1994.
- 28 Cook, Terry. *Op. cit.*

It is thus possible to say that archives are multiple social constructions that include a variety of institutions and agents that found and preserved papers, photos, images of a period of time, a place, a social class, gender, ethnicities. They are also the sum of the wills to preserve and the struggles for legitimate recognition of those vestiges endowed with social and historic value within a community or society. Nothing that is archived by families, scientists, statesmen, and institutions is impartial or neutral; everything carries the mark of the individuals and actions that saved them from oblivion; everything is formed, represented, symbolized, re-signified between the person who acted and spoke, photographed, filmed, wrote and the person who recorded, printed, conserved, classified and reproduced.

The life of an archive is not passive and there are no two individuals or two situations in the life of one same individual that are reproduced in the same way. Asking ourselves about archives, questioning the most common images about the places that keep old papers or that are only of importance to ancient history buffs or historians is an important topic that adds, ethnographically speaking, to what we know about places in history and that can describe a world of relationships that more than describing the life of others (those referred to in the documents) show us a picture of the world of those who frequent them and make them a place full of enigmas, power and representations of the world.

**PART IV  
REPARATIONS AND INSTITUTIONAL REFORM**





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# REPARATION PROGRAMS FOR MASS VIOLATIONS OF HUMAN RIGHTS: LESSONS FROM EXPERIENCES IN ARGENTINA, CHILE AND PERU\*

*Cristián Correa*

## 1. Introduction

The elevated number of victims that result from repressive policies against dissidence or subversion, or in the context of internal or international armed conflicts, are a challenge in terms of ensuring the realization of victims' rights to truth, justice and reparations. The mass nature of the crimes and the fact that they are a result of repressive policies imposes a series of challenges.

Political decisions must be made and public policies implemented to address the consequences of mass crimes that are themselves a result of other public policies. When a political system has been corrupted and its resources, structure and monopoly of legitimate force have been used to repress its citizens, violate their rights, and commit and be complicit in the commission of crimes, the traditional mechanisms for adjudication of disputes are insufficient. It is necessary to implement administrative reparations programs that work closely with the victims, listen to them and provide for the implementation of measures to deal with the most serious consequences. The implementation of such measures and the explicit recognition of responsibility will send a message is diametrically opposite to that of the violations: that the victims are an important part of society and that their dignity is valued.

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\* A similar version of this article appeared in Portuguese in the Journal *Anistia Política e Justiça de Transição*, published by the Ministry of Justice of Brazil, No. 3, January/June 2010. Catalina Díaz and Javier Ciurlizza collaborated in the production of this text.

In order to explain how administrative reparation programs work, this paper will present a brief comparison of administrative reparations programs that use the traditional mechanism developed by the law to provide for the redress for grievances: judicial adjudication. This comparison is useful because the principles and mechanisms of judicial adjudication, which are more widely recognized in regard to the notion of reparations, are frequently used as a measure of what reparations should be. This text will attempt to demonstrate how the nature and magnitude of mass human rights violations require the use of other concepts to justify and implement reparations programs to address the consequences of such violations.

Subsequently, this paper will present the most significant challenges to designing a reparations program, such as the definition of the universe of victims, of the beneficiaries of the right to reparations, and of the reparation measures. The text will refer to the experience of administrative reparations programs in three Latin American countries: Argentina, Chile, and Peru. In the first two, the policies have been in force for a longer period of time, making it possible to evaluate their long term effects as well as the different measures required for their implementation. The Peruvian case is the most recent and has been implemented for a shorter period of time, but illustrates an integrated alternative that is worth considering.

Finally, the conclusions compare the three experiences and their capacity to provide redress for past violations.

## **2. Administrative Reparations and Judicial Adjudication**

The traditional mechanism for obtaining reparations for victims of crimes is judicial adjudication. Through this means, the victims file lawsuits to obtain reparations for the damages and suffering caused. The judicial processes require the victim to play an active role, as plaintiff, acting in an individual capacity (although certain jurisdictions allow collective actions). These processes require proof of damages, identification of the persons responsible, and establishment of the causal relationship between the culpable or intentional act and omission of those responsible and the damages. Once these conditions have been met, the decision handed down will make it possible to establish the specific responsibilities of the different parties and, where appropriate, of the State. After establishing the facts, the judicial investigation will also recognize the dignity of the victim, as one who has suffered an unjust aggression. Finally, the decision should calculate the specific harm and suffering caused to each of the victims in

the particular case, including material and non-material damages. Thus, the decision could contain all of the elements of satisfactory reparations for the victim, which adequately redress or compensate the losses, even when many of the damages are in fact irreparable.

However, one wonders if these traditional mechanisms for obtaining truth, justice and reparations in cases of ordinary crimes, which derive from notions of tort liability related to property damage or responsibility of the State for acts by the Administration that cause damages, where appropriate, are the most suitable for cases of mass and systematic violations. The commission of mass human rights violations requires us to search for mechanisms and principles other than those used in cases of individual property damages. The nature of human rights violations, as acts for which the State is responsible for having distorted its purpose and used its powers and resources to attack rather than protect its citizens, obliges the State itself to take a proactive role in repairing the damages and suffering caused. The mass nature of these crimes also requires that the mechanisms and principles invoked allow real access to the victims, especially those living in marginal conditions, and reflect a political commitment to provide redress for and integrate these victims.

Very few victims are actually in the condition to litigate, especially against the State. Their capacity to exercise their rights, have access to legal counsel, gain access to the justice system, and obtain satisfactory results is limited. Those who have suffered as a result of repressive policies must overcome their fears. It is not easy for them to trust in the State institutions, police, prosecutors and courts after years of State persecution, complicity in or indifference to these crimes, all of which increase the barriers commonly faced by people in their access to justice. Those who do will difficulty proving that the crimes were committed, identifying the perpetrators, and substantiating the harm caused so many years before. The personal cost to those that attempt this are immense and only those with large amounts of resources, who achieve greater visibility in their cases or have the support of specialized organizations will obtain a favorable result. For this reason, only a small number of victims will satisfy their expectations and frequently the poorest or traditionally excluded victims will remain marginalized.

Above all, however, a State that wishes to assert its legitimacy, strive for the common good, and defend and promote human rights must face past violations in the context of a public policy. Since these violations are the result of recent repressive policies implemented by the State, the

mere tolerance of individual demands is not enough to mark a distinction between a repressive past that distorted the very purpose of the state. Political decisions must be made and public policies must be implemented to address the consequences of mass crimes that are themselves a result of other public policies. When a political system has been corrupted and its resources, structure and monopoly of legitimate force have been used to repress its citizens, violate their rights, and commit and be complicit in the commission of crimes, the traditional mechanisms for adjudication of disputes are insufficient.

A policy for reparation of human rights violations must be based on the recognition of the crimes committed, acknowledgement of state responsibility in these crimes, efforts to reach all victims through measures to redress, to the extent possible, the effects of the damage and guarantee that these violations will never again occur. This usually implies policies of truth, justice, reparations and guarantees of non-repetition. These elements are interrelated, because most victims will not feel that they have obtained redress merely by the delivery of material goods if there is no recognition of the events, of where responsibility lies or if the structures that made these violations possible are not modified.

The reparation offered to the victims themselves, however, is different from what they would receive through a judicial process. An administrative reparations policy must define who will receive redress and how, applying criteria that are different from those used by the courts under ordinary legal norms. Defining who will receive redress requires specifying what type of violation was committed and who amongst the victims should be included (whether only direct victims or also family members or indirect victims). It also means deciding how to determine the status of a victim deserving reparations, and how to register the rights holders entitled to reparation.

In addition, the determination of the grievances to be redressed and, therefore, of the reparation measures, should not be based on an individualized review or on requirements similar to those governing the proof of facts during trial. This means using procedures and criteria other than the economic evaluation of each and every one of the damages suffered, which should be based on broad categories of levels of suffering for which damages are presumed and comparable measures are granted for all victims in each category. However, this lack of individualized measures is offset by diverse and complementary measures that address the most

common grievances and the adverse impact that the violations have had on the victim's life. These measures can thus attempt to address the most common deficiencies in terms of income, health, education and housing, as well as the other types of specific consequences. In the perception of the victims, some redress measures will be more satisfactory than others, and they may appreciate some measures more than others, depending on their specific needs and expectations. In this way, the objective of this set of policies, beyond merely compensating for the harm caused, is to restore the dignity of the individual by recognizing the responsibility and commitment of the State, through specific actions that recognize their dignity and acknowledge their place in society, and that help them to overcome the effects of the violence.

Judicial Reparations	Administrative Reparations
Individual petition filed by the victim	Collective State policy on the initiative of the State
Limited only to those cases that are successfully litigated	Broad and comprehensive coverage to registered victims
Individual assessment of damages caused to each victim	Common measures by general categories that do not require detailed proof of damages or consequences
Burden of proof on the victim to determine responsibilities, damages and causation	Mass registration process in which the damages caused are attributed to the State on the basis of patterns of violence
High evidentiary threshold	Low evidentiary threshold, depending on the registration process
Compensation calculated in accordance with individually proven damages	Series of complementary measures to restore dignity and overcome consequences
Compensation is frequently for a large amount, because it is equivalent to the proven damages. In some cases, accompanied by symbolic measures	Smaller amounts that are not intended to be equivalent to damages and that are complemented with other material and symbolic measures
Limited access	Broad access due to the registration process

### 3. Definition of the Universe of Victims

Defining the universe of the victims is crucial to any reparations program. This definition is twofold: definition by the nature of the violation, *i.e.* what crimes will be covered, and definition in terms of time, *i.e.*, the period of time during which the crimes were committed that will be covered. To do this, it is useful to briefly review the criteria established

under international law and the experience of countries with similar justice systems that have designed relatively satisfactory reparations programs. It also requires a comparative review of how victims have been registered and to what extent they have been able to gain access to the reparation policies.

In order to define who should receive reparations, it is necessary to begin by defining what crimes should be redressed. In fact, the definition of the victims to be covered should be based on an objective criterion that compares them with those who are in a similar situation. These definitions have varied in different cases, responding to the circumstances of each transition and, in particular, to the capacity to investigate, assume and address all the human rights violations committed. However, as a general rule it could be argued that the crimes to be covered should primarily be those that constitute serious violations of human rights or international humanitarian law. The Rome Statute of the International Criminal Court and the International Covenant on Civil and Political Rights are two useful instruments for arriving at this definition, without prejudice to the application of existing regional instruments.

Article 7 of the Rome Statute defines crimes against humanity as, *inter alia*, murder, extermination, enslavement, deportation, imprisonment, torture, rape, sexual violence, and enforced disappearance “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”. The convention defines attack directed against any civilian population as “a course of conduct involving the multiple commission of acts referred to against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack”. This definition is consistent with other conventional and customary norms of international law, as established under the International Covenant on Civil and Political Rights, which recognizes that certain rights may not be derogated even under “exceptional circumstances that threaten the life of the nation” (art. 4.1), such as the right to life and to not be arbitrarily deprived of life, and the prohibition of being subjected to torture, or held in slavery or servitude.

While both covenants may not have been ratified by a certain country or may not have been in force when the crimes under investigation were committed, the criteria they define may serve as a guide to what is, in general terms, understood as human rights violations that may not be committed, even under extraordinary circumstances, and in accordance

with customary law or *jus cogens*. This criterion may serve as the basis for the formulation of public policies, according to the conviction within the government and society of what is and is not acceptable.

Notwithstanding the mentioned provisions of international law, the practical implementation of reparation programs has varied. The first measures to acknowledge the truth about human rights violations in Argentina and Chile were limited to enforced disappearance. In Argentina they referred exclusively to disappearance and, in Chile, although also limited, they included summary execution, death as a result of torture, and death as a result of political violence, including cases of victims of subversive groups. However, in both cases, reparations programs for other categories of victims were later created. Peru is different in that it immediately recognized all violations committed during the internal armed conflict, which had been broadly defined in the mandate and recommendations of the Truth and Reconciliation Commission.

In the case of Argentina, due to the importance given to enforced disappearance, the first reparations measures referred to victims identified by the National Commission on Disappeared Persons (CONADEP, in Spanish)<sup>1</sup>, and granted a minimum annual pension to the direct family members, without prejudice to the delivery of other reparations measures in later years, as will be discussed below. However, the family members of the disappeared detainees that had not been recognized by the CONADEP could also request reparations by petitioning the judicial authorities or the Ministry of Interior's Sub-Secretariat of Human and Social Rights, created at the beginning of the democratic transition. During this same period, other laws were passed for the restoration of employment or payment of pensions to persons dismissed for political reasons from their jobs as professors, or as officials of State companies or certain public offices. It was only years later that reparation policies were approved for those who had been deprived of liberty under the State of Siege, and for children who had been taken away from their parents, made to disappear and illegally given up for adoption. Reparations measures for disappeared detainees were also subsequently extended to include the delivery of public treasury bonds. Victim registration procedures were created in all of these subsequent processes.

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1 Article 1 of Decree 187 of December 13, 1983 (published on December 19) established that the purpose of the National Commission was to “clarify the facts related to the disappearance of people in the country”.

The victims of political imprisonment in Argentina were not recognized by a truth commission but through a reparations law enacted seven years after the release of the *Nunca Más* (Never Again) Report and five years after a law was passed granting pensions to relatives of the disappeared detainees. However, the mechanism used for the reparation of victims deprived of liberty resulted in significantly higher amounts, which then led to pressure from the relatives of disappeared detainees for access to this type of reparations.

In the case of Chile, the reparation policy included relatives of the victims recognized by the National Truth and Reconciliation Commission (known as the “Rettig Commission”), as well as the relatives of other victims who would be recognized by the agency created to continue with the registration of victims and implement the reparations, the National Reparations and Reconciliation Corporation. This process only addressed “the most serious violations”, understood as “situations of those persons who disappeared after arrest, who were executed, or who were tortured to death, in which the moral responsibility of the State is compromised as a result of actions by its agents or persons in its service, as well as kidnappings and attempts on the life of persons committed by private citizens for political purposes”<sup>2</sup>. The policy was limited to enforced disappearance and death because, immediately after the democratic transition, it was argued that it was not possible to investigate all the truth about the human rights violations.

However, over time and with the strengthening of the democratic regime, the process of recognizing the truth and providing reparations to victims of political imprisonment and torture was expanded. Thus, 13 years after the return to democracy and the establishment of the Rettig Commission, a new commission was created to “establish, in accordance with the records submitted to it, the identity of those who suffered from the politically-motivated deprivation of liberty and torture through acts committed by State agents or individuals in its service, in the period between September 11, 1973 and March 10, 1990”<sup>3</sup>. This second truth commission, known as the “Valech Commission”, understood that its mandate empowered it to classify as victims all those who had been

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2 Article 1 of Supreme Decree 355 of 1990, which created the National Truth and Reconciliation Commission.

3 Article 1 of Supreme Decree 1040 of 2003, which created the National Commission on Political Imprisonment and Torture



illegally detained or subjected to a legal regime of exception (laws under a state of siege or other exceptional or repressive norms). Victims also included those deprived of liberty without some minimum guarantees, either regarding their prison conditions or in relation to the legal procedures followed in their cases. The Commission presumed that torture had been committed, including sexual violence, in all cases in which the deprivation of liberty was proven, after having found that it had been a systematic and common practice at these sites. However, the Commission found it difficult to obtain convictions in cases of torture committed outside the detention areas, when no records existed or the acts had not been reported.

There have also been other reparation processes, such as the payment of pensions or contributions to the retirement funds of tens of thousands of people that were dismissed for political reasons from their jobs in the public administration or in state companies, and the payment of pensions to peasant farmers whose agrarian reform lands had been taken away from them, among others. These measures, which have included a significant number of people, have had the greatest financial impact on the State. With regard to the time period, in the case of Chile the period was defined by the duration of the dictatorship, and was decreed as such in the creation of both truth commissions<sup>4</sup>.

In the case of Peru, the categories of recognized victims were established in a unique process that was both comprehensive and broad-based. The Truth Commission, created after the fall of Fujimori, was established to “bring to light the process, events and responsibilities involved in the terrorist violence and violations of human rights which took place from May 1980 to November 2000”<sup>5</sup>. This norm also defined the mandate, which stated that “[t]he Truth Commission will focus on the following actions, provided they are attributable to terrorist organizations, State agents or paramilitary groups: (a) Murder and kidnapping; (b) Enforced disappearance; (c) Torture and other serious injuries; (d) Violations of the collective rights of the country’s Andean and native communities; and (e) Other crimes and serious violations of the

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4 Consideration One of Supreme Decree 355 of 1990 and Article 1 of Supreme Decree 1040 of 2003, previously cited.

5 Article 1 of Supreme Decree 065-2001-PCM, which created the Truth Commission. The Commission was established during the interim government of president Paniagua. The name of this Commission was later changed to the Truth and Reconciliation Commission by president Toledo.

rights of individuals”. By virtue of the comprehensiveness of the latter definition, the Commission included murders and massacre; enforced disappearances; arbitrary executions; torture and cruel, inhuman or degrading treatment; sexual violence against women; violations of due process; kidnapping and hostage-taking; child abuse; and violations of collective rights. This comprehensiveness, however, also included a specific timeframe, which covered the period from the date of the first act of violence committed by *Sendero Luminoso* to the fall of Fujimori’s authoritarian regime, as will be discussed later in this document.

With no restrictions to the type of violations, the Commission proposed a comprehensive reparations plan that included them all. This plan became a law<sup>6</sup>, which established a general framework for a broad reparations program, including programs for the restitution of citizen rights, reparations in the areas of education, health, collective and symbolic reparations, promotion and facilitation of access to housing, and others that would be created by the agency in charge of the coordination and implementation of the program. The law also defined different categories of victims, including relatives of disappeared and deceased detainees, people who had been displaced, tortured, victims of sexual violence, kidnapped, some categories of injuries, children born as a result of sexual violations, minors recruited by self-defense committees, etc. It also included communities that were razed to the ground and suffered other forms of collective damage. Finally, the law established that both individual and collective victims should be registered in a sole registry. The regulation of the law stipulated how each program would apply to each category of victim<sup>7</sup>. Implementation of the law, however, has been piecemeal, beginning only with collective reparations for deeply affected communities. Today the implementation of health, education, and financial (compensation) reparation programs are being discussed, starting with elderly victims. Progress on these measures, however, depends on the progress made in the registration process.

Despite its comprehensiveness, the Peruvian law excluded as victims those people who had been members of subversive organizations<sup>8</sup>. This exclusion was not the result of the recommendations of the Truth and Reconciliation Commission which, as in the case of Chile did not exclude

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6 Law 28592, of July 29, 2005.

7 Supreme Decree 015-2006-JUS of July 6, 2006.

8 Article 4 of Law 28592.

victims on the basis of their conduct prior to or after the violation suffered, but of how fresh the attacks by the Sendero Luminoso and the Túpac Amaru movement were in the minds of the political elites and sectors of society. This is, however, contrary to the concept of inalienable and non-derogable rights. As argued by the Chilean Valech Commission regarding the participation of victims in acts that constitute serious violations of the rights of other people, “none of this justifies (...) detention in undisclosed sites, and much less the use of torture”<sup>9</sup>, thus justifying their inclusion as victims.

We can see how different paths have been taken to define the universe of victims that will receive reparations in three different situations of conflict and transition. Over time and with the strengthening of democracy, however, the universe of victims has been expanded, coming more in line with the victims recognized under international law. Moreover, in the three cases the definition of the universe of victims has referred to people who have suffered from specific crimes, on the basis of the records of the truth commissions that preceded the reparations laws, but also has created the mechanisms for registration of victims that were not included by these commissions, as discussed below<sup>10</sup>.

#### 4. Definition of the Universe of Victims according to the Period or Circumstances of the Violation

The other common limiting factor in a reparations policy is the period during which the violations occurred. This period is usually characterized by the use of extraordinary means of repression, which allowed these practices to become systematic. This, in turn, justifies the need to use extraordinary measures of reparation.

In fact, administrative reparations programs are extraordinary ways to ensure the observance of human rights, which are the result of policies

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9 Report of the National Commission on Political Imprisonment and Torture, Santiago, 2005, p. 75.

10 The definition of the universe of victims is also linked to practical aspects, such as the process for the registration of victims. Note that in the cases of Argentina and Chile, where the processes were the result of different laws creating different programs for each category of victim, the processes of registration have had to be expanded or reopened on several occasions. Today, and more than 20 years after the democratic transition, Chile is completing a new registration process that it was obliged to open due to pressure by the victims’ organizations. In Peru, the registration process is continuous, although deadlines have been established for the registration of rights holders entitled to individual economic reparations.

of violations that were also extraordinary. Under normal circumstances, when extraordinary crimes occur, even those committed by State agents, existing ordinary justice mechanisms and institutions can provide justice, truth, and reparations. Massive and systematic violations, however, require extraordinary measures, such as administrative reparations programs.

Thus, in order to specify the scope in terms of territory and time period of the violations to be covered by an administrative reparations program, it is necessary to determine the period during which the exceptional repressive policies were in force. This implies including all those cases that occurred during a period, place and in situations where the protection normally provided by the State in cases of isolated human rights violations or crimes was lacking. These factors tend to lead to mass violations or violations resulting from a State policy, usually secret but accompanied by justifications by the high-level authorities in the country or the respective region of the acts, which at minimum indicates a certain tolerance towards them or a resistance to investigate the alleged crimes. The conduct of the high-level authorities, the police (regarding its willingness to receive and investigate complaints), the prosecutors, and the courts is crucial for establishing the existence of common patterns of behavior, making it possible to determine the period to be investigated.

Another way to define this period is to consider the duration and place of a constitutional or legal state of emergency, such as the declaration of a state of siege or the entry into force of extraordinary laws that diminished the protection of human rights. However, an excessively formalistic approach or one based on the laws in force could exclude some cases that correspond to the same pattern of repression but that occurred before or after the extraordinary legal period.

The definition of these limits depends on the situation in each country. In the case of Argentina, the CONADEP incorporated close to 600 cases of disappearances that occurred before the coup d'état of March 24, 1976, when disappearances were part of a pattern of repression by the armed forces. Subsequently, Law 24.043 on the reparation of victims of arbitrary imprisonment established the time limit as the date the state of siege was declared, November 6, 1974, under the government of María Estela Martínez de Perón. Similarly, a resolution by the Human Rights Secretariat in a case of enforced disappearance stated that “for those cases that occurred before March 24, 1976, [it is necessary] to determine if they were linked to this general pattern of repression and whether they

coincide with the methodology used by the Armed Forces or security forces after March 24, 1976, or whether they had been committed by a paramilitary organization”<sup>11</sup>. The time limit for the reparations programs was the return to democracy, on December 10, 1983.

In the case of Chile, as explained above, both truth commissions restricted the time period for their investigations and subsequent reparations programs to the duration of the dictatorship. Before and after this period, there were very few violations, primarily cases of political violence committed by private citizens, and the victims obtained protection and justice through ordinary means. However, the inflexibility of this time restriction has resulted in unfair exclusions, such as the refusal to grant the status of dismissed for political reasons to Navy officials who had been detained and dismissed days before the coup d'état. They were recognized as political prisoners only after considering that their deprivation of liberty and torture had continued after the *coup*.

In the case of Peru, the time period for the reparations policy was established in the mandate of the Truth and Reconciliation Commission, *i.e.* between May 1980 and November 2000. This time delimitation clearly corresponds to the beginning of the armed conflict undertaken by *Sendero Luminoso* and the installation of the interim government following the resignation of Alberto Fujimori. However, the Peruvian Truth and Reconciliation Commission decided not to review some cases, for example, those involving operation “Cóndor”, even when said complaints referred to kidnappings that took place in July 1980 (and, thus, were under the temporary jurisdiction of the Commission), but did not correspond to the main pattern of violations covered by its mandate. In Peru, reparations are related both to the moment in which they occurred and to their link to the patterns of violence produced during the conflict.

## 5. Definition of the Rights Holders Entitled to Reparation Measures

The definition of rights holders entitled to reparation measures obviously depends on the definition of the crimes to be redressed. To this

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11 Resolution of the Human Rights Secretariat in the “Ortega Peña, Rodolfos/ request Law 24.411” file cited by Gueembe, María José, “La experiencia argentina de reparación económica de graves violaciones a los derechos humanos”, in Díaz, Catalina (ed.). *Reparaciones para las víctimas de la violencia política. Estudios de caso y análisis comparado*. Bogotá: ICTJ, 2008, p. 52.

end, it is useful to distinguish between deceased or missing victims, such as in the case of disappeared detainees, and survivors.

### **5.1. Relatives of Deceased or Missing Victims**

It is clear that direct family members should be presumed to be rights holders entitled to reparation measures in the case of death or disappearance. However, how this has been handled in practice varies from country to country and the intestate succession scheme has not necessarily been used. In fact, in cases of reparations for material and moral damages, it is difficult to speak of inheritance exclusion orders. In addition, along with establishing who should receive the reparation measures, it is necessary to decide how the measures should be distributed, if they susceptible to distribution.

At first, it might seem that the spouse of the victim should be the one to receive the reparations, whether they were in a traditional marriage or in common-law marriage that is stable or permanent and in cases where the couple has had children. The children of the victim and their parents should also be included. However, the inclusion of relatives varies in the three experiences that were reviewed.

In some cases, such as Argentina, the pensions awarded under Law 23.466 included the underage brothers and sisters, who had lost both father and mother and who had lived with the victim, or those who were handicapped and lacked other sources of income. The children were entitled to receive a pension until they turned 21, which was later extended to 25. They were all entitled to receive a minimum pension and to have access to the public health system. In the case of reparations through a consolidated public debt bond, the victim him/herself was the holder of the bond, which would be distributed in accordance with inheritance laws. However, if both a spouse and common-law spouse existed, their portion would be divided between them in equal parts.

In the case of Chile the inheritance order was not followed; instead, a special system was created by the same law that awarded the pension and other reparation measures. This law granted the status of rights holder entitled to the reparation measures to the spouse, the mother, and in her absence the father, the children and the mother of any children born out of wedlock. They all had access to the Reparation and Comprehensive Health Assistance Program and the children, up to the age of 35, were entitled to education scholarships that included university

studies. The pension was distributed in such a way that a large number of beneficiaries did not affect the amount that each would receive. The pension was calculated according to a reference amount equivalent to the average family income. The spouse received 40% of this amount; the mother, and only in her absence the father, received 30%; each child, regardless of how many there were, received 15%; and the mother of any children born out of wedlock received 15% (this discrimination was later corrected, and the amount of her portion was increased to 40%). The existence of a common-law spouse and mother of children born out of wedlock did not reduce the amounts, nor did the existence of several children, because in these cases the entire family group received 100% of the reference amount. If there was only one beneficiary family member, that person received 71% of the reference amount.

Peruvian law, on the other hand, defines the beneficiaries in general terms as the spouse or partner, the father and mother and children, without going into details about how the reparations would be split up. The economic reparations program has not yet been designed, and the debate on how to design such plan has not yet established how the measures will be distributed among the different family members.

The definition of the beneficiaries should also take into account the time that has passed and which relatives, having been affected by the violation, are most likely to be the rights holders entitled to the reparation measures. Among the different distribution schemes, there are advantages to those that reduce the possibility of exclusion or competition between the family members. These can avoid adding new sources of conflict between the relatives or ensure that the subsequent appearance of a new family member does not imply a reduction in the benefits of another, such as is the case of the initial pension in Argentina or the Chilean distribution scheme. It is also advisable to include the recognition of common-law marriage as equal to traditional marriage, as well as the recognition of the union of same-sex couples, which is not stipulated by these laws. However, it should be noted that these schemes are more complex when it comes to estimating definitive costs, since the final amount assigned to each victim will vary depending on the number of existing family members. This could give rise to the argument that it is not fair to hand out different amounts to each victim. However, from the perspective of the harm suffered by each family member, it seems fair that they should receive the same amount, regardless of how many relatives there are. If the objective of the reparation is to restore the

dignity and sense of ownership of the beneficiaries, and the pension or one-off payment is intended to ensure a certain level of subsistence, then it does not seem fair that each family member would receive a smaller amount due to the existence of other relatives who are equally needy.

## 5.2. Surviving Victims

If the reparations program includes crimes that do not lead to the death or disappearance of the victims, then the victim him/herself is the rights holder entitled to reparations. However, if the victim is deceased, which is very possible if a long time has passed since the period of violence, then the direct relatives should be considered subsidiary beneficiaries. This is consistent with the findings of the Valech Commission in Chile, which studied the impact of the violence on the family members, in the cases of torture in Chile. This study recently led to the extension of reparations measures to the children of the victims, by including them in the health program, and to the surviving spouse, by awarding a pension equivalent to 60% of the reparation pension that the direct victims were entitled to. However, limiting this benefit to only the female surviving spouses, which also excludes permanent companions, and the significant reduction in the amount of the already small pension is, at the very least, questionable. This recent modification also grants the victims the right to transfer their right to a university scholarship to a direct descendant. While this was done to address one of the demands of victims' organizations, it is difficult to decide which of the children or grandchildren will receive this benefit. In fact, consistent with its findings on the effects of imprisonment and torture on the families of the victims, the Commission had recommended a scholarship program that included all of the children.

## 6. Definition of Reparation Measures

### 6.1. Monetary Compensation

The delivery of sums of money is the most obvious form of redress. It is immediately associated with the notion of reparations and is also frequently used by national and international courts to redress damages and crimes, although it is commonly recognized that these damages are irreparable and that the intention is, in some way, merely to mitigate the devastating effects of the violation. However, as mentioned above, reparations do not consist only in the delivery of monetary compensation



when the State has been responsible for the crimes. They also entail the public recognition of responsibility, public apologies on the part of high-level national authorities, efforts to investigate the crimes, to find the disappeared detainees, and to ensure that repressive policies of this nature will not happen again. The reparation, understood as both symbolic and material measures, and the delivery of goods should be linked to the recognition of responsibility and the sense of ownership of the victims. This does not imply that the material reparations are irrelevant. The content of the recognition of the seriousness of the crimes committed is also expressed by the value assigned to the reparation.

Monetary reparations are generally of two types: the awarding of pensions or of one-off compensation, although these can also be made in several installments. There are advantages and disadvantages to both modalities, as explained below.

#### *a) One-off Compensation Payments*

A one-off payment, made in one or several installments, represents the value assigned to the loss suffered by the victim. It is a simple distribution system, and the payments can also be made during ceremonies that include important elements of symbolic recognition. It is also the modality most requested by victims, prompted by their knowledge of how the compensation awarded on the basis of judicial decisions can work, and by their natural distrust that payments will effectively be made over time.

The sums of money may be the same for each victim, or calculated in accordance with the direct material damages, consequential damages, and lost profits (estimated on the basis of the victim's income and life expectancy, in the case of death or disappearance, or on the period of deprivation of liberty). The moral damages caused are also factored into the calculation. However, this type of differentiation may lead not only to a complex process of individual calculations that are impossible to make in cases where there are a substantial number of victims, but may also create perceptions of inequality, if victims with larger resources are afforded greater redress, as if some lives are worth more than others.

Argentina used an interesting way of figuring out the extent of the damages, including moral damages, first in relation to arbitrary detention and then extended to include enforced disappearance and identity substitution. The formula was based on the highest salary in the tax earning scale. Thus, in the case of arbitrary detention, the victim was

paid the equivalent of this salary proportional to the number of days he/she was deprived of liberty. The amount increased in the case of death or very serious injury caused during the deprivation of liberty. Subsequently, the same parameter was applied in the case of enforced disappearance and theft of minors and substitution of their identities (the highest salary in the civilian administration salary scale) multiplied by 100.

After recalculations, the amount was equivalent to 322,560 Argentinean pesos, at a time when the peso was pegged to the dollar, without prejudice to the subsequent devaluation that affected the Argentinean economy. However, as will be discussed later, these amounts were not paid in cash but in consolidated public debt bonds, which meant that payment was not made until later.

The use of the equivalent of the highest public administration salary in Argentina had the clear intention of providing symbolic reparation. However, its association to the duration of the deprivation of liberty or the existence of physical injuries may not reflect the intensity of the suffering or the true extent of the damages. It may lead to excluding the conditions under which the person was deprived of liberty (detainment in undisclosed or public sites), as well as forms of torture that may not have left physical scars or sexual violence, from the categories of most serious violations to be redressed. In addition, this series of distinctions can make the verification process more complex since it will be necessary to prove not only the deprivation of liberty, but also the duration and the existence of resulting disabilities. All of this calls into question the desirability of making complex distinctions, which can create differences between victims and undervalue the forms of suffering that affect certain categories of victims. Some of these distinctions, which are frequently based on the most common forms of physical harm, can lead to the underestimation of the most frequent forms of harm to women, as occurs when considering injuries that cause disability, which ignore the consequences of sexual violence, which are invisible but are possibly just as devastating. They also overlook the harm to boys and girls, who may suffer consequences that will affect them for the rest of their lives, such as being deprived of their childhood or of the education that they are entitled to receive as children and adolescents. As explained above, it is also necessary to define how these sums of money will be distributed among direct family members in the case of death or disappearance of the direct victims.

If a payment of a sum of money is to have a reparatory effect and effectively send the message that the State recognizes its responsibility in the commission of serious crimes, it should be accompanied by other measures, both material and symbolic, as will be discussed later. If not, there is the risk that the payment will be perceived as an attempt to buy-off the conscience of the victims, “buy-off death”, one could say. In the case of Argentina, the payment of sums of money that were substantial but were made through a mechanism that delayed the payments, made with no other recognition of responsibility and concurrently with the pardon for the perpetrators, had a negative effect on the victims.

Similarly, the payment of relatively large amounts of money to members of poor farmer communities may disrupt the communities and the families. It is possible that the sudden influx of money may cause conflicts within families, or between neighbors, and increase the chances of fraud.

Finally, a one-off payment to a large number of victims can be a heavy burden on a given fiscal year, which makes it necessary to seek other funding options or distribute the payments over several fiscal years. There are mechanisms that may be used, such as payments in installments or even payment in bank notes, which enable the victim to receive immediate compensation, and which the bank can then charge to the treasury, with a previously agreed interest rate, over a period of years. An option discussed in Peru was to prioritize certain categories of victims to be paid per year, according to their age or other criteria of vulnerability. However, this means asking the victims, who have already been waiting for two decades or even longer, to continue to wait.

#### *b) Pensions*

The payment of pensions is an opportunity to show the victims that the State is committed to ensuring their wellbeing and livelihood for the rest of their lives. There is less risk that the reparations will be considered a “compensation for death”, be misused or create conflicts within families or communities. The reparations can be seen as society’s contribution to enabling the victims to overcome the long-term effects that the crime has had on their lives, through periodic economic assistance. The periodicity can also help send the message that it will be delivered not only once, but many times. It may also guarantee that the victims will not fall into poverty in the future, a situation that could prove embarrassing for the State.

The pensions paid may, however, be perceived as being too small and not equivalent to the scope of the damages. It may have a limited immediate and symbolic effect or be mistaken for social assistance measures, which the State is obligated to provide in any case. A periodic payment in places that lack the infrastructure necessary to make the payments or that requires the victims to have bank accounts can entail administrative costs and create significant barriers in terms of implementation and accessibility.

One way to overcome the first of these objections is to incorporate a one-time payment with the first installment, which could be equivalent an entire year's pension. The victims would thus receive an initial, more substantial amount that could have the necessary symbolic value. This could also be done to supplement the smaller amount that a son or daughter would receive when they reach the cutoff age for receiving the reparation benefit. In Chile, the relatives of disappeared and executed detainees received the equivalent of one year's pension, together with the initial payment. Similarly, after conducting an evaluation more than ten years after the implementation of these measures, the children who received nothing or received less than a certain minimum amount because of their age, were entitled to request a lump sum of US\$ 19,000 or the difference between this amount and the amount they initially received. In addition, the objection to the amount received is compensated over time since the amount of money effectively received over the years is not insignificant.

There are no established parameters for calculating the amount of the pensions. International law standards on reparations speak of restitution and compensation, applying the criterion of proportionality to the harm suffered for economically assessable damages, which are concepts usually associated to one-off payments. However, these norms are used primarily in cases of individual violations and not in mass reparations programs.

In Argentina, the initial pension for relatives of disappeared detainees was the minimum pension received by all retirees, to which all rights holders were equally entitled. However, the amount of the minimum pensions was quite often very small and was frequently insufficient to guarantee even a modest living. If this is the case, the capacity to convey recognition is very limited. This insufficiency also explains why when victims deprived of liberty were later given significant amounts of money in reparations, it was impossible not to include, following a similar

parameter or mechanism, disappeared or deceased detainees. The latter could obviously not be satisfied with receiving a minimum pension when victims of arbitrary imprisonment were beginning to receive more substantial amounts.

In Chile, two criteria were used to determine the amount of the pensions: for disappeared detainees, the criterion was a reference amount, the distribution of which was explained above, calculated on the basis of the average family income of the period (equivalent, at that time, to US\$ 537, and subsequently increased by 50%). As previously mentioned, a widow or widower received 40% of this amount, *i.e.* US\$ 322, after the increase; a mother, 30% or US\$ 241; a son or daughter 15%, *i.e.* US\$ 121, in addition to an initial payment equivalent to one year's pension. Also, in the case of victims of political imprisonment and torture the pension depended on the age of the victim, starting with an amount equal to US\$ 230. These amounts, however, and especially the amount assigned to victims of political imprisonment and torture, have been deemed insufficient by victims' organizations.

Factors such as average family income, *i.e.* socioeconomic indicators that are consistent with the living conditions in the country, instead of fiscally adjustable artificial units, such as tax units or even the minimum wage, may be more useful for determining an amount that could be considered just. The measure can thus be presented as a way to ensure that the pension is fixed to a minimum amount that is consistent with the rest of the population in the country.

In Peru, the government recently established payment of an amount equivalent to US\$ 3,650<sup>12</sup>. The adverse reaction to the measure, a little over a month after the new government took office, makes one expect that the amount will be readjusted by the future government.

Finally, this option obviously offers the advantage that the tax burden can be distributed over several years, which facilitates funding of the measure. This in turn, increases the capacity of the State to pay a significant amount of compensation over the years.

## **6.2. Reparations through Access to Social Programs**

In addition to the payment of sums of money, when dealing with reparations for mass human rights violations we frequently encounter

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12 DS 051-2011 of the PCM.

programs to provide access to health, education, housing, and social and legal assistance services. These programs are considered by international law as measures to repair the harm caused to victims, when referring to different forms of suffering that cannot be redressed by restitution or compensation but instead through provision of services.

Nevertheless, in order for these programs to be perceived as being reparatory in nature, they must focus on addressing specific damages, and not only be seen as ways to facilitate the realization of social rights that should be accessible to all citizens. These programs must not only be accompanied by the recognition of State responsibility; there must also be a difference between these measures and other social services, as will be explained in each case. In order to make this distinction and address the consequences of the violations, the modalities of implementation of the measures should be discussed with the victims and they should be developed taking into account their age, socioeconomic condition, needs, and demands. In Peru and Chile, health, education, housing, and social assistance programs have been included in the reparations measures. These programs vary in terms of extension and content, as well as the degree of effective implementation, and should address the specific needs of the target population. For this reason, it is difficult to develop general guidelines for implementation, other than to highlight the importance of differentiating them from other general social programs. We will, however, explain some aspects of health and education, and social and legal assistance programs. Other options include facilitating access to housing, whereby the victims are incorporated into general housing subsidy programs under more favorable conditions.

#### *a) Health Measures*

Health has a significant impact on the victims' sense of recuperation and also on the feeling that someone is looking out for them. Health services are personalized services, which deal with the psyche and body of an individual, and have great reparatory potential. The victims are also legally entitled to physical and psychological recuperation. This requires specialized medical services to address the harm suffered by the victims. It is necessary to first learn whether this type of damage exists, what exact type it is, and what resources are available to provide adequate services.

In the case of Argentina, the victims had access to the public health system. However, this did not make a substantial difference. In contrast,

a special program was established in Chile, called the Comprehensive Reparations and Health Assistance Program. This program not only ensures access to the public health system but, more importantly, offers specialized care exclusively for the initial reception of victims. This care is provided through small teams of social workers, general practitioners, psychologists and hours of psychotherapy in hospitals. These teams, made up of professionals who understand the needs of victims of human rights violations, offer direct assistance, especially in the area of mental health. Some teams work through self-help groups, in addition to providing individual support. If an individual requires specialized services, they are referred to the public health network. In some special needs cases, such as psycho-social support during exhumations or identification of the remains of disappeared detainees, the government has engaged the services of specialized NGOs.

Interestingly enough, access to health services is not limited to the direct consequences suffered by the victims, but includes all types of specialized services. This is because it is necessary to address the multiple effects of the violations, and it is difficult to determine which are direct consequences and which are not. What is most important is that the victims tend to attribute very diverse health problems to acts of torture or the suffering caused by the disappearance of a loved one and that it is not possible to rule out entirely that this is not true. An assessment to prove or disprove such a statement would not only incur costs but could also constitute a new form of abuse and re-victimization.

In Peru, the regulatory decree for the Comprehensive Reparations Plan law calls for the incorporation of categories of victims into the Comprehensive Health Insurance, *i.e.* the gratuitous public health system. The decree refers in general terms to “comprehensive public health services, prioritizing children, women and the elderly”; “comprehensive recovery through community intervention, which includes: the reconstruction of community support networks; the recuperation of historical memory, and the creation of community spaces for emotional recuperation”. It also mentions “recuperation through clinical intervention, which involves the design of a clinical care model tailored to the needs and human resources in the different regions of the country”; “promotion and prevention through education and awareness-raising”; “inclusion in public health policies”; and “improvement of the infrastructure for health service provision”<sup>13</sup>.

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13 Article 22 of Supreme Decree 015-2006-JUS.

However, in addition to inclusion in the Comprehensive Health Insurance program, which many poor victims are entitled to anyway, little of this has been implemented, even though many of these measures should not be limited to the registration of victims.

### *b) Education Scholarships*

Education has huge transformative potential and offers huge opportunities for breaking the cycle of victimization and the trans-generational effects of the violations. This is why the implementation of special measures to facilitate access to education for victims or their direct relatives can have such a significant reparatory impact. The direct victims can recuperate a certain sense of agency, feel proud of themselves and develop their potential, in addition to improving their capacity to generate greater and sustainable financial income. Knowing that their children or grandchildren have access to education may be an important way for direct victims to reconcile with the future, as they realize that they will be able to overcome the financial difficulties that resulted from the crimes they suffered.

As with other measures, the appropriateness of this category of services depends on the needs and interests of the victims, which are affected by their age, the time that has passed since the violations, their current access to or the obstacles they face to gain access to education services. It will also determine whether the focus should be access to primary, secondary or higher education, in addition to vocational studies, adult education or literacy programs. It will also establish the need to include components of intercultural or bilingual education. In some cases, primary and secondary education is in theory guaranteed and free, but the rate of coverage among victims is very low. This makes it necessary to examine the obstacles that the victims' families may be facing and implement measures to address them. One of these measures could be the delivery of conditional payments to stimulate attendance and achieve certain educational goals for the children or grandchildren of the victims whose education should be ensured. Another option is to deliver stipends for school supplies, uniforms or transportation, which also facilitates the continuation of their studies. The same could be said with regard to university education, which can be facilitated not only through tuition payments or stipends or payments that are conditional on attendance and results, but also the existence of college preparatory programs.



These measures may, however, be insufficient to address the needs of those who are no longer school-aged but who were children during the conflict and, as a consequence, were deprived of their education. This requires the development and implementation of special programs that combine remedial education with vocational programs for job placement. These programs should take into account that, given the age of the participants, it will be necessary to provide livelihood options or organize class schedules that are compatible with a work day, in order to ensure that they attend and complete the courses.

In Peru, the regulation of the law also provides for literacy and adult education programs, taking into account that the affected population is primarily farmers and indigenous people. This makes it necessary to create specialized programs, with trained professors who are stationed in the areas with the highest concentration of victims. However, the provisions of these norms are still not being implemented.

In the case of Chile, the children of victims of enforced disappearance and political execution are entitled to an education scholarship until the age of 35. The extended age limit seeks to benefit those who were outside the regular education cycle but were still at an age where they could benefit from this measure. The scholarships, however, were not conditioned to attendance, performance or the completion of the educational programs, and there were frequent cases of uncompleted studies. This error was repeated in the definition of the educational reparations for victims of political imprisonment and torture, whose average age when the reparations law was enacted was 55. In this case, since the scholarships could be used at private universities, some created specific programs for victims. Although this may have been welcomed by those who would not otherwise have had access to a college education, in some cases the courses did not lead to useful degrees and had elevated costs. The courses created should have more adequately addressed the different needs and characteristics of the potential beneficiaries and a better oversight system for the allocation of public services should have been developed. Only recently did the government authorize the transfer of the scholarship to a descendant, which may well lead to a better use of this benefit, but will also place the victim in the uncomfortable position of having to choose which of their children or grandchildren will receive the scholarship.

### *c) Legal or Social Services*

Other measures may be necessary to address the different consequences of the crimes in order to ensure full reparation of the victims. If the crimes were followed by the disappearance of the victims' documentation or their inclusion in criminal files that affect their honor and access to work, extraordinary and broad-based measures must be found to overcome these problems. It is possible that the ordinary legal assistance mechanisms are not sufficient for the creation or elimination of these records. Given the State's responsibility for allowing the destruction of these records, or for having made accusations that led to the inclusion of the victims in these criminal files, it may be important that the State itself repair these damages, using the lists of recognized victims.

The large number of people that lost their documents as a result of the conflict in Peru, where the *Sendero Luminoso* regularly destroyed vital records, constitutes a challenge for the country, particularly for the documentation of people living in areas where the State has little access. The process of rebuilding vital records has been slow, in part due to the excessive burden it places on victims to prove their marital status. As with the registration of victims, these measures should include special, accessible mechanisms, instigated by the State, with a minimal burden of proof on the victim, even at the risk of incurring mistakes. The benefits of providing due documentation and registration for all victims may be greater than the certainty that no mistakes or fraud will be committed in a small percentage of cases.

Moreover, the victims may have other social needs related to access to benefits that are available to all persons. It may be useful to provide municipalities where there is a high concentration of victims with social workers who are particularly aware of the violations committed and can make special efforts to ensure that the victims have access to these benefits. Also, the agency in charge of implementing and coordinating this policy should have access to this type of professional, such as in the case of the Human Rights Program of the Chilean Ministry of the Interior.

### **6.3. Symbolic Reparations**

All reparation measures are both material and symbolic. The way in which a pension or sum of money is delivered and the way that health and education services, housing subsidies, and legal and social assistance are provided greatly influence whether or not the victims

perceive these measures to constitute reparations. Moreover, there are specific measures of symbolic reparations that can help to give these policies a reparatory nature. It would thus be possible to transmit a coherent message to the victims: that the State acknowledges that the violations were committed, is committed to the wellbeing of the victims and will address the consequences of the violations, and demonstrates its willingness to prevent them from reoccurring. The following are some examples of symbolic reparation measures:

*a) Recognition of Responsibility*

It is crucial that the State acknowledge its responsibility in the commission of the human rights violations. This recognition took place in Argentina, Chile and Peru, and has given the reparation programs moral force and credibility. The strength of this recognition is proportional to the level of State representation of the person who makes it; the best example is a head of State that makes such a statement during a solemn event which is broadcast publicly and broadly. A case in point is the declarations made by Chilean president Aylwin, when he publicly presented the report of the Truth and Reconciliation Commission:

When it was State agents that caused so much suffering and the responsible State entities couldn't or didn't know how to avoid or punish this, and the necessary social reaction to stop it was lacking, then it is the State and society as a whole that are responsible, either by act or omission. It is the Chilean society that is in debt with the victims of human rights violations.

This is why all sectors of society concur with the recommendations made in the Report with regard to moral and material reparations.

This is why, in my capacity as President of Chile, I take the liberty to speak on behalf of the entire nation to ask the forgiveness of the victims' families.

It is also why I solemnly request the Armed Forces, and all those who participated in the crimes committed, to take steps to acknowledge and collaborate to mitigate the suffering caused.

The speech was followed by the publication of the complete report in a State newspaper, by an official letter to the Supreme Court advocating for the continuation of the judicial investigations without, at least not immediately, the application of the amnesty decree-law, and the presentation of draft reparations bills, the declaration of presumption of death following enforced disappearance, the creation of the National Ombudsman's Office and other initiatives, although only the first, on reparations, was ultimately approved (initiatives similar to the latter two were recently approved in 2009). The request for forgiveness, which was significant in itself, was complemented with other measures.

### *b) Memorialization Policies*

Mass violations of human rights are usually associated with propaganda and policies to conceal the facts and denigrate the victims. An important element of reparation programs is to establish the truth and disseminate such truth. This can be done through a report containing the victims' testimonies and explaining the implementation of the reparation policy. This report should be published through multiple means, such as travelling exhibits, documentaries, etc. In addition, there are several mechanisms that can shed light on this period of history and encourage the necessary reflection and debate on the events and on the importance of upholding human rights, even in times of emergency, including the gathering of testimonies, their publication or the creation of literary funds so that they may be published by the victims. The mass dissemination of the *Nunca Más* (Never Again) Report is a valuable example of social recognition of the criminal policy implemented during the dictatorship.

There are other ways to symbolically and physically acknowledge the existence of violations kept silent for so long. They can include the construction of public monuments, museums, memorials, and other memorialization efforts that acknowledge the acts committed and pay tribute to the victims. This may be done in several ways, but in any case the victims should participate actively in the process, to ensure that they feel represented in the final works to be constructed. If not, these physical memorials will lack symbolism. Also, the mere construction of works without efforts to achieve reparation or justice can create a greater sense of frustration.

In the case of Peru, it has been civil society organizations or some regional governments, working autonomously, that have erected the

works, not the State. The works constructed by the victims or on the initiative of the private sector have been appropriated by the human rights movement, which is why the release of the Final Report of the Truth and Reconciliation Commission is commemorated each year at the monument built by a sculptor at her own initiative. Only recently, and due to the controversy that ensued, was the government obligated to designate a commission to build the Memorial Site.

In Argentina, several civil society initiatives have also been undertaken. A few years ago, the Government decided that the Navy School of Mechanics, a known center of torture and disappearances in the center of Buenos Aires consisting of a large area of historical buildings, was turned into memorial site. Interestingly, the Government turned the land title of the site over to victims' groups.

In Chile, the government has implemented a mixed strategy, whereby the Ministry of Interior's Human Rights Program administers a symbolic reparations fund, which finances and provides technical support to projects submitted by victims' organizations. The works are usually chosen through artistic contests with the participation of the victims, ensuring a competitive process and a panel of judges that is also made up of artists. The result is that over 30 significant works have been built around the country. Moreover, the government recently inaugurated the Memorial and Human Rights Museum, with a diverse board of directors. The State has also granted subsidies for other private works, built and administered by victims' organizations, such as the Peace Park, built on the site of the house of torture known as Villa Grimaldi.

All of these actions do not diminish the significance of other, more modest, actions, such as those memorials located in cemeteries or at the location where a person disappeared. This becomes even more important in the case of enforced disappearance, where the family needs a place to remember, a place "to take flowers", as many relatives have requested. This can also be very significant in cases of known places of detention, torture and disappearance of detainees, where the placement of commemorative plaques can have significant reparatory effects.

*c) Resolving the Legal Situation of the Relatives of Disappeared Detainees*

Another very important aspect that is both symbolic and practical, is resolving the legal situation of the disappeared detainees. Ordinary

legal systems have ways to declare the presumed death of a person who has been missing for a long time or after a tragic accident, followed by a lack of news. This makes it possible to resolve the legal limbo of the remaining family members and the assets of the missing person. However, the connotations of a declaration of presumed death following enforced disappearance may not be accepted by the relatives of the victims, as mentioned earlier in the case of Argentina. If a victim is declared dead, albeit presumably and only for the purpose of establishing marital status and inheritance, the State is somehow recognizing that the person is not missing as a result of actions by State agents, which means giving up on the victims' frequent demands to recuperate their loved ones.

This situation led to the creation, first in Argentina<sup>14</sup>, and then in Peru<sup>15</sup> and Chile<sup>16</sup>, as well as in other cases, of the concept of death following enforced disappearance. Special laws were enacted to recognize this distinct status, where no reference is made to the possible death of the victim or to the presumed date of death, only to the establishment of a date of detention or of the last time news of the victim had been received. These laws resolve problems related to patrimony and marital status generated as a consequence of the disappearance, similar to what happens with a declaration of presumed death.

However, the most common demand of relatives of victims of enforced disappearance is to find their loved ones. This is also the greatest debt in terms of justice and reparations, due to the difficulties of finding the bodies. Different policies have been implemented in Argentina, Peru and Chile to locate and identify the remains. Non-governmental organizations with credibility and access to high technology, such as the Argentinean Forensic Anthropology Team or the Peruvian Forensic Anthropology Team, have played an active role in the implementation of these policies. In the case of Chile, after the disastrous mistakes made by the *Servicio Médico Legal* (Legal Medical Service) in the identification of bodies, a technical unit was created within this agency, with oversight by victims' organizations, human rights defenders and foreign experts.

The above-mentioned cases confirm the need for transparent mechanisms for identification of victims, which can be understood by

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14 Law 24.321 of May 11, 1994.

15 Law 28.413 of December 11, 2004.

16 Law 20.377 of September 10, 2009.

the victims and with which they can identify. The idea is to maintain the intricate balance between science and technology, with sensibility, and accepting and listening to the victims. Another problem, however, is locating the bodies, given the lack of specific information from the armed forces or direct perpetrators. This limits the results. In this situation, depending exclusively on the courts to identify possible sites of illegal burials has also become a restriction. What is needed is an investigation system that can identify possible burial sites on the basis of patterns of repression, rather than case by case investigations. The three countries under review have attempted this, with limited results and, in the case of Peru, the national exhumations plan which was recommended by the Truth and Reconciliation Commission has not yet been defined.

## **7. Conclusions**

The three experiences outlined above confirm the need to establish comprehensive administrative programs that clearly identify the universe of victims, the period to be covered, and the rights holders entitled to reparations. Two of the cases, Argentina and Chile, have been implementing the programs for a longer period of time. It is interesting that although they began with restrictive categories of victims, the political reality made it necessary to expand these categories and develop a set of comprehensive policies and programs, which have included the victims of the most serious violations. This also explains the option chosen by Peru, in a context where the right to reparations and the transitional justice experiences were more developed, where the comprehensive program was designed to incorporate all categories of victims.

The restrictive programs chosen by Argentina and Chile, which have later been expanded, have not been without cost. The restrictive definitions generated deep discontent and protests by the groups of excluded victims. The sincerity of the States' reparatory message was affected by this failure, and was perceived as stinginess or fear of addressing the consequences of the scope of the human rights violations. For this reason, after 28 or 21 years, respectively, although both countries have developed relatively comprehensive programs, covering the most serious violations, it is not necessarily clear that the gradual path taken was the most effective. It is, in fact, quite the opposite. These experiences have shown that the partial efforts were insufficient and always lead to new demands, and these new demands were, at least in part, successful.

The experiences presented here also offer different options for the identification of reparation measures, but all in an integrated context. As explained above, administrative reparations cannot comply with the standards for determining damages as applied in individual judicial rulings. Different forms of standardization may cause injustices or be insufficient. Comprehensive measures may help to overcome the perception of insufficiency, to the extent that they address the most direct consequences of the violations, especially in the areas of livelihood, health, children's education, and other direct damages. Reparations through administrative programs may have the advantage of personalizing the reparation measures, not in defining the amount of money to be delivered (based on an individual assessment of damages) but in the delivery of a variety of benefits, where each measure can address the different dimensions of the harm suffered by each victim. So, for some victims, health measures may be more relevant, while for others it may be education, or the granting of a pension, or symbolic actions such as monuments and acts of public recognition.

The exact definition of these programs, however, depends on the context and characteristics of the violations committed, as well as on the affected population. An example of this is the importance of collective reparations in Peru, to which communities that were deeply affected by the violence and non-returning displaced populations<sup>17</sup> are entitled. These measures aim to address a serious form of violation that occurred on a massive scale in Peru, but not in Argentina or Chile.

Another interesting element in the three experiences is the victim registration processes. Where these registries were restricted, such as Argentina and more clearly in Chile, it was necessary to extend the deadlines for registration, open new registries or pass laws to create new agencies to receive and establish the validity of the testimonies. Given the magnitude and characteristics of the conflict in Peru, registration there has been continuous, although this is now under review. This lax attitude has been accompanied with excessive delays in the development of the registry and the definitive implementation of the reparations, caused in part by the government's refusal to provide the necessary funding. The dilemma between certainty, timeliness and non-exclusion continues, and it is not easy to find solutions that adequately address the three.

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17 For information on the Collective Reparations Program in Peru, see: APRODEH-ICTJ. *Collective Reparations Monitoring Report 2007-2011*.



Finally, the three experiences have coincided with different moments in the development of other actions in the areas of recognition of the facts, or the State's responsibility in the incidents, criminal justice, search for the remains of the disappeared detainees, or institutional reforms to guarantee non-repetition. Other complementary transitional justice measures may enhance or detract from the significance of the reparation policies. All of these policies must be coherent in order to effectively send a message to the victims that they are recognized as valuable members of society, and that respect for their rights is crucial for peaceful and democratic coexistence.



# THE REPARATIONS PROGRAM AS THE LYNCHPIN OF TRANSITIONAL JUSTICE IN BRAZIL

*Paulo Abrão & Marcelo D. Torelly*

## 1. Introduction: The Current Landscape of Transitional Justice in Brazil

For many years specialized literature on political transitions classified the Brazilian case as a process of transition through transformation carried out by the military authoritarian regime itself, without the participation of civil society or a rule of law able to effectively promote an agenda of transitional measures different to those planned by the regime<sup>1</sup>. When different demands for transitional justice arose in the country in the second half of the 2000's, even one that challenged the legal interpretation assigning a “bilateral” nature to the 1979 Amnesty Law, a gap in this literature was made apparent. The two most commonly favored theses regarding transitional justice in the country could no longer explain the process. The “delayed” growth of demand for transitional justice measures contradicted both the thesis that the political agreement between regime and opposition supposedly contained in the 1979 amnesty would have ended the dictatorship and that, therefore, the absence of demand for transitional justice was based on the broad social acceptance of the existence of such a “pact of oblivion” (as defined by Gaspari in his extensive work<sup>2</sup>). The other thesis stating that the process of reparations for victims, rooted in the 1979

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1 Cfr. Huntington, Samuel. *The Third Wave*. Oklahoma: University of Oklahoma Press, 1993, p. 126.

2 Gaspari, Elio. *A ditadura envergonhada*. São Paulo: Companhia das Letras, 2002; *id.* *A ditadura escancarada*. São Paulo: Companhia das Letras, 2002; *id.* *A ditadura derrotada*. São Paulo: Companhia das Letras, 2003; *id.* *A ditadura encurralada*. São Paulo: Companhia das Letras, 2004; among others.

Amnesty Law and consolidated during the 1990's and 2000's, transferred a public issue to the private dimension causing social alienation which did not occur in other countries of the region<sup>3</sup> or it served as a payoff for the victims' silence<sup>4</sup>.

Today we observe a country that is implementing one of the world's largest reparation programs for victims of direct violations of human rights (with figures of about US\$ 2 billion). The creation of a Truth Commission is being debated, dozens of civil associations and federal and local governments are implementing projects to disseminate (and debate) the historical memory of the years of repression, and a memorial was built in remembrance of the victims in the city of Belo Horizonte (the "*Memorial da Anistia Política*" of Brazil). Furthermore, two very important legal decisions in terms of justice and the struggle against impunity are currently being debated: one by the country's Supreme Court, which in April 2010 ruled in favor of the validity of the interpretation given to the 1979 Amnesty Law, considering it broad and unrestricted (in the same manner as a blanket amnesty); and the other by the Inter-American Court of Human Rights which declared, referring to this same issue, that the regime's concession of self-amnesty was incompatible with the American Convention on Human Rights, especially regarding the serious violations of human rights, in a scenario where the analysis of the constitutionality and conventionality of the 1979 Amnesty Law led to diverse interpretations about the applicable normative content.

The expansion of the demand for transitional justice in Brazil, although late in coming, thus remains unknown in specialized literature. The following questions arise regarding the commonly defended theses: would society (or at least a relevant portion of it) have abandoned the pact of 1979? What factor generated the mobilization that allowed society to come out of its supposedly aligned posture and start making demands? Why would the supposed payoff have stopped working?

As we have been defending for some time now, those questions cannot be answered by the commonly defended theses on the Brazilian transition to the extent they deserve because they ignore the positive

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3 Mezarobba, Glenda. "O preço do esquecimento: as reparações pagas às vítimas do regime militar (uma comparação entre Brasil, Argentina e Chile)". PhD Thesis in political science presented to the *Faculdade de Filosofia, Letras e Ciências Sociais* of the University of São Paulo, 2008.

4 Villa, Marco Antônio. Interview to *Época Magazine*. *Época*. São Paulo, May 26, 2008.

structural influence of the reparation process on transitional justice in Brazil<sup>5</sup>.

Focusing closely on the origins of the social process which allowed the consolidation of the right to reparations, it is possible to interpret the way in which Brazilian society mobilized in favor of transitional justice by recognizing opportunities taken to break through the adverse scenario of the widespread control of the regime. This reparative process connects two apparently contradictory moments of Brazilian transitional history: the 1979 Amnesty and the rise in the demand for transition in the second half of the 2000's. We begin by analyzing this origin and then analyze the reparations program itself, its results and the pending transitional justice challenges in the country.

## 2. Origin and Structure of the Reparations Program<sup>6</sup>

### 2.1. The Normative Conformation of the Reparative Process

Law No. 6.683 (the “Amnesty Law”), as the symbolic framework for the beginning and re-opening of democracy, is the first to be considered for the information gathering aspects of the reparations process in Brazil. Even though its approach has been primarily criminal and labor, aimed at ending the sanctioning of “political crimes”, this legal statute contains the roots of the current reparations system for Brazilians. This includes people who received political amnesties, establishing the provision for readmission of public servants dismissed for political reasons between September 2, 1961 and August 15, 1979, and the restitution of the political rights to Brazilians that were imprisoned or living in exile.

Article 3 of this Law establishes how return to service would be reinstated. It states that reinstatement would take place as soon as an

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5 Cfr. Abrão, Paulo & Torelly, Marcelo D. “Justiça de Transição no Brasil: a dimensão da reparação”. *Revista Anistia Política e Justiça de Transição*, No. 03, Jan./Jun. 2010, pp. 108-138; and *id.* “As dimensões da Justiça de Transição no Brasil, a eficácia da lei de anistia e as alternativas para a verdade e a justiça”. In: Payne, Leigh A.; Abrão, Paulo; Torelly, Marcelo D. (Orgs.). *A Anistia na Era da Responsabilização*. Brasília/Oxford: Comissão de Anistia do Ministério da Justiça/Centro de Estudos Latino-Americanos da Universidade de Oxford, 2011, pp. 212-247.

6 Some of the arguments presented herein were originally published in a slightly different format, in Abrão, Paulo & Torelly, Marcelo D. “O sistema brasileiro de reparação aos anistiados políticos: contextualização histórica, conformação normativa e aplicação crítica”. *Revista OABRJ*, vol. 25, No. 02, Jul./Dec. 2009, pp. 165-203.

opening was available for the same position and functions held at the time of the resignation, disregarding possible promotions to which the person may be entitled. The amnesty for civil servants linked to labor unions and movements and students was regulated by article 9 of the Law without any reference to eventual compensation for economic damages suffered.

According to Jon Elster the reparation policy is one of the pillars of democratic transition, but in order for it to be effective it must accurately identify the violations that may be redressed, favoring some with respect to others so as to reach the highest number of victims<sup>7</sup>. The 1979 Law produced an imbalance in the Brazilian reparations process when compared with others, specifically those in South America, by favoring job loss as one of the core criteria to verify the level of reparations. The logic of the system is based on the ideal of comprehensive redress for violated rights.

A labor-based criteria may initially appear strange but it is justified given the historical characteristics of the Brazilian regime itself, which prior to 1979 promoted a generalized process of dismissing people it characterized as “subversive” from their public and private jobs. Particularly between 1979 and 1985 was when the regime persecuted the growing labor union movement, which had joined pro amnesty and democratization social movements. The combination of these two factors allow the discovery of the punitive measure most used by the Brazilian state during the state of exception: barring people from the right to work, whether by direct dismissal, obstacles to assuming positions or jobs, orders to resign and commit illegal acts, exile, among other things. For this reason, we will see below how all Brazilian reparation legislation will focus on specific measures for violations related to political persecution within the working environment.

The repetition and transformation of forms of labor-related reparations over time is also justified by the flaws in the mechanisms for returning public servants back to their jobs, in addition to the lack of the creation of a reparation process in 1979 for those people who had been persecuted in the private sector, or for those without jobs. Having

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7 “In order to compensate the victims, it is necessary to decide which forms of damages characterize the condition of victim. (...) First, damages can be material (loss of property), personal (violation of human rights), or intangible (loss of opportunities). (...) Second, it is necessary to define which relatives and close friends of the “primary” victims are to be included as “secondary” victims. (...) Third, it is necessary to fix an initial starting point”. Elster, John. *Rendición de cuentas: la justicia transicional en perspectiva histórica*. Buenos Aires: Katz, 2006, pp. 152-153.

established very limited reparation measures which were sometimes never truly enforced, the 1979 law became simply a measure of compensation for certain violations that continued to occur in the period following enactment of the law (1979-1988), to the extent that subsequent legislations promoted new regulations in this regard.

What is important, therefore, is to understand is that (i) the 1979 Amnesty Law in addition to being depicted as the absolution of political, and related, crimes, was also characterized as a reparation measure, and (ii) since its inception the reparation model in Brazil favored the adoption of measures for the restitution of rights, formulating measures for compensation, satisfaction, rehabilitation and non-repetition following the return to democracy.

The Constitution of 1988 also stipulates an idea of “amnesty as reparation”, as set forth in previous legislation through its *Ato das Disposições Constitucionais Transitórias (ADCT)* (Constitutional Transitional Provisions Act), extending the possibility for reparations to the private sector and also to all workers dismissed in connection with their involvement in strikes. The document sets specifications for some categories and broadens the period to be considered for reparations, which is “from September 18, 1946 until the date of the passage of the Constitution”:

Art. 8. Amnesty is granted to those who, within the period from September 18, 1946 until the date of promulgation of the Constitution, were affected, solely for political reasons, by acts committed during the period of repression, whether institutional or complementary, who were covered by Legislative Decree No. 18 of December 15, 1961, and to those covered by Decree-Law No. 864 of September 12, 1969, granting the promotions in terms of position, job, post or rank that they would be entitled to if they were currently active, complying with the terms of continuance in activity established by laws and regulations currently in force, with respect to the characteristics and specificities of civil and military public service careers, and in compliance with the respective legal regimes.

(...)

§ 2º - The rights established in this article are granted for private sector workers, labor union leaders and

representatives who, solely for political reasons, had been sanctioned, dismissed or coerced into separation from the remunerated activities they used to perform, as well as for those coerced into perform professional activities by virtue of perceived pressures or secret official files.

(...)

§ 5º - The amnesty granted under the terms of this article apply to public civil servants and to employees at every level of government, or who worked in its foundations, public corporations or partly state-owned companies under state control, except for the military ministries, who had been sanctioned or dismissed for interrupting professional activities by virtue of decisions made by the workers, whether as a consequence of Decree-Law No. 1.632 of August 4, 1978, or solely for political reasons, ensuring the readmission of those who were affected after 1979, observing what is set forth in § 1º.

This act was not regulated until 2001, through a Provisional Measure<sup>8</sup> submitted by Fernando Henrique Cardoso's administration, subsequently converted into Law No. 10.559 (unanimously approved by the National Congress). It is the ultimate individual reparation instrument for victims of political persecution in Brazil, significantly extending the range of rights that existed until then and reaching a level of effectiveness considerably higher than any previous measure.

In the period between the provision of the reparation right in the 1988 Constitution and its effective regulation in 2002 by Law No. 10.559, some ministries and public institutions created commissions to assess legal claims for reinstatement and economic reparation, based directly on article 8 of the ADCT, which when approved, generated payments by way of an "exceptional retirement pension" by the National Institute of Social Security (INSS). The creation of these commissions, described only briefly, illustrates that groups of victims of political persecution keep constantly making claims to the new democratic regime.

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8 In Brazilian Law a Provisional Measure is a legislative act of the Executive branch, admissible in relevant or urgent situations, that must be submitted to the National Congress for approval. Such measures are regulated in article 62 of the 1988 Constitution.



Similarly, Law No. 9.140 was drafted during this period specifically to process the claims of family members of those who were killed during the military regime (therefore, with a mandate comparatively not less relevant but much more restricted than that of the Amnesty Commission). This law also stipulates the obligation to locate and identify the mortal remains of people who disappeared for political reasons. For those declared deceased and/or disappeared during the verification process, the reparation was guided by the following criteria:

Art. 11. The compensation, by way of reparation, will consist in the one-off payment equal to R\$ 3,000 (three thousand Real) multiplied by the number of years corresponding to the life expectancy of the disappeared person, considering their age at the time of disappearance and the criteria and values expressed in the table of Annex II of this Law.

§ 1º - In no case would the severance value be less than R\$ 100,000.00 (one hundred thousand Real).

§ 2º - The compensation will be awarded through a Presidential decree, after approval by the Special Commission created by this Law.

During the 11 years it was in force, the *Comissão Especial sobre Mortos e Desaparecidos Políticos, CEMDP* (Special Commission on Political Deaths and Disappearances) recognized and repaired 475 cases, of which 136 had already been automatically distinguished in the annex of Law No. 9.140. The other 339 cases were assessed in an attempt to document the evidence to recognize the death or disappearance and to award reparations to the families. During the course of the work of this Special Commission, the reparations ranged from a minimum of US\$ 62,500<sup>9</sup> and a maximum of US\$ 95,000. The average payment totaled US\$ 75,000 with a total disbursement of approximately US\$ 25 million to relatives of the deceased victims of the military regime.

Thus, when Law No. 10.559 was enacted in 2002, there was a strong criticism because of the state's delay in providing more comprehensive reparations for the broader group of victims. Until the 2002 Law there was a series of damages that were not being redressed, such as: (i) the

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9 For all the values in this text the authors used the September 2011 exchange rate of one dollar = 1.6 Real.

need to provide redress to all citizens affected by acts committed during the state of exception (in the broad sense of the term), beyond the persecutions that resulted in death or disappearance (compensated by the 1995 law ); (ii) flaws in the reintegration process for public servants dismissed from their jobs set forth in previous legislations (1979, 1985); (iii) the need for attention to private sector workers, managers and union representatives who, for exclusively political reasons, have been punished, dismissed or compelled to leave the paid work they performed, as well as those who were prevented from exercising professional activities because of overt pressures or official confidential expedients; (iv) the need to assist a significant group of civil servants and employees at every level of government, or in its foundations, public corporations or partly state-owned companies under state control, who had been sanctioned or dismissed for interrupting their professional activities by virtue of decisions made by their workers, whether politically motivated or not; (v) the criticism of the limits of the reparations awarded to the families of the people murdered or disappeared for political reasons under the reparations modality of the 1995 law because it did not cover transgenerational damages or damages caused by political persecution that occurred before the death or disappearance; (vi) the need to establish a special assessment procedure, given that many of the public documents from that period were never made available to the people and, finally (vii) the existence of a series of harmful acts committed by the State for which economic reparation was not the best alternative.

In this manner, the 2002 law set forth a detailed and systematic measure of reparation, which aimed to respond to the demands of both the “traditional” politically prosecuted people (political officials and activists of resistance organizations who were imprisoned, banned, exiled, forced into clandestinity or related acts) as well as those affected by different acts committed during the state of exception. Especially the enormous contingent of activists, whether they were workers, public servants or private employees dismissed from their professional activities by virtue of the application of exceptional acts or arbitrary orders. Moreover, in order to standardize the reparations, the Law established that all the processes filed before the federal branches of the Direct or Indirect Administration in order to enforce the reparatory provision contained in Article 8 of the ADCT, whether finalized or ongoing, had to be forwarded to the Amnesty Commission in order to be replaced by the legal regime created by the new legislation.

In summary, the Brazilian state created two independent reparation commissions, both empowered to search for documents and seek the truth: (i) the Special Commission on Political Deaths and Disappearances, tasked primarily with recognizing the state's responsibility and providing redress for those events that resulted in death and/or forced disappearance, in addition to locating the mortal remains of the disappeared persons and; (ii) the Amnesty Commission, whose function is to recognize the acts committed during the state of exception that occurred between 1946 and 1988, in the broad sense of the word (*i.e.*, tortures, imprisonment, clandestinity, exile, banishment, arbitrary dismissals, expulsion from school, forfeiture of remunerations, administrative sanctions, indictments in administrative or judicial processes), and to declare the condition of political amnesty for those people covered by these acts and to thus provide them with moral and material compensation.

## 2.2. The Reparations System and its Rights

With the creation of the Amnesty Commission, a special legal procedure for reparations was established which simplified the administrative process and also proposed criteria that set values that distanced itself from the “material/objective damages” and “moral/subjective damages” dichotomy present in the Brazilian Civil Code.

Since the Amnesty Law of 2002 needed to resolve the large debt of the Brazilian state with politically persecuted citizens that had been amnestied for different reasons, seventeen non-exclusive reasons were established for the declaration of amnesty and claims for economic reparations, as identified in article two of the law<sup>10</sup>, some cases classified as “open” (meaning

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10 Article 2: Those who declared political amnesty, from September 18, 1946 until October 5, 1988, for purely political reasons who were:  
I - Affected by institutional acts or complementary, or exception to the full scope of the term;  
II - punished by location transfer other than that where they exercised their professional activities, necessitating changes of residence;  
III - punished with loss of commissions already built into the contract of employment or incidental to their administrative careers;  
IV - compelled to leave paid professional activity, to follow his/her spouse;  
V - unable to engage in civilian life, specifically professional activity as a result of Reserved Ordinances of the Ministry of Aeronautics in the S-50-GM5 of June 19, 1964, and S-285-GM5;  
VI - punished, dismissed or compelled to leave the paid work they performed, and prevented from exercising professional activities by virtue of ostensive pressures or secret official expedients, and private sector workers or managers and union representatives in accordance with § 2 of Art . 8 of the Temporary Constitutional Provisions Act;

more lenient, amenable) or “closed” (meaning strict), even allowing for a second economic reparation for the relatives of the persons murdered and disappeared for political reasons due to the persecution they suffered when alive. Through the 1995 law as well as the 2002 law, Brazil’s legal system for reparations begins addressing different human rights violations, as can be observed in the following table that uses the classification on the different kinds of reparation measures as established by De Greiff<sup>11</sup>, who divides the forms of reparation into four categories: compensation, rehabilitation, satisfaction, and guarantees of non-repetition.

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VII - punished on the basis of acts of exception, institutional or complementary, or suffered discipline, and students;

VIII - covered by Legislative Decree No. 18 of December 15, 1961, and Decree-Law No. 864 of 12 September 1969;

IX - dismissed, while working as public civil servants and employed at any level of government or in its foundations, public corporations or partly state-owned companies under state control, except for the military Commands in regard to the provisions of § 5º of article 8º of the Constitutional Transitional Provisions Act;

X - sanctioned with forfeiture of retirement or availability;

XI - detached, licensed, excluded or coerced in any other way to separate from their remunerated activities, whether based on the common legislation or as a consequence of secret official files.

XII - sanctioned with reassignment to remunerated reserve, reformed, or, if already inactive, with loss of earnings, by institutional or complementary acts of exception in the broad sense of the term;

XIII - coerced into working without remuneration during their term as city councilperson by institutional acts;

XIV - sanctioned with the forfeiture of their terms of office in the Legislative or Executive branches, at every level in the government;

XV - as civil public servants or employees at every level in the government or in its foundations, public corporations or partly state owned companies under state control, sanctioned or dismissed for the interrupting their professional activities, in virtue of decisions made by their workers;

XVI - as public servants, sanctioned with dismissal or separation, and not requiring to be returned or reinstated to activities, in the period between August 28<sup>th</sup>, 1979 and December of the same year, or whose requests were rejected, filed or not known and who were also not considered retired, transferred to reserve or reformed;

XVII - blocked from public office in the Judicial, Legislative or Executive branches, at every level, although the examination was valid.

§ 1º In the case depicted in the clause XIII, the term of the term of office rendered without payment is counted only for the purpose of retirement from the public service and for social security.

§ 2º Realization of the right to request the corresponding declaration to the descendants or dependants of the person that would benefit from having been granted a political amnesty.

11 De Greiff, Pablo. “Justice and Reparations”. In: De Greiff, Pablo (Org.). *The Handbook of Reparations*. Oxford: Oxford University Press, 2006, pp. 451-477; and *id.* “Justiça e Reparações”. *Revista Anistia Política e Justiça de Transição*, No. 03, Jan./Jun. 2010, pp. 42-71.

**Table 01: Legal Measures for Individual Reparation in Brazil**

Exception and repression measures	Core human rights violated	Reparation Modality	Rights considered	Legal instrument
Victims of political persecution and those affected by acts committed during the state of exception <i>lato sensu</i>	General fundamental rights and liberties	Public satisfaction and guarantee of non-repetition	Declaration of the condition of political amnesty	Art. 1º, I of law 10.559/02
Politically disappeared persons	Right to life or right to a life plan	Compensation and	Economic reparation by one-off payment, for disappearance and	Art. 11 of law 9.140/95**
	Public liberties and political rights	Compensation and	Economic reparation by one-off or monthly payment(s), for the political persecutions when alive*** and	Art. 1º, II c/c art. 9º, unique paragraph of law 10.559/02****
Murdered	Civil, cultural and religious rights	Public satisfaction and guarantee of non-repetition	Right to find, identify and return of mortal remains	Art. 4º, II of law 9.140/95
	Right to life	Compensation and	Economic reparation by one-off payment, for death and	Art. 11 of law 9.140/95**
Tortured	Public liberties and political rights	Compensation	Economic reparation by one-off or monthly payment(s)***, for political prosecution when alive	Art. 1º, II c/c art. 9º, sole paragraph of law 10.559/02
	Right to physical and ideological integrity	Compensation	Reparation by one-off compensation	Art. 1º, II c/c art. 2º, I of law 10.559/02
Arbitrarily imprisoned	Right to liberty, right to due process	Compensation and Restitution	Reparation by one-off or monthly payment and Calculation of time for social security purposes	Art. 1º, II c/c art. 2º, I of law 10.559/02
				Art. 1º, III of law 10.559/02

Exception and repression measures	Core human rights violated	Reparation Modality	Rights considered	Legal instrument
Victims of political persecution and those affected by acts committed during the state of exception <i>lato sensu</i>	General fundamental rights and liberties	Public satisfaction and guarantee of non-repetition	Declaration of the condition of political amnesty	Art. 1º, I of law 10.559/02
Arbitrarily separated or coerced to separation from employment, in the public sector, with or without political motivation, with or without impediments to also practice, in the civil life, specific professional activities	Right to a life project, right to freedom to work, right to freedom of thought, right to labor union association	Restitution or Compensation  and  Restitution  and  Rehabilitation	Reintegration/assured readmission, promotions during inactivity, or economic reparation by monthly installment  Calculation of time for social security purposes  Indirect benefits held by the Public Administration for servants (insurance plans, medical, dental and hospital assistance, and dwelling financing)	Art. 1º, II, V <i>c/c</i> art. 2º, IV, V, IX, XI  Art. 1º, III of law 10.559/02  Art. 14 of law 10.559/02
Arbitrarily separated or coerced to separation from employment relationship in the private sector	Right to a life project, right to freedom to work, right to freedom of thought, right to labor union association	Compensation  and  Restitution	Economic reparation by monthly payment and  Calculation of time for social security purposes	Art. 1º, II <i>c/c</i> art. 2º, VI, XI  Art. 1º, III of law 10.559/02
Punished by being transferred to locations different from those where they performed their professional activity, imposing changes of place of residence	Right to freedom of work and stability, right to equality	Compensation	Economic reparation by one-off or monthly payment	Art. 1º, II, and art. 2º, II
Punished with loss of earnings or part of remunerations already incorporated to the work contract or inherent to their administrative careers	Right to remuneration for work and right to equality	Compensation  and  Restitution	Economic reparation by monthly payment and  Calculation of time for social security purposes	Art. 1º, II and art. 2º, III, XII  Art. 1º, III of law 10.559/02

Exception and repression measures	Core human rights violated	Reparation Modality	Rights considered	Legal instrument
Victims of political persecution and those affected by acts committed during the state of exception <i>lato sensu</i>	General fundamental rights and liberties	Public satisfaction and guarantee of non-repetition	Declaration of the condition of political amnesty	Art. 1°, I of law 10.559/02
Blocked from public office after valid public examination	Political rights	Compensation and Restitution	Economic reparation by monthly payment and Calculation of time for social security purposes	Art. 1°, II and art. 2°, XVII Art. 1°, III of law 10.559/02
Sanctioned with forfeiture of retirement or, if already economically inactive, with loss of remuneration	Right to equality, constitutional warranties to work	Compensation	Economic reparation by monthly payment	Art. 1°, II, art. 2°, X, XII of law 10.559/02
Compulsorily retirement in the public sector	Right to equality	Compensation	Economic reparation by monthly payment	Art. 1°, II and art. 2°, I, XII
Forced to live in clandestinity	Right to liberty, right to identity, right to a life project	Compensation and Restitution	Economic reparation by one-off or monthly payment and Calculation of time for social security purposes	Art. 1°, II and art. 2°, I, IV, VII
Banned	Right to a nationality, Right to liberty, right to a life project, right to a family life	Compensation and Restitution and Restitution	Economic reparation by one-off or monthly payment and Calculation of time for social security purposes and Accreditation of diplomas awarded overseas	Art. 1°, II and art. 2°, I, VII Art. 1°, III of law 10.559/02 Art. 1°, IV of law 10.559/02

Exception and repression measures	Core human rights violated	Reparation Modality	Rights considered	Legal instrument
Victims of political persecution and those affected by acts committed during the state of exception <i>lato sensu</i>	General fundamental rights and liberties	Public satisfaction and guarantee of non-repetition	Declaration of the condition of political amnesty	Art. 1º, I of law 10.559/02
Exiled	Right to liberty, right to a life project, right to a family life	Compensation and Restitution and Restitution	Economic reparation by one-off or monthly payment and Calculation of time for social security purposes and Accreditation of diplomas awarded overseas	Art. 1º, II and art. 2º, I, VII Art. 1º, III of law 10.559/02 Art. 1º, IV of law 10.559/02
Politicians with repealed public offices	Political rights	Compensation and Restitution	Economic reparation by one-off payment and Calculation of time for social security purposes	Art. 1º, II and art. 2º, VII, XIV Art. 1º, IV of law 10.559/02
Politicians with forfeiture of remuneration for the exercise of their public office	Right to equality and right to remuneration for work	Restitution	Calculation of time for social security purposes	Art. 2º, XIII
Processed by judicial and/or administrative persecutory inquiries, with or without disciplinary sanction	Right to liberty, right to due process to adversarial procedure	Compensation	Reparation by one-off compensation	Art. 1º, II and art. 2º, I, VII
Sons, daughters and grandchildren exiled, forced to live in clandestinity, imprisoned, tortured or affected by any act of exception	Right to a life project, right to liberty, right to a family life, right to physical and ideological integrity	Compensation and Restitution	Economic reparation by one-off payment In some cases, calculation of time for social security purposes	Art. 1º, II c/c art. 2º, I of law 10.559/02 Art. 1º, IV of law 10.559/02
Illegally monitored*****	Right to privacy	Compensation	Economic reparation by one-off payment	Art. 1º, II c/c art. 2º, I
Other measures of exception, in the broad sense of the term	Fundamental and political rights in general	Compensation	Economic reparation by one-off payment	Art. 1º, I and II c/c art. 2º, I



Exception and repression measures	Core human rights violated	Reparation Modality	Rights considered	Legal instrument
Victims of political persecution and those affected by acts committed during the state of exception lato sensu	General fundamental rights and liberties	Public satisfaction and guarantee of non-repetition	Declaration of the condition of political amnesty	Art. 1° , I of law 10.559/02
Students	Right to Education Right to a life project	Restitution Rehabilitation	Right to tuition in public schools in order to finish the term	Art. 1° , III

\* The declaration of political amnesty is an act of acknowledgement of the victims' right to resistance. It is a condition for the other reparations under law 10.559/02. The victim or his/her descendants or dependents must request it, (art. 2°, § 2° of law 10.559/02)

\*\* The compensation considered in this Law is conferred to the following persons, in the following order: the wife/husband; the partner; the descendants; the ascendants; the relatives, to fourth degree (art. 10 of law 9.140/95).

\*\*\* In case of death of the person who received the political amnesty, the entitlement to economic reparations is transferred to his/her dependents. The reparation by monthly payment applies to cases where the loss of employment is proven as a consequence of the persecution, for the rest of the cases a one-off payment is applied. The compensations (economic reparations by one-off or monthly payment(s) of the law 10.559/02 are not cumulative. Compensations can be accumulated with restitutions and rehabilitations, except for the reparation by monthly payments that cannot be accumulated with reinstatements. Compensations under law 10.559/02 can be accumulated with those of the law 9.140/95.

\*\*\*\* All the economic reparations of a compensatory nature of law 10.559/02 are exempted from payment of income tax.

\*\*\*\*\* The understanding of the Amnesty Commission has been that the right to reparation applies only to those cases where surveillance had led to other specific repressive measure.

Despite the significant amount of rights recognized and guaranteed by the 2002 law, the predominantly restorative nature of the reparation measures was held by providing a series of compensations in situations where the restorative measures would no longer be applicable because of the time lapse between the violation of the right and the State's reparation measures.

The political option of the legislator was to establish criteria for economic reparations, in a single legislation and under the same parameters, that were suitable for those who suffered setbacks in the development of their professional careers (with obvious personal consequences) as well as for those who suffered damages as a direct consequence of their actions against the State based on their political ideals. Considering this perspective, the legislator established two forms of reparation: (i) one for those who had lost their employment; and (ii) another for victims of political persecution without any kind of employment.

Drawing on this law, those who had jobs and could prove that they had been affected by actions of exception by the state could be reinstated, such as in case of public servants and leaders of Unions and state owned enterprises, as stipulated by all legislation since 1979. However, time has shown that this option proved difficult in many cases. Thus, both public servants and private sector workers who were dismissed are now entitled to an economic reparation that aims to compensate the impossibility of reinstatement, which translates into the payment of a monthly pension (referred to as "monthly, permanent and continuous payment", hereinafter "MPCP"). This established is equivalent to a salary of an equally active position, considering the improvements he/she would be entitled to, according to the information provided by his/her former employers, trade associations or public entities. This right was guaranteed from the date of promulgation of the Constitution, October 5, 1988. This way, in addition to the monthly economic reparation, the amnestied persons who had been dismissed from their jobs also received back payments, to be counted five years before the first amnesty request was submitted to any public entity, as this right to retroactive payments is limited by the five-year prescription for state liability<sup>12</sup>.

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12 By law, any debt of the Brazilian state expires after five years. Thus, even going back to 1988, the right to recognition of the existence of a state liability to the victim of persecution, the right to receive such debt is limited to the five years prior to the date that the first amnesty request was filed.

For those without employment (such as the case of expelled students, children and adolescents affected by acts committed during the state of exception, adults arrested and/or imprisoned and/or tortured who by that time were not employed or that cannot prove loss of employment as a result of political persecution), the Law stipulates a one-off payment of thirty minimum wages per year of persecution, up to a maximum amount of US\$ 62,500. In this case, the maximum reparation cap for the victim of persecution is equivalent to the minimum value established by Law No. 9.140 for the reparation of the relatives of murdered and disappeared persons.

The economic reparation process in Brazil, as described above, was unique in comparison to others that were implemented in South America. Entitlement to reparations was the only transitional right the victims were able to legally ensure through social pressure exercised during the constitutional process of 1988. This is how it subsequently ended up becoming the lynchpin of a significant number of efforts undertaken by these same movements during the first years of the democratic transition.

It is thus important to understand how the struggle for effectiveness of this constitutional provision was achieved in 1988 held to the creation of new social networks of mobilization for transitional justice. Notwithstanding we will now discuss the results and criticisms of the Brazilian reparations efforts. This allows us to demonstrate how the evolution of the concept of reparations, which encompasses not only the economic dimension but also that of recognition and memory, enables the emergence of new transitional measures in a *prima facie* “late” moment.

### **3. Results and Asymmetries of the Brazilian Reparation Program**

#### **3.1. Reparations Process Data Analysis**

As stated above, the CEMDP recognized 475 cases of murder and disappearance and awarded reparations in the amount of nearly US\$ 25 million. We will now discuss the actions of the second reparation commission, which had a broader scope: the Amnesty Commission.

The first quantitative element that should be analyzed in order to understand the reparation process in Brazil is the number of requests for amnesty and reparation filed in the Ministry of Justice.

Table 02 demonstrates the permanent flow of demands for realization of rights before the state, primarily explained by two factors: (i) the democratic consolidation and the public visibility of the reparation process, which allows the victims of political persecution to regain and recuperate their trust in the State that previously violated them (this rebuilding of trust was clearly gradual), and (ii) the finding and opening of new files, especially public archives, which enabled the victims of persecution to substantiate their claims more effectively. This flow of demand and processing can be observed in Table 02.

**Table 02: Requests Submitted to and Assessed by the Amnesty Commission**

Year	Submissions (a)	Assessments (b)	Difference (a-b)	Outstanding total
2001	5835	21	+ 5814	5814
2002	8565	2134	+ 6431	12245
2003	22929	5675	+ 17254	29499
2004	11925	7538	+ 4387	33886
2005	2949	4951	- 2002	31884
2006	3623	6820	- 3197	28687
2007	4561	10422	- 5861	22776
2008	2858	8892	- 6034	16832
2009	2698	8714	- 6016	10876
2010	2276	3996	- 1720	9056
<b>Total</b>	<b>68219</b>	<b>59163</b>	<b>- 9056</b>	<b>9056</b>

SOURCE: Brazil. *Relatório Anual da Comissão de Anistia - 2010*. Brasília: Ministério da Justiça, 2010.

Table 02 makes possible to extract at least two important conclusions. First, the demand for amnesty has gradually reduced over time but does not appear to have come to an end because in the last three years it has fluctuated at a level above two thousand per year. Second, just after 2005, the State processed more claims than they received, with a noticeable acceleration of trials and decrease of the total pending cases, especially after 2007, when it promoted a wide administrative reform in the branches responsible for the reparations process<sup>13</sup>.

Of the total of almost 60,000 cases dealt with, it is important to emphasize that not all have been the subject to economic compensation.

13 See: Brazil. *Relatório Anual da Comissão de Anistia - 2007*. Brasília: Ministério da Justiça, 2007.

As is meant to demonstrate in this study, the Brazilian reparations system is not only structured in pillars of economic compensation, but also the moral reparation. Moral reparation derives from the recognition of the commitment of political persecution and leads to the official apology from the state and to other memory, education and truth seeking initiatives that seeks to recover the dignity of the victims.

In this sense, Table 03 shows that a third of the amnesty applications forwarded to the Ministry of Justice were rejected, representing significant accuracy in the assessing activity. But more importantly, it is notable that among the set of processes granted, only in 35.7% the declaration of amnesty were accompanied by some sort of economic compensation. The conclusion drawn from Table 03 is the vast majority of cases (64.3%) the Amnesty Commission simply recognizes the occurrence of harassment, promoting and applying the restitutive measures by the State, through official apology without any mechanism that triggers economic repair.

**Table 03: Acceptance and Refusal of Applications for Amnesty (by type)**

Final Decision	As	Proportional Values	Proportional Values (only granted)
<b>Deferment</b>	<b>38,025</b>	<b>64.27%</b>	<b>100%</b>
<i>Without Economic Reparations</i>	24,454	41.33%	64.31%
<i>With MPCP</i>	9,925	16.77%	26.10%
<i>With One-Off Payment</i>	3,646	6.16%	9.59%
<b>Rejected</b>	<b>21,138</b>	<b>35.73%</b>	<b>***</b>
<b>Total</b>	<b>59,163</b>	<b>100%</b>	<b>***</b>

SOURCE: Brazil. *Relatório Anual da Comissão de Anistia - 2010*. Brasília: Ministério da Justiça, 2010.

Tables 04 and 05 show the average value applied to cases in which applications for amnesty are accompanied by economic compensation, divided by periods of office of each of the seven holders of the Ministry of Justice between 2001 and 2010.

The reparations modality of MPCP generates monthly payments for the lifetime of those who had been amnestied, as well as the retroactive payment from the date the entitlement was obtained (the promulgation of the Constitution), thus showing that calculating the total amount of the financial requirements of the program was a significantly complex process. Studies performed by the NGO *Contas Abertas* (Open Accounts) show that, until March 2010, the total amount invested by the Brazilian

state in its efforts to redress the damages caused during the state of exception was approximately US\$ 1.65 billion<sup>14</sup>. Taking this information into account, we can affirm that the Brazilian program of reparations is one the most robust programs implemented since the end of the WWII.

**Table 04: Average and Total Compensation Awarded in Sole Payment by Minister**

Government	Minister	Concessions	Average Value	Total Value
			Dollars	Dollars
FHC	José Gregori	5	38,475	192,357
<b>FHC</b>	<b>Aloysio Nunes Ferreira Filho</b>	<b>43</b>	<b>22,331</b>	<b>960,250</b>
FHC	Miguel Reale Junior	2	35,000	70,000
<b>FHC</b>	<b>Paulo de Tarso R. Ribeiro</b>	<b>140</b>	<b>40,495</b>	<b>5,669,375</b>
Lula	Márcio Thomaz Bastos	1432	37,324	53,448,836
<b>Lula</b>	<b>Tarso Genro</b>	<b>2024</b>	<b>36,688</b>	<b>72,241,356</b>
Lula	Luiz Paulo Barreto	440	55,759	24,534,356
<b>Total</b>		<b>3646</b>	<b>36,912</b>	<b>134,582,194</b>

SOURCE: Brazil. *Relatório Anual da Comissão de Anistia - 2010*. Brasília: Ministério da Justiça, 2010.

**Table 05: Average Mode of Reparations Granted by Minister MPCP**

Government	Minister	Concessions	Average Value
			Dollars
FHC	José Gregori	2	3,527
<b>FHC</b>	<b>Aloysio Nunes Ferreira Filho</b>	<b>7</b>	<b>2,530</b>
FHC	Miguel Reale Junior	2	2,058
<b>FHC</b>	<b>Paulo de Tarso R. Ribeiro</b>	<b>1456</b>	<b>2,413</b>
Lula	Márcio Thomaz Bastos	5745	2,459
<b>Lula</b>	<b>Tarso Genro</b>	<b>2202</b>	<b>1,850</b>
Lula	Luiz Paulo Barreto	511	1,965
<b>Total</b>		<b>9925</b>	<b>2,292</b>

SOURCE: Brazil. *Relatório Anual da Comissão de Anistia - 2010*. Brasília: Ministério da Justiça, 2010.

14 Available at: [http://contasabertas.uol.com.br/website/noticias/arquivos/90\\_01%20-%20ANISTIADOS%20POLÍTICOS%20-%202003%20A%202010%20-%20ate%2019-03.pdf](http://contasabertas.uol.com.br/website/noticias/arquivos/90_01%20-%20ANISTIADOS%20POLÍTICOS%20-%202003%20A%202010%20-%20ate%2019-03.pdf).

The economic reparations in this way create a compensation for something that cannot be restituted—the victim injury—but as stated above, it doesn’t exhaust the State’s obligation to provide redress for this injury, which is why other mechanisms are needed.

Similarly, the moral reparation contained in the granting of amnesty and official apology, even when accompanied by economic reparations, does not encompass all the necessary dimensions of reparations. Especially because it refers to the individual sphere and the violations that the state intends to redress having frequently generated social effects in the collective sphere. Therein there is a need to advance towards a more comprehensive process, and to establish public policies for memory, truth, and human rights education. The formulation of these policies in the Brazilian system is presented below, using the concept of “reparation as recognition”.

### **3.2. Reparation as Recognition**

Although economic reparation makes it possible to provide albeit limited compensation for certain violations (especially labor-related), other violations motivate processes of ‘negation of recognition’. This is where the affected persons feel stripped not only of their material possibilities but also of their subjective possibilities in a given social context. In the words of Baggio:

Those who were politically persecuted suffered all the forms of refusals of recognition. When tortured, they lost the possibility of reciprocated trust in their fellow men. When their freedoms were violated and their rights were threatened, they were no longer in equal conditions for the processes of social coexistence, integration and participation. When they were labeled as terrorists or traitors, they witnessed the loss of their world views and their ways of life, and their political options were rejected as actions that could historically contribute to enhance or improve their countries and the lives of all around them<sup>15</sup>.

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15 Baggio, Roberta. “Justiça de Transição como reconhecimento: limites e possibilidades do processo brasileiro”. In: Santos, Boaventura de Sousa; Abrão, Paulo; MacDowell, Cecília; Torelly, Marcelo D. (Orgs.). *Repressão e memória política no contexto Ibero-Brasileiro*. Brasília/Coimbra: Comissão de Anistia do Ministério da Justiça/Centro de Estudos Sociais da Universidade de Coimbra, 2010, p. 268.

A reparation policy that goes beyond the economic dimension needs to function as a mechanism to recover the broken civic trust between the citizen, the society where the violation occurred, and the state that commits the violation<sup>16</sup>. It is thus understood that the policy must contain both a private, public and collective dimension. The personal dignity of the individual must not only be rescued, but also the ideas that motivated the persecution must be allowed to flow back into the civic sphere, ensuring that the element used to reject and persecute the victims (or their political ideas) may again be debated. This procedure does not signify the approval of these political ideas in the present days but neither does it imply disapproval. It just means that in a pluralistic, political and public space differences must be accepted and managed in an inclusive way.

With the purpose of promoting the public and moral recuperation of the victims of political persecution and their political ideas which were interrupted by the arbitrary actions the state of exception period (especially during dictatorship), as well as the reinstatement of this in the history of Brazil, the Amnesty Commission is implementing three large projects aimed at providing reparations understood as process of recognition<sup>17</sup>: the Amnesty Caravans, the Amnesty Memorial and the Memory Marks.

### ***3.2.1. The Amnesty Caravans: collective and social spaces for reparation***

The Amnesty Caravans consist of itinerant public sessions to assess the reparation requirements for victims of political persecution<sup>18</sup>. They are, therefore, an extension of the regular sessions of the Amnesty Commission that are usually held in the Federal Capital and are accompanied by educational and cultural activities. All caravans begin

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16 Correa, Cristián. “Programas de reparação para violações em massa aos Direitos Humanos: aprendizados das experiências da Argentina, Chile e Peru”. *Revista Anistia Política e Justiça de Transição*, No. 03, Jan./Jun. 2010, pp. 140-172.

17 Here we use the Honneth’s concept of recognition. See: Honneth, Axel. *A Luta pelo Reconhecimento*. São Paulo, Ed. 34, 2003.

18 For a better understanding of this initiative, see: Rosito, João Baptista Álvares. “O Estado pede perdão: a reparação por perseguição política e os sentidos da anistia no Brasil”. Master dissertation in social anthropology presented to the *Instituto de Filosofia e Ciências Humanas* of the Federal University of Rio Grande do Sul (UFRGS), 2010; Abrão, Paulo; Carlet, Flávia; Franz, Daniela; Meregali, Kelen; Oliveira, Vanda Davi. “As Caravanas da Anistia: um mecanismo privilegiado da justiça de transição brasileira”. *Revista Anistia Política e Justiça de Transição*, No. 02, Jul./Dec. 2009, pp. 110-138.



with memorialization activities to pay public tribute to those people whose processes will be evaluated and to the political groups to which they belonged. This initiative aims, first of all, to thank those who resisted the dictatorial state actions. It is a symbolic relevant recognition in democracy that the state remembers these prior struggles against itself, explicitly recognizing that serious mistakes were committed against Brazilian society and its citizens during that time.

After the ceremonies, assessment hearings are conducted, with the same accuracy as those in the Palace of Justice, to review the evidence and openly discuss the facts. This process turns the actions of the Commission into public deliberations because the hundreds of people present are able to understand the criteria used and the limitations imposed by the laws on the members of the Commission. It is after the reading of the decision of the council that the moment of greatest moral reparation occurs: the amnestied person is allowed to speak and be heard in public and subsequently the state of Brazil officially and publicly apologizes for the injuries committed.

At this moment, the moral and individual reparations become undeniably collective. When the Brazilian state grants a public amnesty to the accused, apologizes and allows them to speak, the state is giving a new generation of Brazilians the opportunity to become involved in building democracy and committing to the values of a new phase in Brazilian history. Reading the speech given by an amnestied person is more effective for understanding the true dimension of these events than merely continuing with a description of the event. On May 15, 2009, the activist Marina Vieira received her amnesty during the 22nd Amnesty Caravan in Uberlandia, Minas Gerais, and proclaimed the following about her story of resistance:

I was expelled from the faculty and I and my siblings suffered, I was expelled from the Fine Arts faculty and my brother was expelled from the faculty of Medicine, and thus began the persecution against me and my siblings. None of us could say that it did not happen to us. I took another admissions exam at the Catholic University because since I was labeled under [decree] 477, I could not work or study in any state university. I began to study History. (...) One day, when leaving the faculty, I was kidnapped in the street, I tried to scream, to save myself,

but it was impossible. (...) The torture began there in the car. In the center of Goiania, they changed cars and took me to the Army barracks (...) and the torture continued. (...) I had bruises for nine months (...) I had cigarette burns on my breasts and joints (...) but I did not talk because, for me, freedom meant not speaking. If I talked, I would stop being Marina Vieira. It was not a question of “I talked”, if I talked they would stop torturing me, but they would torture someone else, the torture was not going to stop. (...) From there, they took me to Brasilia. (...) I resisted, but I knew that I could die, for that reason, I want today’s youth to be aware of our democracy and of our Brazil (...) that democracy is in the hands of the young people (applause) (...) then my lawyer managed to get me home and I spent a long time being pampered. (...) I had to leave for Chile, where I was interrogated by Brazilians and Chileans (...) on September 11 the coup d’état took place and I was imprisoned in Chile, I fled to Argentina where I received an invitation to go live in France. It was there that I lived and was received with much love. (...) Today I live in the United States and here we participate in protests, like when we protested against the Gulf War (...)<sup>19</sup>

Listening to this speech, together with so many others given by the nearly one thousand Brazilians that have already been amnestied during highly visible public events such as the Caravans<sup>20</sup>, allows us to contradict with a high level certainty that “unlike the families of the victims killed by the military regime, the victims of political persecution have only pursued financial compensation”<sup>21</sup>. Even those groups whose primary objective is financial compensation perceive the amnesty as a political act of memory and acknowledgment, because regardless of its economic nature, this public act constitutes effective historic accountability with regard to a

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19 Declaration during the 22nd Amnesty Caravan, held on May 15, 2009, at the Universidad Federal de Uberlandia, in the city of Uberlandia/M.G.

20 *Cfr.* Brazil. *Relatório de Ações Educativas da Comissão de Anistia 2007-2010*. Brasília: Ministério da Justiça, 2010.

21 Mezarobba, Glenda. “Between Reparation, Half Truths and Impunity: The Difficult Break with the Legacy of the Dictatorship in Brazil”. *SUR - International Journal on Human Rights*, vol. 07, No. 13, Dec./2010, p. 14.

disputed past. In the public act of reparations, the economic aspect of the reparation process becomes secondary (especially considering the data above that the vast majority of the requests for amnesty did not seek economic compensation).

When they receive moral reparations, the victims of persecution can again feel they are a part of the country and a part of the society who turned its back on them in the past. Their identity is returned to them, as well as their own sense of political society. In the words of the great Brazilian intellectual and professor, Antonio Candido: “these are moments when Brazil finds itself because the popular aspirations of justice and freedom coincide with the actions of the government”.<sup>22</sup> Another example of this sentiment, which is not related to the economic compensation mechanism, was expressed by the words of Ana Maria Araújo Freire on November 26, 2009. As the widow of educator Paulo Freire, she received the *post mortem* amnesty on his behalf during the Global Education Forum: “Today the citizenship of Paulo Freire has been fully restored after so many years”<sup>23</sup>.

In addition to being an act of collective reparations, the caravans have an undeniable social dimension, to the extent that they recuperate memories and actions that the regime of exception attempted to silence. It was during the caravans, for example, that the state officially and publicly apologized to important public figures, such as the first person persecuted by the regime instated after the coup d'état of 1964: the deposed president João Goulart. Many other important political leaders and intellectuals of Brazil were honored and recognized as persecuted during the caravans, including former governors of state, opposition leaders, murdered social activists, military personnel who did not join or resisted the coup, and family members of people disappeared for political reasons, among others.

Through the mechanism of the caravans, the Brazilian state moved forward not only in moral and individual but also in symbolic and collective reparations. By doing this, these caravans returned to the people of Brazil the example of the leaders who had been taken away from them by an “official history” that did not permit divergence, and also allows the young people who did not live through the dictatorship

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22 Speech made during the 33rd Amnesty Caravan, held on February 4, 2010, at the metal workers union of Sao Paulo and Mogi das Cruzes, in São Paulo/SP.

23 Speech made during the 31st Amnesty Caravan, held on November 9, 2009, during the Global Professional and Technological Education Forum, in the city of Brasília/DF.

access to the history of their country. These acts contribute to building a collective national identity. It is crucial that history, in an attempt to reconstruct multiple narrations, accept the affective, personal and testimonial dimensions that can only come from personal memories. Recuperating these dimensions contributes to achieving comprehensive reparations, firmly installing in future generations so as not to allow these events to ever occur again.

### ***3.2.2. The Amnesty Memorial as a connection between past and present***

As the individual reparations process moved forward—with the incorporation of elements that have collective effects—the Brazilian reparations program also began to focus on the dimension of memorialization as a form of recuperating the truth and promoting political memory that the previous regime had aimed to extricate from the country, in violation of its cultural patrimony.

Throughout the years of working to promote individual reparations and in the process of moral individual reparations with collective effects, thousands of stories and events became public knowledge through the actions of the Amnesty Commission and have given proof of the political persecutions through documentary evidence and testimonies. All of these documents gradually began to accumulate in the archives of the Ministry of Justice. Thousands of files—audio and video—depict not only the persecutions of individuals, but also the history of Brazil narrated from the perspective of those who were persecuted by the state for fighting for a social model that those in power did not deem correct. If all of the paper files that currently exist in the Commission were placed side by side, they would line up to over 150 kilometers long.

The idea of building the Amnesty Memorial reflects similar initiatives implemented in countries such as post-Nazi Germany, post-apartheid South Africa, and the United States after the end of the racially-based segregation. Also in relation to different South American countries, such as Chile and Argentina, that experienced authoritarian regimes similar to that of Brazil, the State is actively creating a process of “memorialization”<sup>24</sup>. This ensures the materialization of an extensive

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24 See: Brett, Sebastian; Bickford, Louis; Sevenko, Liz; Rios, Marcela. *Memorialization and Democracy: State Policy and Civil Action*. New York/Santiago: ICTJ/FLACSO, 2007. At the local level, Brazil already has an important avant-garde memorial site, which

public space for collective reparations that serves as a formal apology by the state to its people for the mistakes committed by the authoritarian regime. Therefore, the conceptual basis for the Amnesty Memorial is integrated into the new tradition of amnesty in Brazil: *the act of acknowledging the right to resist, apologizing and preserving the memory of those who were politically persecuted*.

In this way, an extensive process of collective reparations is being promoted by informing society at large of the right to request an apology, thus generating reparatory effects. This process is for all who were politically persecuted who belonged to groups and collectives whose ideas were prohibited by the authoritarian state. The thematic structure of the brief consists of recuperating these ideas and their protagonists, seeking to recuperate the capacity of the state to coexist with political pluralism, thus reaffirming the moral reparation inherent to the individual who requests an apology that which recognizes the individual right to resist authoritarianism.

The objective of the public policy that supports the Amnesty Memorial is not to create a museum about the history of Brazil (this dimension is obviously included in the Memorial) or even less to create a unilateral space to promote a specific political and cultural idea. It aims to do exactly the opposite: create a public site for memory and awareness that returns to the Brazilian people the different ideas and social projects that were interrupted by the repression and were arbitrarily extracted from the public space. It hopes to accomplish the promotion of wide-ranging political reparations for this society that had its political and cultural development truncated. Thus, the Memorial represents and offers participants and visitors an opportunity to reflect on the crimes against humanity, the amnesty process and transitional justice<sup>25</sup>.

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is the Memorial of the Resistance of Sao Paulo, inaugurated in January 24, 2009, constructed in the facilities of the former prison of the DEOPS/SP-Department of State of Political and Social Order (1940-1983). See: Araújo, Marcelo Mattos & Oliveira Bruno, Maria Cristina (Orgs.). *Memorial da Resistência de São Paulo*. (Articlesby Katia Felipini Neves). São Paulo: Pinacoteca do Estado, 2009. See: [http://www.pinacoteca.org.br/?pagid=memorial\\_da\\_resistencia](http://www.pinacoteca.org.br/?pagid=memorial_da_resistencia).

25 For further information on the creation and implementation of the Archive as well as a description of the museum, see: Abrão, Paulo & Torelly, Marcelo D. "Dictatorship Victims and Memorialization in Brazil: Concepts and Challenges in the Process of Building the Political Amnesty Memorial". In: *Museums and Difficult Heritage*. Helsinki: International Committee for Museums and Collections of Archeology and History, 2011, forthcoming.

This moral and cultural reparation policy, as well as the economic reparations, is a duty of the state that goes beyond any ideology or party. This policy is an additional element for consolidating the process of transition in Brazil, and advancing the idea of comprehensive reparations that includes as broadly as possible those directly affected by acts of exception by the State. With the intent of fostering democratic and citizen values that serve as the basis for the integrity of the constitution as a space for formulating political guiding principles for Brazilian society in the period after the dictatorship.

### ***3.2.3. The Memory Marks project***

By increasing public access to the work of the Commission, the number of testimonies about arbitrary imprisonment, torture and other violations of human rights increased exponentially. The public disclosure of these violations made it possible to break the silence about this topic, but the production of knowledge continued to be conducted directly by the state. The Memory Marks project emerged as an alternative to the concentration of memory initiatives placed in the hands of the government. These projects transferred resources for actions directly created and implemented by civil society, thus allowing different narratives to emerge within society.

In order to achieve this objective, the *Memory Marks* project undertakes four types of actions:

- *Public hearings*: acts and events to promote public hearings with those who were politically persecuted about the past and their relationship with the present. For example, the thematic sessions carried out since 2008 on the different professional categories of workers and unionists who had been arbitrarily dismissed, as well as the public hearing held in Brasilia (2008)<sup>26</sup> on the limits and possibilities of holding responsible those who

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26 It is important to highlight the historical relevance of this particular hearing: it was during this hearing that, for the first time, the Brazilian state officially debated the possibility of finding ways to hold state agents responsible for the crimes committed during the dictatorship, adding different social movements for victims, those who were politically persecuted and other social sectors that defend human rights and citizen rights. After this public hearing, with the presence of then president of the *Conselho Federal da Ordem dos Advogados do Brasil*, the Council joined the Federal Supreme Court through an act of unconstitutionality (ADPF 153) to interpret the 1979 Amnesty Law so that it would not include crimes against humanity committed by state agents during the period of state repression.

had committed acts of torture during the military regime and, more recently, the hearing on the legal regime governing the political amnesty for military personnel held in Rio de Janeiro (2010). The Commission also traveled three times to the region of Araguaia, collecting over 400 depositions from peasant farmers persecuted during the period of the Guerrilla.

- *Oral history*: these interviews were with victims of political persecution, based on theoretical and methodological criteria characteristic of Oral History. The first project to be implemented conducted 108 interviews (recorded, filmed and transcribed) with people who experienced events related to the resistance, and has been promoted in association with the federal universities of Pernambuco (UFPE), Rio Grande do Sul (UFRGS) and Rio de Janeiro (UFRJ). All interviews were made available to the Amnesty Archive and are available in the libraries and research centers of the universities that participate in the project to anyone who is interested in the topic.
- *A call to the public to promote civil society initiatives*: through public invitations, the Commission selects projects for preservation, memory and dissemination presented by civil society organizations. In the first public invitations held in 2010 and 2011, the selected proposals included projects to produce books, documentaries, educational material, artistic works, theater presentations, conferences, musicals and projects to digitize or restore a collection of historical files.
- *Publications*: this is an effort to publish a collection of books, including biographies and memories of victims of political persecution; dissertations and theses on the dictatorship and amnesty in Brazil, as well as reprinting or republishing of other relevant historical texts or works, and the registration of the annals of different events on political amnesty and transitional justice. All publications are distributed without cost, with a priority to schools and universities.

The Memory Marks project gathers statements, systematizes information and promotes cultural events that will allow society as a whole to learn about the past and the lessons that it leaves for the future. It thus reiterates the idea that only by learning about the past can we avoid repetition in the future, making the amnesty process a path for

critical reflection and for refining democratic institutions. In addition, the project strives to represent multiple viewpoints by selecting initiatives through a process of public participation that ensures equal access to all and prevents one sole hegemonic vision of the world from being imposed.

With this project, the most recent reparations process in terms of recognition made by the Amnesty Commission, we expect the citizens of Brazil will have access to multiple narratives about a common past. The reparative act of allowing the victim to narrate his/her story (by different means and forms) becomes an unparalleled way for society to gain knowledge and understanding of the history of each individual.

### **3.3. Criticism and Inequities of the Reparations Program**

There are three different possible inequities in the reparations program in Brazil which have to do particularly with the economic dimension: first, (3.3.1) between the criteria of Law No. 10.559 and Law No. 9.140/95 and other legislation; second, (3.3.2) between the internal criteria of Law No. 10.559; and finally (3.3.3) between the people that received amnesties based on exceptional pensions prior the existence of the Law No. 10.559 regulating article 8 of the ADCT of the 1988 Constitution.

#### ***3.3.1. Possible Asymmetries between the Criteria of Law No. 10.559, Law No. 9.140/95 and other legislation***

Law 10.559 has two criteria to determine economic reparations for victims of political persecution:

**Criteria 1:** those who can prove that they were dismissed from their jobs will receive a monthly, permanent and continuous payment (MPCP), tax free and with retroactive financial effects until October 5, 1988. The value of the MPCP should correspond to the position they occupied “as if they were currently employed”, plus any rights and promotions that would have occurred during the time of service, or to a value that corresponds to the average market salary for this activity.

**Criteria 2:** for those not working at the time the acts occurred, a reparation of a sole payment (SP) of thirty minimum salaries will be made for each year of proven persecution, capped at R\$ 10 thousand Reals tax free;

The criteria for reparations of Law No. 10.559 are generally compared to the criteria (a) of Law No. 9.140, which creates the Special



Commission on Political Deaths and Disappearances, and with (b) the reparations awarded by a judge based on the civil code.

*a) Possible inequities with Law No. 9.140*

Law No. 9.140 establishes reparations in a one-off compensation payment for family members of political activists who were recognized as victims of murder or forced disappearance during the military regime. No compensation made under this law, applied by the Special Commission on Political Murders and Disappearances, can be less than US\$ 62,500 and in practice, following legal criteria, no compensation greater than US\$ 95,000.

There appears to be no inequities related to the payments established under the second criteria of Law No. 10.559, which provides for a one-off compensation payment of up to US\$ 62,500 for victims of political persecution that were unemployed at the time of the events. With regard to the comparison between the affected legal asset, for example, the legal asset of the right to life (death and disappearance) compared to the legal asset of the right to a life plan, citizenship or identity (as in the case of the children forced to live in exile or students expelled from school), the right to life has greater value. In the end, the cap to the sole payment under Law No. 10.559 corresponds to the minimum value of Law No. 9.140/95.

When comparing with the first criteria, which establishes the monthly payment, a discrepancy in values may occur and it may appear that the life of the person disappeared for political reasons had been assessed under the value of the employment of the person who survived. Thus, hypothetically, if a victim of political persecution who was dismissed receives a monthly payment of approximately US\$ 1,750, close to the current average that appears in Table 05, combined with the back payments due, they could receive an amount that is greater than the payment made to the family member of a victim of disappearance, depending on the date on which the request for reparations was filed and the time during which the person would receive the MPCP.

The possibility of inequity arises due to the convergence of two factors: (i) the lack of effectiveness of prior laws, which established the reinstatement of people who had been dismissed, but that today allow them to opt for financial compensation (in particular, due to advanced age or if they have another job) and (ii) the delays in legislation to regulate article 8 of the Constitutional Transitional Provisions Act, taking into account that it took the national Congress 14 years to approve Law

No. 10.559 which established the criteria for reparations, provided that the retroactive sums are high even when the five year limitation enters into force. Even if the law had been enacted in 1989 and the periods for reparation had been administratively and expeditiously analyzed, the retroactive values would not exist and the possibility that a MPCP compensation for the loss of the job could be higher than the compensation for death and disappearance would only occur due to the expectation of life of the person who received political amnesty.

The problem also has to do with comparing different reparation measures, such as comparing restitution with compensation—which is always complicated. As we know, the purpose of restitution is to restore the victims' personal living conditions to those that existed before they were arbitrarily disrupted. While the only objective of compensation is to mitigate the suffering and grievances because it is not possible to restore the damages caused. It is worth noting, in the specific case mentioned above, of workers who had been arbitrarily dismissed, that the reparatory principle in Brazil was the restitution of employment, *i.e.* reinstatement. With the passage of time and due to the practical impossibility of enforcing the reinstatements (due either to the advanced age of those who had been dismissed or because they began new careers or opted for other life choices), the legislation established compensations such as monthly payments. In practice, what happened was that these compensations took on a restorative nature by law to the extent that the constitution stipulates that a compensation may be established at a rate comparable to that which the person would receive if productively active. Thus, if not for the instatement of the five year limitation or of the additional possibility of establishing monthly payments the financial compensations paid monthly to the victims of political persecution who were dismissed would constitute the real restoration of each cent not received due to the loss of employment.

In any case, what cannot be ignored when comparing the reparations paid to the family members of those killed or disappeared and of other victims of political persecution, is that the compensations awarded under Law No. 10.559 can be aggregated with the compensations granted under Law No. 9.140. Since we are dealing with redress for damages based on different facts, the family members of victims of disappearance or murder are entitled to double compensation from the Brazilian state. Thus, they are entitled to receive reparations from the state in the death or forced disappearance of the victim, under Law No. 9.140,

and concomitantly receive reparations from the state for the political persecutions suffered by the deceased or disappeared person while still alive—whether they are entitled to one-off payments (if the deceased or disappeared person was not employed, as in the case of students) or to permanent or continuous monthly payments (for other cases where the victim had lost employment due to imprisonment or persecution).

*b) Possible inequities with reparations based on the civil code*

Many victims of political persecution, due to mistrust in the Executive branch or due to delays by the Legislative branch in regulating the form of reparations, turned to the judicial system to guarantee their right to reparations. On the basis of the civil code and before enactment of Law No. 10.559, the judicial system established the value of the compensations on the basis of the material damages suffered by the victim and of the moral damages that it considered appropriate, while the Amnesty Commission used the special criteria of economic reparations set forth under Law No. 10.559. Thus, two identical cases tried, one by the Amnesty Commission and the other by the justice system could have two very different results. The ambiguous consideration of the moral damages in addition to the compensation of effective losses related to employment tended to make reparations paid under the justice system much higher than those paid by the Executive branch on the basis of the two special criteria of Law No. 10.559. For this reason, this possible inequity is due to the inappropriate comparison between administrative and judicial reparations<sup>27</sup>.

**3.3.2. Possible internal asymmetries of Law No. 10.559**

In addition to comparing other legal criteria, the current amnesty commission law may create inequities among those who are subject to the special criteria of the law, (i) because it establishes different methodologies to calculate reparations for those who were not employed and those who lost their jobs as a result of the persecution, and (ii) because in the case of those who lost their jobs as a result of the persecution, the law takes into account both the standard salary for the work carried out by the victims during the period of repression as well as the current salary they would

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27 De Grieff even argues that judicial reparations are absolutely incompatible with mass reparation programs, such as those that should be created in periods of restoration of rule of law in post-authoritarian regimes. See: De Grieff, Pablo. “Justice and Reparations”. In: De Grieff, Pablo (Org.). *The Handbook of Reparations*. Oxford: Oxford University Press, 2006, pp. 451-477.

receive if they had kept their jobs. Thus, when comparing the possible one-off payment and the possible monthly payments established under Law No. 10.559 or even the different situations where a victim could be entitled to monthly payments, we can observe tangible asymmetries to the extent of two victims of similar political persecution could receive very different reparations.

*a) Asymmetries among the victims that received reparations under Law No. 10.559, that were employed or not by the time of the persecution*

When comparing the possible reparations through one-off payments and the possible reparations through monthly payments under Law No. 10.559, there is an imbalance when the reparations are assessed on the basis of the consequences and the types of damages redressed.

A hypothetical situation is that of two people who were activists in the same “illegal” group, performed similar tasks, were both arbitrarily imprisoned for two years, one a last year journalism student and the other a recently graduated journalist that work regularly for a newspaper. In the first case, since the student did not have a job the law establishes a one-off payment of 60 minimum salaries for the two years of proven persecution (approximately US\$ 18,750 in current values); in the second case, if the imprisonment had caused loss of employment, the law establishes a monthly compensation payment for a journalist, payable for life, in addition to the retroactive payments. Thus, the first victim of persecution, whose right to freedom and right to education were violated, would receive a smaller compensation than the second victim of persecution, whose right to freedom and right to work were violated.

The verification of inequity in this specific case cannot imply the non-recognition of the entitlement of the second victim of persecution to receive compensation for the economic losses caused by the loss of his job, but can imply the acknowledgement that Brazilian law undervalued the magnitude of the damages and trauma that may have been caused to those victims of persecution who did not lose their jobs. This is the specific case of students who were expelled from their studies and whose life plan was disrupted, or of the young people and children who suffered, along with their parents, as a consequence of living in clandestinity, imprisonment, torture, banishment, exile or other restrictions that occurred during the period of repression. In any case, it appears that the legislator did

not intend to explicitly assess these situations for amounts that exceed the minimum established for reparations to family members of people murdered or disappeared as outlined in the example mentioned above.

The one-off payment is established on the basis of the period of political persecution jointly with the Amnesty Commission and not on the consequences of the persecution. In Brazil, individual suffering or permanent consequences of the political persecution are not assessed, and the Amnesty Commission is prohibited from providing any reparations for this reason. Thus, a person who had been dismissed can prove that their prior employment status would receive a monthly payment that will guarantee their subsistence until the time of their death, even if they have not effectively lost their real capacity for subsistence. While others, who did not have jobs but as a consequence of the persecution suffered permanent damages that impede them from working, such as physical and psychological harm caused by torture, will receive a one-off compensation of 30 minimum salaries for each year of persecution.

*b) Asymmetries as a consequence of the permanence of class differences and between public and private employees*

Among those who lost their jobs for purely political reasons, who subsisted on their earnings from their proven economic activity, those who had a higher social position in the period of persecution and thus, better salaries, will today receive higher compensation since the monthly reparation payments is calculated on the basis of the employment they had during the period of persecution and the compensation they would be receiving if they had the same job today. This gives rise to the possibility that two people who were persecuted and whose right to work had been violated in different professions during an identical period of time, would receive today very different amounts of compensation. This imbalance would also arise in the special protection that the successive amnesty laws granted to the victims of political persecution that worked in the public sector, as will be discussed below.

The law clearly favors public servants over private sector workers. Law No. 10.559 establishes two options for calculating the monthly reparation payments: (i) finding the salary amount that the victim would be receiving today by consulting with their former employer, trade association or even the laws governing their profession; and (ii) establishing these values through market research.

There are legally established lists of positions and careers for public service, which makes it possible to precisely determine how much a person would be earning if they had continued in the public service in that same career. In the case of the private sector, salary scales are rarely available for the different professions and the information provided by companies is frequently generic, since promotions in various careers are not regulated. Thus, there is no specific information available on the level of current salaries. The problem exists because the information provided by the unions and trade associations refers only to the job category but not to specific victims.

Thus, the public servants who were dismissed for political reasons or for their participation in strikes tend to receive monthly reparation payments (and as a consequence, retroactive payment to 1988) that exceed those made to people who were dismissed from their private sector jobs. For example, the average salary for a commercial air pilot is US\$ 2,968, and the average salary for a military air pilot is US\$ 8,250<sup>28</sup>. However, as a result of the laws in force prior to 2002, some public servants were reinstated into their jobs, but the reinstatements did not take into account the promotions they would have received had they continued working, which resulted in a loss of economic compensation. In the case of public servants whose regular pension payments today are only a portion of what they should be receiving due to their reinstatement, the Amnesty Commission is legally required to supplement this amount to match the amount that they should be receiving. In many of these cases, the amount of the supplementary payments is higher than the average payment for other categories in the private sector. In fact, taking into account the lack of salary scales for most private sector jobs, those victims of persecution who were reinstated as a result of the amnesty would not receive any supplementary payment to compensate for their dismissal because it is impossible to calculate.

However, it is true that the law provided for rehabilitation mechanisms for public servants, such as the opportunity to receive indirect benefits that the public administration maintained for its public servants like insurance plans, medical, hospital and dental services and housing loans. For private sector victims of persecution there were no

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28 Taking into the account the average values obtained from the Amnesty Commission's database in July 2009.

provisions for reparation mechanisms related to public rehabilitation services.

Thus, there is an exception to the special protection provided for under Law No. 10.559 for the public sector: it does not provide specifically for any reparation measure for those public servants who were correctly reinstated with the due promotions, but who had been separated from their jobs for several years and, in some cases, had been arbitrarily prohibited from working in other places and did not receive compensation for the years during which they were prohibited from working. In these cases, even when damages were obviously caused because reinstatement did not compensate for the time during which the person was prohibited from working, the Commission does not provide for any specific legal mechanisms to provide any type of economic redress for these damages, and is limited to providing moral reparations and public apologies.

***3.3.3. Possible inequities among the people who received an amnesty under Law No. 10.559 and those entitled to an exceptional retirement pension***

Law No. 10.559 stipulated that all administrative amnesty processes established in the special commission prior to the enactment of this law, and that were being processed by Direct or Indirect Federal Public Administration Agencies, should be referred to the Ministry of Justice. In the cases where the public administration hadn't been assessed, the law stipulated that the Amnesty Commission would be responsible for the pretrial proceedings and ruling in such cases. And in those cases when the Administration previously granted a special compensation, paid for by the Institute of Social Services, the Commission should simply replace this exceptional retirement pension with the modality of permanent, continuous and monthly payment ensuring, when appropriate, any new entitlement incorporated by the most recent law. This replacement changes not only the nature of the economic reparation, from a pension to a compensation (which generates tax exemptions), but in practice also changes the source of the payment from the Institute of Social Services to the Planning Ministry (for civilians) or the Ministry of Defense (for military personnel). This is established by law and thus excludes the possibility of a break in continuity.

The criteria used to calculate the compensations granted to the workers that received amnesty prior to the existence of the Amnesty Commission varied according to the administrative agency that was

applying the criteria. Most times these values were significantly higher than those established under Law No. 10.559, which generated inequities between people with identical situations.

### ***3.3.4. Measures adopted by the Executive level to address the legal inequities***

With regard to the possible inequities, only the Legislative branch may amend the two criteria provided for under Law No. 10.559, which all public administration are required to comply. However, in order to reduce the inequities and in compliance with the legal stipulations of Law No. 10.559, the Amnesty Commission took effective measures to establish equitable criteria for those situations in which the law provided for the possibility of choosing secondary criteria that would help on better ruling the cases.

After 2007, the Amnesty Commission stopped using the information provided by former employers or unions as the primary criteria for establishing monthly payments for private sector workers. They began basing its calculations primarily on market research for all cases and situations, partially minimizing the possible inequities in cases considered to be similar. Similarly, market research began to be applied for some of the public sector workers, aiming to eliminate the existing inequity between the private and public sector workers, in cases where the job descriptions were similar, or especially when they were identical, or even when the final calculation of compensation was unreasonably high and inconsistent with the social realities of Brazilian society.

It should be noted that, even taking these inequities into account, the Brazilian reparations program is currently one of the most successful in the world. Also, any reparations program due to their very nature will include some distortions. Because these programs arise precisely to provide mass reparations, most of the specificities of individual cases<sup>29</sup>, as defined in the laws that regulate the reparation commissions, are disregarded in exchange for other benefits, such as the provision of expeditious and homogenous attention to victims of acts committed during the period of repression.

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29 An example of particularities not considered under by this program is the case of people who are injured during confrontations between the armed insurgency and the repressive state; there is no specific legislation for these cases. Some analysts believe that this constitutes a problem for the Brazilian reparations program.



## 4. The Reparations Program as the Lynchpin of Transitional Justice in Brazil

The reparations process in Brazil is currently one of the leaders of its kind in the world. As discussed in this article, the economic dimension of the program is one of the largest to be implemented. In addition, the program contemplates broad-based engagement with civil society and moral reparation measures, addressing both individual reparation and social, symbolic and collective reparation. Considering the different options for reparation mentioned in this text, only very few cases of victims or of relatives of victims of arbitrary acts are not contemplated to some extent with regards to the program.

We can, thus, reach some conclusions about the role of the reparations program within the effective implementation of the transitional justice process in Brazil.

The first conclusion regarding reparations in Brazil stems from article 8 of the ADCT, which is an explicit and genuine act of recognition of amnesty for victims of political persecution and of their right to resist oppression. The second is that, since its inception, amnesty in Brazil constitutes a political act that is linked to the idea of reparation. The third conclusion is that amnesty is granted by the Brazilian constitution to those who were affected by acts of exception committed during the state of repression and is, therefore, aimed at those who were persecuted and not at the perpetrators of such persecution. The fourth is that a wide range of reparation measures are being implemented in Brazil, individual and collective, material and symbolic, although the rehabilitation measures for victims are almost intangible. Finally, given the duration and coverage of the reparations process, it has become the lynchpin of transitional justice in Brazil, since it is through the work of the two reparation commissions (motivated by the continuous social mobilization on the topic since the enactment of the 1988 constitution) that the other transitional justice measures were created: recognition of the right to memory and truth (established as a legal asset under the Third National Human Rights Plan), creation of the DNA database for relatives of victims of political disappearance, public policies on memory and symbolic reparations and the recognition of human rights violations, which all serve as the factual basis for taking legal action both now and in the future.

For this reason, if we compare the dimension of reparations with other dimensions of the transitional justice process in Brazil, we would

observe that not only is it the most developed but also that it functions as the driving force behind the entire process, engaging different actors. The continued requests for amnesty, as well as the recent increase in demands for transitional justice, demonstrate that the implementation of the reparations process not only raises the visibility of the victims' struggle, making it possible to simultaneously better consolidate and advance the reparations program itself (*i.e.* strengthening of the axis of reparations itself), but also raises the visibility of other social struggles for justice, truth and memory, giving rise to the formulation of new initiatives.

Groups that were historically created to defend the right to truth, memory and justice, such as *Tortura Nunca Mais (Torture Never Again)* organized in each state, or the *Movimento Justiça e Direitos Humanos (Movement for Justice and Human Rights)* that works for memory and justice, in particular in the cases of the acts committed during *Operação Cóndor (Operation Cóndor)*, strengthened their capacity to take action when their historic claims were recognized by the Brazilian state in the framework of the reparations process. In addition, the reparations process, to the extent that it functioned as a mechanism for denouncing human rights violations committed during the state of repression, inspired the actions of other human rights movements and activists. In fact, international experiences have shown that it is not possible to formulate a "scale of benefits" that establishes a specific order in which to implement transitional justice mechanisms, nor which models should be adjusted to the reality of each country, because different experiences of successful combinations exist<sup>30</sup>. Therefore, abstract concepts cannot be adopted to define *a priori* which transitional justice measures should be implemented by each state to achieve the best results.

Therefore, the conclusion that the process of transitional justice in Brazil favored reparations, in its inception, should not be understood as a deficit. It is, merely its foundational characteristic, necessarily linked to its concrete political context. Society organized its mobilization around the reparations process in such a way that this so called "delayed" process of transitional justice can only be truly explained by those who visualize this historical development of the struggle for reparation of the victims and its reflection and effects on society. Also we believe the thesis of

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30 Cfr. Ciurlizza, Javier. "Entrevista à Marcelo D. Torelly". *Revista Anistia Política e Justiça de Transição*, No. 01, Jan./Jul. 2009, pp. 22-29.

reparations as a payoff for silence to be totally false<sup>31</sup>. The opposite is true: reparations give the voice back to the victims of persecution in a space that has sufficient repercussion to enable their demands for truth, memory and justice to prosper.

We know that transitional justice measures in Brazil have taken longer than in neighboring countries, such as Argentina and Chile, but this does not diminish the relevance of adopting these measures at the moment when it becomes politically possible to do so. With the characteristics of the process in Brazil—extensive, sensitive, delayed and truncated—it is not realistic to criticize that the reparations process was causing social alienation, having seen that society continued to renew itself and adopt new measures to strengthen democracy through successive innovations in time. What is ultimately not reasonable is to expect that a country that required almost 10 years to complete a first cycle of political aperture (1979-1988) could quickly promote measures of the type implemented in countries like Argentina, where the military regime collapsed followed by a defeat in an external war; or as in Chile, where the “Pinochet case” served as an external mechanism to activate internal structures to come to terms with the past.

It is important to remember that the entire process of transition in Brazil was strictly controlled, so that only those areas where the regime was less efficient in developing its own agenda were able to effectively flourish. This can be seen in the case of the reparations program established by the constitution and designed more comprehensively during the democratic governments of Fernando Henrique Cardoso and Luiz Inácio Lula da Silva.

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31 Reducing the moral value of the declaration of political amnesty to only its economic dimension is the most common strategy currently used by those sectors that are not willing to accept that the state accepts the blame for past mistakes and that, through this discourse (and taking advantage of the inequities that characterize the reparations process in Brazil) attempt to demonstrate that the amnesty law had only been a “silencer” for certain sectors of society. In an interview with the magazine *Época* historian Marco Antônio Villa stated that “distributing money was a beautiful ‘silencer’”. Many people who could have helped to demand the opening of the archives ended up simply keeping this “silencer”. In corroboration of this idea, in an article in the *Folha* newspaper Villa also states that “The military regime in Brazil was not a 21-year dictatorship. It is not possible to call the period between 1964 and 1968 a dictatorship (until the AI-5), with all the political and cultural mobilization that existed. Much less the period between 1979 to 1985, when the Amnesty Law and the state elections in 1982 were approved”. It is therefore difficult to identify the existence of a clear ideological position in these positions. *Cfr.* Villa, Marco Antônio. Interview to *Época Magazine*. *Época*. São Paulo, May 26, 2008.

It is thus possible to identify three advantages of the transitional justice process in Brazil, based on the reparations process, its cornerstone:

- First of all, the fact that the work of the reparations commission had a positive impact on truth-seeking, disclosing histories and raising further awareness of the need to reveal all violations, thus promoting and contributing to the right to the truth. The commissions not only have access to a huge number of historical files but also, and above all, produce new files. The Amnesty Commission of the Ministry of Justice alone has almost 70,000 dossiers in its files that compare official documents to the narratives of the victims of persecution, either through the written petitions or through audio recordings of oral narratives made during hundreds of sessions carried out throughout the country. This file will probably be the main source for the investigations of the newly created Truth Commission.
- The official state acts to recognize serious violations of human rights that were conducted as a result of the reparation commissions, in addition to the evidentiary proceedings that support these acts, have served as the tangible basis for legal procedures within the Federal Public Ministry, thus promoting the right to justice in a context in which the evidence of most of the crimes committed had already been destroyed. In addition, by recognizing the events denounced by the relatives of those killed and disappeared and by victims of political persecution in general, the commissions legitimize the actions of civil society, placing the action of the state at the service of its citizens and not to other powers.
- Finally, the reparations process significantly contributes to the sustained development of memorialization policies in a country accustomed to forgetting, either through publishing basic works, such as the report *Direito à Memória e à Verdade (Right to Memory and Truth)*, an official recognition of the state crimes committed, or through actions such as the Amnesty Caravans, the Amnesty Memorial, and the Memory Marks project. Each of which not only serve as individual and collective reparation policies but also include a well-defined dimension of creation of memory.

In addition to the above mentioned dimension of historic revelation, the constant access to the documents, the registration of the testimonies of

the victims of political persecution and the public debates on the matter have led to a new reflection about this period. This process has been one of the most effective in reversing the implications of the dictatorship and also clearly exposes the practice of arbitrary acts, enabling society to restructure its own historical memory—and not rewrite history, as some would like.

The process of accountability in Brazil should certainly continue in the next few years, especially due to the need to comply with the recent ruling of the Inter-American Court of Human Rights in the case *Gomes Lund et al. vs. the State of Brazil*, and the recent approval of a truth commission. In the future, therefore, we expect that the memorialization and truth seeking measures, and perhaps justice, may occupy a space within society that is even more significant than the one generated by the social mobilization around the issue of amnesty. Thus effectively complementing the ongoing movement where the idea of “reparations” was incorporated into that of “amnesty”, challenging the idea of amnesty as oblivion and impunity and leading to a process of “reparation, memory and truth”, with the hopes of achieving a future of “reparations, truth, memory, and justice”.



## A COMPLEMENTARY RELATIONSHIP: REPARATIONS AND DEVELOPMENT\*

*Naomi Roht-Arriaza & Katharine Orlovsky*

I was detained for four months and two weeks in Puerto Barrios, all my crops, my corn, my rice disappeared, they even ate my cow, I was suffering and my children were suffering, we ended up in absolute poverty, it was all very painful and all because of the conflict we went through, we had to escape and start all over again, except this time we were always afraid<sup>1</sup>.

The voices of victims remind us of what is lost during periods of massive human rights violations. When such violations are committed, international law recognizes a right to reparation that, in its material components, may provide tangible goods or services to victims and survivors. As such, reparations may overlap with plans and programs to improve the material conditions of life for the population more generally. That overall process, often encapsulated under the term “development”, finds concrete expression in funding, planning, and implementing programs for development cooperation. Yet reparations and development are generally conceptualized and approached independently. Reparations to individuals have for the most part been the province of human rights courts, claims commissions, and administrative programs, and advocacy

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1 Testimony of K'ekchi survivor, Guatemala, in Carlos E. Paredes, *Te llevaste mis palabras: efectos psicosociales de la violencia política en comunidades K'ekchi'es* (Guatemala: Equipo de Estudios Comunitarios y Acción Psicosocial (ECAP), 2006), 195 (author's translation).

on the issue has been concentrated among human rights and transitional justice organizations. Development cooperation, a much larger field, encompasses the work of international development institutions, aid agencies, financial institutions, and a constellation of development-oriented nongovernmental organizations (NGOs) and practitioners.

This chapter addresses the specific linkages between reparations and development that may exist in a post-armed conflict context or following a political transition<sup>2</sup>. Demands for reparations—as defined below—are becoming increasingly prevalent in postconflict negotiations, and governments, truth commissions, or other entities have responded by proposing administrative reparations programs. We concentrate on these programs rather than court ordered or claims-commission-ordered reparations.

The victim's legal right to reparation for serious harms suffered is articulated in the UN's 2005 *Basic Principles 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*<sup>3</sup>. According

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- 2 At the outset, we acknowledge that both reparations and development may take place in other contexts. For example, reparations have been awarded to groups in nonconflict settings in the United States and Canada. Reparations and development may intersect in such cases as well, in that such groups—for example, indigenous peoples or immigrant groups—may be relatively economically disadvantaged in the context of a more developed country. Reparations may be ordered by courts or may be part of an administrative scheme; we focus here on the latter. For the sake of simplicity, this article will not address those issues, but will try to more thoroughly address a smaller set of issues. Moreover, we acknowledge at the outset the shortcomings of “post-armed conflict” and “transitional” as labels. We use them as shorthand for situations where massive violations of humanitarian law or serious human rights violations have occurred in the recent past, with a particular focus on cases where there have been large numbers of victims, followed by a change in regime or a negotiated end to the fighting. We also acknowledge that there may be significant differences between “postconflict” and “postdictatorship” situations, which we take up in the third section. Finally, it is important to recognize at the outset that most large-scale reparations programs, especially after armed conflict, remain in their infancy, and so descriptions must be based largely on plans and proposals, and any evaluation of their effectiveness is premature.
- 3 United Nations, *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* (hereafter *Basic Principles*), a/res/60/147, March 21, 2006, vii, 11. For a thorough examination of the Basic Principles and other sources of the right to reparation in international law, see Dinah Shelton, “The United Nations Principles and Guidelines on Reparations: Context and Contents”, in *Out of the Ashes: Reparations for Victims of Gross and Systematic Human Rights Violations*, K. De Feyter, S. Parmentier, M. Bossuyt, & P. Lemmens, Eds. (Antwerpen-Oxford: Intersentia, 2005).



to the Basic Principles, a victim of said violations has the right under international law to: (1) equal and effective access to justice; (2) adequate, effective, and prompt reparation for harm suffered; and (3) access to relevant information concerning violations and reparation mechanisms. Such reparation “should be proportional to the gravity of the violations and the harm suffered”<sup>4</sup>, and may take the form of restitution, compensation, rehabilitation, satisfaction, and guarantees of nonrepetition<sup>5</sup>. The right to a remedy or to reparations is also articulated in the basic human rights instruments, specialized conventions, nonbinding instruments, and the Rome Statute of the International Criminal Court (ICC)<sup>6</sup>.

Reparations are distinct from reconstruction and from victim assistance, both of which are closely related. Reconstruction generally refers to physical and economic rebuilding after an armed conflict or other disaster. Victim assistance focuses on meeting the immediate needs (medical, psychological, economic, legal) of victims. Reparations are distinguished from both, first by their roots as a legal entitlement based on an obligation to repair harm, and second by an element of recognition of wrongdoing as well as harm, atonement, or making good. Reparations are therefore a limited category of response to harm, and generally address violations of basic civil and political rights, such as massacres or disappearances, rather than broader issues of social exclusion or denial of economic, social, or cultural rights<sup>7</sup>. Reparations, by their nature as a response to specific harms, also have a large symbolic component, in which the way they are carried out is as important as or more important than the material result.

Reparations may also be granted according to different methodologies. Court-ordered reparations generally entail individualized considerations of damages to each claimant based on the idea of *restitutio in integrum*—that is, putting the individual back in the position he/she would have been in absent the violation. Administrative schemes tend

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4 *Basic Principles*, ix, 15.

5 *Ib.*, ix, 19-23.

6 See Naomi Roht-Arriaza, “Reparations Decisions and Dilemmas”, *Hastings International and Comparative Law Review* 27, No. 2 (2004): 160-65.

7 This is not to argue that reparations for violations of economic, social, and cultural rights are not possible, simply that no program to date labeled as reparations has attempted to redress such violations in the absence of concurrent violations of basic civil and political rights.

to operate either by providing a uniform sum to all victims or through a schedule of amounts for different violations, and do not attempt to define or repair the full amount of the losses.

Development also has multiple definitions and constituent elements. As discussed further below, we adopt the broad view of development espoused by Amartya Sen and other theorists: rather than a narrowly defined process of economic growth (whether measured by gross domestic product [GDP], foreign direct investment [FDI], or other indicators), development instead entails creating the conditions for all people to develop their fullest possible range of capabilities<sup>8</sup>. It is under a capabilities-centered, bottom-up approach to development that the strongest links to transitional justice generally, and reparations programs in particular, can be made.

There are obviously tensions between reparations programs and the larger development agenda. If nothing else, budgets are finite, and competition for resources is particularly fierce in a post-armed conflict or post-dictatorship context where the economy and infrastructure may be damaged or destroyed and common crime is likely to surge. Fiscal stability and a need to create a favorable investment climate may conflict with the additional social spending and need for additional government revenues that a reparations program will demand. In a number of recent examples, domestic governments, international organizations, courts, and even victims groups have moved for reparations to take the form of specific development projects, such as (re)building community structures or providing schools or health clinics. These “reparations as development” projects raise serious questions about whether such initiatives may violate the essential “character” of reparations—that is, an act done as, and that individuals in the community recognize as, atonement for past harms. The 2007 Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation has gone as far as to state that “Governments should not undertake development instead of reparation”<sup>9</sup>.

At the same time, there are potential synergies between reparations and development. Reparations, from an individual victim’s perspective, may be a necessary step toward creating a sense of recognition as a citizen with equal rights and fostering a certain level of civic trust in

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8 Amartya Sen, *Development as Freedom* (New York: Knopf, 1999).

9 The Nairobi Declaration on Women’s and Girls’ Right to a Remedy and Reparation, March 2007, sect. 3(b).

the government. These, in turn, are preconditions for the (re)emergence of victims and survivors as actors with the initiative, motivation, and belief in the future that drive sustainable economic activity. While all transitional justice measures share this aim, reparations constitute its most concrete, tangible, and to some degree personalized expression. Reparations payments, at least if past and current administrative programs are a guide, will never be large enough to make a difference on a macroeconomic scale. Nonetheless, reparations payments may have positive effects on rebalancing power relations within families and in local communities (though they may also, it should be noted, pose dangers of conflict and fragmentation in these contexts). Even small amounts, under certain conditions, may unleash the energy and creativity of previously marginalized sectors (especially women and indigenous peoples). Reparations in the form of services can improve health, education, and other measures of well-being that are essential to development in ways that “normal” programs for the provision of these services will miss because they are not attuned to the specific potential and needs of survivors, including the need to have their individual harms acknowledged.

Moreover, individual and collective reparations may have important spillover effects on other aspects of development. These include linkages to other issues, such as civil registry and titling, potential strengthening of the state’s ability to be an effective service provider, and the ability of civil society and business groups to interface with the state (through procurement and otherwise) in a “normal” fashion. Interactions with the state around reparations, if positive, can increase awareness of the population as rights-bearing citizens, which can spill over into a demand for access to justice and for effective (and transparent) government.

Just as reparations may affect development, however, development can also contribute to an improved ability to provide effective reparations. At the simplest level, a desperately poor country with little in the way of government infrastructure will face greater difficulties in financing and distributing reparations than a richer, more organized one. The lack of a government presence in the interior of a country emerging from conflict will make it difficult to organize the provision of reparations, or even to know what potential beneficiaries of a reparations program need or want. In particular, many reparations, especially in-kind services, require a delivery system. To the extent that these services can be channeled through already functioning pension, education, or health systems, they

are more likely to be competently provided. Moreover, development efforts focused on anticorruption efforts, public administrative reform, and even security sector reform might make the state more effective in delivering reparations. This has implications for the timing of reparations: it may take some time to build up the required physical, financial, and human infrastructure to ensure an adequate reparations program. While not by any means an argument for delaying the provision of reparations, this may lead to the recognition that the benefits of reparations may accrue in part to the initial victims and survivors of the violations, and in part may be intergenerational.

The second section of this article examines the broader definition of development as well as the interface among certain approaches to development, social exclusion, and reparations. The third section focuses on the impact of reparations programs on the state, and on the limitations of the state that impact the delivery of reparations. The fourth section turns to some of the particular issues raised, respectively, by collective reparations and individual reparations. We then turn, in the fifth section, to the delivery systems for and destinations of reparations. The sixth section looks at reparations and the international development cooperation community. Finally, in the last section, we draw conclusions.

## 1. Conceptions of Development and Their Convergence with Reparations

We use a broad conception of development, defining it as a process that increases a society's prosperity, augments the welfare of its citizens, and builds the infrastructure and the productive, civil, and political institutions necessary to ensure its members the most fulfilling life possible, or at least a minimum level of income or livelihood for a life with dignity. The classical view of economic development is much narrower, focusing on measures of economic growth, such as GDP *per capita* or amount of investment. At the outset, we acknowledge that even the most ambitious reparations projects will have uncertain, and probably minimal, effects as a contributor to GDP growth—the amount of money involved is simply too small. It may not be possible, then, to trace the macroeconomic impact of such programs.

Theories of development have gone through a number of evolutions, from the presumption in the 1950s that all economies went through “stages”, to the focus on basic needs in the 1970s, to a turn in the 1980s to

a stronger macroeconomic focus. During the 1980s and early 1990s, the “Washington consensus” held that growth, and thus development, were a function of opening up economies, selling state assets, and shrinking the public sector. The result in many countries was a contraction of economic activity and cutbacks in the services, such as public health and education, that might overlap with the efforts of many reparations programs. In the current post-“consensus” era, even the international financial institutions (IFIs) and donor agencies now pay lip service to the need for increased government services in these areas and for a direct focus on poverty alleviation (rather than regarding it as a trickle-down consequence of growth). The Millennium Development Goals (MDGs), approved by governments in 2000, are the most well-known expression of the mainstream policy objectives for reducing poverty and improving well-being<sup>10</sup>.

In contrast to the export-led theories of past years, a new line of thinking about economic development stresses the importance of endogenous or locally driven development. Locally driven development does not exclude foreign investment or trade, but it focuses on creating sustained economic growth through strengthening local and regional markets. It emphasizes education (human capital development), on-the-job training, and innovation to create new niche markets that allow even small, capital-poor, and resource poor countries to prosper. This approach leads to a stress on indigenous solutions and on education and health, and it is not hostile to using regulation to encourage innovation and linkages of domestic to global markets<sup>11</sup>. It coincides with theories of local control and bottom-up economic development that are gaining greater currency, especially in light of the perceived failure of the neoliberal approaches of the 1980s and early 1990s. In almost every developing/poor/global-south country, thousands of grass-roots development projects, funded from

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10 The Millennium Development Goals (MDGs) were developed out of the eight chapters of the United Nations Millennium Declaration, signed in September 2000. The eight goals are: eradicate extreme poverty and hunger; achieve universal primary education; promote gender equality and empower women; reduce child mortality; improve maternal health; combat HIV/AIDS, malaria, and other diseases; ensure environmental sustainability; and develop a global partnership for development. For the most part, the goals are to be achieved by 2015.

11 See, e.g., Paul Romer, “Endogenous Technological Change”, *Journal of Political Economy* 98, No. 5 (October 1990): 71-102; and, more generally, William Easterly, *The White Man’s Burden: Why the West’s Efforts to Aid the Rest Have Done So Much Ill and So Little Good* (New York: Penguin Press, 2006).

local resources or NGO networks, now exist alongside, and sometimes in lieu of, centralized government efforts. One expression of this bottom-up approach, but by no means the only one, is the burgeoning microfinance and microcredit movement<sup>12</sup>.

In the 1990s, alongside the concern with opening up economies, came a new focus on “governance”, which over time has brought the concerns and techniques of transitional justice and development experts closer together. After years of focus on markets as the sole drivers of growth, IFIs and donor governments realized that markets could not operate properly without an overarching set of rules provided by the state. They turned their attention to strengthening certain aspects of state performance, including judicial and legal system reform, anticorruption efforts, and tying external support to “good governance”<sup>13</sup>. In particular, lending and aid agencies have focused a large amount of resources on “rule of law” programming aimed at the modernization of codes and courts to facilitate economic activity. Alongside these efforts, which have had decidedly mixed results, other programming has aimed at improving access to justice for the population, especially those who have never seen courts as a useful defender of their rights. This focus on the justice sector has also led to greater sensitivity among some development specialists to the particular needs and characteristics of postconflict societies, and to a renewed focus on the state’s capacity to carry out any of the goals assigned to it, whether these involve development or justice. At the same time, those who have critiqued the emphasis on the rule of law have pointed out that improving state institutions, by itself, cannot ensure that poor people actually make use of such institutions or see them as relevant or fair.

The convergence of recent thinking on development with related paradigms of conflict transformation, human security, and rights-based approaches to development means that the concerns and ways of thinking

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12 See, e.g., International Monetary Fund, “Microfinance: A View from the Fund”, January 25, 2005, 2, [www.imf.org/external/np/pp/eng/2005/012505.pdf](http://www.imf.org/external/np/pp/eng/2005/012505.pdf); and Thomas Dichter, “Hype and Hope: The Worrisome State of the Microcredit Movement”, Microfinance Gateway, [www.microfinancegateway.org/content/article/detail/31747](http://www.microfinancegateway.org/content/article/detail/31747). A number of countries in Latin America, including Brazil, Ecuador, and Bolivia, have been experimenting with economic development strategies based on the “glocal”—that is, an articulation of markets and production starting at the local level and creating linkages upward. See, e.g., Alberto Acosta, *Desarrollo glocal* (Quito: Corporación Editora Nacional, 2005).

13 See, for instance, the Millennium Challenge Account.

of those involved in development work and those focusing on reparations are in many ways parallel. Practitioners of conflict transformation begin

with a central goal: to build constructive change out of the energy created by conflict. By focusing this energy on the underlying relationships and social structures, constructive changes can be brought about (...) How do we address conflict in ways that reduce violence and increase justice in human relationships? *To reduce violence* we must address both the obvious issues and content of any given dispute and also their underlying patterns and causes. *To increase justice* we must ensure that people have access to political procedures and voice in the decisions that affect their lives<sup>14</sup>.

Thus, for conflict transformation practitioners, dealing with the aftermath of conflict in a way that increases justice and gives affected peoples a voice in decision-making converges with the concerns of those involved in reparations programs.

Another convergent set of concerns involves the move among those involved in the security area from military security to a broader view of human security. As part of a move from a state-centered view of security to a “human centered” one, human security “deals with the capacity to identify threats, to avoid them when possible, and to mitigate their effects when they do occur. It means helping victims cope with the consequences of the widespread insecurity resulting from armed conflict, human rights violations and massive underdevelopment”<sup>15</sup>. Here, too, a focus on human security will dovetail with efforts to repair those consequences.

Last but not least, the approaches of development practitioners and those concerned with reparations have converged around rights-based approaches to development. As a United Nations Development Programme (UNDP) publication puts it:

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14 John Paul Lederach & Michelle Maiese, “Conflict Transformation”, October 2003, [www.beyondintractability.org/essay/transformation](http://www.beyondintractability.org/essay/transformation).

15 Shahrbanou Tadjbakhsh, “Human Security: Concepts and Implications with an Application to Post-Intervention Challenges in Afghanistan”, Centre d’Études et de Recherches Internationales, No. 117-118, September 2005, [www.ceri-sciencespo.com/publica/etude/etude117\\_118.pdf](http://www.ceri-sciencespo.com/publica/etude/etude117_118.pdf).

Human rights add value to the agenda for development by drawing attention to the accountability to respect, protect, promote and fulfill all human rights of all people. Increased focus on accountability holds the key to improved effectiveness and transparency of action (...) Another important value provided by the application of a human rights-based approach is the focus on the most marginalized and excluded in society as their human rights are most widely denied or left unfulfilled (whether in the social, economic, political, civil or cultural spheres, and often, a combination of these). A human rights-based approach will further generally lead to better analyzed and more focused strategic interventions by providing the normative foundation for tackling fundamental development issues<sup>16</sup>.

All these approaches have brought the concerns, goals, and methodologies of those working in the development field closer to those of human rights or transitional justice practitioners focusing on reparations programs. A principal point of convergence is the concern with process: how programs and projects are carried out is as important as what is done. For both development and reparations programming, the issue of social exclusion, and the potential of reparations programs to combat it, is central.

## 2. Development, Reparations, and Social Integration

Starting in the 1980s and increasingly today, development economists, academic experts, IFIs<sup>17</sup>, national and international aid agencies, and governments now recognize that growth and other macro

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16 UNDP, “A Human Rights-Based Approach to Development Programming in UNDP—Adding the Missing Link”, Geneva, August 2001, [www.undp.org/governance/docs/hr\\_Pub\\_Missinglink.pdf](http://www.undp.org/governance/docs/hr_Pub_Missinglink.pdf).

17 The most important IFI for purposes of this discussion is the World Bank Group, itself divided into a commercial arm, the International Finance Corporation (IFC), making market-rate loans, and the International Development Association (IDA), which loans at below-market rates to very poor countries for both projects and support of government budgets. Regional banks, such as the Inter-American Bank and the Asian Development Bank, also provide project finance. The International Monetary Fund (IMF), in contrast, does not provide project finance but serves as a lender of last resort in cases of currency or commercial imbalance. The IMF sets conditions on its loans that are often echoed by the World Bank as well as by commercial and state lenders,



indicators alone do not capture many of the essential aspects of a development process. The UNDP's Human Development Index has, since the 1990s, ranked countries in terms of such measures as infant morbidity and mortality, educational level, and women's rights, as well as by GDP growth. Along the same lines, development practitioners now focus on the micro as well as the macro level, looking to village-level interventions and community-driven processes as an important component of development success. Development is increasingly conceptualized not as a goal or end point but as an ongoing process, in which the agency, self-organization, and empowerment of those at the bottom of the economic pyramid are at the same time the means of reaching success and the goal itself.

There is broad agreement that the social exclusion of large sectors of a population, combined with other factors, including geography, conflict, and "governance", is a crucial variable in determining development levels<sup>18</sup>. Indeed, recent research explores the link between social integration and economic development. Kaushik Basu, for example, finds that "once a group of people is left outside the system or treated as marginal over a period of time, forces develop that reinforce its marginalization. The group learns not to participate in society and others learn to exclude members of this group, and participatory inequity becomes a part of the economic and societal "equilibrium"". Therefore, because people evaluate how trustworthy or likely to succeed others may be in an economic endeavor based in part on the identity characteristics of the individual, marginalized groups (whether by race, class, or victim status) tend to stay marginalized and unable to break out of poverty. The solution, according to Basu, lies in fostering a sense of "participatory equity", such that the marginalized belong to their society and also have rights like others<sup>19</sup>.

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in effect making it very difficult for states that defy its prescriptions to borrow money. That is slowly beginning to change with the advent of such states as Venezuela and China willing to lend under different conditions, but it is still the norm. See James M. Cypher & James L. Dietz, *The Process of Economic Development*, 2nd ed. (London: Taylor and Francis, 2004), chap. 17.

- 18 See, e.g., Jeffrey Sachs, *The End of Poverty* (New York: Penguin Press, 2005); for the World Bank's account of the causes and measurements of poverty, see [web.worldbank.org/wbsite/external/topics/extpoverty/0,,contentMDK:20153855~menuPK:373757~pagePK:148956~piPK:216618~theSitePK:336992,00.html](http://web.worldbank.org/wbsite/external/topics/extpoverty/0,,contentMDK:20153855~menuPK:373757~pagePK:148956~piPK:216618~theSitePK:336992,00.html).
- 19 Kaushik Basu, "Participatory Equity, Identity, and Productivity: Policy Implications for Promoting Development", Center for Analytic Economics (CAE), Working Paper No. 06-06, Cornell University, May 2006.

Along similar lines, the UNDP recognizes the importance of social integration, participation, and accountability for the overall development process:

[P]articipation is not simply something desirable from the point of view of ownership and sustainability, but rather a right with profound consequences for the design and implementation of development activities. It is concerned also with access to decision-making, and the exercise of power in general (...) The principles of participation and inclusion means that all people are entitled to participate in society to the maximum of their potential. This in turn necessitates provision of a supportive environment to enable people to develop and express their full potential and creativity<sup>20</sup>.

It is this vision of development, especially as it concerns the life conditions and chances of excluded or marginalized sectors, where the clearest overlap with reparations occurs.

Reparations programs present an opportunity to establish trust, specifically by creating a consciousness of survivors as rights holders. The goals of reparations programs, especially of administrative programs, generally do not include returning beneficiaries to where they had been prior to the violation—even if such a thing were possible. Rather, the goals include recognition that a harm needs to be remedied, expressing social solidarity, and (re)creating civic trust<sup>21</sup>. What distinguishes reparations from assistance is the moral and political content of the former, positing that victims are entitled to reparations because their rights have been violated by the state (through acts or omissions). Thus, those receiving reparations are by definition rights holders, with a claim against the state. Once sectors of the population start thinking of themselves as rights holders, rather than as passive recipients of whatever benefits the government chooses to provide, the demonstration effect may be significant. Rights holders can demand their rights, and they are more likely to seek ways of doing so in non-reparations-related contexts as well.

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20 UNDP, “A Human Rights-Based Approach to Development Programming”, 7.

21 Pablo de Greiff, “Justice and Reparations”, in *The Handbook of Reparations* (hereafter *The Handbook*), Pablo de Greiff, Ed. (Oxford: Oxford University Press, 2006).

Thus, reparations can serve as a jumping-off point for efforts at social inclusion that are key to development.

### 3. Reparations and the State

Reparations are unique among transitional justice measures in requiring adequate performance from a wide range of government entities. Unlike truth commissions, which are set up on an *ad hoc* basis, or even trials, which involve either special chambers or at most police and justice ministries, a complex reparations program requires input and participation from numerous government ministries, including health, education, land, housing, planning, and finance. It may also involve bodies at the national, regional/provincial, and local levels. The more a reparations program is “integrated”—that is, complex or combining different types of benefits—the greater role there is for multiple existing state organs. At a minimum, because funds must be not only collected but also disbursed, financial ministries and an administrative structure must be involved. This broad government involvement required to implement a reparations program is a source of both tensions and, potentially, synergies with longer-term development.

Post-armed conflict states are generally weak, and in many cases the weakness of the state, particularly the central state, was a contributing factor to the conflict. Administrative systems—outside the internal security sector—are generally inefficient, cumbersome, corrupt, and concentrated in the capital. In countries emerging from dictatorship, the state may not be weak *per se*, but its institutions and functions have been skewed toward internal security and the benefit of those in power, to the exclusion of the majority. In both cases, state services rarely reach large sectors of the population, and those that do are low-quality and enmeshed in corruption and patronage systems. Doctors and teachers have often abandoned rural posts, medicine has been diverted from local clinics, and the poor, especially indigenous people, ethnic minorities, and women, are treated with disdain and condescension. Access to any kind of government benefit usually requires several trips to the capital, any number of signatures, stamps, side payments, and extensive delays.

This is the system and the warped development patterns facing the governments that design and implement reparations programs, and they are slow to change. One of the biggest hurdles to the programs in both Peru and Guatemala, for example, has been the need to channel a

transitional justice strategy through existing state structures that are ill suited for the purpose, to the extent they exist at all. In addition to a lack of resources and, often, preparation, government ministries tend to operate in separate “silos” without much communication with other ministries (and often in mistrustful, competitive relations with them), making it even more difficult to create integrated programs. This has led to long delays, to frustrations for victims in dealing with a slow and often unfeeling bureaucracy, and to problems operationalizing the delivery of money and services. The “normal” problems of a weak state unable to deliver benefits or services effectively are exacerbated when infrastructure has been neglected or destroyed during armed conflict or military buildup, and needed professionals have been killed or exiled or have emigrated. They are further exacerbated when the message is supposed to be one of valuing the recipients as equal citizens and creating a new dispensation in which they are fully integrated. Indeed, the wrong message may be sent, angering and retraumatizing the ostensible beneficiaries of a reparations program.

Thus, the more development focuses on strengthening the services that will most likely be used by reparations beneficiaries, the more effective the reparations program or project is likely to be. More generally, a focus on service delivery to the poor, or on the anticorruption and administrative reform efforts needed to make sure those services actually arrive, will have important positive repercussions on the eventual delivery of reparations, and will expand the range of benefits that reparations programs could provide. The limitations of the state become obvious when, for example, it has committed to provide medical and psychosocial services where existing networks for service provision are patently inadequate. How exactly will it do that—using existing delivery systems or setting up a new, parallel system dedicated to victims? Either approach has drawbacks. In Peru, for example, the incipient reparations program—the Comprehensive Reparations Plan (*Plan Integral de Reparaciones*) (PIR)—provides medical services through the existing social health insurance network. But that network only has facilities in major cities, is already overburdened, and did not initially cover many of the chronic diseases common among victims and survivors<sup>22</sup>. In Guatemala, where Inter-American Court—ordered collective reparations, for example, in the *Plan de Sánchez* case—have included mental health services, the

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22 In subsequent regulations implementing the program, specific medicines likely to be needed by victims/survivors were listed and covered.

state responded by sending therapists with no experience dealing with victims of massive crimes into rural areas, where they were completely ineffectual. Moreover, local people complained that the doctors who were sent to staff the local health clinic as part of reparations to the affected community were just as racist and dismissive of their complaints as the doctors they had previously encountered, so much so that many victims no longer visited the clinic<sup>23</sup>.

One solution might be to avoid dysfunctional ministries altogether by setting up new service delivery providers, in a parallel to the establishment of special chambers or special courts for war crimes and crimes against humanity to bypass a dysfunctional judicial system. This was indeed the response in Guatemala, where NGOs supported by the UNDP and other agencies initiated the Psycho-social Assistance to War Victims (*Programa de Dignificación y Asistencia Psicosocial a las Víctimas del Enfrentamiento Armado*) (DIGAP) project, which provided psychosocial counseling and support services around exhumations of mass graves years before the National Reparations Program (*Programa Nacional de Resarcimiento*) (PNR) got under way. Development efforts as well have turned to this solution: the Venezuelan *Misiones*—health and welfare services provided outside the normal government bureaucracy—may be the best-known example. However, setting up dedicated services for victims is more feasible where victim populations are concentrated rather than dispersed, and it raises concerns about creating new stigmatization of, or new resentments against, those able to use the system if it is exclusively for designated victims. Creating new, temporary parallel structures may also simply reproduce old patterns of dependence and elite capture. Although general predictions are difficult, it may make more sense to create new structures where the old ones are hopelessly compromised, and to try to integrate reparations into existing administrative structures where the “transition” is more pronounced or where such structures need to be (re) built almost from the ground up. A related concern involves the stability and permanence of a reparations program itself, especially in politically volatile situations. Where possible, such programs will be more stable if they are backed by legislation and multiyear budgets rather than simply by executive orders.

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23 See Marcie Mersky and Naomi Roht-Arriaza, “Guatemala”, in *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in Latin America*, Due Process of Law Foundation, Ed. (Washington D. C.: Due Process of Law Foundation, 2007).

## 4. Dynamics Between the State and Reparations Programs

### 4.1. Complementing Existing State Functions

Just as development might support a reparations program by focusing on strengthening the government structures that will deliver reparations, reparations programs may in turn play a small role in strengthening certain state functions. An example comes from the plans of the Guatemalan PNR. Sensitive to the criticism that providing services as reparations is not really a reparations program at all, the PNR decided to shy away in its planning from duplicating or funneling its resources into existing health, education, or infrastructure programs. Rather, it aims to complement those programs by focusing on training and support for traditional (Mayan) medicine, preventative health education, teen health education, preschool education, domestic violence prevention, and the like—programs not currently carried out by the relevant ministries. This initiative has been framed as a way of creating sustainable, culturally relevant change while addressing both root causes and survivors' immediate needs<sup>24</sup>. Unfortunately, these plans are, as of December 2008, just plans: actual outlays have focused on individual cash payments (although 2009 programming moves away from this approach to focus on community-led nonmonetary actions). But the idea of complementing, not duplicating, existing state functions is a useful one.

### 4.2. Creating Models of Civic Interactions with the State

Another potentially beneficial dynamic involves the programs and projects started under the auspices of reparations serving as demonstrations of civic interactions with the state. Ideally, these projects can serve as models of a new way of relating to beneficiary populations, and of a new set of priorities that can be folded into existing government programs and ministries. For this to happen, planning and training must start years earlier, so that the ethos and accountability of a highly public and closely watched reparations program is diffused throughout the state. Of course, the danger is that the converse will happen, that the existing state's "business-as-usual" approach will overwhelm efforts at reparations. But, if done consciously and carefully, reparations programs

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24 Interview with Leticia Velásquez, Technical Assistant Director, PNR, Guatemala City, July 10, 2007.

can spearhead change throughout a larger part of the state apparatus. Reparations may constitute the first time affected populations have interacted positively with the state, which is an important step toward (re)building social integration.

There are both promise and pitfalls in embedding reparations programs within much larger existing ministries, however, as exemplified by the Chilean Program of Reparations and Comprehensive Health Care for Victims of Human Rights Violations (PRAIS). This program, which emerged from the recommendations of Chile's Truth and Reconciliation Commission, and with an initial grant from the United States Agency for International Development (USAID), was designed to provide comprehensive physical and psychological health care to those who had suffered human rights violations during the military dictatorship and their family members. PRAIS granted free access to the existing public health service and priority access where there were delays in service provision, using specially trained personnel who were absorbed into the existing service. This allowed for a stable source of funding and a high level of service, but over time the dedicated teams stopped providing exclusive care to victims and began incorporating domestic violence victims into the service, thus diluting the reparatory effect. It took active mobilization and lobbying by the program's beneficiaries to reestablish the emphasis on reparations. As Elizabeth Lira puts it, "the program depended greatly on the individual motivation of the professionals who formed its teams, rather than on institutional compliance with its objectives"<sup>25</sup>.

One way to potentially resolve the conundrum of strengthening existing state institutions versus creating new specialized ones is to place within existing agencies at all levels personnel whose job it is to serve as go-betweens, facilitators, and advocates for the beneficiaries of reparations. Such people could serve as a focal point for the specific needs of survivors, help them access the necessary services and navigate confusing or indifferent bureaucracies, and generally be the "friendly face" of the state with respect to victims and survivors<sup>26</sup>.

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25 Elizabeth Lira, "The Reparations Policy for Human Rights Violations in Chile", in *The Handbook*, 71.

26 This idea emerged from a discussion of one of the authors with Cristián Correa of ICTJ, for which we are grateful.

### 4.3. Strengthening Local and Regional Governments

Another possible positive spillover effect of reparations programs may be in the potential to strengthen local and regional governments in the context of greater democratization. Much of the literature on decentralization stresses the greater ease with which local governments can connect to constituents, tailor priorities to local needs, experiment, and be responsive to citizen participation. This is not necessarily true, of course: local government can also more easily be captured by elite interests and exclude women, youth, and/or minority or indigenous populations. However, at least potentially, a participatory and accountable local government may do better in creating bottom-up development.

In Peru, implementation of the reparations program has been spearheaded by provincial and municipal administrations, which are setting their own priorities and budgets, with national and local government funding. While some provinces have done little, a few have extensive and ambitious plans and have engaged in substantial consultation with local communities on priorities. For example, the regional government of Huancavelica in 2006 programmed more than 2.5 million new soles (US\$837,500) to create its Victims Registry, strengthen local victims' associations, train educators and health personnel, and the like<sup>27</sup>. This effort served as an example and a catalyst for other regional initiatives as well as for the central government. The infusion of resources and attention that the Peruvian PIR has brought to municipal and provincial governments may allow those governments to become more effective service providers across the board, strengthening and deepening decentralization.

In Morocco, reparations are specifically intended to address communities in regions that were marginalized or ostracized. After holding a national forum on reparations, planned state-supported initiatives at a local level are intended to repair communities previously punished for standing up to the repressive regime or for being home to a secret detention center. The uses of reparations funds are thus to be decided by local councils, based on local priorities. In Guatemala, after several years of experience with a centralized program run from regional offices and the capital, the revamped program is now focusing on pilot projects proposed by local villages. In South Africa, the Khulumani survivors' organization

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27 José López Ricci, "Vigilancia de proyectos y actividades relacionados con el Plan Integral de Reparaciones en Huancavelica", Instituto de Defensa Legal, June 2006.



proposed a partnership between organized victims' groups and local government to "build citizen and community competence" through local development efforts focused on the communities most heavily affected by the wrongs of apartheid. This effort would build on constitutional and legal provisions regarding public participation in municipal planning and budgeting. Local development would move beyond

investment in productive assets and infrastructure to re-thinking Child, Health and Education Rights so that public funding becomes programme rights and associated budgets within registered communities. These are either first spent to create local demand, rewarding local production, to bind all adults together to protect and to secure the development of all children (and thus parents and pre-schools), to use School Feeding monies to fuel a local agricultural revolution by buying locally, or to remove the false dichotomy between public and private health and education that ruins both systems and denies community members and parents (now financially secured by Investment rights) from playing key roles as policy requires<sup>28</sup>.

#### **4.4. Strengthening Civil Society**

Reparations discussions may also stimulate the creation and growth of civil society organizations. The time frame for reparations programs tends to be up to a dozen years, which is enough time for various constellations of local organizations, victims' groups, advocacy organizations, and professionals to coalesce around lobbying and implementation activities centered on the programs. The prospect of resources and concerns about their fair distribution provide an incentive for many people to initially organize and learn how to engage with the state. Those concerns over time spread to work around justice, development, or other related issues. Above all, to the extent that reparations programs emphasize the goals of social solidarity, recognition, and equal citizenship, they can provide conduits for people to begin to exercise that citizenship in myriad ways. Thus, it is crucial

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28 Thhoki Mofokeng & Marjorie Jobson, "Repairing the Past: Reparations and Transitions to Democracy: Debates on Transitional Justice: Where Are We in South Africa?", Khulumani Support Group, Cape Town (March 2004): 9.

that reparations programs allow for participation by victims' groups and other civil society organizations in formulating policies and monitoring progress; such participation can create habits of interaction with the state that will carry over. The phenomenon of civil society organizations flourishing as interlocutors of reparations programs exemplifies the ability of such programs to reconceptualize victims as citizens—that is, as persons with rights who are able to make demands on the state.

Examples include the key role of the Human Rights Advisory Council (CCDH) in formulating and delivering the reparations ordered by the Moroccan truth commission, and the reliance on civil society intermediaries for carrying out the projects of the Victims' Trust Fund (VTF) of the International Criminal Court. In Peru, civil society organizations, such as the *Asociación Pro Derechos Humanos* (APRODEH), have played a key role in ongoing monitoring of the implementation of community-level reparations. These organizations have worked with both government and local survivors' groups in order to address the shortcomings of existing reparations and to advocate for greater involvement of marginalized sectors, especially women.

#### **4.5. Bringing Focus to Budgeting, Oversight, and Procurement**

A related potential effect of reparations programs comes from the budgeting, oversight, and procurement areas. State reparations programs mobilize and energize a relatively large and involved constituency to focus on government funding and budgeting practices. In the process, they can prepare people to deal with government as an institution, not just an adversary. Participatory budgeting is a promising development tool, allowing service recipients to oversee and influence how government monies are allocated. Reparations programs can serve as a training ground for methodologies of participatory budgeting, which can then be transferred to other areas. This is beginning to happen with the PIR in Peru, where NGOs have been particularly concerned with the ability to distinguish exactly which funds in ministry budgets are dedicated to reparations as a separate line, in order to avoid having reparations funds simply folded into existing ministry affairs. This provides training to NGOs and other civil society actors in understanding budgets and budgeting, and to the government in having civil society oversight of what has generally been a rather opaque process<sup>29</sup>. Similarly, committees set

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29 Mofokeng & Jobson, "Repairing the Past".

up to contribute to or oversee reparations programs might extend their lifespan as local development committees, and vice versa. For example, the World Bank increasingly requires such community councils as part of the implementation of a country development plan; in at least one case, a preexisting community council in Aceh, trusted by both sides in the armed conflict there, served as a mechanism to verify eligibility of widows for special assistance<sup>30</sup>.

Procurement practices initiated as part of reparations programs may also have longer-term effects. In Guatemala, the PNR has turned to NGOs as providers for specialized services, such as exhumations, psychosocial counseling, and legal services for victims. NGOs, long accustomed to an outsider, reactive role vis-à-vis the state, have had to deal with government bureaucracies in procurement as well as planning. While NGO representatives complain about bureaucratic requirements and the slow pace of government actions, they are learning how to assume a proactive stance and, at least potentially, infusing the agencies with which they collaborate with a new spirit and a new set of priorities. On the other hand, outsourcing service functions to NGOs may result in continuing weakness in the state, or may divert NGO resources and attention from watchdog or activist roles to a competition for service provision contracts. Nor will nonstate actors necessarily be able to manage programs of this magnitude.

#### **4.6. Stimulating the Creation of Registries**

While the above effects largely concern the service provision aspects of reparations schemes, other types of spillover effects could arise from individual compensation and restitution programs. For example, one of the most difficult issues faced by the Peruvian and Guatemalan programs is the inability to easily prove the existence and family connections of those who were killed. In both armed conflicts, the warring parties destroyed city halls, churches, and other places where birth, baptismal, and marriage certificates were kept; few death certificates for those killed were ever issued. Truth commissions could not, within the time and resources allotted, register many victims by name<sup>31</sup>. How, then, to prove that one's father or child was killed as a result of the armed conflict?

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30 Interview with Sarah Cliffe, World Bank, Washington, D. C., June 8, 2007.

31 In earlier efforts in the Southern Cone and in South Africa, the commissions did create at least an initial roster of victims.

Even if the existence of the victim can be proven (through testimony accepted by a truth commission or a court, for example), the names and relationships of the next of kin may be impossible to document.

This creates a terrible dilemma. If the programs demand too much documentation, they will exclude large numbers of eligible victims and survivors, especially those from rural areas who were hardest hit; they will retraumatize victims and undermine any reparatory effect of the compensation. On the other hand, in countries with few jobs and extensive poverty, it would be surprising if the promise of money did not elicit all kinds of fraudulent behavior, including false claims of victimhood. To benefit the true beneficiaries, reparations programs that include individual payments must establish ways to weed out false claims. This is especially true when the resources are coming from the state. States not only have to meet their own budgeting and administrative rules, but also have to show other states, IFIs, debtors, and investors that they have adequate controls on state funds and are actively combating corruption. This has become a more salient concern as the fight against government corruption and for financial transparency has become a centerpiece of the programmatic work of the World Bank, among others. Establishing adequate mechanisms to register victims has thus caused enormous delays in the distribution of compensation in both Peru and Guatemala.

In these countries, the state has responded to this dilemma by trying to create registries for victims and their next of kin. Eventually, programs will have to find innovative ways—including the use of witnesses, elders, or in some cases simply circumstantial evidence of time and place—to establish eligibility for reparations payments through a register of victims. From a development standpoint, these efforts may pay off in the long term, yielding the core of a larger civil registry and staff trained in its operation. In turn, this could facilitate broader efforts at a census, as well as documentation and formalization of generally document-poor populations. This should make it easier for the poor to engage in the formal economy, obtain loans, and the like<sup>32</sup>.

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32 See Hernando de Soto, *The Mystery of Capital* (New York: Basic Books, 2000), on the advantages of formalization. Of course, de Soto's theory that formalization of title will result in unleashing capital for productive use has been subject to critiques. Formalization may be more easily taken advantage of by elites better able to "work the system", and the poor may end up worse off if formalization results in easy credit that leads to increased indebtedness and eventual asset loss.

## 4.7. Stimulating Land Titling and Restitution

Similar frustrations, and similar potential, attend the issue of land restitution. Thousands are forcibly displaced during armed conflicts, and sometimes their land is resettled by others. The process of land restitution is often complicated because those displaced had no title, deficient title, or based ownership on indigenous community landholding norms not recognized by the state. Where the land has been resettled, equivalent lands must be found and adequately titled, and the formal title then must be respected in practice. The frustration comes from the fact that land distribution and titling agencies are extremely underfunded, slow, disrespectful of customary or collective landholding practices, and unable to access much viable land in the absence of broad agrarian reform, thus leaving land restitution programs largely in limbo. The potential arises from the possibility of a new way of working or from putting additional political heat on these agencies to speed up the pace and improve the quality of titling and distribution activities<sup>33</sup>. The South African Land Claims courts, among others, have pioneered an approach to establishing facts of ownership and identity through the use of oral traditions, evidence of witnesses, and other nonwritten sources; a similar approach might be acceptable in other similar circumstances<sup>34</sup>. By putting increased resources into restitution accompanied by titling, reparations programs can indirectly unleash access to credit for the new owners<sup>35</sup>. They can also serve as the catalyst for reforms to ensure women's access to land and title or to recognize the land rights of indigenous or traditional communities as such, which may have important symbolic as well as practical implications.

## 5. Collective and Individual Reparations

Practitioners and scholars have often distinguished between individual and collective reparations as preferable approaches. We start from the premise that both individual and collective reparations

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33 See also the chapter by Chris Huggins, "Linking Broad Constellations of Ideas: Transitional Justice, Land Tenure Reform, and Development", in: *Transitional Justice and Development: Making Connections*, Pablo de Greiff & Roger Duthie, Eds. (New York: Social Science Research Council and International Center for Transitional Justice, 2009).

34 On the Land Claim courts process, see, e.g., Joan G. Fairweather, *A Common Hunger: Land Rights in Canada and South Africa* (Calgary: University of Calgary Press, 2006), 109-11.

35 De Soto, *The Mystery of Capital*.

are important components of a sufficiently complex and integrated reparations effort. Individual reparations serve as recognition of specific harm to an individual, and of an individual's worth as a rights-bearing citizen. Such recognition, which is integral to (re)gaining civic trust, may not be otherwise satisfied. Individual recognition becomes especially important where the government has previously treated the affected population as an undifferentiated mass or as second-class citizens. Collective reparations may serve other, albeit overlapping, functions: to respond to collective harms and harms to social cohesion (especially in places with a strong sense of collective identity), to reestablish social solidarity, and to maximize the effectiveness of existing resources. The objective is not to choose one form of reparation over another, but to understand the strengths and limitations of each and to combine them in a culturally appropriate and creative manner.

Individual reparations need not be limited to monetary compensation; they can also take the form of restitution—of land, other property, jobs, pensions, civil rights, or good name—and of physical, mental, and legal rehabilitation. Individual reparations may be symbolic as well as material; for example, the Chilean government's delivery of a personalized copy of the Truth and Reconciliation Commission's report with a letter indicating where the name of each individual victim could be found had a profound reparative value for the individuals involved<sup>36</sup>. Other individual reparations may include the exhumation and reburial of those killed, apologies to individual survivors or next of kin, or the publication of the facts of an individual case. Individual reparations can also take the form of government service packages, such as enrollment in government health plans, preferential access to medical services, or scholarships.

The concept of collective reparations is more complicated, in part because it is used to mean different things in different contexts. In practice, collective reparations have most often been conceptualized as either nonindividualized modalities of distribution or public goods tied to specific communities—either basic goods, such as schools, health clinics, roads, and the like, or extra funds targeted at specific regions deemed to have suffered most during the period of conflict, as in Peru or Morocco. Thus, while access to scholarships or hospital privileges would constitute an individual reparation, the building of schools or

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36 Lira, "The Reparations Policy for Human Rights Violations in Chile".

health clinics in affected communities, open to all residents, would be a collective reparation. Some modalities of reparations are collective in form but are still largely limited to victims, and may be targeted at group-based harm<sup>37</sup>. Examples include psychosocial accompaniment for groups of victims, exhumations of mass grave sites in specific communities, titling of collective lands, restitution of sites of communal worship, and microcredit or other producer targeted projects for groups of widows and the like.

As with individual reparations, these forms of collective reparations may include material as well as symbolic measures, and restitution, satisfaction, and compensation. Fundamentally, collective reparations consider the individual in the context of societal ties. Use of the term “collective reparations” may refer to reparations to a particular social, ethnic, or geographical group, or simply to a community that suffered harm to its cohesion and social fabric as such and thus is being repaired qua community. This approach, of course, raises the difficulty of assigning victims to groups or communities for reparations purposes, a problem magnified by demographic and social shifts during the course of an armed conflict, especially those caused by widespread displacement and migration.

Most existing proposals and programs, at least in theory, combine both individual and collective components. The South African Truth and Reconciliation Commission (TRC), for example, called for a reparation and rehabilitation policy that was “development-centred”, to actively empower individuals and communities to take control of their own lives<sup>38</sup>. In particular, the community rehabilitation measures included health and social services, mental health services, education, housing, and institutional reform<sup>39</sup>. But the TRC also called for individual awards, which were eventually distributed, although the amounts involved were far smaller than those the TRC recommended.

The law creating the Peruvian PIR specifies multiple modalities, including restitution of civil rights; reparations in health, education, and

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37 Ruth Rubio-Marín, “Gender and Collective Reparations in the Aftermath of Conflict and Political Repression”, in *The Politics of Reconciliation in Multicultural Societies*, Will Kymlicka & Bashir Bashir, Eds. (Oxford: Oxford University Press, 2008).

38 “Truth and Reconciliation Commission of South Africa Report”, vol. 5, para. 46, reproduced in *The Handbook*, 800.

39 *Ib.*, paras. 94-155, in *The Handbook*, 810-13.

housing; symbolic and collective reparations; and others<sup>40</sup>. Reparations may be paid to individual victims or their next of kin, or to collectivities, defined as:

The peasant and native communities and other population centers affected by the violence, that present certain characteristics such as: a concentration of individual violations, destruction, forced displacement, breaks or cracks in local authority structures, loss of family or communal infrastructure; and organized groups of non-returning displaced, who come from the affected communities but have resettled elsewhere<sup>41</sup>.

A pilot process in Peru grants hard-hit communities around 100,000 soles (US\$33,500) each for development projects of their choosing. The first 440 of these ranged from projects for irrigation, electrification, water, and school and road improvements to projects to raise small livestock (*cuyes*, or guinea pigs), improve tourist infrastructure, and create a computer center for a small town. It is too early to evaluate the long-term effectiveness of these projects or the process by which they were allocated support, although an initial monitoring project found a number of shortcomings in the way in which the projects were chosen<sup>42</sup>. On a conceptual level, the projects had no tie to the nature or type of harms they were supposed to be redressing, which led to a lack of understanding of their purported purpose among beneficiaries. In practical terms, although the PIR design called for community participation in choosing the projects, in practice those with connections to local government or existing leaders tended to be most active in the discussions about potential projects, with little participation of women. Of course, these local-level power dynamics can exist more broadly in setting local development priorities. Reparations programs can take advantage of the lessons learned in this area by development practitioners in crafting ways of ensuring more widespread participation.

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40 Ley No. 28592, Ley que crea el Plan Integral de Reparaciones (PIR), in Lisa Magarrell & Julie Guillerot, *Reparaciones en la transición peruana: memorias de un proceso inacabado* (Lima: Asociación Pro Derechos Humanos (APRODEH) / ICTJ / OXFAM-GB, 2006), 259.

41 *Ib.*

42 APRODEH-ICTJ, “Sistema de Vigilancia a Reparaciones”, Reporte Nacional de Vigilancia del Programa de Reparaciones Colectivas, 2008, [www.aprodeh.org.pe/reparaciones/sistema/reparaciones/reportenacional.pdf](http://www.aprodeh.org.pe/reparaciones/sistema/reparaciones/reportenacional.pdf).



The Guatemalan truth commission recommended either individual or collective reparations, depending on the violation. To facilitate reconciliation without stigmatizing victims or perpetrators, it mandated that collective measures “should be carried out within a framework of territorially based projects to promote reconciliation, so that in addition to addressing reparation, their other actions and benefits also favor the entire population, without distinction between victims and perpetrators”<sup>43</sup>. The Guatemalan PNR in theory includes both an individual compensation component and a large collective reparations component, including psychosocial and cultural reparations, productive projects for women, and education, health, and housing benefits for affected communities. In practice, to this point the major component of actual disbursements has been in individual reparations and in support for exhumations of mass graves, although in 2008 the program was being revamped.

In Morocco, the reparations paid by the Equity and Reconciliation Commission will include collective reparations focused on building infrastructure, including schools, clinics, and women’s centers in the hardest-hit areas of the country. Individual reparations in Morocco took the form of compensation granted to individuals and were distributed through their local post office, along with a personalized letter of apology and acknowledgment, an explanation of the ruling in their individual case, and an application form for health coverage<sup>44</sup>. In Ghana, while most of the recommendations of the truth commission focused on individual payments, collective reparations, in the form of reconstruction of a destroyed market, were also part of the proposal<sup>45</sup>.

## **6. Relative Advantages and Limitations**

The most effective and legitimate reparations program will be, generally speaking, one that combines individual and collective reparations of some kind (not necessarily monetary) and in which the reparative value of both types is paramount. For the most part, human rights practitioners and theorists writing about reparations have

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43 Report of the Commission for Historical Clarification, Conclusions and Recommendations, pt. iii, Reparatory Measures, para.10, [shr.aaas.org/guatemala/ceh/report/english/recs3.html](http://shr.aaas.org/guatemala/ceh/report/english/recs3.html).

44 International Center for Transitional Justice, “Truth-Seeking and Reparations in Morocco”, ICTJ Reparations Unit Country Summary, April 2008.

45 National Reconciliation Commission Report (Accra, Ghana, April 2005).

discouraged the use of nonexclusive goods and services as the principal, or even a principal, form of reparations. Such an approach may appeal as a practical and fail-safe approach to addressing mass violations, but there are a number of related problems. Among them is the concern that, at an individual level, social reconstruction as reparations will have a limited psychological impact, especially for those seeking individual reparations. In addition, survivors (and community members generally) may consider the upgrading of their communities to be a right provided by citizenship. Brandon Hamber notes that genuine reparation and healing do not occur only or primarily through the delivery of an object or acts of reparations, but also through the process that takes place around the object or act<sup>46</sup>. Advocates have pointed out that using reparations funds to provide nonexclusive goods or services to underserved populations (including but not limited to victims) allows the government to get off too easy: it need only do what it should be doing anyway and slap a reparations label on it<sup>47</sup>. Moreover, the beneficiaries are likely to consider the results as a product of official largesse rather than a legally defined obligation.

Nonetheless, governments tend to prefer the use of collective reparations, often for pragmatic reasons. Collective reparations may allow them to funnel programs into existing ministries, seem more efficient and less likely to be politically sensitive, require less new bureaucracy, and seem more acceptable to budget-conscious managers and creditors. Nonexclusive reparations also avoid problems associated with singling out victims or creating new resentments. Aid agencies also prefer to speak of “victim assistance” but not of reparations.

Indeed, despite the limitations of nonexclusivity and the danger of confusion outlined above, there may be some substantial advantages to collective reparations in the context of longer-term development, especially if used to complement some kind of individual reparations. First, in conditions where there is resource scarcity and a large number of victims, the choice may be between, on the one hand, collective reparations and, on the other hand, no material reparations at all, or individual compensation so meager as to be insulting. The provision of services, such as health and education, is at least of some concrete benefit

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46 Brandon Hamber, “Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition”, in *The Handbook*, 580.

47 See Roht-Arriaza, “Reparations Decisions and Dilemmas”; de Greiff, “Justice and Reparations”; and Rubio-Marín, “Gender and Collective Reparations”.

to beneficiary populations. Moreover, by avoiding the creation of new resentments or the singling out of victims, nonexclusive access for larger segments of an affected population, including victims and perpetrators, can avoid the stigmatization and continuing marginalization that victim only programs may engender.

Collective reparations can be designed to maximize their symbolic impact (although they often are not), through naming ceremonies, in combination with symbolic reparations of different kinds, or the like. It is important, in that sense, that collective reparations be explicitly tied to the nature of the harms, something that has been largely absent, for instance, in the Peruvian program. Moreover, the dangers of governments downplaying the rights-based, obligatory nature of reparations, allowing them to be perceived as merely largesse, are not limited to collective reparations, nor to reparations in the form of infrastructure improvements and service delivery. This risk may be just as applicable to individual compensation payments. In Guatemala, for example, victims' groups have complained that checks to victims of human rights violations are perceived as equivalent to checks issued at the same time to civil patrollers (who were often human rights violators) for forced labor. In that situation, there are also (with rare exceptions) no symbolic or apologetic aspects to the handover of funds, and groups report that people are confused and upset by different amounts being handed out to different families, notwithstanding the fact that the differing amounts had a clear logic behind them<sup>48</sup>.

Individual reparations in the form of lump-sum cash payments can create other types of difficulties. Anecdotal evidence about reparations negotiated in or ordered by the Inter-American System suggests that large payments (admittedly, an order of magnitude larger than those offered by most administrative reparations programs) have provoked community dislocations: historic leaders were abandoned in favor of a host of newcomers promising that they could obtain more and better reparations; towns were flooded with hucksters promising fast checks; long-lost and unknown family members suddenly appeared; and some recipients were assaulted or threatened into turning over the proceeds of

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48 Amounts depended on the nature of the violation (*i.e.*, whether the victim was killed) and also on how many family members suffered the violation, in order to deal with situations where entire extended families were nearly wiped out. Amounts ranged from Q20,000 to Q44,000 (US\$2,608 to \$5,737).

their check<sup>49</sup>. Intra-family dynamics were also impacted: while in some cases women were empowered by receiving disposable cash in their names, in other cases male family members quickly laid claim to the compensation paid to their wives and mothers<sup>50</sup>.

A judicious combination of individual and collective reparations, however, may have potential positive impacts from a development standpoint beyond any impact on the state. It may, for example, help rebalance power at the local level by altering the dynamic between victims and the local power structure. After many armed conflicts, the victors constitute the local (official or de facto) leadership: they have the most resources (often as a result of appropriating the resources of victims), they are protected by rampant impunity from any kind of accountability, and they have sometimes morphed into local mafia or crime bosses. Victims, on the other hand, tend to be among the worst-off members of the community, because of a lack of one or more breadwinners, a lack of land, and/or health problems. Despite the return of peace, they tend to continue to be largely powerless and marginalized. As described earlier, this creates difficulties in fully engaging a substantial sector of the population in development efforts.

Under these circumstances, a well-designed reparations program can help rebalance local power. Most obviously, it can put much-needed resources into the hands of the worst off, which in turn may underscore and make public the state's recognition that those people have suffered disproportionately. But even such services as schools, roads, or health centers, which will benefit everyone living in the area, including perpetrators, bystanders, and rescuers as well as victims<sup>51</sup>, may help rebalance power in favor of victims. If needed services for all come to

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49 Mersky & Roht-Arriaza, "Guatemala". Elizabeth Lira notes a similar result in the Mapuche areas of Chile, where "in very poor communities the economic reparations distorted family relations of solidarity and negatively affected family and community networks". Lira, "The Reparations Policy for Human Rights Violations in Chile", 63.

50 This information is based on discussions in Guatemala regarding reparations paid as a result of Inter-American cases, especially interviews with Olga Alicia Paz of ECAP and with massacre survivors in Plan de Sánchez. See also Mersky & Roht-Arriaza, "Guatemala".

51 These categories are obviously fluid: the same individual may fall into more than one category by, *e.g.*, rescuing some people while attacking others; within families there are often representatives of all of them. It may be impossible to benefit only the "right" victims; Peru's PIR, *e.g.*, excludes members of subversive groups, but this provision has raised a host of criticisms that the exclusion is discriminatory and sweeps much too broadly.

the community because of the needs—and, even better, the efforts—of victims and survivors, it provides them with a source of status and pride in the eyes of their neighbors. One source of status in many cultures and communities is the ability to bring resources to bear for the common good, to be a benefactor<sup>52</sup>. By making clear that victims are the reason that services arrive, even if those services benefit everyone, collective reparations can begin to address an existing power imbalance. This may, in turn, allow for broader participation by the victims in local governance.

Ideally, reparations programs should maximize the relative advantages of both the individual and collective approaches in combining them. Experiences dealing with the reintegration of ex-combatants may be helpful here. According to the World Bank's Sarah Cliffe, one planned modality of reintegration payments to demobilized combatants in Aceh involved a small individual cash payment, a somewhat larger voucher for individual services, such as school fees or vocational training, and a third component of community development vouchers. These vouchers, given to each ex-combatant, entitled him (and rarely her) to pool the resources represented by the voucher with others to fund community programs. The vouchers had no redeemable cash value except when combined with others, and could only be used for collective purposes.

This sort of scheme has a number of potential advantages when applied to reparations for victims. It allows for small individualized payments to be made, while at the same time focusing the bulk of resources elsewhere. It makes victims the agents of positive change in their communities, with positive impacts on local power dynamics. In this instance, that effect is strengthened because it is victims, collectively, who decide which projects are a priority, and these projects are clearly differentiated from regular government spending. It also creates a mechanism for collective decision-making that may outlive a reparations program, especially in communities with large numbers of victims. It maximizes the potential of collective reparations, while minimizing the drawbacks.

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52 This phenomenon takes different forms in different cultures. It is (derogatorily) talked about as the ability to act as a godfather, big man, or mover and shaker, but the same impulse motivates, at least in part, large wedding feasts and hefty donations to the ballet or new hospital wing.

## 7. Delivery Systems and Destinations of Reparations

As mentioned earlier, on a macro scale it is probably impossible to detect the economic contribution of reparations programs, if any, to development. However, on the community, family, and individual levels, the type of reparations, how monetary compensation or service packages are provided, and the possibility of using even modest amounts of money to jump-start local demand or local productive capacity may be significant. This is especially true given the baseline level of poverty of most beneficiaries. In this section, we examine some of the implications for using different modalities and delivery systems of reparations.

### 7.1. In-kind and Monetary Reparations

The development impact of reparations may in some cultural contexts be different depending on whether reparations are made as in-kind restitution for losses or through cash payments as compensation. Restitution in kind includes housing materials, farm or grazing animals, seeds, and work and domestic implements, such as hoes and pots. While economists will argue that providing goods rather than cash is inefficient<sup>53</sup>, there are a few reasons why augmenting restitution in kind might have a differing impact on both the reparatory effect and on long-term development.

First, the symbolic values are different: replacement goods are a tangible connection to what was lost, whereas money is generic. This is why international law traditionally favors restitution if at all possible, and considers monetary compensation only for goods (and people) that cannot be replaced. Second, the relative values of money and goods in certain societies are different. Of all the potential types of reparations, money is the most controversial: in some places, monetary reparations for the death of a loved one is considered “blood money”; in others, cash is associated with colonial impositions and the necessity of wage labor; and in some places, wealth and worth are measured by money, while in others wealth is measured in cattle, pigs, or other goods, and personal worth is a function of giving away assets to the community rather than saving them. In many traditional non-Western cultures, different kinds of money have

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53 Welfare economists stress the ability of cash recipients to satisfy a wider range of preferences and the smaller administrative costs of cash disbursements. Daniel M. Hausman & Michael S. McPherson, “Beware of Economists Bearing Advice”, *Policy Options* 18, No. 7 (September 1997): 16-19.

different uses, with cash often associated with more crass, commercial dealings, and other products (*pom*, shells, cattle, and offerings, among others) seen as valuable in solemn contractual or important interpersonal dealings<sup>54</sup>. While, in many cases, these differences may be nothing more than residual at this point, when highly symbolic, emotion-fraught goods are at stake they may resonate. Thus, in Rwanda, reparations paid from one community to another shortly after the genocide under traditional notions of *gacaca*<sup>55</sup> took the form of cattle—the traditional marker of wealth in east Africa—not cash. In East Timor, reparations for property and personal damage under the community reparations procedures included young pigs or chickens and ceremonial beads<sup>56</sup>.

At the same time, the line between personal and property losses may not be the same in all societies. In some places, domestic animals may be seen as sentient beings more akin to extended family, while in others even crops and domestic goods may have spirits. This is especially true in the cosmivision of indigenous cultures. Thus, the loss of these things may be felt as more than the loss of “mere” property. It is quite striking in the testimonies of victims the number of times people enumerate losses of crops, domestic animals, and tools with great specificity, even decades after the losses took place, as the testimony of the K’ekchi survivor in the opening quote of this article suggests.

Third, restitution in goods rather than compensation may change the intra-family and gender-based effects of the payment. The domestic economy tends to be the sphere of women, while the cash economy is that

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- 54 There is a vast literature on commodities, gifts, and currencies and their meaning. See, e.g., Andrew Strathern & Pamela J. Stewart, “Objects, Relationships and Meanings”, in *Money and Modernity: State and Local Currencies in Melanesia*, David Akin & Joel Robbins, Eds. (Pittsburgh: University of Pittsburgh Press, 1999), speaking of the Nuer of East Africa: “Limits on the interconvertibility of money and cattle are based on the idea that money ‘has no blood’ and does not carry the procreative power that cattle do. The fact that humans and cattle do have blood is given by Nuer as the reason why cattle can stand for people in reproductive exchanges (bridewealth, blood payments) as pigs do in New Guinea”. See also C. A. Gregory, *Gifts and Commodities* (London: Academic Press, 1982).
- 55 We do not refer here to the “legal *gacaca*” created to hold low-level perpetrators accountable, but to the spontaneous version that sprung up in the years immediately following 1994.
- 56 See Patrick Burgess, “A New Approach to Restorative Justice: East Timor’s Community Reconciliation Processes”, in *Transitional Justice in the Twenty-First Century*, Naomi Roht-Arriaza & Javier Mariezcurrena, Eds. (New York: Cambridge University Press, 2006).

of men. Control over resources will then tend to depend on whose sphere they belong to, so that the provision of goods will more likely retain them in the hands of women. Domestic animals in particular are more likely than cash to be used for improving the family's nutrition or to augment an income stream under the control of women. In turn, studies show that income controlled by women is more likely to be spent on nutrition and the education of children<sup>57</sup>.

Admittedly, restitution in kind may not be practicable in urban areas, nor may it have the same resonance in all cultures, even rural ones. But even there, care should be taken to think about culturally appropriate and economically beneficial forms of noncash individual payments, whether these be housing materials or tools that would give victims the means to live with dignity. Thought should also be given to the nature and size of available markets: if the things people most need cannot be bought locally, cash payments may end up benefiting urban or foreign elites and not creating any kind of multiplier effect at the local level. They may even serve to drain the local economy of human resources, as when people use their reparations payments to send their young abroad to work as migrant labor.

## 7.2. Cash Payment Delivery Systems

Most individual compensation programs have issued checks for the full value of the promised compensation. Two alternatives to lump-sum payments are bond issuance and periodic pensions. As a compensation distribution strategy, bonds allow the government to make an early statement that a wrong was done, and that reparation will be paid, while allowing the payment to be amortized over a number of years, thus lessening the fiscal impact. This allows a cash-strapped government to make larger payments to victims, at least in principle. For example, Argentina financed relatively large payments (on average close to \$224,000) to the families of the disappeared by issuing bonds to them, payable in full over a sixteen-year period in 120 monthly payments, including interest and principal, after a 72-month grace period<sup>58</sup>.

While allowing for larger payments and an important early commitment to repair, however, issuing bonds creates two major problems:

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57 Sen, *Development as Freedom*, 195-98

58 María José Guembe, "Economic Reparations for Grave Human Rights Violations: The Argentinean Experience", in *The Handbook*, 40-41.



it forces the victims to bet on the government's future financial probity, and it forces them to wait a long time to be paid in full. Both problems surfaced in Argentina, when the 2001 financial crisis temporarily led to the suspension of the payment of bond proceeds, and forced many victims to sell their bonds on secondary markets for less than face value in order to obtain needed cash<sup>59</sup>. Thus, richer and younger recipients were able, in practice, to receive more than those who were poorer, older, or with fewer alternative sources of funds.

The Chilean reparations program provided for a periodic pension rather than a single lump-sum payment for the families of those killed or disappeared<sup>60</sup>. The payment, calculated according to average civil servant wages, is divided in fixed percentages among the spouse, parents, and children of the deceased or disappeared, with each child receiving the stipulated percentage until age twenty-five, even if the total exceeds 100 percent. Where adequate infrastructure for distribution of a pension exists, it may be preferable because some income will accrue to each family member, rather than running the risk of a lump sum being appropriated by the strongest. A pension is also a continuing reminder of the state's commitment to make good on the harm, even if the actual sums involved are far from adequate for support (as is the case in Chile). However, it also puts on the victims the risk that the state will decline to continue paying, leaving them with a smaller overall recovery. Periodic payments also require an ongoing administrative structure; in countries with other pension systems, pensions to victims may simply be folded into an existing administration, but where such programs are incipient or badly managed, victims may suffer.

On a national scale, the amounts involved in reparations payments are relatively small, but if those payments are relatively regionally concentrated and injected into otherwise cash-poor areas, they could make a significant difference at the local and regional level. They could result in a short-lived burst of spending that flames out in a year or two, leaving its recipients no better off; they could stimulate increased crime against recipients; or they could simply provide the means for larger numbers to flee the area and resettle in the United States, Europe, or

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59 *Ib.*; see also Marcelo A. Sancinetti & Marcelo Ferrante, *El derecho penal en la protección de los derechos humanos* (Buenos Aires: Hammurabi, 1999).

60 Law 19.123 of February 8, 1992, cited in Lira, "The Reparations Policy for Human Rights Violations in Chile", 59.

large cities. In either case, the development impact at the local level will be minimal (except perhaps for eventually stimulating remittances from successful migrants)<sup>61</sup>. On the other hand, reparations in the form of a small, regionally focused infusion of cash could serve as the catalyst for locally generated productive investment, local demand, and sustainable livelihoods, maximizing the impact of small amounts of money and tapping into local capabilities in ways that can be similar to the injection of micro-lending.

To encourage a link between such a reparations program and sustainable development would involve a process of education, training, and planning around finances and small investment opportunities, encouraging recipients to use local vendors when possible. It may also involve stimulating the creation of mini-credit unions or other local (formal or informal) banking systems with initial capital formed from reparations payments, which could give beneficiaries both access to credit and shares in a potentially profitable enterprise<sup>62</sup>. Cash payments disbursed as part of disarmament, demobilization, and reintegration (DDR) programs regularly include training in both concrete skills and financial management, but with reparations programs little seems to be done beyond, at most, opening a bank account for recipients. Governments may object that it is paternalistic to tell people how to spend their money, but surely laying out options and possibilities is not the same as coercive limits to spending<sup>63</sup>. Indeed, when given the option early enough in a reparations process, beneficiaries may well see advantages to a community-development-centered approach that entails aspects of financial management.

To date, productive activities make up only a small part of the plans of reparations programs. In Guatemala, the PNR has set aside a small fund for productive activities and is beginning to explore how the program could support investments in, for example, solar energy. It also has a proposed fund for women structured along the model of a communal

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61 Pablo Fajnzylber & J. Humberto López, Eds., *Remittances and Development: Lessons from Latin America* (Washington D. C.: World Bank, 2008).

62 See Hans Dieter Seibel & Andrea Armstrong, "Reparations and Microfinance Schemes", in *The Handbook*, 676.

63 The debate over whether training in financial planning and legal protection should accompany individual reparations or whether this would imply that recipients cannot be trusted with the money was also present in South Africa. See Christopher J. Colvin, "Overview of the Reparations Program in South Africa", in *The Handbook*, 192.

bank. Women would receive small amounts (\$300 to \$350) for productive activities, along with literacy classes. The program is still not under way, although several other (private) microcredit schemes are operating within the most hard-hit areas. Several of the Peruvian community projects referenced earlier involve productive activities, from planting pasture and buying grazing animals to a handicrafts center, although most focus on the basic infrastructure necessary for agriculture and rural life. In South Africa, the private sector Business Trust, in collaboration with local governments, is providing skills training and cofinancing for tourism and other productive projects in communities heavily affected by apartheid, including several that have recently recovered land. However, although the goals include reconciliation and reconstruction, the program is billed as an antipoverty rather than a reparations initiative<sup>64</sup>.

### **7.3. Trust Funds**

Reparations may also come from a trust fund created for the purpose of funding reparations to individuals, through service providers, or in the form of projects that benefit a community. Given that any reparations program requires time to lay its groundwork (at a minimum, the time needed to identify victims and projects and to acquire and distribute funds), the establishment of a trust fund at the beginning of a reparations process furthers at least four objectives. These objectives should be of interest both to development professionals and transitional justice professionals.

First, establishing a trust fund gives victims a concrete institution to focus on, both for advocacy and accountability, and lets them know that a definite pool of money exists for reparations. This should strengthen the demand for transparency and accountability with respect to that specific institution, which should assist the community to define the process of reparations and any resulting development impacts. This is very much in keeping with Sen's emphasis on development as freedom, which advocates for the right of a community to define its own development goals.

Second, establishing a trust fund allows the funding of discrete projects by application, potentially involving civil society and victims in a dialogue about how reparations could be best used in their particular

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64 See discussion of the Trust's Community Investment Program at [www.btrust.org.za/index.aspx?\\_id=127&id=9&sid=4](http://www.btrust.org.za/index.aspx?_id=127&id=9&sid=4).

situation. The involvement of civil society actors as intermediaries with a trust fund may also strengthen and promote civil society (although it may also create competition for funds and put less vocal communities at a disadvantage). Representatives of survivor communities can be included on the governing body of a trust fund to serve as links to those communities.

Third, a trust fund can maintain the flexibility to fund both collective and individual reparations as needed. As discussed above, a combined approach may maximize the impact of such programs, both in terms of dignification and in terms of development objectives. Without a trust fund, the flexibility to adjust to the local situation may be lost; for example, the reparations program may be defined at the outset as purely collective or purely individual in nature.

Fourth, a trust fund could be funded and managed by both domestic and international sources and actors, creating the possibility that the international community, especially those countries that may have had some connection to the conflict, could make a contribution to reparations for victims. A measure of international oversight may also be especially useful when domestic governance structures are weak. A major challenge for any trust fund, as with any reparations program, will be in securing adequate funding to fulfill its mandate. A number of government-created trust funds have had little success to date in attracting sufficient sources of capital<sup>65</sup>. At times, however, the trust fund form may prove useful in channeling resources from a wide variety of sources.

One prominent example of a trust fund is the Victims' Trust Fund (VTF) of the International Criminal Court, which, although connected to a court, may provide a useful model for trust funds in other situations<sup>66</sup>. The VTF was established by the Assembly of States Parties of the ICC in September 2002<sup>67</sup>, as provided for in Article 79 of the Rome Statute, which mandates that a trust fund be established for the benefit of victims of crimes within the jurisdiction of the court, and of their families. The VTF is therefore limited to serving victims of genocide, war crimes, and crimes against humanity. Victims, in this case, may include organizations and

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65 Alexander Segovia, "Financing Reparations Programs: Reflections from International Experience", in *The Handbook*.

66 See also the example of Sierra Leone's Special Fund for War Victims.

67 Information on the VTF is at [www.iccnw.org/?mod=vtfbackground](http://www.iccnw.org/?mod=vtfbackground).

institutions as well as individuals<sup>68</sup>. The VTF has two mandates, the first to provide reparations to victims participating in cases before the court, upon a conviction, and the second to use “other resources” to provide interim assistance to affected communities, again for crimes within the jurisdiction of the court. The VTF may receive fines and forfeitures from convicted persons, but it may also receive funds from, among other sources, voluntary contributions from governments, international organizations, individuals, corporations, and other entities<sup>69</sup>.

The VTF may not undertake projects that would predetermine any issue before the court, cause prejudice to the rights of the accused, or compromise any of the issues related to the participation of victims in the situation, and it must receive the approval of the relevant chamber for its activities<sup>70</sup>. However, the fund otherwise retains discretion with respect to the form that this second mandate should take, and has decided to focus on projects of physical rehabilitation, psychological rehabilitation, and material support. Projects are selected from proposals solicited by the VTF Secretariat, in an increasingly formalized process, and are carried out by local partners, usually civil society groups. Although the VTF’s work is in its early stages, its projects in the Democratic Republic of Congo and Uganda are expected to include microcredit programs targeted at reintegrating and supporting victims of rape and sexual violence and physical mutilation, as well as vocational training and counseling<sup>71</sup>.

As noted above, with a trust fund private actors could be involved in the funding of reparations, which may be especially appropriate where a link can be drawn between high profit margins and the origins or continuation of conflict. There are some precedents for private funding for reparations, although most of the examples are underscored by the reluctance of private actors to take any actions that could be construed as admitting culpability for the victims’ harms. The South African TRC recommended that the private sector pay a one-time levy on corporate

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68 Rome Statute, Rules of Procedure and Evidence, Rule 85.

69 Resolution ICC-ASP/1/Res.6.

70 Regulation 50 requires the board to notify the court, and to wait for a response from the relevant chamber, or the expiration of the requisite time period, before undertaking a project. See, *e.g.*, the filings made in the situations of the Democratic Republic of Congo and Uganda: [www.redress.org/reports/2008%20March%20April%20Legal%20Update.pdf](http://www.redress.org/reports/2008%20March%20April%20Legal%20Update.pdf); [www.icc-cpi.int/iccdocs/doc/doc470235.PDF](http://www.icc-cpi.int/iccdocs/doc/doc470235.PDF); [www.icc-cpi.int/iccdocs/doc/doc459788.PDF](http://www.icc-cpi.int/iccdocs/doc/doc459788.PDF).

71 “Trust Fund for Victims Program Overview”, 2008, on file with the authors.

income and a donation of 1 percent of market capitalization of public companies, a retrospective surcharge on corporate profits, and a “wealth tax” to make repairs for the excess profits generated by apartheid-era wages and restrictions on labor, but the private sector refused; although, as noted above, the Business Trust has provided funds to hard-hit communities without naming them as reparations<sup>72</sup>. The Peruvian PIR is financed in part by the “óbolominero”, a voluntary contribution of 3 percent of net profits to the government by mining companies, but it is not specifically tied to reparations and has many claimants; a windfall profits tax on mining in Peru was rejected. Private funds could also come from the tracing and confiscation of the assets of perpetrators and the ill-gotten gains of former leaders. The Peruvian PIR is also partially financed (15 million new soles for 2007, or approximately US\$4,745,334) from a special fund set up to hold monies recovered from former government officials accused of embezzlement from the state<sup>73</sup>. However, there are multiple demands on the fund’s assets, and once the current assets are depleted it is unclear where more will come from.

## 8. Reparations and the International Development Community

To serve their expressive and symbolic function, reparations should come primarily from the parties responsible for the violations. Thus, in cases of state sponsored human rights violations, it is important that reparations come from the state, rather than from outside agencies. However, this does not mean that IFIs, aid agencies, and private actors have no role to play. As donors, they provide funding and technical assistance that may determine which postconflict initiatives are implemented, either through the international community directly or by internationally assisted local partners. Transitional justice initiatives, in the form of prosecutions, truth-telling, and especially security sector reform and DDR, have been heavily dependent on external support and funds from multilateral and bilateral donors.

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72 Colvin, “Overview of the Reparations Program in South Africa”, 209.

73 The Fondo Especial de Administración de Dinero Obtenido Ilícitamente a Perjuicio del Estado (FEDEDI) holds funds recovered from ex-president Alberto Fujimori and his officials. According to the National Human Rights Commission, it has been used for the PIR. Informe CCDDHH 2006, citing Proyecto de Ley 110-2006-PE.

Reparations programs have also benefited from external support, but to a much lesser extent. This may in part be because it is difficult to show the necessary favorable payback periods and rates of return on investment in a reparations program, given its focus on intangibles, such as dignification and inclusion. At the same time, however, there may be risks, especially with large, multilateral donors, in allowing the conceptual basis or practical implementation of reparations projects to be too closely linked to or dependent on the other agendas of a donor. A bias in the culture, expertise, and mission of these institutions may lead to excessive focus on the monetizable aspects of programs, or to the imposition of unrealistic cost-benefit evaluation rubrics. Furthermore, in implementing their other agendas, donors may also make reparations programs more difficult: too strong a focus on cutting budget deficits and state payrolls to meet externally imposed structural adjustment, for example, will undermine a government's ability to fund any kind of repairation scheme.

On the other hand, an understanding among donors of the potential and purposes of reparations programs may overcome opposition and free up resources for such programs. For IFIs—and the World Bank in particular—the trend appears to be an increase in their postconflict work, and support for reparations programs could in theory become part of this growing postconflict agenda<sup>74</sup>. However, several of those involved in World Bank activities agreed that until now, at least, reparations projects have been mostly off the Bank's radar. In part, little is known about how reparations programs have worked and might work outside the context of post-World War II Germany, and there is therefore a sense that such programs are a luxury that poor countries cannot afford. In addition, reparations programs seem unnecessarily political: Why take the chance of exacerbating tensions between beneficiaries and those left out, or seeming to take sides in the past conflict, when the problem can be avoided by terming the provision of resources to those injured by the conflict “victim assistance” rather than “reparations”? A clear explanation of the rationale behind reparations programs and the difference between court-ordered tortlike remedies and the kinds of reparations possible after massive conflict would help bridge the gap between transitional

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74 World Bank, “The Role of the World Bank in Conflict and Development: An Evolving Agenda”, no date, 9, [web.worldbank.org/servlets/ecr?contentmdk=20482342&sitepk=407546](http://web.worldbank.org/servlets/ecr?contentmdk=20482342&sitepk=407546).

justice practitioners and World Bank personnel, with the hope that in time economic actors would make room for and support reparations efforts alongside victim assistance.

At the same time, while most donors have been slow to provide significant material or technical support to reparations programs in a postconflict setting, they do provide significant support for DDR and for the reform of the security sector. Donors justify this focus by framing the reintegration of former combatants and the removal of arms from circulation as a security issue, which has been shown to have major implications for the stability of society and the economy. One recent study of aid patterns after conflict in Rwanda and Guatemala showed that, over the eleven-year period in question, security sector reform, including DDR, received the bulk of aid that went to transitional justice measures—more aid than went to criminal prosecutions, truth commissions, traditional justice mechanisms, or reparations<sup>75</sup>. However, it is not clear that this very strong emphasis on DDR, possibly to the detriment of other approaches, is the best means to stabilize the society and the economy.

While there are benefits to donors taking on DDR, there are also tensions if the demand for reparations is not taken up simultaneously. DDR often works by creating incentives for former combatants to turn in their weapons and reintegrate into society in a nonmilitaristic role. However, reparations, because it is not framed in terms of security, may be pushed off for months, if not years, after a conflict. This can create the perception that combatants or perpetrators will be compensated and given social benefits, whereas the victims may receive nothing. It is hard to advance goals of either reconciliation or social (re)integration or an end to the exclusion of marginalized groups without better attention to this imbalance. Indeed, as de Greiff has noted, at a rhetorical level some DDR efforts have begun to reflect this criticism, noting the broader context in which they operate while maintaining the primary aim of promoting security<sup>76</sup>. But, while working with different populations—

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75 Ingrid Samset, Stina Petersen, & Vibeke Wang, “Foreign Aid to Transitional Justice: The Cases of Rwanda and Guatemala, 1995-2005”, in Kai Ambos, Judith Large, & Marieke Wierda, Eds., *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* (Heidelberg: Springer, 2009).

76 Pablo de Greiff, “DDR and Reparations: Establishing Links Between Peace and Justice Instruments”, in *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development: The Nuremberg Declaration on Peace and Justice*, Kai Ambos, Judith Large, & Marieke Wierda, Eds. (Heidelberg: Springer, 2009).



combatants and victims—DDR and reparations programs share certain similar challenges. Both types of programs must, for example, define beneficiaries, benefits, and the goals of the program.

Reparations and development agency agendas overlap during the period of planning and programming after a conflict has ended, when there is an opportunity for donors to understand the extent to which national funds will need to be committed to reparations programs, and to hold governments accountable for promises to institute reparations initiatives. Bilateral agencies and the UNDP have provided significant support for reparations initiatives within the context of support for transitional justice generally. As a percentage of overall development aid, though, support for transitional justice has been minor—in the study referred to above covering Guatemala and Rwanda, aid for all transitional justice came to about 5 percent of all development aid<sup>77</sup>. About 20 percent of all aid to transitional justice in Guatemala went to reparations—for mental health, exhumations, and assistance in setting up the PNR—while in Rwanda the figure was 5 percent—and was used for mental health program support and commemorative museums and sites.

In addition, the UNDP in some situations has served as the administrative vehicle for national and international funds related to reparations<sup>78</sup>. Together with the German cooperation agency GTZ, the UNDP has been involved in the conceptualization of the reparations program in Guatemala and especially with the psychosocial aspects of working with hard-hit communities<sup>79</sup>. The UNDP identifies reparations

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77 Samset, Petersen, & Wang, “Maintaining the Process?” 13.

78 The UNDP undertakes a wider range of support activities in the field of transitional justice—coordination, program management and implementation, situation analysis and needs assessments, facilitation of national dialogue processes, technical assistance and fund management, capacity development, and information management. Examples of UNDP transitional justice support include support for the Timor-Leste Commission for Reception, Truth and Reconciliation; a role in the creation of the Sierra Leone Truth and Reconciliation Commission; and support for the Truth and Reconciliation Commission in Peru, where the UNDP acted as a channel for donor funding. The UNDP was also involved in Guatemala’s Historical Clarification Commission and was key in funding psychosocial support in the context of exhumations and in keeping Guatemala’s PNR alive when the bank holding the program’s funding collapsed in 2006. UNDP Bureau for Crisis Prevention and Recovery, “UNDP and Transitional Justice: An Overview”, January 2006, 5-8.

79 Informe de la Evaluación Conjunta del Programa Nacional de Resarcimiento y de los Programas de Apoyo al PNR de GTZ y PNUD, Guatemala, December 14, 2007, [www.berghof-peacesupport.org/publications/Informe%20final%20ec%20pnr.pdf](http://www.berghof-peacesupport.org/publications/Informe%20final%20ec%20pnr.pdf).

programs as one of the “four pillars” of transitional justice and recognizes both financial and nonfinancial measures as reparations. In practice, however, the UNDP does not initiate programs but responds to government requests. If a reparations program has, for instance, been included in a peace agreement or the recommendations of an official truth commission, the UNDP can follow up, but otherwise it is limited to serving as an “honest broker” with strong government connections in a dialogue between government and civil society.

The most important contribution that international development actors could make to creating viable reparations programs would be to build consideration of reparations into the initial discussions of government budgets for the immediate post-armed conflict years. Setting up reparations discussions at the point of negotiation of peace accords or initial government plans would, for example, allow them to become part of a UNDP assistance framework, which would then permit follow-up and would make it more difficult for governments to cite budgetary impossibility as a reason not to implement reparations. To the degree that development actors play a role in the peace accords and initial government plans, they should ensure that reparations are at least a viable possibility.

## 9. Conclusions and Recommendations

It is under a capabilities-centered, bottom-up approach to development that the strongest links can be made to transitional justice generally, and reparations programs in particular. Like development more broadly, reparations is a process, not a deliverable. The most important determinant of success is how things are done—that is, whether the discussion and delivery of reparations are set up in a way that makes the goals of acknowledgment, respect, restoration of dignity, and civic interest in the betterment of lives a felt reality for survivors.

A well-designed and implemented reparations program can have follow-on and spillover effects that affect longer-term development. Such a program can help to create sustainable, culturally relevant change while addressing both root causes and survivors’ immediate needs. Reparations can play an important role in changing citizens’ relationship to the state, in strengthening civic trust, and in creating minimum conditions for victims to contribute to building a new society. At the same time, the resources—human, institutional, and financial—available for reparations will obviously vary depending on the level of development. While the two

processes are different and should not be conflated or merged, there are a number of ways in which they can strengthen and complement each other. Indeed, care should be taken to ensure that reparations programs *complement* development efforts (and related state functions) rather than *duplicate* them.

For development experts, especially those in aid agencies and IFIs, the needs and contours of a reparations program need to be considered early on, in initial donor conferences or during negotiations for a post-armed conflict government. Governments need to consider both a budget and the specificity of programming as early as possible. Those funding DDR should simultaneously think about funding reparations. For both DDR and reparations programs, if individuals receive cash, they should also receive some training in budgeting and investing so as to maximize the long-term return. Transitional justice experts need to better understand the financing process and engage with banks, governments, and donors early enough to influence budget allocations for the three- to five-year planning period. Post-armed conflict reconstruction and initial economic development planning will overlap with the time frame in which reparations are being negotiated for the victims of the conflict—after initial emergency and humanitarian aid has ended but before a business-as-usual phase sets in. The lack of adequate provision and sequencing has meant that many reparations programs only come about twenty or more years after the end of the violations they are meant to redress, when both their material and symbolic effect is attenuated. It may be, however, that a time lag is inevitable, and that reparations should be conceived of as a multigenerational effort that takes into account the multigenerational effects of trauma<sup>80</sup>. Thus, reparations for the first generation could focus on livelihood reconstruction, psychosocial and medical assistance, and dignification, while for the second and third generations a focus on education and social empowerment would be appropriate.

Both collective and individual reparations can contribute to dignification—or not. Collective reparations should not be automatically rejected by human rights groups and NGOs. Rather, they should be designed to maximize both the perception that victims are contributing to their community and the ability of victims' and survivors' groups to

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80 For a discussion of the multigenerational effects of genocide, repression, and other trauma, see generally Yael Danieli, Ed., *International Handbook of Multigenerational Legacies of Trauma* (New York: Springer, 1998).

establish priorities for social spending. While individual reparations are important, they need not be entirely, or even mostly, made up of a one-time cash award. In particular, in-kind restitution of domestic animals, housing materials, seed, and tools may have more positive effects in rural communities. Conversely, reparations must have at least some individualized component to fulfill its goals—the provision of basic services, no matter how needed or how well executed, will not serve the same functions.

In this context, those designing reparations programs should make conscious efforts to rebalance power after a process of victimization, making the survivors and their descendants empowered to shape and take ownership over the process of reparation. Those affected by violence should ideally see themselves as and be agents of positive change, with the capacity to organize around solving shared problems.

States planning reparations programs should think about service provision that does not duplicate existing services but rather improves these for all while providing tailored and complementary help to victims and survivors. They should also maximize the ability of such programs, where needed, to eventually merge into the regular government (and budget). They should use NGO providers, where needed, to infuse programs with new knowledge and energy, in the areas of community mental health, exhumations/forensics, or participatory budgeting, for example.

Reparations cannot, and should not, replace long-term development strategies. But they can be designed to be the initial “victim-friendly” face of the state, creating habits of trust and rights possession among their target population that will set the stage for a more positive long-term interaction between the state and a sizeable group of its citizens.

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