

**THE JUDICIAL ENFORCEABILITY OF THE INDIVIDUAL DIMENSION OF
THE RIGHT TO TRUTH THROUGH THE WRIT OF AMPARO IN EL SALVADOR**

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INTRODUCTION

“Solo una cosa no hay. Es el olvido”

Jorge Luis Borges

This thesis advances the argument that, despite the existence of the General Amnesty Act for the Consolidation of Peace which granted a full, absolute and unconditional amnesty to perpetrators of heinous crimes during the armed conflict and despite the application of statutory limitations to international crimes by the domestic courts, there is a possibility to enforce the right that the relatives of the victims of forced disappearances and extrajudicial killings have to know the truth about the fate and the whereabouts of their loved ones.

To judicially enforce the right to truth in El Salvador, the mechanism proposed is the writ of *amparo*, which is a constitutional process whose purpose is to protect and to ensure the rights and freedoms enshrined in the Constitution of El Salvador. Despite the fact that the right to truth is not expressly recognized within the constitutional text, this thesis argues that the right to truth can be derived from other human rights guaranteed by the constitution.

As a background, the thesis begins with a historical account of the civil war in El Salvador and the nature of the Peace Accords, which put an end to the armed conflict and which, at the end, allowed the possibility to enact a pervasive law, such as the General Amnesty Act for the Consolidation of Peace. Additionally, the thesis provides a background on the legal framework in El Salvador and the role which the constitutional processes, such as the writ of *amparo*, play in the protection and assurance of human rights. The paper also traces the

development and application of the right to truth at the regional system for the protection of human rights in the Americas as well as the domestic courts of other countries in the region.

Thus, the first chapter focuses on the armed conflict in El Salvador including the roots of the conflict, such as the economic, social and political exclusion of large sectors of the population. It also highlights how the widespread violence exerted both by the government and the guerrilla forces affected the population. Finally, it will depict the context in which the Peace Accords were signed and the effects of the report of the Truth Commission created pursuant to the Peace Accords.

The second and the third chapters will show how both the Inter-American Commission on Human Rights and the Inter-American Courts of Human Rights have addressed the right to truth within the context of forced disappearances and extrajudicial killings. Additionally, they will describe how the domestic courts of Argentina, Colombia and Peru had been able to enforce the right to truth within its domestic jurisdictions.

The fourth and the fifth chapters will provide the necessary information to understand the legal framework in El Salvador and, particularly, the writ of *amparo*. Finally, it will explain how the individual dimension of the right to truth of the relatives of the victims of forced disappearances and extrajudicial killings can indeed be judicially enforced through that constitutional mechanism, despite the obstacles already mentioned.

CHAPTER I
THE CIVIL WAR IN EL SALVADOR AND ITS END THROUGH
THE PEACE ACCORDS

1. The roots of the conflict in El Salvador

While the armed conflict officially began with a military offensive launched by the guerrilla movement during the early nineteen eighties, its causes were deeply connected to the repression and marginalization that large sectors of the population suffered for a long period of time under the rule of military regimes directly supported by a few families, which, at that time, held the monopoly over the greatest monoculture export commodity of the country at that time.¹ Indeed, even though, “legend and radical propaganda have quantified the oligarchy at the level of fourteen families, a figure of several hundred families lies much closer to the truth”². However, what it is certainly undisputable is that the military governments at that time responded to the interests of an oligarchy which owned most of the fertile land within the country and which obtained most of its profits from the production of coffee since the last decades of the nineteen century.

Hence, to better understand the development of the civil war, the terms for its end and the never-ending transitional process that the country has undergone since the official end of the civil war, it is necessary to highlight the underlying social, economic and political conditions that

¹. Cfr. Cuéllar Martínez, Benjamín, *Los Dos Rostros de la Sociedad Salvadoreña* in Verdad, Justicia y Reparación, Desafíos para la Democracia y la Convivencia Social, Inter-American Institute of Human Rights, San José, 2005, 145-174, 146-149.

². Haggarty, Richard A. and ors, *El Salvador: A Country Study*, U.S. Library of Congress, Washington D.C. 1988.

created a fertile breeding ground for popular movements which, later in time, saw the armed struggle as their only solution.

Among the most relevant conditions that triggered the civil war in the country was the economic and social exclusion to which the vast majority of its inhabitants were subjugated since the establishment of what became known as the “coffee republic”³ during the last decades of the nineteenth century. A few years before the armed conflict started, the Inter-American Commission on Human Rights drew the attention of the government to these conditions by expressing the fact that many people, both within and outside the government, claimed that the poor economic conditions and the inadequate social circumstances were causing increasing polarization among the population.⁴ In words of the Commission, among the most serious sources of division of the Salvadoran society were both “the tremendous concentration of land ownership and of economic power in general, as well as political power, in the hands of a few, with the consequent desperation and misery of the campesinos, who make up a large majority of the Salvadoran population”.⁵

³. “Despite some differences over the degree of emphasis of political versus economic issues, Salvadoran liberals generally agreed on the promotion of coffee as the predominant cash crop, on the development of infrastructure (railroads and port facilities) primarily in support of the coffee trade, on the elimination of communal landholdings to facilitate further coffee production, on the passage of antivagrancy laws to ensure that displaced campesinos and other rural residents provided sufficient labor for the coffee *fincas* (plantations), and on the suppression of rural discontent”. In Haggarty, Richard A. and ors, supra note 2, at *The Coffee Republic*.

⁴. For example, according to some of the figures provided by the Commission in its report about the situation of human rights in El Salvador, that entity revealed that, at that time, “with regard to the distribution of income by families, the highest 5 percent of families received 38 percent of the income, and the highest 20 percent received 67 percent of the total, while the lowest 40 percent of families received only 7.5 percent of the income. With regard to land tenure, according to a 1961 estimate, six families owned 71,923 hectares. In contrast, according to the 1971 census, approximately 305,000 families lived on 42,692 hectares. More than one third of this last group of families did not own the lands they worked on. According to other figures, the top 10 percent of landowners in El Salvador hold 78 percent of the arable land, and the lowest 10 percent, barely 0.4 percent. According to another estimate, the top 0.55 percent of the landowners occupies 37.7 percent of the land, and 91.4 percent has 21.9 percent of land”. In the Inter-American Commission on Human Rights, Report on the Situation of Human Rights in El Salvador, Organization of American States, Washington D.C. 1978.

⁵. *Id.*

A second factor which led the popular movements to abandon their quest for a pacific solution was the institution and the perpetuation, for almost fifty years, of military regimes which ruled with the approval and the support of the oligarchy within the country and which closed every space for political participation. Those military regimes, which were already used to exercising its power in an authoritarian way and without any subjection to social accountability, were neither willing to relinquish power nor to share it with the civilian sector and, therefore, for several years, they obstructed the democratic participation of the population in the management of the government.

In the above report on El Salvador, the Commission stated that, at that time, there was a “widespread skepticism among the citizenry regarding the right to vote and to participate in government. In particular, the political parties of the opposition, in this connection, [...] have no confidence in the possibility of having free and honest elections. Not only in the light of their experiences during the course of recent elections, but also because of the structure of the electoral system and [because] of the obstacles the parties encounter in trying to organize in the interior of the country. For all these reasons, the Commission considers that electoral rights are not effective under the present circumstances”.⁶ The environment of skepticism to which the Commission referred in its report was essentially a consequence of the presidential election held on February 20, 1972, which is still remembered by the people as the most shameless electoral fraud perpetrated in El Salvador by a military regime. During those elections, the “Central Elections Council, working in tandem with ORDEN, a paramilitary force operating under the auspices of the National Guard, stole the victory from the National Opposition Union”.⁷

⁶ Id.

⁷ Cuéllar Martínez, Benjamín, *El Salvador in Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in America Latina*, 33-70, 37, Due Process of Law Foundation, Washington D.C. 2007.

A third factor was the violent response by the government to the social, economic and political demands of the population. When former President General Carlos Humberto Romero assumed his presidency on July 1, 1977, he proposed, as a response to the demands of the opposition, to confront those demands “by using the armed forces and other tools of repression to ‘guarantee institutional order’ and defeat the ‘communist threat’ allegedly posed by religious groups and ‘front organizations’”.⁸

The violence to which large sectors of the population were subjected before the beginning of the armed conflict was widely documented by several reports written by different entities, such as Socorro Jurídico⁹ and the United States Embassy in El Salvador. In 1978, Socorro Jurídico reported a monthly average of 12.25 civilian political deaths.¹⁰ In 1979, Socorro Jurídico “documented 1,030 civilian murders due to political repression. [In] 1980 the figure was 8,062”.¹¹ On the other hand, the United States Embassy in El Salvador reported 1,924 civilian political deaths from the middle of September 1980 to the beginning of 1981.¹²

Finally, another factor which caused the civil war in the country was the absence of the rule of law and the incapacity that prevailed among the institutions responsible to enforce it. Those institutions, at the end, played an accessory role in the perpetration of human rights violations, particularly those who were in charge of investigating, prosecuting and punishing the persons responsible for gross violations of international human rights laws and serious violations

⁸. Cuéllar Martínez, Benjamín, *supra* note 7, at 39.

⁹. “Socorro Jurídico was established in 1975, independent of the Church, by a small group of Catholic lawyers and law students. Its purpose was to give free legal aid to those who could not afford lawyers’ fees”. However, in “October 1977, the archbishop [of El Salvador] gave Socorro Jurídico official status within the archdiocese, space on the Church’s premises in El Salvador, and mandate to work on human rights cases as well as its original tasks”. In Brown, Cynthia G., *U.S. Reporting on Human Rights in El Salvador: Methodology at odds with Knowledge*, Americas Watch Report, New York, 1982, 13.

¹⁰. Cuéllar Martínez, Benjamín, *supra* note 1, at 147.

¹¹. Brown, Cynthia G., *supra* note 9, at 33.

¹². Brown, Cynthia G., *supra* note 9, at 35.

to international humanitarian laws and those who had the duties to protect and to guarantee those rights.

Addressing this issue, the Commission in its above-mentioned report expressed that the “security bodies have committed serious violations of the right to liberty, in making arbitrary arrests. They have maintained secret places of detention, where some persons, whose capture and imprisonment have been denied by the government, were deprived of liberty under extremely cruel and inhuman conditions. In general, the laws of El Salvador contemplate the right to a fair trial and to due process of law, but in practice the legal remedies are not effective for protecting the persons arbitrarily deprived of their basic human rights. This situation is particularly serious in the cases concerning missing persons. Even in regard to the formal legal system, there is an important deficiency in that police magistrates can sentence a person to jail for up to six months, without that person being able to exercise his right to defense and to due process in an effective way”.¹³

Additionally, according to Commission, the sectors most affected by the violence in El Salvador were the union leaders and the people living in rural areas. The Commission declared in that report that the “rights of assembly and of association, especially the latter, frequently meet obstacles when exercised by persons or groups opposing the government, especially in the case of campesinos. The right to freedom of thought and of expression is subject to limitation, especially at this time, as a result of the interpretations that have resulted from the Law of Defense and Guaranty of Public Order”,¹⁴ which “criminalized actions that supposedly undermined the established 'democratic' and 'constitutional' government”.¹⁵

¹³. The Inter-American Commission on Human Rights, *supra* note 4.

¹⁴. *Id.*

¹⁵. Cuéllar Martínez, Benjamín, *supra* note 7 at 39.

In conclusion, the civil war in El Salvador was not the consequence of an abrupt decision adopted by a group of people who were not in agreement with some of the policies adopted by the military governments at that time. Rather, it was a desperate response to a series of unresolved claims made by large sectors of the population over a long period of time, which were closely related with severe economic conditions and state repression that hindered their possibilities to achieve decent standards of living for them and for their families. Certainly, if both the oligarchy and the military had paid a closer attention to the homilies preached by Monsignor Romero and obeyed his suggestion to “take their rings off their fingers before others had to take these from them”,¹⁶ the armed conflict probably could have been avoided.

2. The civil war in El Salvador

On October 15, 1979, a new generation of military officers led a coup d'état which had among its main purposes the overthrow of President General Carlos Humberto Romero and the implementation of economic and social reforms, basically in order to restore order in the country and to address the demands of the population. The coup d'état achieved its first goal instituting a government junta which, for the first time in almost fifty years, allowed civilians to take part in the conduct of public affairs, particularly giving them the opportunity to occupy public offices and to act as public servants.

The new government junta, composed of both the military and civilians, rapidly announced its desire to execute major social and economic reforms which, if executed, would have had significantly affected the privileges enjoyed by the oligarchy up until that date and

¹⁶. For more information, see webpage: <http://celebratingmonsignorromero.com/call-to-action/monsignor-romero-by-rev-marta-benavides/>

probably would have helped to stop the civil war. For instance, as soon as it took power, the new government junta “enacted decrees to freeze landholdings [of] over ninety eight hectares and to nationalize the coffee export trade”.¹⁷ Additionally, it adopted a decree officially disbanding the Nationalist Democratic Organization, which was the most famous and the most violent paramilitary structure within the country at that time. That paramilitary structure was composed mainly of poor peasants and, in some cases, elite landowners, who operated under the collaboration and acquiescence of the military regime, in order to suppress popular revolts particularly in rural areas.

But, despite the measures adopted by the new government junta and the expectations generated within and outside the country, no real structural changes were made. Instead, the repression towards the popular movements became stronger than in the past regimes, since neither the new government junta nor the government juntas that followed it were able to exert power over the most conservative sectors of the country. The new governments’ lack of ability to effectively implement its decisions “reflected not only the resistance of conservative military and security force commanders but also the outrage expressed by elite landowners and the majority of the private sector over the reform decrees and the prospect of even more wide ranging actions to come”.¹⁸ Indeed, according to some sources at the time “the campaign of terror waged by the death squads was organized and coordinated by conservative officers [...] with the financial backing of the oligarchy”.¹⁹

After a few months of struggle with the most conservative sector of the security forces and of the oligarchy, most of the members which were part of the government junta instituted after the coup d'état resigned and, as a consequence, their positions were taken in, some cases, by

¹⁷. For more information, see webpage: <http://www.globalsecurity.org/military/world/war/elsalvador2.htm>

¹⁸. For more information, see webpage: <http://www.globalsecurity.org/military/world/war/elsalvador2.htm>

¹⁹. For more information, see webpage: <http://www.globalsecurity.org/military/world/war/elsalvador2.htm>

good faith civilians who believed that the *status quo* could be changed by political means. This resulted in what later became known as the second and the third government juntas, all of which, actually, faced the same problems as their predecessor and, thus, were neither able to implement serious reforms nor to put an end to violence in the country.

The disappointment experienced by the vast majority of the people who had placed high hopes for a change in those governmental juntas, coupled with the repression suffered by large sectors of the population and by widely respected figures in the political arena, became the last spark that was needed to ignite the civil war. Therefore, on January 10, 1981, the guerrilla forces carried out a military operation which became known as the “final offensive”. This “final offensive” failed in its objective to overthrow the government and it marked the official beginning of the armed conflict in the country, since the guerrilla forces were able to establish an effective control over certain areas of the territory and to place themselves as a representative force before the international community, both politically and militarily. Indeed, the “final offensive” led to the recognition of the guerrilla forces²⁰ as a “representative political force”²¹ by the governments of Mexico and France and an advocacy campaign for a negotiated solution to the armed conflict by the international community.

Since the beginning of the armed conflict in the country and during the twelve years that it lasted, the violence became like a “fire which swept over the fields of El Salvador”.²² Indeed, in words of the Truth Commission for El Salvador, violence “turned everything to death and

²⁰. In January, 1980, three of the guerrilla groups, the FPL, ERP and FARN, joined to form the Unified Revolutionary Directorate (DRU). Later in the year, the PRTC joined as well. Fidel Castro, as a condition for his support, ordered that all Salvadoran guerrilla organizations must come under unified command, so with the addition of the FAL, the Farabundo Martí National Liberation Front was formed in October, 1980, with the Democratic Revolutionary Front as its political branch. See generally Little, Michael R., *A War of Information: The Conflict between Public and Private U.S. Foreign Policy on El Salvador, 1979-1992*, University Press of America Inc., Maryland, 1994, 18.

²¹. Haggarty, Richard A. and ors, *supra* note 2.

²². The Commission on the Truth from El Salvador, *From Madness to Hope: The twelve year war in El Salvador*, United Nations, 1993, 6.

destruction, for such is the senselessness of that breach of the calm plenitude which accompanies the rule of law, the essential nature of violence being suddenly or gradually to alter the certainty which the law nurtures in human beings when this change does not take place through the normal mechanisms of the rule of law. The victims were Salvadorians and foreigners of all backgrounds and all social and economic classes, for in its blind cruelty violence leaves everyone equally defenseless”.²³ This heartbreaking depiction of the situation in El Salvador during the armed conflict, precisely describes what the inhabitants of the country and those in exile had to suffer for at least twelve years.

The consequences of the widespread, systematic and indiscriminate violence in El Salvador were, among others, thousands of innocent civilians killed, thousands of deaths among the combatant forces, total breakdown of the rule of law, widespread insecurity, ongoing power shortages, economic recession and financial instability, inflation, devaluation of its national currency, destruction of an important part of its productive means and other important infrastructure, increased polarization and prevalent psychosocial trauma among the population.²⁴ In figures, more than 75,000 civilians were the victims of extrajudicial killings, more than 8,000 people were the targets of forced disappearances and more than 1,000,000 people fled the country. On the military side, according to the information gathered by the armed forces, approximately 28,000 combatants were killed in action, wounded, maimed or disappeared. The economic losses during that period were estimated to be more than 1,600,000,000 dollars and, as a consequence, the gross domestic product (GDP) of the country decreased to the levels that the country had two decades before, as well as its position in the human development index. Finally,

²³. The Commission on the Truth from El Salvador, *supra* note 22, at 7.

²⁴. Instituto de Derechos Humanos de la Universidad Centroamericana “José Simeón Cañas”, *La Agenda Pendiente, Diez Años Después (De la Esperanza Inicial a las Responsabilidades Compartidas)*, Universidad Centroamericana “José Simeón Cañas”, San Salvador, El Salvador, 2002, 18.

a significant amount of the economic resources of the State was devoted exclusively to military purposes and, therefore, social investment projects were practically left aside in its entirety.²⁵

According to several reports on the civil war and to the news released at that time, the first years of the armed conflict were among the most violent ones. This can be explained by the fact that the military decided to implement during its first years a “deliberate strategy to eliminate or terrorize the rural population, symbolized by the massacre perpetrated in El Mozote, where troops from the Atlacatl Batallón, part of the Batallón de Infantería de Reacción Inmediata (BIRI), murdered a number of defenceless peasants in December 1981”.²⁶

The Inter-American Commission on Human Rights alluded to this fact by stating in an annual report that “the serious and widespread violations of human rights in the country in recent years have diminished during the period covered by this report”,²⁷ as opposed to its previous annual reports where the Commission had stated that the violations of the right to life were alarming. In the words of the Commission, during the first years of the armed conflict, it was “estimated that the total number of persons who have died as a consequence of the violence reached 50,000, many of them assassinated in the most inhumane way, in acts attributable to the security forces or those that operate with their acquiescence”.²⁸ According to the Commission, the sectors of the population that suffered in more severe ways the effects of the governmental repression during the armed conflict were the members of “trade unions, cooperatives,

²⁵. Instituto de Derechos Humanos de la Universidad Centroamericana “José Simeón Cañas”, supra note 24, at 18 and 17.

²⁶. Human Rights Council, *Report of the Working Group on Enforced Or Involuntary Disappearances*, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Mission to El Salvador, General Assembly of the United Nations, A/HRC/7/2/Add.2, Geneva 2007, 8.

²⁷. Inter-American Commission on Human Rights, Annual Report on the Inter-American Commission on Human Rights: 1984-1985, El Salvador, Organization of American States, Washington D.C. 1985.

²⁸. Inter-American Commission on Human Rights, Annual Report on the Inter-American Commission on Human Rights: 1983-1984, El Salvador, Organization of American States, Washington D.C. 1984.

universities, human rights organizations and other such bodies”,²⁹ who were considered by the security forces as “fronts and havens of the guerrillas or insurgents”³⁰

These findings were reaffirmed by the Truth Commission for El Salvador which expressed that the first three years of the decade of the eighties were the most violent and defined that period as the institutionalization of violence. According to the Truth Commission, the “main characteristics of this period were that violence became systematic and terror and distrust reigned among the civilian population. The fragmentation of any opposition or dissident movement by means of arbitrary arrests, murders and selective and indiscriminate disappearances of leaders became common practice. Repression in the cities targeted political organizations, trade unions and organized sectors of Salvadorian society”.³¹

The conflict lasted for more than a decade and ended through a negotiated settlement in which the international community played an important part by exerting strong pressure on both parties to stop the armed conflict. However, this negotiated settlement would not have had been possible if the parties had not realized, after a period of stagnation of the civil war, that none of them had enough power to triumph over the other by military means.

3. The Peace Accords

On 16 January, 1992, the parties to the conflict signed an agreement which put an end to the bloody civil war. The Chapultepec Agreement was the last of many agreements which were signed within a period of almost two years with the support and the help of the international

²⁹. Inter-American Commission on Human Rights, Annual Report on the Inter-American Commission on Human Rights: 1988-1989, El Salvador, Organization of American States, Washington D.C. 1989.

³⁰. Id.

³¹. The Commission on the Truth from El Salvador, *supra* note 22, at 27.

community, which mediated in the conflict, particularly the United Nations. The first agreement signed by both the guerrilla and the government during the peace process on April 4, 1990, known as the Geneva Agreement, described the four core objectives of the peace process and, therefore, became known as the heart and the soul of that process. The four core objectives were to “end the armed conflict by political means as speedily as possible, promote the democratization of the country, guarantee unrestricted respect for human rights and reunify Salvadorian society”.³² Further agreements relating specifically to human rights issues were signed by the parties to the conflict, including the San José Agreement, the Mexico Agreements and the New York Agreement. All these agreements, it is important to note, contained several rights and obligation which had already been adopted by the State through the signature and the ratification of various international agreements. However, due to the fact that those obligations had largely been overlooked, it was necessary to obtain a new commitment from both parties towards the obligations.

According to the Inter-American Commission on Human Rights, the San José Agreement dealt with two main issues: the obligations of the State to respect and to guarantee the human rights of the people under its jurisdiction; and the establishment of an international verification mechanism for the peace process, which involved the creation of the United Nations Verification Mission that became known by its acronyms as ONUSAL.³³

The Mexico Agreements dealt with “four major issues vital to effective enjoyment of and respect for human rights”:³⁴ the restructuring of the armed forces, the police, the judicial system

³². United Nations, *El Salvador: Geneva Agreement, April 4, 1990*, in *The United Nations and El Salvador 1990-1995*, United Nations Blue Books Series, Vol. IV., United Nations, Department of Public Information, New York, 1995, 164-165.

³³. Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in El Salvador*, Organization of American States, Washington D.C., 1994.

³⁴. *Id.*

and the electoral system through constitutional amendments and through reforms to secondary laws. Moreover, it addressed the matter of the creation of a Truth Commission for El Salvador, in order to clarify the events that had left a permanent mark in the hearts and souls of the Salvadoran population. However, the Truth Commission did not seek, in any way, to hamper the investigations carried out by the State, nor the enforcement of the law when an illegal act had occurred.³⁵

The New York Agreement provided for establishment of the National Commission for Consolidation of Peace whose goal was to “monitor fulfillment of all the peace agreements and give every civilian [an] opportunity to participate in the change process”.³⁶ In the words of the Commission, this entity was very important for human rights purposes because the parties to the agreement had the obligation to “consult it before taking any decisions or measures on matters covered under the peace agreements and because it had access to and can investigate any activity or site associated with execution of the agreements”.³⁷

With time, the Peace Accords of El Salvador³⁸ became the object of various criticisms made both by national and by international organizations. These criticisms mainly revolved around the fact that, among the four core objectives of the peace process, just the first one was fully achieved, which aimed solely to “end the armed conflict by political means as speedily as possible”.³⁹ Other criticisms of the Peace Accords through the years included, on one hand, the lack of political will by the State to comply with the recommendations of the Truth Commission

³⁵. Id.

³⁶. Id.

³⁷. Id.

³⁸. The Peace Accords which put an end to the conflict in El Salvador include several agreements signed by the guerrilla and the government during the period of two years and the dispositions contained in all those instruments were legally binding to the parties that signed it. The first one is known as the Geneva Agreement, which was signed in April 4, 1990 and the last one is known as the Chapultepec Agreement, which was signed in January 16, 1992. However, between those two instruments, both parties signed the Caracas Agreement, the San José Agreement, the Mexico Agreement and the New York Agreement.

³⁹. United Nations, *supra* note 32, at 164-165.

for El Salvador and, on the other hand, the enactment of the General Amnesty Act for the Consolidation of Peace just five days after the Truth Commission for El Salvador issued its report, which hampered the possibilities of the country to comply with the last three objectives described in the Geneva Agreement. Both of these factors hindered the investigation, prosecution and punishment of those responsible for gross violations of international human rights laws and serious violations to international humanitarian laws, creating an environment of permanent impunity around those heinous crimes. Moreover, both factors destroyed the promises made to the victims and to their families related to the payment of reparations for the harm suffered during the civil war, perpetuating the structural causes that permitted the armed conflict and the feeling of distrust among the population in the apparatus of the State.

In conclusion, although the Peace Accords in El Salvador marked a new era for the country since they put an end to the armed conflict, the lack of political will showed by the parties, particularly by the party in the government, hampered the possibilities to comply with the content of the peace accords and, therefore, to address the issues that caused the civil war. Specifically, the failure to deal with the structural causes of the conflict, such as the economic conditions of the vast majority of the population, and the failure to surrender to justice those persons responsible for gross violations to international human rights laws and serious violations to human rights laws hindered the possibilities of rebuilding the social tissue that was torn apart by the civil war.

4. The Truth Commission for El Salvador as a result of the Peace Accords

With the emergence of what became known as the “third democratic wave”⁴⁰ and the recent development of the theory of transitional justice, nowadays the international community has arrived to the conclusion that, in order to successfully overcome either authoritarian regimes or armed conflicts, States need to meet certain obligations towards the victims, their families and society as whole, particularly those related to truth, justice and reparations for the human rights abuses perpetrated in the past.

It is important to note, as Professor Juan Méndez has stated, the obligations described are “not a menu from which states can choose. They are obligations that have to be approached holistically, comprehensively, and in good faith. Nevertheless, they are obligations of means and not obligations of results. So as long as the effort is conducted in good faith, we still need to understand that the full truth will never be known, full justice to everyone will never be achieved, and reparations will always leave us with a sense that more should have been done”.⁴¹

Moreover, according to Professor Juan Méndez, in those countries in which there “has been denial and refusal to acknowledge human rights abuses, the state has an obligation to explore the truth to the best of its abilities and to disclose it publicly”.⁴² Thus, in countries in transitions to democracy and to peace, States have the positive obligation to reveal the truth about past human rights abuses and, moreover, to accept their responsibility for their wrongdoings.

⁴⁰. A democratic wave has been described as a “group of transitions from nondemocratic to democratic regimes that occur within a specified period of time and that significantly outnumber transitions in the opposite direction during that period”. Specifically, The third democratic wave “began in Southern Europe in the mid-1970s, spread to the military regimes of South America in the late 1970s and early 1980s, reached East, Southeast, and South Asia by the mid- to late 1980s, then at the end of the 1980s saw a surge of transitions from Communist authoritarian rule in Eastern Europe and the former Soviet Union and a trend toward democracy in Central America as well. Finally, the democratic trend spread to Africa in 1990, beginning in February of that year with the sovereign National Conference in Benin and the release of Nelson Mandela and unbanning of the ANC in South Africa”. In Diamond, Larry, *Is the Third Wave of Democratization Over?: An Empirical Assessment*, Working Paper Number, 236, Kellogg Institute, Notre Dame 1997, 2.

⁴¹. Méndez, Juan, Lou Henkin, *Transitional Justice and the Prevention of Genocide*, Columbia Human Rights Law Review, New York 2007, 477-485, 482.

⁴². Méndez, Juan, *supra* note 41, at 480.

Specifically with regard to the right to truth, it is important to clarify that “how and where truth is delivered matters”,⁴³ because when truth is “officially sanctioned and thereby made 'part of the public cognitive scene', [it] acquires a mysterious quality that is not there when it is merely 'truth'”.⁴⁴ Undeniably, in most cases which involve gross violations of human rights laws and serious violations of international humanitarian laws, general knowledge of the truth is not sufficient because, usually, the “victimized populations are often clear about what abuses took place and who has carried them out”.⁴⁵ Thus, an “official recognition of the injustices that have been suffered is necessary”⁴⁶ and that is why “the difference between knowledge and acknowledgment counts”.⁴⁷ As Professor Aryeh Neier has expressed, acknowledgment “implies that the state has admitted its misdeeds and recognized what it was wrong”.⁴⁸ Indeed, by “knowing what happened, a nation is able to debate honestly how and why dreadful crimes came to be committed. To identify those responsible, and to show what they did, is to mark them with a public stigma that is a punishment in itself, and to identify the victims, and recalled how they were tortured and killed, is a way of acknowledging their worth and dignity”.⁴⁹

4.1 Truth commissions as transitional justice mechanisms

⁴³. Argentine Forensic Anthropology Team, 2002 Annual Report, Special Section: Right to Truth, 130. For more information, see webpage: <http://eaaf.typepad.com/pdf/2002/17RightToTruth.pdf>

⁴⁴. Hayner, Priscilla B., *Unspeakable Truths: Confronting State Terror and Atrocity*, 26, Routledge, New York and London, 2001.

⁴⁵. Aryeh Neier, *What Should be Done about the Guilty?* in Kritz, Neil J., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, United States Institute of Peace, United States of America, 2004, 172-183, 180.

⁴⁶. Huyse, Luc, *Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past*, *Law & Social Inquiry*, Vol. 20, No. 1, Winter, 1995, 51-78, 53.

⁴⁷. *Id.*

⁴⁸. Hayner, Priscilla B., *Fifteen Truth Commissions-1974 to 1994: A Comparative Study*, *Human Rights Quarterly* 16, 1994, 597-655, 607.

⁴⁹. Aryeh Neier, *supra* note 45, at 180.

Since the last decades of the twentieth century, in order to achieve the goal of truth telling by officially sanctioned mechanisms, post conflict societies have frequently resorted to truth commissions because their judicial system lacks credibility among their general population and/or when the judicial system is not prepared to deal with those types of human rights violations. Truth commissions are frequently described as “official, temporary, non judicial fact finding bodies that investigate a pattern of abuses of human rights and/or humanitarian law, usually committed over a number of years”.⁵⁰ These bodies are usually useful in post conflict societies, in order “to discover, clarify and formally acknowledge past abuses, to respond to specific needs of the victims, to contribute to justice and accountability, to outline institutional responsibility and recommend reforms and to promote reconciliation and reduce conflict over the past”.⁵¹

Although the emerging rules in transitional justice do not “mandate the establishment of a truth commission”,⁵² they compel States “with a legacy of crimes against humanity or war crimes to reckon with this legacy by investigating the facts and disclosing them to the relatives of the victims and to society. In this respect, a truth commission is one instrument through which to fulfill that obligation”.⁵³

Throughout the years, these truth telling mechanisms have been more and more accepted by the international community. This is perhaps attributable to the fact that truth commissions have the ability to not only disclose the patterns of violence in a country and to signal individual responsibilities, but to contribute in the design of reparation policies. Moreover, in some

⁵⁰. Commission on Human Rights, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Definitions, Economic and Social Council of the United Nations, sixty-first session, E/CN.4/2005/102/Add.1, Geneva, 2005.

⁵¹. Hayner, Priscilla B., supra note 44, at 24.

⁵². Mendez, Juan E., *The Human Right to Truth, Lessons Learned from Latin American Experiences with Truth Telling* in Borer, Tristan Anne, *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies*, 115-150, 119, University of Notre Dame, Notre Dame 2006.

⁵³. Id.

occasions, truth commissions represent the best way for transitional governments to deal with the human rights abuses committed during the conflict and to come to terms with the past, particularly in those cases where the perpetrators still retain great quotas of power and its exercise may threaten the incipient regime.

Following the footsteps of Argentina and Chile, El Salvador decided to institute a truth commission to investigate a past plagued by gross violations of international human rights laws and serious violations of international humanitarian laws, becoming the third Latin American country to include a truth commission in a transitional process. However, certain features distinguished the Truth Commission for El Salvador from the ones established in Argentina and in Chile including: one, the enormous financial and political support given by the United Nations to the peace process in El Salvador and, two, the absence of national representatives among the commissioners.

4.2 The Truth Commission for El Salvador

The proposal to create a truth commission to deal with past human rights abuses and serious violations to international humanitarian laws was included by the guerrilla forces and by the government in the Peace Accords, particularly in the Mexico Agreements. There, both sides agreed to fully cooperate with the Truth Commission's investigations and to comply with its recommendations. Additionally, they agreed that the establishment of the truth commission would not "impair routine investigations of any situation or case, regardless of whether it had

been investigated by the commission, and that the law was to be enforced whenever an illegal act occurred”.⁵⁴

Therefore, although it would appear like the Truth Commission for El Salvador was not constrained by political restraints, since both parties expressly agreed to its establishment, to comply with its recommendations and to proceed with criminal trials whenever necessary, at the end, the whole peace process was plagued with mutual concessions which led to the parties to overrule its initial agreements. This was due to the fact that the Peace Accords through which the Truth Commission was instituted were, in fact, the result of a negotiated settlement between an undefeated guerrilla force and an undefeated government that led both parties to arrive at mutual concessions which not necessarily responded to their obligations towards truth, justice and reparations. Indeed, although at the beginning of the negotiations, it was “clear that the peace negotiators wanted this new peace to be founded, raised and built on the transparency of a knowledge which speaks its name”,⁵⁵ nobody could foresee, at that time, the enormous concessions that both parties were about to make some years later.

Furthermore, the mandate given to the Truth Commission for El Salvador was itself constrained since its beginning by a very limited duration of six months and by the terms of its mandate which, on one hand, did not allow the commissioners to investigate all serious acts of violence and, on the other, did not compel them to distinguish how the violence exerted during the conflict had affected different sectors of the populations, particularly women. Taken as a whole, the mandate of the Truth Commission for El Salvador was, primarily, to investigate “serious acts of violence that have occurred since 1980 and whose impact on society urgently

⁵⁴. Inter-American Commission on Human Rights, *supra* note 33.

⁵⁵. The Commission on the Truth from El Salvador, *supra* note 22, 8.

demands that the public should know the truth”⁵⁶, without differentiating the sector to which the perpetrator belonged.

In order to comply with their primary obligation, the commissioners had to take into account two factors. First, the “exceptional importance that may be attached to the acts to be investigated, their characteristics and impacts, and the social unrest to which they gave rise”;⁵⁷ and, second, “the need to build confidence in the positive changes being promoted by the peace process”.⁵⁸ Despite the fact that the mandate of the Truth Commission was to investigate past human rights abuses, due to its limited duration and the terms of its mandate, the commissioners had to focus on those abuses that had shocked society as a whole and on those which they were able to give an overall view of the patterns of violence conducted both by the government and by the guerrilla forces during the armed conflict.

As a consequence of its restricted mandate, the report issued by the Truth Commission for El Salvador did not include all those crimes which had not left an indelible print on the society as a whole, such as the vast majority of the crimes that were perpetrated during the civil war. This situation would have been overcome if, after the report of the Truth Commission was released, the State had complied with its obligations to investigate, prosecute and punish those responsible for the perpetration of gross violations of international human rights laws and serious violations of international humanitarian laws.⁵⁹

However, when the hopes for justice and accountability that the victims and their families had in the State were sacrificed in the name of national (re)conciliation⁶⁰ through the enactment of

⁵⁶. The Commission on the Truth from El Salvador, *supra* note 22, at 8.

⁵⁷. Popkin, Margaret – Roth-Arriaza, Naomi, *Truth as Justice: Investigatory Commissions in America Latina*, 20 *Law & Soc. Inquiry*, 1995, 79-116, 87.

⁵⁸. *Id.*

⁵⁹. The Commission on the Truth from El Salvador, *supra* note 22, at 15.

⁶⁰. According to Carlos Martín Beristain, it is preferable to use the term (re)conciliation to point out that although in several occasions the main purpose of transitional justice’s processes is to reconstruct relationships that were

the General Amnesty Act for the Consolidation of Peace, feelings of revenge and distrust in the new state apparatus emerged among society and, at the end, transformed El Salvador into one of the most violent countries in Latin America.⁶¹

Certainly, when States fail to provide sufficient recourses to its population to repair the wrongdoings of the past, and when they fail to protect and to ensure the rights and the freedoms of the people under their jurisdiction, the victims tend to take justice in their own hands to overcome impunity and to restore the natural balance that was lost between the victims and the perpetrators by the wrongdoings committed by the latter. This necessity to make justice by the victims' own hands it is not particular to any society or to any conflict and, basically, it is the consequence of the States' failure to fulfill its obligations towards the victims of a wrongdoing. The victims, who initially relinquished to the power to impart justice by their own hands and handed it over to the States, as an exercise of their sovereignty, simply decide to take back that power when the States legally fail to provide them with the kind of retribution that it is needed in a society where nobody is deemed as inferior.

This situation was brilliantly portrayed by Ariel Dorfman in his play "The Death and the Maiden" and, moreover, superbly taken up again by Professor Teresa Godwin Phelps, who utilized the play to depict the consequences of impunity in post conflict societies. In the words of Professor Teresa Godwin Phelps, the "troubling and provocative answer that the play provides is

destroyed because of war or political violence; in several others the aim is to build relationships that have never existed before the conflict. In Beristain, Carlos Martín, *Reconciliación y Democratización en América Latina: Un Análisis Regional, Papel de las Políticas de Verdad Justicia y Reparación* in Verdad, Justicia y Reparación, Desafíos para la Democracia y la Convivencia Social, 53-84, 53, Instituto Interamericano de Derechos Humanos, San José 2005.

⁶¹. Its "homicide rate in 2005 stood at 55.5 per 100,000 residents - more than twice the average rate for the region". Indeed, according to "the Pan American Health Organization (PAHO), the estimated 2000-2004 homicide rate for Latin America was 25.1 per 100,000 residents". In International Human Rights Clinic, No Place to Hide: Gang, State and Clandestine Violence in El Salvador, Human Rights Program, Harvard Law School, Boston 2007, 1.

this: if what happened to Paulina⁶² is ignored, if the state fails in its responsibility to enact retribution for her, she will take revenge into her own hands. If a new government turns its back on the victims, the victims will, in time, get their own back, becoming the perpetrators in the next stage of the cycle, the cycle of revenge that has no appropriate stopping place. If a state expects the Paulinas of the world to be the ones who make the concessions, it ignores critical truths about human history and psychology”.⁶³

In El Salvador, although the mandate of the Truth Commission allowed the commissioners to investigate and to report on abuses perpetrated both by the guerrilla forces and the government, the Commission did not take into account the gender perspective and, therefore, it did not address specifically how the violence inflicted by both parties had affected women, yet it is widely known and accepted that sexual violence is often used during armed conflicts as a weapon over women.⁶⁴

Although the initial six months’ period that the Truth Commission had to submit its report to both parties and to the Secretary General of the United Nations was later extended to nine months, it was still, according to Professor Thomas Buergenthal, “not sufficient time do

⁶². Paulina Salas, one of the main characters in the play “The Death and the Maiden”, was the victim of kidnap and torture, including rape, during an authoritarian regime which was under review by a truth commission instituted by the newly democratically elected government. However, since the crime that she suffered was not considered among the most serious perpetrated during the dictatorship, it was neither going to be part of those reported by the truth commission nor the focus of a judicial investigation because the new government had decided not to enact prosecutions. Then, the main questions raised by Paulina during the whole play as a consequence of the decisions adopted by the new government were: what about her own personal good when the argument of national reconciliation is raised? Why is it always the victims the ones “who have to sacrifice, who have to concede when concessions are needed?” In Godwin Phelps, Theresa, *Shattered Voices: Language, Violence and the Work of Truth Commissions*, 5, University of Pennsylvania Press, Pennsylvania 2004.

⁶³. *Id.*

⁶⁴. Cuéllar Martínez, Benjamín, *supra* note 1, at 154.

justice to all the terrible injustices committed by both sides of the conflict in El Salvador”,⁶⁵ although, in fact, that was not the intention of the parties.

During eight exhausting months, the Truth Commission for El Salvador conducted thousands of direct interviews, investigated a series of cases of gross human rights violations assembled statistics which depicted the sad history of the country for twelve years. In those cases in which the Truth Commission “felt it had obtained sufficient information to make a finding, it named the individuals responsible for or complicit in specific acts of violence (including most of the high command of the armed forces, some civilians and judges, and some [guerrilla] leaders)”.⁶⁶

At the end of the nine months, the Truth Commission for El Salvador issued its report documenting thirty two cases which showed that the majority of the violations committed fell into the categories of “extrajudicial executions (55 percent), forced disappearances (21 percent) and torture (21 percent). The responsibility for these violations was distributed among the armed forces of El Salvador (47 percent), the 'security forces' (21 percent), paramilitary groups (17 percent), death squads (7 percent), 'unidentified men in civilian dress' (5 percent) and the [guerrilla forces] (3 percent)”.⁶⁷

Additionally, the commissioners had the mission to recommend a series of legal, political and administrative measures that could be inferred directly from its findings, including those actions designed to thwart the repetition of gross violations of international human rights laws and international humanitarian laws, as well as to assist the society in its transition to national

⁶⁵. Buergenthal, Thomas, *The United Nations Truth Commission for El Salvador* in Kritz, Neil J., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, United States Institute of Peace, United States of America, 2004, 292-325, 294.

⁶⁶. Pokin, Margaret, *The Salvadoran Truth Commission and the Search for Justice*, 15 *Criminal Law Forum*, 2004, 105-124, 111.

⁶⁷. Cuéllar Martínez, Benjamín, *supra* note 7, at 43.

reconciliation.⁶⁸ The Truth Commission therefore included in its report a series of measures which were aimed at (re)building the social tissue that was destroyed by the armed conflict and (re)constructing a culture of democracy which was destroyed by almost sixty years of authoritarian regimes. In particular, they recommended measures that were targeted to address the last three objectives established in the Geneva Agreement which had not been addressed and which required a continuing effort by the new authorities, such as the democratization of the country, the unrestricted respect for human rights and the reunification of the Salvadorian society.

Among the most important measures recommended by the Truth Commission for El Salvador were, first, the institution of lustration process in its public institutions and the banning from public office for those persons whose names were included in the report or who were responsible for the perpetration of the crimes described in it; second, carrying out a thorough reform of its judicial system including the process of election of its authorities; third, the eradication of the structural causes of the armed conflict, particularly a comprehensive reform of the armed forces and the security forces and the investigation of the paramilitary structures; and, finally, the compensation of the victims of the conflict, both materially and morally.

Although initially both sides had committed themselves to follow and to implement the recommendations of the Truth Commission for El Salvador, this commitment was later abandoned and, although some measures were adopted, such as the institution of a national civilian police, the creation of the ombudsman, the passing of time has proved that, in most of the cases, only cosmetic actions were taken. This led the Secretary General of the United Nations to declare, five years later after the signature of the Chapultepec Agreement, that it was “to be regretted, however, that more of the recommendations of the Commission were not heeded by

⁶⁸. Buergenthal, Thomas, *supra* note 65, at 293.

the parties, especially the Government.⁶⁹ Specifically, he stated that a “clear instance of the rejection of the findings of the Commission on the Truth was evident in the approval of a sweeping amnesty law a few days after the publication of the Commission's report. The speed with which it was rushed through the Legislative Assembly was evidence of the lack of political will to investigate and arrive at the truth by judicial means and punish those responsible”.⁷⁰

CHAPTER II

THE RIGHT TO TRUTH WITHIN THE ORGANIZATION OF AMERICAN STATES

1. Origins within the United Nations

Although this chapter intends to focus specifically on the development of the right to truth within the regional system established by the Organization of American States for the protection and the assurance of human rights within the Americas, to better understand its development within this regional system it is necessary to provide a little background about the development of that right at the international level.

⁶⁹. Secretary General of the United Nations, *Assessment of the Peace Process in El Salvador in The Situation in Central America: Procedures for the Establishment of a Firm and Lasting Peace and Progress in Fashioning a Region of Peace, Freedom Democracy and Development*, General Assembly, United Nations, 1997, paragraph 25.

⁷⁰. *Id.*

The right to truth implies “knowing the full and complete truth as to the events that transpired, their specific circumstances and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them”.⁷¹ Moreover, it has also been specified that in the case of forced disappearances, summary executions and other crimes in which the location of the remains of the victims is uncertain, the right to truth entail the disclosure of their fate and whereabouts.⁷²

Among the first occasions in which the right to truth was addressed as such by the Human Rights Committee was during a proceeding conducted against the State of Uruguay, which dealt with the forced disappearance of Elena Quinteros Almeida by military authorities. The individual communication that initiated the proceeding was submitted by the mother of Elena Quinteros Almeida, María del Carmen Almeida de Quinteros, who alleged that her daughter had been the subject of a forced disappearance by state agents and, since that time, she had not been able to obtain any official information about the fate and the whereabouts of her daughter.

In that case, the Human Rights Committee found the State of Uruguay liable for the forced disappearance of Elena Quinteros Almeida and also declared that María del Carmen Almeida de Quinteros had “the right to know what ha[d] happened to her daughter”.⁷³ Additionally, the Committee declared that the “the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and

⁷¹. UN Commission on Human Rights, Study on the Right to Truth, Report of the Office of the United Nations High Commissioner for Human Rights, February 8, 2006, paragraph 59.

⁷². *Id.*

⁷³. Human Rights Committee, María del Carmen Almeida de Quinteros et al. v. Uruguay, Communication No. 107/1981, U.N. Doc. CCPR/C/OP/2 at 138 (1990).

whereabouts”⁷⁴ constituted cruel, inhuman and degrading treatment and, thus, a violation to article 7 of the International Covenant on Civil and Political Rights.⁷⁵

At the beginnings of the twentieth first century, the Commission on Human Rights linked the right to truth to the general obligation that the States have to investigate human rights violations. Therefore, on one hand, the Commission established that the “victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fate”⁷⁶. On the other hand, the Commission declared that every “people have 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”.⁷⁷ Additionally, around the same time, the General Assembly of the United Nations associated the right to truth with the right to an effective remedy and, thus, it declared that victims have the right to “access to relevant information concerning violations and reparation mechanisms”.⁷⁸

With time, the right to truth has achieved both an individual and a collective dimension at an international level, although not yet recognized as such through binding treaties. However, that does not mean that the right to truth is not enforceable at all, but it means that it can be derived from other human rights norms, since it has been acknowledged through binding treaties that State have the obligation to conduct investigations to avoid impunity. In other words, the right to truth can be considered as an emerging right within the international sphere, which

⁷⁴. Id.

⁷⁵. Id.

⁷⁶. Commission on Human Rights, *supra* note 50, Principle 4.

⁷⁷. Commission on Human Rights, *supra* note 50, Principle 2.

⁷⁸. United Nations General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, Principle VII, Resolution 60/147, UN Doc.A/RES/60/147, 2005.

actually does not imply that the right to truth is a new right, but a right that has emerged from “new ways of interpreting norms that have been in the human rights canon all along”,⁷⁹ in order to bring to life and to give essence “to core principles of human rights protection”.⁸⁰ Indeed, as Professor Juan Mendez has affirmed, whether “we call it a right or not, the obligation of the state very honestly to explore every detail of what happened in a legacy of human rights abuses is now so well established that almost nobody denies it anymore”.⁸¹

In conclusion, at an international level, the right to truth has been linked by different bodies to different human rights, such as the right to personal integrity to the relatives of the victims of forced disappearances, the right to an effective remedy and the right to reparation. As a consequence, through a progressive interpretation of well established binding norms, the international bodies have been able to successfully enforce the right to truth as a response to the necessity of the victims to effectively know what happened in their cases.

2. Origins within the Organization of American States

In the Americas, the right to truth or the right to know has been widely and repeatedly addressed by the two supervisory organs under the American Convention on Human Rights and, more recently, by the General Assembly of the Organization of American States. For almost twenty five years, both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have dedicated a large part of its jurisprudence to the recognition and to the development of that right, particularly in response to the practice of forced disappearances that has plagued the region for many years. This right emerged in transitional societies mostly as a necessity to overcome the secrecy in which authoritarian regimes carried

⁷⁹. Méndez, Juan, *supra* note 41, at 479.

⁸⁰. *Id.*

⁸¹. Méndez, Juan, *supra* note 41, at 480 and 481.

out a wide number of atrocities during the course of an armed conflict or throughout the development of a dictatorship. Moreover, it came about as an instrument for the relatives of the disappeared to learn the whereabouts and fate of their loved ones and to untangle a web of denial knitted by the former authoritarian governments.

In order to understand in a more comprehensive way the origins of the right to truth specifically in the Americas, and to be able to trace it subsequently to its actual nature and scope, it is necessary to highlight briefly those resolutions and judgments in which the two supervisory organs of the Organization of American States and its General Assembly referred for the first time to that right.

The right to truth was addressed for the first time in 1986 by the Inter-American Commission on Human Rights in its annual report dealing with the consolidation of democracies that have emerged from a repressive past. In that report, the Commission outlined the problems that incipient democracies had to overcome in light of the heinous crimes committed by previous governments and highlighted the duty of the former to carry out investigations in order to disclose the truth.⁸² The Commission specifically stated in the report that “society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future. Moreover, the family members of the victims are entitled to information as to on what happened to their relatives”.⁸³ It is important to note the inalienable character that was attributed

⁸². Inter-American Commission on Human Rights, *Areas in which steps need to be taken towards full observance of the Human Rights set forth in the American Declaration of the Rights and Duties of Man and the American Convention on Human Rights* in Annual Report of the Inter-American Commission on Human Rights 1985-1986, Chapter 5.

⁸³. *Id.*

by the Commission to the right to truth in the report which implies that this right is not to be subjected to derogations or limitations, no matter the circumstances surrounding it.⁸⁴

Several years later, the Commission explicitly referred to the right to truth in one of its individual reports. The report was based on a case submitted by the relatives of Manuel Stalin Bolaños Quiñonez, who have been forcibly disappeared by agents of the State of Ecuador and, moreover, in the lack of political will of the latter to investigate the crime. Throughout that individual report, the Commission explicitly declared that the victims' next of kin have the right to know the fate and the whereabouts of their loved ones. Furthermore, it affirmed that, in light of that right, the States have the correlative obligation to conduct a thorough investigation, as part of an effective and prompt judicial recourse.

In words of the Commission, in the case of *Manuel Stalin Bolaños Quiñonez*, the State of Ecuador “failed to honor its obligation to provide simple, swift and effective legal recourse to the victim's family, so that their rights might be determined. The family of Manuel Bolaños has the right to know the truth about what happened to him, the circumstances of his detention and death, and to know the location of his remains. This flows from the obligation of the state to use all the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction to identify those responsible”.⁸⁵

Two years later after the resolution adopted by the Commission in the case of *Manuel Stalin Bolaños Quiñonez v. the State of Ecuador*, the Inter-American Court of Human Rights included the right to truth in one of its judgments. Sadly, the individual complaint filed before it by the Commission also revolved around the forced disappearance of another human being, with the slight difference that his disappearance was attributed in that occasion to two agents of the

⁸⁴. UN Commission on Human Rights, Study on the Right to Truth, *supra* note 71, paragraphs 41 and 44.

⁸⁵. Inter-American Commission on Human Rights, Report No. 10/95, Case 10.580, Ecuador, September 12, 1988, paragraph 45.

State of Peru. In this case, the lack of interest by the State to conduct a thorough investigation to resolve the crime was also present, as in the case of *Manuel Stalin Bolaños Quiñonez v. the State of Ecuador*. In its judgment, the Court stated that the relatives of Ernesto Rafael Castillo Páez had “the right to know what happened to him and, if appropriate, where his remains are located. It is therefore incumbent on the State to use all the means at its disposal to satisfy these reasonable expectations”.⁸⁶

Through the above decisions, the two supervisory bodies of the Organization of the American States gave birth to the right to truth, and began to provide it with substantive content. These decisions are significant because the right to truth is not enshrined as such in the American Convention on Human Rights and, therefore, as well as in the international level, it had to be implied from the rights already included and given substantive content through the jurisprudence drafted by both bodies. Indeed, when the Court mentioned the right to truth in its individual dimension within the judgment adopted in the case of *Ernesto Rafael Castillo Páez v. the State of Peru*, it declared that although that right did not exist in the American Convention as such, it was a concept that was being developed in “doctrine and case law”⁸⁷ at that time.

Within the past five years, the General Assembly of the Organization of American States has also adopted several resolutions in which it has acknowledged the emergence of the right to truth within the international sphere. In them, the General Assembly has stressed that “the regional community should make a commitment to recognize the right of victims of gross violations of human rights and serious violations of international humanitarian law, and their families and society as a whole, to know the truth regarding such violations to the fullest extent

⁸⁶. Inter-American Court of Human Rights, Case of Castillo Páez v. Peru, Judgment of November 3, 1997, paragraph 90.

⁸⁷. Inter-American Court of Human Rights, *supra* note 86, paragraph 86.

practicable”.⁸⁸ Furthermore, it has stressed the importance for States “to provide effective mechanisms for society as a whole and, in particular, for relatives of the victims, to learn the truth regarding gross violations of human rights and serious violations of international humanitarian laws”.⁸⁹

More significant has been the public recognition by the General Assembly of the anguish that the victims’ next of kin have had to endure in cases of forced disappearances. Indeed, through those resolutions, a regional political body composed of many States has finally acknowledged that the situation of uncertainty that surrounds the fate of those disappeared causes extreme suffering to their relatives, who are also deprived of the right to mourn. To respond to the claims of the victims’ next of kin, to deter perpetrators from future human rights violations and, finally, to promote accountability in the region, the General Assembly has urged its members through those resolutions to adopt all the mechanisms and institutions that are needed to disclose the information that is under its custody related to human rights violations and to give effect to that right by its enforceability at a domestic level.⁹⁰

In conclusion, the birth and rise of the right to truth has been a response by the Organization of American States to the perverse practices developed by authoritarian regimes in Latin America, which resulted in the abduction and subsequent disappearances of fellow human beings. As a consequence, for all the aforementioned considerations, it is possible to affirm that the enforceability of the right to truth through judicial and non judicial mechanism has become

⁸⁸. General Assembly of the Organization of American States, Resolution AG/RES 2175 (XXXVI-O/06), Right to the Truth, adopted at the fourth plenary session held on June 6, 2006. See also, General Assembly of the Organization of American States, Resolution AG/RES 2267 (XXXVII-O/07), Right to the Truth, adopted at the fourth plenary session held on June 5, 2007. General Assembly of the Organization of American States, Resolution AG/RES 2406 (XXXVIII-O/08), Right to the Truth, adopted at the fourth plenary session held on June 3, 2008. General Assembly of the Organization of American States, Resolution AG/RES 2509 (XXXIX-O/09), Right to the Truth, adopted at the fourth plenary session held on June 4, 2009.

⁸⁹. Id.

⁹⁰. Id.

recognized as an obligation that transitional governments must fulfill. Indeed, in order for post conflict societies to come to terms with their past, it is essential to know what happened, particularly in cases of forced disappearances and extrajudicial killings, respecting, on one hand, the right to mourn that the relatives of the victims have, and on the other hand, the necessity of society to have a holistic account of past abuses.

3. Legal framework of the right to truth within the American Convention on Human Rights

As previously stated, despite the fact that the right to truth is not explicitly acknowledged in the American Convention on Human Rights, the two supervisory organs of the Organization of American States have declared that that right is subsumed in several dispositions enshrined within that corpus of law and, moreover, they have provided it with substantive content through a wide variety of resolutions on the subject. In a report dealing with forced disappearances and extrajudicial killings in Chile, the Commission declared that, pursuant to the rights and freedoms enshrined in the American Convention on Human Rights, the States had the obligation to protect and to ensure the right of the families of the victims and of society as a whole to “know the truth of the facts connected with the serious violations to human rights which occurred in Chile, as well as the identity of those who committed them”.⁹¹ The Court has similarly acknowledged that the right to the truth is “subsumed in the right of the victim or his next of kin to obtain

⁹¹. Inter-American Commission on Human Rights, *supra* note 108, paragraph 85.

clarification of the events that violated human rights and the corresponding responsibilities from the competent organs of the State, through the investigation and prosecution”.⁹²

Such obligations are primarily a consequence from the “general duty of the States to respect and guarantee human rights, the right to a hearing by a competent, independent and impartial tribunal, the right to an effective remedy and judicial protection and the right to seek information”.⁹³ Moreover, it derives from the right to humane treatment and the right to reparation for the harm caused, according to both supervisory organs.

5.1 Article 5⁹⁴ of the American Convention on Human Rights

Recalling the words of United Nations Working Group on Enforced or Involuntary Disappearances, the Commission has stated that, as a direct consequence of the lack of information of the fate and the whereabouts of their loved ones, the relatives of the victims oscillate from hope to despair and experience extreme distress and sorrow for many years and, sometimes, endlessly.⁹⁵ The Commission has further stated that in cases of forced disappearances, the victims’ next of kin “experience slow mental torture, not knowing whether

⁹². Inter-American Court of Human Rights, Case of Barrios Altos v. Peru, Judgment of March 14, 2001, paragraph 48.

⁹³. UN Commission on Human Rights, supra note 71, paragraph 29.

⁹⁴. Article 5.1 “Every person has the right to have his physical, mental, and moral integrity respected. 2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person. 3. Punishment shall not be extended to any person other than the criminal. 4. Accused persons shall, save in exceptional circumstances, be segregated from convicted persons, and shall be subject to separate treatment appropriate to their status as unconvicted persons. 5. Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors. 6. Punishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners. In Organization of American States, American Convention on Human Rights, San José, Costa Rica, 22 November 1969.

⁹⁵. Inter-American Commission on Human Rights, Report No. 101/01, Case 10.247, Peru, October 11, 2001, paragraph 178.

the victim is still alive and, if so, where he or she is being held, under what conditions, and in what state of health”⁹⁶.

The Court has affirmed in several of its judgments that the denial of the right to truth constitutes a cruel, inhumane and degrading treatment for the relatives of the victims of forced disappearances⁹⁷ and extrajudicial killings⁹⁸ and, thus, a violation of article 5 of the American Convention on Human Rights. According to the Court, this cruel, inhumane and degrading treatment is a consequence of the anguish that the relatives of the victims have to endure while wondering about the fate of their loved ones, and about the clarification of their whereabouts.

Through a judgment against the State of Guatemala, the Court explicitly declared that the secrecy over the whereabouts of Efraín Bámaca Velásquez “caused his next of kin the profound anguish mentioned”⁹⁹ by the Human Rights Committee several years later in the case submitted before the latter by María del Carmen Almeida de Quinteros against the State of Uruguay. Indeed, in the case of *Bámaca Velásquez v. the State of Guatemala*, the Court declared that the obstacles faced by his relatives to “learn the truth of the facts and, above all, the concealment of the corpse of Bámaca Velásquez and the obstacles to the attempted exhumation procedures that various public authorities created”¹⁰⁰ constituted cruel, inhuman and degrading treatment on the terms established in the American Convention on Human Rights.

This jurisprudence was reaffirmed years later through the judgment provided by the Court in the case of *Myrna Mack Chang v. the State of Guatemala*. In that case, the Court

⁹⁶. Id.

⁹⁷. Inter-American Court of Human Rights, Case of Goiburú et al v. Paraguay, Judgment of September 22, 2006, paragraph 100.

⁹⁸. Inter-American Court of Human Rights, *Moiwana Village V. Suriname*, Judgment of June 15, 2005, paragraph 100.

⁹⁹. Inter-American Court of Human Rights, Case of Bámaca Velásquez v. Guatemala, Judgment of November 25, 2000, paragraph 165.

¹⁰⁰. Inter-American Court of Human Rights, Case of Bámaca Velásquez v. Guatemala, Judgment of November 25, 2000, paragraph 165.

declared that the relatives of the victim had been subjected to inhumane treatment by “the long time that has passed without elucidation of the facts”.¹⁰¹ In words of the Court, that situation has caused “constant anguish among the next of kin of the victim, together with feelings of frustration and powerlessness”.¹⁰²

One of the most important outcomes that emerged from the connection between the right to truth and the right to a humane treatment was the confirmation of the inalienability and the inderogability of the right to truth. Indeed, since the right to truth has been connected to a right which cannot be derogated under any circumstance, such as the right to a humane treatment, it is also possible to conclude that the right to truth also cannot be derogated.¹⁰³ In the words of the Commission on Human Rights, since the right to truth is closely related to other human rights, it “should be considered as a non-derogable right and not be subject to limitations”.¹⁰⁴

5.2 Articles 1.1¹⁰⁵, 8.1¹⁰⁶ and 25.1¹⁰⁷ of the American Convention on Human Rights

¹⁰¹. Inter-American Court of Human Rights, Case of Myrna Mack Chang v. Guatemala, Judgment of November 25, 2003, paragraph 232.

¹⁰². *Id.*

¹⁰³. UN Commission on Human Rights, *supra* note 71, paragraph 44.

¹⁰⁴. UN Commission on Human Rights, *supra* note 71, summary.

¹⁰⁵. Article 1.1 “The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition”. In Organization of American States, *supra* note 94.

¹⁰⁶. Article 8.1 “Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature”. In Organization of American States, *supra* note 94.

¹⁰⁷. Article 25.1 “Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the

Both the Commission¹⁰⁸ and the Court¹⁰⁹ have agreed that, based on the American Convention on Human Rights, the Contracting Parties have the duty to provide effective remedies to the victims of human rights violations. This duty derives from the States obligation to ensure the free and full exercise of the rights enshrined in the American Convention on Human Rights to all the people under its jurisdiction. With respect to the right to truth, this implies that the Contracting Parties to the American Convention on Human Rights have the obligation to conduct thorough investigations to reveal what happened to those persons who were subjected to gross violations of international human rights laws and to serious violations of international humanitarian laws, where their remains are in case they are missing or presumably dead, who perpetrated those crimes and who the masterminds who planned it were.¹¹⁰ In order to fulfill adequately this obligation, the Court has stated that the investigation “is not to be undertaken by the State as a mere formality condemned beforehand to be unsuccessful or as a mere reaction to private interests”.¹¹¹ In other words, in order to comply with the terms of the American Convention on Human Rights, States must conduct its investigations with due diligence and *ex officio*.

This means, on one hand, that the States must take all the necessary measures to obtain the required results and must conduct the investigation within a reasonable period of time. On the other hand, it means that the investigation must be carried out independently of the procedural

constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. In Organization of American States, *supra* note 94.

¹⁰⁸. Inter-American Commission on Human Rights, Report No. 10/95, Case 10.580, Ecuador, September 12, 1988, paragraph 47.

¹⁰⁹. Inter-American Court of Human Rights, Case of the Pueblo Bello Massacre v. Colombia, Judgment of January 31, 2006, paragraph 169.

¹¹⁰. Inter-American Court of Human Rights, Case of Goiburú et al v. Paraguay, Merits, Judgment of September 22, 2006.

¹¹¹. Inter-American Court of Human Rights, Case of Zambrano Vélez et al v. Ecuador, Judgment of July 4, 2007, paragraph 120.

initiative of the victims or their relatives and, moreover, without relying solely on the victims or their relatives to obtain evidence.¹¹²

As a consequence of the obligations that arise from the articles already mentioned, both the Commission and the Court have dealt with situations in which investigations are hampered by the existence of amnesty laws. Those laws are usually enacted to pardon the perpetrators, without even the necessity for them to disclose the truth or to publicly acknowledge their abuses. In those cases, the Commission has affirmed that “whenever amnesties are being enforced, States must adopt the measures necessary to clarify the facts and identify those responsible for the human rights violations that occurred during the *de facto* period. The State has the obligation to investigate all violations that have been committed within its jurisdiction, for the purpose of identifying the persons responsible”.¹¹³ Moreover, it has stated that blanket amnesties eliminate the “possibility of undertaking any further judicial investigations through the courts to establish the truth and it denied the right of the victims, their relatives and society as a whole to know the truth”¹¹⁴.

Following these steps, the Court has declared that self amnesties “precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation”.¹¹⁵ As a consequence, it has declared that “the States cannot neglect their duty to investigate, identify, and punish those

¹¹². Inter-American Court of Human Rights, Case of the Serrano-Cruz Sisters v. El Salvador, Judgment of March 1, 2005, paragraphs 52-107.

¹¹³. Inter-American Commission on Human Rights, Report No. 25/98, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.657, 11.675 and 11.705, Chile, April 7, 1998, paragraph 91.

¹¹⁴. Inter-American Commission on Human Rights, Report No. 136/99, Case 10.488, El Salvador, December 22, 1999, paragraph 232.

¹¹⁵. Inter-American Court of Human Rights, Case of Barrios Altos v. Peru, Judgment of March 14, 2001, paragraph 43.

persons responsible for crimes against humanity by enforcing amnesty laws or any other similar domestic provisions”.¹¹⁶

Finally, in those cases where truth commissions have been established to clarify the facts about past human rights abuses, the Commission has argued that, although they actually can contribute to build a collective history of a particular society in the aftermath of a conflict, those mechanisms cannot be considered as substitutes for the judicial truth. This is due to the fact that, as the Commission has stated, under the article 1.1 of the American Convention on Human Rights, the duty to investigate human rights violations perpetrated within its jurisdiction, to identify those responsible for its commission and to punish them belongs exclusively to the State and, primarily, to its judicial system. Thus, because that power cannot be delegated, truth commissions cannot be understood as substitutes for prosecutions.¹¹⁷

Following this criteria, the Court has said that truth commissions cannot be understood, in any way, as “a substitute to the obligation of the State to ensure the judicial determination of individual and state responsibilities through the corresponding jurisdictional means, or as a substitute to the determination, by this Court, of any international responsibility”.¹¹⁸ Indeed, in the words of the Court, both truth commission and trials “are about determinations of the truth which are complementary between themselves, since they all have their own meaning and scope, as well as particular potentialities and limits, which depend on the context in which they take place and on the cases and particular circumstances object of their analysis”.¹¹⁹ In other words, although truth commissions can help to restore the social tissue in a country by developing a

¹¹⁶. Inter-American Court of Human Rights, Case of Almonacid Arellano et al v. Peru, Judgment of September 26, 2006, paragraph 114.

¹¹⁷. Inter-American Commission on Human Rights, Report No. 136/99, Case 10.488, El Salvador, December 22, 1999, paragraph 230.

¹¹⁸. Inter-American Court of Human Rights, Case of Zambrano Vélez et al v. Ecuador, Judgment of July 4, 2007, paragraph 128.

¹¹⁹. *Id.*

“global”¹²⁰ truth about its recent history plagued by brutality, those bodies are not intended to replace trials in any way and by no mean are a substitute to the individual truth that victims and their relatives deserve to hear.

Indeed, as the Commission has declared, despite the important and enormous contributions that truth commissions can make to transitional processes and to incipient democracies, their value “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”.¹²¹

5.3 Article 13¹²² of the American Convention on Human Rights

Since the Commission first dealt with the right to truth in one of its country reports, it stated that, in order for States to fulfill the obligations that emanated from that right, both freedom of expression, access to information and prompt legal recourses were necessary. Thus, since its origins, the right to truth has been linked with article 13 of the American Convention on Human Rights.¹²³

¹²⁰. A “global truth” refers to a history shared by all the members of a society within a country, which enables them to speak a common language about the events that occurred in a recent past plagued with gross human rights violations. In Zalaquett, José, *La Reconstrucción de la Unidad Nacional y el Legado de Violaciones de los Derechos Humanos*. See webpage: http://www.cd.h.uchile.cl/articulos/Zalaquett/Reconstr_Unidad_Nacional_Perspectivas_.pdf

¹²¹. Inter-American Commission on Human Rights, Report No. 136/99, Case 10.488, El Salvador, December 22, 1999, paragraph 229.

¹²². Article 13.1 “Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice”. In Organization of American States, *supra* note 94.

¹²³. Inter-American Commission on Human Rights, *Areas in which steps need to be taken towards full observance of the Human Rights set forth in the American Declaration of the Rights and Duties of Man and the American*

However, twelve years had to pass by for the Commission to explicitly acknowledge the connection of the right to truth with the rights to freedom of expression and access to information in one of its individual reports. In it, the Commission declared that both individuals and society have the right to know the truth about the facts associated with human rights violations and that the State has the duty to provide it. Such an obligation, according to the Commission, was a consequence of articles 1.1, 8, 25 and 13 of the Convention.¹²⁴

A year later, the Commission reiterated the close relationship that it considered to exist between the right to truth and the right to “seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice”.¹²⁵ The Commission stated that “the right to know the truth with respect to grave violations of human rights, as well as the right to know the identity of those who participated in them, is a duty that all States Parties to the American Convention must carry out, in respect of both the victims' next-of-kin and society in general. These obligations arise fundamentally from the provisions of Articles 1(1), 8(1), 25, and 13 of the American Convention”.¹²⁶

Unlike the Commission, the Court has not deemed necessary to declare explicitly that a violation of the right to truth had also been a violation of the rights of freedom of expression and access to information. Thus, in those cases in which the Commission has invoked before the Court a violation of the right to truth as a result of the inability to access to information in cases

Convention on Human Rights in Annual Report of the Inter-American Commission on Human Rights 1985-1986, Chapter 5.

¹²⁴. Inter-American Commission on Human Rights, Report No. 25/98, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.657, 11.675 and 11.705, Chile, April 7, 1998, paragraph 85.

¹²⁵. Organization of American States, Article 13 of the American Convention on Human Rights, San José, Costa Rica, 22 November 1969.

¹²⁶. Inter-American Commission on Human Rights, Report N° 37/00, Case 11.481, El Salvador, April 13, 2000, paragraph 142.

of forced disappearances and extrajudicial killings, the Court has held that, although indeed there had been a violation of the right to truth, that situation had been a consequence of the lack of judicial guarantees and judicial protection, and not as an effect of the violation to the right of access to information.¹²⁷ For instance in the case of *Barrios Altos v. the State of Peru*, the Court has stated that the right to truth was “subsumed in the right of the victim or his next of kin to obtain clarification of the events that violated human rights and the corresponding responsibilities from the competent organs of the State, through the investigation and prosecution that are established in Articles 8 and 25 of the Convention”.¹²⁸

The right of access to information, according to the latest annual report released by the Office of the Special Rapporteur for Freedom of Expression for the Americas, includes “a positive obligation for the State to allow its citizens access to information under its control”¹²⁹ and to “to produce and preserve certain information”.¹³⁰ Following this criterion, according to the Commission, the State “has the obligation to produce and preserve archives or registries of police detentions. Effectively, the duty to produce and preserve archives on police detentions is essential for fulfilling the right of access to information of detained individuals and their families. [Indeed] [a]ltering or destroying this kind of information is usually accompanied by State silence on the whereabouts of a person arrested by its agents. It generates fertile ground for impunity and for the propagation of the worst kind of crimes”.¹³¹

¹²⁷. Inter-American Court of Human Rights, Case of Barrios Altos v. Peru, Judgment of March 14, 2001, paragraph 48. See also, Inter-American Court of Human Rights, Case of Bámaca Velásquez v. Guatemala, Judgment of November 25, 2000, paragraph 201.

¹²⁸. Inter-American Court of Human Rights, Case of Barrios Altos v. Peru, Judgment of March 14, 2001, paragraph 48.

¹²⁹. Inter-American Commission on Human Rights, *The Right of Access to Information*, Report of the Special Rapporteur for Freedom of Expression, Annual Report of the Inter-American Commission on Human Rights, Washington D.C. 2009, paragraph 2.

¹³⁰. Inter-American Commission on Human Rights, *supra* note 129, paragraph 74.

¹³¹. *Id.*

In cases of forced disappearances and extrajudicial killings, the respect and the assurance of the right of access to information achieves a particular relevance for the relatives of the victims, since accessing to the information held by state agents can help them to discover the fate and the whereabouts of their loved ones. In fact, based on what it has been said about the right to truth, “the family members of victims of serious human rights violations, have the right to know the truth about such violations”.¹³² This imposes on the States the positive to “guarantee individuals the right of access to State archives that hold information on gross violations of human rights”,¹³³ which includes not only the processed data, but also the raw data.¹³⁴ Thus, States cannot shield themselves from this obligation by arguing that they do not have organized information about a specific case on a forced disappearance or on an extrajudicial killing.

The right to access to information, as well as the right to freedom of expression is not an absolute right and, thus, is subject to limitations.¹³⁵ However, in order to fully exercise the right of access to information, the Court has declared that this right must be governed by the principle of maximum disclosure. Under this principle it is presumed that, at least in the beginning, all information is accessible and, therefore, it can only be restricted in exceptional cases which must be established beforehand through a law and solely on the basis of “a real and imminent danger that threatens national security in democratic societies”.¹³⁶ This consensus has been reached in order to avoid situations of arbitrariness by the authorities who have power over the information requested¹³⁷.

¹³². Inter-American Court of Human Rights, Case of Gómez-Palomino v. Peru, Judgment of November 22, 2005, paragraph 78.

¹³³. Inter-American Commission on Human Rights, *supra* note 129, paragraph 80.

¹³⁴. Inter-American Commission on Human Rights, *supra* note 129, paragraph 81.

¹³⁵. Inter-American Commission on Human Rights, *supra* note 129, paragraph 45.

¹³⁶. Inter-American Commission on Human Rights, Inter-American Declaration of Principles on Freedom of Expression, Principle 4, approved during its 108th Session.

¹³⁷. Inter-American Court on Human Rights, Case of Claude-Reyes et al v. Chile, Judgment of September 19, 2006, paragraph 98.

With regards to the limitations on the right of access to information, it is important to clarify that, although under some circumstances it becomes necessary to impose certain restrictions on the exercise of that right, but those restrictions must be explicitly aimed at satisfying a compelling public interest. Indeed, all limitations to the right of access to information “should be prescribed expressly by law, have a legitimate aim, and be necessary and proportionate in a democratic society”.¹³⁸ In other words, if there are other ways to achieve the desired objective, the authorities must choose those that least restricts the right in question. Indeed, as the Court has stated, for a restriction to be compatible with the American Convention on Human Rights, it “must be proportionate to the legitimate interest that justifies it and must be limited to what is strictly necessary to achieve that objective. It should interfere as little as possible with effective exercise of the right”.¹³⁹

Under these terms, it is essential that the confidentiality or secrecy of information is determined by law.¹⁴⁰ However, in those cases in which judicial and administrative proceedings are being conducted in order to clarify situations dealing with gross and serious human rights violations, the authorities who are requested to provide information cannot invoke a limitation to the right of access to information to refuse to themselves to provide information that may lead to the clarification of the facts.¹⁴¹ In the words of the Court, in cases of human rights violations, “the State authorities cannot resort to mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information

¹³⁸. Inter-American Commission on Human Rights, *supra* note 129, paragraph 79.

¹³⁹. Inter-American Court on Human Rights, *Case of Herrera-Ulloa v. Costa Rica*, Judgment of July 2, 2004, paragraph 123.

¹⁴⁰. Inter-American Court on Human Rights, *Case of Claude-Reyes et al v. Chile*, Judgment of September 19, 2006, paragraph 99.

¹⁴¹. Inter-American Commission on Human Rights, *supra* note 129, paragraph 59.

required by the judicial or administrative authorities in charge of the ongoing investigation or proceeding”¹⁴².

Moreover, in those cases in which the information requested to support an investigation about human rights abuses is, actually, in the hands of the authorities who are being subjected to an inquiry, those authorities cannot be released from the obligation to provide the information asked, based on confidentiality. In these cases, according to the Court, public authorities “cannot shield themselves behind the protective cloak of official secret to avoid or obstruct the investigation of illegal acts ascribed to the members of its own bodies. In cases of human rights violations, when the judicial bodies are attempting to elucidate the facts and to try and to punish those responsible for said violations, resorting to official secret with respect to submission of the information required by the judiciary”¹⁴³ only may serve to perpetuate impunity.

Finally, according to the last annual report issued by the Special Rapporteur for Freedom of Expression for the Americas, when there is indeed a legitimate reason to limit the access to the information that it is in possession of the State, “the person who requests the access must receive a reasoned response that provides the specific reasons for which access is denied”¹⁴⁴. Moreover, the person must have access to an effective and adequate remedy “that allows the challenging of decisions of public officials that deny the right of access to specific information or simply neglect to answer the request”¹⁴⁵. By virtue of the obligation to provide a reasoned response, the State must provide sufficient legal and factual arguments supporting its decision, in order to demonstrate that it was neither discretionary nor arbitrary. The failure to provide these reasons

¹⁴². Inter-American Court of Human Rights, Case of Myrna Mack Chang v. Guatemala, Judgment of November 25, 2003, paragraph 180.

¹⁴³. Inter-American Court of Human Rights, Case of Myrna Mack Chang v. Guatemala, Judgment of November 25, 2003, paragraph 181.

¹⁴⁴. Inter-American Commission on Human Rights, *supra* note 129, paragraph 55.

¹⁴⁵. Inter-American Commission on Human Rights, *supra* note 129, paragraph 29.

would violate not only the right of access to information, but also the right to due process.¹⁴⁶

Under the second obligation, the State must also create a legal recourse that allows those exercising the right of access to information to appeal a decision that might be contrary to their interests. Thus, the State must guarantee that there is a simple, quick and effective means of appeal¹⁴⁷ to decide if the right of access to information was violated and which is the authority competent to respond to the claim. In fact, in the words of the Court, in those situations that a “punishable fact is being investigated, the decision to define the information as secret and to refuse to submit it can never depend exclusively on a State body whose members are deemed responsible for committing the illegal act”.¹⁴⁸

5.2 Article 25.2¹⁴⁹ of the American Convention on Human Rights

The right to truth has also been derived from the right to reparation, particularly to its manifestation as a measure of satisfaction,¹⁵⁰ since, in order to comply with that measure, States must verify the facts and publicly disclose the full truth. However, “despite the link between

¹⁴⁶. Inter-American Commission on Human Rights, *supra* note 129, paragraph 55.

¹⁴⁷. Inter-American Commission on Human Rights, *supra* note 129, paragraph 29.

¹⁴⁸. Inter-American Court of Human Rights, *Case of Myrna Mack Chang v. Guatemala*, Judgment of November 25, 2003, paragraph 181.

¹⁴⁹. Article 25.2 “The States Parties undertake: a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; b. to develop the possibilities of judicial remedy; and c. to ensure that the competent authorities shall enforce such remedies when granted. In Organization of American States, *supra* note 94.

¹⁵⁰. “In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should, as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation [...] which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition”. United Nations’ General Assembly, *supra* note 78, principle IX

them, these two rights are distinct because the object of the right to truth is to shed light on the facts and identify those individually responsible”.¹⁵¹

The Commission has linked the right to truth to the “right to compensation for human rights violations, in terms of providing satisfaction and ensuring that there is no repetition”¹⁵². In order to fulfill both dimensions of the right to truth, the Commission has addressed the right to reparation from an individual and from a collective level.

At an individual level, the Commission has recalled the jurisprudence of the Human Rights Committee and has declared that “the duty to compensate for damages cannot be satisfied merely by offering money to the victim’s family. The uncertainty in which those people find themselves must be first cleared up.”¹⁵³ At a collective level, the Commission has affirmed that, as an important part of “the right to compensation for human rights violations, in terms of providing satisfaction and ensuring there is no repetition, is the right of any person, and of society in general, to know the full, complete and public truth about the events that have occurred, the specific circumstances surrounding them, and those who participated in them. Society’s right to know all about its past must be seen not only as a means of ensuring compensation and clarification of the facts, but as a means of preventing future violations”.¹⁵⁴

In its judgments, the Court has also acknowledged the connection that exists between the right to truth and the right to reparation. In the words of the Court, when the “right to the truth is recognized and exercised in a specific situation, it constitutes an important measure of

¹⁵¹. UN Human Rights Council, Right to Truth, Report of the Office of the United Nations High Commissioner for Human Rights, June 7, 2007, paragraph 31.

¹⁵². Inter-American Commission on Human Rights, Report No. 136/99, Case 10.488, El Salvador, December 22, 1999, paragraph 228.

¹⁵³. Inter-American Commission on Human Rights, Report No. 136/99, Case 10.488, El Salvador, December 22, 1999, paragraph 227.

¹⁵⁴. Inter-American Commission on Human Rights, Report No. 136/99, Case 10.488, El Salvador, December 22, 1999, paragraph 228.

reparation, and is a reasonable expectation of the victims that the State must satisfy”.¹⁵⁵ Consequently, as a measure of satisfaction, the Court has imposed upon the States the obligation to conduct an exhaustive judicial investigation, within a reasonable time, in order to clarify the facts and to identify those who perpetrated the violations and those who were responsible for giving the commands to execute them. Moreover, in those cases in which the victims were subjected to forced disappearances or extrajudicial killings and their remains are still missing, the Court has obliged the States to locate, identify and provide a proper burial to the victims.¹⁵⁶

Additionally, the Court has ordered the States to publicize the results of the proceedings, in order to allow society as a whole to know the truth about human rights violations,¹⁵⁷ but as a remedial measure and not as substantive right. Certainly, about this issue, it is important to highlight that the Court has only recognized, so far, a substantive right to truth for the victims and their relatives and not for the society as a whole. However, that situation does not impede the Court to provide remedial measures, as part of the right to reparation, that include society as a whole. Finally, it has instructed the States to publicly acknowledge its responsibility in the commission of the atrocities and to publicly apologize to the victims and to their relatives.¹⁵⁸

It is important to conclude that all those measures can help the victims and their relatives to regain the dignity that it was brutally stolen from them by the State or with its acquiescence. Moreover, it can help to heal their wounds and to ignite a personal process that will probably allow them to forgive, but not to forget.

¹⁵⁵. Inter-American Court of Human Rights, Case of the Pueblo Bello Massacre v. Colombia, Judgment of January 31, 2006, paragraph 266.

¹⁵⁶. Inter-American Court of Human Rights, Case of the Pueblo Bello Massacre v. Colombia, Judgment of January 31, 2006, Number XII, Reparations.

¹⁵⁷. *Id.*

¹⁵⁸. Inter-American Court of Human Rights, Case of the Pueblo Bello Massacre v. Colombia, Judgment of January 31, 2006, Number XII, Reparations.

Furthermore, those measures can allow people within the same country to speak in a common language about the atrocities endured by several sectors of the population through many years. Additionally, it can help to avoid contradictory versions of the past that could lead to the resurgence of violence or to the propagation and perpetuation of resentments. Finally, it can contribute to (re)construct the social tissue that divided the society during the civil war.

4. The dimensions and the scope of the right to truth within the Organization of American States

After briefly reviewing the provisions which have been extensively interpreted both by the Commission and by the Court to make the right to truth a part of the emerging norms that are needed to effectively ensure and protect core human rights, it is necessary to summarize the dimensions and the scope that both bodies have granted to the right to truth through its decisions and judgments.

4.1 The dimensions

The Commission has recognized that the right to truth has both individual and collective elements. For instance, the Commission has declared that the right to truth “is 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”.¹⁵⁹ The Court, on the other hand, only has explicitly acknowledged the individual dimension of the right to truth and, thus, it

¹⁵⁹. Inter-American Commission on Human Rights, Report No. 136/99, Case 10.488, El Salvador, December 22, 1999, paragraph 224.

has stated that that right entitles the victims and their relatives to “obtain clarification of the facts relating to the violations and the corresponding responsibilities from the competent State organs, through investigation and prosecution”.¹⁶⁰

Nevertheless, in the words of Professor Douglas Cassel, without “articulating a general right of society to know the truth, the Court has nonetheless in practice, if not entirely in doctrine, gone far to require states both to find and to make known the truth, not only to victims and families in the case at hand, but to society as well”.¹⁶¹ Yet, that does not mean, in any way, the recognition of a societal dimension of the right to truth. On the contrary, the Court has affirmed that “there is no societal right to truth, only a right of victims and families”.¹⁶²

Finally, as stated above, since the past five years, the General Assembly has stressed that “the regional community should make a commitment to recognize the right of victims of gross violations of human rights and serious violations of international humanitarian law, and their families and society as a whole, to know the truth regarding such violations to the fullest extent practicable”.¹⁶³ Furthermore, it has stressed the importance for States “to provide effective mechanisms for society as a whole and, in particular, for relatives of the victims, to learn the truth regarding gross violations of human rights and serious violations of international humanitarian laws”.¹⁶⁴

4.2. The scope

¹⁶⁰. Inter-American Court of Human Rights, Case of *Bámaca Velásquez v. Guatemala*, Judgment of November 25, 2000, paragraph 201.

¹⁶¹. Cassel, Douglas, *The Inter-American Court of Human Rights*, in *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in America Latina*, 151-166, 161, Due Process of Law Foundation, Washington D.C. 2007.

¹⁶². *Id.*

¹⁶³. General Assembly of the Organization of American States, *supra* note 89.

¹⁶⁴. *Id.*

In its beginnings, the right to truth was specifically linked to forced disappearances, in order to enable the relatives of the victims to obtain information about the fate and the whereabouts of those who have been subjected to those heinous crimes. However, as this right evolved over the years, it was applied to wider categories of gross violations of international human rights law and serious violations of international humanitarian law, particularly forced disappearances, extrajudicial killings and torture.¹⁶⁵

As a consequence of its development, the content of the right to truth was also extended to other circumstances beyond discovery of what had happened to those persons who had been disappeared. Thus, in words of the Human Rights Council, the material scope of the right to truth was expanded to seek and obtain information about the “causes leading to the person’s victimization; the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law; the progress and results of the investigation; the circumstances and reasons for the perpetration of crimes under international law and gross human rights violations; the circumstances in which violations took place; in the event of death, missing or enforced disappearance, the fate and the whereabouts of the victims; and the identity of perpetrators”.¹⁶⁶

The disclosure of the identity of the perpetrators as an element of the right to truth represents several difficulties within truth telling processes. Problems arise particularly in those cases in which guarantees of due process of law and the principle of presumption of innocence of the alleged perpetrators are considered. Undeniably, “truth commissions are not judicial bodies, and those commissions that name names take pains to reiterate this fact in their report, thus attempting to distinguish between a legal judgment and a statement of opinion, however

¹⁶⁵. UN Commission on Human Rights, *supra* note 71, at paragraph 33.

¹⁶⁶. UN Commission on Human Rights, *supra* note 71, at paragraph 38.

authoritative that opinion may be. The publication of a person's name, regardless, is popularly understood to indicate their guilt".¹⁶⁷

When the identity of the perpetrators is revealed as a consequence of a judicial mechanism, in which the perpetrators have the opportunity to submit their allegations and to present their defense, the attribution of responsibility is usually not questioned. A different situation arises when the identity of the perpetrators is exposed by truth commissions or by commissions of inquiry in which the guarantees of due process of law and the principle of presumption of innocence are not always applied. In the words of Professor José Zalaquett, to "name culprits who had not defended themselves and were not obligated to do so would have been the moral equivalent to convicting someone without due process. This would have in contradiction with the spirit, if not the letter, of the rule of law and human rights principles".¹⁶⁸

In those countries in which no further measures are adopted to investigate, prosecute and punish those responsible for gross violations of international human rights laws and serious abuses of international humanitarian laws, naming names can help victims to achieve partial justice. For instance, in El Salvador, although a blanket amnesty was enacted five days after the report of the Truth Commission was released, by "naming names, it imposed the moral punishment of exposure on the perpetrators. By the same token, it provided the moral redress of public vindication for the previously maligned victims".¹⁶⁹ This argument is also supported by Professor Juan Méndez, who has suggested that "if the truth commission is to be the only vehicle

¹⁶⁷. Hayner, Priscilla B., *supra* note 48 at 648.

¹⁶⁸. *Id.*

¹⁶⁹. Cassel, Douglass, *International Truth Commissions and Justice*, in Kritiz, Neil J., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, United States Institute of Peace, United States of America, 2004, 326.

to address impunity, names should be included in the interests of making the full truth known”.¹⁷⁰

In the Americas, both the Commission the Court have stated that, in fulfillment of the right to truth, names must be named. About that issue, the Commission has declared that the all persons have the right “to know the full, complete, and public truth as to the events transpired, their specific circumstances, and who participated in them is part of the right to reparation for human rights violations”.¹⁷¹ On the other hand, the Court has affirmed that, through several of its judgments, it “has repeatedly referred to the right of the next of kin of the victims to know what happened and who the agents of the State responsible for the facts were”.¹⁷²

In those cases in which the identity of the perpetrators is revealed by truth commissions or by commission of inquiry, their experience has demonstrated that the inclusion of the version of the perpetrators account can help to overcome those types of criticisms. For instance, the “Secretariat for Human Rights in the Ministry of Justice of Argentina, depository for the archives of disappeared persons where those accused of being responsible for illegal repression are held, decided that any person whose reputation is affected in the archives could include their version of events in the records.”¹⁷³ Likewise, the Truth Commission for El Salvador “adopted strict criteria based on the degree of reliability of evidence”.¹⁷⁴ Indeed, when names were named, the Truth Commission for El Salvador “sought to guarantee the reliability of its evidence by verifying, substantiating, and reviewing all statements it received. According to the Commission,

¹⁷⁰. Popkin, Margaret, *The Salvadoran Truth Commission and the Search for Justice*, Criminal Law Forum, Springer Netherlands, Volume 15, Numbers 1-2, March 2004, page 112.

¹⁷¹. Inter-American Commission on Human Rights, Report N° 37/00, Case 11.481, El Salvador, April 13, 2000, paragraph 142.

¹⁷². Inter-American Court of Human Rights, *Case of the Gómez Paquiyaury Brothers v. Peru*, Judgment of July 8, 2004, paragraph 229.

¹⁷³. UN Commission on Human Rights, *supra* note 71, at paragraph 40.

¹⁷⁴. *Id.*

no single source or witness was considered sufficiently reliable to establish the truth on any issue of fact necessary for the Commission to arrive at a finding”.¹⁷⁵

Due to the fact that this paper will deal mainly with crimes of forced disappearances and extrajudicial killings, it is necessary to review the jurisprudence developed by the Inter-American Commission on Human Rights and by the Inter-American Court of Human Rights about these heinous crimes and in relation to the right to truth.

On forced disappearances and its connection with the right to truth, the Commission has stated on several occasions that the “duty to investigate the facts extends for as long as the uncertainty over the final fate of the disappeared person exists,”¹⁷⁶ due, basically, to its ongoing nature. The Court has supported this argument and it has affirmed that its “effects extend until such time as the disappearance is entirely solved”.¹⁷⁷ Indeed, in the words of the Court, “the crime of forced disappearance is an indivisible whole inasmuch as it is a continuing or permanent crime, which extends beyond the date on which the actual death occurred, provided that the death took place in the context of the disappearance”. Moreover, according to the Court, 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”.¹⁷⁸ This is due to the fact that forced disappearance involves the

¹⁷⁵. Popkin, Margaret, *supra* note 170, at 111.

¹⁷⁶. Inter-American Commission on Human Rights, Report No. 25/98, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.657, 11.675 and 11.705, Chile, April 7, 1998, paragraph 87.

¹⁷⁷. Inter-American Court of Human Rights, Case of Blake v. Guatemala, Judgment of January 24, 1998, paragraph 55.

¹⁷⁸. Inter-American Court of Human Rights, Case of Velásquez Rodríguez v. Honduras, Judgment of July 29, 1988, paragraph 181.

“disregard of the obligation to organize the State apparatus to safeguard the rights recognized in the Convention and reproduces the conditions of impunity so that this type of act is repeated”.¹⁷⁹

On extrajudicial killings and its connection with the right to truth, the Commission has declared that in those cases in which such heinous crimes have been perpetrated, the relatives of the victims have the right to be informed about the circumstances that surrounded the death of their loved ones and the identity of those responsible for the death. In words of the Commission, in those occasions in which an extrajudicial killing has been perpetrated, the States have the obligation to put an end “to the state of uncertainty and lack of information in which the victims’ next of kin have been placed”.¹⁸⁰ Additionally, in the words of the Court, in those cases in which extralegal executions have been conducted, the States have “the duty to *ex officio* and promptly begin a serious, impartial and effective investigation”.¹⁸¹

In conclusion, the material scope of the right to truth has expanded from forced disappearances to other crimes also considered as gross violations of international human rights laws, such as extrajudicial killings and torture. This expansion has been a consequence of the importance of the right to truth as a means to restore the dignity of the victims which has been taken by the authorities of the State or with the State’s acquiescence. Furthermore, due to its relevance as a mean to put an end to the situation of uncertainty lived by the relatives of the victims for many years and to publicly acknowledge their suffering. Finally, because of its pertinence to reveal to society the abhorrent crimes that took place in its own the country and to expose the pain endured by many victims, which was unknown to their fellow citizens initially.

¹⁷⁹. Inter-American Court of Human Rights, Case of Goiburú et al v. Paraguay, Judgment of September 22, 2006, paragraph 89.

¹⁸⁰. Inter-American Commission on Human Rights, Report No. 1/99, Case 10.480, El Salvador, January 27, 1999, paragraph 154.

¹⁸¹. Inter-American Court of Human Rights, Case of Mapiripán Massacre v. Colombia, Judgment of September 15, 2005, paragraph 219.

CHAPTER III
THE DEVELOPMENT OF THE RIGHT TO TRUTH BY DOMESTIC COURTS IN
LATIN AMERICA

1. The respect and the assurance of the right to truth at a domestic level

One of the most important measures that must be adopted during a transitional process is the disclosure of truth, both at an individual and at a collective level. Although difficult to listen in the beginning, the truth can help the victims and their relatives to continue their lives without remorse in their hearts and to coexist with the wrongdoers. Moreover, it can help the perpetrators to expiate their sins and to unload the heavy burden that they had to carry for many years. Additionally, it can help bystanders to develop feelings of empathy towards the victims and to acknowledge what some persons are capable to do to their fellow human beings. In brief, despite the negative feelings that may arise at its beginning, the truth can help society as a whole to

come to terms with its past and to provide them with a fresh start. Indeed, as it was stated since biblical times by the apostle John, “you will know the truth, and the truth will set you free”.

To disclose the truth about gross violations to international human rights laws and serious violations to international humanitarian laws committed during an authoritarian regime or during an armed conflict, independent bodies of experts have been established throughout the world since the last decades of the twentieth century. These bodies have come to be known as “truth commissions” and their missions are, among others, to uncover systematic and widespread violations and abuses to human rights, to reveal the patterns of violence followed by the parties in conflict and to evidence the structural causes that allowed the emergence and the perpetuation of those abuses.

According to some scholars, truth commissions can “promote tolerance and understanding”¹⁸² among the victims, the perpetrators and the bystanders, by allowing each other to listen to their grievances and sufferings and to explain their motives. In other words, “stories can communicate the experience of pain and suffering between people who normally cannot understand each other”.¹⁸³

Despite the fact that truth commissions are usually created in those cases in which the judicial system of a country is not capable to deal with violations or abuses to human rights, their mission is neither to replace nor to obstruct prosecutions, but to contribute to the future development of trials. Therefore, although truth commissions may be helpful during transitional periods in which the judicial system of a country is deemed ineffective, corrupt or politically biased, those bodies must not be seen, in any way, as a substitute for trials and for the truth that

¹⁸². Freeman, Mark – Hayner, Priscilla, *Truth Telling* in Bloomfield David et al, *Reconciliation after a Violent Conflict: A Handbook*, 122-139, 126, International Institute for Democracy and Electoral Assistance, Sweden 2003.

¹⁸³. Godwin Phelps, Theresa, *Shattered Voices: Language, Violence and the Work of Truth Commissions*, 66, University of Pennsylvania Press, Pennsylvania 2004.

may arise from a judicial process. Indeed, as it has been declared by the Inter-American Court of Human Rights, the “recognition of historical truths through this mechanism should not be understood as a substitute to the obligation of the State to ensure the judicial determination of individual and state responsibilities through the corresponding jurisdictional means”.¹⁸⁴ This follows from the fact States Parties to the American Convention on Human Rights have a non delegable “duty to investigate human rights violations and to prosecute and punish those responsible”¹⁸⁵ and, thus, the right to “access to justice should ensure, within a reasonable time, the right of the alleged victims or their next of kin for every necessary measure to be taken to know the truth about what happened and to sanction those eventually found to be responsible”¹⁸⁶ through a judicial process.

Furthermore, because truth commissions usually have a very broad mandate and a very limited time to conduct their inquiries, their findings generally tend to reveal a collective truth which finds its basis in certain cases which shocked society as a whole. Thus, despite the commitment and the effort that commissioners usually devote to these processes, and despite how comprehensive the reports of the truth commissions may be, the majority of the cases remain unresolved and the fate and the whereabouts of the victims continue to be unknown.

Truth commissions frequently center on “the construction and preservation of the historical memory, the elucidation of the facts, and the determination of institutional, social, and political responsibilities during specific historical periods of a society”.¹⁸⁷ In contrast, “trials focus narrowly on identifying individual legal responsibility for specific crimes and punishing

¹⁸⁴. Inter-American Court of Human Rights, Case of Zambrano Vélez et al v. Ecuador, Merits, Judgment of July 4, 2007, paragraph 128.

¹⁸⁵. Inter-American Court of Human Rights, Case of La Cantuta v. Perú, Merits, Judgment of November 29, 2006, paragraph 160.

¹⁸⁶. Inter-American Court of Human Rights, Case of Cantoral-Huamaní and García-Santa Cruz v. Peru, Merits, Judgment of July 10, 2007, paragraph 132.

¹⁸⁷. Inter-American Court of Human Rights, Case of Heliodoro Portugal v. Panama, Merits, Judgment of August 12, 2008, footnote 37.

those found guilty”.¹⁸⁸ In other words, cases submitted before domestic courts “use legal approaches to seek to determine the culpability of alleged perpetrators in committing specific, often narrowly defined offenses and to determine what constitutes appropriate punishment. In contrast, truth commissions undertake a much broader inquiry, to provide a narrative of the kinds of abuses that occurred during a defined historical period”.¹⁸⁹

In short, truth commissions focus more on a historical truth and, in contrast, trials focus more on individual truths. That does not imply, in any way, that one of those two instruments is better than the other. Instead, it means that they complement each other and that, in order to have a comprehensive picture of the past that satisfies both the victims and the society as a whole, both measures must be applied by the newly elected government to show a clear separation from past regimes, to reinforce the rule of law within the country and to demonstrate that no one is deemed inferior under the newly emergent society. Accordingly, the full enjoyment of the right to truth in an individual dimension implies the judicial enforceability of the right to truth, by the victims and their relatives, through the diverse juridical mechanisms established by States to protect and to ensure the rest of the rights and the freedoms of the people under their jurisdiction.

This statement is founded in the jurisprudence developed by both international and national courts about the right to truth, as a response to the necessity of the victims and of their relatives to know the fate and the whereabouts of their loved ones during periods of social and political turmoil, particularly in Latin America.

As shown in the previous chapter, the two supervisory organs of the Organization of American States have confirmed the obligations that States have to investigate through juridical

¹⁸⁸. Hayner, Priscilla B., *Unspeakable Truths: Confronting State Terror and Atrocity*, 88, Routledge, New York and London, 2001.

¹⁸⁹. Chapman, Audrey R., *Truth Finding in the Transitional Justice Process*, in Van Der Merwe, Hugo et al, *Assesing the Impact of Transitional Justice: Challenges for Empirical Research*, 91-113, 93, United States Institute of Peace Press, Washington D.C. 2009.

mechanisms human rights violations and abuses and to individually reveal to the victims and their relatives the names of the perpetrators and the circumstances under which the crimes were committed. The Inter-American Commission on Human Rights has stated that truth commissions “cannot be considered as a suitable substitute for proper judicial procedures as a method for arriving at the truth”.¹⁹⁰ The Inter-Court of Human Rights has similarly declared that the historical truth established through non judicial mechanisms, such as truth commissions, “does not complete or substitute the State’s obligation to also establish the truth through judicial proceedings”.¹⁹¹ Additionally, both bodies have affirmed that the victims and their next of kin have an individual right to truth and, therefore, the States have “the obligation to have the facts effectively investigated by [their] authorities and, in that sense, to know the truth of what occurred”.¹⁹²

Since the previous chapter was dedicated exclusively to the development of the right to truth by the two supervisory organs of the Organization of the American States and to depict the scope and the approach that both bodies have given to that right, this chapter would exclusively focuses on the contributions made by national courts in Latin America to the expansion of the right to truth within their domestic jurisdictions, particularly Argentina, Colombia and Peru. This is because to limit the scope of the right to truth to what has been stated by the international and the regional bodies would overlook the enormous contributions made by domestic courts to the enhancement of the content of that right and to the emergence of new obligations for the States in order to respect and to ensure that right. Indeed, the obligations that have emanated

¹⁹⁰. Inter-American Commission on Human Rights, Report No. 136/99, Case 10.488, El Salvador, December 22, 1999, paragraph 229.

¹⁹¹. Inter-American Court of Human Rights, Case of Radilla-Pacheco v. Mexico, Merits, Judgment of November 23, 2009, paragraph 179.

¹⁹². Inter-American Court of Human Rights, Case of Radilla-Pacheco v. Mexico, Merits, Judgment of November 23, 2009, paragraph 180.

from national experiences, have actually contributed to clarifying the fate and the whereabouts of the victims of human rights violations or abuses, despite the impossibility to obtain criminal convictions, such as the case of the “truth trials” in Argentina.

2. Domestic courts and the right to truth in Latin America

2.1 Argentina

In Argentina, during the period known as the “dirty war”, the authoritarian regime in power developed and perfected the horrendous practice of forced disappearances of political dissidents, among other people, in order to create a state of fear among those living within and outside its boundaries. During that tragic moment in the history of the country, the kidnappings of thousands of persons were frequently followed by a disconcerting silence about their fate and their whereabouts.¹⁹³

Following that abominable practice that was either conducted or tolerated by the State, for several years the relatives of those persons who “were abducted during the dirty war tried to discover what happened to those who disappeared. The families sought explanations from the Argentine authorities, but the authorities refused to acknowledge that they had custody or knowledge of the individuals who disappeared”.¹⁹⁴

After the defeat of the authoritarian regime and with the return of democracy to the country, the victims of human rights violations and their relatives sought for truth, justice and

¹⁹³. Pérez Solla, María Fernanda, *Enforced Disappearances before Argentinean Tribunals: New Developments in an Endless Fight for Justice*, 19 S. Afr. J. on Hum. Rts., 2003, 691-716, 691.

¹⁹⁴. Weissbrodt, David – Bartolomei, María Luisa, *The Effectiveness of International Human Rights Pressures: The Case of Argentina, 1976-1983*, 75 Minn. L. Rev. 1009-1035, 1013, 1990-1991.

reparations before the national authorities, in order to restore the dignity that was abruptly taken away from them and in order to properly exercise their right to mourn. In response, the newly democratically elected government created the National Commission on the Disappearance of Persons, which was mandated to investigate the fates and the whereabouts of those disappeared under the rule of the military junta.¹⁹⁵ Furthermore, it instituted criminal trials against the members of the military junta who governed the country during the dirty war.

As a consequence of both measures, a comprehensive report about the practice of forced disappearances was released and five members of the military junta were convicted and sent to jail.¹⁹⁶ However, neither the National Commission on the Disappearance of Persons report nor “the subsequent criminal trials were able to determine what had happened to all of the more than ten thousand victims of forced disappearances”¹⁹⁷ during that dark period in the history of Argentina. Furthermore, with the adoption of the Full Stop Act¹⁹⁸ and the Due Obedience Act¹⁹⁹, the institution of criminal prosecutions against the perpetrators of gross violations to international human rights laws and serious violations to international humanitarian laws were prohibited in the country.

All these aforementioned developments gave rise in Argentina to the judicial enforceability to the right to truth through the so called “truth trials”, since the relatives of those

¹⁹⁵. Anales de Legislación Argentina, Article 1, Decree Number 187/83, December 15, 1983, Tomo XLIV-A, Secretaría de Redacción, Buenos Aires 1984.

¹⁹⁶. Cfr. Tappatá de Valdez, Patricia, *El Pasado, un Tema Central del Presente: La Búsqueda de la Verdad y Justicia como Construcción de una Lógica Democrática* in Instituto Interamericano de Derechos Humanos, Verdad, Justicia y Reparación, Desafíos para la Democracia y la Convivencia Social, 85-113, 93, Institute for Democracy and Electoral Assistance, San José 2005.

¹⁹⁷. Mendez, Juan E., *The Human Right to Truth, Lessons Learned from Latin American Experiences with Truth Telling* in Borer, Tristan Anne, Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies, 115-150, 121, University of Notre Dame, Notre Dame 2006.

¹⁹⁸. The Full Stop Act extinguished criminal actions sixty days after its enactment. In Pérez Solla, María Fernanda, Enforced Disappearances before Argentinean Tribunals: New Developments in an Endless Fight for Justice, 19 S. Afr. J. on Hum. Rts., 2003, 691-716, 693-694.

¹⁹⁹. The Due Obedience Act created the presumption that subordinates in the security forces duly acted on orders and could accordingly not be punished. In Pérez Solla, María Fernanda, Enforced Disappearances before Argentinean Tribunals: New Developments in an Endless Fight for Justice, 19 S. Afr. J. on Hum. Rts., 2003, 691-716, 694.

disappeared “never stopped demanding an individualized truth to supplement the structural one uncovered by [the National Commission on the Disappearance of Persons] and by the Junta trials”.²⁰⁰ These truth trials were conducted before the Federal Courts in Argentina and they were essentially based on the fact that “although the amnesty laws had blocked criminal proceedings, family members still had the 'right to truth' and they could pursue that right through judicial investigations”.²⁰¹ Through them, the Federal Courts in Argentina ordered “the opening of incidents of inquiry on the fate of some victims of enforced disappearances”.²⁰²

Specifically, the “truth trials” consisted of a series of juridical procedures which aimed at obtaining “official information about the fate of victims before criminal courts in the absence of the legal possibility to impose criminal sanctions”.²⁰³ These trials contributed to clarifying the facts, “further establishing responsibilities and opening the way to full prosecution in evolving political and legal contexts”,²⁰⁴ such as the one that emerged after the decision adopted by the Argentinean Supreme Court of Justice in 2005, which declared unconstitutional both the Full Stop Act and the Due Obedience Act.

Moreover, although “truth trials do not have prosecutorial capacities in relation to the crimes covered under the amnesty laws, they [might] and [did] prosecute for contempt of court. Therefore, such crimes as false testimony and failure to appear before the court [...] resulted in

²⁰⁰. Mendez, Juan E., *The Human Right to Truth, Lessons Learned from Latin American Experiences with Truth Telling* in Borer, Tristan Anne, *Telling the Truths: Truth Telling and Peace Building in Post-Conflict Societies*, 115-150, 121, University of Notre Dame, Notre Dame 2006.

²⁰¹. Sikkink, Kathryn – Booth Walling, Carrie, *Argentina’s Contribution to Global Trends in Transitional Justice* in Roth-Arriaza, Naomi, Mariezcurrena, Javier, *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, 301-324, 306, Cambridge University Press, United Kingdom 2006.

²⁰². Pinto, Mónica, *Trials of Truth in Argentina*.

²⁰³. Filippini, Leonardo G., *Criminal Prosecutions for Human Rights Violations in Argentina*, 2-3, International Center for Transitional Justice, Buenos Aires 2009.

²⁰⁴. Filippini, Leonardo G., *Criminal Prosecutions for Human Rights Violations in Argentina*, 3, International Center for Transitional Justice, Buenos Aires 2009.

the detention of at least eight military and fifty-five police involved in cases of torture during the dictatorship”²⁰⁵.

Nevertheless, the acceptance of the judicial enforceability of the right to truth by the domestic courts in Argentina was neither free from the imposition of several procedural obstacles within the judicial system itself, nor from the initial reticence by the judicial authorities to accept the submission of those complaints and their ignorance on how to handle those kinds of petitions. Indeed, the recognition of the right to truth by the domestic courts in Argentina was only possible through a friendly settlement reached at a regional level through the Inter-American Commission on Human Rights. As a consequence of that settlement, the country “committed itself to admit the right to truth by means of a law and to define an appropriate procedure for its effective enforcement”²⁰⁶.

Among the first cases that were filed before Federal Court of Appeals in Argentina, stands out the one submitted by Carmen Aguilar de Lapacó, who was the mother of Alejandra Lapacó, a victim of the practice of forced disappearances carried out by the security forces in Argentina during the dirty war. That was also the same case that was brought before the regional system for the protection and the assurance of human rights in the Americas and that led to the acceptance of the right to truth by the domestic courts in Argentina.

At a domestic level, Carmen Aguilar de Lapacó “petitioned the Federal Court of Appeals to issue a written communication to the Headquarters of the Army Chief of Staff of the Ministry of Defense, asking it to submit all the existing information on the fate of the persons who disappeared while in detention kept by the Army and the security and intelligence branches which were under the operating orders of the First Army Corps from 1976 to 1983. As grounds

²⁰⁵. Argentine Forensic Anthropology Team, 2002 Annual Report, Special Section: Right to Truth, 130-135, 132.

²⁰⁶. Guembe, María José, Reopening of Trials for Crimes Committed by the Argentine Military Dictatorship, 3 SUR Int'l J. on Human Rights, 115-131, 118, 2005.

for this petition, she alleged the right of family members to know the fate of their loved ones and the right of society to a detailed account of the methods used by the military dictatorship to exterminate tens of thousands of Argentines, or, in short, the right to the truth”.²⁰⁷

Although her petition was initially declared admissible by the Federal Court of Appeals of Buenos Aires, that decision was later reversed by that same court when further measures aimed at the investigation of the armed forces were requested, despite the fact that the arguments to support that later request had already been discussed at the beginning of the proceeding. Afterwards, that last decision was upheld by the Supreme Court of Argentina and, thus, the petition filed by Carmen Aguilar de Lapacó was finally dismissed.

The main arguments for the last verdict were, in words of the Supreme Court of Justice of Argentina, that the “purpose of investigative proceedings is to determine the existence of a punishable act”.²⁰⁸ Therefore, there “would be no point in gathering evidence for the prosecution without a subject against whom it could be brought”,²⁰⁹ since the adoption of some actions towards that direction “would entail[ed] a reopening of the proceedings and the consequent introduction of legal action against persons who were acquitted in final judgment for the conduct that is the subject of this case”.²¹⁰

However, through that same judgment issued by the Supreme Court of Justice of Argentina, an important contribution to the development of the right to truth was made, although as a part of a dissenting opinion by one of the judges. In fact, due to invaluable contribution of the arguments expressed about the judicial enforceability of the right to truth when amnesty laws

²⁰⁷. Inter-American Commission on Human Rights, Report No. 21/00, Case 12.059, Argentina, February 29, 2000, paragraph 12.

²⁰⁸. Inter-American Commission on Human Rights, Report No. 21/00, Case 12.059, Argentina, February 29, 2000, paragraph 15.

²⁰⁹. *Id.*

²¹⁰. *Id.*

had been adopted during transitional periods, it is important to translate in full the words of the two judges Enrique Petracchi and Gustavo Bossert.

Both judges, in their dissenting opinion, argued that the fact that criminal prosecutions were banned for certain persons and for certain acts through the Full Stop Act and the Due Obedience Act did not imply, automatically, the closure of the investigations conducted against those persons. On the contrary, it was only through the continuation of a thorough investigation it was possible to determine if the acts perpetrated by those persons were, indeed, covered by the benefits granted by the amnesty acts and, thus, if they were undeniably free from the imposition of sanctions.²¹¹

Those judges also argued that the laws that exempt from criminal liability specific persons for specific facts do not do it in an indiscriminate way, but they establish the characteristics of the beneficiaries or describe the circumstances in which the acts should have been perpetrated. Indeed, the purpose of those laws is not to exempt all persons or all circumstances, but only when the characteristics of the perpetrators and the circumstances surrounding the acts that are described by the law are met and, thus, the inconvenience or the inefficacy of a sanction is deemed.²¹²

Therefore, those judges concluded that, in order to avoid arbitrariness in the application of the benefits of an amnesty law, it is crucial that the investigation continues until its end to ensure that the beneficiaries of the law will only be those who the amnesty originally intended to cover. That implies that, despite the fact that for a variety of reasons a criminal prosecution against certain persons and certain acts may be banned, that does not exempt the competent

²¹¹. Carmen Aguilar de Lapacó v. Carlos Guillermo Suárez Mason, Supreme Court of Justice of Argentina, Extraordinary Remedy, 450, Buenos Aires, 13 August 1998, Dissenting Opinion by Judges Enrique Petracchi and Gustavo Bossert, paragraph 25.

²¹². Id.

authorities from their obligation to determine if, indeed, the crimes judge or the perpetrators prosecuted indeed fall into those categories.²¹³

Furthermore, it is important to highlight what was declared by the Federal Court of Appeals of Buenos Aires when it initially accepted its competence to deal with the petition submitted by Carmen Aguilar de Lapacó. The Court declared that the judicial enforceability of the right to truth was nothing more than the response of the State towards its obligation to provide all the mechanisms available to determine the fate and the whereabouts of the persons disappeared during the dirty war.²¹⁴ Additionally, the Court stated that the Full Stop Act and the Due Obedience Act were, by no means, an obstacle to investigate the fate of those disappeared, especially according to the principles and the obligations enshrined in the American Convention on Human Rights, which was part of the law of the land. Finally, that Court affirmed its competence to continue the investigations since the amnesty laws impeded the imposition of sanctions, but not the closure of the process and, thus, of the investigations.²¹⁵

Finally, it is necessary to highlight that, as a consequence of the case brought at the regional level under the argument that the State of Argentina had refused to verify what had happened to Alejandra Lapacó,²¹⁶ that same State, at the end, recognized the right to truth in its domestic jurisdiction through a friendly settlement and expressed that the protection and the guarantee of that right involved “the exhaustion of all means to obtain information on the

²¹³. *Id.*

²¹⁴. Carmen Aguilar de Lapacó v. Carlos Guillermo Suárez Mason, Supreme Court of Justice of Argentina, Extraordinary Remedy, 450, Buenos Aires, 13 August 1998, Dissenting Opinion by Judges Enrique Petracchi and Gustavo Bossert, paragraph 11.

²¹⁵. Carmen Aguilar de Lapacó v. Carlos Guillermo Suárez Mason, Supreme Court of Justice of Argentina, Extraordinary Remedy, 450, Buenos Aires, 13 August 1998, Dissenting Opinion by Judges Enrique Petracchi and Gustavo Bossert, paragraph 13.

²¹⁶. Inter-American Commission on Human Rights, Report No. 21/00, Case 12.059, Argentina, February 29, 2000, paragraph 2.

whereabouts of the disappeared persons. It is an obligation of means, not of results, which is valid as long as the results are not achieved, not subject to prescription”.²¹⁷

On June 14, 2005, the Supreme Court of Justice of Argentina declared unconstitutional both the Full Stop Act and the Due Obedience Act. To support its judgment, among other situations, the Court alleged that, based on the American Convention on Human Rights and on the jurisprudence developed by both of the supervisory organs of the Organization of American States, the “State has an obligation to investigate, prosecute and punish those who have committed violations of the right to life, to humane treatment or who have engaged in disappearances, obligation which cannot be limited or abolished by the enactment of an Amnesty or Due Obedience Laws”.²¹⁸ Following that judgment, the domestic courts in Argentina were able to open and to reopen criminal prosecutions against those presumably responsible for gross human rights violations and for serious violations of international humanitarian laws during the dirt war.

Among the first perpetrators to be brought to justice after the declaration of unconstitutionality of the amnesty laws was Miguel Osvaldo Etchecolatz for gross violations to human rights committed during the dirty war. On September 19, 2006, the First Oral Federal Court from La Plata found Miguel Osvaldo Etchecolatz guilty and, thus, he was sentenced to life imprisonment.

The First Oral Federal Court from La Plata, besides passing the judgment, also declared the understanding of the term “reconciliation” as an equivalent to the formula of “forgive and forget”, totally the opposite of what law represents. Indeed, the rule of law and the right to truth

²¹⁷. Inter-American Commission on Human Rights, Report No. 21/00, Case 12.059, Argentina, February 29, 2000, paragraph 2.

²¹⁸. Trial Watch, Miguel Osvaldo Etchecolatz. See web page: http://www.trial-ch.org/en/trial-watch/profile/db/context/miguel-osvaldo_etchecolatz_583.html

are the basic steps that need to be followed in order to restore the victims and their families and to deter future exterminations.²¹⁹

2.2 Colombia

Since the middle of the twentieth century, Colombia has witnessed the longest internal armed conflict in the history of Latin America. The origins of the war can be traced to a period known as “La Violencia” in 1948 during which “the Conservative Party launched a violent offensive against supporters of the Liberal and Communist parties, who were demanding socioeconomic and political changes”,²²⁰ mostly due to the absence of the public authorities in certain parts of the territory, the inequitable distribution of land and wealth, and the exclusion of important sectors of the society in the political sphere. Following that period, with some variations over time, including the emergence of paramilitary groups and the dispute about the effective control over the drugs business, more than sixty years later the conflict has left a toll of 200,000 victims, 3,000,000 internally displaced people and 9,000,000 acres of land abandoned.²²¹

During the beginnings of the conflict, in order to confront the guerrilla groups, the Colombian government resorted to self defense committees that initially were born within the rural communities to protect their own interests, due to the absence of military presence in those regions. Over many years, these paramilitary structures “historically enjoyed the collaboration, support and toleration of units of the Colombian security forces, a fact that has led many to refer

²¹⁹. Fundación para el Debido Proceso Legal, *Digesto de Jurisprudencia Latinoamericana sobre Crímenes de Derecho Internacional*, Fundación para el Debido Proceso Legal, Washington 2009, 254.

²²⁰. Laplante, Lisa J. – Theidon, Kimberly, *Transitional Justice in Times of Conflict: Colombia’s Ley de Justicia y Paz*, 28 *Mich. J. Int’l L.*, 49-108, 53.

²²¹. For more information, see webpage: <http://www.laht.com/article.asp?CategoryId=12393&ArticleId=332464>

to the paramilitaries as a 'sixth division' of the army".²²² Furthermore, although now legally outlawed, "they now exert a very high degree of political influence, both locally and nationally".²²³

The crimes that finally led to the banning of these structures in Colombia were, first, the massacre of nineteen merchants who were travelling within its territory in a caravan of vehicles in 1987 and, second, the massacre of the members of the judicial commission who conducted a visit *in loco* to investigate the fate and the whereabouts of the nineteen merchants in 1989. Subsequent to the massacre of the members of the judicial commission by paramilitary forces with the aid of the official forces in the area, the "State began to adopt measures, including legislative measures, to counter the armed control exercised by paramilitary groups in several parts of Colombia".²²⁴

To conduct the process of disarmament, demobilization and reintegration of those persons belonging to paramilitary structures, several laws were passed in Colombia. Within those laws, in order to comply with international standards, the State introduced different elements of transitional justice, such as the right to truth, among others,²²⁵ and invested both the attorney general and the judicial system with competence to investigate, to prosecute and to impose sanctions. The "current legal framework for individual and collective demobilization rested and continues to rest on Law 418 of 1997, which was extended by Congress by Law 782 in

²²². Human Rights Watch, *Smoke and Mirrors: Colombia's Demobilization of Paramilitary Groups*, August 2005, Volume 17, No. 3, 1.

²²³. *Id.*

²²⁴. Inter-American Commission on Human Rights, *Follow-up on the Demobilization Process of the AUC in Colombia*, paragraph 39, General Secretariat, Organization of American States, Washington D.C. 2007.

²²⁵. Colombian Congress, Law No. 975/05, Article 4, July 22, 2005, Colombia.

December 2002”.²²⁶ In addition, on June 21, 2005, the National Congress approved Law 975 and which came into force on July 22, 2005.

The first two laws establish that a series of benefits may be “granted on behalf of those who confess and have been or were accused of or tried for political crimes, and have not been convicted by a firm judgment, provided that they choose to participate in an individual or collective demobilization”.²²⁷ Also both “echo the limitation of benefits for those who have been involved in conduct constituting atrocious acts of ferocity or barbarism, terrorism, kidnapping, genocide, and homicide committed when the victim does not participate in combat”.²²⁸ Thus, as it can be seen, these laws do not provide an extinction of criminal liability for several crimes and, as a consequence, not so many paramilitaries were encouraged to demobilize.

As a consequence, in order to “facilitate peace processes and the reintegration into civilian life of groups or individuals who are members of illegal armed groups”, the Justice and Peace Law was passed in 2005. This law was intended to create an alternative system for those persons who do not benefit from Law 782. As a result, the “bill establishes an alternative criminal system of justice, which entails the suspension of a criminal sentence and its replacement with an alternative punishment. Benefits are granted commensurate with the individual’s contribution to attaining peace, justice, and reparation to the victims, as well as her or his own re-socialization”.²²⁹

On the right to truth, the Justice and Peace Law establishes that society as a whole, and specially the victims, have the inalienable right to fully and effectively know the truth about the

²²⁶. Inter-American Commission on Human Rights, Follow-up on the Demobilization Process of the AUC in Colombia, paragraph 62, General Secretariat, Organization of American States, Washington D.C. 2007.

²²⁷. Id.

²²⁸. Id.

²²⁹. Guembe, María José – Olea, Helena, *No Justice, no Peace: Discussion of a Legal Framework Regarding the Demobilization of Non-State Armed Groups in Colombia* in Roth-Arriaza, Naomi, Mariezcurrena, Javier, *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, 120-142, 127, Cambridge University Press, United Kingdom 2006.

crimes perpetrated by those groups organized outside the law, as well as the whereabouts of the persons that were either kidnapped or disappeared.²³⁰ Furthermore, according to that law, the investigations and the criminal proceedings to which it applies, must aim to discover the fate of the victims of those criminal conducts and to provide the pertinent information to their relatives.²³¹

To guarantee the effectiveness of the right to truth, the Justice and Peace Law states that, during the conduction of the proceedings under that law, the public officers must have at their disposal all the necessary means to ensure the revelation of the truth about the facts under investigation.²³² Moreover, along with the collaboration of the people that had demobilized, the police have the duty to investigate the whereabouts of those kidnapped or disappeared and the obligation to duly inform their relatives the results obtained.²³³

As a remedial measure, particularly as a measure of satisfaction and as a guarantee of non repetition, the Justice and Peace Law has addressed the necessity to verify and to clarify the facts and to disclose publicly and fully the truth that arises from judicial proceedings, as long as that truth neither generates more unnecessary damages to the victims, the witnesses or other people, nor represents a threat to their personal security.²³⁴ Additionally, as part of those measures, it includes the search for those disappeared and the remains of those killed, in order to give them a proper burial, according to the traditions of the family and of the community.²³⁵ Furthermore, it stresses the importance of the acknowledgment of the wrongdoings and the assumption of responsibilities related to them.²³⁶ Finally, it addresses the necessity to preserve the archives by

²³⁰. Colombian Congress, Law No. 975/05, Article 7, July 22, 2005, Colombia.

²³¹. Id.

²³². Colombian Congress, Law No. 975/05, Article 15, July 22, 2005, Colombia.

²³³. Id.

²³⁴. Colombian Congress, Law No. 975/05, Article 49.1, July 22, 2005, Colombia.

²³⁵. Colombian Congress, Law No. 975/05, Article 49.2, July 22, 2005, Colombia.

²³⁶. Colombian Congress, Law No. 975/05, Article 49.4, July 22, 2005, Colombia.

the judicial authorities, in order to and to contribute to the development of the historical memory of the country, as a manifestation of the right to truth.²³⁷

After the Justice and Peace Law was adopted, it became the target of several criticisms made both by the national and the international community. Despite the fact that both the legislative and the executive branch claimed that the law complied with the international standards established for transitional processes, the judicial branch, particularly the Constitutional Court of Colombia, had some reservations about those arguments, and that was when the judicial enforceability of the right to truth came into play within the country.

Following a petition for an application for a constitutional review filed by Gustavo Gallón Giraldo and others, the Constitutional Court of Colombia ruled on the constitutionality of several provisions enshrined in the Justice and Peace Law and on how those provisions had to be interpreted by the authorities entitled to enforce them, in order to be compatible with the Constitution.²³⁸

Particularly on the provisions related to the right to truth, the Constitutional Court of Colombia declared that the Justice and Peace Law did not “establish judicial means to ensure disclosure of the truth about specific crimes committed by members of specific groups”,²³⁹ nor “to uncover the overall criminal enterprise in question”,²⁴⁰ since it established a voluntary and an open confession in order for the perpetrators to become recipients of the benefits enshrined by the law. Therefore, according to the Court, in order for the law to be constitutional and to ensure the compliance of the right to truth, the confession given by the perpetrators must be “complete

²³⁷. Colombian Congress, Law No. 975/05, Articles 56 and 57, July 22, 2005, Colombia.

²³⁸. For more information, see: Re 975 Act, Application for Constitutional Review, Constitutional Chamber of Colombia, C-370/06, 18 May, 2006.

²³⁹. Inter-American Commission on Human Rights, Statement by the Inter-American Commission on Human Rights on the Application and Scope of the Justice and Peace Law in Colombia, paragraph 40, General Secretariat, Organization of American States, Washington D.C. 2006.

²⁴⁰. *Id.*

and truthful, thus ruling out the possibility that events not included in that statement might later be confessed without thereby losing the legal benefits”.²⁴¹ In other words, according to the Constitutional Court, the beneficiaries must only have “a single opportunity to tell the truth, and if their statements have concealed the truth about their participation as members of the group in a crime directly connected with that membership, the benefit of the alternative penalty is to be revoked”.²⁴²

Finally, the Constitutional Court of Colombia added a requirement in order for the perpetrators to enjoy the benefits of the Justice and Peace Law, which is crucial for the effectiveness of the right to truth. That requirement was “to report on the missing persons, inasmuch as it would be unconstitutional for the State to grant a reduced penalty to those responsible for forced disappearances without requiring them not only to demobilize under the Law but to reveal, from the very moment their eligibility is being determined, the whereabouts of the missing persons”.²⁴³

To support its judgment, the Constitutional Chamber of Colombia relied on the jurisprudence provided by it in prior cases on the right to truth. Thus, the Constitutional Chamber recalled the decision adopted in a previous application for constitutional review filed by Ricardo Danies González²⁴⁴, through which it declared that the victims of a crime not only have a right to economic reparations for the harms caused, but also the right to know the truth about what

²⁴¹. Inter-American Commission on Human Rights, Statement by the Inter-American Commission on Human Rights on the Application and Scope of the Justice and Peace Law in Colombia, paragraph 26, General Secretariat, Organization of American States, Washington D.C. 2006.

²⁴². Id.

²⁴³. Inter-American Commission on Human Rights, Statement by the Inter-American Commission on Human Rights on the Application and Scope of the Justice and Peace Law in Colombia, paragraph 20, General Secretariat, Organization of American States, Washington D.C. 2006.

²⁴⁴. For more information, see: Re 600 Act, Application for Constitutional Review, Constitutional Chamber of Colombia, C-228/02, 3 April, 2002.

happened in their case through a criminal proceeding.²⁴⁵ Indeed, in the judgment provided in that prior case, the Constitutional Chamber arrived to the conclusion that an integral restoration of the rights that have been violated by a crime implies an obligation for the State to guarantee the victims have, at least, their rights to truth, justice and economic reparation for the wrongdoings.²⁴⁶

Specifically on the right to truth in the application for constitutional review filed by Ricardo Danies González, the Constitutional Chamber of Colombia defined that right as the possibility to know what happened and to look for the harmonization between the procedural truth and the substantive truth. The Chamber further established that the right to truth entails a special relevance in cases of gross human rights violations and abuses.²⁴⁷

However, in that same decision, the Constitutional Chamber of Colombia also determined that, for a person to invoke his right to truth during a judicial proceeding, that person must have suffered a real, tangible and specific damage by the denial of the truth, whatever that harm might be and even without trying to pursue an economic reparation. Furthermore, even if economic reparations have been awarded, the victim can continue the judicial proceeding just to know the truth about what happened.²⁴⁸

Finally, the Constitutional Court of Colombia recalled that, in previous decisions, it had recognized as constitutional rights both the right of the victims to know the truth about what had happened to them and the right of society to clarify the truth about macrocriminality processes that massively and systematically affect their human rights as a whole. According to the Court,

²⁴⁵. Re 975 Act, Application for Constitutional Review, Constitutional Chamber of Colombia, C-370/06, 18 May, 2006, paragraph 4.9.2.

²⁴⁶. Re 975 Act, Application for Constitutional Review, Constitutional Chamber of Colombia, C-370/06, 18 May, 2006, paragraph 4.9.3.

²⁴⁷. Re 975 Act, Application for Constitutional Review, Constitutional Chamber of Colombia, C-370/06, 18 May, 2006, paragraph 4.9.3.

²⁴⁸. Id.

those rights derived from the rights of access to justice, due process and an effective remedy, the right to be free from cruel, inhumane and degrading treatments, as well as from the obligations of the States to respect and ensure the rights of the people under its jurisdiction.²⁴⁹

2.3 Peru

Like most of the countries in the continent, Peru was the subject of economic, social and political turmoil during several decades of the past century and of numerous successive authoritarian regimes. All those situations led to the emergence of one of the most violent guerilla movements in the region, ironically, when the first democratic elections were about to be held after twelve years of military regimes. Indeed, “the day before the vote, members of [Shining Path] burned ballot boxes in the Ayacuchan town of Chuschi, inaugurating a period of political violence that is remembered as one of the most sorrowful eras of Peruvian history”.²⁵⁰

The emergence of Shining Path and of the Túpac Amaru Revolutionary Movement and the attempts by the government to crash them, unleashed a ruthless repression by the security forces, which, in its way, took the lives of many civilians, eroded the democratic institutions of the country and suppressed many of the fundamental rights and freedoms provided by the law for long periods of time. Certainly, the “worst abuses began in 1982, when the democratic government of Belaúnde Terry ordered the armed forces to spearhead an attack against the Shining Path and the Túpac Amaru Revolutionary Movement”.²⁵¹

²⁴⁹. Re 975 Act, Application for Constitutional Review, Constitutional Chamber of Colombia, C-370/06, 18 May, 2006, paragraph 4.9.4.

²⁵⁰. Villarán de la Puente, Susana, Peru, in *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in America Latina*, 95-126, 96, Due Process of Law Foundation, Washington D.C. 2007.

²⁵¹. Villarán de la Puente, Susana, Peru, in *Victims Unsilenced: The Inter-American Human Rights System and Transitional Justice in America Latina*, 95-126, 96, Due Process of Law Foundation, Washington D.C. 2007.

In the middle of the decade of the nineties, the government successfully halted the violence exerted by the guerrilla movement under the administration of Alberto Fujimori, in spite of a few isolated incidents of recurrence, such as the takeover of the Japanese embassy by the Túpac Amaru Revolutionary Movement. However, as stated before, that achievement was not exempted from numerous gross violations of international human rights and serious violations of international humanitarian laws, such as torture, extrajudicial killings and forced disappearances, among others.

In 2000, after Albert Fujimori fled Peru, Valentín Paniagua became the interim president of the country and, in the most radical act executed under his brief administration, he decided to create the Commission for Truth and Reconciliation. That decision was also saluted by the next president, Alejandro Toledo, who actually added the term “reconciliation” to the denomination of the Commission.

The duties of the Commission for Truth and Reconciliation were, among others, to contribute to the clarification of the crimes and the human rights violations perpetrated both by the terrorist organizations and by the state agents, to determine the fate and the whereabouts of the victims and to establish responsibilities, whenever deemed appropriate.²⁵²

The creation of the Commission for Truth and Reconciliation in Peru and the terms of its mandate, particularly its obligation to cooperate with criminal justice and its further decision to create a unit “charged with the investigation of specific cases”,²⁵³ raised high expectations

²⁵². Cfr. Cobián, Rolando Ames, *Violencia, Verdad... ¿Reconciliación en el Perú?* in *Verdad, Justicia y Reparación, Desafíos para la Democracia y la Convivencia Social*, Inter-American Institute of Human Rights, San José, 2005, 205-228, 212.

²⁵³. González Cueva, Eduardo, *The Peruvian Truth and Reconciliation Commission and the Challenge of Impunity* in Roth-Arriaza, Naomi, Mariezcurrena, Javier, *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, 70-93, 80, Cambridge University Press, United Kingdom 2006.

among the victims, their relatives and the society in terms of truth, justice and reparations which the states authorities were neither ready, nor eager to fulfill as a whole.²⁵⁴

Despite the initial reticence of some state authorities, it is important to highlight the fact that progress at domestic level in terms of transitional justice has been made by the State of Peru after the release of the report by the Commission for Truth and Reconciliation and after several judgments provided by the Inter-American Court of Human Rights against the State, particularly after the case known as *Barrios Altos v. Peru*.

In terms of the right to truth, the Constitutional Court of Peru decided to recognize the enforceability of that right at a domestic level. That situation “can be seen in the case of Genaro Villegas Namuche, where the Constitutional Court recognized that the right to know the truth has a societal dimension and an individual/next of kin dimension”.²⁵⁵

Throughout that judgment, the Constitutional Court of Peru declared that, although the right to truth was not expressly enshrined in its constitutional text, it was completely protected under its legal framework and directly enforceable, particularly based on the duties that the State has to protect fundamental rights and to provide access to justice in case of violations. On the question on the right to truth not being included within the Constitution, the Court held that it was necessary to develop the rights that are implicit in its text, particularly when a case that is brought before the judiciary introduces novel and special circumstances which have to be considered in order to rule according to the realities that those situations demand and to enhance the rule of law.²⁵⁶

²⁵⁴. González Cueva, Eduardo, *The Peruvian Truth and Reconciliation Commission and the Challenge of Impunity* in Roth-Arriaza, Naomi, Mariezcurrena, Javier, *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice*, 70-93, 70, Cambridge University Press, United Kingdom 2006.

²⁵⁵. Sandoval, Clara, *The Challenge of Impunity in Peru: The Significance of the Inter-American Court of Human Rights*, *Essex Human Rights Review* Vol. 5 No. 1 July 2008, 1-20, 10.

²⁵⁶. Fundación para el Debido Proceso Legal, *Digesto de Jurisprudencia Latinoamericana sobre Crímenes de Derecho Internacional*, Fundación para el Debido Proceso Legal, Washington 2009, 252 and 254.

Additionally, the Constitutional Court affirmed that, although along with the right to truth there were other human rights at stake, such as the right to life, liberty, personal integrity, among others, the right to truth in fact had an autonomous configuration, which distinguished it from the fundamental rights to which it was actually linked. That, due to the special object that was aim to be protected through it and to specific outcome that was intended to be achieved.²⁵⁷

Finally, the Constitutional Court of Peru argued that the right to truth had a constitutional rank, since it constituted a natural consequence of the principles enshrined in the constitutional text, such as the rule of law, the respect of democracy and the human dignity. In its individual dimension, according to that body, the right to truth derived from the principle of human dignity, since the harm was not only to the life of a person or to his personal integrity, but to the ignorance of his fate and of his whereabouts by his relatives, which affected also the human dignity of the latter. In its collective dimension, the right to truth derived from the respect to democracy and to the rule of law because, through the exercise of that right, society as a whole was able to learn the pain and the suffering that some human beings are capable to inflict on others, in order to avoid impunity and to prevent future acts.²⁵⁸

²⁵⁷. Fundación para el Debido Proceso Legal, *Digesto de Jurisprudencia Latinoamericana sobre Crímenes de Derecho Internacional*, Fundación para el Debido Proceso Legal, Washington 2009, 252.

²⁵⁸. Fundación para el Debido Proceso Legal, *Digesto de Jurisprudencia Latinoamericana sobre Crímenes de Derecho Internacional*, Fundación para el Debido Proceso Legal, Washington 2009, 253.

CHAPTER IV

THE CONSTITUTIONAL AND LEGAL FRAMEWORK FOR HUMAN RIGHTS

PROTECTION IN EL SALVADOR

1. An introduction to the legal framework in El Salvador

El Salvador has a hierarchical legal framework and in its pinnacle rests the Constitution as the supreme law of the country. Within that hierarchical legal system there is a wide range of laws with a position inferior to the Constitution, such as international treaties, domestic laws and other series of regulations. In order to understand better how this hierarchical legal framework operates in El Salvador, it is necessary to examine carefully the text of the Constitution, because it contains the rank and the force that each law has within the system. In addition, it is crucial to study thoroughly the jurisprudence provided by the Constitutional Chamber of the Supreme Court of Justice, because it stands as the maximum guardian and as the last interpreter of the Constitution.

Furthermore, due to the fact that the right to truth and its judicial enforceability is deeply related to the transition in El Salvador from a civil war to a negotiated peace, it is crucial to study the amnesties laws adopted in the country during that period and to refer to some of the arguments that both its detractors and its supporters have made about it through time. This would help to understand better the scope of those laws and the legal implication that they have had in the incipient democracy of El Salvador.

Finally, it is important to take a look at the three constitutional processes designed to preserve the integrity of the Constitution and to protect the rights and freedoms enshrined in it. It

is necessary to highlight that those processes are filed exclusively before the Constitutional Chamber of the Supreme Court of Justice, due to the fact that it is the highest court of justice within the country. This only exception to this rule is the writ of habeas corpus which, due to its urgency, can also be filed to the Appellate Chambers, but only to those located outside the capital city.

1.1 The Constitution of El Salvador

Article 246 of the Constitution explicitly establishes the supreme character of that instrument, as it states that it shall prevail over any other law in the country, whatever the nature of those other laws may be. This situation implies that the principles, the rights and the obligations enshrined in the Constitution cannot be altered by the laws that develop or that regulate their content, in such a way that its exercise may be impaired.

In order to preserve its integrity, the Constitution of El Salvador has established the Constitutional Chamber of the Supreme Court of Justice as the only tribunal with the power to declare unconstitutional a law which may be contrary to its text through an application for constitutional review. The effect that a declaration of this nature has over a norm is its immediate exclusion from the legal system through a resolution which has both binding and *erga omnes* effects.²⁵⁹

Indeed, an application for constitutional review is a constitutional process through which the Constitutional Chamber of the Supreme Court of Justice confronts a norm that is claimed to

²⁵⁹. Constituent Assembly, Constitution of the Republic of El Salvador, Article 183, Decree 38, El Salvador 1983.

be unconstitutional, whether substantively or procedurally, in order to determine its conformity or its unconformity with the Constitution and its possible exclusion from the legal system.²⁶⁰

The supreme character of the Constitution described in its article 246 also implies that its text is directly applicable in those cases in which a judge decides that the scope of protection granted by its norms is more favorable to the parties or when he deems that the law applicable to a case has the possibility to be unconstitutional. This is because the norms contained in the Constitution have both priority and preference over any law hierarchically inferior, whatever its nature may be. Furthermore, this is because all judges, when performing their functions, are obliged to preserve the integrity of the text of the Constitution and, therefore, to apply it directly when a contradiction arises between the latter and a hierarchically inferior law.²⁶¹

1.2 International treaties and domestic laws

In the hierarchical legal framework of El Salvador, below the Constitution are the international treaties and the domestic laws at the same level. The Constitution stipulates that international treaties celebrated between El Salvador and other States or between El Salvador and an international organization will constitute law of the land, since the moment they enter into force upon ratification by the Congress. As a consequence of this situation, the international treaties signed and ratified by the competent authorities hold the same force that domestic laws have and, therefore, they have binding effects toward the people under the jurisdiction of the State of El Salvador.²⁶²

²⁶⁰. Supreme Court of Justice of El Salvador, Application for Constitutional Review of the General Amnesty Act for the Consolidation of Peace, San Salvador, 26 September 2000.

²⁶¹. Constituent Assembly, Constitution of the Republic of El Salvador, Article 185, Decree 38, El Salvador 1983.

²⁶². Constituent Assembly, Constitution of the Republic of El Salvador, Article 144, Decree 38, El Salvador 1983.

However, since contradictions may arise between international treaties and domestic laws and since both have the same hierarchical level within the legal framework, it is necessary to provide a solution inside the same legal system in order to preserve its coherence and its integrity. Thus, due to the fact that El Salvador has adopted a monist position towards the incorporation of international treaties within its legal system, in case of a conflict between both corpuses of law, domestic laws are neither allowed neither to modify nor to derogate the terms of a treaty that has been signed and ratified by the competent authorities. Moreover, according to that same article, in the event of a conflict between an international treaty and a domestic law, the former will prevail.²⁶³

Despite the evident substantive supremacy of international treaties over domestic laws, this situation does not imply, in any way, that the international treaties have a power equivalent to the one enjoyed by the Constitution of El Salvador, whatever the nature of the international treaties may be. In fact, the Constitution forbids the competent authorities from signing or to ratifying any international treaty whose terms may be in contradiction with the norms enshrined in the text of the Constitution, unless reservations to those dispositions are made.²⁶⁴ Additionally, the Constitution establishes the possibility to submit to judicial review an international treaty, just like any domestic law and, what it is more, to declare it unconstitutional by the Constitutional Chamber of the Supreme Court of Justice.²⁶⁵

All these statements make possible to affirm that in El Salvador there is no constitutionality block,²⁶⁶ which incorporates international treaties or domestic laws as part of

²⁶³. Id.

²⁶⁴. Constituent Assembly, Constitution of the Republic of El Salvador, Article 145, Decree 38, El Salvador 1983.

²⁶⁵. Constituent Assembly, Constitution of the Republic of El Salvador, Article 149, Decree 38, El Salvador 1983.

²⁶⁶. The term “constitutionality block” or “constitutional block” derives from the French term “bloc de constitutionnalité” and it refers to a group of norms which enjoy a privileged status within a legal framework. This privileged status is acquired through a remission made by the Constitution to other laws, in order to expand the content of the rights and freedoms enshrined in it. Therefore, the laws to which the Constitution refers in its text as

the Constitution. This includes those international human rights treaties which either develop or expand the scope of the rights and freedoms enshrined in the Constitution. In other words, the fact that international human rights treaties complement and develop rights and freedoms enshrined in the Constitution, it does not presupposes, in any way, a normative fusion between those corpuses of law, nor an expansion of the parameter of constitutionality.

The status conferred to international treaties by El Salvador does not contradict international law, since the monist theory does not seek to award those instruments a normative force similar to the one enjoyed by the Constitution. However, it indeed bans the existence of a constitutionality block which would have granted international human rights treaties a special authority over the rest of the norms.

In conclusion, although this situation does not compromise the international responsibility of the State *per se*, it has made possible the existence of the General Amnesty Act for the Consolidation of Peace for almost twenty years. Therefore, it has hindered the State of El Salvador from complying with its international obligations related to truth, justice and reparations towards the victims of the civil war and towards their relatives.

2. The General Amnesty Act for the Consolidation of Peace

By the way that it was enacted and by the terms in which it was drafted, the General Amnesty Act for the Consolidation of Peace clearly constituted a malicious response by the Salvadoran political elite to the findings of the Truth Commission for El Salvador. To date, this law has allowed the State to legally disobey the recommendations of the Truth Commission in

part of a constitutionality block comprise, at the end, an integral part of it and, what it is more, a parameter of constitutionality to other laws deemed hierarchically inferior.

order to achieve a successful transition to democracy. The General Amnesty Act for the Consolidation of Peace was issued just five days after the findings of the Truth Commission were made public. Thus, in words of Human Rights Watch, the enactment of an amnesty law so close to the issue of the report by the Truth Commission, revealed that the party in power and its supporters deliberately wanted to weaken the report.²⁶⁷

Indeed, a few days before the report of the Truth Commission was released, former President Alfredo Cristiani started to urge the nation to forgive and to forget the violations of human rights perpetrated during the civil war. He started to advocate for the approval of a blanket amnesty whose main purpose was to allow the State to evade its international obligations related to the investigation, the prosecution and the punishment of those responsible of gross violations to international human rights law and serious violations of international humanitarian law.²⁶⁸ To support those claims, President Cristiani suggested that the people in El Salvador “must not continue refuting ourselves, denigrating ourselves, recriminating ourselves. We must turn that page and continue forward”.²⁶⁹

However, it is important to mention that the adoption of General Amnesty Act for the Consolidation of Peace was not solely the consequence of the private desire of former President Alfredo Cristiani, but a common aspiration of military officers, conservative politicians and government officials “who vehemently repudiated the report”²⁷⁰ and who were interested in preserving impunity.

²⁶⁷. Human Rights Watch, El Salvador, Accountability and Human Rights: The Report of the United Nations Commission on the Truth for El Salvador, Volume V, Issue number 7, August 10, 1993, page 26.

²⁶⁸. Wilkinson, Tracy, El Salvador Government OKs Blanket Amnesty. Latin America: Pardon flouts U.N. report. Critics say ruling party's intention is to spare itself embarrassment. Los Angeles Times, Article Collection, March 21, 1993.

²⁶⁹. Meisler, Stanley – Wilkinson, Tracy, El Salvador urged to bar all rights abusers from public life. Central America: Guilty officials should be fired, and rebel violators should be banished from politics, U.N. report says. Cristiani repeats call for amnesty, Los Angeles Times, Article Collection, March 16, 1993.

²⁷⁰. Human Rights Watch, Human Rights Watch World Report 1994 - El Salvador, January 1994.

One of the most ferocious opponents to the report of the Truth Commission was the former Defense Minister, General René Emilio Ponce, who was identified by the Truth Commission as a human rights violator. In one of his public statements after the report was issued, he expressed that he considered “the report to be unjust, incomplete, illegal, unethical, partial and insolent”.²⁷¹ In addition, he declared that the report had defrauded “the hope and faith of all Salvadorans [...] who were expecting a serious and impartial document that might contribute to healing the wounds generated in twelve years of war”.²⁷²

In conclusion, by virtue of the General Amnesty Act for the Consolidation of Peace, the State has neither investigated, nor prosecuted nor punished those persons who were named in the report and, what it is more, it has pardoned those who were already condemned or under investigation at the time of the enactment of that law. As a consequence, the State has failed to honor its international obligations to respect and to ensure the rights and freedoms of the people under its jurisdiction and failed to provide effective remedies to the victims of human rights violations and to their relatives. Further, due to its failure to enable the State to provide truth, justice and reparations, the General Amnesty Act for the Consolidation of Peace has become an obstacle for society as a whole to rebuild the social tissue that was fragmented by the brutality of the civil war and, moreover, it has become an impediment to lay the foundations for a democracy based on the rule of law.

²⁷¹. Wilkinson, Tracy, Salvadoran military assails U.N. Report. Central America: Bitter response to atrocity charges sets off political, diplomatic tremors, Los Angeles Times, Article Collection, March 25, 1993.

²⁷². Id.

2.1 The content of the General Amnesty Act for the Consolidation of Peace

Throughout the provisions of the General Amnesty Act for the Consolidation of Peace, the Salvadoran Congress endowed a “full, absolute and unconditional amnesty to all those who participated in any way in the commission of political crimes or common crimes linked to political crimes or common crimes in which the number of persons involved is no less than twenty before January 1, 1992”.²⁷³ The amnesty granted by the General Amnesty Act for the Consolidation of Peace was extended to all those persons who had been explicitly excluded from that benefit one year before through the enactment of the National Reconciliation Law. Therefore, those “individuals who, according to the Report of the Truth Commission, participated in acts of violence committed after January 1, 1980, which left such an indelible imprint on society that it is all the more imperative that the public know the truth”²⁷⁴ were also included in the amnesty granted by the General Amnesty Act for the Consolidation of Peace.

The National Reconciliation Law was an amnesty law enacted by the Salvadoran Congress a few days after the signature of the Peace Accords by the warring forces. This law was particularly adopted to legalize the situation of former guerrilla leaders who were returning to the country to participate in the peace process. It created the conditions needed for the establishment of a disarmament, demobilization and reintegration process after the ratification of the Peace Accords. Thus, the National Reconciliation Law was not explicitly conceived as a blanket amnesty and, as a consequence, it was approved by all the representative political forces in the Salvadoran Congress.²⁷⁵ In fact, that law specifically “exempted from the potential benefits of

²⁷³. Legislative Assembly of El Salvador, General Amnesty Act for the Consolidation of Peace, Article 1, Decree 486, March 20, 1993.

²⁷⁴. Legislative Assembly of El Salvador, National Reconciliation Law, Article 6, Decree 147, January 23, 1992.

²⁷⁵. Legislative Assembly of El Salvador, National Reconciliation Law, Decree 147, January 23, 1992.

amnesty those persons named in the Truth Commission report as being responsible for serious acts of violence”,²⁷⁶ in order not to compromise its results beforehand.

Probably that can be attributed to the fact that the party in power was not aware that its own members were going to be named by the Report of the Truth Commission at the moment they gave their consent for the enactment of the National Reconciliation Law. Perhaps at that time the party in power was not aware that its founder and leader was going to be signaled as a perpetrator of heinous crimes and that he was going to be subjected to a possible trial as a consequence of the findings of the Truth Commission.

It is essential to highlight the fact that General Amnesty Act for the Consolidation of Peace broadened the scope of political crimes that was traditionally recognized. Under its definition of political crimes, the law included “crimes against the public peace, crimes against the activities of the courts, and crimes “committed on the occasion of or as a consequence of the armed conflict, without regard to political condition, militancy, affiliation or ideology”.²⁷⁷ To illustrate the dangers that this wide definition of political crimes had, it is worth to mention, for example, that under the definition of “crimes against the activities of the courts” were included both actions and omissions that, in fact, allowed the perpetration of human rights violations during the civil war. Among those crimes were, for example, “perjury, false expert opinions and reports, procedural fraud, false evidence, bribery [...] punishable omissions, prevarication”,²⁷⁸ conspiracy and delay of justice.

Finally, Article 4 of the General Amnesty Act for the Consolidation of Peace provided that those individuals who were being held in prisons were to be released and all pending cases

²⁷⁶. Popkin, Margaret, *The Salvadoran Truth Commission and the Search for Justice*, Criminal Law Forum, Springer Netherlands, Volume 15, Numbers 1-2, March 2004, page 108.

²⁷⁷. Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in El Salvador*, Organization of American States, Washington D.C., 1994.

²⁷⁸. *Id.*

were to be dismissed. The Act also provided that in those cases in which an individual was not subjected to an investigation at that time, but a future one was to be conducted against him for the crimes covered by the amnesty, he would be entitled to demand the extinguishment of the criminal action instituted against him and to request its definitive dismissal. Additionally, it was provided that an individual had the right to appear before a judge to ask for the benefits of amnesty to be applied in his case, although he had not been subjected to any investigation, trial or sanction whatsoever. Finally, the law provided the extinction of civil liability for all those persons who received the benefit of amnesty.²⁷⁹

2.2 The applications for constitutional review of the General Amnesty Act for the Consolidation of Peace

The judicial branch in El Salvador was not free from blame for the human rights violations perpetrated during the civil war. Indeed, the Truth Commission addressed this situation in its report and stated that one “painfully clear aspect [...] is the glaring inability of the judicial system either to investigate crimes or to enforce the law, especially when it comes to crimes committed with the direct or indirect support of State institutions”.²⁸⁰ Therefore, it was not a surprise that the Supreme Court of Justice of El Salvador rejected the findings and the recommendations made by the Truth Commission in its report. In a public statement made by the Supreme Court of Justice of El Salvador after the report was issued, the Court declared that the report “passes over the legitimate and permanent interests of the country and seriously threatens

²⁷⁹. Legislative Assembly of El Salvador, General Amnesty Act for the Consolidation of Peace, Articles 4 and 6, Decree 486, March 20, 1993.

²⁸⁰. The Commission on the Truth from El Salvador, *From Madness to Hope: The twelve year war in El Salvador*, United Nations, 1993, page 178.

the independence of the judges, who must always be free from all political pressure”.²⁸¹ The former President of the Supreme Court of Justice of El Salvador, Dr. Mauricio Gutiérrez Castro, declared that the recommendations made by the Truth Commission in its report were “completely and absolutely unjust”.²⁸² Additionally, he affirmed that “only God” could prevent him from finishing his term as president of the Supreme Court and, therefore, that it was not necessary to pay any attention to those suggestions.²⁸³

The latter statement was basically a response to the recommendations made by the Truth Commission about the need to reform the judicial system in El Salvador. In its report, the Truth Commission articulated the necessity to overcome the “tremendous concentration of functions in the Supreme Court of Justice, and in its President in particular, as the body which heads the judiciary. This concentration of functions seriously undermines the independence of lower court judges and lawyers, to the detriment of the system as a whole”.²⁸⁴

As a consequence of the absence of the rule of law in the country and the perpetuation of impunity by the enactment of the General Amnesty Act for the Consolidation of Peace, it was not a surprise that the Supreme Court of Justice of El Salvador declared that the Amnesty Act was outside its sphere of control when an application for constitutional review was submitted to the Court the same year that the amnesty law entered into force. On May 20, 1993, by virtue of an application for constitutional review of the General Amnesty Act for the Consolidation of Peace, the Constitutional Chamber of the Supreme Court of Justice of El Salvador ruled that it

²⁸¹. Associated Press, *Salvador Court Rejects Rights Panel Findings*, Los Angeles Times, Article Collection, March 27, 1993.

²⁸². French, Howard, W., *Highest Judge in El Salvador is under Fire*, New York Times, March 23, 1993.

²⁸³. *Id.*

²⁸⁴. The Commission on the Truth from El Salvador, *From Madness to Hope: The twelve year war in El Salvador*, United Nations, 1993, page 188.

was not part of its competence to declare the constitutionality or otherwise of that law.²⁸⁵ To support that decision, the Constitutional Chamber of the Supreme Court of Justice argued that, although it was true that the judicial branch through courts and, particularly, through the Constitutional Chamber had been entitled to ensure the conformity of the legal framework with the Constitution, there were some decisions adopted by the executive and the legislative powers that were beyond its jurisdiction, mainly because the nature of those decisions is purely political.²⁸⁶

Among those decisions beyond its jurisdiction, according to the Constitutional Chamber of the Supreme Court of Justice, was the enactment of amnesty laws in general, such as the one whose constitutionality was subjected to a review by an individual petitioner, *Joaquín Antonio Cáceres Hernández*. According to the Constitutional Chamber, the power to grant amnesties was an attribution of the legislative power and, thus, a decision of political nature.²⁸⁷ Indeed, in words of the Constitutional Chamber, the political nature of the General Amnesty Act for the Consolidation of Peace allowed the Salvadoran Congress to draft its content as it pleased, without the ability of the judicial branch to rule about the validity of its content, as long as the Salvadoran Congress respected the rules of procedure for its enactment.²⁸⁸

In conclusion, according to the decision provided by the Constitutional Chamber of the Supreme Court of Justice, to decide about the constitutionality or unconstitutionality of the General Amnesty Act for the Consolidation of Peace at that time, it would have affected the separation of powers necessary in a democratic society for the Court to interfere. In other words, due to the political nature of that amnesty law, a judicial resolution about the content of that law

²⁸⁵. Constitutional Chamber of the Supreme Court of Justice of El Salvador, General Amnesty Act for the Consolidation of Peace, Application for Constitutional Review, 10-93, May 20, 1993.

²⁸⁶. *Id.*

²⁸⁷. *Id.*

²⁸⁸. *Id.*

would have affected the necessary checks and balances that must exist between the legislative, the executive and the judicial powers.

Later in time, another application for constitutional review was filed by several individual petitioners against the General Amnesty Act for the Consolidation of Peace. The main argument on which they based their petition was that both articles 1 and 4 of the amnesty law not only violated the Constitution of El Salvador, but several other international treaties directly as well as indirectly. The petitioners argued, first, that Articles 1 and 4 of the General Amnesty Act for the Consolidation of Peace violated directly the American Convention on Human Rights, an instrument that was an integral part of the Constitution, by contravening the human rights enshrined in the American Convention on Human Rights. Further, they argued that the American Convention on Human Rights, along with the Constitution of El Salvador, conformed a constitutionality block, meaning that the rights and the freedoms enshrined in the American Convention on Human Rights also constituted a parameter to determine the constitutionality of the secondary laws.

Second, they claimed that articles 1 and 4 of the General Amnesty Act for the Consolidation of Peace indirectly violated several international human rights treaties and, as a consequence, they directly violated Article 144²⁸⁹ of the Constitution. The international treaties whose indirect violation was invoked by the petitioners were the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention against Torture and Other Cruel,

²⁸⁹. The treaties celebrated between El Salvador and other State or between El Salvador and an international organization constitute law of the land, since the moment of its entry into force, according to the dispositions of the treaty itself and of the Constitution. The domestic law would not modify or derogate that agreed upon in a treaty in effect in El Salvador. Moreover, according to it, in the event of a conflict between a treaty and a domestic law, the international treaty would prevail. Constituent Assembly, Constitution of the Republic of El Salvador, Article 144, Decree 38, El Salvador 1983.

Inhuman or Degrading Treatment or Punishment and the Inter-American Convention to Prevent and Punish Torture.

Third, the petitioners alleged that articles 1 and 4 of the General Amnesty Act for the Consolidation of Peace violated directly articles 2²⁹⁰, 244²⁹¹ and 245²⁹² of the Constitution. To support this statement, firstly, the petitioners argued that article 1 of the Amnesty Act banned the State from prosecuting several crimes committed during the period covered by the amnesty law. Secondly, they argued that article 1 of the Amnesty Act impeded the investigation, the prosecution and the punishment of those persons responsible for violations to human rights perpetrated during the civil war. Lastly, they stated that article 4 of the law extinguished both the criminal and the civil responsibility derived from the crimes to which the amnesty law applied.

On September 26, 2000, the Constitutional Chamber of the Supreme Court of Justice dismissed the first two arguments filed by the petitioners through their application for constitutional review on the grounds that, although it was undeniable that the international human rights treaties, such as the American Convention on Human Rights, complemented and developed the content of those human rights enshrined in the Constitution, that did not imply, in

²⁹⁰. Every person has a right to life, to physical and moral integrity, to liberty, to security, to work, to property and to possession and, moreover, to be protected in the conservation and in the defense of those rights. It is guaranteed the right to honor, personal and familiar privacy and to self image. It is established compensation, according to law, in those cases in which moral harm is caused. Constituent Assembly, Constitution of the Republic of El Salvador, Article 2, Decree 38, El Salvador 1983.

²⁹¹. The violation, the infraction or the alteration of any constitutional disposition would be specially punished by law, and the civil and the criminal responsibilities in which public authorities incurred, whether civilians or militaries, would not allow amnesty, commutation or official pardon, if the crimes were committed during the presidential period in which those benefits are intended to be granted. Constituent Assembly, Constitution of the Republic of El Salvador, Article 244, Decree 38, El Salvador 1983.

²⁹². The public authorities would respond personally and the State subsidiary for those material or moral harms which they might cause as a consequence of a violation to the rights enshrined in the Constitution. Constituent Assembly, Constitution of the Republic of El Salvador, Article 245, Decree 38, El Salvador 1983.

any way, that international treaties were an integral part of the Constitution, nor that those instruments were deemed as part of a constitutionality block.²⁹³

The Constitutional Chamber for the Supreme Court of Justice further argued that the Constitutional Procedures Act stated that an application for constitutional review was a constitutional process through which laws hierarchically inferior to the Constitution were contrasted with the Constitution, in order to determine its conformity with it. In other words, its aim was to determine whether laws hierarchically inferior to the Constitution were in conformity with its text and not to decide whether laws hierarchically inferior were compatible among themselves, such as international treaties and domestic laws.²⁹⁴

Therefore, the Constitutional Chamber of the Supreme Court of Justice ruled that it was beyond its sphere of competence to determine a possible incompatibility between articles 1 and 4 of the General Amnesty Act for the Consolidation of Peace and several dispositions enshrined in the American Convention on Human Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Inter-American Convention to Prevent and Punish Torture.

The Constitutional Court of the Supreme Court of Justice further held that the last three arguments made by the petitioners did not reflect the unconstitutionality of articles 1 and 4 of the General Amnesty Act for the Consolidation of Peace, since the judges had the possibility to interpret those articles according to the Constitution when dealing with an specific case.

²⁹³. Constitutional Chamber of the Supreme Court of Justice of El Salvador, General Amnesty Act for the Consolidation of Peace, Application for Constitutional Review, 24-97 21-98, September 26, 2000.

²⁹⁴. *Id.*

Therefore, based on those arguments, the Constitutional Chamber did not dismiss the application on constitutional review, but actually declared that the law was constitutional.²⁹⁵

2.3 International responses to the General Amnesty Act for the Consolidation of Peace

In times of transition from authoritarian regimes to democratically elected governments and in periods of transitions from armed conflicts to negotiated peace, often two or more principles come into conflict, such as justice and peace.²⁹⁶ This is often due to the fact that in those situations in which the distinction between the winners and losers tends to be uncertain and blurred, the parties to the conflict must reach a negotiated agreement in order to lay the foundations in which the new society would be cemented. In those cases, although it is necessary to grant a certain margin of appreciation to the national parties involved in the negotiation processes, the international community must be alert, in order to guarantee that the States under transition would comply with the international obligations that arise either from international treaties or from international customary law. This mandate is a direct consequence of the internationalization of human rights after the Second World War. Indeed, after the end of that terrible war, the international community arrived to the conclusion that the protection and the assurance of human rights was not to a matter of national sovereignty, but an issue that concerned all humankind.

This conclusion was included in the United Nations Charter. Indeed, in one of its articles, the United Nations declared that, in order to create conditions of stability and welfare for all

²⁹⁵. Constitutional Chamber of the Supreme Court of Justice of El Salvador, General Amnesty Act for the Consolidation of Peace, Application for Constitutional Review, 24-97 21-98, September 26, 2000.

²⁹⁶. Cfr. Uprimny Yepes, Rodrigo, et. al., *¿Justicia Transicional sin Transición?*, Reflexiones sobre Verdad, Justicia y Reparación en Colombia, 1, Centro de Estudios de Derecho, Justicia y Sociedad, Bogotá 2006.

humankind, it should promote, among other situations, a “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion”.²⁹⁷

However, since the adoption of the United Nations Charter, the situation of the world has changed tremendously. Indeed, since that time, several processes of decolonization and democratization have taken place and, thus, transitional governments have had to face the investigation, prosecution and punishment of those responsible for human rights violations. The role of democratically elected governments has been subjected to serious scrutiny, specifically in those cases in which amnesty laws have been applied to gross violations of international human rights laws and serious violations of international humanitarian laws. Thus, although amnesty laws are not banned by the international treaties or by customary international law, the problem arises when immunity becomes a variant of impunity.²⁹⁸

There exists an international consensus that, in order for an amnesty law to meet the international obligations adopted by a State, it is necessary for the amnesty law to meet certain minimum conditions: i) to have a public debate preceding its enactment; ii) it should provide for the adoption of measures to guarantee the investigation, prosecution and punishment of the perpetrators of heinous crimes; and, finally, iii) the implementation of effective remedies²⁹⁹. Therefore, those blanket amnesties which, whether *de jure* or *de facto*, impose the obligations to forgive and forget to the people under the jurisdiction of a State are the ones that are contrary to

²⁹⁷. United Nations, Charter of the United Nations, Article 55, adopted in June 26, 1945 and entered into force in October 24, 1945.

²⁹⁸. Cfr. Huyse, Luc, *Justice*, in Bloomfield David and ors, *Reconciliation after a Violent Conflict: A Handbook*, 97-115, 109, International Institute for Democracy and Electoral Assistance, Sweden 2003.

²⁹⁹. Cfr. Huyse, Luc, *Justice*, in Bloomfield David and ors, *Reconciliation after a Violent Conflict: A Handbook*, 97-115, 110, International Institute for Democracy and Electoral Assistance, Sweden 2003.

the international obligations that arise both from international treaties and customary international law.

In order to provide the international community with a series of guidelines for the drafting of amnesties laws compatible with international obligations, Professor Douglas Cassel has listed a variety of standards that should be met. These standards include the democratic adoption of the amnesty law, the investigation to human rights violations, the revelation of the names of the perpetrators of heinous crimes, the participation of the victims in the investigations, the provision of effective compensation, the acknowledgement of the responsibility of the State and the prosecution and punishment of serious human rights violations, among others.³⁰⁰

These guidelines were taken up by the United Nations when it drafted the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity³⁰¹ and by several other international tribunals through its jurisprudence, such as the Inter-American Court of Human Rights. The Inter-American Court of Human Rights has, accordingly, declared that all “amnesty provisions, provisions on prescription and the

³⁰⁰. Cassel, Douglass, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 *Law & Contemp. Probs.*, 1996, 197-230, 228-229.

³⁰¹. “Even when intended to establish conditions conducive to a peace agreement or to foster national reconciliation, amnesty and other measures of clemency shall be kept within the following bounds: (a) The perpetrators of serious crimes under international law may not benefit from such measures until such time as the State has met the obligations to which principle 19 refers or the perpetrators have been prosecuted before a court with jurisdiction - whether international, internationalized or national - outside the State in question; (b) Amnesties and other measures of clemency shall be without effect with respect to the victims’ right to reparation, to which principles 31 through 34 refer, and shall not prejudice the right to know; (c) Insofar as it may be interpreted as an admission of guilt, amnesty cannot be imposed on individuals prosecuted or sentenced for acts connected with the peaceful exercise of their right to freedom of opinion and expression. When they have merely exercised this legitimate right, as guaranteed by articles 18 to 20 of the Universal Declaration of Human Rights and 18, 19, 21 and 22 of the International Covenant on Civil and Political Rights, the law shall consider any judicial or other decision concerning them to be null and void; their detention shall be ended unconditionally and without delay; (d) Any individual convicted of offences other than those to which paragraph (c) of this principle refers who comes within the scope of an amnesty is entitled to refuse it and request a retrial, if he or she has been tried without benefit of the right to a fair hearing guaranteed by articles 10 and 11 of the Universal Declaration of Human Rights and articles 9, 14 and 15 of the International Covenant on Civil and Political Rights, or if he or she was convicted on the basis of a statement established to have been made as a result of inhuman or degrading interrogation, especially under torture”. Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, Principle 24, Economic and Social Council of the United Nations, Geneva 2005.

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”.³⁰²

With regard to the General Amnesty Act for the Consolidation of Peace enacted in El Salvador, a report by the Working Group on Enforced or Involuntary Disappearances recommended to the State of El Salvador to take “effective steps to guarantee and enforce the rights to justice, truth, redress and rehabilitation”³⁰³ and to overhaul the General Amnesty Act for the Consolidation of Peace, in order to bring it into line with its international obligations. In that report, the Working Group on Enforced or Involuntary Disappearances recalled previous statements made by former authorities of the United Nations about the General Amnesty Act for the Consolidation of Peace, such as that by the Secretary General of the United Nations to the effect that “the approval of the amnesty act as a clear instance of the rejection of the findings of the Commission on the Truth”.³⁰⁴

On the other hand, the Inter-American Court of Human Rights has expressed its concern over the fact that the General Amnesty Act for the Consolidation of Peace is “still in force in El Salvador and has been applied in other cases”³⁰⁵. Moreover, it urged the State of El Salvador to “abstain from using figures such as amnesty and prescription or the establishment of measures

³⁰². Inter-American Court of Human Rights, *Case of Barrios Altos v. Peru*, Judgment of March 14, 2001, paragraph 41.

³⁰³. Human Rights Council, *Report of the Working Group on Enforced Or Involuntary Disappearances*, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Mission to El Salvador, General Assembly of the United Nations, Geneva 2007, 3.

³⁰⁴. Human Rights Council, *Report of the Working Group on Enforced Or Involuntary Disappearances*, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Mission to El Salvador, General Assembly of the United Nations, Geneva 2007, 16.

³⁰⁵. Inter-American Court of Human Rights, *Case of the Serrano-Cruz Sisters v. El Salvador*, Judgment of March 1, 2005, paragraph 171.

designed to eliminate responsibility, or measures intended to prevent criminal prosecution or suppress the effects of a conviction”.³⁰⁶

Finally, the Inter-American Commission on Human Rights has stated in several occasions that the General Amnesty Act for the Consolidation of Peace is in contravention of several obligations adopted by the State of El Salvador when the latter subscribed and ratified the American Convention on Human Rights. Among these obligations are the duty to adopt domestic legislative measures in order to give effect to the rights and freedoms enshrined in the American Convention on Human Rights, the obligation to investigate, prosecute and punish those responsible for human rights violations and, lastly, the duty to reveal the identity of those who perpetrated the crimes.³⁰⁷ The Commission has specifically declared that the General Amnesty Act for the Consolidation of Peace “legally removes the right to justice established by Articles 1(1), 8(1) and 25 of the American Convention, since it makes impossible any effective investigation of human rights violations, or the prosecution and punishment of all those persons involved and the reparation of damages caused. Therefore, [...] 'it disregards the legitimate rights of the victims' next-of-kin to reparation. Such a measure will do nothing to further reconciliation”.³⁰⁸

Hence, the General Amnesty Act for the Consolidation of Peace has been considered by several bodies of the international community as a law that violates the “international obligations assumed by the State [...] because it makes possible a 'reciprocal amnesty' (without first acknowledging responsibility), [...] because it applies to crimes against humanity, and because it

³⁰⁶. Inter-American Court of Human Rights, Case of the Serrano-Cruz Sisters v. El Salvador, Judgment of March 1, 2005, paragraph 172.

³⁰⁷. Inter-American Commission on Human Rights, Report No. 136/99, Case 10.488, El Salvador, December 22, 1999 and Inter-American Commission on Human Rights, Report N° 37/00, Case 11.481, El Salvador, April 13, 2000.

³⁰⁸. Inter-American Commission on Human Rights, Report on the Human Rights Situation in El Salvador, Washington D.C. 1994, 82.

eliminates any possibility of obtaining adequate reparations, including financial compensation, for the damages caused”.³⁰⁹

3. The constitutional processes designed to protect the rights and freedoms enshrined in the Constitution in specific cases

The three constitutional processes established to preserve the integrity of the Constitution and to protect and ensure the rights and freedoms enshrined in it are described in the text of the Constitution. The constitutional processes whose objective is to guarantee the conformity of the whole Salvadoran legal framework with the Constitution are: the application for constitutional review,³¹⁰ the writ of amparo³¹¹ and the writ of habeas corpus.³¹² However, the dispositions which define those processes need to be developed by secondary laws which do not contradict their spirit. As a consequence, the Salvadoran Congress drafted the Constitutional Procedures Act through which every constitutional process is carefully described, particularly its scope, its subjects, its requirements and its effects.

In order to understand how these constitutional processes work, what are their main differences and why the writ of amparo will be particularly selected to judicially enforce the

³⁰⁹. Inter-American Commission on Human Rights, Report No. 136/99, Case 10.488, El Salvador, December 22, 1999, paragraph 216.

³¹⁰. The Supreme Court of Justice of El Salvador, through its Constitutional Chamber, will be the only tribunal entitled to declare the unconstitutionality of any law, decree or other regulation, based on substantive or procedural reasons, with obligatory and general effects, as a response to a petition submitted by any citizen. Constituent Assembly, Constitution of the Republic of El Salvador, Article 183, Decree 38, El Salvador 1983.

³¹¹. Any person can submit a writ of amparo before the Constitutional Chamber of the Supreme Court of Justice for the violation of the rights enshrined by the Constitution. Constituent Assembly, Constitution of the Republic of El Salvador, Article 247, Decree 38, El Salvador 1983.

³¹². Every person has a right to the writ of habeas corpus whenever an individual or an authority, illegally or arbitrarily, restricts his freedom. The writ of habeas corpus will also proceed whenever an authority attempts either against the dignity or the physical and mental integrity of the persons detained. Constituent Assembly, Constitution of the Republic of El Salvador, Article 11, Decree 38, El Salvador 1983.

right to truth, every one of them will be briefly described in this heading, specially its scope and its effects.

3.1 The application for constitutional review

As stated before, an application for constitutional review is a constitutional process through which laws hierarchically inferior to the Constitution are confronted *in abstracto* with its text, both substantively and procedurally, in order to determine the conformity of those laws with the provisions enshrined in the Constitution. The aim of this constitutional process is to determine, in abstract, whether the laws hierarchically inferior to the Constitution contradict its text, either in substance or in procedure, but not to decide whether the laws hierarchically inferior to the Constitution are consistent among themselves. This is due to the fact that the main goal of this process is not to monitor the compatibility of the whole legal framework, but only if secondary laws are in harmony with the supreme law of the country, which is the Constitution.

However, in recent years, the Constitutional Chamber of the Supreme Court of Justice has accepted the there can exist an indirect violation of the Constitution when a domestic law may be in contradiction with an international human rights treaty, departing from what it is established in article 144 of the Constitution. The Constitutional Chamber of the Supreme Court of Justice has specifically declared that even if the international treaties are not a parameter of control under an application for constitutional review, its binding force within the legal framework in El Salvador³¹³ cannot be disregarded by the Constitutional Chamber of the

³¹³. The domestic law would not modify or derogate that agreed upon in a treaty in effect in El Salvador. Moreover, according to it, in the event of a conflict between a treaty and a domestic law, the international treaty would prevail. Constituent Assembly, Constitution of the Republic of El Salvador, Article 144, paragraph 2, Decree 38, El Salvador 1983.

Supreme Court of Justice. Therefore, when a domestic law contradicts an international treaty, the Constitution is indirectly violated because of what is established in its article 144, but only when it deals with international human rights treaties, since the latter share the same values with the Constitution of El Salvador.³¹⁴

It is important to mention that if that way of thinking had predominated among the Judges of the Constitutional Chamber of the Supreme Court of Justice when dealing four years ago with the General Amnesty Act for the Consolidation of Peace, probably the decision reached by them would have been different. Thus, they would possibly not have dismissed one of the arguments submitted by the petitioners related, particularly, to an indirect violation of the Constitution due to the contradiction between the General Amnesty Act for the Consolidation of Peace and some international treaties.

An application for constitutionality review can be submitted by any citizen of the Republic of El Salvador³¹⁵ and by certain public authorities, such as the ombudsman, according to the jurisprudence of the Constitutional Chamber of the Supreme Court of Justice of El Salvador.³¹⁶

An application for constitutional review can be filed either to protect the specific interests of a citizen who is being affected by laws hierarchically inferior to the Constitution and which are apparently in contradiction with the dispositions enshrined in the latter. Moreover, that process can be filed to compel the Constitutional Chamber of the Supreme Court of Justice to

³¹⁴. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Anti Gang Law, Application for Constitutional Review, 52-2003/56-2003/57-2003 April 1, 2004.

³¹⁵. Constituent Assembly, Constitution of the Republic of El Salvador, Article 183, Decree 38, El Salvador 1983 and Legislative Assembly of El Salvador, Constitutional Procedures Act of El Salvador, Article 2, Decree 2996, El Salvador 1960.

³¹⁶. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Emergency Transitory Law against Delinquency and Organized Crime, Application for Constitutional Review, 15-96, 14 February 1997.

implement an abstract control over secondary laws, without the necessity that those laws are actually causing a direct harm to the petitioner.³¹⁷

However, in an application for constitutional review, it is indispensable for the petitioner to define the norm whose constitutionality is challenged. Therefore, the parameter of control of an application of constitutional review has necessarily to be a law hierarchically inferior to the supreme law of the country, such as an international treaty, a domestic law, among other.³¹⁸ This requirement implies that in an application for constitutional review, the Constitutional Chamber of the Supreme Court of Justice does not have the ability to apply the principle of *iura novit curia* because, since it is not crucial for those processes to allege concrete facts, the ability to modify or to rectify the norm whose control is expected would involve, in fact, the drafting of the petition by the Constitutional Chamber of the Supreme Court of Justice on behalf of the petitioner.

3.2 The writ of amparo

The procedural institution of amparo has been recognized widely by most countries in Latin America, with some variations in its definition and in its application from country to country. Nevertheless, from the different legislations in different countries, it is possible to arrive to the conclusion that, in general, the institution of “amparo is used to safeguard all human rights

³¹⁷. Legislative Assembly of El Salvador, Constitutional Procedures Act of El Salvador, Article 2, Decree 2996, El Salvador 1960.

³¹⁸. Legislative Assembly of El Salvador, Constitutional Procedures Act of El Salvador, Article 6, Decree 2996, El Salvador 1960.

established in the national constitutions with the exception of personal liberty, which is protected by habeas corpus”.³¹⁹

Indeed, one of the two supervisory organs of the Organization of American States has defined the writ of amparo as a “simple and prompt remedy designed for the protection of all of the rights recognized by the constitutions and laws of the States Parties and by the Convention”.³²⁰

In El Salvador, the Constitution enables not only all citizens, but all persons, to file a writ of amparo before the Constitutional Chamber of the Supreme Court of Justice for the violation of any right or any freedom enshrined in it³²¹, with the exception of the right to personal liberty, which has its own special procedure for its protection and for its assurance, such as the writ of habeas corpus.³²²

According to the Constitutional Procedures Act of El Salvador, the writ of amparo proceeds against any action or any omission attributed to any public authority which violates all the rights and the freedoms protected by the Constitution,³²³ except the right to personal liberty, which is protected by the writ of habeas corpus.³²⁴ Furthermore, through its jurisprudence, the Constitutional Chamber of the Supreme Court of Justice has expanded the scope of protection of the writ of amparo and has established that it also proceeds against any action or any omission attributed to both private individuals and private entities that hold a position of power before another individual. Therefore, through its decisions, the highest court has adopted the theory

³¹⁹. Fix Zamudio, Héctor, *The Writ of Amparo in Latin America in Lawyer of the Americas*, Volume 13, Number 3, 1981, 361-391, 366.

³²⁰. Inter-American Court of Human Rights, Advisory Opinion OC-9/87 of October 6, 1987, paragraph 32.

³²¹. Constituent Assembly, Constitution of the Republic of El Salvador, Article 247, Decree 38, El Salvador 1983.

³²². Constituent Assembly, Constitution of the Republic of El Salvador, Article 11, Decree 38, El Salvador 1983.

³²³. Legislative Assembly of El Salvador, Constitutional Procedures Act of El Salvador, Article 12, Decree 2996, El Salvador 1960.

³²⁴. Legislative Assembly of El Salvador, Constitutional Procedures Act of El Salvador, Article 4, Decree 2996, El Salvador 1960.

known as the third party effect, specifically in its horizontal effect, known also as *drittwirkung*.³²⁵

About the scope of protection of the writ of amparo, it is important to clarify that, as stated before, it only proceeds against actions or omissions which violate the Constitution. Therefore, any action or any omission attributed to a person or to an entity situated in a position of power which only violates secondary laws cannot be the basis to submit a writ of amparo before the Constitutional Chamber of the Supreme Court of Justice.³²⁶

Moreover, since the writ of amparo has been conceived as a process whose main goal is to give a reinforced protection to the rights and the freedoms enshrined in the Constitution, a person needs to exhaust all ordinary legal remedies in order to file a writ of amparo before the highest court in El Salvador.³²⁷ This is because, according to the Constitution, all judges with jurisdiction within the country, when exercising their powers, are compelled to protect and to ensure the rights and freedoms described in the Constitution and, therefore, they have the possibility to remedy any possible violation presumably caused to its text.³²⁸

The writ of amparo can, therefore, be said to have two main goals. The first one is to protect and to ensure the rights and the freedoms of those persons who have alleged a violation against them by an authority situated in a position of power within a specific case. The second one is to provide a judgment which will serve as an interpretation guideline for future authorities when adopting a decision within a specific case under their knowledge. In conclusion, the writ of

³²⁵. “Horizontal direct effect is the application of public law rules to directly affect legal relations between private individuals in their relations with other private law persons”. “Norms given horizontal direct effect bind the citizens of the Member States in their mutual relations”. In Engle, Eric, *Third Party Effect of Fundamental Rights (Drittwirkung)* in *Hanse Law Review*, Volume 5, Number 2, 2009, 165-173, 165.

³²⁶. Legislative Assembly of El Salvador, Constitutional Procedures Act of El Salvador, Article 13, Decree 2996, El Salvador 1960.

³²⁷. Legislative Assembly of El Salvador, Constitutional Procedures Act of El Salvador, Article 12, Decree 2996, El Salvador 1960.

³²⁸. Constituent Assembly, Constitution of the Republic of El Salvador, Article 185, Decree 38, El Salvador 1983.

amparo has both a subjective and an objective dimension whose intention, as a whole, is to preserve the integrity of the Constitution and, therefore, its effects are not limited, in any way, to the parties that intervene in it.³²⁹ That is why one of the two supervisory organs of the Organization of American States has declared that the writ of amparo, along with the writ of habeas corpus, is one of “those judicial remedies that are essential for the protection of various rights whose derogation is prohibited”³³⁰ and, therefore, that remedy as itself is not subject to derogation in a state of emergency.³³¹

3.3 The writ of habeas corpus

The writ of habeas corpus has been defined as a “judicial remedy designed to protect personal freedom or physical integrity against arbitrary detentions by means of a judicial decree ordering the appropriate authorities to bring the detained person before a judge so that the lawfulness of the detention may be determined and, if appropriate, the release of the detainee be ordered”.³³² As earlier mentioned, in El Salvador the writ of habeas corpus is considered an independent remedy from the writ of amparo. This is due to the fact that the main purpose of the writ of habeas corpus is to “protect the personal freedom of those who are being detained or who have been threatened with detention”³³³ by determining the lawfulness or unlawfulness of the detention of the petitioner.

³²⁹. Cfr. Montecino Giralt, Manuel Arturo, *El Amparo en El Salvador*, Corte Suprema de Justicia de El Salvador, Sección de Publicaciones, San Salvador, 2005, pages 53-62.

³³⁰. Inter-American Court of Human Rights, Advisory Opinion OC-9/87 of October 6, 1987, paragraph 33.

³³¹. Inter-American Court of Human Rights, Advisory Opinion OC-9/87 of October 6, 1987, Merits, paragraph 1.

³³². Inter-American Court of Human Rights, Advisory Opinion OC-8/87 of January 30, 1987, paragraph 33.

³³³. Inter-American Court of Human Rights, Advisory Opinion OC-8/87 of January 30, 1987, paragraph 34. See also, Constituent Assembly, Constitution of the Republic of El Salvador, Article 11, Decree 38, El Salvador 1983.

In order for the writ of habeas corpus to achieve its objective, the person who has been detained has to be brought before a competent judge and has to be prosecuted according to preexisting laws. Moreover, at the moment of his detention, his rights must be respected and ensured by the authorities responsible for conducting it. In other words, the institution of habeas corpus aims to ensure the life and physical integrity of a person, prevent his disappearance and protect him against torture or other cruel, inhumane or degrading treatment.³³⁴ As a consequence of this situation, the writ of habeas corpus has also been deemed as a remedy which cannot be suspended under any circumstance, not even under a declared state of emergency.³³⁵

According to the Constitution of El Salvador and to the Constitutional Procedures Act of El Salvador, any person is entitled to submit a writ of habeas corpus before the Constitutional Chamber or before the Appellate Chambers located outside the capital, in order to speed up the proceeding.³³⁶ However, to ensure its constitutional nature, in those cases in which an Appellate Chamber decided to deny the liberty of the petitioner, that decision can be subjected to revision by the Constitutional Chamber of the Supreme Court of Justice.³³⁷ But, when the liberty of the petitioner is denied by the Constitutional Chamber of the Supreme Court of Justice, that decision is no longer subject to revision, just like the decisions provided by that entity within an application for constitutional review or within a writ of amparo.³³⁸

With regards to who is entitled to submit a writ of habeas corpus, the Constitutional Chamber of the Supreme Court of Justice of El Salvador has recognized an *actio popularis*. That means that any person can file a writ of habeas corpus and not only the victim of the violation

³³⁴. Inter-American Court of Human Rights, Advisory Opinion OC-8/87 of January 30, 1987, paragraph 35.

³³⁵. Inter-American Court of Human Rights, Advisory Opinion OC-8/87 of January 30, 1987, paragraph 43.

³³⁶. Constituent Assembly, Constitution of the Republic of El Salvador, Article 247, Decree 38, El Salvador 1983 and Legislative Assembly of El Salvador, Constitutional Procedures Act of El Salvador, Article 41, Decree 2996, El Salvador 1960.

³³⁷. Constituent Assembly, Constitution of the Republic of El Salvador, Article 247, Decree 38, El Salvador 1983.

³³⁸. Legislative Assembly of El Salvador, Constitutional Procedures Act of El Salvador, Articles 77 F and 86, Decree 2996, El Salvador 1960.

himself. In other words, even a person whose right to liberty to personal freedom has not been restricted is entitled to present a writ of habeas corpus on behalf of other persons.³³⁹ Furthermore, the writ of habeas corpus can be decided *ex officio*, when the competent tribunals are aware of an illegal detention.³⁴⁰

Throughout the development of its jurisprudence, the Constitutional Chamber of the Supreme Court of Justice of El Salvador has declared that, in cases of forced disappearances, the writ of habeas corpus must include an investigation aimed at revealing the fate and the whereabouts of those disappeared, since the normal effect of the writ of habeas corpus cannot be materialized in those cases, which is to put into liberty the person whose right has been illegally restricted. Therefore, in cases of forced disappearances known through the writ of habeas corpus, the Constitutional Chamber of the Supreme Court of Justice has stated that its duty is not restricted to declare a violation to constitutional right to personal liberty, but it has expanded its mandate to order an investigation with the assistance of other entities of the State.³⁴¹

In conclusion, the writ of habeas corpus has an enormous importance in the protection and assurance of the right to personal liberty and, due to its urgency, it can be filed before other tribunals despite its constitutional nature and it can be requested by any person and not only the one whose right is subject to violation. However, due to its specificity, it is important to recall that it has a more limited scope than the writ of *amparo*.

³³⁹. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Habeas Corpus, 24-2005, August 16, 2005.

³⁴⁰. Legislative Assembly of El Salvador, Constitutional Procedures Act of El Salvador, Article 42, Decree 2996, El Salvador 1960.

³⁴¹. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Habeas Corpus, 198-2007, November 25, 2009.

3.4 The writ of habeas data

According to the Special Rapporteur for Freedom of Expression of the Organization of American States, the “action of habeas data is the most important instrument for blocking the disclosure of erroneous or sensitive information that may adversely affect reputation, privacy or other extremely important human rights”.³⁴² In the words of the Inter-American Commission on Human Rights, the action of habeas data is “a fundamental instrument for investigation into human rights violations committed during past military dictatorships in the Hemisphere. Family members of disappeared persons have used habeas data actions to obtain information concerning government conduct, to learn the fate of disappeared persons and to exact accountability”.³⁴³

Thus, the remedy of habeas data can be described as the mechanism instituted to modify, rectify or eliminate personal data that it is in possession of public or private entities, particularly in those cases in which an individual believes the information belonging to him is sensitive, inaccurate, subjective or discriminatory. Additionally, this mechanism can be used by victims and their relatives to enforce the right to truth through a judicial mechanism and, therefore, to obtain information about past human rights violations.

In order for the action of habeas data to be effective, the Inter-American Commission on Human Rights has stated that “the administrative hurdles that complicate or frustrate the obtention of information must be eliminated, and simple, easily accessible systems enabling individuals to request information inexpensively must be put in place”.³⁴⁴

³⁴². Inter-American Commission on Human Rights, Annual Report of the Inter-American Commission on Human Rights, Organization of American States, Washington D.C. 2009, chapter 4, paragraph 95.

³⁴³. Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, Organization of American States, Washington D.C., 2002, paragraph 290.

³⁴⁴. Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, Organization of American States, Washington D.C., 2002, paragraph 293.

This is due to the fact that habeas data is intimately related to the right of access to information, which is connected to the principle of maximum disclosure. Besides, in cases of human rights violations, the authorities who are being subjected to an administrative or to a judicial investigation and, therefore, that are requested to provide information, “cannot shield themselves behind the protective cloak of official secret to avoid or obstruct the investigation”.³⁴⁵

In El Salvador, the procedural institutions described in the Constitution to protect the rights and the freedoms granted by it to all persons are the writ of amparo and the writ of habeas corpus. Thus, the action of habeas data as such has not been, up to date, recognized to ensure the respect for the right of access to information. However, that situation does not imply that the latter right does not enjoy any protection under the Salvadorian legal framework.

Indeed, on March 2, 2004, the Constitutional Chamber of the Supreme Court of El Salvador provided a ruling through which it was established that, due to the lack of recognition of the institution of habeas data, the writ of amparo was the adequate instrument through which the rights.³⁴⁶

³⁴⁵. Inter-American Court of Human Rights, Case of Myrna Mack Chang v. Guatemala, Judgment of November 25, 2003, paragraph 181.

³⁴⁶. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Amparo, 118-2002, March 2, 2004.

CHAPTER V

THE JUDICIAL ENFORCEABILITY OF THE RIGHT TO TRUTH IN EL SALVADOR THROUGH THE WRIT OF *AMPARO*

1. The necessity for the judicial enforceability of the right to truth in its individual dimension in El Salvador

According to rules and guidelines that have been developed during the last decades in order to deal with a past plagued by gross violations of international human rights laws and serious violations of international humanitarian laws, the right to truth has both an individual and a collective dimension in itself³⁴⁷ and also as part of the right to an effective remedy.³⁴⁸

³⁴⁷. The “victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations”. United Nations General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Principle X, Resolution 60/147, UN Doc. A/RES/60/147, 2005. “Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations”. Commission on Human Rights, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Principle 2, Economic and Social Council of the United Nations, Geneva, 2005.

³⁴⁸. Measures of satisfaction “should include, where applicable, any or all of the following: (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim’s relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations; (c) The search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities; (d) An official declaration or a judicial decision restoring the dignity, the reputation and the rights of the victim and of persons closely connected with the victim; (e) Public apology, including acknowledgement of the facts and acceptance of responsibility; Commission on Human Rights, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Principle IX, Economic and Social Council of the United Nations, Geneva, 2005.

In El Salvador, as earlier highlighted, as a result of the Peace Accords, a Commission on the Truth was established after the end of the armed conflict to investigate “serious acts of violence that have occurred since 1980 and whose impact on society urgently demands that the public should know the truth”.³⁴⁹ After nine months of collecting testimonies from thousands of direct and indirect sources, reviewing several public and private files and records and conducting few on site visits, the Truth Commission for El Salvador released a comprehensive and thorough report titled “From Madness to Hope: The twelve year war in El Salvador”.

Through that report, the Truth Commission was able to present a holistic picture of the structural causes that allowed the emergence and the perpetuation of the war for twelve years in the country, to depict an ample account of the patterns of violence followed by the parties in conflict and, finally, to provide a detailed report of those specific cases that had shocked society as a whole, which led to the commissioners to even name the names of the perpetrators where sufficient evidence was provided.³⁵⁰

That report contributed enormously to building a global truth about the abuses committed during the recent past in El Salvador and to assign responsibilities both at a global scale and at an individual scale in some specific cases. Indeed, thirty two cases were documented thoroughly in the report and, “where the Commission felt it had obtained sufficient information to make a finding, it named the individuals responsible for or complicit in specific acts of violence”.³⁵¹

However, due to the constraints in its mandate and due to its limited period of operation, the Truth Commission was not able to provide through its report an individual truth to all the

³⁴⁹. United Nations, *El Salvador: Mexico Peace Agreements-Provisions Creating the Commission on Truth, Mexico City, April 27, 1991* in Kritz, Neil J., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Volume III, United States Institute of Peace, United States of America, 1995, 174-176, 175.

³⁵⁰. The Commission on the Truth from El Salvador, *From Madness to Hope: The twelve year war in El Salvador*, United Nations, 1993.

³⁵¹. Popkin, Margaret, *The Salvadoran Truth Commission and the Search for Justice*, *Criminal Law Forum* 15, 105 – 124, 111, 2004.

persons who were the victims of abuses during the war and whose cases had not given rise to a social unrest of such dimension that society as a whole felt affected by it. Thus, despite the enormous contribution of the report to the construction of a collective memory, the vast majority of the relatives of the victims of extrajudicial killings and of forced disappearances kept wondering about the fate and the whereabouts of their loved ones, in order for them to come to terms with the past.

That situation of uncertainty was aggravated by the reactions of the public authorities and the armed forces, who vehemently denied the findings of the Truth Commission and who refused to acknowledge any responsibility for the human rights violations attributed to them. Furthermore, that situation of unending uncertainty was further confirmed by the enactment of the General Amnesty Act for the Consolidation of Peace, which closed the possibility to arrive to an individual truth through judicial means.

For all the aforementioned considerations, despite the colossal work performed by the Truth Commission to satisfy the right to truth in its collective dimension, the State of El Salvador still has a pending debt to the relatives of the victims of extrajudicial killings and of forced disappearances to inform them the fate and the whereabouts of their loved ones through judicial mechanisms. This pending debt derives, on one hand, from the “willingness of people to abdicate their right to personal revenge [...] upon the strength of the central authority”³⁵² and, on the other, from its international obligation to respect and to ensure the rights and the freedoms of the people within its jurisdiction.³⁵³

³⁵². Godwin Phelps, Theresa, *Shattered Voices: Language, Violence and the Work of Truth Commissions*, 24, University of Pennsylvania Press, Pennsylvania 2004.

³⁵³. Organization of American States, *American Convention on Human Rights*, Article 1.1 San José, Costa Rica, 22 November 1969.

Finally, as it was recalled in a recent judgment provided by one of the supervisory organs of the Organization of American States against the State of Mexico, “the historical truth documented in the reports and recommendations of bodies such as the National Commission, does not complete or substitute the State’s obligation to also establish the truth through judicial proceedings”.³⁵⁴

2. The writ of amparo as a better suited mechanism for the judicial enforceability of the right to truth in its individual dimension

According to the Constitution of El Salvador and to the Constitutional Procedures Act of El Salvador, and not only the citizens of the country, but all persons are entitled to file a writ of amparo before the Constitutional Chamber of the Supreme Court of Justice for the violation of any right or any freedom enshrined its text,³⁵⁵ with the exception of the right to personal liberty, which has the writ of habeas corpus for its own special protection and assurance.³⁵⁶

However, since all the judges with jurisdiction within the country have also the duty to protect and to respect the constitutional text and, furthermore, to apply its provisions directly when the applicable law is deemed contrary to it, the writ of amparo is considered as a subsidiary mechanism to the ordinary jurisdiction, whose objective is to provide a reinforce protection to the rights and freedoms enshrined within the Constitution. This situation implies that, in order for a writ of amparo to be admissible, among other requirements, the petitioners have the obligation

³⁵⁴. Inter-American Court of Human Rights, Case of Radilla Pacheco v. Mexico, Merits, Judgment of November 23, 2009, paragraph 179.

³⁵⁵. Constituent Assembly, Constitution of the Republic of El Salvador, Article 247, paragraph 1, Decree 38, El Salvador 1983. See also, Legislative Assembly of El Salvador, Constitutional Procedures Act of El Salvador, Articles 3 and 12, Decree 2996, El Salvador 1960.

³⁵⁶. Constituent Assembly, Constitution of the Republic of El Salvador, Article 11, paragraph 2, Decree 38, El Salvador 1983. See also, Legislative Assembly of El Salvador, Constitutional Procedures Act of El Salvador, Articles 4 and 40, Decree 2996, El Salvador 1960.

to exhaust the ordinary remedies established either for the judicial process or for the administrative proceeding in which the allegedly violation occurred.³⁵⁷

Still, throughout an extensive interpretation of article 12 of the Constitutional Procedures Act of El Salvador, the Constitutional Chamber of the Supreme Court of Justice has established several exceptions to the exhaustion of remedies. These exceptions are the imminent occurrence of an irreparable harm as a consequence of the constitutional violation³⁵⁸, the absence or the effectiveness of the remedy to repair the constitutional violation³⁵⁹ and the irrationality of the periods established for the remedy.³⁶⁰

As stated before, the rights and freedoms that can be protected and assured through the writ of amparo are, initially, those which are enshrined in the constitutional text. Nevertheless, again throughout an extensive interpretation, the Constitutional Chamber of the Supreme Court of Justice has declared that those other rights or freedoms which are not enshrined specifically in the constitutional text can be protected through the writ of amparo, if the petitioner is able to link them either with the principles included in it or with the rights and the freedoms contained in the Charta Magna. According to the Constitutional Chamber, to affirm otherwise would imply a very narrow and a very inadequate interpretation of the whole conception of the writ of amparo, as an instrument designed to protect and to ensure rights and freedoms.³⁶¹

³⁵⁷. Legislative Assembly of El Salvador, Constitutional Procedures Act of El Salvador, Articles 12, paragraph 3, Decree 2996, El Salvador 1960.

³⁵⁸. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Amparo, 741-2004, 27 May 2005.

³⁵⁹. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Amparo, 737-2004, 10 June 2005. See also, Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Amparo, 5-S-96, 10 July 1996.

³⁶⁰. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Amparo, 143-1998, 30 June 1999.

³⁶¹. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Amparo, 545-2003, 12 April 2003.

Therefore, although the right to truth is not expressly enshrined in the constitutional text, that right can be protected and ensured through the writ of amparo if the petitioner can link it to several rights included in the constitutional texts, such as the right to physical and moral integrity,³⁶² the right to freedoms of expression in its manifestation of access to information³⁶³ and the right to an effective protection by the State through judicial and non judicial mechanisms.³⁶⁴

Furthermore, based on the jurisprudence provided by the Constitutional Court of Peru, a petitioner can claim the right to truth based on the principle of human dignity, which is a principle that inspires the Constitution of El Salvador.³⁶⁵ Indeed, according to the Constitutional Court of Peru, the right to truth in its individual dimension can be inferred from the principle of human dignity, since the harm done was not only caused to the life of a person or to his personal integrity, but to the ignorance of his fate and of his whereabouts by his relatives, which affects also their human dignity.³⁶⁶

If the writ of amparo succeeds, the judgment that awards it shall include measures of reparation for the harm suffered as a consequence of the constitutional violation. According to Constitutional Procedures Act of El Salvador, the desirable measure to be awarded to the victim is the *restitutio in integrum*.³⁶⁷ However, if the *restitutio in integrum* is not feasible in the case in

³⁶². Constituent Assembly, Constitution of the Republic of El Salvador, Article 2, paragraph 1, Decree 38, El Salvador 1983.

³⁶³. Constituent Assembly, Constitution of the Republic of El Salvador, Article 6, paragraph 1, Decree 38, El Salvador 1983.

³⁶⁴. Constituent Assembly, Constitution of the Republic of El Salvador, Article 2, paragraph 1, Decree 38, El Salvador 1983. See also, Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Amparo, 674-2001 23 December 2003.

³⁶⁵. Constituent Assembly, Constitution of the Republic of El Salvador, Preamble, Decree 38, El Salvador 1983.

³⁶⁶. Fundación para el Debido Proceso Legal, *Digesto de Jurisprudencia Latinoamericana sobre Crímenes de Derecho Internacional*, Fundación para el Debido Proceso Legal, Washington 2009, 253.

³⁶⁷. Legislative Assembly of El Salvador, Constitutional Procedures Act of El Salvador, Article 35, paragraph 1, Decree 2996, El Salvador 1960. "Restitution should, whenever possible, restore the victim to the original situation before the gross violations of international human rights law or serious violations of international humanitarian law occurred". United Nations General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and*

question due to its particularities, the law establishes compensation as a measure of reparation, which shall be paid by the person responsible for the constitutional violation or in subsidiary way by the State.³⁶⁸

Additionally, when a favorable decision is awarded through a writ of amparo based on the fact that a public officer or an authority either delayed or hampered the exercise of a constitutional right, the judgment ought to establish the specific acts that shall be followed by them to assure the effective exercise of that right, as a measure of satisfaction.³⁶⁹ Finally, the judgment shall also establish the civil responsibility of the authority who had denied the existence of the constitutional violation throughout the proceedings or who had lied about its existence.³⁷⁰

Based on all the aforementioned considerations, it is possible to consider the writ of amparo as an appropriate mechanism to enforce the right to truth at a judicial level in El Salvador, in order to obtain both moral and material reparations, specifically for the concealment of information to the relatives of the victims of forced disappearances and extrajudicial killings

Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Principle IX, Resolution 60/147, UN Doc. A/RES/60/147, 2005.

³⁶⁸. Legislative Assembly of El Salvador, Constitutional Procedures Act of El Salvador, Article 35, paragraph 1, Decree 2996, El Salvador 1960. “Compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, resulting from gross violations of international human rights law and serious violations of international humanitarian law”. United Nations General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Principle IX, Resolution 60/147, UN Doc. A/RES/60/147, 2005.

³⁶⁹. Legislative Assembly of El Salvador, Constitutional Procedures Act of El Salvador, Article 35, paragraph 2, Decree 2996, El Salvador 1960. “Satisfaction should include, where applicable, any or all of the following: (a) Effective measures aimed at the cessation of continuing violations”. Nations General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Principle IX, Resolution 60/147, UN Doc. A/RES/60/147, 2005.

³⁷⁰. Legislative Assembly of El Salvador, Constitutional Procedures Act of El Salvador, Article 35, paragraph 3, Decree 2996, El Salvador 1960. “Satisfaction should include, where applicable, any or all of the following: (f) Judicial and administrative sanctions against persons liable for the violations”. Nations General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Principle IX, Resolution 60/147, UN Doc. A/RES/60/147, 2005.

and, also, for the lack of official investigations that might have led to answer those questions in individual cases, despite the inability to institute prosecutions against the perpetrators.

Those arguments exclude the possibility to judicially enforce the right to truth and to obtain reparations for the violation of that right *per se* through the writ of habeas corpus, since the concealment of information to the relatives of the victims and the lack of investigation to provide answers to them cannot be linked specifically to the right to personal liberty, due to the fact that the latter is an individual right whose holder is actually the person disappeared or the person illegally detained and presumably killed.

Certainly, despite the fact that the Constitutional Chamber of the Supreme Court of Justice has expanded its faculties within the writ of habeas corpus through its recent jurisprudence and, as a consequence, has ordered the institution of investigations by the competent authorities to learn the fate and the whereabouts of those disappeared,³⁷¹ that situation does not imply that the lack of an investigation to provide answers to their relatives and the concealment of information by the security forces during all these years can be considered *per se* a violation to the right to personal liberty through the writ of habeas corpus.

Indeed, although in cases of forced disappearances the Constitutional Chamber of the Supreme Court of Justice has stated that its duty is not restricted only to declare a violation to the constitutional right to personal liberty, but to order the competent authorities to open an investigation aimed to learn the fate and the whereabouts of those disappeared,³⁷² that body has also established that in order to file a writ of habeas corpus, the petitioner needs to invoke the violation to constitutional rights directly connected to the deprivation of the personal liberty of

³⁷¹. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Habeas Corpus, 198-2007, November 25, 2009.

³⁷². Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Habeas Corpus, 198-2007, November 25, 2009.

the victim of the illegal detention, which, of course, does not specifically address the right to know of the relatives of the victims.³⁷³

Additionally, since the judicial system does not contemplate the writ of habeas data to protect and to ensure the right to access to information, the writ of amparo becomes the suitable remedy to protect and to ensure that right. In fact, according to the Constitutional Chamber of the Supreme Court of Justice, due to the lack of recognition of the institution of habeas data, the writ of amparo was the adequate instrument through which the rights.³⁷⁴

3. The pliantiffs

According to the legal framework in El Salvador, all persons are entitled to file a writ of amparo before the Constitutional Chamber of the Supreme Court of Justice for the violation of any right or any freedom enshrined its text. This entitlement includes both natural and legal persons whose rights and freedoms have been violated by either the actions or the omissions of a public officer or either by the actions or the omissions of a private person in a position of authority.

However, despite the fact that all persons are entitled to file a writ of amparo,³⁷⁵ that situation does not implies that through it is possible to determine a violation *in abstracto* to the

³⁷³. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Habeas Corpus, 49-2004, January 20, 2005.

³⁷⁴. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Amparo, 118-2002, March 2, 2004.

³⁷⁵. Constituent Assembly, Constitution of the Republic of El Salvador, Article 247, paragraph 1, Decree 38, El Salvador 1983. See also, Legislative Assembly of El Salvador, Constitutional Procedures Act of El Salvador, Articles 3 and 12, Decree 2996, El Salvador 1960.

rights and the freedoms enshrined in the constitutional text, since, for that purposes, the law has designed the application for constitutional review.³⁷⁶

Certainly, according to the Constitutional Procedures Act of El Salvador and to the jurisprudence of the Constitutional Chamber of the Supreme Court of Justice, under a writ of amparo, the plaintiffs must have suffered a concrete, specific and actual or imminent harm which, at the same time, constitutes a violation to a right or a to a freedom enshrined in the constitutional text and, finally, which has been perpetrated by a subject capable to be deemed as a defendant in that kind of processes.³⁷⁷

Therefore, in the terms that the writ of amparo has been defined by the legal framework of El Salvador and by the jurisprudence of the Constitutional Chamber of the Supreme Court of Justice, the victims must claim that they have been actually affected by the violation alleged in their petition. Indeed, as well as the regional level, the Constitutional Chamber of the Supreme Court of Justice has established that its competence under the writ of amparo “pertains to facts involving the rights of a specific individual or individuals”.³⁷⁸

That situation excludes the submission of an *action popularis* through a writ of amparo, since a claim filed by a person based on the protection and on the assurance of a general and a public interest is deemed inadmissible. Nevertheless, that situation does not exclude the protection and the assurance of collective rights based on the theory of diffuse interests, which must not be confused with a class action. Thus, through a writ of amparo, a person who, along with other members of society, has suffered a real, a specific and an actual or an imminent

³⁷⁶. Constituent Assembly, Constitution of the Republic of El Salvador, Article 183, Decree 38, El Salvador 1983. See also, Legislative Assembly of El Salvador, Constitutional Procedures Act of El Salvador, Article 2, Decree 2996, El Salvador 1960.

³⁷⁷. Legislative Assembly of El Salvador, Constitutional Procedures Act of El Salvador, Article 16, Decree 2996, El Salvador 1960.

³⁷⁸. Inter-American Commission on Human Rights, Report No. 28/98, Case 11.624, Guatemala, March 6, 1998, paragraph 30.

violation to a right of collective nature, is entitled to file a petition whose decision, at the end, may be extended to another members of society, without the necessity that all the persons affected by that act intervene.³⁷⁹

Based on the all aforementioned considerations, it is possible to affirm that the relatives of the victims of forced disappearances and of extrajudicial killings are entitled to file a writ of amparo on their own behalf. That, based on the fact that the situation of ignorance and uncertainty to which they have been submitted during all these years has caused them a concrete, specific and actual harm that has also violated several of their constitutional rights.

Indeed, due to the lack of an official investigation and due to the concealment of information that might have led the relatives of the victims to learn about the fate and the whereabouts of their loved ones, those relatives have also become themselves the victims of a violation to their right to truth. However, since the right to truth is not expressly enshrined within the constitutional text, they are entitled to claim a violation to that right as a derivation from the infringement of their right to physical and moral integrity, their right to access to information and the right to an effective protection by the State through judicial and non judicial mechanisms.

The last two statements are also supported by the jurisprudence of the Inter-American Court of Human Rights, which has stated that the victims are not only to those persons who have been subjected to a crime which constituted a gross violation to international human rights laws or a serious violation to international humanitarian laws, but also to their relatives.

Certainly, about the right to truth, it has been declared that “the victims or their next of kin have the right, and the States the obligation, to have the facts effectively investigated by the State authorities, and to know the results of the investigation. The Court calls to mind that the

³⁷⁹. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Amparo, 104-98, December 2, 1998. See also, Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Amparo, 630-2000, March 3, 2001.

right to know the truth is included in the rights of the victim or their next of kin to obtain from the competent organs of the State an elucidation on the facts of the violation and corresponding responsibilities, through the investigation and prosecution”.³⁸⁰

4. The defendants

According to the Constitutional Procedures Act of El Salvador and to the jurisprudence of the Constitutional Chamber of the Supreme Court of Justice, the defendant within a writ of amparo must hold a position of authority before the plaintiff and must be clearly identified by the latter. In other words, the petitioner has the duty to individualize the defendant, who can be either a public or a private person who holds a position of power and who, either by action or by omission, is directly responsible the violation of the rights and the freedoms enshrined in the constitutional text.³⁸¹ Thus, although the State responds in a subsidiary way when a favorable decision is awarded to the plaintiff under a writ of amparo, that is why the main responsible to restore is the person directly responsible for the action or the omission that caused the violation.³⁸²

The action or the omission attributed to the defendant has to meet certain requirements, in order for the writ of amparo to be deemed admissible, but that situation does not implies that

³⁸⁰. Inter-American Court of Human Rights, Case of the “Las Dos Erres” Massacre v. Guatemala, Merits, Judgment of November 24, 2009, paragraph 151.

³⁸¹. Legislative Assembly of El Salvador, Constitutional Procedures Act of El Salvador, Articles 12 and 14, Decree 2996, El Salvador 1960. See also, Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Amparo, 78-2003, January 30, 2004. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Amparo, 855-99, December 10, 1999.

³⁸². Legislative Assembly of El Salvador, Constitutional Procedures Act of El Salvador, Article 35, paragraph 1, Decree 2996, El Salvador 1960.

sufficient evidence about the possible constitutional violation must be provided along with the petition of the writ of amparo to support the claim.³⁸³

Under these requirements, the action or the omission has to be the consequence of a relation of power, in which the plaintiff is the recipient of the decisions adopted by the defendant. Additionally that action or that omission has to be able to generate either a direct or a diffuse harm to the plaintiff and to cause a violation either to the rights and the freedoms enshrined within the constitutional text or to the rights and the freedoms that can be derived from that text. Finally, the action or the omission has to be definitive or, in other words, neither an act that cannot cause an irreparable harm until the end of the proceeding in which it was adopted, nor an act susceptible to be repealed by other means.³⁸⁴

Additionally, it is important to highlight the difference that the Constitutional Chamber of the Supreme Court of Justice has made between the persons who actually adopts the decisions and those who merely limit themselves to execute them. According to that body, the first ones are invested with the power to adopt decisions which can actually create, modify or extinguish the situation of an individual, in a unilateral and in an imperative way. The second ones, only are invested with the power to execute the decision adopted by the first authorities and, thus, to materialize its effects.³⁸⁵

That distinction, it is necessary to mention, it is not a merely academic exercise by the Constitutional Chamber of the Supreme Court of Justice, but is essentially its criteria to determine who can be a defendant within a writ of amparo. Therefore, according to that body,

³⁸³. Cfr. Montecino Giralt, Manuel Arturo, *El Amparo en El Salvador*, Corte Suprema de Justicia de El Salvador, Sección de Publicaciones, San Salvador, 2005, 197.

³⁸⁴. Constitutional Chamber of the Supreme Court of Justice of El Salvador, *Writ of Amparo*, 196-2000, September 13, 2000.

³⁸⁵. Cfr. Montecino Giralt, Manuel Arturo, *El Amparo en El Salvador*, Corte Suprema de Justicia de El Salvador, Sección de Publicaciones, San Salvador, 2005, 201.

only those authorities invested with the power to decide are, in fact, the ones who can be considered as defendants, since the will of the executive authorities is not taken into account when the decision that presumably violates constitutional rights and freedoms is adopted and as long as the latter acts within the limits of what has been decided.³⁸⁶

About the right to truth in cases of forced disappearances and extrajudicial killings, one of the hypothetical defendants within a writ of amparo can be the attorney general, due to his omission to conduct an official investigation to determine the fate and the whereabouts of the victims of those crimes during all these years and due to the negative effects that the situation of uncertainty has caused to the relatives of the victims of those heinous crimes. Indeed, despite the fact that, through a writ of habeas corpus, the Constitutional Chamber of the Supreme Court of Justice ordered the attorney general the institution of an investigation in the case of a girl disappeared during the armed conflict as a measure of reparation³⁸⁷, that situation does not constitutes a violation to right to truth itself.

That based on the fact that, according to the Constitution of El Salvador³⁸⁸ and to the actual Criminal Procedural Code of El Salvador³⁸⁹, the attorney general holds the monopoly of the criminal action and, therefore, he has the duty to exercise the criminal action *ex officio* in specific cases, such as forced disappearances and extrajudicial killings and to conduct the appropriate investigations to support the criminal action with the necessary due diligence.

Furthermore, despite the fact that in the past Criminal Procedural Code of El Salvador, the attorney general did not had the monopoly of the criminal action, since the judges, *ex officio*

³⁸⁶. Cfr. Montecino Giralt, Manuel Arturo, *El Amparo en El Salvador*, Corte Suprema de Justicia de El Salvador, Sección de Publicaciones, San Salvador, 2005, 201.

³⁸⁷. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Habeas Corpus, 198-2007, November 25, 2009.

³⁸⁸. Constituent Assembly, Constitution of the Republic of El Salvador, Article 193, Decree 38, El Salvador 1983.

³⁸⁹. Legislative Assembly of El Salvador, Criminal Procedural Code of El Salvador, Article 19, Decree 904, 1996.

or *ex parte*, were also entitled to conduct investigations,³⁹⁰ that situation did not freed the attorney general from its duty to conduct investigations and to institute criminal proceedings with due diligence before the inaction of the judges.

Finally, as it has been stated by one of the supervisory organs of the Organization of American States, the investigations conducted by the State through its competent authorities, such as the attorney general, must “have a purpose and be undertaken by [it] as a juridical obligation of its own and not as a mere processing of private interests, subject to procedural initiative of the victim or his or her next of kin or to evidence privately supplied, without the public authorities effectively seeking the truth”.³⁹¹

Another hypothetical defendant in cases of forced disappearances and extrajudicial killings related to the right to truth can be the armed forces and the security forces, due to the concealment of information that it has been under their possession during all these years and due to the refusal to disclose it to the relatives of the victims who have asked them about the fate and the whereabouts of their loved ones.

According to the Truth Commission for El Salvador, the “[a]rmed forces personnel were accused in almost 60 percent of complaints, members of the security forces in approximately 25 percent, members of military escorts and civil defense units in approximately 20 percent”.³⁹² Thus, undeniably the armed forces must be in possession of valuable information that can contribute to clarify the fate and the whereabouts of thousands of cases of forced disappearances and extrajudicial killings that still remain unresolved.

³⁹⁰. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Amparo, 674-2001, December 23, 2003.

³⁹¹. Inter-American Court of Human Rights, Case of Bulacio v. Argentina, Merits, Judgment of September 18, 2003, paragraph 112.

³⁹². The Commission on the Truth from El Salvador, *From Madness to Hope: The twelve year war in El Salvador*, in Kritz, Neil J., *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, Volume III, United States Institute of Peace, United States of America, 1995, 177-215, 190.

However, due to the requirements established for the defendants within a writ of amparo, prior to its submission, the victims of the relatives have to file a petition before the armed forces or before the security forces, in order to identify the specific authorities who, inside those institutions, refused to provide them with the information requested. Moreover, prior to the submission of a writ of amparo, the relatives of the victims have to exhaust all remedies inside those institutions, in order to sue all the authorities who played a role in the concealment of the information and who actually had power to disclose it.

5. The constitutional rights from which the right to truth in its individual dimension can be derived

According to the Inter-American Court of Human Rights, “everyone, including the next of kin of victims of serious human rights violations, has the right to know the truth”.³⁹³ That situation implies “the right of the next of kin of the alleged victims to know what happened and who was responsible for the respective facts”.³⁹⁴

At a domestic level, El Salvador has not recognized the right to truth *per se* within its constitutional text and, moreover, has not acknowledged the existence of a constitutionality block, which would include the international human rights treaties as a parameter of constitutionality. As a consequence of those two situations, a violation to the right to truth cannot be explicitly and exclusively invoked through a writ of amparo before the Constitutional Chamber of the Supreme Court of Justice of El Salvador.

³⁹³. Inter-American Court of Human Rights, Case of the Serrano-Cruz Sisters v. El Salvador, Merits, Judgment of March 1, 2005, paragraph 62.

³⁹⁴. *Id.*

Nevertheless, to overcome that obstacle, it is important to highlight the fact that the Constitution of El Salvador has included, within its text, several rights and principles that have a direct connection to the right to truth, in the terms that it has been developed during all these years through the jurisprudence provided both by national and international courts. That situation allows the relatives of the victims of forced disappearances and extrajudicial killings to judicially enforce the right to truth under a writ of amparo through other rights, such as their right to physical and moral integrity, their right to access to information and the right to an effective protection by the State through judicial and non judicial mechanisms.

Additionally, although international human right treaties does not enjoy the same hierarchical position as the Constitution of El Salvador and, thus, the rights and the freedoms enshrined solely in them cannot be directly enforced under a constitutional process if they do not have a link with those included in the constitutional text, the Constitutional Chamber of the Supreme Court of Justice of El Salvador has declared, through its jurisprudence, that the former can be used to complement and to develop the content of the rights and the freedoms enshrined in the Constitution of El Salvador.³⁹⁵

Therefore, to support the judicial enforceability of the individual dimension of the right to truth under the writ of amparo within El Salvador, the same argument made by the Constitutional Court of Peru about the judicial enforceability of that right will be used in this paper.³⁹⁶ Thus, although the right to truth is not expressly enshrined in the Constitutional of El Salvador, that right can indeed be legally protected and ensured through a writ of amparo, due to the fact that it is directly linked to the principle of human dignity, to the rights to access to information and to

³⁹⁵. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Application for Constitutional Review, 24-97/21-98, 26 September 2000.

³⁹⁶. Fundación para el Debido Proceso Legal, *Digesto de Jurisprudencia Latinoamericana sobre Crímenes de Derecho Internacional*, Fundación para el Debido Proceso Legal, Washington 2009, 253.

the moral and physical integrity and, finally, to the duties of the State to protect and to ensure the rights and the freedoms of the people under its jurisdiction through judicial and non judicial mechanisms.

5.1 The right to truth and the right to moral and physical integrity

Although the constitutional text recognizes the right to moral and physical integrity, the provision which enshrines it does not establish what the exact content and scope of that right is.³⁹⁷ Thus, through a jurisprudential development, the Constitutional Chamber of the Supreme Court of Justice has determined that the right to physical and moral integrity implies that no one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment, among other situations.³⁹⁸

However, the Constitutional Chamber of the Supreme Court of Justice essentially has dealt with the right to moral and physical integrity in connection to the right to physical liberty³⁹⁹ and, thus, the right to truth has never been mentioned in connection to the right to moral and physical integrity at a domestic level.

Therefore, due to the fact that the jurisprudence of the Constitutional Chamber of the Supreme Court of Justice has declared that international human rights treaties can contribute to develop and expand the content and the scope of the rights and freedoms enshrined in the constitutional text, the American Convention on Human Rights and the jurisprudence provided

³⁹⁷. Constituent Assembly, Constitution of the Republic of El Salvador, Article 2, paragraph 1, Decree 38, El Salvador 1983.

³⁹⁸. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Habeas Corpus, 125-2005, 29 February 2008.

³⁹⁹. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Habeas Corpus, 125-2005, 29 February 2008. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Habeas Corpus, 107-2001, 23 November 2001. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Habeas Corpus, 6-H-95, 29 August 1995.

by its judiciary body will be used to support a petition for a writ of amparo based on the judicial enforceability of the right to truth as a derivation of the right to physical and mental integrity.

In El Salvador, due to the lack of official investigations and due to the absence of prosecutions, the relatives of the victims of forced disappearances and extrajudicial killings have not been able to obtain individual information about the fate and the whereabouts of their loved ones. The uncertainty and the ignorance that the relatives of the victims have had to face have during all these years has perpetuated in them feelings of anguish, remorse, anxiety and distress, among others, since they have not been able to put a closure to their neverending quest for the truth.

Those situations were accurately depicted in the judgment provided in the case of the Serrano Cruz sisters against El Salvador through the testimonies given by the relatives of the victims, which, at the same time, reflected the feelings of thousands of relatives who are still looking for a trace that might led them to know what happened to their loved ones, either to reunite with them or to give them a proper burial.

For example, during the proceedings, before she died, the mother of Ernestina and Erlinda Serrano Cruz stated that only thing that she “want[ed was] to have [her] daughters returned to her, and if [she] could ask the judges something, it [was] that they at least show [her] daughters to her”.⁴⁰⁰ Additionally, the father Jon Cortina expressed that “shortly before Erlinda and Ernestina’s mother died, she was going blind as a result of diabetes, and she told him that she hoped she would not lose her sight, because perhaps she could still see her daughters.”⁴⁰¹ Finally, the expert witness in that case, Ana Deutsch, testified that the mother of Ernestina and Erlinda Serrano Cruz “had the typical symptoms of post-traumatic stress and depression. She

⁴⁰⁰. Inter-American Court of Human Rights, Case of the Serrano-Cruz Sisters v. El Salvador, Merits, Judgment of March 1, 2005, paragraph 113.

⁴⁰¹. Id.

could not sleep well, she was very irritated at times, she never stopped thinking of her disappeared daughters, she was extremely sad, [...] she complained of chest pains [, ...] and that is the surest description of anguish”.⁴⁰²

In that case, the Inter-American Court of Human Rights declared that the State of El Salvador had indeed violated the right of the relatives of the victims to a humane treatment, since the “frustration of not having the help and collaboration of the State authorities to determine what happened to Erlinda and Ernestina and, if applicable, to punish those responsible, and also to determine their whereabouts and achieve family reunification profoundly affected the physical and mental integrity of their next of kin”.⁴⁰³

About the right to truth and its connection to the right to physical and mental integrity, the Court has confirmed, through its recent jurisprudence, that the “continuous deprivation of the truth regarding the fate of a disappeared person constitutes a form of cruel and inhuman treatment for the close relatives”.⁴⁰⁴ Moreover, in cases of forced disappearances, the Court has affirmed that “the violation of the right to mental and moral integrity of the victim's next of kin is, precisely, a direct consequence of that event, which causes them severe suffering and is made worse by the continued refusal of state authorities to supply information on the victim's whereabouts or to conduct an effective investigation to elucidate the facts”.⁴⁰⁵

In conclusion, due to the fact that El Salvador recognizes within its constitutional text the right to mental and physical integrity and, moreover, due to the fact that the jurisprudence provided by the Constitutional Chamber of the Supreme Court of Justice has acknowledged the

⁴⁰². *Id.*

⁴⁰³. Inter-American Court of Human Rights, Case of the Serrano-Cruz Sisters v. El Salvador, Merits Judgment of March 1, 2005, paragraph 114.

⁴⁰⁴. Inter-American Court of Human Rights, Case of Radilla Pacheco v. Mexico, Merits, Judgment of November 23, 2009, paragraph 166.

⁴⁰⁵. Inter-American Court of Human Rights, Case of La Cantuta v. Perú, Merits, Judgment of November 29, 2006, paragraph 123.

that that right implies that no one shall be subjected to cruel, inhumane and degrading treatment, it is possible to judicially enforce the right to truth under the writ of amparo.

Certainly, although the Constitutional Court of the Supreme Court of Justice has not linked the right to physical and mentally integrity with the right to truth, the judicial enforceability of the latter right is feasible, based on the ability to use the jurisprudence of the regional system of protection of human right to develop and to enhance the scope of protection of the rights and the freedoms enshrined within the constitutional text.

5.2 The right to truth and the right to access to information

Although, the Constitution of El Salvador recognizes the right to freedom of expression, its scope and its limitations,⁴⁰⁶ it does not explicitly recognize the right to access to information. Therefore, through legal development and through the recognition of its protection by international human rights treaties, the right to access to information has come to life in El Salvador.

Certainly, within the preamble of an amendment introduced to the actual Criminal Procedural Code of El Salvador, the Legislative Assembly declared that, within the right to freedom of thought and expression enshrined in the constitutional text, there are also the inherent the right and the freedom to seek, receive, and impart information and ideas of all kinds”.⁴⁰⁷ Furthermore, within that preamble, the Legislative Assembly also acknowledged that the right to

⁴⁰⁶. Constituent Assembly, Constitution of the Republic of El Salvador, Article 6, Decree 38, El Salvador 1983.

⁴⁰⁷. Legislative Assembly of El Salvador, Criminal Code of El Salvador, Preamble to the Amendment of Article 191, Decree 499, 2004.

access to information was protected both by the Constitution and by the American Convention on Human Rights.⁴⁰⁸

According to the jurisprudence provided by one of the supervisory organs of the Organization of American States, the right to access to information that is in the hands of the States “protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied”.⁴⁰⁹

Indeed, since the right to access to information is not an absolute right and, thus, it is susceptible to certain limitations, the legitimacy of that limitation must meet the proportionality test, in order to avoid arbitrariness by the authorities who are in possession of the information that is being requested. Thus, to legitimately limit the right to access to information, the restrictions imposed to its exercise “must have been established by law”,⁴¹⁰ “should respond to a purpose allowed by the American Convention⁴¹¹ and, finally, “must be necessary in a democratic society”.⁴¹² In brief, in order to fully exercise the right of access to information by the individuals, that right must be governed by the principle of maximum disclosure, which implies

⁴⁰⁸. Legislative Assembly of El Salvador, Criminal Code of El Salvador, Preamble to the Amendment of Article 191, Decree 499, 2004.

⁴⁰⁹. Inter-American Court on Human Rights, Case of Claude-Reyes et al v. Chile, Judgment of September 19, 2006, paragraph 77.

⁴¹⁰. Inter-American Court on Human Rights, Case of Claude-Reyes et al v. Chile, Judgment of September 19, 2006, paragraph 89.

⁴¹¹. Inter-American Court on Human Rights, Case of Claude-Reyes et al v. Chile, Judgment of September 19, 2006, paragraph 90.

⁴¹². Inter-American Court on Human Rights, Case of Claude-Reyes et al v. Chile, Judgment of September 19, 2006, paragraph 91.

that it can be restricted only under the circumstances established above, in those cases in which the information requested is at the hands of the State.⁴¹³

However, in those cases in which the information held by state agents is related to gross violations to international human rights laws and to serious violations to international humanitarian laws, it has been established that “the State authorities cannot resort to mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or proceeding”.⁴¹⁴

Based on that last argument, that it is why it is necessary to judicially enforce the right to truth through the writ of amparo, since it is a mechanism through which the state agents cannot refuse to provide information and, thus, to impede that the information held by them becomes available to the relatives of the victims. This argument is reinforced by what is established in the Constitutional Procedures Act of El Salvador, which states that when the judgments provided by the Constitutional Chamber of the Supreme Court of Justice is favorable to the petitioner and the defendant refused to provide information during the proceeding or to denied its existence, the judgment shall also establish the civil responsibility of that authority for those acts.⁴¹⁵

About this situation, although it can be arguable that through the expansion of its powers through a writ of habeas corpus, the Constitutional Court of Justice can also request information to state agents and to order the conduction of investigations to determine the fate and the

⁴¹³. Inter-American Court on Human Rights, Case of Claude-Reyes et al v. Chile, Judgment of September 19, 2006, paragraph 92.

⁴¹⁴. Inter-American Court of Human Rights, Case of Myrna Mack Chang v. Guatemala, Judgment of November 25, 2003, paragraph 180.

⁴¹⁵. Legislative Assembly of El Salvador, Constitutional Procedures Act of El Salvador, Article 35, paragraph 3, Decree 2996, El Salvador 1960. “Satisfaction should include, where applicable, any or all of the following: (f) Judicial and administrative sanctions against persons liable for the violations”. Nations General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Principle IX, Resolution 60/147, UN Doc. A/RES/60/147, 2005.

whereabouts of the persons disappeared, that faculties do not extend to the relatives of the victims to access to information in cases of extrajudicial killings.

Moreover, through a writ of habeas corpus, it is not possible to determine if the concealment of information during all these years to the relatives of the victims by state agents indeed amounts to a violation to their right to access to information and, thus, to provide them with measures of reparation.

Finally, although the jurisprudence developed by the judicial body of the Organization of American States has not specifically linked the right to truth to the access to information, in El Salvador it is important to judicially enforce the right to truth in connection to the right to access to information through the writ of amparo, since the violation to a constitutional right does not prescribe and, thus, it is not subject to statutory limitations, such as criminal actions.

5.3 The right to truth and the right to protection through non judicial mechanisms

The Constitution of El Salvador recognizes a wide range of substantive rights within its text and, also, the right to be protected by the state apparatus in the exercise and in the enjoyment of those rights, in order not to turn them illusory. Nevertheless, as well as the right to physical and moral integrity, the provision which enshrines it does not establish what the exact content and scope of that right is.⁴¹⁶

Thus, the Constitutional Chamber of the Supreme Court of Justice, through its jurisprudence, has developed the content and the scope of that right and, as a consequence, it has declared that it implies for the State the creation of effective judicial and non judicial

⁴¹⁶. Constituent Assembly, Constitution of the Republic of El Salvador, Article 2, paragraph 1, Decree 38, El Salvador 1983.

mechanisms to avoid the violation, the contravention, the annulment and the arbitrary limitation or suspension of the rights and the freedoms enshrined in the constitutional text.⁴¹⁷ Undeniably, according to the Constitutional Chamber of the Supreme Court of Justice, that right constitutes the natural response to the obligations that the State has to respect and to ensure the rights and the freedoms of the people within its jurisdiction in cases of illegal or arbitrary deprivation.⁴¹⁸

In El Salvador, the lack of an official investigation by general attorney has hampered the possibilities of the relatives of the victims of forced disappearances and of extrajudicial killings to learn about the fate and the whereabouts of their loved ones and, thus, they have been deprived from the protection and the assurance of their right to truth through non judicial mechanism. That lack of protection through non judicial mechanisms has also violated, as stated above, the rights to physical and moral integrity of the relatives of the victims, due to the endless suffering that they have had to endure for long periods of time as a consequence of the state of uncertainty that they have had been subjected.

Certainly, the attorney general, who holds the monopoly of the criminal action and, thus, has the obligation to conduct an investigation to support the cases that are brought before the judicial system, has systematically failed to perform his duties, since the entrance into force of the actual Criminal Procedural Code of El Salvador, which was enacted five years after the Peace Accords were signed by parties that participated in the conflict.

To avoid his legal obligation, the attorney general has excused himself in the content of the General Amnesty Act for the Consolidation of Peace, which awarded a full, absolute and unconditional amnesty to “those individual who participated in any way in the commission of political crimes or common crimes linked to political crimes or common crimes in which the

⁴¹⁷. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Application for Constitutional Review, 14-99, 3 December 2002.

⁴¹⁸. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Amparo, 167-97, 25 May 1999.

number of persons involved is no less than twenty before January 1, 1992”⁴¹⁹ and, also, to those individuals who were “named in the Truth Commission report as being responsible for serious acts of violence”⁴²⁰.

Indeed, according to the attorney general, the absence of an official investigation was justified since the General Amnesty Act for the Consolidation of Peace impeded him to act, due to the fact that that law extinguished both the criminal and the civil responsibility of the perpetrators of gross violations to international human rights laws and serious violations to international humanitarian laws.⁴²¹

However, that excuse was ruled out by a judgment provided by the Constitutional Chamber of the Supreme Court of Justice, which stated that there were some limitations to applicability of the benefits awarded by the General Amnesty Act for the Consolidation of Peace. Certainly, according to the interpretation of that law by the maximum tribunal, the benefits of the amnesty were not applicable when the crime perpetrated violated the human rights enshrined within the constitutional text.⁴²²

Based on that judgment, the excuse invoked by the attorney general for a long period of time became inadmissible since, according to that decision, an official investigation was crucial to determine if the alleged perpetrator was, in fact, a recipient of the benefits awarded by the General Amnesty Act for the Consolidation of Peace or not. In other words, previously to the enactment of a criminal action, the attorney general was compelled to conduct an investigation to determine if the presumed perpetrator was covered by the amnesty law or if it was possible to

⁴¹⁹. Legislative Assembly of El Salvador, General Amnesty Act for the Consolidation of Peace, Article 1, Decree 486, March 20, 1993.

⁴²⁰. Popkin, Margaret, *The Salvadoran Truth Commission and the Search for Justice*, Criminal Law Forum, Springer Netherlands, Volume 15, Numbers 1-2, March 2004, page 108.

⁴²¹. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Amparo, 674-2001 23 December 2003.

⁴²². Constitutional Chamber of the Supreme Court of Justice of El Salvador, Application for Constitutional Review, 24-97/21-98, 26 September 2000.

file a criminal action against him. That investigation should have led him to adopt an informed decision and its findings might have led the relatives of the victims of forced disappearances and of extrajudicial killings to learn about the fate and the whereabouts of their loved ones, despite the possibilities to prosecute or not the perpetrators.

That argument was also implemented by the countries which took amnesty acts as given, but insisted on the necessity to conduct investigations, in order to determine if the benefits awarded by the amnesty laws were, indeed, applicable to the perpetrators or not. For example, in Chile, it was held that “courts should investigate disappearances cases, even calling military officers to testify if needed, up to the point at which the court could determine that a crime coming within the terms of the amnesty had been committed. Recent cases in Argentina, Honduras and Guatemala involve courts insisting that they have jurisdiction to investigate, and that only after investigation will be possible in each individual case to determine whether or not the amnesty applies. In effect, this transforms a blanket amnesty into a series of case by case determinations.”⁴²³

That argument also finds its support in the jurisprudence provided by the Inter-American Court of Human Rights which has declared that 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”.⁴²⁴

Additionally, the attorney general alleged that, before the enactment of the actual Criminal Procedural Code of El Salvador, he did not hold the monopoly of the criminal action

⁴²³. Roth-Arriaza, Naomi, Truth Commissions and Amnesties in Latin America: The Second Generation, 92 *Am. Soc’y Int’l L. Proc.* 1998, 313-315, 315.

⁴²⁴. Inter-American Court of Human Rights, Case of Velásquez-Rodríguez v. Honduras, Merits, Judgment of July 29, 1988, paragraph 181.

and, thus, he did not fail in his duty to conduct an investigation *ex officio* against the persons named in the report of the Truth Commission for El Salvador, since he was not the only person entitled to do so.

That argument was upheld by the Constitutional Chamber of the Supreme Court of Justice when it stated that, at the moment that the findings of the Truth Commission for El Salvador were revealed, the institution of a criminal action could have been requested by the victims or their relatives and, moreover, it could have been conducted *ex officio* by the competent judges which, at that time, also had investigative faculties.⁴²⁵

However, that last argument can also be easily contested through the jurisprudence of the Inter-American Court of Human Rights that has declared that the “duty to investigate is an obligation of means and not of results, which must be assumed by the State as an inherent legal obligation and not as a mere formality preordained to be ineffective. The State’s obligation to investigate must be complied with diligently in order to avoid impunity and the repetition of this type of act”.⁴²⁶ Thus, in “light of this obligation, as soon as State authorities are aware of the fact, they should initiate, *ex officio* and without delay, a serious, impartial and effective investigation using all available legal means, aimed at determining the truth and the pursuit, capture, prosecution and eventual punishment of all the perpetrators of the facts, especially when public officials are or may be involved”.⁴²⁷

⁴²⁵. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Amparo, 674-2001 23 December 2003.

⁴²⁶. Inter-American Court of Human Rights, Case of González et al. (“Cotton Field”) v. Mexico, Merits, Judgment of November 16, 2009, paragraph 289.

⁴²⁷. Inter-American Court of Human Rights, Case of González et al. (“Cotton Field”) v. Mexico, Merits, Judgment of November 16, 2009, paragraph 290.

5.4 The right to truth, the right to protection through judicial mechanisms and the question of the application of statutory limitations to international crimes

Although with the judgment provided by the Constitutional Chamber of the Supreme Court of Justice about the constitutionality of the General Amnesty Act for the Consolidation of Peace and the possibility to interpret its provisions according to the constitutional text and, thus, exclude from its benefits those acts which had affected the rights and the freedoms enshrined in the Constitution, a new problem arose to conduct prosecutions. This new problem was the application of statutory limitations to international crimes by the judiciary as the consequence of its request by the general attorney, who claimed for the dismissal of the criminal action towards the masterminds of the extrajudicial killings of six jesuits priest and two women, based on the prescription of the crime.⁴²⁸

Certainly, based on the fact that, although “there can be no doubt that international crimes are not subject to statutory limitations as far as prosecutions by international criminal courts are concerned”,⁴²⁹ it is still “difficult to assess, however, whether international law states the impermissibility of statutory limitations in respect to prosecutions by national courts”.⁴³⁰ Indeed, despite the inclination by domestic courts to avoid the application of statutory limitations to international crimes, the fact that the United Nations Convention on the Non-Applicability of Statutory Limitations has been ratified only by a limited number of countries and, moreover, the absence of such provisions in the statutes of certain criminal courts, such as the International

⁴²⁸. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Amparo, 674-2001 23 December 2003.

⁴²⁹. Kreicker, Helmut, *Statutes of Limitations* in Cassese, Antonio, International Criminal Justice, Oxford University Press 2009, 522-524, 522.

⁴³⁰. Kreicker, Helmut, *Statutes of Limitations* in Cassese, Antonio, International Criminal Justice, Oxford University Press 2009, 522-525, 522.

Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, cannot lead to conclude with certainty that the application of statutory limitations for international crimes by domestic courts is banned by a of a rule of customary international law and by a general principle of law.

Therefore, to link the right to truth to the right to an effective protection through judicial mechanisms by the institution of criminal proceedings against those responsible for the perpetrations of gross violations to international human rights laws and serious violations to humanitarian laws, it is necessary that the Constitutional Chamber of the Supreme Court of Justice adopts a definite position about the application or not of statutory limitations to international crimes.

In a case based on similar facts, but not in the same rights, the Constitutional Chamber Court of the Supreme Court of Justice, within a writ of amparo, tacitly upheld the decisions adopted by the Third Justice of the Peace of San Salvador and the Third Criminal Chamber of San Salvador about the possibility to impose statutory limitations on international crimes perpetrated before the entrance into force of a reform introduced to the Criminal Procedural Code of El Salvador, which stipulated that certain crimes were not subjected to statutory limitations. Furthermore, it tacitly upheld the impossibility to suspend the prescription period of the crimes perpetrated during the armed conflict, based on the constitutional provision which impedes the retroactive application of the criminal law.⁴³¹ This, despite the fact that there was a legal impediment which hampered the possibilities to prosecute those crimes during seven years, which could have justified the suspension of the prescription of the crimes during that period of

⁴³¹. Constituent Assembly, Constitution of the Republic of El Salvador, Article 21, paragraph 1, Decree 38, El Salvador 1983.

time⁴³² and, moreover, despite the fact that the retroactive application of suspension statutes is, actually, “based on the idea that suspects of international crimes should not benefit from statutes of limitation during the period that they are systematically left unpunished by a particular political regime. In this approach, statutes of limitation are deemed not to have run during periods where there is no realistic prospect of international crimes being prosecuted”⁴³³.

In conclusion, due to the lack of a definite position by the State of El Salvador about the application of statutory limitations to international crimes by its domestic courts, the right to truth will not be linked in this case with its judicial enforcement through the right to protection through judicial mechanisms.

However, the arguments to support the inapplicability of statutory limitations by domestic courts become stronger every day, since the rejection to impunity and the demands of justice by the victims are constantly growing. Thus, nothing impedes to file a writ of amparo based on those terms, since, through that last judgment, the Constitutional Chamber of the Supreme Court of Justice avoided to adopt a definitive decision based on the facts that either there was not enough evidence to support the allegations of the petitioners or that their arguments reflected a mere unconformity with the decisions adopted by the previous authorities.

Furthermore, attached to that judgment is the dissenting opinion of the Magistrate Victoria Marina Velásque de Avilés, who argued that, according to her judgment, the decision adopted by the Constitutional Chamber overruled a rule of customary international law and,

⁴³². Legislative Assembly of El Salvador, Criminal Procedural Code of El Salvador, Article 238, Decree 904, 1996.

⁴³³. Kok, R. A., *Statutory Limitations in International Criminal Law*, Universiteit Van Amsterdam, The Netherlands 2007, 340.

moreover, a *ius cogens* norm, which had been crystallized in the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.⁴³⁴

Finally, there was the unresolved question about the distinction that can be made between an “immediate” and a “retroactive” application of new rules regarding statutory limitations which enter into force when the criminal action has not yet prescribes. “In an immediate application, a rule with regard to statutes of limitation is applied to crimes that have been committed before the adoption of that rule, but that have not yet become prescribed at the moment the rule was adopted. In a retroactive application, on the other hand, the rule is applied to crimes that have already become prescribed”.⁴³⁵

This because, through an amendment introduced to the actual Criminal Procedural Code of El Salvador, it was stipulated that certain criminal actions did not prescribe when they were based in crimes of torture, genocide, serious violations to international humanitarian laws, forced disappearances, political, ideological, racial, sexual or religious persecution, among others, if they were perpetrated after the entrance into force of the actual Criminal Procedural Code of El Salvador.⁴³⁶

6. Exhaustion of remedies

As stated before, in order to file a writ of amparo, the petitioners have the obligation to exhaust the ordinary remedies established either for the judicial process or for the administrative

⁴³⁴. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Amparo, 674-2001 23 December 2003.

⁴³⁵. Kok, R. A., Statutory Limitations in International Criminal Law, Universiteit Van Amsterdam, The Netherlands 2007, 330.

⁴³⁶. Legislative Assembly of El Salvador, Criminal Procedural Code of El Salvador, Article 34, Decree 904, 1996.

proceeding in which the allegedly violation occurred.⁴³⁷ However, through an extensive interpretation of that provision, the Constitutional Chamber of the Supreme Court of Justice has established several exceptions to the requirement of exhaustion of remedies. These exceptions are the imminent occurrence of an irreparable harm as a consequence of the constitutional violation⁴³⁸, the absence or the effectiveness of the remedy to repair the constitutional violation⁴³⁹ and the irrationality of the periods established for the remedy.⁴⁴⁰

In the case of the judicial enforceability of the right to truth, there are not effective remedies to address the violation to that right, since, for seven years, the General Amnesty Act for the Consolidation of Peace presumably hampered the possibilities to conduct investigations in cases of gross violations to international human rights laws and of serious violations to international humanitarian laws. Moreover, when the Constitutional Chamber of the Supreme Court of Justice provided a judgment through which it was established some exceptions to the benefits awarded by that law, the general attorney requested the dismissal of the criminal action in the case of the six jesuits priests and the two women that were extrajudicially killed within the premises of the Central American University “José Simeón Cañas”, based on the argument that the criminal action had prescribed and that allegation was accepted by the competent judges.⁴⁴¹

Finally, although in cases that have dealt with the right to access to information, the judicial body of the Organization of American States has declared that it is necessary that the

⁴³⁷. Legislative Assembly of El Salvador, Constitutional Procedures Act of El Salvador, Articles 12, paragraph 3, Decree 2996, El Salvador 1960.

⁴³⁸. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Amparo, 741-2004, 27 May 2005.

⁴³⁹. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Amparo, 737-2004, 10 June 2005. See also, Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Amparo, 5-S-96, 10 July 1996.

⁴⁴⁰. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Amparo, 143-1998, 30 June 1999.

⁴⁴¹. Constitutional Chamber of the Supreme Court of Justice of El Salvador, Writ of Amparo, 674-2001 23 December 2003.

alleged victim files a petition before the competent authority requesting the information desired, the information can be easily denied by those authorities based on reasons of national security and public order. Indeed, according to the jurisprudence provided by that same entity, it is only during the conduction of an administrative or a judicial proceeding dealing with gross violations and abuses to human rights that state agents cannot refuse to provide the information that it is in their power.

CONCLUSION

*“La memoria despierta para herir a los pueblos dormidos que no la dejan vivir
libre como el viento.
libre como el viento.
La memoria apunta hasta matar a los pueblos que la callan y no la dejan volar
libre como el viento”*

Leon Gieco

As it has been possible to observe through this thesis, although already eighteen years has passed by since the parties in conflict signed the Peace Accords and put an end to the armed conflict, El Salvador has not yet finished its transition to democracy. Indeed, the causes that gave rise to the insurrectional movements several decades ago are still present in the country, such as the economic and social exclusion of large sectors of the population. Furthermore, neither the situation of impunity has not been adequately addressed, nor the structures that allowed the escalation of violence. Finally, the obligations State towards the victims of the war have not been fulfilled by the State and, thus, the debts on truth, justice and reparation are still pending.

Additionally, as it has been possible to observe, despite a series of obstacles, such as the General Amnesty Act for the Consolidation of Peace and the imposition of statutory limitations to international crimes, such as war crimes and crimes against humanity, in order to perpetuate a state of impunity, there is a small window that still has not been open to bring peace to the relatives of the victims who are eager to discover the fate and the whereabouts of their loved ones.

Therefore, this thesis intends to be a small contribution to promote strategic litigation to judicially enforce the right that the relatives of the victims have to know what happened to their loved ones who were forcibly disappeared or extrajudicially killed and who are still looking for

their remaining to give them a proper burial. Moreover, it pretends to give the elemental tools to file a writ of amparo whose final decision would not only acknowledge the constitutional violations that the relatives have had to endure throughout all these years, but it would also provide them with some form of reparation that probably would restore their dignity that was abruptly taken from them.