



**DIPARTIMENTO DI GIURISPRUDENZA**  
**Cattedra di Tutela Internazionale dei Diritti Umani**

## **The Right to the Truth**

**RELATORE**  
**Chiar.mo Prof**  
**Pietro Pustorino**

**CANDIDATO**  
**Vincenzo Carlo Marchiolo**  
**Matr.124573**

**CORRELATORE**  
**Chiar.mo Prof.**  
**Roberto Virzo**

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*In un paese dove regna la bugia  
la verità è una malattia.*

*(Anonimo)*

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## **Introduction**

Truth has been since ever a complex and elusive concept. Truth can be interpreted both as a dogmatic and monolithic notion as well as a multifaceted and potentially infinite one. In the legal area truth is usually related to the judicial factual truth that emerges during trials, which, given the existence in any legal system of mechanisms of judicial review, is arguable by definition. In fact, the same event may be interpreted in as many ways as the number of persons on the planet. Moreover, truth has assumed in recent legal discourse additional connotations such as its capability to ensure reparation, foster reconciliation and guarantee non-recurrence after severe human rights violations or in the aftermath of violent armed conflicts. Still, truth remains an abstracted and smoky concept that is apparently unapt to constitute a legal good protected by international human rights law.

Nevertheless, the Right to the Truth is today an almost undisputed autonomous human right upheld both at international and national level all around the world gaining growing attention from scholars, international organisations and courts.

This thesis aims at furnishing an overall picture of such right and its ways of application upholding its nature of self-standing human right and as a fundamental procedural tool for victimized societies or States transitioning from authoritarian rule to democracy.

The first chapter of this paper will provide the definition of the Right to the Truth, the core obligations it triggers on behalf of States, its twofold sphere of application as well as its interrelationship with other fundamental human rights. In addition, the numerous UN documents dedicated to such right and those of other international organisations will be analysed in order to underline the importance gained by the Right to the Truth over the last 30 years and their contribution to its definition, evolution and protection.

On the same line, the second chapter will be dedicated to the study of the international jurisprudence on the Right to the Truth which constitutes such right's emergence first upheld by the Inter-American Court of Human Rights and then by the European Court of Human Rights. The chapter is divided in two parts respectively dedicated to the rulings prior to the year 2000 when the two tribunals, despite recognising its existence and autonomous nature, were still reluctant in underpinning a self-standing breach of the Right to the Truth and a second part focused on the sentences rendered after the abovementioned date when the Courts adopted a more explicit approach to such issue.

Further on, given that the Right to the Truth has been held to be also a fundamental transitional justice tool, the third chapter will address the “political” function of such right, hence, by analysing the various roles it may play in the aftermath of violent armed conflicts, civil wars or States transitioning from authoritarian rule to democratically elected government. Thus, it will focus on the functioning and scope of truth commissions as well as on the relationship between amnesties for grave human rights violations and the Right to the Truth and the need for national reconciliation by analysing the wide legal literature on the topic together with the various and several studies sponsored by the United Nations.

The fourth chapter is focused on the most prominent national experiences of the Right to the Truth both at the jurisprudential and normative level. It is divided in three parts, one for every continent analysed (South America, Europe and Africa) and it is aimed at emphasising the different nuances a same right may assume depending on the context and background in which it emerges and is subsequently applied. As a consequence, South American countries will appear to have a much “harder” approach to the Right to the Truth due to the fact that it first emerged in this region, while European or African countries tend to have a rather softer attitude with South Africa upholding a

unique approach as a consequence of the reconciliation and pardoning mentality of such country.

Finally, the fifth and last chapter will address the case of the Argentinian transition after the last military dictatorship and the role played by the Right to the Truth in this regard together with such right's weaknesses and negative implications. The choice of Argentina as case-study is due to the fact that such country's experience with the Right to the Truth is emblematic for both such right's strengths and weaknesses. This latter, will be accompanied by some foreseeable solutions that may at least marginalise the "backfire effects" of a too dogmatic or perfunctory application of the Right to the Truth in contexts where, still, basilar human rights are disregarded.

# Chapter I The Right to the Truth's Definition, Emergence and Evolution

## 1.1 Definition

The Right to the Truth can be defined as an obligation on every State to unveil all that can reliably be known about the reasons and circumstances related to massive or systematic human rights violations.<sup>1</sup>

This obligation presupposes the perpetration, in the past or present, of the most heinous human rights violations under international law such as enforced disappearances, genocide, war crimes and torture, and requires a positive effort on behalf of the State to investigate in a thorough and sustained way in order, *inter alia*, to identify the perpetrators and instigators and eventually prosecute and punish them. The judicial investigations may nevertheless not be sufficient themselves since the Right to the Truth requires the competent State-authorities to clarify the general context, the policies and the institutional failures and decisions that enabled the occurrence of such violations.<sup>2</sup> Furthermore, the State is required to offer to victims certain measures of reparation, not limited to monetary compensation, and, in addition, to ensure guarantees of non-recurrence, which is an integral component of the Right to the Truth. The latter task may require also to remove from the ranks of the security forces those agents who are known to have participated in such crimes.

All obligations triggered by the Right to the Truth are independent from each other and must be executed in good faith. Hence, whenever one of

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<sup>1</sup> Juan E. Méndez, *Accountability for past abuses* (Working paper 223) published by The Helen Kellogg Institute for International Studies (1996).

<sup>2</sup> UN General Assembly, *Promotion and protection of the right to freedom of opinion and expression*, Note by the Secretary-General, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, U.N. Doc. A/68/362, para. 30



them is rendered impossible to execute, State-authorities must still strive to comply with the others. Nevertheless, they all flow from the general duty of States to ensure and guarantee inalienable human rights. The Right to the Truth, thus, on one hand constitutes a due corollary of such general obligation under international law aimed at ensuring its effective compliance and enforcement, on the other, it retains the nature of an autonomous right, as stated by several International Tribunals, International Organisations and legal scholars and that will be examined below.

Indeed, according to the most recent doctrinal and jurisprudential developments that will be addressed further on, the Right to the Truth is a legally enforceable right in international law and has been recently held to have acquired the rank of *jus cogens*.<sup>3</sup>

The Right to the Truth has both an individual and a collective sphere of application: the first consisting in the entitlement of every individual victim or his nearest, irrespective of any legal proceedings, to know the circumstances in which violations took place and, in the event of disappearance or death, the victim's fate;<sup>4</sup> collectively it responds to every society's need to be informed of its past history of oppression or violence given that it constitutes part of its cultural heritage.<sup>5</sup> Thereupon, depending on its sphere of application the Right to the Truth may serve two fundamental purposes; a reparative one in its individual dimension and, when operating in its "societal area", one of non-recurrence. However, this does not mean that it has to be applied

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<sup>3</sup> Dermot Groome, *The Right to the Truth in the Fight against Impunity*, 29 *BERKLEY J. OF INT'L L.* 29, 175 (2011), Juan E. Méndez & Francisco J Bariffi, *Right to the Truth* in Max Planck Encyclopedia of Public International Law (2012), E/CN.4/Sub.2/1995/20, annex I, paras. 39 and 40; Supreme Court of Argentina, Case No. 17768 of 14 June 2005

<sup>4</sup> UN Commission on Human Rights, *Question of the impunity of perpetrators of human rights violations (civil and political)*, *Final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119*, U.N. Doc. E/CN.4/Sub.2/1997/20, princ.3

<sup>5</sup> UN Commission on Human Rights, *Report of the independent expert to update the Set of principles to combat impunity*, Diane Orentlicher, U.N. Doc. E/CN.4/2005, princ.3.

differently according to the goal is aimed at pursuing, indeed, for its very nature, it covers both spheres simultaneously.<sup>6</sup>

The Right to the Truth is strictly connected to other fundamental human rights such as the Right to Justice, the Right to Reparation, the Right to Family Life, the Right to be free from torture and inhuman or degrading treatment and, of course, the Right to Access to Information.

With regard to reparation, the satisfaction of the Right to the Truth itself already constitutes a form of remedy that victims and their families are entitled to receive. Indeed, reparation includes, among other things, guarantees of non-recurrence, which would be ensured also and foremost through the knowledge of the facts and circumstances which lead to the violations. This flows from the general thinking, rooted since the end of World War II., that the disclosure of the facts and the preservation of the related historical memory best serve the aforementioned goal.

To this aim judicial proceedings and, hence, the Right to Justice, play further a fundamental role. Actually, the assessment of the facts through the judiciary, but also the very possibility to access to justice constitutes a form of reparation, since the core obligation that stems from the Right to the Truth is to unveil the facts and circumstances related to gross human rights violations as well as to identify, prosecute and punish those responsible. Moreover, reparation should entail also collective measures such as annual homage to the victims or public recognition of State responsibilities, in order, *inter alia*, to restore the victims' dignity and to be forearmed against such distortions of history known as revisionism or negationism.<sup>7</sup>

From this point of view the Right to the Truth may overlap with the Right to Information; nonetheless, the latter may be submitted to

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<sup>6</sup> *Romero y Galdámez*, Inter.-Am. Comm. H.R. (Rep. No. 37/00), para. 148 (2000).

<sup>7</sup> UN Commission on Human Rights, *Question of the impunity of perpetrators of human rights violations (civil and political)*, Final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, U.N. Doc E/CN.4/Sub.2/1997/20, para. 42.

limitations in states of emergency or other exceptional circumstances accepted under international law<sup>8</sup>.

The Right to the Truth, on the contrary, since being aimed at protecting inalienable rights *i.e.* the Right to Life, the Right to Family Life, the Right to be free from torture etc., has non-derogable nature.<sup>9</sup> Such feature is a due consequence of this right's interpretation and evolution; suffice it to say at this point, that the first rulings acknowledging the Right to the Truth typified the State's failure to inform the victim's relatives of the fate or whereabouts of a victim of enforced disappearance as amounting to torture or ill-treatment, which is unanimously recognized as an imperative prohibition under international law.<sup>10</sup>

At the same time, today, it is almost not disputed that the Right to the Truth has acquired the status of an autonomous right. Although not being embodied in any binding legal instrument, this flows from the wide-ranging jurisprudence and doctrinal writings in different regions of the world;<sup>11</sup> moreover the peculiar nature of this right, given that it protects the most fundamental human rights simultaneously and from different types of abuses, militates in favour of such an understanding. So much so, that even in those rulings in which the Right to the Truth

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<sup>8</sup> *e.g.* ICCPR, 19 (3).

<sup>9</sup> UN Commission on Human Rights, *Study on the right to the truth, Report of the Office of the United Nations High Commissioner for Human Rights*, U.N. Doc. E/CN.4/2006/91, para. 44.

<sup>10</sup> Human Rights Committee, notes Nos. 64, 65 and 66; *Cyprus v. Turkey*, 2001 – IV Eur. Ct. H.R. 1 (2001); *Kurt v. Turkey*, 2007 – II Eur. Ct. H.R. (2007).

<sup>11</sup> Juan Méndez, *Responsibility for Past Human Rights Violations: An Emerging "Right to the Truth,"* in TRUTH AND JUSTICE: IN SEARCH OF RECONCILIATION IN SURINAME 44 (Alfredo Forti & Georgine De Miranda eds., 1999); Eduardo Ferrer Mac-Gregor, *The Right to the Truth as an Autonomous Right under the Inter-American Human Rights System*, in Mexican Law Review (2016); United Nations, High Commissioner for Human Rights, *Study on the right to the truth*, U.N. Doc. E/CN.4/2006/91 (2006); Organization of American States, General Assembly, Resolutions: AG/RES. 2175 (XXXVI-O/06) (2006), GA/RES. 2267 (XXXVII-O/07) (2007); GA/RES. 2406 (XXXVIII-O/08) (2008); GA/RES. 2509 (XXXIX-O/09) (2009), and GA/RES. 2595 (XL-O/10) (2010), AG/RES. 2662 (XLI-O/11) (2011), AG/RES. 2725 (XLII-O/12) (2012), AG/RES. 2800 (XLIII-O/13) (2013), GA/RES. 2822 (XLIV-O/14) (2014) in the Report of the independent expert to update the Set of Principles to combat impunity, Diane Orentlicher, (E/CN.4/2005/102) of 18 February 2005.

has been held to be subsumed in other rights, such as the above-mentioned ones, the Courts<sup>12</sup> issuing the judgements felt the need to point out the existence of this right.

The Right to the Truth is, hence, outlined as an autonomous right which, although entailing an obligation of means, it requires States to comply with a number of independent, but still, interconnected tasks (unveil the facts, investigate and punish, ensure reparation and preserve memory) whose core function is to ensure the effective enforcement of other fundamental rights that were previously breached, in order to avoid impunity and further violations.

## **1.2 The Contributions of International Organisations to the Right to the Truth**

### **1.2.1 The Emergence and Evolution of a New Human Right**

Together with regional human rights jurisprudence, that will be analysed in the following chapter, various International Organisations contributed to the definition and evolution of the Right to the Truth and, analogously as for Courts, the starting point was the fight against enforced disappearances and impunity.

#### **(i) The United Nations System Role**

Particularly, the United Nations started confronting this issue already in the early '80s with the establishment of the Working Group on enforced or involuntary disappearances.<sup>13</sup>

According to its first report, the Working Group's terms of references included also "cases in which a person's detention between his arrest and his death is not accounted for and his family have not known his

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<sup>12</sup> Inter-Am. Ct. H.R.; Eur. Ct. H.R.

<sup>13</sup> Commission on Human Rights resolution 20 (XXXVI), adopted at the 1563<sup>rd</sup> meeting on 29 February 1980.

whereabouts”<sup>14</sup> and pointed out that most of the cases it had to deal with implied the responsibility of State authorities.<sup>15</sup> Further on, the report explicitly recalls article 32 of the Additional Protocol I to the Geneva Conventions of 1949 (*see supra*) in relation to the mental distress caused to missing persons relatives’ by the uncertainty of the formers’ fate and whereabouts.<sup>16</sup>

However, it is in its recommendations that the Working Group explicitly mentioned “a right to learn what happened” in cases of enforced disappearances,<sup>17</sup> and called upon Member States to undertake “urgent and thorough investigations of such cases as have occurred”.<sup>18</sup>

So much so, that few years later, in 1983, the Human Rights Committee by adopting its views on an individual Communication reached the same findings.<sup>19</sup> Specifically, the case dealt with the disappearance of Elena Quinteros Almeida, a Uruguayan student, after her arrest by Uruguayan Policemen in the embassy of Venezuela in Montevideo.

According to the Communication filed by the student’s mother, Elena was last seen in 1976, when the incident occurred, and since then Uruguayan authorities systematically denied that even the arrest took place; even though Venezuela broke off diplomatic relations with Uruguay as a consequence of the strike in the embassy.

The Human Rights Committee accepted the alleged facts as true given also that Uruguay appeared “to have ignored the Committee’s request for a thorough inquiry”<sup>20</sup>, and recognised the mother’s right to know what happened to her daughter.<sup>21</sup> Furthermore, it stated that the anguish

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<sup>14</sup> UN Commission on Human Rights, *Question of Human Rights of all persons subjected to any form of detention or imprisonment, in particular: Question of missing and disappeared persons, Report of the Working Group on enforced or involuntary disappearances*, U.N. Doc. E/CN.4/1435, para. 4 (1981).

<sup>15</sup> *Id.* para. 3.

<sup>16</sup> *Id.* para. 187.

<sup>17</sup> *Id.* para. 192.

<sup>18</sup> *Id.* para. 195.

<sup>19</sup> UN Human Rights Committee, Communication No. 107/1981, *del Carmen Almeida de Quinteros v. Uruguay* (July 1983), U.N. Doc. CCPR/C/OP/2.

<sup>20</sup> *Id.* para. 11.

<sup>21</sup> *Id.* para. 14.

and stress caused by the uncertainty on the fate and whereabouts of a close relative amounted to torture and ill-treatment,<sup>22</sup> hence, outlining for the first time within the context of International Organisations, the parallelism between torture and the breach of the Right to the Truth.

In 1987, also the Parliamentary Assembly of the Council of Europe in its Recommendation 1056 (1987) observed that “the families of missing persons are entitled to know the truth”, unfortunately this Institution’s contribute to the Right to the Truth’s early developments is limited to this assertion.<sup>23</sup>

The United Nations went further and continued focusing on this right. Indeed, in December 1992, the UN General Assembly adopted the Declaration on the Protection of All Persons from Enforced Disappearance, whose article 9(1) defines the Right to Judicial Remedy as “a means of determining the whereabouts or state of health of persons deprived of their liberty and/or the authority ordering or carrying out” such deprivation.<sup>24</sup> But, most importantly, articles 13 and 14 establish, respectively, the duty of the State to investigate “promptly, thoroughly and impartially” cases of disappeared persons in order, *inter alia*, to account for their fate and whereabouts to their relatives, and the duty to prosecute and punish those responsible.<sup>25</sup>

Finally, in 2006, the General Assembly endorsed the final draft of the International Convention for the Protection of All Persons from Enforced Disappearance. Specifically, already in the Preamble it “affirms” the victims’ right to know the truth about the circumstances of enforced disappearances as well as to right to seek and receive freely information to this end.<sup>26</sup> Most notably, this right is even more explicitly established in article 24, which makes it clear that, such “right to know the truth”, implies the obligation to conduct investigations,

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<sup>22</sup> *Id.* para. 14.

<sup>23</sup> Council of Europe, Parliamentary Assembly Resolution 1056 (1987), para. 17.

<sup>24</sup> UN General Assembly, *Declaration on the Protection of All Persons from Enforced Disappearance*, U.N. Doc. A/RES/47/133, art. 9(1), (1992).

<sup>25</sup> *Id.* artt. 13 and 14.

<sup>26</sup> U.N. G.A. Res. 61/177, U.N. Doc. A/RES/61/177, Preamble (2006).

prosecutions and reparations to the victims or their families, as well as to give guarantees of non-repetition.<sup>27</sup> Those, in particular, should include such measures as the strengthening of the judiciary independence, a stricter civil control over the military, human rights education in schools and reviewing and reforming existing norms in order to avoid impunity.

It is noteworthy to say that the abovementioned article 24 was drafted after several years of studies on such “right to know the truth”, indeed its content owes much to the various reports commissioned by several United Nations Organs, first on the issue of impunity then on the Right to the Truth itself and that will be acknowledged further on.

On 25 June 1993, the World Conference on Human Rights adopted the Vienna Declaration and Programme of Action which raised the attention on impunity of perpetrators of human rights violations as one of the main concerns for the international protection of human rights.<sup>28</sup> Few years later, in 1997, the Economic and Social Council of the United Nations published the final report prepared by Mr Joinet on the “Question of the impunity of perpetrators of human rights violations (civil and political)”.<sup>29</sup>

The report proposes a “Set of Principles” in order to combat and overcome impunity and already in the “Overall Presentation” it strives the attention on “the right to know” which actually corresponds to the Right to the Truth.<sup>30</sup> Additionally, in Annex I, which contains the “Set of Principles”, it reads: *Principle 1 - The inalienable right to the truth*,<sup>31</sup> defined as the right of every people “to know the truth about past events and about the circumstances and reasons” that lead to gross violations

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<sup>27</sup> *Id.* art. 24.

<sup>28</sup> A/CONF.157/24, Part II, para.91 (1993).

<sup>29</sup> UN Commission on Human Rights, *Question of the impunity of perpetrators of human rights violations (civil and political), Final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119*, U.N. Doc. E/CN.4/Sub.2/1997/20 (1997).

<sup>30</sup> *Id.* paras. 16-18.

<sup>31</sup> *Id.* Annex I, Principle 1.

of human rights.<sup>32</sup> The full exercise of this right, according to the report, would be “essential” to avoid the recurrence of such crimes; indeed, Principle 2 affirms that States are obliged to preserve the collective memory of a society’s history of oppression or abuses for the sake of warding off revisionism or denialism.<sup>33</sup> Principle 3 deals with the “Victims’ right to know” and affirms that, notwithstanding any legal proceeding, victims and their relatives “have the right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victim’s fate”.<sup>34</sup> Moreover, Mr Joinet addressed the collective sphere of the Right to the Truth claiming that it should entail a “duty to remember” on behalf of the State so that the common memory of such heinous violations remains preserved as a reminder and a warning for future generations.<sup>35</sup>

The report lists further several measures in its “Set of Principles” such as the preservation of archives and the protection of witnesses, which are almost all aimed at establishing the truth; sign of the particular importance given to this matter in the protection of human rights.

In 2000 Special Rapporteur Mr M. Cherif Bassiouni, published his final report, which sets out a number of “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law”, the victims’ Right to a Remedy includes access to factual information concerning the violations.<sup>36</sup> Most notably, the “Forms of reparation” shall include the “verification of the facts and full and public disclosure of the truth”, as well as “judicial or administrative sanctions against persons responsible for the violations”.<sup>37</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.* Principle 2.

<sup>34</sup> *Id.* Principle 3.

<sup>35</sup> *Id.* Principle 2.

<sup>36</sup> UN Commission on Human Rights, *The right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, Final report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33*, U.N. Doc. E/CN.4/2000/62, Annex I, para. 11(c) (2000).

<sup>37</sup> *Id.* para. 25 (b) (f).



Those two reports, despite the fact that they only outline the Right to the Truth, set the minimum content of this right and its double sphere of application, but, most and foremost, they establish its inalienable nature. Accordingly, since the aim of such right is to ensure the effective enforcement of fundamental and inalienable human rights, as a consequence, also the Right to the Truth should have such nature, in order to be fully effective in turn.

However, the United Nations went further in the development of the Right to the Truth and, since 2005 other reports were provided specifically on such right.

The first was drafted by Ms Diane Orentlicher, appointed in order to prepare an update of the Set of principles to combat impunity, which includes the “inalienable right to know the truth about violations” among the General obligations of States to take effective action to combat impunity in Principle 1.<sup>38</sup> The update increased also the attention on extra-judicial proceedings, such as the establishment of truth commissions, as one of the guarantees to give effect to the Right to the Truth, and on the administration and preservation of archives too.<sup>39</sup>

One year later, in 2006, the Special Rapporteur on the independence of judges and lawyers, Mr Leandro Despouy, highlighted the growing importance of the Right to the Truth as an autonomous and inalienable right.<sup>40</sup> The report cites various sources in its analysis, both national and international jurisprudence as well as doctrinal papers and, of course, previous UN studies, and derived the Right to the Truth’s content and nature from its interrelation with other rights.

Specifically, the Right to the Truth would not be fully ensured without an effective exercise of the Right to Justice and the Right to

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<sup>38</sup> UN Commission on Human Rights, *Report of the independent expert to update the Set of principles to combat impunity*, Diane Orentlicher, U.N. Doc. E/CN.4/2005, Principle 1 (2005).

<sup>39</sup> *Id.* Principles 6-13 and 14-18.

<sup>40</sup> UN Commission on Human Rights, *Report of the Special Rapporteur on the independence of judges and lawyers*, Leandro Despouy, U.N. Doc. E/CN.4/2006/52 (2006).

Reparation.<sup>41</sup> The former should ensure the notion of the facts that lead to the violations through the action of the judiciary, the latter would not be fully realized without knowing the truth.

Moreover, it is in this report that the obligations flowing from the Right to the Truth were said to have acquired the rank of *jus cogens*; in fact, when comparing it to the Right to Freedom of Opinion, Expression and Information, since the latter may be subject to restrictions, the Right to the Truth, given the untouchable nature of the underlying rights, would have untouchable nature as well. In the words of Special Rapporteur Despuoy: “It would be illogical to accept that for public order reasons a State may suspend rights and guarantees - including the right to the truth - thereby jeopardizing untouchable rights such as the right to life or to the physical and moral integrity of persons.”<sup>42</sup>

Further on, the United Nations High Commissioner for Human Rights submitted in 2010 his report on the Right to the Truth pursuant to Human Rights Council Resolution 12/12 introducing new elements to this right’s conception;<sup>43</sup> namely by stressing the importance of witnesses and, as consequence, witness protection programmes in truth finding processes. This report marks a second phase of the UN studies on the Right to the Truth; indeed, it is the first which analysed such right in its comprehensiveness thoroughly by considering also its related issues. In 2011 and 2013 other reports were submitted, respectively on the experience of archives and on truth commissions, both as means to guarantee the Right to the Truth, as will be addressed in chapter III.<sup>44</sup>

Further, the UN General Assembly, with its resolution 65/196 of

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<sup>41</sup> *Id.* paras. 17 and 19.

<sup>42</sup> *Id.* para. 23.

<sup>43</sup> UN General Assembly, *Report of the United Nations High Commissioner for Human Rights on the Right to the truth*, U.N. Doc. A/HRC/15/33 (2010).

<sup>44</sup> UN General Assembly, *Report of the Office of the United Nations High Commissioner for Human Rights on the seminar on experiences of archives as a means to guarantee the right to the truth*, U.N. Doc. A/HRC/17/21 (2011), UN General Assembly, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff*, U.N. Doc. A/HRC/24/42 (2013).

December 2010, in the follow-up to of the UN Human Rights Council resolution 14/7 of June 2010, proclaimed the 24 March as “the International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims.”<sup>45</sup> Interestingly, beside recalling the various resolutions and decisions issued by the UN Human Rights Council together with the other UN-sponsored studies on the Right to the Truth, the General Assembly resolution also refers to articles 32 and 33 of Additional Protocol I to the Geneva Conventions of 1949<sup>46</sup> which is considered to be the “progenitor” of the Right to the Truth.<sup>47</sup> In fact, the said protocol was the first international human rights instrument which provided that the next-of-kin of those died or disappeared during an armed conflict had the right to know the fate and whereabouts of their loved ones.<sup>48</sup>

Moreover, in October 2011, the UN Human Rights Council with resolution 18/7 decided to appoint a Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, whose tasks include, *inter alia*, the provision of technical assistance, advisory services, the monitoring and reporting on special issues, the preparation of topic studies etc.<sup>49</sup> This is an additional and concrete signal of the interest and engagement of the UN on the topic. The Special Rapporteur may, indeed, furnish precious advices, mostly in transitional periods, where such organisations’ experience may result most valuable.

The United Nations System had for sure an outstanding role, confirming its role of the most active international organisation on such

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<sup>45</sup> UN General Assembly, *Proclamation of 24 March as the International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims*, U.N. Doc. A/RES/65/196 (2011), UN Human Rights Council, *Proclamation of 24 March as the International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims*, U.N. Doc. A/HRC/RES/14/7 (2010).

<sup>46</sup> Protocol Additional to the Geneva Conventions, *supra* note 15.

<sup>47</sup> *Id.*, first *Recalling*.

<sup>48</sup> *Id.*

<sup>49</sup> UN Human Rights Council, *Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, U.N. Doc. A/HRC/RES/18/7 (2011).

topic, nevertheless it was not the only International Organisation dealing with the Right to the Truth.

**(ii) Other International Organisations**

In fact, the International Committee of the Red Cross argued, in 1981, that the Right to the Truth is a norm of international customary law applicable to international as well as internal armed conflicts, thus obliging each party to the conflict to account for missing persons and to furnish all the relevant information to the families.<sup>50</sup>

With regard to international organisations of regional dimension, the General Assembly of the Organisation of American States adopted several resolutions from 2006 to date recognising “the importance of respecting and ensuring the right to truth so as to contribute to ending impunity and to promoting and protecting human rights”.<sup>51</sup>

In addition, the Organisation of American States and the Inter-American Commission on Human Rights published an almost two-hundred pages long document entitled “The Right to Truth in the Americas”.<sup>52</sup> Such document, notably published thanks to the financial support of Argentina, represents one of the most complete analysis of the Right to the Truth’s emergence, evolution and application to date, starting from the jurisprudence of the Inter-American Court, through the United Nations contributions and ending with a country report of every Member States’ own experience with such right. Hence, underlining the constant attention conferred to the Right to the Truth by the Inter-American Institutions that, to date, have given the most

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<sup>50</sup> Resolution II of the XXIV International Conference of the Red Cross and Red Crescent (Manila, 1981).

<sup>51</sup> General Assembly of the Organization of American States, Resolutions: AG/RES. 2175 (XXXVI-O/06) of June 6, 2006, AG/RES. 2267 (XXXVII-O/07) of June 5, 2007, AG/RES. 2406 (XXXVIII-O/08) of June 3, 2008, AG/RES. 2509 (XXXIX-O/09) of June 4, 2009, AG/RES. 2595 (XL-O/10) of June 8, 2010, AG/RES. 2662 (XLI-O/11) of June 7 2011, AG/RES. 2725 (XLII-O/12) of June 4, 2012, AG/RES. 2800 (XLIII-O/13) of June 5, 2013, AG/RES. 2822 (XLIV-O/14) of June 4, 2014.

<sup>52</sup> Inter-American Commission on Human Rights, *The Right to Truth in the Americas*, O.A.S. Doc. OEA/Ser.L/V/II.152 (2014).

substantial contributions to the said right.

The European Union on its side officially recognised the existence of the Right to the Truth, although not as a self-standing right, but included in a broader document as the 2015-2019 Action Plan on Human Rights and Democracy, in 2015.<sup>53</sup> Specifically, in a document issued by the European Commission entitled *The EU's Policy Framework on support to transitional justice* the Right to the Truth is acknowledged both in its individual and collective dimension as a fundamental right. Despite the fact that such an accreditation of the Right to the Truth is made with reference to transitional justice, it still constitutes a step forward for the EU which has been for too long so loudly silent in this regard. It would have been, indeed, more appropriate, for an international institution as important as the said is, to spend some attention to the Right to the Truth as a substantial right, thus, recognizing it a higher “dignity”.

Finally, the African Commission infers “access to factual information concerning the violations” as part of a right to an effective remedy, which might be regarded as an indirect recognition of the Right to the Truth.<sup>54</sup> Anyway, in a resolution of 2007, the African Commission explicitly recognises the Right to the Truth as an autonomous right.<sup>55</sup>

This overall picture leads to several conclusions.

First and foremost, the Right to the Truth is today undeniably an autonomous, inalienable and independent human right which entitles victims, their relatives and society as a whole to know the truth about the facts and circumstances related to gross or systematic human rights violations. It is strictly connected with the States’ duty to protect and ensure human rights, the Right to Justice, the Right to Freedom of Opinion, Expression and Information, the Right to Reparation, the Right to Family Life and, last but not least, the Right to be free from

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<sup>53</sup> EU

<sup>54</sup> African Commission on Human and Peoples’ Rights, *Principles and Guidelines on the Right to Fair Trial and Legal Assistance in Africa*, A.U. Doc. DOC/OS (XXX) 247, C. a) (iii).

<sup>55</sup> African Commission on Human and Peoples’ Rights, *Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence*, A.U. Doc. ACHPR/Res. 111 (XXXXII) 07.

torture. Furthermore, the Right to the Truth has been recognized as a fundamental tool in order to combat impunity and, although its nature of procedural right, it imposes on States to take a positive action not only to clarify past events, but also to impede the recurrence of such heinous crimes.

However, although the above mentioned are egregious soft-law initiatives, hence having the sole capacity to encourage States to take action in the promotion and protection of the Right to the Truth, they nevertheless indicate that the attention toward such right dates back to the 1980s and is still not waned.

Furthermore, according to a traditional view and interpretation of the UN General Assembly's role, its resolutions serve as signals of the current status and evolution of international law. Thus, the General Assembly's proclamations are supposed to be backed by the majority of States of the international community and which should act accordingly.

As stated above, however, the cited international organisations' initiatives have non-binding nature and lack of a more right-specific approach. Fortunately, regional human rights courts, such as the Inter-American Court for Human Rights and its European homologous, upheld, also in their most recent rulings, a "hard" approach and specified the Right to the Truth increasingly. Which, in turn, may put additional attention on such right substantially and, hopefully, give the input for the drawing up of a Convention on the Right to the Truth, which, eventually, poses binding legal obligations.

## **Chapter II**

# **International Jurisprudence on the Right to the Truth: The Inter-American and the European Court of Human Rights as the Leading Actors.**

### **2.1 Initial Jurisprudence prior to the 2000's**

#### **2.1.1 Inter-American Court of Human Rights**

It is in the context of enforced disappearances case law of the Inter-American Court of Human Rights that the Right to the Truth was first conceived. The leading case was *Velásquez Rodríguez v. Honduras*, related to the abduction and consequent disappearance of Manfredo Velásquez, a Honduran student, at the hands of Honduran State officers (Policemen and Militaries) in 1981. Accordingly, the victim's fate and whereabouts were held secret (his taking and detention were even repeatedly denied) both to his family and to judicial authorities that eventually tried to investigate into the case; the Court itself declared that, at the time the cause was decided, his fate was still unknown.<sup>56</sup> In this case the Court declared the existence of a "right of the victim's family to know his fate and, if appropriate, where his remains are located, which represents a fair expectation that the State must satisfy with the means available to it".<sup>57</sup>

Although it was not explicitly named, such right of the victim and of his relatives became the cornerstone of what today is called Right to the Truth; indeed, the "fair expectation" cited by the Court represents the Right to the Truth's content when applied in its individual sphere, which entitles the victim and his relatives to access all relevant information related to the violations that had occurred.

The Inter-American Court did not make up this right out of the blue; articles 32 and 33 of the Protocol Additional to the 1949 Geneva

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<sup>56</sup> *Id.* para. 147 lett. e)

<sup>57</sup> *Velásquez Rodríguez*, Inter.-Am. Ct. H.R. (ser.C) No.4, para. 181 (1998).

Conventions and relating to the Protection of Victims of International Armed Conflicts (Protocol I) already recognised the right of families to know the fate of their relatives, as well as obligations on behalf of the conflicting parties to look for persons that have been reported missing.<sup>58</sup> Still, the Protocol did not recognise a new right and, moreover, it had a limited scope of application, since it was aimed at regulating international armed conflicts, or at least, post armed conflicts scenarios. The judges derived the Right to the Truth from other provisions, enshrined in the American Convention on Human Rights: article 1, “*Obligation to Protect Rights*”, and article 2, entitled “*Domestic Legal Effects*”. The former establishes the general duty of the Contracting Parties to respect and ensure “*the free and full exercise*” of human rights, while the latter binds the States to adapt their internal legislation in order to ensure the effectiveness of the rights and freedoms recognized in the Convention.

According to the Court those two provisions require the State to organize its entire apparatus towards the fullest protection of fundamental human rights, which triggers the duty to prevent, investigate and punish human rights’ violations.<sup>59</sup> Furthermore, investigations, whilst being an obligation of means, shall be conducted seriously and not “*as a mere formality doomed from the beginning to be unsuccessful*” in order to search for the truth.<sup>60</sup>

Thus, the Right to the Truth has been initially held to arise from the general duty of States to ensure and protect human rights which, accordingly, would imply the obligation to organize the governmental apparatus so that they are capable of ensuring the free and full enjoyment of such rights and, in case of violations, to investigate, punish and restore, if possible, the right violated eventually through

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<sup>58</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 18 June 1977 artt.32 and 33, Jun. 8, 1977.

<sup>59</sup> *Velásquez Rodríguez*, Inter.-Am. Ct. H.R. (ser.C) No.4, para. 166 (1988).

<sup>60</sup> *Id.* para. 177.



reparation.<sup>61</sup>

In 1997 the Inter-American Commission presented before the Court the case of *Castillo-Páez v. Peru*, for his abduction by the Peruvian Police and consequent disappearance, claiming, *inter alia*, the violation of the Right to the Truth.<sup>62</sup> The Court, nevertheless stated that this “referred to the formulation of a right that does not exist in the American Convention, although it may correspond to a concept that is being developed in doctrine and case law, which has already been disposed of in this Case through the Court’s decision to establish Peru’s obligation to investigate the events that produced the violations of the American Convention.”<sup>63</sup>

In this case the Right to the Truth was subsumed under the obligation to investigate into breaches of article 4 of the Convention which protects the Right to Life. Nonetheless, the Court denied not the existence of such right and, by declaring that it was “already been disposed of” in the case at stake, it implicitly stated that its content implies the duty to investigate human rights violations.

The following year in deciding *Blake v. Guatemala* the Inter-American Court ascertained that, by impeding the clarification of Mr. Blake’s whereabouts and by delaying unreasonably the investigations, the Guatemalan authorities breached article 8(1) (Right to a Fair Trial) of the Convention.<sup>64</sup> The petition filed with the Inter-American Commission concerned the abduction, murder and disappearance of Nicholas Blake, an American journalist, on behalf of agents of the Guatemalan State. To worsen the circumstances of the case, Guatemalan authorities systematically denied having knowledge of the fate and whereabouts of Mr. Blake and, in addition, furnished false versions of the facts to his relatives.

This, as said above, constituted a violation of the Right to a Fair Trial,

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<sup>61</sup> *Id.* para.166.

<sup>62</sup> *Castillo-Páez*, Inter.-Am. Ct. H.R. (ser.C) No.32 (1997).

<sup>63</sup> *Id.* para. 86.

<sup>64</sup> *Blake*, Inter.-Am. Ct. H.R. (ser.C) No.36, paras. 91 and 97 (1998).

hence, of the Right to Justice. Moreover, the mental harm that the uncertainty on the whereabouts of Mr. Blake procured to his next of kin amounted, according to the Court, to a detriment of their mental and moral integrity and so to a violation of article 5 (Right to Humane Treatment) of the Pact of San José.<sup>65</sup>

It is interesting to note that, although the sources from which the obligation to clarify the facts and circumstances surrounding human rights violations have been extended, still, the Court does not explicitly cite the Right to the Truth. However, all the allegedly breached provisions require the State parties, at least to investigate into the crimes in order to unveil the truth.

Subsequently, in the case of *Bámaca-Vélasquez v. Guatemala* in 2000 for the first time this right was explicitly mentioned.

Efraín Bámaca Vélasquez formed part of a guerrilla movement known as “ORPA” (Revolutionary Organisation of the People in Arms). After an encounter in 1992 between the Guatemalan army and “ORPA” Mr. Bámaca Vélasquez was captured by the militaries and since then disappeared. Accordingly, during his detention he suffered torture and ill-treatment until his eventual execution. At the time, the case was decided his fate and whereabouts were still unknown.

Among the other claims, the Commission alleged a violation of the Right to the Truth both of the victim’s next of kin and of society as a whole. Indeed, the Inter-American Commission declared that the Right to the Truth has a collective nature, which includes the right of society to “have access to essential information for the development of democratic systems”.<sup>66</sup>

The Court, however, was, again, reluctant in facing a direct violation of such right. Specifically, it was stated that “the right to the truth was subsumed in the right of the victim or his next of kin to obtain clarification of the facts relating to the violations and the

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<sup>65</sup> *Id.* paras. 114-116.

<sup>66</sup> *Bámaca-Vélasquez*, Inter.-Am. Ct. H.R. (ser.C) No. 70, para. 197 (2000).

corresponding responsibilities from the competent State organs, through the investigation and prosecution established in Articles 8 and 25 of the Convention.”<sup>67</sup>

The following year in *Barrios Altos v. Peru*, related to a mass shooting in Lima on behalf of a State-controlled paramilitary group, the State acknowledged the violation of the Right to the Truth, while the Commission correlated it not only to articles 8 and 25 of the Convention, but also to article 13; the Right to seek and receive Information.<sup>68</sup> The Court, in any case, still considered that such right is subsumed in the right to investigation and prosecution established in articles 8 and 25.<sup>69</sup>

Remarkably, this case was also one of the first in which the issue of the so called “blank-amnesty” laws was raised. However, the judges avoided to link it to the Right to the Truth, which, in any case, was still held to be subsumed in other provisions of the Inter-American Convention.

The Inter-American Institutions (Commission and Court) developed the Right to the Truth and its content, both the individual as well as the collective one;<sup>70</sup> case law suggests that such right has been first linked to the State’s obligation to investigate human rights violations, prosecute and punish those responsible in order to fight impunity and further to the Right to a Fair Trial and judicial protection as well as to the Right Humane Treatment. Thereon, the Commission widened its scope also to the societal sphere, highlighting this right’s function in democratic societies as a mean to ensure, not only the access to relevant information about criminal State practice, but mostly, the non-recurrence of gross human rights violations.

Undoubtedly, the Inter-American System played a prominent and pioneering role in the Right to the Truth’s evolution, even though it was

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<sup>67</sup> *Id.* paras. 200-201.

<sup>68</sup> *Barrios Altos*, Inter.-Am. Ct. H.R. (ser.C) No. 75, paras. 45 and 46 (2001).

<sup>69</sup> *Id.* paras. 47-49.

<sup>70</sup> *Bámaca-Vélasquez*, Inter.-Am. Ct. H.R. (ser.C) No. 70, para. 197 (2000).

never directly recognised as an autonomous right. Probably this is due to the fact that International Tribunals, such as the Inter-American Court, have to face severe political pressure on behalf of the State parties, which would have probably not accepted to be sentenced for the breach of a right not directly embodied in the Pact of San José. Moreover, South American Countries have a long history of human rights violations and State despotism and they might have been reluctant in enforcing a ruling that made up a new right out of the blue. The Inter-American Court for sure had to hold this in mind in drafting its judgements.

Nonetheless, this jurisprudence is still a fundamental source, if not the primary, of the Right to the Truth and marked the starting point of its evolution and propagation in other legal systems.

### **2.1.2 European Court of Human Rights**

Also the European Court of Human Rights dealt on more than one occasion with equivalent issues. In its jurisprudence prior to the first decade of 2000 two cases are noteworthy: *Aksoy v. Turkey* (1996) and *Cyprus v. Turkey* (2001).

The former dealt with the alleged detention of Mr Zeki Aksoy, a Turkish citizen, and his ill-treatment while in custody of Turkish police authorities. After his release, no investigation of any kind was started on behalf of Turkish prosecutors, despite the fact that there was visible evidence that Mr Aksoy had been tortured. Similarly to the Inter-American Court, the Strasbourg Tribunal, once requested to decide, did not explicitly mention the Right to the Truth, indeed, it held that given the combined provisions of articles 3 and 13 of the European Convention on Human Rights (respectively “Prohibition of torture” and “Right to an effective remedy”), whenever there is a reasonable suspect that somebody has been tortured, the State is bound to conduct a thorough and effective investigation.<sup>71</sup> Anyway, the European Court of

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<sup>71</sup> *Aksoy v. Turkey*, ECtHR, Application No. 21987/93, para. 98 (1996).

Human Rights stated that the aforementioned investigation should have led to the identification and punishment of those responsible, which actually corresponds to the obligations set out by the Right to the Truth. Hence, such right's content and function has been identified in the same way as by the Inter-American Court, but, still, it was subsumed under other provisions.

Few years later, in 2001, in the case of *Cyprus v. Turkey*, the Court had to deal with the issue of 1.491 Greek Cypriots disappeared in 1974 and still missing, last seen alive while in Turkish military custody. Furthermore, the missing persons disappeared in life-threatening circumstances at a time where there was sufficient evidence of large-scale killings, since Turkish armed forces and Turkey-controlled armed groups conducted violent military operations in the area at stake and, eventually extra-judicial executions.

In any case, since then, Turkish military and administrative authorities not only did not start any type of investigation, but, by means of their military occupation directly obstructed any effective attempt to clarify the facts and refused to account for the fate of the disappeared.

According to the Court, by avoiding to account, in whatever way, for the fate and whereabouts of persons disappeared in life-threatening circumstances and allegedly in the custody of its own authorities, Turkey breached both articles 2 ("Right to life") and 5 ("Right to liberty and security") of the Convention. In fact, a procedural obligation to conduct a prompt and efficient inquiry flows from those two provisions.<sup>72</sup>

In addition the Court went on considering the victims' relatives; accordingly, "the silence of the authorities of the respondent State in the face of the real concerns of the relatives of the missing persons attains a level of severity which can only be categorised as inhuman treatment within the meaning of Article 3."<sup>73</sup>

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<sup>72</sup> *Cyprus v. Turkey*, ECtHR, Application No. 25781/94, paras. 131, 136, 147 and 150 (2001).

<sup>73</sup> *Id.* para. 157.

European case-law, even if less broad, agrees in several aspects with the Inter-American's one in its identification of the rights and duties which, altogether, largely correspond to the Right to the Truth's content. Moreover, it is considerable that both Courts establish the sources of this right in the same rights and duties that States shall protect and observe.

In conclusion, despite the fact that none of the abovementioned Courts clearly acknowledged the existence of the Right to the Truth in a straightforward way, both ascertained the right of victims', of gross human rights violations, and of their next of kin to seek and receive all the relevant information related to the facts and circumstances that lead to the abuses and, furthermore, to have the perpetrators prosecuted and punished. By doing so they both identified the core content and posed the basis for the further doctrinal evolution of what today is known as the Right to the Truth and that, these very Courts continued to define and protect.

## **2.2 Evolving International Jurisprudence: post 2000's**

### **2.2.1 European Court of Human Rights**

After the world-shocking terrorist attack at the World Trade Center in New York, on 11 September 2001, the Government of the United States and its allies have struggled to conciliate harsh counter-terrorism security policies with human rights. Sadly, the national security doctrine underpinned by the Bush-administration foresaw, in reality, the recourse *inter alia* to arbitrary detention, illegal abduction and the use of torture and other degrading treatments as a routine technique for the interrogation of "suspects".<sup>74</sup> Among these, the infamous extraordinary renditions programme (which will be described further

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<sup>74</sup> The infamous "waterboarding" is known worldwide as the symbol of the US security forces' illegal interrogation methods thanks to the many reportages and whistle-blowers, that, over time, shed light on such practices.

on) became the headline of many European newspapers in 2012, due to the shocking ruling rendered by the European Court of Human Rights on such issue.

In fact, on 13 December 2012, the Grand Chamber of the European Court of Human Rights delivered its judgement in the case of *El-Masri v. The Former Yugoslav Republic of Macedonia*.<sup>75</sup> The case concerned the illegal abduction and detention of Mr. El-Masri, a German citizen of Lebanese descent, at the hands of both Macedonian police authorities and CIA agents in the context of the so-called CIA's "extraordinary renditions programme". These operations, according to what emerged in the cause, consisted in a US-led counter-terrorism strategy that foresaw terrorist suspects to be flown between States on civilian aircrafts, outside the scope of any legal protection, and detained on CIA "black sites" or handed over to States who usually resort to torture or other inhuman and degrading treatments.<sup>76</sup>

Turning to the events concerning Mr. El-Masri, the facts that emerged were the following. Mr. El-Masri, while on vacation in the Former Yugoslav Republic of Macedonia (hereinafter FYRM), was arrested on 31 December 2004 upon suspicion of being a terrorist. He was kept incommunicado for the following 23 days by and under the constant surveillance of Macedonian policemen in a hotel room in Skopje. During this period of time he has been interrogated repeatedly and once, as he tried to leave the room, seriously threatened with a gun.

On 23 January 2005 Mr. El-Masri was driven to Skopje Airport and handed over to CIA agents. These last beaten him severely, stripped him and sodomised him in the presence of the Macedonian policemen; he was then, handcuffed and hooded, placed on to a CIA plane and

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<sup>75</sup> *Case of El-Masri v. The Former Yugoslav Republic of Macedonia*, ECtHR, Application No. 39630/09 (2012).

<sup>76</sup> *Id.* par. 43, Council of Europe, Committee on Legal Affairs and Human Rights, Rapporteur Dick Marty, Secret Detentions and Illegal Transfers of Detainees involving Council of Europe Member States: Second Report, AS/Jur (2007) 36, June 7, 2007, par. 7.

secretly transferred to Afghanistan. Until May 2005, Mr. El-Masri was kept in a CIA-run secret detention centre where he was subjected to “enhanced” interrogations on several occasions. That same month, the CIA has come to the conclusion that there has been a mistake of identity and decided to flow back Mr. El-Masri to Europe where he was abandoned at night on the side of an Albanian road.

As soon as he was back in Germany, Mr. El-Masri started proceedings both in the US and FYRM which, however, ended in nothing; US courts resorted to the State secrets privilege while Macedonian authorities, without conducting any independent investigation, rejected his claim as unsubstantiated. At that point, on September 2009, he lodged an application before the European Court of Human Rights.

Whereas generally the Strasbourg court can rely on the reconstruction of the facts made by domestic courts, in this case, since judicial proceedings were terminated before reaching the merits stage, no court assessment of the evidence and establishment of the facts had occurred. Thus, the court reconstructed the facts basing itself on the applicant’s version, the respondent government’s submissions and other information submitted to it as additional evidence (*inter alia*, the two reports by Dick Marty, commissioned by the Parliamentary Assembly of the Council of Europe<sup>77</sup>, and the report by Claudio Fava, commissioned by the European Parliament<sup>78</sup>).

The Court ruled unanimously that FYRM violated articles 3 (Prohibition of torture), 5 (Right to liberty and security), 8 (Right to respect for private and family life) and 13 (Right to an effective remedy) of the European Convention on Human Rights. However, for the sake of this paper, the most salient part of the Court’s reasoning is the one regarding the violation of article 3, in particular with regard to its procedural aspect.

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<sup>77</sup> Dick Marty, *supra* note 108.

<sup>78</sup> European Parliament, *Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners*, (2006/2200(INI)) (2007).



In fact, after recalling the duty on behalf of contracting States to start an effective official investigation whenever an individual raises a reasonable claim that he has suffered torture or ill-treatment<sup>79</sup>, the Court addressed explicitly the Right to the Truth. Accordingly, the way Macedonian authorities conducted their investigation into the claims of Mr. El-Masri were unsatisfactory not only for article's 3 procedural limb, but also for the victim's and society's Right to the Truth.<sup>80</sup> As stated in the ruling: "[...] the Court also wishes to address another aspect of the inadequate character of the investigation in the present case, namely its impact on the right to the truth regarding the relevant circumstances of the case; [...] it underlines the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened."<sup>81</sup> It thus, acknowledged two fundamental aspects of the Right to the Truth, namely, its individual and collective spheres as well as the necessary investigation that its observance requires.

In addition, the European Court, having also regard to the third-party interventions (among which a notable intervention of the UN High Commissioner for Human Rights on the Right to the Truth<sup>82</sup>), underlined how the issue of "extraordinary rendition" attracted worldwide attention and the related attitude of concerned States in being "not interested in seeing the truth come out".<sup>83</sup> Further, its reference to "State secrets invoked to obstruct the search for truth" seemed to allow for an even broader in-depth in the Right to the Truth which, however, the Court avoided.

This, in light of the following, is, however, among the most explicit acknowledgements made by the Strasbourg Tribunal and may draw the

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<sup>79</sup> Case of El-Masri, *supra* note 107, par. 182.

<sup>80</sup> *Id.* paras. 191-192.

<sup>81</sup> *Id.* par. 191.

<sup>82</sup> *Id.* par. 175.

<sup>83</sup> *Id.* par. 191.

path to further and increasingly accurate affirmations of the Right to the Truth. Indeed, though this brief analysis, this judgement marks a change of attitude in the European Court of Human Rights' approach to the Right to the Truth, which has been only paraphrased since then.<sup>84</sup> A “braver” approach would have been surely preferable, also given the importance and the gravity of the “extraordinary renditions”, however, the two joint concurring opinions attached to the judgement may furnish an explanation in such regard.

In particular, in their joint concurring opinion, judges Tulkens, Spielmann, Sicilianos and Keller claimed a “somewhat timid allusion” to the Right to the Truth which, accordingly, would have resulted in giving the impression of “a certain over-cautiousness”.<sup>85</sup> Furthermore, in the concurring judges view, the Right to the Truth should have been explicitly acknowledged in relation of article 13 of the Convention (Right to an effective remedy) given, in the present case, its link to the procedural obligations of article 3, 5 and 8, rather than only to article 3. On the other hand, in the joint concurring opinion of judges Casadevall and López Guerra, the two justices argued that, with regard to the procedural limb of article 3, the Right to the Truth should not have been considered “as something different from, or additional to,” the requisites already fixed in such matters by previous case-law.<sup>86</sup> Hence, the Court's reference to such right would have been redundant and, with regard to the societal aspect of the Right to the Truth, even wrong since only the victim would be entitled to it.

It seems, thus, that the European Court for Human Rights faced different and contrasting views among the judges regarding the Right to the Truth, which resulted in its abovementioned quasi acknowledgement. Still, this judgement signals a different and, though

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<sup>84</sup> see *Aksoy v. Turkey* and *Cyprus v. Turkey*, supra notes 28 and 29.

<sup>85</sup> *Id.* Joint Concurring Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller, par. 10.

<sup>86</sup> *Id.* Joint Concurring Opinion of Judges Casadevall and López Guerra.

“timid”<sup>87</sup>, new relevance of the Right to the Truth in the Strasbourg’s Court jurisprudence that may led to clearer and more explicit acknowledgements in future.

### **2.2.2 Inter-American Court of Human Rights**

In furtherance of this hopeful prevision, the Inter-American Court for Human Rights’ jurisprudence of the last decade offers solid antecedents for upholding more accurately the Right to the Truth. Three decisions, in particular, illustrate this new approach, which, as has already been the case up to now, may positively influence other Treaty Bodies as well as scholars and policy-makers.

The first, issued by the San José Tribunal in 2010 in the case of *Gomes Lund et al. v. Brazil*, regarded the arbitrary detention, torture, extrajudicial execution and enforced disappearance of 70 persons as a result of military operations of the Brazilian Army between 1972 and 1975, in the latter’s attempt to fight the so-called “Guerrilha do Araguaia”.<sup>88</sup> The victims were mostly members of the Communist Party of Brazil and peasants of the region; their next of kin, after almost forty years, obtained not even minimum information and every past attempt in this regard resulted in public authorities hindering their search. Furthermore, to aggravate the victims’ family members search for truth, the 1979 amnesty law passed by the former military regime in Brazil posed a practically insurmountable obstacle to investigations of any kind also due to the state’s interpretation and application of such law.

Anyway, with regard to the findings on the Right to the Truth, the Court acknowledged it in this case in connection with the right to freedom of thought and expression (article 13 of the Pact of San José) which, accordingly, includes the right to seek, request and receive

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<sup>87</sup> Joint Concurring Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller, *supra* note 120; par. 10.

<sup>88</sup> *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, Inter.-Am. Ct. H.R. (ser.C) No. 219 (2010).

information.<sup>89</sup> The Right to Truth is acknowledged, in this context, as an element of reinforcement and, hence, as a complementary right in cases where “classical human rights” are insufficient in triggering the due safeguards.<sup>90</sup> Moreover, the Inter-American Court briefly exposed how the Right to the Truth has been recognised and acknowledged both in its jurisprudence as in international *fora* such as the UN and the OAS General Assembly.<sup>91</sup> Moreover, by exposing the two dimensions of such right, the Court noted how the Right to the Truth of victims’ next of kin is enshrined in the right to access to justice and that, the need for a thorough investigation derived also from “the violation of the Right to the Truth in the specific case”.<sup>92</sup> In the present case, thus, the Right to the Truth would have been related to both the right to seek and receive information and the right to access to justice.

However, the San José tribunal underlined further that “pursuant to its jurisprudence, the deprivation of access to the truth of the facts of the location of a disappeared person constitutes a form of cruel and inhumane treatment for close relatives.”<sup>93</sup> By this confirming that a violation of the Right to the Truth of next of kin of victims of gross human rights violations may rise to torture or ill treatment.

Finally, the fact that the Court appreciated the institution of Brazil’s National Truth Commission “as an important mechanism to comply with the obligation of the State to guarantee the Right to the Truth”<sup>94</sup> confirms such right’s status as an autonomous human right capable of creating binding obligations for States.

Later, in August 2017, the Inter-American Court found Colombia to have infringed the Right to the Truth in the case *Vereda La Esperanza v. Colombia*.<sup>95</sup> The case concerned the alleged enforced disappearance

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<sup>89</sup> *Id.* par. 197.

<sup>90</sup> *Id.* par. 200.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* par. 201.

<sup>93</sup> *Id.* par. 240.

<sup>94</sup> *Id.* par. 297.

<sup>95</sup> *Vereda La Esperanza v. Colombia*, Inter.-Am. Ct. H.R. (ser.C) No. 341 (2017).

of 14 persons, the extrajudicial killing of another and the arbitrary and illegal detention of a child in the community of Vereda la Esperanza, a small village in mountains that surround the Medellin-Bogota highway, by members of the paramilitary group “Autodefensas del Magdalena Medio” and Colombian armed forces between 21 June and 27 December of 1996.

Both the Inter-American Commission and the victims’ representatives alleged, among other claims, a violation of the Right to the Truth.<sup>96</sup> This latter, according to the Court’s findings, has been usually found to be enshrined in the right to access to justice, however, given “its autonomous and ample nature”<sup>97</sup>, it may affect other and different rights depending on the circumstances of the case.<sup>98</sup> Moreover, the Court noted that, in cases of enforced disappearances, such right is infringed whenever the victims’ relatives are denied access to information. The Tribunal found, hence, Colombia guilty for the violation of the Right to the Truth “enshrined in articles 8.1 and 25 of the American Convention” due to the fact that more than 20 years have passed with the victims’ next of kin not knowing anything about their loved ones’ fate.<sup>99</sup>

This judgement, beside recognising an autonomous violation of the Right to the Truth, contains an important insight of the Court’s attempts to justly position it inside the Pact of San José among other and “traditional” human rights. In this regard, the Right to the Truth’s multifaceted aim and nature appears evidently along with the Court’s explicit acknowledgement.

On 15 March 2018, the Inter-American Court of Human Rights issued its decision in the case of *Herzog et al. v. Brazil*, which, to date, is the latest judgement issued by an international Treaty Body that supports the Right to the Truth.<sup>100</sup>

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<sup>96</sup> *Id.* par. 219.

<sup>97</sup> *Id.* par. 220.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* par. 226.

<sup>100</sup> *Herzog et al. v. Brazil*, Inter.-Am- Ct. H.R. (ser.C) No. 353 (2018).

According to the findings made by the Court, Brazil has been found responsible for the illegal detention, torture and death of Vladimir Herzog, a naturalized Brazilian journalist, tortured and murdered, while in custody of Brazilian security forces, on 25 October 1975. After a summary investigation carried out by the military police, Vladimir Herzog was held of having committed suicide, though already the following year, in 1976, a declaratory sentence of the Tribunal of Sao Paulo ascertained that Mr. Herzog has been murdered. Nevertheless, Mr. Herzog's relatives received a rectification of his death certificate which, since then, stated that the journalist died for having attempted suicide, only in 2013.

The Inter-American Commission and the representatives claimed that, in the present case, the Right to the Truth has been infringed as a consequence of the 1975 military inquiry which resulted in a decoy-attempt furnishing false information on the causes of Mr. Herzog's death, the amnesty law that blocked any effort to seek the judicial truth and the persistent denial to access military archives for the journalist's relatives.

On its side, the Court underpinned the Commissions characterisation recalling its previous case-law on the Right to the Truth and stressing that the acknowledgement of the "historical truth" through a truth commission, though laudable, may under no circumstance exempt the State from seeking the judicial truth without which any human rights violation would result in intolerable impunity.<sup>101</sup> Moreover, the Inter-American tribunal stated that in cases of gross abuses the recourse to the State-secret privilege should be avoided and, in cases in which the same authority who resorts to such privilege is the same accused or suspected of the violations, totally prohibited.<sup>102</sup> The State, added the Court, may never consider accomplished its duties, with regard to access to information declaring that the relevant archives have been

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<sup>101</sup> *Id.* paras. 329 and 330.

<sup>102</sup> *Id.* paras. 333 and 334.

destroyed. On the contrary, public authorities should use every mean at their disposal to seek for the information that has been supposedly lost<sup>103</sup> and, in addition, to respect their positive obligation to grant access to public archives.<sup>104</sup>

In conclusion, the Court found that Brazil infringed the Right to the Truth twice: in connection with articles 8 and 25 of the Convention by not conducting any effective and independent investigation into the torture suffered by and murder of Mr. Vladimir Herzog and for having both furnished years long a false official version of his death and by systematically denying access to military archives.<sup>105</sup>

To date, no international judgement had ever made such an explicit acknowledgement of the Right to the Truth with a whole head of the ruling dedicated to such right's infringement. The Inter-American Court of Human Rights, hence, confirms itself as the major jurisprudential promoter of such right refining more and more its contours and ways of application as well as of protection.

Indeed, while the European Court of Human Rights seems to be, still, focused on the procedural aspects of the Right to the Truth, the San José Tribunal has engaged itself in defining such right also substantially emphasizing, thus, the Right to the Truth's autonomous nature. Probably, this is due to the different politic attitude the two institutions have: the Strasbourg Tribunal has always been concerned in not rendering sentences that may have been interpreted as going beyond such institutions' scope. The Inter-American Court of Human Rights, on contrary, having both broader functions and powers (the Court may *inter alia* interpret the legitimacy of internal legislation) and being inserted in a context ruled for decades by the gravest human rights abuses and impunity, has long been the last, or even only, institution that furnished protection and accountability for crimes committed in the

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<sup>103</sup> *Id.* par. 337.

<sup>104</sup> *Id.* par. 339.

<sup>105</sup> *Id.* par. 338.

countries on which it has jurisdiction. It has, thus, adopted an almost “frontal” approach in dealing with human rights violations and, the elaboration and development of the Right to the Truth as new and autonomous human right, is an example thereof.

Regional human rights case law and several International Organisations’ statements and studies constitute the Right to the Truth’s basic framework and were the starting point for the arising of a new norm of international law and a new tool in the protection of human rights that influenced both international and national legal systems by promoting accountability and helping to shed light on deplorable cover-ups of the worst crimes under international law.

In addition, the Right to the Truth played a prominent role also in Transitional Justice and Post-Conflict situations marked by the end of political violence proving itself to be also an efficient reconciliation tool.



# Chapter III The Extrajudicial Function of the Right to the Truth.

## 3.1 The Right to the Truth in Transitional Justice

Before analysing the role of the Right to the Truth in transitional justice it may be appropriate to briefly define what this term actually means.

The term “transitional justice” emerged in the beginning 1990s and was initially developed mostly by scholars and policy makers helping governments in dealing with recent past of state-brutality, political violence or civil war. Later, in 2004, the Secretary-General presented to the UN Security Council its report on “The rule of law and transitional justice in conflict and post-conflict societies”<sup>106</sup>, which in its paragraph 8 contains the most complete and agreed definition of transitional justice to date, namely: “the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.”<sup>107</sup> Furthermore, those processes could include both judicial and non-judicial mechanisms as well as individual prosecutions, reparations, institutional reform, vetting and, most notably truth-seeking mechanisms.

To be fair, the Office of the United Nations High Commissioner for Human Rights (OHCHR) has been dealing with this issue already since 2002 supporting actively transitional justice programmes in more than 20 countries around the world.<sup>108</sup> So much so, that in 2006 the Secretary-General has designated the OHCHR as the lead entity in the

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<sup>106</sup> UN Security Council, *The rule of law and transitional justice in conflict and post-conflict societies, Report of the Secretary-General*, U.N. Doc. S/2004/616 (2004).

<sup>107</sup> *Id.* par. 8.

<sup>108</sup> UN Human Rights Council, *Annual Report of the United Nations High Commissioner for Human Rights and reports of the High Commissioner and the Secretary-General, Analytical study on human rights and transitional justice*, U.N. Doc. A/HRC/12/18 (2009), par. 4.

area of transitional justice in the UN system.<sup>109</sup> The OHCHR has also published nine manuals under the series of “Rule of Law Tools for Post-Conflict States”, which address topics such as prosecutions, truth commissions, vetting, reparations, amnesties etc. Moreover, the OHCHR victim-centred approach to transitional justice is underpinned by the so-called four pillars of transitional justice<sup>110</sup>, namely the right to justice, the right to reparations, the duty of States to guarantee non-recurrence and, most importantly for this paper, the Right to the Truth. This approach has been upheld in 2012 by a Guidance Note of Secretary-General on the UN Approach to transitional justice.<sup>111</sup>

All UN sponsored studies on this topic stress the importance of truth-seeking and truth-telling mechanisms in post-conflict societies, thus confirming the existence and the importance of the Right to the Truth as a fundamental right owed by victims, their relatives and society as a whole. Indeed, in a report submitted by Special-Rapporteur Pablo de Greiff to the Human Rights Council in 2013 paragraph 20 states: “[...]in the aftermath of repression or conflict, the right to truth should be understood to require States to establish institutions, mechanisms and procedures that are enabled to lead to the revelation of the truth, which is seen as a process to seek information and facts about what has actually taken place, to contribute to the fight against impunity, to the reinstatement of the rule of law, and ultimately to reconciliation.”<sup>112</sup>

This view is corroborated by the Right to the Truth itself. In fact, since the societal sphere of such right requires the State to uncover the truth not only to victims, but to society as a whole, it follows that in periods of political transition after large-scale human rights abuses, mechanisms to guarantee such disclosure to all have to be established. Moreover, since the Right to the Truth is nowadays accepted as an

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<sup>109</sup> *Id.* par. 5, see also U.N. Doc. A/61/636 – S/2006/980.

<sup>110</sup> *supra*, U.N. Doc. S/2004/616 (2004), par. 26.

<sup>111</sup> UN General Assembly, *Promotion of truth, justice, reparation and guarantees of non-recurrence, Note by Secretary-General*, U.N. Doc. A/67/368 (2012).

<sup>112</sup> UN Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, U.N. Doc. A/HRC/24/42 (2013).

autonomous human right, truth-seeking and truth-telling policies in political transitions have become international obligations States should deal with.

Among the various truth-seeking mechanisms that have been designed in the last 40 years one has acquired particular importance showing its suitability for such purposes and giving a key contribute to the development of the Right to the Truth: “truth commissions”.

Truth commission, indeed, may reach out to thousands of victims covering at best “society’s Right to the Truth”. So much so, that the first of such commissions arose almost spontaneously after periods of widespread state-violence coupled by systematic omissions and denials, allowing to investigate the causes and patterns of such abuses in periods where prosecutions were unfeasible due to de facto or de jure amnesties (that will be addressed further on).<sup>113</sup>

### **3.2 Truth Commissions**

Over the last 44 years truth commissions have emerged in almost 40 countries around the world from Africa (the first country that set up such institution in 1974 was Uganda), to South America, Asia and Europe with different names and for different purposes, but all with the same core attributes. They have become an accepted, and almost expected, way of addressing victims’ and societies’ Right to the Truth. A truth commission can be broadly defined as a temporary institution, set up in the aftermath of harsh political repression or armed conflict, in order to investigate and spread out in a final report, the causes, patterns and individual as well as institutional responsibilities related to human rights violations during a specific period of time.

According to Priscilla B. Hayner, a major scholar in this field, a truth commission, in the absence of a general standard, has five constant

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<sup>113</sup> Most notably countries of the Southern cone of Latin America such as Argentina, Chile, Peru etc.

characteristics:

(1) it is focused on the past, and not on ongoing events; (2) it investigates a number of events that took place over a period of time; (3) it engages directly with the affected population, collecting information and testimonies; (4) it is a temporary body aimed at issuing a final report; and (5) it is officially empowered or authorized by the state.<sup>114</sup>

Thus, the first and most important objective of a truth commission is sanctioned fact-finding<sup>115</sup>. Nevertheless, a truth commission is distinct from a judicial or parliamentary commission of inquiry as the latter is aimed at investigating one or at least few single events while the former usually investigates on a given period of time. Moreover, truth commissions' mandates usually provide terms of reference that indicate which kinds of violations are to be investigated and the period to be investigated, which may result in a commission with a very limited scope. However, those mandates vary deeply for each truth commission and are usually contained either in legislative acts, executive decrees or peace agreements<sup>116</sup>.

The investigations a truth commission conducts are largely dependent on its mandate and composition; in addition, political constraints, the width of information accessible and the resources a commission has access to play a fundamental role on its outcomes. Indeed, since truth commissions are usually established in periods of political transition within a country to demonstrate an end to past abuses of human rights, promote reconciliation and to stabilize political legitimacy, collaboration with and from state institutions is determinant.

Almost all truth commissions have among their objectives the promotion of reconciliation by offering “a cathartic forum” for family

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<sup>114</sup> Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2001) p.11.

<sup>115</sup> *Id.* p.20.

<sup>116</sup> UN Human Rights Council, *Report of the Special Rapporteur on the promotion of truth, justice, reparations and guarantees of non-recurrence*, U.N. Doc. A/HRC/24/42 (2013), par. 32.

members still suffering for past abuses.

Although victimized population in transitional states may already have knowledge of what happened and who committed it, “acknowledgement implies that the state has admitted its misdeeds and recognized that it was wrong.”<sup>117</sup> Therefore, the true value of a commission and its report would lay in its acknowledgement of the truth rather than in its findings of truth.<sup>118</sup> This, in particular, has always been a very critical aspect of truth commissions. Especially in countries where commissions were poorly founded and were given limited mandates the truth that was acknowledged offered little to deal with, both for victims and society. Thus, the truth a commission may find out or speak out and its impact are strictly bound to the political will behind its institution and the powers conferred to it.

Finally, a truth commission usually proposes how the acknowledged wrongs should be reconciled. Although not all commissions make recommendations, those who did covered the strengthening of democratic governments, the independence of the judiciary, reparations for victims, military and police reform etc. Even if those recommendations will be implemented long after the issuing of the commission’s report they, still serve as a goal to point to for future political reorganization in the country.<sup>119</sup>

The greatest advantages of truth commissions lay in their flexibility to adapt to each country’s needs and in their ability to be established almost immediately at a low cost.<sup>120</sup>

Still, truth commissions have weaknesses that may potentially result in an unnecessary waste of money and time. Since truth commissions are

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<sup>117</sup> Aryeh Neier, *What Should Be Done About the Guilty?*, The New York Rev. of Books (1990), p.34.

<sup>118</sup> Mark Vasallo, *Truth and Reconciliation Commissions: General Considerations and a Critical Comparison of the Commissions of Chile and El Salvador*, 33 U. Miami Inter-Am. L. Rev. 153 (2002) p. 158, Priscilla B. Hayner, *Fifteen Truth Commissions-1974 to 1994: A Comparative Study*, 16 Hum. Rts. Q. 600, 613 (1994) p. 607.

<sup>119</sup> Vasallo and Hayner, *supra*, p. 159; p. 607.

<sup>120</sup> Vasallo, *supra* note 77, p.159, Angelika Schlunk, *Truth and Reconciliation Commissions*, 4 INT’L L. STUDENTS ASS’N J. Int’l & Comp. L. 415, 417 (1998), p. 419.

usually set up by the new executive, the width of the investigations the commission will conduct hugely depend on the latter's political will and this, as said above, may represent a flaw or even an obstacle. For example, a government may deny certain necessities of an effective investigation, such as, adequate funding, ample staffing, a reasonable time period within to work, authority to investigate certain types of crimes, and access to potentially incriminating documents.<sup>121</sup>

Moreover, the final report issued by a truth commission may have an impact only if the public has unconstrained access to it and the government is willing to observe the findings and recommendations (given their non-binding nature) enshrined therein. The Haitian National Commission for Truth and Justice is in this regard iconic; the commission suffered organizational and administrative problems and struggled to issue its report with great difficulties. In addition, the report was not published until a year later, accordingly due to "the printing expenses". Needless to say, the report was never widely distributed in the country.<sup>122</sup>

Some critics claim that truth commissions alone rarely help to promote and improve human rights in transitional states.<sup>123</sup> Accordingly, truth commissions would improve human rights protection only from the interaction of trials' accountability function and amnesties' stability function.<sup>124</sup> Those outcomes are based on a number of statistical data from national experiences which, however, cover long periods of time. It follows, that it is definitely true that *e.g.* Chile's National Commission on Truth and Reconciliation posed the basis for criminal prosecutions, but, as a matter of fact, the same prosecutions started only years after the commission published its final report. Hence, the ideal interaction between truth commissions, trials and amnesties those

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<sup>121</sup> *Id.* p. 161

<sup>122</sup> Hayner *supra* note 73, p.54; Human Rights Watch, *Thirst for Justice: A Decade of Impunity in Haiti*, (New York: Human Rights Watch, September 1996) 18.

<sup>123</sup> Tricia D. Olsen, Leigh A. Payne, Andrew G. Reiter and Eric Wiebelhaus-Brahm, *When Truth Commissions Improve Human Rights*, *Int. J. of Transit. Just.* 4(3) (2010).

<sup>124</sup> *Id.*

scholars claim would be optimal in improving human rights, is often the result of the passing of time and societal changes rather than of a pre-ordered political plan.

Still, several scholars claim that criminal prosecutions should be preferred to truth commissions as the best prohibitive action against future violations.<sup>125</sup> The use of criminal tribunals, however, may be inapt or even unfeasible for a state in transition. A weakened judiciary, a strong and reactionary military still in power, the usually enormous number of “perpetrators” and the lack of resources are just a few of the concerns a government may have in deciding whether to start criminal prosecutions or not.

Furthermore, it is a common misperception that the holding of trials and the institution of a truth commission are mutually exclusive.<sup>126</sup> Truth commissions may be, in fact, a first way to address human rights abuses in situations in which, in addition to the abovementioned issues, a victimized and scared population may be reluctant in testifying the crimes they suffered in a courtroom. In Uganda, the commission that operated between 1986 and 1995, though having forwarded several cases to the police investigations, was followed by very few trials. This, according to a former director of public prosecutions, was due to the fact that victims felt intimidated or were too scared to give testimony.<sup>127</sup> In addition, truth commissions may collaborate with judicial authorities by “naming names”, furnishing insights, collecting testimonies in remote zones of the country and other valuable information a prosecutor may be unable to collect. Peru’s Truth and Reconciliation Commission created a quasi-independent unit within the commission dedicated to preparing cases for prosecution. The commission also signed a formal agreement with the prosecutor’s office in order to cooperate on joint

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<sup>125</sup> Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 Yale L.J. 2537, 2542 (1991).

<sup>126</sup> Vasallo, *supra* note 77, p. 160.

<sup>127</sup> Hayner, *supra* note 73, p. 97.

exhumations, information sharing and witness protection.<sup>128</sup>

Indeed, since criminal prosecutions have to focus on individual criminal responsibility, trials rarely give a bigger picture of what occurred in the past. Finally, even in cases in which such a virtuous relation is unfeasible, a truth commission may become appealing as the only way to recognize and memorialize a period of severe human rights abuses.

However, since there is no fixed model for truth commissions, as there is not and cannot be a single model to account for past abuses in transitional states, trying to sum up or to elaborate a “one size fit all” model for truth commissions may not only be impossible, but also potentially damaging.

As stated at the beginning, truth commissions are nowadays an accepted and almost expected transitional justice tool. So much so, that the United Nations as well as the OCHCR stress their importance constantly in relation to transitional state policies.<sup>129</sup> This is due to the fact that truth commissions not only serve the Right to the Truth, which today implies international obligations upon states to uncover the truth regarding past abuses, but also to their ability to be adapted to potentially every transitional society’s need given the flexibility that characterises them. A truly democratic and human rights respectful approach is, however, determinant for a truth commission to have a positive impact and in this regard the critical relation between amnesties, accountability and truth play a foreground role.

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<sup>128</sup> Hayner, *supra* note 73, p.95, *Institutional Cooperation Agreement between the Prosecutor’s Office and the Truth and Reconciliation Commission*, August 15, 2002.

<sup>129</sup> UN Human Rights Council, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, U.N. Doc. A/HRC/RES/12/11 (2009), par. 5., Office of the United Nations High Commissioner for Human Rights, *Rule-Of-Law Tools for Post-Conflict States, Truth Commissions*, United Nations New York and Geneva 2006, U.N. Doc. HR/PUB/06/1 (2006).



### 3.3 Amnesty, Accountability and Truth

The OHCHR defines amnesties as any legal measure which has the effect of:

- a) Prospectively barring criminal prosecution and, in some cases, civil actions against certain individuals or categories of individuals in respect of specified criminal conduct committed before the amnesty's adoption; or
- b) Retroactively nullifying legal liability previously established.<sup>130</sup>

Truth commissions are usually held to be accompanied by amnesty laws rather than prosecutions. Scholars, however, claim this may be a result of the attention given to the South African Truth and Reconciliation Commission, which has become famous for its' amnesty-for-truth policy.<sup>131</sup> In fact, South Africa and Liberia were, to date, the only two countries in which amnesty-for-truth was built into the commission. Furthermore, in the case of Liberia, the commission had the power to recommend, not grant, amnesty to alleged perpetrators.<sup>132</sup> Instead, the South African commission received 7,115 applications for amnesty, which, according to the TRCs' mandate could have been granted for politically motivated crimes.<sup>133</sup> Of those, the Amnesty Committee denied 4,500 applications, hence leaving about 88 percent of the applicants available for prosecutions.<sup>134</sup>

It is true, however, that many truth commissions had to deal with already existing amnesty laws; in countries such Chile, Brazil, Uruguay

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<sup>130</sup> Office of the United Nations High Commissioner for Human Rights, *Rule-Of-Law Tools for Post-Conflict States, Amnesties*, United Nations New York Geneva 2009, U.N. Doc. HR/PUB/09/1 (2009), p. 5.

<sup>131</sup> Onur Bakiner, *Truth Commission Impact: An Assessment of How Commissions Influence Politics and Society*, Int. J. of Transit. Just. Vol.8 (2014), p. 27

<sup>132</sup> The commission's mandate is available at Truth and Reconciliation Commission of Liberia, 'Mandate,' <http://trcofliberia.org/about/trc-mandate>

<sup>133</sup> Data available at Truth and Reconciliation Commission, 'Amnesty Hearings & Decisions,' <http://www.justice.gov.za/trc/amntrans/index.htm>.

<sup>134</sup> *Id.*

and Sri Lanka amnesty laws preceded truth commissions years early and the OHCHR definition in sub a) easily reminds those countries policies. In Guatemala and El Salvador transitions were facilitated by UN peace agreements which contained both the institution of truth commissions and the granting of amnesty laws.<sup>135</sup> In Morocco, an unofficial agreement between the king and the commissions' leadership resulted in a "prohibition of invoking individual responsibility".<sup>136</sup>

Ultimately, where no amnesty is already in place, for which there are many more examples, resistance or unwillingness were the determining reasons for the absence of prosecutions. So much so, that in those countries where amnesties were formerly emitted none ever tried to cope with them using the so called *Radbruch Formula*. According to the German scholar Radbruch, law and justice have to be balanced by considering the political and institutional balance which it issued. Hence, the law has to be considered just only in circumstances in which the powers and balances of the State are properly and justly divided in such a way for the law to be "just".

It could have been therefore possible, e.g. in Brazil, Chile or Argentina to challenge the amnesty laws that hindered prosecutions. Thus, it is not correct, or at least not precise, to generally associate truth commissions with amnesty laws, although they often coexist in the same transitional period.

The United Nations, for its part, has prohibited its representatives to back amnesties for serious human rights violations since 1999.<sup>137</sup> So much so, that in those scarce cases after 1999 where such an option was advanced the UN refused its' cooperation (such as with the Truth and Friendship Commission sponsored by Timor-Leste and Indonesia).<sup>138</sup>

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<sup>135</sup> Elin Skaar, *Truth commissions, trials or nothing? Policy options in democratic transitions*, Third W. Q., 20.6, 1109-1128, (1999) p. 1117.

<sup>136</sup> Hayner *supra*, p. 43.

<sup>137</sup> Office of the United Nations High Commissioner for Human Rights, *Rule-Of-Law Tools for Post-Conflict States, Amnesties*, United Nations New York Geneva 2009, U.N. Doc., p.27. HR/PUB/09/1 (2009).

<sup>138</sup> Hayner *supra* note 73, p. 105.

More specifically, the United Nations, “recalling various sources of international law”, consider amnesties impermissible whenever they prevent prosecution for war crimes, genocide, crimes against humanity or gross violations of human rights; interfere with victims’ right to an effective remedy and, most notably, restrict victims’ and societies’ right to know the truth about violations of human rights and humanitarian law.<sup>139</sup>

It follows, that the granting of amnesties with the abovementioned characteristics would violate a number of international obligations, most importantly, for the sake of this paper, the Right to the Truth. Indeed, as stated by the UN, amnesties are incompatible with both the right to an effective remedy and the right to know the truth. However, as often previously stated, the Right to the Truth and the right to an effective remedy have nowadays an almost complementary relation, since the acknowledging of the truth is already a part of the remedy.

With regard to truth commissions this relation may assume also a political connotation; the constraints that may arise in political transitions with regard to trials, truth-telling and accountability have been already widely addressed and the contribution a truth commission may give to criminal prosecutions greatly depends on its’ mandate and powers. The findings of the commissions in Argentina, Chile, Chad, Sri Lanka, Guatemala and Peru were incorporated in a number of foreign and domestic prosecutions albeit years after the reports were handed out.<sup>140</sup>

Truth commissions do not usually have the powers nor the guarantees to act as criminal courts and even in cases where the commission might have used subpoena powers or access to information privileges (*e.g.* Sierra Leone) prosecutions were very limited.

In the end, truth commissions produce limited judicial impact at first, while on the long period, due to a lesser political pressure, a

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<sup>139</sup> Office of the United Nations High Commissioner for Human Rights, *supra* note 89, p. 11.

<sup>140</sup> Bakiner *supra*, p. 26

strengthened judiciary and civil society and NGOs activism, their findings may start (or even restart) criminal prosecutions. In this regard the experience of Argentina, which will be addressed in the final chapter, is emblematic.

Hence, for the sake of the Right to the Truth, a truth commission might be a valid tool for transitional states to deal with past abuses. However, given the specificity each country has and the challenges a transition may pose it is difficult to develop a standard solution or a standard model for “a Right to the Truth implementation scheme”. Still, truth-seeking mechanisms, whose strength depends from the Right to the Truth, have shown to be valid and accepted methods to deal with past human rights violations and, although often years after, to grant accountability for such heinous crimes. In addition, past experiences of more than 40 countries, with all their lights and shadows, furnish valid and numerous examples of how to deal with such institutions all around the world and providing inputs of any kind in this regard. The United Nations, the OHCHR and various Treaty Bodies give additional guidance and assistance in the struggle of transitional states dealing with past abuses.

The Right to the Truth is, in this context, maybe the most valuable and comprehensive tool, protecting both the disclosure of the facts, the starting of investigations and prosecutions and standing as a supplementary obstacle to the granting of amnesties for serious international crimes.

# **Chapter IV**

## **The Right to the Truth's Diffusion and Application in Domestic Legal Systems and its Possible Future Evolution.**

### **4.1 National Experiences of the Right to the Truth**

#### **4.1.1 South America – Colombia and Peru**

Latin America has been the scene of some of the most brutal dictatorships of the second half of 1900. Usually guided by the military who overthrew the former government, they distinguished themselves for their relentlessness and brutality towards their own civilian population. In addition, and despite the fact that most people knew that the government backed or even ordered such abuses, the gravest human rights violations that took place on such continent (*i.e.* enforced disappearances, extrajudicial killings, torture, arbitrary and illegal detentions etc.) were accompanied by systematic policies of omissions, denials and red herrings that impeded anybody who tried to shed light on such heinous crimes to reach to the truth.

It, thus, appears obvious that, in such an environment, the Right to the Truth was welcomed as a balsam for victims' relatives and society as a whole. Indeed, almost every country of South America instituted a truth commission (in some cases even more than one *e.g.* Chile) as soon as dictatorships were losing their brutal grip in order to acknowledge black on white the responsibilities of perpetrators and instigators, and eventually start prosecutions.

In this sense Colombia and Peru offer some interesting examples of how the Right to the Truth has been enforced in national countries by domestic courts (Peru) and by both national legislation and jurisprudence (Colombia). Moreover, despite the fact that none of the abovementioned countries ever experienced a military dictatorship as *e.g.* Argentina or Uruguay, they nevertheless went through long and brutal civil wars which often saw governmental forces recurring to the

cooperation of ruthless paramilitary groups that, in the end, rendered also those countries a scenario where human rights violations and impunity were the rule.

Starting from Peru, the Constitutional Court issued on 18 March 2004 a landmark decision, with regard to the Right to the Truth, in a petition for *habeas corpus* filed by María Emilia Villegas Namuche on behalf of her brother Genaro Villegas Namuche.<sup>141</sup> The petitioner's brother, an engineer student, allegedly disappeared on 2 October 1992 while going to work. The day after his disappearance, a group of twenty armed and hooded men stormed into the petitioner's home searching for "subversive material" belonging to her brother. Moreover, every try to seek for judicial guarantees ended in nothing or even in lawyers, to whom the woman asked for help, being arrested. She, hence, requested to oblige the Peruvian State to free her brother or, in the case he died, to locate his remains.

The Court, in upholding the woman's claim, did not hesitate in qualifying the alleged events as a case of enforced disappearance, also by recalling the Inter-American Court of Human Rights' jurisdiction together with several international conventions, and underlined how such crimes are typically connected with a subsequent and abhorrent situation of impunity.<sup>142</sup>

Subsequently, it directly addressed the Right to the Truth recalling such right's double nature and, with respect to its collective sphere, stating that it constitutes "an inalienable collective juridical good".<sup>143</sup> Furthermore, the Court noted that, in cases of enforced disappearances or other severe violations of human rights, the Right to the Truth is imprescriptible, thus, confirming the characterisation made by the UN.<sup>144</sup> However, the Tribunal went on and stressed that, although not

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<sup>141</sup> Peru, Constitutional Court, *Case of Genaro Villegas Namuche*, Judgement of 18 March 2004, Case file No. 2488-2002-HC/TC (2004).

<sup>142</sup> *Id.* §2 and §3.

<sup>143</sup> *Id.* §4 par. 8.

<sup>144</sup> *Id.* §4 par. 9, see also UN Human Rights Council, *Study on the Right to the Truth*, *supra* note 9.

expressly recognized in Peru's Constitution, the Right to the Truth is "fully protected" since it is implied in the State's obligation to guarantee the protection of rights and, most notably, it constitutes an "implicit constitutional right" given that it is an expression of the constitutionally protected human dignity.<sup>145</sup> In addition, such right's societal dimension would be, according to the Court, a due expression of the democratic and republican order of the State because it has the effect to build trust and transparency between State-institutions and citizens.<sup>146</sup>

This judgement, though being almost an *unicum* in Peru, is remarkable for the Right to the Truth's application and development. Peru's Constitutional Court defined and interpreted such right in a groundbreaking way particularly by declaring it an "implicit constitutional right". Moreover, its reconnection of such right to the concept of human dignity may bolster the Right to the Truth's application also in other countries such as *e.g.* Germany, where human dignity is one of the core and inalienable human rights protected by the Constitution.

However, Colombia went a step further by explicitly recognising the Right to the Truth in its national legislation. Specifically, law 975 of 2005, also known as "law of justice and peace", recognises the Right to the Truth at article 7.<sup>147</sup> The said norm is officially aimed at facilitating the reintegration in and reconciliation with civil society of former members of extra-legal paramilitary groups, that fought in the 40 years long Colombian civil war, by granting the victims' right to truth, justice and reparation.<sup>148</sup>

Article 7, entitled "Right to the Truth", stresses that Colombian society as a whole, and especially the victims, have an inalienable right to know the truth regarding the crimes committed by paramilitary groups as well as regarding every case of kidnapping or enforced disappearance.

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<sup>145</sup> *Id.* §4 paras. 13, 15 and 16.

<sup>146</sup> *Id.* §4 paras. 17 and 18.

<sup>147</sup> Colombia, Law of 25 July 2005 No. 975, Diario Oficial 45.980 (2005).

<sup>148</sup> *Id.* art. 1.

Moreover, the second paragraph states that the investigations and prosecutions, to which the said law is applicable, should aim at establishing the truth and grant the participation of victims and victims' relatives. The third and last paragraph, finally, establishes that the abovementioned proceedings should be without prejudice to future non-judicial truth-seeking mechanisms.

Albeit law 975/2005 has a quite specific scope of application, it is a notable piece of legislation on the Right to the Truth which the law recalls some thirteen times. Therewith, also the Colombian Constitutional Court contributed to such right's development in that country at least as of 2002, producing a vast jurisprudence on the Right to the Truth's different contents and ways of application,<sup>149</sup> that for sure had an influent impact in the issuing of the law of justice and peace.

What, however, has influenced most the Colombian legislator was its aim to find a lasting solution for the decades-old civil war that took place in its country. At the same time, the widely-supported rhetoric of reconciliation-through-truth-telling advocated *in primis* by the UN seems to have been the inspiring spirit of such legislation, hence, showing how transitioning countries may be positively influenced by the international community if backed by a strong and independent judiciary and willing politics.

Of course, the experiences of the Right to the Truth in South America are many others (the Argentinian will be addressed in the following chapter), but, in order to not overlook other equally important practices

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<sup>149</sup> Colombia, Constitutional Court. Cases T-249/03 of 20 January 2003, and C-228 of 3 April 2002; on the intrinsic relationship between the right to reparation and the right to the truth and justice (Judgment C-715 of 2012); the disregard of the right to the truth in norms that do not establish the loss of benefits due failure to confess all the offenses in the justice and peace proceedings (Judgment C-370 of 2006); the right to the truth and the provision of information to the relatives of a victim, as well as public access to the records in cases of final judgments in the justice and peace proceedings (Judgment C-575 of 2006); the scope, purpose, dimensions and dual connotation of the right to the truth (Judgments C-370 of 2006, C-454 of 2006, C-1033 of 2006, T-299 de 2009, C-753 of 2013, C-872 of 2003, C-579 of 2013, C-180 de 2014 and C-936 of 2010).



regarding such right, the analysis of the mentioned continent has been limited to Peru and Colombia.

The Right to Truth, in fact, has reached also the national legal orderings of Europe, interestingly, in the former ruler of Latin America: The Kingdom of Spain.

#### **4.1.2 Europe – Spain and Bosnia and Herzegovina**

In 1936, during the so-called Second Spanish Republic, a group of nationalist generals attempted a coup against the government that led to a three-years long bloody civil war. Following the victory of the military led by general Franco, Spain turned into a dictatorship until 1975, when Franco himself died. Both the civil-war and the dictatorship were marked by severe human rights violations and abuses against opponents or individuals unable to clearly demonstrate their affection to the *regime*. However, after Franco's death Spain transitioned to a parliamentary monarchy totally democratised in which the issue of the memorialisation of past crimes has been recurrent.

Finally, on 27 December 2008, the Spanish Parliament approved Law 52/2007 known as “the Law of Historical Memory”.<sup>150</sup> According to its article 1, scope of the present law is to recognise and broaden the rights of those who suffered persecution, or their descendants, during the civil war and the dictatorship by facilitating the knowledge and acknowledgement of the facts and circumstances that led and regarded the suffered abuses. Moreover, the law explicitly foresees, as one of its scopes, the collection and preservation in public accessible archives of any document related to the abovementioned period of time.<sup>151</sup> In articles 2 and 3, the legal instruments prepared by the Francoist regime to legitimize or execute its repression policies, including trials, are broadly declared illegitimate, “as an expression of every citizens’ right

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<sup>150</sup> Ley ordinaria (L) 52/2007, de 26 de diciembre, por la que se reconocen y amplían derechos y se establecen medidas en favour quienes padecieron persecución o violencia durante la guerra civil y la dictadura.

<sup>151</sup> *Id.* art.1 comma 1-2.

to moral reparation and recovery of his own and family memory”<sup>152</sup>. Furthermore, article 4 provides for the establishment of a specific legal procedure to repair and rehabilitate the honour of those who suffered persecution, which is voluntary and has to be initiated at the request of the victims’ or their next of kin.<sup>153</sup>

Lastly, articles 20 to 22, respectively create the Documentary Centre of the Historical Memory and the General Archive of the Civil War and dictate provisions on the collection, conservation and access to all the public and private documentary collections regarding the years from 1936 to 1975.<sup>154</sup>

The Spanish law does not recognise the Right to the Truth in such an explicit manner as the above-addressed Colombian “Law on Justice and Peace”, nevertheless, its provisions widely correspond to such right’s content. Indeed, the law recognises both an individual and collective dimension of “the right to memory” and underpins the correlation between such right and the right to reparation. In addition, the provisions on the conservation to archives are aimed at granting the fullest access possibilities possible, which is one of the requirements for the protection of the Right to the Truth.

Unfortunately, from the prosecutions point of view, little has been done in Spain so far. The 1977 amnesty law, that should have helped democratisation, turned to be a tremendous impunity-bolster since no single trial to former human rights abusers has been held. Furthermore, rather than being aimed at protecting the Right to the Truth, law 52/2007 seems to be more focused on the preservation of Spanish historical memory.

It is, however, noteworthy that, after more than 30 years, the Spanish legislator has issued a law that regulates historical memory and its conservation. Despite the fact that, in order to fully guarantee the Right

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<sup>152</sup> *Id.* art. 2 and 3.

<sup>153</sup> *Id.* art. 4.

<sup>154</sup> *Id.* articles 20-22.

to the Truth, further steps should have been taken, it still constitutes a valuable example not only for scholars, but for European societies as a whole which are recently suffering of worrying forms of revisionism. In this regard, the Human Rights Chamber of Bosnia and Herzegovina produced some pieces of interesting jurisprudence regarding the Right to the Truth in the aftermath of grave human rights abuses and ferocious secession wars.

Specifically, in two sentences of January and November 2001 which, respectively, dealt with the disappearance and extrajudicial killing of a Bosnian high-rank military at the hand of Bosnian Serb forces and the killing of a Bosnian Serb family by Bosnian army effectives, the Chamber found the respondent State (Republika Srpska in the first, the Federation of Bosnia and Herzegovina in the latter) to be in breach of articles 8 and 3 of the European Convention on Human Rights.<sup>155</sup> Particularly, the uncertainty regarding the fate and whereabouts of the husband, in *Palic*, and of the daughter and her family, in *Unkovic*, amounted, according to the Court, to inhuman and degrading treatment also in light of the decision issued in 1983 in the case of *Elena Quinteros v. Uruguay*.<sup>156</sup> In addition, the Bosnian Human Rights Chamber held that the arbitrary withholding of information related to a disappeared person constitutes a breach of State's obligation to respect the private and family life of its citizens.<sup>157</sup> Later, in 2003, the Chamber upheld the Right to the Truth of the relatives of some 7,500 missing men and boys in the "Srebrenica cases" condemning the Republika Srpska for the violation of articles 3, 8 and 13, thus confirming its previous case law.<sup>158</sup>

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<sup>155</sup> Decision on admissibility and merits of 11 January 2001, *Palic v. Republika Srpska*, Case No. CH/99/3196 (2001); Decision on admissibility and merits of 9 November 2001, *Unkovic v. Federation of Bosnia and Herzegovina*, Case No. CH/99/2150 (2001).

<sup>156</sup> *Palic*, supra note 150, par. 77; *Unkovic*, supra note 150, par. 94; see also *Elena Quinteros*, supra note 37.

<sup>157</sup> *Palic*, par. 81, 82 and 84; *Unkovic*, par. 101.

<sup>158</sup> Decision on admissibility and merits of 7 March 2003, "Srebrenica cases", Case Nos. CH/01/8365 *et al.*, par. 202 (2003).

In conclusion, although never explicitly mentioning it as such, the Human Rights Chamber for Bosnia and Herzegovina has confirmed the existence of the Right to the Truth of the next of kin of victims of enforced disappearances and extrajudicial killings. What is noteworthy, however, is that the said Court endorsed a similar approach as the European Court of Human Rights with regard to such right, hence confirming the trend of acknowledging it more and more also in European national contexts. Moreover, in a similar way as the Inter-American Court of Human Rights and due to the fact that the Bosnian Tribunal is closely linked to the Strasbourg Court, the latter's jurisprudence may be seen as an *unicum*, which, in chronological evolution, recognises the Right to the Truth increasingly.

Anyway, the vast majority of European countries have still none or very little provisions regarding specifically the Right to the Truth. This may depend both to fact that State sponsored abuses or violent conflicts in Europe have, fortunately, become very rare and that Europeans themselves are mostly satisfied of the level of transparency of their countries. As a consequence, given that little or none pressure in this sense is put on national legislators, the Right to the Truth is, to date, in no government's agenda. The Spanish and Bosnian experiences, however, suggest that there may be room for further legislation on the topic also in other countries, which, *e.g.* experienced civil wars or ferocious State repression.<sup>159</sup>

Anyway, in conclusion, a noticeable interpretation of the Right to the Truth has been made by the Constitutional Court of South Africa showing the width of the Right to the Truth's diffusion around the globe.

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<sup>159</sup> Italy, for instance, faced a violent civil war between 1943 and 1945 marked by war crimes and crimes against humanity never fully investigate nor officially acknowledged.

#### 4.1.3 Africa – South Africa

As already seen in chapter III, after a period of almost 50 years of human rights abuses and segregationist practices, South Africa instituted the Truth and Reconciliation Commission whose distinctive characteristic was its amnesty-for-truth policy.

In 2011, the South African Constitutional Court had to face the consequences of such policy in the case of *The Citizen v. McBride* which regarded the relation between the Reconciliation act (the law that granted the amnesties) and the right to freedom of expression protected under the South African constitution.<sup>160</sup> More specifically, the case dealt with the dispute arose between The Citizen newspaper and Mr. McBride, a candidate for a senior police-post and former member of the African National Congress (ANC), as a consequence of several articles published by the first defining the latter a “murderer” due to its pardoned precedents (a car bomb attack).

With regard to the Right to the Truth, though never mentioned, it is interesting to note how the Court interpreted the interrelation of the truth telling process South Africa went through and amnesties. According to the Tribunal, the *ratio* of the Reconciliation Act was to encourage those responsible for human rights abuses to unveil the truth and, in the end, promote national reconciliation, in exchange for amnesty.<sup>161</sup> Hence, the effects of amnesties could not “obliterate or erase the facts of those occurrences”<sup>162</sup> and render an historical truth false.

This judgement offers a number of noteworthy points for the Right to the Truth: first, it is one of few sentences that deals with amnesties and truth without questioning the opportunity of holding prosecutions; second, it endorses a peculiar relation between amnesties and historical truth, which, however, would have been possible only in South Africa.

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<sup>160</sup> *The Citizen v. McBride*, Case No. CCT/23/10 [2011] ZACC 11 (2011).

<sup>161</sup> *Id.* par. 51.

<sup>162</sup> *Id.* par. 67.

Indeed, the Court acknowledged only a very limited aspect of the Right to the Truth, that is its offering a dam to historical revisionism or denial, that derives from its assumption of the legality of South Africa's amnesty policy.

Still, it furnishes an important insight of this nation's approach toward both reconciliation and truth telling that may inspire, or even teach, other African countries. It is, in fact, true that full observation of the Right to the Truth should require also criminal accountability, however, the core obligation remains that of uncovering the truth. Furthermore, the Reconciliation act was passed as South Africa had already transitioned to democracy, hence it constituted a law enacted by an elected government expression of the majority of South Africans which is totally different from the "self-amnesties" analysed in chapter II.

In conclusion, every region of the world evaluated in this chapter made an interpretation of its own of the truth seeking and truth telling that States have as a consequence of the Right to the Truth. Latin American countries tend to interpret it more narrowly and loyal to the Inter-American Court of Human Rights view whereas in Europe a timid but growing recognition has been and is still tied to already existing and codified rights. Finally, South Africa, as said, has a quite unique way to address such issue due to its story and particular mentality, which, over the years has always furnished interesting interpretations of human rights law generally and that renders this country's jurists the most idealist interpreters on the international scene.

## **4.2 The Right to the Truth in the Future**

The Right to the Truth, given its multifaceted contents and implications would seem to be applicable to almost every kind of human rights abuse. It is, nonetheless, important to stress that, according also to the definition rendered in this paper, the Right to the Truth may be invoked only after serious or systematic human rights violations; whereas those

latter terms, for the sake of this paper, stand for genocide, crimes against humanity, war crimes, enforced disappearances and torture.<sup>163</sup> However, having regard to the analysed case-law, a red wire, that connects almost any of the cases, can be noted, an additional “element” which is common to all: the respondent party (usually the very national State of the applicant(s)) had always denied or hindered in some way the search for the truth.

If, on the contrary, the State would have only delayed the required investigations or prosecutions the various Courts, the Inter-American Court of Human Rights first and foremost, would not have felt the need to acknowledge the Right to the Truth limiting themselves to the already codified human rights. Furthermore, with some rare exception, all proceedings dealt with incidents that took place years before arriving to trial.

This means that, along with the complicity with or even the instigation of grave or systematic human rights abuses, the State has usually firmly denied any responsibility, obstructed with both legal and extra-legal resources any attempt to shed light on such facts which, in the end, resulted in shameful impunity. Considering this, the South-American countries of the 70’s and 80’s were the most “natural” environment in which the necessity for a Right to the Truth may have arisen.

A brief example may render better the principle behind such enunciation: the right to water. The human right to water first emerged in countries such Kenya, South Africa, Gambia, Bangladesh, India, hence, countries in which the need and “request” has always been high due to the notorious water-scarcity those regions of the world face since

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<sup>163</sup> According to article 5 of the Rome Statute of the International Criminal Court, this latter should exercise its jurisdiction on “the most serious crimes of concern to the international community as a whole”. Those include: genocide, crimes against humanity, war crimes and the crime of aggression. Further on, article 7 states that “for the purpose of this Statute, ‘crime against humanity’” includes *inter alia* torture and arbitrary detention; *Rome Statute of the International Criminal Court*, art. 5 and 7; with regard to enforced disappearances the UN International Convention for the Protection of All Persons from Enforced Disappearances recalls, in the preamble, the seriousness of such crime under international law; *International Convention for the Protection of All Persons from Enforced Disappearances*, Preamble.

ever.

Analogously, the need for truth emerged and became always higher in countries that were going through ferocious state-sponsored violence that, in addition, had to suffer also of a climate of total secrecy and what can be literally called a culture of impunity. The Inter-American Court and Commission, in fact, are composed of jurists and citizens of the Member States, that, logically, went through and lived in those violent societies and knew which consequences the whitewash of truth may have.

In the “motherland” of human rights (western Europe), instead, only Spain and Portugal were still ruled by authoritarian regimes in the second half of 1900. State sponsored violence, indeed, ended for most western European countries after World War II with the defeat of fascist dictatorships and the democratisation of the vast majority of western Europe. Moreover, given the anguish and suffer that the war caused to the whole humankind, soon after their defeat, the fascist *regimes* were immediately blamed for their crimes both towards their own nationals as towards foreigners and other countries.<sup>164</sup> The trials to former war criminals or *nazi* collaborators in the aftermath of the war, may be seen as ways of protecting the Right to the Truth due to the acknowledgements and disclosures they made. State transparency in nazi Germany or fascist Italy was far from better as in Pinochet’s Chile. Given the abandonment of such brutal forms of government in most western Europe, whenever there has been a claim of human rights violations, it has been usually protected with “ordinary” human rights which, also today, are connected to the Right to the Truth.

This all above is not to say that western European countries were an

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<sup>164</sup> The 1945 London Charter instituting the Nuremberg Tribunal foresaw a totally new criminal charge: crimes against humanity. Scope of the tribunal was to prosecute and punish the major nazi war criminals, however, it had also a prominently political function, namely, marking a red line beyond which only barbarity is left.

Furthermore, the Nuremberg Tribunal made one of the most important and complete acknowledgements of the nazi-era crimes uncovering hundreds of facts and abuses that were, until then, unknown to the most.



example of democracy and respect for human rights starting from 1945, rather than the States recurring to the methods and practices of the South American dictatorships in Europe, had been defeated militarily and internationally prosecuted. Quasi as if the Nuremberg Tribunal would have served the equivalent functions of a truth commission.

This latter is, of course, an exaggerated comparison which, still, shows how European societies morally reacted to such historical events. Furthermore, Europe has a long nation history of nations which lasts, at least, since the 1648 Peace of Westphalia at that has rendered its societies experienced in dealing with the “State”. In less than 50 years, in fact, European political scholars passed from sponsoring a paternalistic State, not inconsiderable powers also towards citizens’ private life, to defending a democratic and power-balanced State with a number of core obligations mostly regarding human rights.

On the contrary, South American States were and are still quite “young” countries in which, most importantly, the majority of the citizens usually live in total or almost total ignorance and far from any type of official authority. Assuming and exercising despotic control in such countries has been, hence, much easier for dictatorships.

The Right to the Truth, in fact, has been a useful tool for such societies given its capacity of activating multiple connected rights such as the right to justice or the right to an effective remedy and, in light of the above, it naturally emerged in victimised communities of countries suffering from heinous state practices. Still, its definition and interpretation by scholars and law-makers (as the UN General Assembly in theory should be) tends to be often too broad which sometimes, as already seen in the concurring joint opinion in *El Masri*<sup>165</sup>, pushes more traditional jurists to underestimate its role or even denying its autonomy. This, together with Europeans’ history of State-theory, may depend from the fact that the Right to the Truth should be applied only in the very specific situations discussed in the

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<sup>165</sup> *El Masri*, supra note 117.

previous chapters. These are, specifically, those cases in which, in addition to grave or systematic human rights violations, the State shows little or none interest neither in investigating nor in punishing such crimes.

This positioning for the Right to the Truth would facilitate the recognition of its autonomy and, in parallel, underline the seriousness of the situations in which it might be invoked. Furthermore, any overlap, which may render the acknowledging by a Court more onerous or time-consuming, might be avoided.

In confirmation, European history may help again; in addition to their democratisation, most western European countries adopted legislation, usually at constitutional level, regarding commissions of inquiry.

A commission of inquiry can be broadly defined as a public-appointed body tasked with the investigations into specific facts or a specific case (their differences with truth commissions has been already stressed in chapter II.). Every country attributes different powers and functions to commissions of inquiry, *e.g.* the Italian Constitution at its article 82 prescribes that the parliament may set up a commission of inquiry in order to investigate, with the same powers of the judicial authority, into matters “of public interest”.<sup>166</sup>

However, what is important to stress is that there has been in Europe (as in the US) truth telling mechanisms since longer than in other regions of the world. This, as a consequence, rendered the governments in that countries accountable for truth long before such terminology even emerged. So much so, that the Right to the Truth first emerged in the European Court of Human Rights’ jurisprudence on the conflict in Cyprus and on extraordinary renditions which marked two particularly dramatic moments in the European recent history. In the same way, in the Balkans, such right was first acknowledged in the aftermath of the wars of 1992-1995 and 1996-1999.

Of course, also European history after World War II has been marked

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<sup>166</sup> Art. 82 Cost.

by dramatic episodes<sup>167</sup> in which States were involved as much as in South America in human rights abuses, however, the scale and width were and are not comparable.

In conclusion, the Right to the Truth has the capability to render accountable (*inter alia* by overcoming amnesty-laws) those who usually escape from the responsibilities for the gravest crimes under international law also in contexts in which denial and impunity have become the rule. It is, nevertheless, important that this remains the main and foremost scope of such right in order to avoid that it becomes a “general right to the truth”, that might be *e.g.* a right that could be invoked against any type of lie.

Indeed, given its nature as human right, the Right to the Truth should serve those suffering from both the violation of their rights and the denial of the very violation or the unwillingness in making justice after it. Otherwise, it would be unduly diluted and rendering, so, years of disputes and suffering useless by rendering, once again, abuses easier. Human Rights’ function, in fact, is that of creating a legal and solid deterrent, by creating rights for one side which in parallel implies duties on the other, to anybody or any authority who might be tempted to return to such heinous practices the world has already sufficiently experienced.

The Right to the Truth is therefore a precious and fundamental “right of last resort”, which poses a last and hopefully insurmountable dam to all authoritarian derives that find their start in the denial and cover-up of the truth.

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<sup>167</sup> Italy’s *anni di piombo* (lead years) which lasted from the late 60s to the first 80s were marked by numerous acts of violence on behalf of various terrorist groups and the infamous *stragi di stato* (State-massacres), bomb-attacks against the civilian population for which, still, no real culprit has been found and in which State-officials have been allegedly involved.

# Chapter V The Shortcomings of the Right to the Truth. The Case-study of Argentina.

## 5.1 Argentina

The Right to the Truth, as already stated, first emerged in South America as a way to shed light on the fate and whereabouts of the sadly well-known *desaparecidos*. In fact, in their struggle to fight “the communist threat”, Latin-American military dictatorships extensively resorted to enforced disappearances as a way to fight back “subversives” and crush internal dissent.

Among the various countries that suffered under authoritarian rule in the second half of the 20<sup>th</sup> century, Argentina is the most emblematic also due to the enormous number of victims of enforced disappearances and the importance of such country in the region.

### (i) The Military Dictatorship

Since 1930 Argentina faced a number of *coups d'état* (1930, 1943, 1955, 1962, 1966) that, each in turn, interrupted and altered the democratic process. As a consequence, military interventionism had become almost natural for wide sectors of Argentinian society as well as the practice resolving political conflicts with violence had.<sup>168</sup> However, the 1970's were years of “unprecedented” political violence in Argentina.<sup>169</sup> Indeed, in addition to the aforementioned several *coups*, around 1970 a number of small guerrilla organisations emerged and attempting to earn power through urban armed struggle. Two of these organisations, the *Montoneros* and the *Ejercito Revolucionario del Pueblo* (ERP), gained sufficient power to pose a serious challenge to the capacity of public authorities to maintain order in the mid-1970's.

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<sup>168</sup> On military interventionism in Argentine political history, see, Prudencio García, *El drama de la autonomía militar* (Madrid: Alianza, 1995).

<sup>169</sup> Americas Watch, *Truth and Partial Justice in Argentina*, 87 n.1 (August 1987).

Still, the number of their adherents and supporters has never been that high as to allow them to seriously contend power over the whole country.

The elected government of Isabel Perón, however, adopted a response-strategy of assassinations undertaken mostly by paramilitary groups that acted under the guidance and protection of the authorities. Accordingly, the intimidation of the citizenry, as well as the incompetence and corruption of Isabel Perón's government, were the reasons that lead, on 26 March 1976, the Commanders-in-Chief of the Army, the Navy and the Air Force to overthrow the government and institute them, as a *Junta*, as "the supreme power of the land".<sup>170</sup> It is important to stress out that the *coup* took place in an atmosphere of national emergency with the Peronist government that had already declared a state of siege, suspended several civil liberties and endowed the task to fight internal disorder to the Armed Forces.<sup>171</sup>

The *Junta*, analogously as the other military dictatorships in Brazil, Uruguay and Chile, was guided by the so-called "national security doctrine" which interpreted national political struggles as an East-West confrontation and Marxism as an all-pervading enemy that requested a new type of strategy for a new type of war, a "dirty war".<sup>172</sup> Despite having dissolved the Congress, suspended fundamental articles of the Constitution and having promulgated legislation that altered penal law both substantially and procedurally, thus "legalizing" its counter-subversion methods, the military government resorted to secret and clandestine means to fight its enemies.<sup>173</sup> Consequently, a campaign of enforced disappearances was started throughout the country and became the *Junta* main weapon of its "Process of National Reorganization" (Proceso de Reorganización Nacional).

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<sup>170</sup> Americas watch, *supra* note 162.

<sup>171</sup> Paula K. Speck, *The Trial of the Argentine Junta: Responsibilities and Realities*, 18 U. Miami Inter-Am. L. Rev. 491 (1987).

<sup>172</sup> José Zalaquett, *Confronting Human Rights Violations committed by Former Governments: Applicable Principles and Political Constraints*, 13 Hamline L. Rev. 623 (1990).

<sup>173</sup> Americas Watch, *supra* note 162.

Each disappearance was carried out with a similar *modus operandi*: Task forces of the armed services were mandated to arrest suspected subversives without warrant; in order to avoid identification of the captor, the armed unit busted into the victim's house late at night or in the early hours of the morning often plundering the property; the attackers warned family members that any appeal to the authorities would have been useless and drove the victim away on an unmarked car. The prisoner was taken hooded to clandestine detention centres, usually in military or police facilities, where he or she was interrogated under the most severe forms of torture. Family members were also kidnapped and often tortured in each other's presence.<sup>174</sup> Some prisoners were detained for years; others were tortured to death. Bodies were found floating on the Río de la Plata or in mass graves often with heads and hands cut off to prevent identification.<sup>175</sup> Most of them, however, simply disappeared. Victims were chosen without fixed criteria and included elderly, pregnant women and also foreigners. Anyway, the dictatorship officially denied any responsibility for them. The camps were deliberately shielded from any administrative or judicial investigation in order to allow torturers to be free to use any method, to deny even the existence of the prisoners and, finally, to act in total impunity.<sup>176</sup> In the end, no traces were left, the body of the *desaparecido* became invisible, their arbitrary detention, torture, rape and murder denied and no one was held accountable.<sup>177</sup> It is estimated that 10,000 to 30,000 persons disappeared in Argentina from 1976 to 1983 as a consequence of State's repression.

In 1978, a second *Junta* took power and announced the victory of the war against subversion and, as a consequence, disappearances, though still common, decreased. Nevertheless, intestine fights among the

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<sup>174</sup> Paula K. Speck, *supra* note 164.

<sup>175</sup> *Id.*

<sup>176</sup> Americas Watch, *supra* note 162.

<sup>177</sup> Emilio Crenzel, *Argentina's National Commission on the Disappearance of Persons: Contributions to Transitional Justice*, *The Internat. J. of Trans. Just.* Vol. 2, 2008, 173-191 (2008).

generals and the lasting financial and economic problems rendered Argentines more outspoken about their criticism toward the military, including protest over the methods of the “dirty war”.<sup>178</sup> By then, in 1982, Lieutenant General Galtieri, who succeeded Lieutenant General Videla (1976-1978) and Lieutenant General Viola (1978-1981), was President; partly to provide a distraction to the growing unrest, the third *Junta* launched an ill-advised invasion war against the Falkland/Malvinas Islands in April 1982. The islands, located in the South Atlantic Ocean, had been taken by force by the United Kingdom in 1833 and were, thus, British territory. Despite wide popular support, Argentinian militaries were both too unprepared and unequipped to fight a serious war against the overwhelming British forces; by mid-June 1982 the invasion resulted in a disaster and General Galtieri resigned.<sup>179</sup>

#### **(ii) Transition to Democracy and First Attempts to Ensure Accountability and Truth**

A fourth and last *Junta* appointed General Bignone as a President to lead the country in its transition to democracy. The humiliation for the military defeat and the ongoing economic problems spread anger throughout the Argentine society. The military, however, were mainly concerned of avoiding losing their privileged role and, most importantly, evading accountability for the crimes of the dirty war. Indeed, by the time, early 1983, many relatives of the disappeared and survivors of the *Junta*'s repression started bringing accusations before the courts or rendered testimonies to the press.

On 28 April 1983, thus, the outgoing military government issued the first of the two documents which, in their intentions, should have helped them escaping accountability: “the Final Document on the War against

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<sup>178</sup> Americas Watch, *supra* note 162.

<sup>179</sup> *Military Defeat Hammers Last Nail into Galtieri's Political Coffin*, Latin. Am. Weekly Rep., June 18, 1982, at 1, col. 1.

Subversion and Terrorism” (*Documento Final de la Junta Militar sobre la Guerra contra la Subversion y el Terrorismo*).<sup>180</sup> According to this document, which obviously denied that unacknowledged detentions took place, or that secret detention centres were maintained etc., underlined that all the actions and “eventual excesses” had to be considered “acts of duty”. In addition, the Final Document declared that all those who had disappeared and who were not in exile or in hiding must be considered dead “for all legal and administrative purposes”. The most notable content of this document, anyway, was the explanation offered by the *Junta* of the origins of the dirty war. Consistently, the said war had been ordered by President Isabel Perón when, in February 1975, she launched *Operativo Independencia*, calling on the Army to put down a guerrilla movement in the Tucumán province; later in September of the same year, Italo Luder, acting as President, ordered the Armed Forces to “annihilate” subversion. Thus, according to the Final Document, these decrees would have been both the legal basis and the justification for the dirty war.

The second document to evade accountability was issued by the military government on 22 September 1983, two weeks before the election: Law 22.924 called “the Law of National Pacification” (*Ley de Pacificación Nacional*). This law consisted in a broad self-amnesty which established a general amnesty for all criminal offences committed during “the war against subversion” between 25 May 1973 (the date of the last amnesty for political crimes) and 17 June 1982 (when General Galtieri resigned) and that included also a limited amnesty to benefit some of those who fought against the government.<sup>181</sup> The self-amnesty had, nevertheless, a backfire effect for the military; the candidates for the presidency immediately condemned the law and promised inquiries into the fate and whereabouts of the disappeared

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<sup>180</sup> Available at <http://www.ruinasdigitales.com/revistas/dictadura/Dictadura%20-%20Documento%20Final.pdf>

<sup>181</sup> Americas Watch, *supra* note 162.



people. Among the candidates, Raúl Alfonsín showed to be the less ambiguous in this regard and on 30 October 1983 he was elected president with 52% of the votes cast.<sup>182</sup>

Indeed, on 13 December 1983, only three days after his inauguration, Alfonsín sent to congress a bill which became law on 27 December and that declared the “Law of National Pacification” null. The declaration of nullity was fundamental since the simple repealing of the self-amnesty, due to the principle of non-retroactive application of criminal law, could have prevented prosecutions and punishments of crimes formerly subject to amnesty.<sup>183</sup>

Moreover, in the same month President Alfonsín issued decrees declaring the necessity to prosecute the leaders of the *Montoneros* and ERP as well as the nine high officers that formed the three military *Juntas* which ruled the country from 1976 to 1982; proposed reforms of the military code of justice; created a an investigative commission on forced disappearances; and, in addition, submitted to congress legislation raising the penalties for torture and criminalising the take-over of government by force of arms and rendering this latter provision not subject to a statute of limitations no matter what actions could be taken by the *de facto* government.<sup>184</sup> Those measures became all law.

With regard to the trials for human rights violations committed by member of the security forces, according to Law 23.049 (enacted on 9 February 1984), those had to be judged by the Supreme Council of the Armed Forces (the Council) in first instance and by the civilian Federal Court of Appeal in Buenos Aires in case of appeal.<sup>185</sup> In September 1984, the Council, which had to decide on the charges pending on the former *Junta* members, reported to the Federal Court of Appeal that it found all the orders issued by the defendants unobjectionable and that they might have been accused only for negligence in failing to control

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<sup>182</sup> *Id.*

<sup>183</sup> Zalaquett, *supra* note 165.

<sup>184</sup> Americas Watch, *supra* note 162.

<sup>185</sup> Zalaquett, *supra* note 165.

their subordinates.<sup>186</sup> Thus, in early October, the Court took jurisdiction and declared that it would have judged the case *de novo*.

The trial began in early 1985, the prosecution accused nine generals and admirals of crimes ranging from aggravated homicide, torture and illegal deprivation of liberty to falsification of public documents and cover-ups. Of the quasi 9,000 cases reported by CONADEP (the National Commission on Disappeared Persons which will be addressed further on), the prosecution offered evidence on 711 different cases of illegal abduction, torture and murder and produced evidence, in the form of witnesses to each event.<sup>187</sup> Pablo Alejandro Díaz, for example, testified that as a high-school student aged 17, he and other several girls and boys of his age, who petitioned for a reduction of bus fares for students, were abducted and severely tortured; he was the lone survivor. A young woman, Adriana Calvo de Laborde, recounted to giving birth to her baby on the floor of a police car while she was being transferred from one detention centre to another.<sup>188</sup>

The defendants, without attempting to deny the factual picture rendered by the prosecution, resorted mainly to the argument that the state of internal war justified and even necessitated the suspension of all constitutional guarantees. However, on 9 December 1985, the Federal Court of Appeal found all the accused military leaders guilty for the affirmative acts of ordering and facilitating the crimes charged and, most notably, for ensuring the secrecy and impunity of the crimes.<sup>189</sup>

The following year, in December 1986, the Supreme Court, in front of which the defendants appealed the 1985 sentence, confirmed and uphold the Federal Court's ruling.

As previously stated, among the several actions took by President Alfonsín's government, on 15 December 1983 (five days after entering

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<sup>186</sup> Paula K. Speck, *supra* note 164.

<sup>187</sup> Americas Watch, *supra* note 162; Paula K. Speck, *supra* note 164.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*; a translation in English of the Court's decision is available at [https://www.jstor.org/stable/20693086?seq=1#page\\_scan\\_tab\\_contents](https://www.jstor.org/stable/20693086?seq=1#page_scan_tab_contents)

office) it issued decree 187/83 establishing the “National Commission on Disappeared Persons (Comisión Nacional sobre la Desaparición de Personas; hereinafter CONADEP or the Commission), composed of ten civilian experts and members of the congress (only the Chamber appointed 3 representatives).<sup>190</sup>

The Commission was tasked to investigate into the fate and whereabouts of the *desaparecidos* and to produce a report to the President. Though not having *subpoena* powers nor the capacity to compel testimony, CONADEP had access to all government facilities and the security forces were obliged to collaborate with it.<sup>191</sup> Furthermore, during its six months period of investigations, CONADEP was supposed to provide information to the relevant courts whenever it uncovered evidence of the commission of crimes.<sup>192</sup>

In September 1984, the Commission submitted its report to President Alfonsín and a summary of it was later published under the title *Nunca Mas* (Never Again) which soon became a best-seller.

CONADEP reported 8,961 disappearances and lists hundreds of clandestine detention centres. According to Alberto Mansur, the Commission’s secretary of legal affairs, “it was ascertained that any police or military facility could, merely by virtue of what they were, be turned into a clandestine centre by decision of military officers, thus proving the systematic nature of state terrorism”.<sup>193</sup> Moreover, CONADEP’s documentation included names of over 1,300 military officers implicated by witnesses heard or resulting from the Commission’s research, which, however President Alfonsín decided not to make public.<sup>194</sup>

The Commission’s Report constitutes still today one of the most complete and detailed writings on the repressive system that the *Juntas*

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<sup>190</sup> Zalaquett, *supra* note 165.

<sup>191</sup> Americas Watch, *supra* note 162.

<sup>192</sup> Crenzel, *supra* note 170.

<sup>193</sup> *Id.*

<sup>194</sup> Nevertheless, the names were leaked by the weekly “El Periodista”.

set-up in Argentina between 1976 and 1982. Furthermore, it is a valuable example of how civil society and strong political will may bolster the search for truth even in the recent aftermath of a dictatorship that ruled the country only few years early.

### **(iii) Halt to Prosecutions and Return to Impunity**

So far, Argentina's transition seemed to move towards both full accountability and total uncover of the truth. However, already before the “*Junta* Trial” high government officials were concerned about the more than 2,000 pending complaints against other members of the armed and security forces. Although there was not any official figure, it was estimated that at least one third of the defendants were still on active duty.<sup>195</sup> The high command was mostly distressed by those latter and stressed to the government that the comrades-in-arms of those younger officers threatened disobedience or revolt if the accused were “handed over” for prosecution.<sup>196</sup>

In September 1985, a series of bomb attacks on school and military institutions which led the government to declaring a sixty days state of siege on 25 October and arresting military officers and civilians.<sup>197</sup>

Pressure from the military and their supporters on the government grew, and by the end of 1986 Law 23.492 was enacted: the infamous “Full Stop Law” (Ley de Punto Final). According to such law, no new claims could be brought against crimes committed during the dirty war after the expiration of a 60-day term following enactment. During that term, all complaints already filed would have been moot unless the defendants have been heard or attempted to be heard by the courts. Only crimes related to the theft and irregular adoption of the children of the disappeared were exempt from the law.<sup>198</sup> Courts and human rights organisations raced against the deadline managing to file, still,

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<sup>195</sup> Americas Watch, *supra* note 162.

<sup>196</sup> *Id.*

<sup>197</sup> Zalaquett, *supra* note 165.

<sup>198</sup> Americas Watch, *supra* note 162.

hundreds of complaints also regarding officers in active service.

As a consequence, during the 1987 Easter weekend, a series of military revolts took place in Cordoba and Buenos Aires. Other army units refused to move against the rebels. Accordingly, the militaries' main request was that of an amnesty for those in active service; since the rebellion seriously threatened to undermine the government's legitimacy, President Alfonsín conceded to talk in person to the insubordinates bringing an end to the revolt.

On 5 June 1987, though claiming its victory over the rebellion, the Alfonsín government enacted the "Law of Due Obedience" (Ley de Obediencia Debida) which granted immunity to all army personnel ranked colonel or below on the grounds that they were following orders. In fact, the law introduced a *de jure* presumption (no evidence could be introduced to the contrary) that they acted without any possibility of examining, opposing or resisting their orders. The only exceptions admitted, once again, were cases of rape, abduction of children or falsification of papers related to their identity. On 23 June of the same year, the Supreme Court backed it and prosecutors were instructed, under the penalty of sanctions, to urge its application.

The two laws, despite the government's rhetoric, resulted in the end in an amnesty for armed and security forces. Nevertheless, in 1988, two more military uprisings threatened Argentina's stability respectively in January and December. The rebels, popularly known as *carapintadas* (painted faces) due to their commando-face-paint, were motivated by the "illegitimate intrusion of the government" in the Armed Forces' organisation. Indeed, even though Alfonsín's promulgation of the Full Stop Law and the Law of Due Obedience, reforms in the military apparatus went on in order to bring it under total civilian control.

The *carapintadas* revolts, however, were put down and, in order not to raise tension further, the arrested were accused of mutiny, instead of rebellion which have called for civilian jurisdiction, and tried in front of military courts.

Disciplinary proceedings languished in front of military courts until, in October 1989, the new President Carlos Menem, who entered office in July, issued several decrees granting pardon to military personnel accused or sentenced for human rights violations, with the only exception of the high-ranking officers already convicted. In addition, also those who had been convicted for the conduction of the Falkalnds/Malvinas *debacle*, or were awaiting trial for the *carapintadas* uprisings as well as those who had proceedings pending for participating in *Montoneros* or ERP actions, were pardoned.

According to President Menem himself, the pardon was purposed to foster national reconciliation and, in addition, he made it known that he intended to pardon the remaining military leaders. Protest at national and international level mounted against this initiative.<sup>199</sup>

Anyway, in early December 1990, a fourth *carapintada* uprising took place. This time, the rebels took over a number of military facilities in downtown Buenos Aires provoking the immediate reaction of loyalist forces and which resulted in several hours of urban firefights and deaths among both militaries and civilians. President Menem's "good relation" with the Armed Forces, however, helped shutting down this last rebellion.

On 29 December 1990, finally, Menem issued his second set of pardons for those not included in the first and the former and convicted members of the *Juntas*. These second pardons were followed by outraging protests throughout the country, but the government, and Menem specifically, claimed they would have been justified by the need for reconciliation.

In any case, with the 1989 and 1990 pardons, President Menem definitely closed the circle of accountability in Argentina, at least in the 20<sup>th</sup> century. It must be said, in any case, that President Menem, despite the issuing of the two sets of pardons, instituted beginning in 1991 the Human Rights Office of the Ministry of the Interior and provided, first

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<sup>199</sup> Americas Watch, *supra* note 162.

by decree and then by law, for a reparation campaign to benefit survivors or victims' relatives.<sup>200</sup>

Human rights organisations, which have had a determining role in the country's transition and the successive attempts to end impunity, have continued their struggle in the search for truth and justice at national and international level. The various provisions enacted by Alfonsín, in fact, included the ratification of several international human rights instruments, including the UN Covenant on Civil and Political Rights and on Economic and Social Rights, the Inter-American Convention on Human Rights. Furthermore, Argentina accepted to be bound, for future cases, to the decisions of the Inter-American Court of Human Rights. This allowed human rights organisations such as the *Madres de Plaza de Mayo* and the *Centro de Estudios Legales y Sociales* (hereinafter, CELS) to bring complaints also in international forums and to stimulate proceedings even in foreign countries and to bind Argentina to supra-national provisions which pose also binding obligations. Moreover, those organisations, together with other representatives of civil society, never interrupted their search for legal loopholes in the laws that impeded prosecutions.

One of the said loopholes regarded the many babies born to mother detained in clandestine centres and illegally adopted under false identities. Since these cases were excluded by the Full Stop Law and by the Law of Due Obedience, former officers could be prosecuted for crimes committed as a result of illegally abducting children and altering his/her identity<sup>201</sup>. As a consequence, in 1992, Menem created the *Comisión Nacional per el Derecho a la Identidad* (National Commission for the Right to Identity, CONADI).

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<sup>200</sup> International Center for Transitional Justice, *Accountability in Argentina, 20 Years later Transitional Justice maintains Momentum*, ICTJ, New York (2005).

<sup>201</sup> This point will be specifically addressed further on.

#### **(iv) “Truth Trials” and Reopening of Prosecutions**

However, these was not the only event that led to a renewed quest for truth and justice. As stated, civil society’s and human rights organisations’ activism never stopped in Argentina and, among the other things, they sought in annual Senate hearings to block the promotion of officers implicated in the dirty war. Between 1994 and 1995, several of these officers, angered for the blocked promotion but shielded by the *de facto* amnesties from prosecutions, started confessing the atrocities they were involved with claiming they had been scapegoated for following orders.

For instance, in a series of interviews given by a former ESMA<sup>202</sup> official, Capt. Adolfo Scilingo, recounted that between 1,500 and 2,000 detainees held at ESMA were drugged, stripped of their clothing, and thrown alive from planes into the Atlantic Ocean between 1976 and 1977.<sup>203</sup> Scilingo’s confession was not the only related to the so-called “death flights” that, according to another former officer, routinely departed under cover of darkness from the military base of El Campito, near Buenos Aires.

These confessions reopened one of the deepest wounds of the disappeared relatives: the uncertainty on the fate and whereabouts of their loved ones. Once again civil society and human rights organisations called for action. They pushed on courts for the opening of *Juicios de la Verdad* (Truth Trials) stating that victims’ relatives and society had the right to know what happened and stressing the already existing Inter-American Court’s jurisprudence on the Right to the Truth.<sup>204</sup>

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<sup>202</sup> *Escuela Superior de Mecánica de la Armada* (Higher School of Mechanics of the Navy) was originally an educational facility of the Argentine Navy. During the military dictatorship, it was used as a secret detention centre where an estimated number of 5,000 persons have been tortured and killed. In 2004, the National Congress passed a law to turn the site into a museum, the Space for Memory and the Promotion and Defence of Human Rights.

<sup>203</sup> International Center for Transitional Justice, *supra* note 195.

<sup>204</sup> The Inter-American Court for Human Rights’ sentence in *Velásquez*, the first document mentioning a Right to the Truth, had been issued in 1986.



Hence, in 1996, despite the impossibility to initiate criminal prosecutions, relatives of victims and human rights attorneys started proceedings in front of the Federal Court of Appeal in Buenos Aires. Federal courts had the power to order people suspected of crimes to appear and testify as well as to access any official record, but, still, they could not impose charges or convictions. Apart from this, the investigative function of those trials helped in resembling precious and detailed documentation that posed the basis for future investigations with a potential for prosecutions or punishment.

Furthermore, one of these cases managed to arrive in an international forum, specifically that of the Inter-American Commission for Human Rights. Such case regarded the illegal abduction and detention of Carmen Aguiar de Lapacó and her daughter, Alejandra Lapacó, who after the first's release had never be seen again. Since at the domestic level the case had been cut short due to the impossibility to reopen prosecutions, Carmen Aguiar, in response, filed a complaint with the Inter-American Commission which admitted the case in 1999.<sup>205</sup> The Commission brokered a friendly settlement of the dispute, by which the State agreed to "accept and guarantee the right to truth which consists in the exhaustion of all means to obtain clarification of what happened to disappeared persons."<sup>206</sup> The agreement required the government to confer competence only to the federal courts to continue the truth trials, which could not be made the object of any statute of limitations. The agreement, therefore, made it an official obligation of the state to continue judicial investigations into the fate of the *desaparecidos*.

Thus, recognizing to the Right to the Truth the same dignity as other human rights that create obligations on behalf of States and allowing to circumvent both the amnesties and the pardons. It allowed anguished and distressed mothers, grandmothers, wives, children etc. to finally

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<sup>205</sup> *Aguiar de Lapacó v. Argentina*, Case 12.059, Inter-Am. C.H.R., Report No. 70/99, OEA/Ser.L/V/II. 106, doc. 6 rev. (1999).

<sup>206</sup> *Id.* par. 17

shed light on the fate and whereabouts of their loved ones after years of forced silence and denial of justice.

Meanwhile, prosecutions in foreign countries for abuses committed by Argentine state agents increased. In Italy and France former military officers were convicted *in absentia* for the disappearance of their citizens.<sup>207</sup> Analogously, courts in Spain, Germany and Sweden began demanding the extradition of various military personnel. Anyway, both the Argentine Supreme Court and President Menem, denied the validity of such initiatives. Accordingly, the holding of trials in contumacy would have violated the accused's defence rights while the extradition orders disregarded Argentina's sovereignty and territoriality.<sup>208</sup>

Although these foreign prosecutions had little practical effect they indicate Argentinian human rights organisations' strong activism. Moreover, they also served the scope to put also international pressure on the government and national judicial institutions that were open to outflank the *de facto* amnesties. Indeed, by that time, the Inter-American Commission had already found that impunity laws and presidential pardons for grave human rights violations were in breach of the American Convention on Human Rights.<sup>209</sup>

Finally, in March 2001, Federal Judge Gabriel Cavallo issued the sentence in the seminar case *Simón* brought forth by CELS and that reopened completely Argentina's accountability issue.<sup>210</sup> The court investigation regarded the theft of a child abducted with her parents in 1978 (thus being exempt from the amnesties) and for the first time a federal judge declared the Full Stop Law and the Law of Due Obedience

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<sup>207</sup> The majority of Argentinians has Italian origins and has, thus, double nationality; In 1977 two French missionary nuns were arrested during a counter-subversion raid and had been never seen again.

<sup>208</sup> International Center for Transitional Justice, *supra* note 200.

<sup>209</sup> Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights 1992-1993*, Inter-Am. C.H.R., OEA/Ser. L/V/II. 83, doc. 14 corr. 1 (1993), Report No. 28/92, Argentina.

<sup>210</sup> *Simón, Julio Hector, Del Cerro, Juan Antonio s/sustracción de menores de 10 años*, First instance judgment, Federal Court for Criminal and Correctional Matters No 4, 6th March 2001, Argentina.

void. Accordingly, judge Cavallo argued that it would have been nonsensical to investigate the crime against the child without investigating the abduction, torture and disappearance of her parents. Moreover, the two *de facto* amnesty-laws were held to be in contrast with both the Argentine Constitution and its international obligations (that is why Alfonsín's decision to become part to the ICCPR and to the Pact of San José were so important). The Federal Court of Appeal upheld Cavallo's ruling in the same year and the cause passed to the Supreme Court for constitutional review.

In 2003, Néstor Kirchner became President after a string of emergency interim presidents that followed De la Rúa's mandate. This latter signed a decree in 2001 formalizing the government's refusal for Argentines to stand trial abroad on grounds of territoriality which, however was overturned briefly after.<sup>211</sup> Since taking office President Kirchner actively ordered cooperation with extradition requests and, in August 2003, Congress passed Law 25.779, which repealed the Full Stop Law and the Law of Due Obedience.

Later, in July 2005, the Supreme Court upheld the decision in *Simón* and, at the same time, validated Law 25.779 and in 2006 a federal court found the presidential pardons for the *Junta* members convicted in 1985 unconstitutional. The following year the Supreme Court confirmed this decision.

Since then proceedings have grown quickly in number and are still going on today. According to the *Ministerio Público Fiscal* (Ministry for Public Prosecution), as of March 2018, 599 cases have been brought to court for human rights violations (*lesa humanidad*) of which 15 to be decided, 278 in phase of instruction, 103 indicted and 203 already sentenced.<sup>212</sup> Moreover, circa 2985 individuals have been charged for human rights violations of whom 867 (27%) has been already

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<sup>211</sup> This decree was repealed by interim president Adolfo Rodríguez Saá.

<sup>212</sup> Further data are available at <https://www.fiscales.gob.ar/lesa-humanidad/?tipo-entrada=estadisticas>

convicted.<sup>213</sup> Among the accused, concordant with the data furnished by CELS, 85% are or were members of the armed or security forces.<sup>214</sup> In the end, almost all the formerly pardoned militaries are facing or faced trial since 2006 for the crimes and abuses committed during the “Process of National Reorganisation”. Only those who meanwhile died because of their seniority ultimately escaped justice.

#### **(v) Trials Abroad**

In addition, trials are going on also in Italy where, from 1999 to 2011, sentences have been issued in cases regarding *inter alia* ESMA and Admiral Massera. But another is still pending in front of the Roman Assize Court of Appeal: the infamous “Operation Condor” trial.<sup>215</sup>

Operation Condor or *Plan Cóndor* was a secret intelligence and operations network in the 1970s through which the South American military dictatorships coordinated intelligence information (by classifying and tracking persons) and seized, tortured and executed political opponents in combined cross-border operations.<sup>216</sup> Condor’s key-members were Argentina, Chile, Uruguay, Paraguay, Bolivia and Brazil. Without making a further in-depth, the disturbing similarities that lay between Condor and the CIA’s extraordinary renditions programme described in the previous chapter are sinisterly notable.

However, the Italian trials are additional examples of how Argentinians have rendered its struggle against impunity, analogously as their despotic rulers fight against “subversion”, transnational.

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<sup>213</sup> *Id.*

<sup>214</sup> Data and additional statistics are available at <https://www.cels.org.ar/web/estadisticas-delitos-de-lesa-humanidad/>

<sup>215</sup> The dates of the next court hearings are available at [http://www.24marzo.it/index.php?module=pagemaster&PAGE\\_user\\_op=view\\_page&PAGE\\_id=574&MMN\\_position=198:198](http://www.24marzo.it/index.php?module=pagemaster&PAGE_user_op=view_page&PAGE_id=574&MMN_position=198:198)

<sup>216</sup> J. Patrice McSherry, *Tracking the Origins of a State Terror Network: Operation Condor*, *Lat. Am. Perspectives* Vol. 29, No. 1, pp.38-60 (2002).

**(vi) The Right to the Truth Among the Determinant Factors**

The Right to the Truth, coupled with the patient and tireless work of Argentine civil society and human rights organisations, played a determinant role in ending impunity in such country. In fact, the Right to the Truth constituted the indispensable legal basis for the “Truth Trials”, that, despite not leading to convictions, collected fundamental documentation for the actual prosecutions. Furthermore, they finally shed light on the fate and whereabouts of thousands of victims on which CONADEP was not able or did not manage to investigate into.

However, the positive contribution of such right would have not been possible without the adequate participation of Argentina in the international community. Indeed, prior to Alfonsín’s decision to become part to the ICCPR and to be bound to the Inter-American Court of Human Right’s jurisdiction, the Right to the Truth would have had little possibility to enter the Argentine legal system producing binding effects. Once again, it is important to stress the role played by this Court in ending impunity most and foremost in its very continent.

Argentina could be seen, in this regard, as a pioneer country; despite the start-stop development of its accountability process for human rights violations, it offers one of the best examples of how civil society, the international community and willing politics may cooperate in the fight against impunity as well as in the promotion and protection of human rights. So much so, that Argentina was among the first countries that officially acknowledged and obliged themselves in recognising and assuring the Right to the Truth.<sup>217</sup> In fact, despite the Inter-American Court had already upheld the Right to the Truth in previous rulings, the respondent States started to recognise such right only after 2000 starting with the case of *Barrios Altos v. Peru*.<sup>218</sup>

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<sup>217</sup> *Aguiar de Lapacó*, *supra* note 205.

<sup>218</sup> *Barrios Altos*, *supra* note 25.

### (vii) Argentina Today

Unfortunately, despite all the above-mentioned efforts and achievements, the overall human rights situation in such country has still to be drastically improved. In particular, the continuation of police practices of the dirty war raises questions on the success of Argentina's transition.

Apparently, taking into account all cases in which death has been a direct or indirect consequence of the conduct or intervention of police or security forces, since 1983, 5,462 persons have died.<sup>219</sup> More than 2,000 died during Cristina Kirchner's presidency alone (2007-2015), and, in the triennium 2015-2017 (721 days of government), 725 cases have been registered.<sup>220</sup> The majority of the total deaths since 1983 (44%) were a consequence of what Argentinians call *gatillo fácil* (trigger happy) followed by cases of persons died while detained or in police custody (40%).<sup>221</sup>

In addition, according to a report issued in 2013 by the Prosecutor Office against the Trafficking and Exploitation of Persons (PROTEX) together with the NGO *Acciones Coordinadas Contra la Trata* (Coordinated Actions against Human Trafficking, ACCT), between 1990 and 2013 an estimated number of 6,040 persons were reported as "disappeared".<sup>222</sup> What is noteworthy is that, in both statistics the vast majority of victims are individuals aged between 12 and 25 years, which is quiet worrying. In January 2009, for example, 16-year-old Luciano Arruga disappeared after being last seen alive in a police detachment in Greater Buenos Aires.<sup>223</sup>

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<sup>219</sup> Coordinator against Police and Institutional Repression (Correpi), *Informe de la Situación Represiva Nacional* (2017), available at <https://drive.google.com/drive/folders/1Pzix6h733WfV6kgCusfR7nlXZwHcZkLY>

<sup>220</sup> *Id.* graphics 3-5.

<sup>221</sup> *Id.* graphic 8.

<sup>222</sup> Ministry for Public Prosecution, *Búsquedas en Democracia, Diagnóstico sobre la búsqueda de personas entre 1990 y 2013*, (2013), available at <https://www.mpf.gob.ar/protex/files/2015/02/BÚSQUEDAS-EN-DEMOCRACIA.pdf>

<sup>223</sup> Michelle D. Bonner, "Never Again": *Transitional Justice and Persistent Police Violence in Argentina*, *The Internat. J. of Transit. Just.*, Vol. 8, 235-255, (2014).

Those data appear unjustifiable having regard to Argentina's recent history and painful transition. Nevertheless, by analysing in detail such country's reforms it appears evident that little has been done in reframing police powers and tasks. Indeed, while almost every government after 1983 has been concerned by the military and reforming this latter's apparatus, only few provisions were enacted with regard to police.

Police impunity is still high, and, when charges are laid the punishments are merely symbolic. So much so, that, *e.g.* it took 22 years for a police officer who orchestrated a raid that led to the torture and death of a 17-years-old boy to be sentenced.<sup>224</sup> He was given a suspended sentence of three years in prison and will not spend a single day detained; no other policeman has been charged.<sup>225</sup>

The only government that got seriously engaged in police reform was that of President Alfonsín. It replaced high officers involved in human rights abuses during the regime, made it a requirement for the chief of the PFA (the Federal Police) to be a career police officer (not military), improved police training and reduced police resources.<sup>226</sup> However, since then any police reform that was proposed or enacted, have occurred as a response to recent scandals and were reversed anyway by the successor politician.<sup>227</sup>

Argentina's transition policies have been very successful with regard to truth-seeking and truth-telling mechanisms as well as with regard to accountability, despite over several years. Indeed, the "National Security" rhetoric and its denials have been totally overcome and nowadays nobody would be able to deny that during the dictatorship the worst human rights abuses have been committed. In the same way, leaving aside the years that such process took, nobody would claim that

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<sup>224</sup> *Id.*

<sup>225</sup> Carlos Rodríguez, *Walter Bulacio, la impunidad hasta el final*, Página/12, 9 November 2013.

<sup>226</sup> Michelle D. Bonner, *supra* note 213.

<sup>227</sup> Kent Eaton, *Paradoxes of Police Reform: Federalism, Parties and Civil Society in Argentina's Public Security Crisis*, *Latin American Research Review*, 43 (3), 5-32, (2008).

former militaries involved in such abuses were only executing orders. Notwithstanding this, police abuses committed in contemporary, or at least in democratic, Argentina are described with an analogous oratory that tends to define such episodes as “institutional violence” and, hence, wrongdoings.

The difference between shaping the torture to death of a minor as a wrongdoing rather than as a human rights abuse is enormous. In fact, the term “wrongdoing” seems to imply that police resorted to one of its legitimate uses of force, but, in the wrong situation. That is to say, in a legal system based on proportionality between offence and defence, a policeman threatened by knife fired against its aggressor with a machine gun.<sup>228</sup>

On contrary, “abuse” makes it in itself clear that the action has gone beyond of what its legal and natural limits should be. It immediately underlines its illegitimacy and, hence, calls for punishment.

This misperception of the phenomenon has as a consequence that the data prior analysed are not interpreted in Argentina as human rights abuses. Therefore, neither such country’s politics nor its long-standing human rights organisations (with some exceptions)<sup>229</sup> feel the need to intervene in the issue.

Moreover, after the return to democracy Argentina has seen common criminality raising over years provoking the inauguration of a “insecurity” rhetoric.<sup>230</sup> This has favoured the dissemination of a frame that presents human rights and human rights organisations as shielding “criminals” instead of protecting citizens. While similar discussions are becoming and have been popular also in European political discourses, the great inequalities among Argentinian citizens and the little police reforms pushed through since 1983, led to consequences that in the “first world” would have been called massacres or carnages.

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<sup>228</sup> Italian legislation provides for police or other public officials to resort to guns only in few emergency situations or to prevent crimes of particular severity.

<sup>229</sup> Corpepi and CELS for example.

<sup>230</sup> Michelle D. Bonner, *supra* note 213.



During the dictatorship, part of what was shocking to the most was that the regime targeted indiscriminately persons from all classes and races with a majority of victims, however, from the middle class. This latter, traditionally supported military coups in Argentina and the militaries usually defended the interest of the middle class.<sup>231</sup> Hence, what has been upsetting for the middle class after the last coup was that they were considered as targets as well. Moreover, traditionally the middle class is of European descent, it also usually has a quasi-European education and it constitutes the social class from which most jurists and legal practitioners come from.

Current police violence, on contrary, victimizes majorly the poor or popular classes that have little or no education. This is, unfortunately, not surprising given Argentina's long history of, widely unreported, racialized class divisions.<sup>232</sup> So much so, that shantytowns have been defined the source of crime by almost every politician since the latter 1990s.<sup>233</sup>

Thus, while the middle-class victims or survivors of the dirty war could trust on the support of many human rights organisations, that are usually formed by persons from the middle class, to seek for truth and justice, the same is not possible for the victims of existing repression practices. It might be indeed common, among middle class citizens, to know and to afford a lawyer; it is, however, totally unrealistic for a shantytown inhabitant.

In conclusion, the persistence of police practices from the dictatorship urges a thorough and objective analysis from Argentinian politics and policy makers. Beside the legal steps that have to be duly made in order to combat police impunity, economic and cultural factors have to be specifically addressed. In a sentence rendered by the Permanent

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<sup>231</sup> *Id.*; José Nun, *The Middle-Class Military Coup*, in *The Politics of Conformity in Latin America*, ed. Claudio Veliz (Oxford: Oxford University Press, 1967).

<sup>232</sup> Michelle D. Bonner, *supra* note 213.

<sup>233</sup> *Id.*

Peoples' Tribunal in 1991 regarding impunity for human rights violations in South America, the Court underlined how economics played a prominent role in allowing perpetrators to commit such heinous crimes and evade accountability.<sup>234</sup>

Indeed, as long as extreme poverty and extreme inequalities persist in a society one class will always be more vulnerable, if not at the mercy, of the others. This has not to take necessarily the form of one class actively trying to exploit or destroy the other, since, as Argentina's police practices show, indifference would be enough. It is, in fact, no exaggeration to claim that poorer classes in such country, as it is the case in all Latin America, have almost no idea of what their rights are and how many rights they have. So much so, that western countries societies human rights situation has improved proportionately to their homogeneity.

Thus, what ultimately renders a country human rights friendly is its citizens self-consciousness and well-being, which, in any case, have to be upheld by strong and consistent political will.

## **5.2 The Weaknesses of the Right to the Truth and Its Negative Implications**

So far, the Right to the Truth has been analysed focusing on its positive implications demonstrating that such right may indeed give significant contributions in rendering accountable perpetrators of serious human rights violations as well as in transitional justice.

However, Argentina's experience is, in this regard, thought-provoking and offers suggestions on the Right to the Truth's weaknesses and negative implications. In particular, the ongoing repressive police practices in such country seriously question that right's function as a mean to guarantee non-recurrence for egregious crimes. This,

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<sup>234</sup> Permanent People's Tribunal, *Impunity for Human Rights Violations in Latin America*, Bogotá, (1991), paras. 36-43.

nevertheless, does not undermine the Right to the Truth's fundamental contribution in the eradication of impunity for dirty war abuses in Argentina, but, as a matter of fact, the overall human rights situation has still to be improved.

The Right to the Truth, according to the definition transposed in this paper, implies the obligation, on behalf of the State, to reveal to the victims and society all that can be reliably known regarding the facts and circumstances related to gross or systematic human rights violations of the past, including the identity of the perpetrators and instigators, as well as to thoroughly investigate those facts.<sup>235</sup> It is, thus, evident *ictu oculi* that such right may be only exercised when the violation or violations already took place.

Hence the Right to the Truth is a prominent *ex post* instrument, it operates after that the victim of human rights abuses has become such. On contrary, "traditional" or "old" human rights usually protect from eventual future situations. The Right to Life or the Right to be free from torture or inhuman or degrading treatment, for instance, pose a general prohibition, that States have to respect, which implies a number of obligations and render the transgressors accountable.

Moreover, the legal doctrine and the various International Tribunals that watch over the respect of the said obligations have developed a number of procedural limbs to strengthen the safeguards posed by such rights. In fact, in the previously discussed ruling in *El Masri*, the European Court of Human Rights stressed that the need of a thorough and effective investigation derives from the procedural limb of article 3 (Prohibition of torture) of the Convention.<sup>236</sup>

This, in turn, suggests another potential weakness of the Right to the Truth. Given that such right's aim is that of disclosing the "truth", principally by urging investigations and prosecutions, and, at the same time, due to the existence, in practically all international human rights

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<sup>235</sup> See *supra* Chapter I.

<sup>236</sup> *El Masri*, *supra* note 107, par. 182.

instruments, of the Right to (access to) Justice, the Right to a fair trial and the procedural limbs of “traditional rights”, the Right to the Truth seriously faces the danger of being considered superfluous.

All the aforementioned legal tools have, indeed, the function to oblige States to investigate and prosecute violations, hence the Right to the Truth does not seem to answer to an impellent need of international human rights law. Having again regard to *El Masri* this appears clear also by taking into account the concurring opinion of judges Casadevall and López Guerra.<sup>237</sup> According to them, “a right to the truth” would have been already comprised in the Court’s requisites for a violation of the procedural aspect of article 3 rendering hence, such right’s separate analysis “redundant”.<sup>238</sup>

This view is not the interpretation of an old-school scholar unwilling to collaborate with the advancements in international law. In fact, necessities of legal certainty militate in favour of such an interpretation. Several legal tools already exist and, hence, additional rights that, however, pose the same obligations as others may fragment the human rights array excessively and bring confusion to both right-holders and right-enforcers. Most and foremost in countries and societies affected by severe poverty and great inequalities, which are usually more exposed to human rights violations, persons barely know to which rights they might be entitled. Further, such societies usually have insufficient school institutions and, this, may render difficult for them to fully understand what *e.g.* Freedom of expression or torture are, let alone the Right to the Truth.

Indeed, the concept of truth itself may often raise some serious problematics. Law is commonly thought to regulate or clarify a dispute and, in the case of human rights law, a dispute between an individual who suffered a violation of its most basilar rights and another who, in turn, has committed the said violation.

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<sup>237</sup> *Id.*, *supra* note 117.

<sup>238</sup> *Id.*

Having in mind the Italian legal system, where even small claims procedures between two persons make it over years to the Court of Cassation (the court of last instance in Italy) and, hence, both are unwilling to accept the other's truth, it appears difficult, in the aftermath of grave or systematic human rights violations, to agree or shed light on "the truth".

Once again, the Argentinian experience is emblematic. After being pardoned by President Menem, former General and *Junta* leader Rafael Videla, wrote a public letter to the high-command claiming that the Army had been unjustly accused and, hence, deserved an apology and vindication from society.<sup>239</sup> He was not the only who viewed Argentina's recent past in this optic. Indeed, the very pardons issued by Menem in 1989 and 1990 were a necessary step to avoid further exacerbation between the Armed Forces, which really thought they had beaten subversion, and the government.

Another example may furnish a better illustration; studies made in post-war Serbia offer an eloquent example of how many different "truths" may exist.<sup>240</sup> While 91.5% of the Serbian interviewees had heard that Sarajevo had suffered a terrible seize during which snipers regularly shot at civilians, only 54.7% of them believed it.<sup>241</sup> When they were asked if "the knowledge of new evidence would have changed their minds regarding the sides involved in the war", 85.5% answered no and only 14.5% stated it might have been "willing and able to adjust their views according to the new evidence".<sup>242</sup>

This, does not only demonstrate that it might be very difficult for former conflicting parties to agree or furnish an objective truth at trial, in

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<sup>239</sup> Americas Watch, *supra* note 162.

<sup>240</sup> The information below regarding public opinion in Serbia is from Dejan Ilic', 'The Yugoslav Truth and Reconciliation Commission: Overcoming Cognitive Blocks,' *Eurozine*, 23 April 2004, available at <http://www.eurozine.com/articles/2004-04-23-ilic-en.html> (accessed 31 January 2007). Ilic' analyzes the original data in Svetlana Logar and Srajan Bogosavljevic', 'Viäjenje Istine u Srbiji,' ['Perception of Truth in Serbia'] *Re'c* 62(8) (2001): 7-34.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

addition, it shows how potentially jeopardizing the introduction of truth in a legal discourse could be. Indeed, according to due-process guarantees the facts that a tribunal may hold as “true” are only those which can be proven in court. Further, trials are not supposed to ascertain truth, rather, they have the scope to determine whether an individual is criminally liable or if a claim is justified. In addition, human rights, and rights in general, are aimed at protecting a definite juridical good. The Right to Life, the Right to Freedom of expression etc. have as their scope the defence of inalienable and precise juridical and natural goods. How may “truth” be interpreted in the same way? How broad would become the protection offered by the Right to the Truth if “truth” is interpreted as a juridical good?

That is not to say that truth does not have place into a courtroom, but, it cannot be the major claim in front of a tribunal. It is, thus, fundamental to establish a precise and circumscribed field of application for the Right to the Truth in order to avoid costly losses of time in trials and potentially pretext claims.

Moreover, the potentially infinite facets that “truth” may have also seriously question the Right to the Truth’s reconciliatory capacity in transitional justice. Just as in trials, in times of transition from dictatorship to democracy or in the aftermath of violent conflicts, there will always be two parts in conflict trying to impose their own “truths”. In addition, the role of “loser” and “winner” are already assigned in transitions while during trials only the outcome of the ruling will make such division.

As a consequence, it is highly probable that the winning party, in shaping the transition will surely give more prominence to its own truth, maybe even by discrediting that of the others. As a matter of fact, truth can foster reconciliation in the same way as it may create divisions.

From a more juridical perspective, it might be argued that the Right to the Truth is able to render abuses not subject to prescription by maintaining States’ obligation to investigate also long after the abuse

has been committed. Nonetheless, as claimed previously, such right operates after serious or systematic human rights violations; that is to say, the gravest crimes in international law, most notably, continuing crimes such as enforced disappearances.

Furthermore, the Right to the Truth presumes that basilar information regarding the facts and circumstances of the crime to be unknown. Hence, gross or systematic violations of human rights and the lack of factual information regarding the circumstances of the crime should be the two preconditions to trigger such right's protection.

However, the cases in which the Right to the Truth may be invoked are already regulated in the sense to exclude the prescription of the illicit act that requires State's intervention. In fact, since the violations themselves are continuing crimes, whenever States omit to observe their obligations with regard to investigating and prosecuting, the State itself is committing a violation. This latter, being linked to a continuing crime becomes continuing on its turn. Put it in a nut shell: the lack of investigations and prosecutions into a continuing crime renders the State's inaction a continuing violation in turn and, at the same time, implies a continuing obligation to take these mandatory steps.

Such interpretation finds confirmation in international law itself. The UN 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, for instance, beside obviously stressing that such offences have to be considered "imprescriptible", adds that its provisions ought to be observed "irrespective of the day of their commission";<sup>243</sup> the same obligations are enshrined in the 1974 European Convention on the Non-Applicability of Statutes of Limitation to Crimes against Humanity and War Crimes.<sup>244</sup> The 1984 Convention against Torture and other Cruel,

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<sup>243</sup> UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, 26 November 1968

<sup>244</sup> European Convention on the Non-applicability of Statutory Limitation to Crimes against Humanity and War Crimes, 25 January 1974; 1974 European Convention, Art. 1(1): 'Each Contracting State undertakes to adopt any necessary measures to secure that statutory

Inhuman or Degrading Treatment or Punishment does not make references to the non-applicability of statutory limitations, but the Committee against Torture has often rendered comments recommending that punishments for human rights violations should be imprescriptible.<sup>245</sup> Finally, the 1966 International Covenant on Civil and Political Rights despite allowing in article 4 (1) States to recur to statutory limitations in times of public emergency, still, list at 4 (2) a number of articles that have always to be observed *inter alia* articles 6 (Right to life) and article 7 (Prohibition of torture).<sup>246</sup>

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limitation shall not apply to the prosecution of the following offences, or to the enforcement of the sentences imposed for such offences, in so far as they are punishable under its domestic law: The crimes against humanity specified in the Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948 by the UN GA; the violations specified in Art. 50 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Art. 51 of the 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Art. 130 of the 1949 Geneva Convention relative to the Treatment of Prisoners of War and Art. 147 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War; any comparable violations of the laws of war having effect at the time when this Convention enters into force and of customs of war existing at that time, which are not already provided for in the above-mentioned provisions of the Geneva Conventions, when the specific violation under consideration is of a particularly grave character by reason either of its factual and intentional elements or of the extent of its foreseeable consequences; Any other violation of a rule or custom of international law which may hereafter be established and which the Contracting State concerned considers according to a declaration under Art. 6 as being of a comparable nature to those referred to in paragraph 1 or 2 of this article.’

<sup>245</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, UN GA Res. 39/46. As of 1 September 2006; Committee Against Torture, Concluding observations/comments on Venezuela, 23 December 2002, CAT/C/CR/29/2, at §6(c): ‘It requires the State to investigate and impose penalties on human rights offences, declares that action to punish them is not subject to a statute of limitations and excludes any measure implying impunity, such as an amnesty or a general pardon’; Committee Against Torture, Concluding observations/comments on Turkey, 27 May 2003, CAT/C/CR/30/5, at §7(c): ‘Repeal the statute of limitations for crimes involving torture, expedite the trials and appeals of public officials indicted for torture or ill-treatment, and ensure that members of the security forces under investigation or on trial for torture or ill-treatment are suspended from duty during the investigation and dismissed if they are convicted’; Concluding observations/comments on Slovenia, 27 May 2003, Cat/C/CR/30/4, at §6(b): ‘Repeal the statute of limitation for torture and increase the limitation period for other types of ill-treatment’; Concluding observations/comments on Chile, 14 June 2004, CAT/C/CR/32/5, at §7(f): ‘Consider eliminating or extending the current 10-year statute of limitations for the crime of torture, taking into account its seriousness.’

<sup>246</sup> International Covenant on Civil and Political Rights, Adopted by the General Assembly of the United Nations on 19 December 1966; art.4.



In addition, the prohibition of torture and basic human rights have become norms of *jus cogens* and are thus inviolable norms. Hence, when the Inter-American and the European Court of Human Rights claimed that the uncertainty related to the fate and whereabouts amounted to torture or ill-treatment, they recognised a transgression of a well-known obligation rather than a new right.

Many national laws have analogous or even overlapping provisions for crimes of particular gravity<sup>247</sup> and, as previously discussed, the Argentinian Supreme Court upheld the decision to reopen trials on the basis of the non-applicability of statutes of limitations to crimes such as enforced disappearances and torture rather than on the Right to the Truth.

There would be, thus, no apparent reason to vindicate such additional right given the several international and national instruments that may serve the scope of rendering human right violations imprescriptible.

As a consequence, the Right to the Truth may be a surplus also in this regard.

Another issue posed by such right is its enforceability *vis à vis* non-State actors. In fact, the Right to the Truth has always been shaped as an obligation on behalf of States or other public authorities.

At the same time, however, such right has been originally derived from the States' general obligation to guarantee and protect human rights. Accordingly, the State should intervene whenever a human rights violation is claimed disregarding if the perpetrator is a private or a public actor.

It appears unthinkable to exclude from the outset non-State actors from the array of possible perpetrators of gross or systematic violations of human rights. Torture or enforced disappearances remain such also when their executor is neither a public servant nor a public official.

Nonetheless, this critical aspect has never been discussed nor analysed

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<sup>247</sup> The Italian penal code, for example, prescribes at article 157 that crimes for which life imprisonment is provided are imprescriptible.

with the potential to leave a not insignificant lacuna in the Right to the Truth's framework.

Lastly, such right's claimed potential to guarantee non-recurrence is seriously questionable. As noted with regard to Argentina, almost 20 years of transitional policies, "Truth Trials" and a National (Truth) Commission did not impede police to persist in abusive practices from the dictatorship era.

In the same way, the Nuremberg Trial did not prevent the re-occurrence of a genocide in the heart of Europe in 1995 (50 years after the end of World War II and the Trial itself).<sup>248</sup> Nor did the establishment and the sentences rendered by the two UN-sponsored *ad hoc* tribunals (International Criminal Tribunal for the Former Yugoslavia, ICTY; International Criminal Tribunal for Rwanda, ICTR) prevent serious human rights violations to occur in Syria, Myanmar and Nicaragua.

Human history is a constant of genocides and massacres, but, unfortunately, the telling or the truths behind those heinous facts never posed a serious deterrent for those willing to commit them.

It is, thus, surely fundamental to keep the past in mind, to keep its painful memory alive, but these cannot and will not be sufficient guarantees of non-recurrence.

The Right to the Truth has surely the potential to shed light on the darkest and most infamous aspects of a tyrannical government (which may exist even in democracy), of an authoritarian State or of a former abusive ruler.

Truth has also the capacity to give redress to those who suffered as a consequence of the lack of information regarding a missing or disappeared relative, in so far as it furnishes them exactly what they were suffering for. Still, some issues remain, precisely those addressed above which, among the other things, raise deeper questions with regard

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<sup>248</sup> The reference regards the Srebrenica massacre of July 1995 in the homonymous Bosnian city perpetrated by Bosnian-Serb forces in which more than 8,000 Bosniaks, mainly men and boys, died. In 2004, the International Criminal Tribunal for the Former Yugoslavia held in the case of *Prosecutor v. Krtic* that the massacre constituted genocide.

to human rights.

According to what has been endorsed in the previous chapter, the Right to the Truth emerged in societies where atrocious abuse were daily occurrence and the very perpetrators first denied and then tried to escape accountability. On the same time, it has been argued that this necessity lacked in Europe *inter alia* because of this continent's longer National States tradition.

However, such analysis lacked an obvious, though fundamental, element: the economical factor. Since modern States exist and several philosophers have dealt with the State-citizens relation, Europeans have interpreted it as a *do ut des* affiliation. The more States became rich the more its citizens became self-conscious and less prone in being submissive to a despotic authority.

On the contrary, when Europeans created their colonies in poor and "ignorant" countries and imported, or even imposed their culture, they had little regard in taking into account the local living conditions.

Human rights were not an invention of the Neanderthal, neither of the Middle-age, they first appeared in embryonic form during the Roman Republic and reappeared only in the 18<sup>th</sup> century, the century of the Enlightenment. Hence, when Europe started "to come out of the dark", when Europe had one of its many peaks in well-being.

Also in this regard Argentina furnishes an eloquent example. Apparently, the ongoing police abuses are a consequence of the extreme poverty of several parts of the country. In the same way, poorer people are usually the favourite victims of human rights abuses.

The struggle for satisfying basilar needs such hunger and thirst and the poor education that this social classes usually have leaves them since ever in deficient defence against any possible violation of their rights.

In the end, the determining factor for an effective protection and promotion of human rights in a country is its economy and the homogeneity of its society. The several "annual reports", "country visits" etc. all point to this conclusion. So much so, that the poorest

continent in the world, Africa, has been and still is the scene of ferocious civil wars and gross human rights violations.

In so far, the Right to the Truth may give little contribution and the international community should develop more efficient economic-help-programmes as well as seriously effective and deterrent penalties for human rights violations, rather than elaborating new and overlapping rights.

Where the most basilar rights such as the Right to Life are infringed an additional right that “confirms” that such infringement took place can bring few improvements. It is, thus, indispensable, in order to not render the Right to the Truth superfluous, to define its framework and the situations in which it might be invoked. Otherwise, international human rights scholars will lose a chance to advance the protections that the weakest persons deserve.

## Final Remarks

The relationship between modern States and citizens has usually been characterized by mutual obligations and rights. Simplistic as it may appear, such relationship might be summed up in the Latin maxim *do ut des* since, as Hobbes claimed human beings live in societies because it resulted more advantageous than living a life trying to overwhelm my fellow man. In the same line, citizens, or at least self-conscious citizens, will accept only those State authorities which respect such basic and unwritten principle of societal life.

However, States are the sole legitimate owners of public force and will, hence, detain a stronger position of its citizens. Human rights, by recognising self-standing and natural rights to every human being, are aimed at marginalising also this inherent power of the State. But, what happens when human rights are brutally violated by the State?

According to this thesis here is when the Right to the Truth should come in place posing a number of obligations on behalf of the State that violated or was accomplice in the said violation. Nevertheless, for the Right to the Truth to pose serious duties on States by itself is not sufficient. Indeed, a State that systematically deports, executes or tortures its citizens will hardly desist from committing such abuses for the sole existence of the Right to the Truth.

For the obligations posed by such right to be effective, to constitute a valid deterrent a willing and strong international community is vital. The failures of the Society of Nations before World War II and those of the United Nations during the Cold War are only little examples of how the international community should not act. Every human right violation, every war crime, genocide, crime against humanity are a slap in the face of international law and human values that are claimed to be the base of the global world.

The Right to the Truth may, in fact, help victims, their next of kin and societies to gain some form of reparation, to have culprits punished and

their stories told, but, still, it can do little for future violations. It has scarce preventive power. In addition, without other States, international organisations or courts putting pressure on a human rights-violator State also the abovementioned goals will hardly be achieved.

Which may be then the solution?

Europe is in this regard a helpful example. After World War II almost every European country joined a culture of pacifism, respect of human dignity and schooling. These three variables resulted in societies becoming more and more self-conscious that, in turn, produced human rights respectful politicians and, hence, States.

Nevertheless, the economic wealth of the continent played a fundamental role too. It is, in fact, not a case that the gravest human rights violations of the last 70 years usually took place in the so-called third world or, anyway, in economically disadvantaged regions.

Moreover, where money lacks also schooling policies are usually very poor and, as a consequence, citizens tend to be more vulnerable to easy vows of aspiring authoritarian rulers. In Argentina, for instance, there is few persons that admit that the Falklands/Malvinas debacle was nothing more than an operation of mass distraction due to the weakness of the *Junta*.

That is to say, that human rights abuses are best prevented through an effective human rights culture and adequate economic resources among citizens. As long as there will exist sections of societies invisible to the others it will be easy for those willing to do so, to abuse of them.

It is, however, also a responsibility of the international community to grant and protect the rights and guarantees that international law and international human rights law pose. In this regard the Right to the Truth has been an important achievement since the Inter-American Court of Human Rights and the United Nations have been too long the sole actors trying to combat the heinous crimes that were committed in South America.

Nonetheless, there is still much to do in order to render such right a real deterrent for human rights violations.

In fact, an international convention or treaty posing binding legal obligations with correlated sanctions is still lacking, despite it would have been the most obvious and effective way to ensure the Right to the Truth. States reluctance and the difficulty to find an accord among the various actors of the international community are for sure valid obstacles. Anyway, some minimal mechanisms to impose States behaviours they were previously unwilling to hold exist. It has been done with the International Criminal Tribunal for the Former Yugoslavia and Rwanda, for example.

Memory is one the few things that remains after decades and centuries, the knowledge of the past is what helps human beings not to make an error twice. As a consequence, the memory of past abuses or of violent conflicts is what should help every society to be watchful and to sidestep suffering from already known violence. In the same way, the empathy provoked by the knowledge of a fellow man suffering will impede to disregard other future abuses against others.

Hence, despite all its weaknesses the Right to the Truth remains a precious and fundamental human right that the international community and States individually should recognise, protect and upheld in order to avoid the “wheel of history” to turn backwards.

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