

THE RIGHT TO TRUTH AND REPARATION FOR VICTIMS OF GROSS HUMAN RIGHTS VIOLATIONS:

The Case of Colombia



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Abbreviations

ACHR	American Convention on Human Rights
Asfaddes	Association of Families of the Disappeared and Detained (Colombia)
AUC	United Self-Defense Forces of Colombia
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CED	International Convention for the Protection of All Persons from Enforced Disappearance (not yet in force)
CCAJAR	Corporación Colectivo de Abogados José Alvear Restrepo (Colombia)
CNRR	National Commission on Reparation and Reconciliation (Colombia)
DDR	Disarmament, demobilization and reintegration
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
ELN	National Liberation Army (Colombia)
FARC	Revolutionary Armed Forces of Colombia
HRC	United Nations Human Rights Committee
IACFDP	Inter-American Convention on the Forced Disappearance of Persons
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICTJ	International Center for Transitional Justice
ILC	International Law Commission
MOVICE	National Movement of Victims of State Crimes (Colombia)
NGO	Non-Governmental Organization
OAS	Organization of American States
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNHCHR	United Nations High Commissioner for Human Rights

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1 Introduction

1.1 Background to the study

In a state recovering from armed conflict characterized by massive human rights violations, there are many challenges to overcome. Measures to address these challenges vary from one context to another, depending on the type of conflict, the country's history and its current social, political, legal and economic situation. The vast majority of today's conflicts are internal, they are extremely protracted and complex and the majority of those being killed and wounded are civilians. Ending the conflicts that are causing so much harm is the number one priority, and perhaps rightly so. Unfortunately, when this is the main concern, the victims of the conflict tend to be forgotten and ignored. During peace negotiations, DDR programs and amnesties are implemented more efficiently than reparations programs, and often reparation for victims is simply neglected.¹

Transitional justice refers to a range of approaches that societies take on to deal with legacies of widespread human rights abuse as they move from a period of violent conflict towards peace, democracy, rule of law and respect for human rights. These approaches are both judicial and non-judicial, including prosecutions of perpetrators, truth-telling initiatives, victim reparations, and institutional reforms.² Reparations are essential to any transitional justice initiative and are the part of transitional justice that is most specifically focused on the recognition of victims' rights and the harm suffered.³ Truth-seeking is also victim-focused, both as an independent measure and as a part of reparations. Transitional justice mechanisms can only be considered legitimate if the victims of the conflict are able to participate in and benefit from them.

¹ Schotsmans (2005) p.125.

² ICTJ: <http://www.ictj.org/en/tj/780.html> (visited 15 December 2007)

³ Magarell (2007), p.2.

Notwithstanding the widespread abuses of recent history, few efforts have been taken to provide redress to either victims or their families.⁴ In international law, the trend the last decades has been criminalization, focusing on the perpetrator rather than the victim. However, with the adoption of the Rome Statute of the International Criminal Court (ICC), providing for the participation of and reparation to victims, the victim's role has become more prominent.⁵ At a time when large numbers of people are victims of gross human rights abuses, it is important to examine what are their rights in terms of receiving reparations and knowing the truth, and establish how these are protected on the national level in accordance with the international and regional legal framework.

1.2 Problem statement

It is recognized in international law that victims of human rights violations have a right to remedy. Three main components of the right to remedy can be identified; the right to know, the right to reparation and the right to justice.⁶ Of those rights, the right to reparation and the right to truth are frequently bartered away for political reasons. These two rights are in many ways related, but the exact nature of the relationship is somewhat unclear.

It is thus, first of all, meaningful to study how victims' rights to truth and reparation in cases of gross human rights violations are protected in international human rights law, and how they can be implemented on the national level. Preliminary to the above examination are questions such as: What are gross human rights violations? What are the international standards regarding the right to truth and reparation for such abuses? As human rights treaties are living documents, how has the right to truth and the right to reparation been developed in international jurisprudence? What is the relationship between the two rights?

⁴ Bassiouni (2002), p.38.

⁵ Zwanenburg (2006) p.647.

⁶ *Question on the impunity of Perpetrators of Violations of Human Rights (civil and political rights)*: Revised final report prepared by Mr. Joinet, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, annex II. Hereinafter the Joinet Principles.

1.3 The objective and purpose of the thesis

The main research aim of this thesis is to examine the legal evolution of the right to truth and the right to reparation for victims of gross human rights violations. This research aim is supported by three sub questions. Firstly, how are these rights protected under international human rights law? Secondly, how have the rights evolved through the jurisprudence of the Inter-American Court of Human Rights?⁷ Thirdly, how are these concepts of truth and reparation interrelated? Fourthly, to what degree does the protection of the victims' rights in Colombia meet the international standards?

1.4 Definitions

For the purposes of this thesis, it is necessary to clarify some central terms. "Remedy" or "remedies" refer to the means by which a right is enforced, or the means by which a violation of a right is prevented or redressed.⁸ For the purposes of this paper, remedies for gross human rights violations are seen as including the victim's right to equal and effective access to justice; adequate, effective and prompt reparation for the harm suffered; and access to relevant information concerning violations and reparation mechanisms.⁹ "Reparation" can in its simplest form be defined as the provision of redress to victims of human rights abuses¹⁰ and may include a wide range of measures.¹¹ For the purposes of this paper, a "victim" is a person who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of their fundamental legal rights through acts or omissions that constitute gross violations of international human rights. The term "victim" may also include a dependant or a member of the immediate family or household.¹²

⁷ Hereinafter the Inter-American Court or IACtHR.

⁸ Laplante (2004) p.351.

⁹ Basic Principles and Guidelines on the Right to Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, contained in the annex to Resolution A/RES/60/147 of the General Assembly, adopted on 16 December 2005, without a vote. Principle 11. Hereinafter the Basic Principles.

¹⁰ The Final Report of the Truth & Reconciliation Comm. of Sierra Leone, Vol.2, Ch.4: "Reparations", para.22.

¹¹ See section 2.2.3 of this paper for the various forms of reparation.

¹² Basic Principles, Principles 8-9.

1.5 Methodology and sources

The nature of this study requires the use of an interdisciplinary approach. The study is mainly conducted from a legal, human rights approach with focus on the right to reparations and the right to truth, stating the applicable law at the international and regional level. The thesis further looks at case judgments from the Inter-American Court to see how the content of the concept of truth and reparations has evolved. Based on secondary sources the study gives a theoretical presentation of how truth and reparations can be defined, what these concepts entail in a transitional justice setting, and how the concepts are interrelated. Colombian legal sources will be used to look at the degree to which victims' right to truth and reparation is protected by law on the national level and what obligations the provisions of these laws place on the Colombian government. Examining the implementation and practices requires the use of a social science perspective. As the process in Colombia is an ongoing one, no conclusive remarks have been given.

The international human rights instruments used as sources for this thesis include both "hard law" treaties like ICCPR, and "soft law" instruments like the Basic Principles and Guidelines on the Right to Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles). "Hard law" signifies treaties or conventions legally binding upon States Parties, while "soft law" means standards which although not being legally binding, may hold a high political and moral status internationally. Other sources are books and journal articles, reports and recommendations by UN bodies, reports and studies by NGOs, case law from the Inter-American Court and the Constitutional Court of Colombia and information from official websites. The study has mainly used desktop research as the method of data collection.

1.6 Scope and limitation of the thesis

The thesis is due to constraints on time and length limited mainly to the mentioned aspects of victims' rights to truth and reparations. Truth and reparation is closely related to justice, as they are all part of the trinity of State obligations to victims. However, to avoid making this thesis yet another contribution to the much discussed truth-versus-justice debate,¹³ the justice part will not be analyzed, although not without recognizing its importance.¹⁴

Since the topic of victims' reparation is very broad, it has been important to limit the study to those of gross violations. This does not mean that there should not be redress for victims of ordinary violations. As this thesis is written from a human rights perspective, the scope is further narrowed down to gross *human rights* violations, although recognizing the importance of international humanitarian law in armed conflict. Human rights violations are by definition violations directly committed by the State or State officials, or with its support or acquiescence. If the State fails to prevent and/or investigate human rights violations committed by others, this also constitutes a breach of international human rights law. The notion of State responsibility is therefore crucial to this study.

Victims of enforced disappearance receive particular attention in this thesis since the right to truth is especially important in cases where there is uncertainty about the events and the fate of the victim. The regional focus will be on Latin America, as it is the Inter-American human rights system which has been in the forefront of developing jurisprudence on truth and reparations. The choice of Colombia as the case study is justified by its actuality and the qualification of violations recorded during the conflict, especially related to enforced disappearances. It is further a particularly interesting study because transitional justice mechanisms have been introduced while the country is still in conflict, not post-conflict

¹³ For contributions to this debate, see Skaar (2005); Rotberg and Thompson (2000); and Roth-Arriaza and Mariezcurrena (2006).

¹⁴ This is partly why the focus of this thesis is specifically on reparations, and not remedy in general, as the "access to justice" part will be outside of the scope of the paper.

like most other countries. The study of Colombia helps anchor the analysis, but does not exhaustively represent the varied approaches to this research. It can nevertheless illustrate the debate and raise a general trend that can be helpful in solving subsequently similar problems.

Lastly, this study does not discuss in depth, nor does it provide an exhaustive historical account of the Colombian conflict and of the implementation of transitional justice mechanisms in the country. It limits itself, to the most part, to describing relevant facts, and analyzing the legal framework and its implications for victims claiming their rights to truth and reparation.

2 Making reparation to victims of gross human rights violations: Legal and conceptual framework

2.1 “Gross” human rights violations under international standards

2.1.1 Definition of ‘gross’ human rights violations

Though the violation of any of the rights contained in international human rights instruments is considered reprehensible, a focus on “gross” human rights violations has several times been used by regional human rights systems.¹⁵ At the universal level, although not used in the ICCPR, the characterization of human rights violations as “gross” constitutes the jurisdictional threshold for consideration of human rights complaints following ECOSOC Resolution 1503.¹⁶

It can be difficult to distinguish between gross and less serious human rights violations, and this cannot be done with complete precision.¹⁷ According to the conclusions of the Maastricht Seminar on the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, “the notion of gross violations of human rights and fundamental freedoms includes at least the following practices: genocide, slavery and slavery-like practices, summary or arbitrary executions, torture, disappearances, arbitrary and prolonged detention, and systematic

¹⁵ Though ACHR does not expressly refer to gross human rights violations, its monitoring bodies have made use of it, see *La Rochela Massacre v. Colombia*, IACtHR (2007) para.79, where the IACtHR speaks of the State of Colombia’s “duty to investigate gross violations of human rights”.

¹⁶ ECOSOC Resolution 1503 (XLVIII) (1970) authorizes the Sub-Commission on Prevention of Discrimination and Protection of Minorities to consider communications received from individuals and groups that “appear to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms”.

¹⁷ See du Plessis and Peté (2007) for a discussion of what constitutes “gross” human rights violations.

discrimination”.¹⁸ A working paper by the Commission on Human Rights on the definition of gross and large-scale violations of human rights as an international crime further confirms that it “will be fairly obvious that any list of gross human rights violations will include most large-scale violations: genocide, disappearances and the like”.¹⁹ The Basic Principles do not contain a definition of what constitutes “gross” violations of human rights, thus maintaining flexibility for a concept that is fluid and evolving.²⁰

2.1.2 Enforced disappearances

Enforced or involuntary disappearance²¹ is a particularly gross and heinous violation of human rights. It violates an entire range of rights contained in the major international human rights instruments, including the right to recognition as a person before the law, the right to liberty and security of the person, the right not to be subjected to torture and other cruel, inhuman or degrading treatment and punishment, and, when the disappeared person is killed, the right to life.²² It has further been established in jurisprudence that as long as the whereabouts of the disappeared person is unknown, the violation is *continuing*.²³ Enforced disappearance has been defined as a “crime against humanity” by a number of important international instruments including the Rome Statute of the International Criminal Court²⁴, the UN Declaration on the Protection of All Persons from Forced Disappearance, and the recently adopted UN International Convention for the Protection of All Persons from Enforced Disappearance (CED).²⁵

¹⁸ Van Boven (1992) p.17.

¹⁹ Working paper submitted by Mr. Stanislav Chernichenko in accordance with Sub-Commission decision 1992/109, E/CN.4/Sub.2/1993/10 (8 June 1999), para.15.

²⁰ Zwanenburg (2006) p.650.

²¹ See Pérez Solla (2006); and Scovazzi and Citroni (2007) for literature on this subject.

²² UNHCHR, Fact Sheet No.6 (Rev.2) on Enforced or Involuntary Disappearances.

²³ *Velásquez-Rodríguez v Honduras*, IACtHR (Merits, 1988) para.155.

²⁴ Rome Statute, Art.7(1)(i). Enforced disappearance of persons is a “crime against humanity[...] when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.

²⁵ The Convention was adopted on 20 December 2006 by UN General Assembly resolution 61/177 on its sixty-first session, and has not yet entered into force. Hereinafter referred to as CED.

In Latin America, enforced disappearance has been a widespread and systematic practice since it was used as a form of political repression under the dictatorships in the Southern Cone in the 1970, and was the reason why the Inter-American system of human rights came into existence. The Inter-American system has been in the forefront in this area ever since, with a well-developed framework, many cases and a convention specifically on enforced disappearances. The Inter-American Convention on the Forced Disappearance of Persons defines forced disappearance as:

the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.²⁶

This is very similar to the definition given of enforced disappearance in CED. The definition in CED specifies however that the result of the disappearance as defined is that it places the person “outside of the protection of the law”.²⁷ The person who is forcibly disappeared is taken to an unknown location and deprived of all rights. He knows that his fate is in the hands of his captors, and it is up to them how long he will suffer, how much he will be tortured and if he eventually will die. The enforced disappearance does not only violate the rights of the direct victim, but also those of his family. It violates their right to know the truth about what has happened, and causes them great emotional harm. Without knowing the fate of their beloved one, they wait for years for news that may never come. This uncertainty deprives them of the possibility of mourning and adjusting to their loss. Even if they learn that the victim is dead, they may never find out where the bodily remains are located and will never be able to give him a proper burial. As a result of this trauma, the family may need medical or psychological treatment. However, this may be difficult as they will also have suffered economical consequences as a result of the disappearance since the person who is disappeared is usually the breadwinner of the family. Without a death certificate, pensions or other forms of support will be hard to obtain. Furthermore, resources will be spent searching for the disappeared and trying to find out the truth, which

²⁶ IACFDP Art.2.

²⁷ CED Art.2.

gives the family an additional economical burden. To apply for reparations, they will need to cover travel expenses and pay for legal assistance, which is financially impossible for many victims.

The adoption of CED in 2006 confirms the continued need for international protection against disappearances. The Convention is considered to be one of the strongest human rights treaties ever adopted by the UN, as some of its provisions appear for the first time and introduce important new standards. It aims to prevent enforced disappearances from taking place, uncover the truth when they do occur, punish the perpetrators and provide reparations to the victims and their families.²⁸ However, for the Convention to become effective, States must ratify it and develop national legislation to implement it.

By making someone disappear, or not investigating properly accusations of disappearances, the State has failed its citizens; it is the ultimate breach of the democratic contract. What can the State do and what is it obligated to do to make up for this kind of violation?

2.1.3 State responsibility

The law of state responsibility enshrines the underlying principle that every breach of an international obligation attributable to a State carries with it a duty to repair the harm caused.²⁹ This is based on the *Chorzów Factory case*,³⁰ which remains the cornerstone of international claims for reparation, and has been confirmed in subsequent jurisprudence of international human rights courts.³¹ The State's core responsibility is to respect and ensure the human rights of all individuals within its territory and subject to its jurisdiction,³² and failure to do so triggers the State responsibility to repair. Some scholars claim that "for the

²⁸ Amnesty International: <http://www.amnesty.org/en/enforced-disappearances> (visited 10 March 2008).

²⁹ Shelton (2005) p.12.

³⁰ *Chorzow Factory case*, PCIJ (Merits, 1928), p.24: 'it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation'.

³¹ Cited in, *inter alia*, *Velásquez-Rodríguez v. Honduras*, IACtHR (Reparations, 1989) para.25; *Aloeboetoe et al. v. Suriname*, IACtHR (Reparations, 1993) para.43; *Caballero Delgado and Santana v. Colombia*, IACtHR (Reparations, 1997) para.15.

³² This formulation is from ICCPR Art.2, but similar formulations are used in other human rights instruments.

sake of conceptual clarity”, one should distinguish between the *primary* duty of a State to comply with its human rights obligations, and the *secondary* duties of a State “that arise as a result of the breach of that primary duty”³³, such as providing reparations for human rights violations for which it is responsible.

The International Law Commission’s Draft Articles on State Responsibility, (ILC Articles), codify the State obligation to make reparation for internationally wrongful acts.³⁴ The ILC Articles lay down the obligation of the responsible State to cease the act, offer guarantees of non-repetition, and to make full reparation for the injury caused by this act, including both material and moral damage. The responsible State cannot invoke its own law as a basis for failing to provide reparations.³⁵ Although the scope of application of the relevant part of the ILC Articles is limited to States and the international community, article 33(2) establishes that the part “is without prejudice to any right, arising from the international responsibility from a State, which may accrue directly to any person or entity other than a State”, implying the existence in international law of secondary rights accruing to individuals or groups.³⁶

2.2 The right to reparation in international human rights law: legal basis

2.2.1 Universal human rights instruments as a source of victims’ reparation

The right to an effective remedy can be found in all major international and regional human rights treaties,³⁷ similar to that found in the Universal Declaration of Human Rights, which provides, “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by

³³ Rombouts, Sardaro and Vandeginste (2005), p.353.

³⁴ *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries (2001)*, text adopted by the International Law Commission at its fifty-third session in 2001, and submitted to the General Assembly as a part of ILC’s report covering the work of that session (A/56/10). Hereinafter the ILC Articles.

³⁵ ILC Articles, Arts.30-32.

³⁶ Rombouts, Sardaro and Vandeginste (2005) p.367.

³⁷ See, *inter alia*, ICCPR Arts.2(3), 9(5) and 14(6); ACHR, Arts.1(1), 8, 10 and 25; CAT, Art.14.

law”.³⁸ Although the right to reparation is not explicitly mentioned, the right to remedy is generally interpreted as including both a *procedural* dimension, consisting in the right to access to mechanisms and processes through which human rights violations can be effectively vindicated and redressed, and a *substantive* dimension, consisting primarily of the right to reparation for victims.³⁹

Accordingly, the Human Rights Committee (HRC), the treaty-body that interprets the content of the provisions in ICCPR, has in its General Comment No. 31 on state obligation interpreted article 2(3) of ICCPR to require that States Parties make reparation to individuals whose Covenant rights have been violated. The General Comment reads:

Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3 is not discharged. In addition to the explicit reparation required by articles 9, paragraph 5, and 14, paragraph 6, the Committee considers that the Covenant generally entails appropriate compensation. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction [...].⁴⁰

Hence, the HRC further states that in addition to the primary duty to provide reparation for victims of violations of Covenant rights that is established in Articles 9(5) and 14(6), the State Party also has a general secondary duty to provide reparation for violations of *all* human rights contained in the Covenant.

Declarations, resolutions and other non-treaty texts adopted by UN Charter-based and treaty bodies also address the right to reparation. The most sustained effort on the topic has been the work of the UN Sub-Commission on Promotion and Protection of Human Rights and the UN Commission on Human Rights to elaborate international principles on reparation for victims of human rights violations. After more than 15 years of work by independent experts Professors Theo van Boven and M. Cherif Bassiouni⁴¹ and

³⁸ UDHR, Art.8.

³⁹ Pisillo Mazzeschi (1999) p.162; Rombouts, Sardaro and Vandeginste (2005) p.367-368.

⁴⁰ HRC General Comment No.31 (2004) CCPR/C/21/Rev.1/Add.13, para.16.

⁴¹ The Basic Principles are also referred to as the Van Boven/Bassiouni Principles.

consultations involving Member States, international organizations and NGOs, the General Assembly adopted the Basic Principles on 16 December 2005.⁴² The Basic Principles adopt a victim-oriented perspective and clarify the scope of the right to a remedy and reparation, and outline what can be done to realize it. They do not limit the concept of reparation to monetary compensation but also provide for other forms of redress, such as restitution, rehabilitation, satisfaction and guarantees of non-repetition.⁴³

The Basic Principles do not constitute a treaty and are thus not binding on states, however, they are seen as crystallizing already existing norms in international law and can be a valuable tool for states to fulfill their obligations to guarantee an effective remedy and provide reparations for human rights abuses.⁴⁴ Dinah Shelton argues that not everyone may agree that the Basic Principles and Guidelines simply codify existing law. She claims however that the right of victims of human rights violations to receive reparations is now widely acknowledged, and that “the firm articulation of a legal obligation to afford adequate reparation to all victims of gross human rights violations [...] marks an advance in international law.”⁴⁵

Shelton further notes that the Basic Principles must be placed alongside other UN efforts to consider reparations, undertaken in the context of studies of, *inter alia*, impunity and disappearances, and by treaty bodies monitoring compliance with the obligations of State parties.⁴⁶ The internationally acknowledged Joinet Principles provide that “[a]ny human rights violation gives rise to a right to reparation on the part of the victim or his beneficiaries, implying duty on the part of the State to make reparation and the possibility of seeking redress from the perpetrator.”⁴⁷ The recently adopted CED is using a similar language to the Basic Principles in Article 23(4) and 23(5) of the Convention:

⁴² For an overview of the Basic Principles and their drafting history, see Zwanenburg (2006).

⁴³ UNHCHR: <http://www2.ohchr.org/english/issues/remedy/principles.htm> (visited 26 February 2008).

⁴⁴ Echeverria (2003).

⁴⁵ Shelton (2005) p.31-33.

⁴⁶ Shelton (2005) p.12.

⁴⁷ Joinet Principles, Principle 36.

4. Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.

5. The right to obtain reparation referred to in paragraph 4 of this article covers material and moral damages and, where appropriate, other forms of reparation such as:

(a) Restitution;

(b) Rehabilitation;

(c) Satisfaction, including restoration of dignity and reputation;

(d) Guarantees of non-repetition.

This means that when a State ratifies CED, it has an obligation to provide various forms of reparation and compensation to victims of enforced disappearance. Although an important step towards protecting the right to reparation for victims, the Convention has not yet entered into force.⁴⁸

2.2.2 Victims' reparation as customary international law

Customary international law is a set of international legal norms which, by virtue of state practice (*usus*)⁴⁹ and belief in their binding force (*opinio juris*),⁵⁰ give rise to obligations upon states and bind upon them regardless of their consent.

The Inter-American Court of Human Rights has held that the obligation to make reparation is a “rule of customary law” and “one of the fundamental principles of current international law”.⁵¹ There is certainly a broad corpus of law on the subject of reparations, and one can determine from international instruments and jurisprudence the definition, scope and nature of these rights. However, the norms and jurisprudence are extremely dispersed. Reparations

⁴⁸ So far, 72 countries have signed the Convention, including Colombia on September 27, 2007. The Convention will enter into force when ratified by 20 states parties, but so far only four countries have ratified it. UNHCHR: <http://www2.ohchr.org/english/bodies/ratification/16.htm> (visited 8 April 2008).

⁴⁹ Cassese (2005) p.120.

⁵⁰ Cassese (2005) p.119-120.

⁵¹ This principle is confirmed in most of IACtHR's judgments on reparations. The wording here is from *Aloeboetoe et al. v. Suriname*, IACtHR (Reparations, 1993) para.43.

and the right to an effective remedy are approached from the specific position of the rights they are designed to protect, resulting in a fragmented body of law.⁵² The range of standards and interpretations may hinder a clear application of applicable international norms on the right to reparations. However, as mentioned above, the codification of these norms has come a long way with the adoption of the Basic Principles, which are becoming a point of reference for international jurisprudence and national practice. As an example, several Latin American countries, in drawing up legislation on reparation for victims, have taken the Basic Principles into account. Similarly, the Inter-American Court has referred in its jurisprudence several times to them.⁵³

The question is then, if the aforementioned treaty rules and principles, combined with relevant practice, have contributed to the development of an international customary rule, which imposes on states an obligation of reparation towards injured individuals, and gives the victims a corresponding right to reparation. Professor Pisillo Mazzeschi concludes that in the field of human rights, despite the different content and scope of the various conventional rules and the fact that many of them establish reparation only in some particular areas, several international supervisory organs are developing a uniform judicial or quasi-judicial practice concerning reparation. Consequently, one could perhaps maintain that a customary rule on reparation is *slowly developing* in the field of human rights.⁵⁴ Since practice by international supervisory organs is based on specific rules in specific treaties, this is not necessarily proof of a customary rule. It may perhaps be well grounded customary law that a state is under duty to provide reparations for its violations of human rights,⁵⁵ but State practice, especially outside of the context of conventional regimes, appears to indicate that the *right* for an individual to claim reparation is not yet established in international customary law.⁵⁶

⁵² Zwanenburg (2006) p.667.

⁵³ Van Boven (2005) p.vi.

⁵⁴ Pisillo Mazzeschi (2003) p.347.

⁵⁵ Bassiouni (2002) p.49.

⁵⁶ Zwanenburg (2006) p.655.

2.2.3 Inter-American human rights instruments as source of victims' reparation

Under Article 1(1) of the American Convention on Human Rights, States Parties have the obligation to ensure 'the free and full exercise' of the rights recognized by the Convention to all persons subject to their jurisdiction. In its judgments, the Inter-American Court has interpreted this to imply that States, as a consequence of this obligation, "must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to *restore* the right violated and *provide compensation* as warranted for damages resulting from the violation."⁵⁷ Moreover, Article 25(1) of the Convention confers on individuals "the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights [...]". This article also requires States parties to provide a legal system that possesses authority to enforce reparation judgments issued in favor of victims.⁵⁸

If the Inter-American Court determines that a State is responsible for a violation of the American Convention, or the State itself has voluntarily accepted responsibility, Article 63(1) of the Convention will authorize victim reparation:⁵⁹

Article 63

1. If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

It is difficult to know what is meant by the terms "fair compensation" (art. 63) and "compensatory damages" (art. 68) in the Convention, and it is therefore necessary to turn to the bodies in charge of interpreting these treaty provisions. Since the opinions from the Inter-American Commission are non-binding, the focus will be on the Court judgments.

⁵⁷ *Velásquez-Rodríguez v. Honduras*, IACtHR (Merits, 1988) para.166 (my emphasis).

⁵⁸ Laplante (2004) p.353.

⁵⁹ Pasqualucci (2003) p.233.

2.3 How the right to reparation has developed in the case law of the Inter-American Court of Human Rights

The Inter-American Court has played a pioneering role in the field of reparations and has in many significant cases ordered a wide range of reparative measures,⁶⁰ many inspired by the work on the Basic Principles as they spell out compensation, rehabilitation, satisfaction and guarantees of non-repetition as different and complimentary forms of reparation.⁶¹

The Inter-American Court issued its first judgment on reparations in the 1989 disappearance case of *Velásquez-Rodríguez v. Honduras*.⁶² The Court asserted that reparation of harm resulting from violation of an international obligation “consists in full restitution (*restitutio in integrum*), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and nonpatrimonial damages, including emotional harm.”⁶³ The Court further ruled that the “fair compensation” referred to in Article 63(1) included reparation to the victim’s family of the material and moral damages they suffered because of the involuntary disappearance.⁶⁴ Based on an estimation of probable earnings of the victim for the rest of his life, a single payment was given to the victim’s wife and children, and the government was also ordered to pay them compensation for moral damages based on the harmful psychological impact the disappearance had on them.⁶⁵ The judgment on the merits was in itself considered to be a type of reparation and moral satisfaction for the families of the victims.⁶⁶ The request for compensation for expenses of the family related to the investigation of the whereabouts of the disappeared was however denied. The Court also

⁶⁰ ECtHR, on the other hand, has determined that ECHR Art.41 limits it to order financial compensation, and has regularly declared that “it is for the State to choose the means to be used in its domestic legal system to redress the situation”, see *Belilos v. Switzerland*, ECtHR (1988), para.78. However, in recent cases the Court has voiced a need to go beyond this traditional approach, and has ordered some States to provide specific non-monetary measures to victims (“individual measures”), and even indicated general measures that the State should adopt, such as a repeal or amendment of a law, see *Assanidze v. Georgia*, ECtHR (2004).

⁶¹ Van Boven (2005) p.vii.

⁶² *Velásquez-Rodríguez v. Honduras*, IACtHR (Reparations, 1989). A very similar judgment on reparations was given in the other Honduran disappearance case, *Godinez-Cruz v. Honduras*, IACtHR (1989).

⁶³ *Velásquez-Rodríguez v. Honduras*, IACtHR (Reparations, 1989) para.26.

⁶⁴ *supra* note 63, para.39.

⁶⁵ *supra* note 63, paras.51-52.

⁶⁶ *supra* note 63, para.36.

refused to order the State to take measures such as making public condemnation of the practice of disappearances or naming a public place after the victims of disappearances.⁶⁷

In a later case, *Aloeboetoe et al. v. Suriname*, the Court stated that in certain cases, *restitutio in integrum* “may not be possible, sufficient or appropriate”.⁶⁸ Cases where full restitution would not be “possible” are those of enforced disappearance or judicial execution, where the Court cannot restore to the victim the enjoyment of the right to life that has been violated.⁶⁹ It is however not clear from the Court’s jurisprudence when full restitution would not be ‘sufficient’ or ‘appropriate’.

Since in many cases *restitutio in integrum* is not possible, the Court in its reparation decisions has calculated economic values to cover the damages caused by the violation, including physical or mental harm; psychological or physical pain or suffering;⁷⁰ loss of opportunities including education, loss of wages and the capacity to earn a living;⁷¹ reasonable medical and other expenses in rehabilitation; damages to property, goods and business; damages to reputation or dignity;⁷² and reasonable legal and expert fees.⁷³

The American Convention specifies that it is the “injured party” who shall receive reparations.⁷⁴ This term is synonymous with the term “victim”, meaning the person or persons affected by the violation. For certain types of human rights violations, especially extrajudicial executions and enforced disappearances, the Court may consider the injured party to be not only the direct victim, but also that person’s next of kin who suffered as a result of losing a loved one and who was denied recourse by State authorities.⁷⁵ The

⁶⁷ *Velásquez-Rodríguez v. Honduras*, IACtHR (Reparations, 1989), para.9 and op. paras.

⁶⁸ *Aloeboetoe et al. v. Suriname*, IACtHR (Reparations, 1993) para.49

⁶⁹ Pasqualucci (2003) p.240.

⁷⁰ *Loayza-Tamayo v. Peru*, IACtHR (Reparations, 1998) para.139.

⁷¹ *El Amparo v. Venezuela*, IACtHR (Reparations, 1996) para.28.

⁷² *Villagran-Morales et al. v. Guatemala*, IACtHR (Reparations, 2001), para.84.

⁷³ Laplante (2004) p.352.

⁷⁴ ACHR Art.63(1).

⁷⁵ *Trujillo-Oroza v. Bolivia*, IACtHR (Reparations, 2002) para.54; *Bámaca Velásquez v. Guatemala*, IACtHR (Merits, 2000) para.160.

Court's Rules define "next of kin" as the "direct ascendants and descendants, siblings, spouses or permanent companions, or those determined by the Court, if applicable."⁷⁶

In the case of *Loayza-Tamayo v. Peru* a new concept was introduced in the Court's jurisprudence. In addition to monetary compensation to the victim and her next of kin for both pecuniary and moral damages, Loayza-Tamayo also requested compensation for damages to her 'life plan' (*proyecto de vida*). The Court stated that:

"The concept of a "life plan" is akin to the concept of personal fulfillment, which in turn is based on the options that an individual may have for leading his life and achieving the goal that he sets for himself. [...] Those options, in themselves, have an important existential value. Hence, their elimination or curtailment objectively abridges freedom and constitutes the loss of a valuable asset, a loss that this Court cannot disregard."⁷⁷

The Court returned to the concept of "life plan" in *Cantoral Benavides v. Peru*, where it held that the best way to restore the victim's life plan was for the State to pay for the victim's university degree preparing him for the profession of his choosing, and cover his living expenses during his studies. In this case the Court also ordered for the first time that the responsible State make a public apology to admit its responsibility regarding the facts of the case and prevent a recurrence of similar events.⁷⁸ This is a significant development from the Court's judgment on reparations in the *Velásquez-Rodríguez* case only a decade earlier.

The Court has made repeated reference to the right of victims and their next of kin to know the fate of the victims and the identity of the State agents responsible for the events, and the State obligation to investigate the facts and punish those responsible.⁷⁹ In later judgments, starting with *Trujillo-Oroza v. Bolivia*, the Court has made clear that the right of the victim's next of kin to know what happened to the victim and, when appropriate, where the mortal remains are, constitutes an important measure of reparation and gives rise to an

⁷⁶ 2001 Rules of Procedure of the IACtHR, Art.2(15), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L/V/I.4 rev.9(2003).

⁷⁷ *Loayza-Tamayo v. Peru*, IACtHR (Reparations, 1998) para.148.

⁷⁸ *Cantoral-Benavides v. Peru*, IACtHR (Reparations, 2001) paras.80-81.

⁷⁹ *Velásquez-Rodríguez v. Honduras*, IACtHR (Merits, 1988), para.181; *El Amparo v. Venezuela*, IACtHR (Reparations, 1996), para.61; *Villagran-Morales et al. v. Guatemala*, IACtHR (Reparations, 2001), para.100.

expectation that the State must satisfy for the next of kin and the society as a whole.⁸⁰ The delivery of the mortal remains in cases of disappeared persons is, in itself, considered an act of reparation.⁸¹

To conclude on the development of the case law of the Inter-American Court on reparations, it has in less than two decades changed from solely focusing on compensation or monetary reparations to include a wide range of reparations measures. It has successfully ordered States to adopt or amend laws to bring the State into compliance with its international obligations. It has ordered States to exhume bodies and allow families to give the victim a proper burial at the State's expense, to pay for the victim's schooling, or build a school or health clinic in the area of the beneficiaries. The Court has also ordered that victims be memorialized in monuments or street names, and that the State publicly apologizes.⁸² However, though the Inter-American system has been appraised for being progressive in terms of its landmark reparation judgments, which have contributed greatly to international jurisprudence,⁸³ the Court has also been subject of criticism.

2.3.1.1 The Inter-American Court's use of reparations: lack of effectiveness

The duty to make reparations when an individual's rights are violated should be ordered first and foremost by domestic courts.⁸⁴ The Inter-American Court has held that 'the absence of an effective [domestic] remedy to violations of the rights recognized in the Convention is itself a violation of the Convention by the State Party'.⁸⁵ First when the domestic justice system has failed to provide a victim with an effective remedy can the victim take the case to an international court. However, few of these cases are actually considered by an international court, for various reasons, and thus, the majority of victims who suffer similar abuses never receive reparations. The Court has received criticism for

⁸⁰ *Trujillo-Oroza v. Bolivia*, IACtHR (Reparations, 2002), para.114; *Myrna Mack Chang v Guatemala*, IACtHR (2003) para.274.

⁸¹ *Trujillo-Oroza v. Bolivia*, IACtHR (Reparations, 2002), para.115.

⁸² Pasqualucci (2003) p.289-290.

⁸³ Laplante (2004) p.348.

⁸⁴ Pasqualucci (2003) p.232.

⁸⁵ *Constitutional Court v. Peru*, IACtHR (2001) para.89.

not ordering the violating States to pay the costs incurred by the Inter-American human rights system,⁸⁶ because States not paying could ultimately result in a limitation on the number and types of cases that the Commission can afford to refer to the Court.⁸⁷

Similarly, the Inter-American Court has explicitly not recognized “punitive” damages⁸⁸, by repeatedly stating in their judgments that reparations should be compensatory, not punitive, in nature.⁸⁹ The question then is if the reparation judgments are sufficient incentive for the States to refrain from violating human rights again, or sufficient incentive to make States guarantee effective access to domestic remedies. Laplante argues that the true test of the effectiveness of the Court’s use of reparations is the actual impact on the behavior of States. She claims that the Court has so far been cautious in its expansion of reparations so that States do not withdraw their consent to the contentious jurisdiction of the Court, but proposes that the Court move away from the compensatory rationale and start to sanction States for human rights violations, just enough to give them incentive to change their internal practices so that domestic remedies will be both accessible and effective.⁹⁰ This would in the long term lead to reparation for a much larger number of victims.

2.4 Defining reparations

2.4.1 Forms of victims’ reparation

Victims’ reparation may, as mentioned above, take a number of forms under international law. According to the Basic Principles, “full and effective reparation” includes restitution, compensation, rehabilitation, measures to ensure satisfaction and guarantees of non-repetition.⁹¹ Restitution aims to re-establish to the extent possible the situation that existed

⁸⁶ *Aloeboetoe et al. v. Suriname*, IACtHR (Reparations, 1993) para.114; *Caballero Delgado and Santana v. Colombia*, IACtHR (Merits, 1995) para.70.

⁸⁷ Pasqualucci (2003) p.279.

⁸⁸ Use of punitive damages in this context means that compensation in excess of actual damages are ordered against a State with the purpose of punishing it and deter it from committing similar violations in the future.

⁸⁹ *Velásquez-Rodríguez v. Honduras*, IACtHR (Reparations, 1989) para.38.

⁹⁰ Laplante (2004) p.348-349.

⁹¹ Basic Principles, Principles 15-23.

before the violation;⁹² compensation relates to any economically assessable damage resulting from the violations;⁹³ rehabilitation includes legal, medical and psychological care as well as legal and social services; while satisfaction and guarantees of non-repetition⁹⁴ relate to measures to acknowledge the violations and prevent their recurrence in the future. Usually, a combination of these forms of reparation is appropriate,⁹⁵ but this is normally left to the discretion of domestic institutions, unless ordered by an international court.

2.4.2 How do the various forms of reparation interrelate?

Reparation intends to return the victim to the position he or she would have been in had the violation not occurred.⁹⁶ Professor Roth-Arriaza acknowledges that this is “the basic paradox at the heart of reparation” because this aim is impossible to reach,⁹⁷ especially in cases of gross human rights violations. The forms of reparation mentioned above are both material and moral, and can be both individual and collective. While there is often much focus on material reparations, especially in the form of compensation, moral reparations are as important – and often more important – than material ones.⁹⁸ They are sometimes grouped under the heading of “satisfaction” and may include verification of facts and disclosure of the truth, the search for the whereabouts of the disappeared and the remains of

⁹² Restitution includes, as appropriate: restoration of liberty, enjoyment of human rights, identity, family life and citizenship, return to one’s place of residence, restoration of employment and return of property. Basic Principles, Principle 19.

⁹³ This damage includes physical or mental harm; lost opportunities, including employment, education and social benefits; material damages and loss of earnings, including loss of earning potential; moral damage; costs required for legal or expert assistance, medicine and medical services, and psychological and social services. Basic Principles, Principle 20.

⁹⁴ Guarantees of non-repetition includes ensuring effective civilian control over military and police forces and providing them with human rights education, strengthening the independence of the judiciary, and the reform of laws contributing to human rights violations. Basic Principles, Principle 23.

⁹⁵ Hayner (2001) p.171.

⁹⁶ In the *Chorzow Factory* case, *supra* note 30, at 47, it is held that “reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if the act had not been committed.”

⁹⁷ Roth-Arriaza (2004) p.158.

⁹⁸ Roth-Arriaza (2004) p.159.

victims, official acknowledgement of wrongs and a public apology, judicial and administrative sanctions against those responsible, and commemoration to victims.⁹⁹

Roth-Arriaza argues that reparations are both backward- and forward-looking, serving a dual function. They aim to compensate for loss and restore the good name of the victims, but also to reintegrate victims into society.¹⁰⁰ Similarly, certain forms of reparations may help victims deal with their past, such as truth-telling, while other forms, such as monetary compensation, may be just what the victims need to continue with their life and look towards the future. There is certainly a need for symbolic reparations, such as acknowledgement and apologies, which speak to the dignity of victims,¹⁰¹ but there must also be reparation that in the practical sense helps victims to move on with their life. A comparative study that interviewed victims from several countries to ascertain their needs¹⁰² showed that for victims, moral and legal measures of reparation are fundamental, while monetary compensation is controversial and problematic. They all agreed that compensation was never enough, or even the most important thing. Provision of scholarships and money for educational expenses was however emphasized as a positive; showing the importance for these victims of a forward-looking measure that would improve the lives of their children and improve the chances for future generations.¹⁰³

2.4.3 Providing reparations

Domestic remedies must have been exhausted for a victim to be able to pursue a claim before an international body. At the national level, victim reparation can come about in two ways; through complaints filed in the courts, or through specially designed administrative schemes. In theory, national courts serve as the first opportunity for reparations in cases of gross human rights violations. In practice, however, this may not always be the case. After periods of gross violations, national courts may have been inoperative, or not independent

⁹⁹ Basic Principles, Principle 22.

¹⁰⁰ Roth-Arriaza (2004) p.160.

¹⁰¹ Minow (1998) p.131.

¹⁰² Espinoza Cuevas, Ortiz Rojas and Rojas Baeza (2008).

¹⁰³ Roth-Arriaza (2004) p.180.

enough to find powerful forces liable for violations. Amnesty laws may also close off any possibility of both civil claims and criminal prosecution. Some governments have instituted administrative schemes to pay reparations to victims of massive human rights violations as part of a package of transitional measures, but these reparations programs have normally involved relatively well-off countries or those where there is a limited and easily identifiable set of victims.¹⁰⁴

There is also the possibility of collective reparations in the wake of massive human rights violations. This has generally been the solution in countries where the violations have created large numbers of victims and where civil conflict has devastated the country's infrastructure and made it impossible to provide individualized monetary reparations. There are both advantages and disadvantages of collective reparations programs; however, that issue is outside of the scope of this paper.¹⁰⁵

2.5 Conclusion

There is a growing consensus on the duty to provide reparations, at least for gross violations of human rights attributable to state actors. The individualization of the international law discourse through human rights law has the recognition of the right to the victim of reparation as a counterpart. The debates that have taken place both inside and outside the UN on the issue have had a clear impact in international and national venues.¹⁰⁶ This chapter concludes that victims' right to reparation is relatively well-established in international human rights law, especially concerning particularly gross human rights violations. Unfortunately, in State practice the right is recognized only to a certain limit, except when reparation measures are ordered by international mechanisms against a State.¹⁰⁷ The most important impact of this level of generalized obligation to provide reparation to victims is to precisely to influence the approach of national legal systems,

¹⁰⁴ Roth-Arriaza (2004) p.165-169.

¹⁰⁵ Roth-Arriaza (2004) p.181. See p.181-200 for a discussion on advantages and disadvantages of various collective reparation approaches.

¹⁰⁶ Shelton (2005) p.14.

¹⁰⁷ Pérez Solla (2006), p.181.

since national authorities are the ones ultimately responsible for providing it.¹⁰⁸ The implementation of the obligation to provide reparations may be done through administrative or judicial mechanisms, and should be adequate, effective and prompt.¹⁰⁹ Also, despite international standards, the variety of transitional justice contexts can lead to States making different choices when choosing forms of redress, and there is the danger that this could result in diversifying international standards on victim reparation. Still, having established the legal rights of victims to receive reparation for the wrongs done to them, the challenges that remain are implementing them on the national level and choosing between the approaches to providing reparations. Most likely the approaches will be as many as the different contexts, and it will be essential to take into account the needs and wishes of the victims to find the best-fitted ones.

¹⁰⁸ Falk (2006) p.497.

¹⁰⁹ Basic Principles, Principle 11(b).

3 Ensuring truth to victims of gross human rights violations

3.1 The right to truth in international human rights law: legal basis

In cases of gross human rights violations, one of the State obligations is to disclose to the victims and to society all that can be reliably known about the circumstances of the crime, including the identity of the perpetrators and instigators. This chapter intends to establish the legal basis of the victims' corresponding right to truth.¹¹⁰

3.1.1 Universal human rights instruments as a source of victims' right to truth

The wording in most of the major international human rights conventions¹¹¹ does not include any right to truth. In the newly adopted CED, however, article 24(2) reads that: "Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard." The preamble affirms this right and "the right to freedom to seek, receive and impart information to this end." The fact that this principle has been affirmed in an international convention that will be legally binding for the states who ratify it indicates that the right to truth of victims, in first instance victims of enforced disappearance, is gaining international acceptance.

The right to the truth is also recognized in several soft law instruments. The Commission on Human Rights adopted in 2005 a resolution on "Right to the truth".¹¹² Referring to

¹¹⁰ Méndez (2006) p.117.

¹¹¹ *Inter alia*, ICCPR and CAT.

¹¹² Commission on Human Rights Resolution 2005/66 on Right to the Truth, see ch.XVII, E/CN.4/2005/L.10/Add.17 (20 April 2005).

principles of international humanitarian law, the resolution recalls article 32 of Additional Protocol I to the Geneva Conventions of 1949, relating to the protection of victims of international armed conflicts, which recognizes the right of families to know the fate of their relatives. It also recalls article 33 of Additional Protocol I, which provides that the parties of an armed conflict shall search for the persons who have been reported missing, as soon as circumstances permit. The resolution acknowledges the need to study the interrelationship between the right to truth and reparations and recognizes “that the right to truth may be characterized differently in some legal systems as the right to know or the right to be informed [...]”. The resolution further stresses “the imperative for society as a whole to recognize the right of victims of gross violations of human rights [...] and their families, within the framework of each State’s domestic legal system, to know the truth regarding such violations, including the identity of the perpetrators and causes, facts and circumstances in which such violations took place.” States should preserve archives and other evidence concerning gross human rights violations to facilitate knowledge of such violations, to investigate allegations, and to provide victims with access to an effective remedy in accordance with international law.

The HRC has in several concluding observations and communications recognized the right to truth for victims of gross human rights violations and their relatives.¹¹³ The Working Group on Enforced or Involuntary Disappearances has also acknowledged the right to truth in a number of its reports.¹¹⁴

Mark Freeman excellently sums up what the right to truth has been found to include:

The right to truth has been found to encompass an individual’s right to have serious human rights violations effectively investigated by the State, to be informed of the fate of missing or forcibly disappeared relatives, to be kept informed of the State of official investigations into

¹¹³ *Quinteros v. Uruguay*, HRC, Comm. No. 107/1981(21 July 1983) para.16; Concluding Observations, HRC: Guatemala, CCPR/C/79/Add.63 (3 April 1996).

¹¹⁴ Commission on Human Rights, *Report of the UN Working Group on Enforced or Involuntary Disappearances: Mission to Colombia*, U.N. Doc.E/CN.4/2006/56/Add.1 (17 January 2006), para.101. Hereinafter the UN Working Group on Disappearances Report 2006.

disappearances and other serious violations, to be provided with “mortal remains” of loved ones once they have been located, and to know the identity of those responsible for the violations. It has also been found to include a societal right to know the full truth concerning serious violations, both for its own sake and to avoid the future reoccurrence of such violations.¹¹⁵

The question that remains to be answered is if the right to truth has achieved the status of customary law. The recognition of victims’ right to know the truth in several soft law instruments and court jurisprudence is not sufficient to achieve this status; it must also be a general and consistent practice of states.

3.1.2 Right to the truth as customary international law?

A number of legal experts have concluded that the right to truth has achieved the status of a norm of customary international law.¹¹⁶ Juan E. Méndez, on the other hand, who has written extensively on this issue, refers to the right to truth as an “emerging principle” in international law, based on the fact that the right to truth is “not found in the letter of the law of human rights instruments but rather in authoritative interpretations of otherwise binding norms.”¹¹⁷

Hayner writes that “there is an emerging right to truth, spelled out in several international legal decisions, which some argue now constitutes a norm of customary international law.”¹¹⁸ There are namely some indications that the right to truth may be more than just an emerging principle in international law. For instance, when CED comes into force, the right to truth *will* be found in the letter of the law of an international human rights instrument.¹¹⁹

¹¹⁵ Freeman (2006) p.7-8. Please refer to the author’s footnotes for references to decisions and judgments from the HRC, ECtHR, IACHR and IACtHR.

¹¹⁶ See the meeting cited by L. Despouy, Special Rapporteur on States of Emergency in his 8th Annual Report, UN Doc. E/CN.4/Sub.2/1995/20, according to which the experts concluded that the right to truth has achieved the status of a norm of customary international law.

¹¹⁷ Méndez (2006) p.116. See also Naqvi (2006).

¹¹⁸ Hayner (1998) p.215.

¹¹⁹ CED Art.24(2).

However, judging from state practice it is still too early to say that the right to truth constitutes customary international law.

3.1.3 Inter-American human rights instruments as a source of victims' right to truth

The right to truth is not found in the wording of ACHR. However, as other international human rights treaties it is a living instrument, and Article 62(3) of the Convention establishes that the Inter-American Court has the jurisdiction to interpret and apply the provisions of ACHR, “provided that the States Parties to the case recognize or have recognized such jurisdiction”. Hence, we must again turn to the jurisprudence of the Court and its interpretation of the Convention as a source of victims' right to truth. The opinions of the Commission have been much more progressive than the judgments of the Court in establishing a right to truth, but because of constraints on the length of this thesis mainly the binding Court judgments will be dealt with.

As previously mentioned, The Inter-American Court has interpreted Article 1(1) of the Convention to imply that States “must prevent, investigate and punish any violation of the rights recognized by the Convention”.¹²⁰ In connection with Article 1(1), the Court has invoked Articles 8 and 25, which it has interpreted to “provide the right of the victim or his or her next of kin to obtain a State determination of the truth of the events and the corresponding responsibility through an investigation and trial.”¹²¹

3.2 How the right to truth has developed in the case law of the Inter-American Court of Human Rights

The right to truth applies primarily to cases of enforced disappearances and extrajudicial executions where there is uncertainty about what happened to the victim. In the

¹²⁰ *Velásquez-Rodríguez v. Honduras*, IACtHR (Merits, 1988) para.166.

¹²¹ *La Rochela Massacre v. Colombia*, IACtHR (2007) para.147.

disappearance case of *Velásquez-Rodríguez v. Honduras*, the Court establishes that the duty of the State to investigate must be taken seriously and include an effective search for the truth by the government. This duty continues as long as there is uncertainty about the fate of the disappeared person, and the “State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains.”¹²² This State duty to investigate, and the right of the victim’s family to know what happened and, “if appropriate”, where the remains are located, is confirmed in *Castillo-Páez v. Peru*. In this case, the Court also comments upon the Commission’s argument that there has been a violation of the right to truth and information based upon the State’s lack of interest in investigating the events of the case. The Commission does not cite any Convention article, but points out that the right to truth has been recognized by several international organizations. The Court holds that this argument refers to the formulation of a right that does not exist in the ACHR, although it “may correspond to” a concept of the already established obligation to investigate.¹²³

In the important case of *Bámaca-Velásquez v. Guatemala*, the Court includes a separate chapter on “Right to the truth” in its judgment on the merits. The Court describes the situation of ineffective judicial remedies and obstruction by State agents that prevented the victim’s next of kin from knowing the truth about what happened to him. It holds however that due to the characteristics of this case, “the right to the truth is subsumed in the right of the victim or his next of kin to obtain clarification of the facts relating to the violations and the corresponding responsibilities from the competent State organs, through the investigation and prosecution established in Articles 8 and 25 of the Convention.”¹²⁴ This issue was therefore resolved in accordance with the findings in the chapter on judicial guarantees and judicial protection.¹²⁵

¹²² *Velásquez-Rodríguez v. Honduras*, IACtHR (Merits, 1988) paras.177 and 181.

¹²³ *Castillo-Páez v. Peru*, IACtHR (Merits, 1997) paras.85-90.

¹²⁴ *Bámaca Velásquez v. Guatemala*, IACtHR (Merits, 2000) para.201.

¹²⁵ This is confirmed in *Barrios Altos v. Peru*, IACtHR (Merits, 2001) para.45, under a separate chapter called “Right to the truth and judicial guarantees in the rule of law”.

In the reparations judgment of the *Bámaca-Velásquez* case, the Court states that the “right that every person has to the truth has been developed in international human rights law”, making reference to HRC case of *Quinteros v. Uruguay*,¹²⁶ the Joinet principles, and the study by Theo van Boven.¹²⁷ The Court also states in this judgment that the State has the obligation under Article 1(1) of the American Convention to ensure that the grave violations of this case are not repeated in the future, and must take all steps necessary to attain this goal. This includes the society’s “right to know the truth about such crimes, so as to be capable of preventing them in the future.”¹²⁸

In *Myrna Mack-Chang v. Guatemala*, the Court reiterates that “every person, including the next of kin of the victims of grave violations of human rights, has the right to the truth. Therefore, the next of kin of the victims and society as a whole must be informed of everything that has happened in connection with said violations.”¹²⁹ “Society as a whole” is a concept exclusive to the Inter-American system. While the Commission has repeatedly argued that the society as a whole has a right to the truth,¹³⁰ the Court has not explicitly stated this, but rather held that the right that every person has to the truth, gives rise to an expectation that the State must satisfy for the next of kin of the victim and society as a whole.¹³¹

In *La Cantuta v. Peru*, the Court recalls that “continued deprivation of the truth regarding the fate of a disappeared person constitutes cruel, inhumane and degrading treatment against close next of kin.”¹³² This is an important holding by the Court, since the prohibition of torture and other forms of cruel, inhuman and degrading treatment or

¹²⁶ *Quinteros v. Uruguay*, HRC (1983).

¹²⁷ *Bámaca Velásquez v. Guatemala*, IACtHR (Reparations, 2002) para.76. This is confirmed in *Trujillo-Oroza v. Bolivia*, IACtHR (Reparations, 2002) para.114.

¹²⁸ *Bámaca Velásquez v. Guatemala*, IACtHR (Reparations, 2002) para 77.

¹²⁹ *Myrna Mack Chang v. Guatemala*, IACtHR (2003) para.274. This is confirmed in *19 Merchants v. Colombia*, IACtHR (2004) para.261; *Plan de Sánchez Massacre v. Guatemala*, IACtHR, (Reparations, 2004) para.97; *Serrano-Cruz Sisters v. El Salvador*, IACtHR (2005) para.62.

¹³⁰ *Mapiripán Massacre v. Colombia*, IACtHR (2005) para.190(j).

¹³¹ *Myrna Mack Chang v. Guatemala*, IACtHR (2003) para.274.

¹³² *La Cantuta v. Peru*, IACtHR (2006) para.125.

punishment is considered customary international law,¹³³ and is further a non-derogable right under the ICCPR, and thus must be upheld also in states of emergency.¹³⁴ This ruling can thus strengthen the position of the right to truth for the next of kin of forcibly disappeared persons.

In sum, the Court has recognized both an individual (as a means of reparation for the victims and their next of kin) and a collective or societal (importance for society) dimension to the right to know the truth. The right the truth is connected with the unavoidable duty of the State to effectively investigate the events resulting in the human rights violations, and the duty to identify, prosecute and punish those responsible.

The Commission has had an even more progressive development of the concept of the right to truth, acknowledging already a decade ago that victims have a right to truth and information.¹³⁵ The Commission has also indicated that in addition to being founded in Articles 8 and 25 of the Convention, the right to truth also has its roots in Article 13(1) of the Convention, because that article recognizes the right to seek and receive information.¹³⁶ The Court has not yet taken this Article into consideration, maintaining that the right to truth is subsumed within Articles 8 and 25 of the Convention.¹³⁷

3.3 Truth

A heavy burden is put on the family of victims when they do not know the truth about what has happened to their beloved ones, while surviving victims have the need to know *why* they had to suffer the abuses. Knowing the truth is an essential aspect of the individual healing process. It is important on a societal level as well, and can prevent gross violations from being repeated in the future.

¹³³ The prohibition of torture is considered a peremptory norm in international law, or *jus cogens*, however the prohibition of other forms of cruel, inhuman or degrading treatment does not seem to have reached this status yet, especially not judging from State practice.

¹³⁴ HRC General Comment No. 29 (2001) CCPR/C/21/Rev.1/Add.11, para.7.

¹³⁵ *Castillo-Páez v. Peru*, IACtHR (Merits, 1997) para.85.

¹³⁶ *Barrios Altos v. Peru*, IACtHR (Merits, 2001) para.45.

¹³⁷ *La Rochela Massacre v. Colombia*, IACtHR (2007) para.147.

3.3.1 The search for truth

An important part of searching for the truth is locating the victims' remains. Modern day forensic techniques are efficient when it comes to identifying victims, but they are expensive and seldom available immediately after systematic and massive human rights abuses. Victims are often buried unidentified in mass graves, either by survivors to avoid diseases, or by the perpetrators to cover up their crimes, and exhumation of such mass graves is currently taking place several places in the world.¹³⁸ The success in locating and identifying victims depends on State ability in forms of resources, and willingness in terms of prioritizing investigations and searches. However, for victims it is often essential to understand not only what happened, but also who did it and why.¹³⁹ This will not be known only from locating remains, but will depend on the results of, *inter alia*, investigations, trials, and truth commission reports.

However, there are many obstacles standing between victims and the truth. First of all, there is the very real problem that the perpetrators are unknown, or that they cannot be located. Secondly, there may be a political unwillingness to finding out the truth if the perpetrators are somehow connected to the people in power. Thirdly, the perpetrators may deny responsibility, or even deny that the violations took place at all. This is especially true for those in command responsibility, who can easily claim that the perpetrators acted on their own without following any orders. Fourthly, a group of perpetrators can collectively decide not to tell the truth, such as to avoid prosecution.¹⁴⁰

Due to these obstacles to truth-seeking, victims, researchers, truth commissions or courts often get only some information, mostly from lower-ranking perpetrators or ex-combatants.

¹³⁸ In Colombia there has been a process of exhumation of mass graves led by the Attorney General's Office since 29 March 2006.

¹³⁹ Schotsmans (2005) p.121.

¹⁴⁰ Schotsmans (2005) p.122.

Sometimes this is given in exchange for confidentiality, reduced or alternative sentences,¹⁴¹ or amnesty. Increasingly, amnesty laws are seen as violating international human rights law and cannot be applied.¹⁴² The problem with trading benefits for information, is that the perpetrators may tell only parts of the truth, just enough to receive the benefits, or even construct a “truth” that they believe that the victim or investigator want to hear, without revealing what they really did.¹⁴³ In most cases it will be very difficult to verify if they are telling the truth or not.

After a period of mass violations, people who were not directly affected often argue that the past must be forgotten for the society to move forward. They may argue this partly because they want to forget about their own role as bystanders and the fact that they did nothing to stop the atrocities. This pressure from the rest of the society makes the situation especially difficult for victims of gross violations. Victims cannot simply forget, and sooner or later they will demand to know the truth. History shows that the need to find truth is stronger than ever, and when the past is left covered up, it will be returned to until it is resolved. The arrest of General Pinochet in London, the stolen generations of aboriginals in Australia, and the case of the children of “political” opponents in Argentina who were given away for adoption by the military are just a few cases of crimes committed in the past that have not been forgotten by victims and human rights defenders.¹⁴⁴ The *Maher Arar* case and its thorough report of the events of what happened to him is a later example of the increasing demand to know the truth.¹⁴⁵

Schotsmans points out that victims’ need for truth makes them very vulnerable.¹⁴⁶ By knowing what the victims desperately want to know, the perpetrator has power over them. To change the power balance it is crucial that the State helps the victims to disclose the

¹⁴¹ See Chapter 4 on the Colombian Justice and Peace Law, which offers reduced sentences to paramilitaries who demobilize and give “free versions” (*versiones libres*) of the truth.

¹⁴² See *Mapiripàn Massacre v. Colombia*, IACtHR (2005) para.304.

¹⁴³ Schotsmans (2005) p.123.

¹⁴⁴ Schotsmans (2005) p.123.

¹⁴⁵ See the report of the Arar Commission: www.ararcommission.ca (visited 3 April 2008).

¹⁴⁶ Schotsman (2005) p.123.

truth. This is why it is so important that to know the truth is a victim's *right*, and not simply a 'good' for which they have to trade away something else, such as justice or reparations.

Although this is usually not the main obstacle, it must also be acknowledged that the victims themselves can hinder a disclosure of the truth. Some victims may deliberately change their stories or lie to receive more assistance or more attention. There is also the risk, in close communities, that victims may have shared stories and created a 'collective memory' which may not be completely accurate with what really happened, making it hard for investigators to find reliable witnesses.¹⁴⁷

3.3.2 Historical vs. factual truth

The previously mentioned Joinet principles establish the right to know, which includes the right of all people to know the truth about past events and the circumstances which led to gross human rights violations; the duty of the State to remember by preserving the collective memory of the violations that took place; and the right of victims and their families to know the circumstances of the violations and, if disappeared or killed, the fate of the victim.¹⁴⁸ There is clearly both an individual and a collective or societal aspect here. While the society has a right to know the truth about the gross violations and the circumstances surrounding them, both as a part of the collective memory and to prevent similar violations from occurring in the future, the individual victims and their families have the right to know what happened to themselves and their beloved ones.

Juan Méndez correspondingly distinguishes between *structural* truth and *individualized* truth. Structural truth establishes such things as patterns of violence; the nature, scope, and methods of repression; and the responsibility for the planning and execution of the violations. Individualized truth, on the other hand, provides details about individual disappearances; the exact circumstances, location, and fate of the disappeared individual.¹⁴⁹

¹⁴⁷ Schotsman (2005) p.125.

¹⁴⁸ Joinet Principles, Annex II, Principles 1-3.

¹⁴⁹ Borer (2006) p.22.

The same distinction can be categorized as *historical* truth versus *factual* truth.¹⁵⁰

In sum, there are clearly two dimensions of truth in the aftermath of gross violations of human rights. On the one hand you have the structural and historical truth, which establishes the circumstances of the violations and who were responsible, placing it in a larger historical and social context. This corresponds with the right of society to know the truth and is important to prevent such violations from reoccurring in the future. On the other hand, you have the individualized, factual truth, providing details about specific violations based on forensic evidence and testimony from witnesses and perpetrators. This corresponds with the right to know for victims and their families.

3.3.3 Who does it benefit to find out the truth?

After arguing the importance of victims to know the truth, the obvious answer to this question would be precisely that: the victims. However, there are also certain negative aspects connected to knowing the truth that must be acknowledged.

The difficulty with knowing the truth is illustrated by the case of the children of the “political” opponents in the 1970s Argentina who were given away for adoption by the military after their parents had been murdered.¹⁵¹ At the request of the victims’ families and human rights organizations, DNA-tests were developed, making it possible to trace and match the children to their biological parents. Although the children learned the truth about their biological parents, there are also many negative effects of being torn up from everything you know. Who did it really benefit in these cases to find out the truth; the society, the families of the victims, or the children themselves?

For various reasons, victims may themselves choose not to know the truth. ICTJ conducted an extensive national survey in Colombia with more than 2,000 respondents to find out

¹⁵⁰ See also Minow (1998) p.85-86, distinguishing between explanatory and forensic truth.

¹⁵¹ Skaar (2005) p.166-167.

their perceptions and opinions about justice, truth, reparation and reconciliation.¹⁵² Four out of five of the respondents believed they have a right to truth and wanted an impartial historical record of the facts and responsibilities for the violations suffered during the conflict. The vast majority of those who wanted to know the truth said it was to understand what happened and maybe forgive those responsible. However, 37% answered that they did not want to know anything, and among the population directly affected by paramilitary or guerrilla violence, this figure rose to 55%. Skepticism seems to be part of the reason, as 48% said that they did not believe that revealing the truth would make a difference, and 10% did not think that the truth would actually be revealed. Also, 14% preferred not to know the truth out of fear for vengeance or retaliation, and 28% said it was painful to think about the past and relive the violations.¹⁵³

The respondents were also asked why it was important for the society to know the truth about what has happened in the course of the armed conflict. The respondents answered that it was for it not to happen again, to punish those responsible, and to remember the history. “To honor the victims” was the alternative with the lowest score. This is concerning, because for the Colombian population the “duty to remember” does not seem to relate much to the necessity to acknowledge the dignity and suffering of the victims of the armed conflict.¹⁵⁴

The survey report gives a picture of how the victims in a country affected by decades of armed conflict and gross human rights violations feel about knowing the truth, and is an important contribution to theoretical debates where it is taken for granted that knowing the truth is a good and a necessary part of the healing process for both victims and society.

¹⁵² *Percepciones y opiniones de los colombianos sobre justicia, verdad, reparación y reconciliación*, 2005. Hereinafter the ICTJ survey. Available at: <http://www.ictj.org/static/Americas/Colombia/ColomSurvey.pdf>

¹⁵³ ICTJ survey, p.34-39.

¹⁵⁴ ICTJ survey, p.39-41.

3.4 Conclusion

The right to truth for victims and their next of kin is slowly gaining international acceptance. The Inter-American Court has recognized both an individual and societal dimension to the right to know the truth, connected with the duty of the State to effectively investigate the events resulting in the human rights violations. However, State practice clearly shows that much remains to be done. Millions of victims are still buried in mass graves, and most of them will never be identified. States should make every effort to provide as much truth as possible for the victims of gross human rights violations. The process should be victim-led, as with reparations, in the sense that their needs and perspectives are taken into account. This would be a step on the way to repairing the harm done to them.

4 Transitional justice in conflict: Victims' right to truth and reparation in Colombia

4.1 Background of gross human rights violations in Colombia

It is generally understood that the human rights situation in Colombia is one of the most difficult and severe in Latin America.¹⁵⁵ Before looking at the how victims' rights to truth and reparation are protected in Colombia, it is important to provide a short factual overview of the internal armed conflict with a particular emphasis on the problem of enforced disappearances.

4.1.1 Factual overview of the conflict

Despite several attempts of peace negotiations, the internal armed conflict in Colombia has raged for over forty years.¹⁵⁶ The conflict is very complex for various reasons; it is one of the most protracted conflicts in the world, and is not only between two factions, but various actors. Hence, it is a conflict that is very hard to grasp and define.¹⁵⁷ Also, when there are differing stories about how the it started and who is to blame, it is very hard to put an end to it. The presence of the State has always been weak in Colombia, and this has resulted in violent confrontations between left-wing guerrillas, now mainly the bigger FARC (Revolutionary Armed Forces of Colombia), and the ELN¹⁵⁸ (National Liberation Army), the government, and paramilitary groups, mainly organized under The United Self-Defense Forces of Colombia (AUC). This has caused enormous loss of life, weakened rule of law,

¹⁵⁵ IACHR, *Third Report on the Situation of Human Rights in Colombia*, OEA/Ser.L/V/II.102, Doc.9. rev.1, ch.I, para.1(1999), available at <http://www.cidh.org/countryrep/Colom99en/table%20of%20contents.htm> (visited 4 May 2008).

¹⁵⁶ For an overview of Colombia's history, see Laplante and Theidon (2006), p.53-79.

¹⁵⁷ Saffon and Uprimny (2007b) p.3-7.

¹⁵⁸ ELN is currently involved in peace negotiations with the Colombian government.

and caused a sense of despair and hopelessness in the Colombian population. The civilians are caught in the crossfire and often deliberately targeted for “collaborating”. At least 3,000 civilians are believed to die every year as a result of the conflict, although these estimated figures vary drastically. Some three million people have been internally displaced by the fighting. In 2004, the UN humanitarian affairs chief named Colombia as the worst humanitarian crisis in the Western hemisphere.¹⁵⁹ The conflict is further complicated by the drug trade, which elements of all parts of the conflict have been involved in. Government security forces attempt to eliminate the narcotics groups, and the combination of these violent tactics and counter-tactics makes Colombia one of the most dangerous countries to live in.¹⁶⁰ Paramilitaries have been responsible for massacres, enforced disappearances, and cases of torture and forced displacement, while guerrilla groups are behind assassinations, kidnapping and extortion.¹⁶¹ Links between high-ranking politicians and the AUC were revealed in the “parapolítica” scandal, which resulted in the investigation and arrest of dozens of politicians and Congress members. In addition to paramilitary links, there are reports of Colombia’s own public security forces engaging in grave human rights abuses.¹⁶²

4.1.2 Enforced disappearances in Colombia

Colombian NGOs estimate that about 15,000 people have been forcibly disappeared in Colombia since the late 1970s, although the official figures are much lower.¹⁶³ Over 1,200 graves have been uncovered the last two years as a result of the confessions from demobilized paramilitaries, many of them containing victims who were forcibly disappeared.¹⁶⁴ Hundreds of mass graves are still thought to remain hidden across the country. A 2006 report from the UN Working Group on Disappearances indicates that the

¹⁵⁹ BBC News: <http://news.bbc.co.uk/2/hi/americas/1738963.stm> (visited 21 April 2008).

¹⁶⁰ Ahmad (2006) p.342.

¹⁶¹ BBC News, *supra* note 159.

¹⁶² HRW, *World Report 2008: Colombia: Events of 2007* (2008), available at: <http://hrw.org/englishwr2k8/docs/2008/01/31/colomb17754.htm> (visited 4 May 2008).

¹⁶³ Asfaddes: www.asfaddes.org.co and IPS News: <http://ipsnews.net/news.asp?idnews=41298> (visited 15 May, 2008).

¹⁶⁴ Attorney General’s Office: www.fiscalia.gov.co/justiciapaz/EXH/Exhum_Home.htm (visited 18 May 2008)

scale of disappearances in the country has remained constant or increased since 1996. It also found that there is substantial underreporting of cases of enforced disappearance, due to a number of factors such as poverty, illiteracy and inefficient reporting mechanisms, as well as the links between State authorities and the paramilitaries, an atmosphere of fear, intimidation and terror, and a lack of trust in the justice system.¹⁶⁵ In the majority of cases reported to the Working Group it is the paramilitaries, acting allegedly with the support or acquiescence of certain fractions within the State military and security forces, that have been held primarily responsible for the violations. However, in recent years there has been an alarming increase in reports of enforced disappearances and extrajudicial executions with direct involvement of the Colombian military.¹⁶⁶ The Inter-American Court has also issued several judgments against Colombia for direct participation in disappearances and for lack of investigation and punishment of the guilty.¹⁶⁷

4.2 The status of international human rights in Colombia's legal framework

Colombia enacted a new Constitution in 1991, which recognizes all fundamental human rights and provides for the appropriate guarantees and safeguards in case of their violation. It is a progressive Constitution, as an example it specifically forbids the practice of enforced disappearance.¹⁶⁸ Additionally, human rights treaties to which Colombia is a party are included in the Constitution with the same legal status as the Constitution itself. In reality these treaties have a higher position in the legal hierarchy because when there is a contradiction between the provisions of the Constitution and the clauses of these treaties, article 93 establishes that the rights enshrined in the Constitution shall be interpreted in accordance with the human rights treaties ratified by Colombia.¹⁶⁹

¹⁶⁵ UN Working Group on Disappearances Report 2006, para.60.

¹⁶⁶ *supra* note 165, para.21.

¹⁶⁷ See, *inter alia*, the cases of *19 Merchants v. Colombia*, IACtHR (2004) and *Mapiripàn Massacre v. Colombia*, IACtHR (2005).

¹⁶⁸ Political Constitution of Colombia, 1991, Art.12.

¹⁶⁹ UN Working Group on Disappearances Report 2006, paras.23-24.

The Constitution further created the Constitutional Court as an independent body from the Supreme Court of Justice. It decides on the constitutionality of legislative and other Government acts, and reviews judicial decisions related to the tutelage action.¹⁷⁰ The Court initiated from the very beginning a progressive judicial activism whose fundamental objective was to ensure that the promises that were established in the 1991 Constitution did not remain words on paper, and it has so far shown itself to be the most politically independent judicial body in the country.

Although Colombia has ratified all the major international and regional human rights treaties¹⁷¹ and has a well-developed national legal framework, there is unfortunately a large gap between commitments on a national level and implementation on the local level.

4.3 Justice and Peace Law of 2005

The signing of the “Agreement of Santa Fe de Ralito” on July 15, 2003 put the transitional justice issue on the Colombian agenda and marked the beginning of formal talks between the government and the paramilitaries.¹⁷² As a sign of peace, a collective demobilization process of the paramilitaries was initiated, but in return the paramilitary leaders wanted the government to minimize the threat of long prison sentences for even the most grave human rights abuses. After much debate, Law 975 of 2005, the “Justice and Peace Law”, was passed as the first transitional justice law in Colombia’s history.¹⁷³ It was originally designed to fill the gap left by Law 782/02 and Decree 128/03, which governed both the individual and collective demobilization processes, providing economic and legal benefits, including pardons, to armed groups that have committed political and legal crimes, also securing them immunity from future prosecution for those same crimes. However, an individual suspected of having committed a human rights violation, irrespective of whether

¹⁷⁰ The tutelage action (*acción de tutela*), created by the 1991 Constitution, is aimed at protecting the citizens’ basic constitutional and human rights and can be used as a quick and effective appeal mechanism when there are no other appropriate mechanisms.

¹⁷¹ UNHCHR: <http://www.ohchr.org/EN/Countries/Pages/HumanRightsintheWorld.aspx> (visited 13 May 2008)

¹⁷² For the text of the agreement, see the Office of the High Commissioner for Peace: www.altocomisionadoparalapaz.gov.co/acuerdos/index.htm (visited 10 April 2008).

¹⁷³ Justice and Peace Law, Law No.975, 2005. Hereinafter Law 975/05.

the acts in question were political, will not be eligible for Law 782,¹⁷⁴ but can then demobilize under Law 975.¹⁷⁵ Law 975 provides benefits for the paramilitaries through so-called alternative sentencing of no more than five to eight years, and reincorporation into civilian life, in return for them demobilizing and contributing to peace. The law claims to do so while “guaranteeing the victims’ rights to truth, justice, and reparation.”¹⁷⁶

Law 975 was criticized by the representative of UNHCHR in Colombia and a number of human rights organizations for violating victims’ rights, claiming that the law focused more on the demobilization of the paramilitaries responsible for human rights abuses than on providing truth and reparations for the victims of the atrocities committed.¹⁷⁷ The law was for the same reasons challenged before the Constitutional Court by a grouping of more than a hundred human rights and victims’ organizations. In ruling C-370 on 18 May 2006, the Court upheld Law 975 in general terms, but declared some parts of it unconstitutional and modified others.¹⁷⁸

4.3.1 Victims’ right to truth in the Justice and Peace Law

Article 7 of Law 975 states that “[t]he society, and especially the victims, have the inalienable, full, and effective right to learn the truth about the crimes committed by illegal armed groups, and to know the whereabouts of the victims of kidnapping and forced disappearance” and that the “investigations and judicial proceedings to which this law applies should promote an investigation into what happened to the victims of such conduct, and inform the family members of the relevant findings.” Although this may appear promising, there are a number of flaws in this law concerning the victims’ right to truth.

¹⁷⁴ Flaws in the system have however resulted in pardons for paramilitary members under investigation for human rights violations, see Laplante and Theidon (2006) p.65.

¹⁷⁵ Law 975 applies to demobilized individuals who “have been or could be charged, accused or convicted” of those crimes that are *excluded* from the juridical benefits established in Acts 418/97, 782/02 and Decree 128/03, as long as their names are on the list that the Government provides to the Attorney General’s Office, and meet a number of conditions, see Law 975/05, Art.10.

¹⁷⁶ Law 975/05, Art.1.

¹⁷⁷ ICTJ: <http://www.ictj.org/en/news/press/release/767.html> (visited 16 January 2008)

¹⁷⁸ *Gustavo Gallón Giraldo v. Colombia*, Const’l Ct. Judgment No. C-370/2006, Expediente D-6032 (18 May 2006). Hereinafter ruling C-370/06. See section 4.3.3.

4.3.1.1 Right to truth

The truth-gathering capacity of Law 975 rests on the obligation of the demobilized paramilitaries to give “spontaneous confessions”¹⁷⁹ in which they present a free and full version of the facts regarding time, manner, and place of the criminal acts they committed as a member of the illegal armed group. This shall be done in the presence of their defense counsel, followed by interrogation by a prosecutor.¹⁸⁰ Law 975 seems however to lack compelling incentives for ex-combatants to tell the full truth. If it is discovered at a later point that a demobilized combatant withheld information, but still benefited from the law, according to the law, the individual will only be punished if the withholding of information was “intentional”. This is hard to prove. Further, the punishment provided for by the law only constitutes a twenty percent increase of the alternative sentence that was imposed¹⁸¹ and thus hardly acts as a deterrent.

Besides from telling the full truth about their crimes, there is no separate obligation for the demobilized combatants in Law 975 to provide the location of victims of enforced disappearance. The law simply states that the judicial police shall investigate the whereabouts of persons kidnapped or disappeared “[w]ith the collaboration of the demobilized persons”.¹⁸² This led the Working Group on Disappearances to conclude that the demobilization efforts in Law 975 do not call for disclosure of the location of disappeared persons, contrary to treaty law.¹⁸³

Further, there may not be enough incentives for demobilized combatants to confess to human rights violations in the first place. Most human rights violations have never come under investigation in Colombia, and thus most of the crimes do not have a known

¹⁷⁹ Law 975/05, Art.17.

¹⁸⁰ Law 975/05, Arts.17 and 19.

¹⁸¹ Law 975/05, Art.25.

¹⁸² Law 975/05, Art.15. See also Arts.44(4) and (5).

¹⁸³ UN Working Group on Disappearances Report 2006, para.70.

author.¹⁸⁴ If it cannot be proven that they are human rights violators, demobilizing combatants are therefore unlikely to confess to it, when demobilizing under Law 782 will give them de facto pardon or amnesty instead of a reduced sentence. The claimants in case C-370/06 used statistics from the Attorney General's Office and estimated that only 0.48% of all paramilitaries will be subject to Law 975, while the remaining 99.52% will benefit from Law 782.¹⁸⁵

4.3.1.2 Historical memory

Also with regard to victims' right to truth, the tribunals in charge of processing the demobilized combatants must systemize and conserve archives of criminal facts that the victims will have access to.¹⁸⁶ Law 975 establishes the States' duty to preserve the historical memory, implying that the "knowledge of the history of the causes, developments, and consequences of the actions of the illegal armed group should be maintained."¹⁸⁷ However, in Colombia, the historical memory will be constructed by using judicial proceedings to establish the facts of individual cases and individual criminal responsibility. This judicial truth has certain limits, particularly that the larger context of the internal armed conflict, the roles of different actors, and especially the role of the State, will remain under-explored. If truth is defined as individualized and structural truth put together, using the classification of Juan Méndez, then learning the truth of several individualized events without them being integrated into an overarching historical framework will not constitute the full truth. The report that is to be written on the emergence and development of armed groups by the CNRR¹⁸⁸ may contribute to a fuller truth, but only if it takes into account the role and responsibility of *all* actors in the conflict, including the State. This is however not in the CNRR's mandate and is unlikely to happen.

¹⁸⁴ Laplante and Theidon (2006) p.89.

¹⁸⁵ Ruling C-370/06, Section 3.1.2.3.3. President Uribe stated however on 13 May 2008 that so far, 47,433 people have demobilized, and 3,284 of them have been nominated for the benefits of Law 975/05. http://web.presidencia.gov.co/sp/2008/mayo/13/09132008_i.html (visited 15 May 2008).

¹⁸⁶ Law 975/05, Arts.57-58.

¹⁸⁷ Law 975/05, Art.56.

¹⁸⁸ Law 975/05, Art.51(2).

A more comprehensive investigation exploring the broader context of the conflict and providing a “collective memory” is usually done through the work of truth commissions. The authors Laplante and Theidon argue that in truth-commissions, the emphasis is on the voices of the victims and their families, while confessions focus on perpetrators, “omitting the personal experiences of victims.” In their opinion, due to the absence of a truth commission in Colombia and the undue restrictions placed on criminal proceedings, the country’s transitional justice effort does not include enough truth.¹⁸⁹ Law 975 does very little to allow victims, as opposed to perpetrators, a voice.¹⁹⁰ Besides, the official version of the conflict in Colombia with its many actors is different from the stories of the directly affected victims. If Colombia’s transitional justice process is to include truth, it is crucial that the victims are granted an opportunity to give their own fullest account of events and that their voices are heard.¹⁹¹ On the other side, one could claim that because of the risk that the continued conflict poses, victims should perhaps not give testimonies before the conflict is over. One must think about the specific mechanisms that are suitable for a context of conflict, and the effects they may have in such a context. A wrong timing of their creation could make it dangerous to collect sufficient testimonies and could in the longer perspective wary out the possibility of a truth commission.¹⁹²

4.3.2 Victims’ right to reparation in the Justice and Peace Law

Similar to the Basic Principles, Article 8 of Law 975 establishes that “[t]he victims’ right to reparation includes the actions taken for restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.” The State shall guarantee victims’ access to the administration of justice, and in connection to this, the victims shall have the right to “prompt and comprehensive reparation for the harm suffered; the perpetrator or participant in the crime shall be responsible for making such reparation.”¹⁹³ In terms of non-monetary reparations, the actions the demobilized individuals are to carry out seem to follow the

¹⁸⁹ Laplante and Theidon (2006) p.88-92.

¹⁹⁰ Guembe and Olea (2006) p.139.

¹⁹¹ Saffon (2007).

¹⁹² Email from Maria Paula Saffon, 17 May 2008.

¹⁹³ Law 975/05, Art.37(3).

criteria established by international law. However, some of them are more likely the responsibility of the State.¹⁹⁴

Law 975 develops a detailed implementation scheme with regard to reparations. First, the demobilized individuals shall in the spontaneous declaration and confession indicate the illegally obtained assets that are surrendered for making reparation to the victims, if they have any.¹⁹⁵ These assets shall be provided to the Victims Reparation Fund. When the perpetrator is not identified, but the harm and causal nexus with the illegal armed group in question is proven, reparations shall be paid directly to the victim from the Fund.¹⁹⁶

During the judicial processing, victims can intervene to claim their reparation rights by petitioning the Superior Judicial District Court.¹⁹⁷ After an express request is made by the victim, the Court opens the proceeding for comprehensive reparation and calls a public hearing, where the victim states specifically the type of reparation sought, and indicates the evidence that will be introduced to support the claim. The parties will be encouraged to reach a “friendly settlement”. If they cannot reach such an agreement, their respective evidence and arguments will be taken into consideration and there will be a ruling on the reparations motion during sentencing.¹⁹⁸

The reparation plan created by Law 975 relies on judicial determinations at the request of victims, leaving the burden of seeking reparations on the victims rather than the State. The claimants in ruling C-370/06 contended that the right to reparation should be guaranteed in all circumstances, taking into consideration that participation may be limited by causes outside of the victim’s control.¹⁹⁹ Instead, in the case of Colombia – if a victim is unaware of his case or does not know the circumstances surrounding the death or disappearance of a loved one and fails to present a claim, there will be no reparation. Also, the requirement

¹⁹⁴ Guembe and Olea (2006) p.135-136.

¹⁹⁵ Law 975/05, Arts.17 and 44(1).

¹⁹⁶ Law 975/05, Art.42.

¹⁹⁷ Law 975/05, Art.45.

¹⁹⁸ Law 975/05, Art.23.

¹⁹⁹ Ruling C-370/06, Section 1.2.16.

that the victim must identify their perpetrator or prove nexus to the armed group in question is a serious obstacle to obtaining reparations.

4.3.3 Constitutional Court judgment

In ruling C-370/06 of the Constitutional Court, some of the above concerns were addressed and amended. Firstly, the Court declared that the criminal procedure established by Law 975 does not “effectively promote full disclosure of the truth” and stated that the granting of substantive benefits of sentence reduction without declaring *full* disclosure of all the crimes the ex-combatant may have participated in, constitutes a violation of the right to truth.²⁰⁰ The Court held that a more serious sanction for withholding information should apply. Failure to provide the full truth must trigger the State’s legal responsibility to investigate and sanction, resulting in subjection to the normal criminal justice system and making the free confession alternative a “one-shot deal.” Secondly, the Court required that the location of the disappeared be part of the information submitted by the demobilized individuals.²⁰¹ Thirdly, it stated that ex-combatants who benefit from the provisions of Law 975 should contribute to the financial compensation of victims from their personal estates, including property that they have *legally* acquired, and not only ‘when possible.’ The Court affirmed that the State is not authorized to exempt those responsible for gross crimes from civil responsibility and explained that under Colombian and international law, economic compensation is an element of the right to reparations of victims and a condition to promote the fight against impunity.²⁰² Fourthly, the Court rejected limits in the national budget as a reason for failure to pay reparations, saying it could not be subjected solely to political will. This holding is important because States often claim that limited resources restrict their obligation to pay reparations. Fifthly, the Court held that victims shall be allowed to participate in all stages of the criminal proceeding, that is; free confession, indictment, and acceptance of the charges. Sixthly, it eliminated any ambiguity about the need to identify the perpetrator to receive reparations, since such a literal reading would

²⁰⁰ Ruling C-370/06, Section 6.2.2.1.7.5.

²⁰¹ Laplante and Theidon (2006) p.104.

²⁰² Ruling C-370/06, Section 6.2.4.1.11-6.2.4.1.12.

amount to a disproportionate burden on the victim.²⁰³ Lastly, the Court prolonged investigation periods,²⁰⁴ giving the special prosecutor more time to investigate and verify the “spontaneous confession” of the demobilized individual before the criminal trial must be initiated. This is important to secure as much truth as possible. Although the Colombian Victims’ Movement wanted the Court to declare the whole law unconstitutional, this is still a very important ruling, and has expanded victims’ rights. However, the changes are yet to be implemented,²⁰⁵ and this needs to be done quickly if the process is not to lose its legitimacy.

4.3.4 National Commission on Reparation and Reconciliation (CNRR)

The CNRR was created by Law 975 to regulate the demobilization process.²⁰⁶ Its functions include guaranteeing victims their participation in the judicial proceedings and the realization of their rights, and evaluating the reparation and restitution of the victims. Law 975 does not establish any special non-judicial truth-telling mechanism, but assigns to CNRR certain responsibilities normally given to truth commissions, such as the task of producing a report about the causes of the emergence and development of the illegal armed groups,²⁰⁷ currently under work by the Historical Memory Group,²⁰⁸ as well as recommending criteria for reparations addressed by Law 975²⁰⁹ and making recommendations to the government about a collective reparations program.²¹⁰ The president of CNRR, Dr. Eduardo Pizarro, states that “reconstruction of the truth, both factual and historical, will be one of the main tasks” of the Commission, because “without truth, neither justice nor reparations nor reconciliation are possible.”²¹¹

²⁰³ Laplante and Theidon (2006) p.103-106.

²⁰⁴ Ahmad (2006) p.366.

²⁰⁵ IACHR, *Report on the Implementation of the Justice and Peace Law: Initial Stages in the Demobilization of the AUC and First Judicial Proceedings*, OEA/Ser.L/V/II. Doc. 3 (2 October 2007) para.109(3). Hereinafter IACHR Report 2007.

²⁰⁶ CNRR was created by Law 975/05, Art.50 and Decree 4760/05, Art.21.

²⁰⁷ Law 975/05, Art.51.

²⁰⁸ The Historical Memory Group: http://www.cnrr.org.co/memoria_historica.htm (visited 19 May 2008).

²⁰⁹ Law 975/05, Art.51(6).

²¹⁰ Law 975/05, Art.49.

²¹¹ Laplante and Theidon (2006) p.93.

However, victims see their right to truth as only partially fulfilled though CNRR, because they have only exceptionally been included in the process. This lack of victim support is a cause of concern for the CNRR, as its success hinges on their participation.²¹² The victims have created an alternative commission, the International Ethics Commission for Colombia, which is to collect evidence, documents and testimonies from victims and their families, and support their reparation initiatives.²¹³ It is uncertain what the role of the Ethics Commission will be, as this depends on its developments, as well as those of the Historical Memory Group.

When it comes to reparations, CNRR has made progress in setting up regional commissions and a regional care network for victims, and is compiling a register of victims and victim organizations.²¹⁴ CNRR has further been working on a proposal for a comprehensive National Reparations Program, which resulted in Decree 1290 of 2008 on administrative individual reparations, passed on 22 April 2008.²¹⁵ This administrative reparations program was first encouraged by victims, as not all victims are able to access the judicial process for claiming reparations. However, many victims are now criticizing the administrative program. Firstly, victims will only receive small financial compensations that can in reality only be considered as humanitarian assistance. They are likely to all receive the same amount, failing to recognize that some victims suffered, and continue to suffer, more than others, and should be compensated accordingly.²¹⁶ Secondly, it seems as if receiving reparations through the administrative program will impede victims from claiming reparations in the judicial processes.²¹⁷ Since this is such a recent development it

²¹² Laplante and Theidon (2006) p.93-94.

²¹³ See National Movement of Victims of State Crimes (MOVICE): <http://www.movimientodevictimas.org>.

²¹⁴ General Assembly, Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia*, U.N. Doc.A/HRC/4/48 (5 March 2007), para.31. Hereinafter UNHCHR Report 2007.

²¹⁵ The proposal will also consist in administrative programs concerning collective reparations and, according to ruling T-821 of 2007 of the Const'l Court, restitutions. Email from Maria Paula Saffon, 17 May 2008.

²¹⁶ Roth-Arriaza (2004) p.169-180.

²¹⁷ CCAJAR (2008).

is not possible to foresee the results, but as for now it does not seem to be a reparations program that will secure dignity and the possibility of a new start for the victims.

The administrative individual reparations as well as the reparations ordered under the judicial proceedings will mostly be covered by the Victims Reparation Fund.²¹⁸ The Reparation Fund shall be made up of all the assets or resources that may be surrendered by the individuals or illegal armed groups demobilizing under Law 975, resources from the national budget, and donations, both national and foreign. There are however strong indications that the Reparation Fund will not have sufficient resources, mainly because few members will be sentenced under the Law 975, and because straw men hold many of their assets.²¹⁹ Further, there are no actual mechanisms to *make* perpetrators surrender their goods. Also, the law does not specify the proportion of State contributions, and experiences from other countries show that reparations are not particularly attractive to donors.²²⁰ This leads to a great deal of uncertainty for the Colombian victims.

4.4 Obstacles to obtaining truth and reparation

Since the beginning of the implementation of the judicial proceedings under Law 975, there have been great difficulties and obstacles preventing victims from participating fully in these processes.

4.4.1 Burden on victims

The Inter-American Court has clarified that initiating criminal investigations is the State's legal duty and not the responsibility of victims and their next of kin.²²¹ However, Decree 4760, the preliminary regulation of Law 975, indicates that investigations will be instigated

²¹⁸ The Reparation Fund is created by article 54 of Law 975 as a special account without legal personality, under the responsibility of the Social Solidarity Network

²¹⁹ Crisis Group Latin America, *Colombia: Towards Peace and Justice?* Report No.16, 14 March 2006, p.13

²²⁰ Guembe and Olea (2006) p.135.

²²¹ *Velásquez-Rodríguez v Honduras*, IACtHR (Merits, 1988) para.177.

following requests, petitions, or complaints from victims.²²² Consequently, the burden is on the victim instead of the State. The IACHR also argues that securing the recovery of assets from demobilized combatants in order to pay reparations must not depend on the initiative of the victim. Beyond the information that the victim can provide, the State has much greater resources and capacities than the victims for this purpose.²²³

4.4.2 Lack of information to victims on how to claim their rights

The Prosecutor General's Office is the legal intermediary for informing victims about the processes so that they can claim their right to participate. It has been in charge of issuing notices to attend the voluntary deposition and confession hearings, publishing notices in newspapers of broad circulation and at its website. However, there are regions without television or internet service, and where these newspapers are not distributed. This is unfortunately where the majority of the victims live who require access to information on their rights and how to enforce them. To ensure victim participation, notices should therefore be given through local radio stations and regional newspapers.²²⁴ In the words of UNHCHR; “[i]t will be necessary to strengthen the mechanisms for giving information to victims, and to take measures to ensure their effective participation in legal proceedings against the perpetrators.”²²⁵

4.4.3 Lack of resources

Victims have the right to personal and direct access, or through their attorney, to all stages of the criminal proceedings under Law 975.²²⁶ However, it has been found that victims must go to great efforts to attend the hearings. No financial support is granted for travel and accommodation expenses, and not everyone has the necessary financial means to cover the

²²² Laplante and Theidon (2006) p.89-90.

²²³ IACHR Report 2007, para.94.

²²⁴ IACHR Report 2007, paras.56-58.

²²⁵ UNHCHR Report 2007, para.32.

²²⁶ Ministry of Interior and Justice, Decree 315 of 7 February 2007, regulating intervention by victims in the investigation stage of justice and peace proceedings in accordance with Law 975/05.

expenses involved.²²⁷ Many victims will also effectively be denied access to reparations because of their own problem in accessing the justice system, difficulties in providing evidence, and the strict criteria for criminal liability employed in criminal proceedings. Because of the complexity of the process, there is a need for legal assistance, and victims have encountered great difficulties in being represented at the hearings and finding adequate legal counsel.²²⁸ Those who can afford to pay for an own attorney and other expenses will have a greater chance to receive reparations. This could contribute to a polarization among the victims to the disadvantage of the most vulnerable groups.

4.4.4 Lack of transparency

Another obstacle to victim participation in the judicial processes is the lack of transparency in the processes. Victims should have full victim access to all hearings or voluntary deposition sessions and a real possibility to question the demobilized combatants and learn the truth. Today the victims' questions are incorporated into a form that is delivered to the prosecutor, who in turn transmits to the demobilized only the questions he deems relevant. The victim is not in the same room as the prosecutor, and thus has no possibility to raise new questions, to seek clarification for further details, or to cross-examine.²²⁹

4.4.5 Continued armed conflict and fear of reprisals

The biggest hindrance to victim participation is however the fear of retaliation from the paramilitaries. Several victims have been murdered, threatened, or harassed, partly a result of inadequate security measures. The IACHR has repeatedly stated that the "participation of victims with security guarantees is a crucial aspect of the judicial process and of protecting the right to truth, justice and reparation."²³⁰ On 30 January 2007, Mrs. Yolanda Izquierdo was shot and killed. She attended the hearing of paramilitary leader Salvatore Mancuso as a leader in the complaints lodged by hundreds of farmers over the seizure of

²²⁷ IACHR Report 2007, paras.59 and 81.

²²⁸ *supra* note 227, paras.83 and 95.

²²⁹ *supra* note 227, para.82.

²³⁰ *supra* note 227, para.87.

their land by AUC members and as a victim in accordance with the procedure established by Law 975. She had repeatedly requested the judicial authorities for protection because she was receiving death threats, but without any response.²³¹ The Colombian State thus failed its duty for the second time, by not protecting a victim who was trying to achieve reparations for the harm done to her in the first place.

In a context of continued armed conflict, the issue of security is particularly pressing. There is evidence that the demobilization of the paramilitaries has not been successful and that they are being “recycled” into the conflict, operating under a new name.²³² Many victims are living in areas of influence of demobilized paramilitaries, and claim they are “still receiving threats and are subject to violence, intimidation and local control.” The IACHR has called upon the Colombian State to urgently adopt the measures required to give due protection to the victims of the conflict and their representatives in the exercise of their fundamental rights.²³³ If victims who have prepared to testify in the purpose of seeking reparations renounce to do so because of lack of security, this is a serious obstacle preventing victims from obtaining truth and reparations. Only the State can take the measures necessary to fulfill the victims’ right, and is obligated to do so. This can also contribute to victims regaining confidence in the government. As for now, since there is no regime change in the country²³⁴ and because of the country’s history and the recent exposed links between the government and the paramilitaries, victims lack confidence in the government, the security forces, and the judiciary. This is justified, since the Colombian State has so far not taken the measures necessary to allow for genuine participation by victims and witnesses, especially given the context of the ongoing internal armed conflict.

The President of CNRR, Eduardo Pizarro, points out that “promoting policies on truth, justice and reparation in the middle of conflict will be undoubtedly one of the greatest

²³¹ IACHR Report 2007, para 88.

²³² Laplante and Theidon (2006) p.68. See also IACHR Report 2007, paras.106-108.

²³³ IACHR Report 2007, paras.88-92.

²³⁴ Colombia is possibly a case of “transitional justice without transition”, see Uprimny et al. (2006).

challenges to confront the CNRR.”²³⁵ This is another obstacle presented by the continued armed conflict; that before there is peace, many Colombians may feel that it is too early to seek the historical truth.²³⁶ This can probably also be related back to fear of reprisals; it certainly seems safer to reveal the truth when the actors in the conflict have laid down their arms and the structure of the armed groups is dismantled.

4.5 Protection of victims’ right to truth and reparation in Colombia versus international standards

Colombia has ratified all the major human rights treaties, and both the Constitution and Law 975 establish that their provisions shall be interpreted and applied in accordance with those treaties.²³⁷ On paper, therefore, the protection of victims’ rights to truth and reparation in Colombia seems to meet international standards. However, as laid out above, there are provisions in Law 975 that hinder the victims’ access to the process where they can claim their rights to truth and reparation. Law 975 has had to stand the test of international standards set forth by the Inter-American Court, HRC, and the Colombian Constitutional Court. Also, Colombia ratified the Rome Statute of the ICC, and is subject to its jurisdiction.²³⁸ As mentioned, some amendments to Law 975 have been ordered in the Constitutional Court ruling, but are still not implemented. Other improvements have been highly encouraged by the UNHCHR, the IACHR and the Inter-American Court. Especially the Inter-American Court has set some important precedents in the case of Colombia.

²³⁵ Laplante and Theidon (2006) paras.93-94.

²³⁶ ICTJ survey, p.69.

²³⁷ Constitution of Colombia of 1991, Art.93; Law 975/05, Art.2.

²³⁸ Approved by Congress through Law 742/02, reviewed by the Const’l Court, Judgment C-578 (30 July 2002).

4.5.1 Judgments by the Inter-American Court of Human Rights

4.5.1.1 Law 975

In the case of the *Mapiripán Massacre*, which involved the kidnapping, torture, and murder of at least forty-nine civilians by state and paramilitary agents, the victim representatives argued that the enactment of Law 975 constituted an additional obstacle for the establishment of truth and the attainment of justice and reparations in the instant case, as they were not ensured the possibility of fully participating in the criminal proceeding and of receiving comprehensive reparations. They therefore asked the Court to examine the normative framework of the paramilitary demobilization as a whole, and order that domestic legislation and the demobilization program be adjusted to international standards regarding the rights of victims. To the disappointment of many victims' organizations and human rights NGOs, the Court did not rule specifically on Law 975, but only reiterated the importance of investigations and stressed that amnesty provisions are unacceptable and that impunity must be avoided.²³⁹ Thus, it seems as if Law 975 meets the bare minimum requirements of the Court's jurisprudence and thereby withstands its scrutiny.²⁴⁰

4.5.1.2 Investigation as the State's responsibility and victims' right to participation

Regarding victims' rights and participation, the Court stated in the above case that "the State is responsible for effectively seeking to establish the truth, and this depends neither on the procedural initiative of the victims or of their next of kin, nor on their contributing evidence"²⁴¹ It confirms then that when it comes to truth-seeking and investigation, the burden is not on the victim, but on the State. The Court has also repeatedly stated that victims of human rights violations and their families should have the opportunity to participate fully in the clarification of crimes committed against them, including seeing

²³⁹ *Mapiripán Massacre v. Colombia*, IACtHR (2005) paras.301-304.

²⁴⁰ Ahmad (2006) p.345.

²⁴¹ *Mapiripán Massacre v. Colombia*, IACtHR (2005) para.219; confirmed in *La Rochela Massacre v. Colombia*, IACtHR (2007) para.195.

those responsible brought to justice and reparations ordered.²⁴² In the *La Rochela Massacre* case, the Court stated:

With regard to the participation of the victims, the State should guarantee that at every stage of the proceedings the victims have the opportunity to present their concerns and evidence, and that these be completely and seriously analyzed by the authorities before determining the facts, responsibility, penalties, and reparations.²⁴³

4.5.1.3 State responsibility of creation of paramilitary groups and a duty to protect

In the case of the *19 Merchants*, the Inter-American Court established the responsibility of the Colombian State in the creation and support of self-defense groups, which later became paramilitary organizations dedicated to unlawful activities.²⁴⁴ This was confirmed in subsequent cases against Colombia: the *Mapiripán Massacre*, the *Ituango Massacres*, the *Pueblo Bello Massacre*, and the *La Rochela Massacre*. In the case of the *Pueblo Bello Massacre*, the Court stated that the result of this State responsibility is an obligation to protect the civilian population:

While it subsists, this dangerous situation accentuates the State's special obligations of prevention and protection in the zones where the paramilitary groups were present, as well as the obligation to investigate diligently, the acts or omissions of State agents and individuals who attack the civilian population.²⁴⁵

These rulings from the Inter-American Court are important, firstly, because they are judgments of incremental development which confirm and strengthen, and thus consolidate the content of the rulings, and secondly, because they do not only reiterate in the exact manner what has been said in previous rulings, but also make gradual advances. Without all these rulings, the truth produced by the Inter-American Court could have been fragmented and partial, able to satisfy the right to truth for the victims and constitute some form of reparation, but instead it also confirms the larger picture of the truth about the

²⁴² *Mapiripán Massacre v. Colombia*, IACtHR (2005) para.219; *Pueblo Bello Massacre v. Colombia*, IACtHR (2006) para.144.

²⁴³ *La Rochela Massacre v. Colombia*, IACtHR (2007) para.195

²⁴⁴ *19 Merchants v. Colombia*, IACtHR (2004) paras.116, 118, 124.

²⁴⁵ *Pueblo Bello Massacre v. Colombia*, IACtHR (2006) para.126.

paramilitarismo and the responsibility of the Colombian State, capable to satisfy also the collective truth of the society to the truth and constitute a tool for non-repetition.²⁴⁶

In one of the last judgments of the Inter-American Court so far, the *La Rochela Massacre v. Colombia*, the Court again addresses the issue of security. There is a clear development in the Court's jurisprudence here, as it orders the State to institute an effective system of adequate security and protection for justice officials and investigators, and to likewise "ensure the effective and expeditious protection of witnesses, victims, and their next of kin in cases of gross violations of human rights [...]"²⁴⁷

4.5.1.4 The right to truth and reparation

In the cases of *the Ituango Massacres*, *the Pueblo Bello Massacre* and *the Mapiripán Massacre*, the Court found that the comprehensive reparation of the violation of a Convention right cannot be reduced to the payment of compensation to the next of kin of the victim, but must include measures of rehabilitation and satisfaction and guarantees of non-repetition. The Court has further established that in cases of human rights violations, the State has the duty to provide reparations.²⁴⁸ In the case of the *La Rochela Massacre* it established that the State must "ensure that the reparation claims formulated by the victims of grave human rights violations and their next of kin do not encounter excessive procedural burdens or obstacles that could present an impediment or obstruction to the satisfaction of their rights."²⁴⁹ This was meant to orient the application of Law 975, and is of crucial importance for victims to fulfill their right to reparation.

Regarding the right to truth, the Court emphasized in *La Rochela Massacre* that "the satisfaction of the collective dimension of the right to truth requires a legal analysis of the most complete historical record possible." It further held that in cases of gross human rights

²⁴⁶ Saffon and Uprimny (2007a).

²⁴⁷ *La Rochela Massacre v. Colombia*, IACtHR (2007) OP 10, also para.297. The IACHR reiterated this in its 2007 Report, para.100.

²⁴⁸ *Pueblo Bello Massacre v. Colombia*, IACtHR (2006) para.209.

²⁴⁹ *La Rochela Massacre v. Colombia*, IACtHR (2007) paras.198-201.

violations, “the positive obligations inherent in the right to truth demand the adoption of institutional structures that permit this right to be fulfilled in the most suitable, participatory, and complete way. These structures should not impose legal or practical obstacles that make them illusory.”²⁵⁰ This ruling can have important implications for the process under Law 975 since, as previously shown, the process contains many obstacles, both legal and practical, that hinder victims from fulfilling their right to truth.

Based on the above rulings from the Inter-American Court, it is clear that under international standards, victims’ rights are not sufficiently protected in Colombia. Although Law 975 survived the scrutiny of the Court, suggesting an adequate protection of victims’ rights to truth and reparation on paper, it is obvious that there are many practical obstacles, such as lack of security and lack of efficient participation, that are keeping victims from fulfilling their rights. These are landmark judgments from the Inter-American Court, and we can only wait and see if they will have an impact on the behavior of the Colombian State and, most importantly, be implemented on the national level.

4.5.2 The International Criminal Court

Colombia is party to the Rome Statute of the ICC. The ICC can try cases of gross human rights violations when domestic judicial systems cannot, either due to their inability or unwillingness. A circumstance where the ICC would find unwillingness on part of the State is if the State holds domestic prosecutions for the purpose of shielding. The question is; could Law 975 and the procedures it provides for be considered a form of shielding? Since proceedings are existent, the Prosecutor would have to show that they are being carried out without adequate independence, or with undue delay, for the State to be considered “unwilling” to prosecute. An indication of shielding could also be a disproportionately lenient sentence in light of the gravity of the crime. However, Article 80 of the Rome Statute seems to give States some leeway in imposing sentences.²⁵¹ If not, five- to eight-

²⁵⁰ *La Rochela Massacre v. Colombia*, IACtHR (2007) para.195.

²⁵¹ Guembe and Olea (2006) p.137.

years sentences for paramilitary leaders taking responsibility for as much as 720 killings²⁵² certainly seem too lenient. It is likely that the ICC Office of the Prosecutor will continue to monitor developments in Colombia.²⁵³

4.6 Recent developments

On 13 May 2008, 14 paramilitary leaders were extradited from Colombia to the United States to face trial on drug trafficking charges. Victims in Colombia now fear that this development may keep them from learning the truth about the violations these paramilitary leaders committed, included the fate of the disappeared persons, and keep them from receiving reparations. IACHR also expressed its concern, as the extradition can be a serious obstacle to victims' right to truth, justice, and reparations for the crimes committed by the paramilitary groups.²⁵⁴ The Colombian government argues that the paramilitary leaders were extradited because they did not follow the requirements under Law 975. However, many claim that in the case of the paramilitaries, there are strong interests opposing truth-seeking and truth-telling mechanisms in Colombia as they would result in uncovering the identities of prominent figures who funded and supported such groups.²⁵⁵ One can speculate if this is the real reason for the extradition of the paramilitary leaders, as the extradition most likely will put an end to the *parapolítica* scandal. This is too early to tell, however these are certainly developments that should be followed closely by the international community.

²⁵² On 4 March 2008, the newspaper *El Tiempo* wrote about ex-paramilitary leader Jose Gregorio Mangones, alias "Carlos Tijeras", who under two hearings admitted to killing altogether 720 persons who were under accusation of cooperating or sympathizing with the left-wing guerrillas. Demobilizing under Law 975, he will spend from 5 to 8 years in jail for killing 720 civilians <http://www.isn.ethz.ch/news/sw/details.cfm?ID=18843> (visited 15 May 2008).

²⁵³ ICTJ: <http://www.ictj.org/en/where/region2/514.html> (visited 21 April 2008)

²⁵⁴ IACHR: <http://www.cidh.org/Comunicados/English/2008/21.08eng.htm> (visited 14 May, 2008).

²⁵⁵ Guembe and Olea, p.138.

4.7 Conclusion

Victims' rights to truth and reparations are quite well protected on paper in Colombia, however, the rights are not being implemented. In terms of the balances that Law 975 seeks to strike as an instrument of transitional justice, the victims are obliged to lower their expectations for justice through the substantial reduction in penalties for atrocious crimes, in exchange for achieving peace, obtaining the truth, and effective access to reparations.²⁵⁶ It is not reasonable for the State then, having established a legal framework for the process and guaranteed its fate, not to guarantee victims access to the judicial process where they can claim their right to truth and reparation. Without removing the obstacles that are keeping victims from claiming their rights, the Colombian State is not fulfilling its duty. There has been some truth achieved in Colombia, with the ongoing exhumation process and the parapolítica trials in the Supreme Court, but the recent extraditions may prove to be a backlash. Also, an administrative program for reparations has now been approved, but the State should acknowledge its responsibility to provide reparations instead of seeing it as an "act of solidarity" on their part.²⁵⁷ Lastly, reparations should be provided to all victims regardless of whether the crimes against them were committed by agents of the State or by illegal armed groups. The rights of the victims should be absolute, irrespective of who the perpetrators were.²⁵⁸

²⁵⁶ IACHR Report 2007, para.97.

²⁵⁷ http://web.presidencia.gov.co/sp/2008/abril/22/01222008_i.html (visited 16 May 2008)

²⁵⁸ Declaration by MOVICE: <http://colombiasupport.net/news/2008/02/criteria-for-integral-reparation-of.html> (visited 15 May 2008).

5 Concluding remarks

When a State has failed to protect its citizens from gross violations of human rights, either by act or omission, it has the duty to repair the damage. The victims have a corresponding right to receive reparations, a right that, as shown in the first chapter of this thesis, has been acknowledged by various UN organs as well as the Inter-American Commission and Court. In soft law UN instruments and Inter-American jurisprudence, the concept of reparation has developed from focusing solely on compensation to include a wide range of reparative measures. Closely interrelated with this is the concept of truth. Not only is disclosure of the truth through testimony or investigation necessary for victims in order to receive reparations, but the right to truth for victims and their family members has also come to be seen as an important *part of* reparations, as has been established in the Basic Principles and in Inter-American Court judgments. However, the right to truth is also increasingly acknowledged as an independent right. It has been developed to embrace a broad range of measures, and includes both an individual and a societal dimension, although it is still only an individual, and not a collective, right.

The above rights are connected with the State obligations to create conditions for a full exploration of the truth and to provide reparations to all victims. They must be understood as separate from each other in the sense that if for some reason one of them cannot be accomplished, the other still remains an obligation. However, the State cannot choose freely between its duties, such as offering reparations on the condition that no questions will be asked about the fate and whereabouts of forcibly disappeared victims. Both obligations must be pursued in good faith and to the best of the government's abilities.²⁵⁹

²⁵⁹ Méndez (2007) p.198-199.

In sum, truth and reparations are both interrelated and independent concepts. The complexity of the relationship between them is illustrated by truth as a “backward-looking” mechanism and reparation as a “forward-looking” mechanism. What is more important to the victims; truth and an official recognition of the past, or reparation to help them begin a new life and look towards the future? Providing truth without any reparation is likely to be seen by victims as “cheap talk” and an empty gesture on part of the State, while providing reparations without any truth may be viewed as “blood money” or an attempt to buy the victims’ silence. Reparations are very important as they in a sense are the material form of the recognition owed to those whose fundamental rights have been violated,²⁶⁰ but cannot be seen as simply a substitute for truth or justice.²⁶¹ It seems as the general view of victims is that you cannot have one without the other. The National Victims’ Movement in Colombia argues that “in developing any proposal for integral reparation that recognizes the constitutional rights of the victims, truth should be a fundamental principle.”²⁶²

The greatest challenge that the victims’ face in attempting to claim their rights is that they are not given a voice in the official processes. The ICTJ survey from Colombia highlights the importance of including victims when making proposals for reparations programs and truth-seeking mechanisms. The survey shows that those asked prefer forms of reparation that secure them a dignified life, such as education, work and medical and psychological attention, while symbolic reparation measures, such as apologies or building of monuments, were not of much value to them.²⁶³ If the purpose is indeed to “repair” the harm done in the best possible way, then these views and opinions should be taken into account. In Colombia, the lack of victim participation resulted in great dissatisfaction with the outcome and a parallel process of truth-seeking organized by the victims themselves. As mentioned in the introduction, the legitimacy of transitional justice mechanisms is to a large degree measured by the victims’ ability to participate in and benefit from them. In the case of Colombia, then, it can be questioned if the process is indeed legitimate.

²⁶⁰ De Greiff (2006) p.461.

²⁶¹ Hamber (2005) p.139.

²⁶² MOVICE, supra note 258.

²⁶³ ICTJ survey, p.65-75.

Truth and reparations are subjects that are moving so quickly and encompass such breadth that it has been impossible to cover more than parts of them in this thesis. Similarly, the many developments in Colombia at the time of writing do not provide for any concluding observations. Nevertheless, some general recommendations should be given. First of all, States should ratify CED as soon as possible for it to enter into force. Unfortunately, there is still a need for international protection against enforced disappearance, and with the new standards introduced in CED, the Convention is likely to contribute to strengthening the legal status of the right to truth and reparation of victims of gross human rights violations. Secondly, with consistent and widespread State practice of fulfilling victims' rights to truth and reparation, these rights and the corresponding State duties could eventually become customary law. This would make them binding also for States in regions of the world that have not ratified international human rights treaties. It is therefore crucial that States acknowledge the right to truth and reparation for victims and fulfill their duties in a consistent manner. This has particular relevance in the "war against terror" and the secrecy that surrounds the actions of the States who are involved in fighting it. "Extraordinary renditions" is the new form of enforced disappearances, and if they those persons who are victims of it can demonstrate State failure to protect, they also have a right to truth and reparation. Thirdly, when it comes to Colombia, it is not enough to ratify human rights treaties and have a well-developed legal framework protecting victims' rights if the mechanisms or the political will to implement it is not present. Although the country faces additional challenges in implementing transitional justice mechanisms in a context of continued conflict, the government must show the will to include the victims in the processes and give them priority over the demobilizing perpetrators, and not least implement the rulings of the Constitutional Court and the Inter-American Court. Lastly, there is an urgent need for international attention to both conflict situations and demobilization and peace processes. The international community should only support processes which can be considered legitimate, and should particularly support the victims' struggle to make sure their voices are heard. This would strengthen the protection of the fundamental and important rights of victims to truth and reparation.

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Office of the High Commissioner of Human Rights: <http://www.ohchr.org>

Semana: <http://www.semana.com>

All material referred to in this essay is listed in the reference list.

