

The background of the cover is a blurred photograph of several individuals, likely activists or protesters, holding megaphones. The image is overlaid with several semi-transparent rectangular boxes in shades of blue and brown, which serve as a design element and a backdrop for the title text.

# Victims **U**nsilenced

The Inter-American Human Rights System  
and Transitional Justice in Latin America



## **VICTIMS UNSILENCED**



The Inter-American Human Rights System  
and Transitional Justice in Latin America

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# ABBREVIATIONS

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<b>APRODEH</b>	<i>Association for Human Rights / Asociación Pro Derechos Humanos (Peru)</i>
<b>ARENA</b>	<i>Nationalist Republican Alliance / Alianza Republicana Nacionalista (El Salvador)</i>
<b>ASVEM</b>	<i>Association of Military Veterans / Asociación de Veteranos Militares (El Salvador)</i>
<b>CEAS</b>	<i>Episcopal Commission for Social Action / Comisión Episcopal de Acción Social (Peru)</i>
<b>CEH</b>	<i>Historical Clarification Commission / Comisión de Esclarecimiento Histórico (Guatemala)</i>
<b>CEJIL</b>	<i>Center for Justice and International Law / Centro por la Justicia y el Derecho Internacional (United States)</i>
<b>GELS</b>	<i>Center for Legal and Social Studies / Centro de Estudios Legales y Sociales (Argentina)</i>
<b>COMISEDH</b>	<i>Human Rights Commission / Comisión de Derechos Humanos (Peru)</i>
<b>CONADEP</b>	<i>National Commission on the Disappearance of Persons / Comisión Nacional sobre la Desaparición de Personas (Argentina)</i>
<b>Coordinadora</b>	<i>National Human Rights Coordinating Committee / Coordinadora Nacional de Derechos Humanos (Peru)</i>
<b>COPREDEH</b>	<i>Presidential Commission on Human Rights / Comisión Presidencial Coordinadora de la Política del Ejecutivo en Materia de Derechos Humanos (Guatemala)</i>
<b>CSJM</b>	<i>Supreme Council of Military Justice / Consejo Supremo de Justicia Militar (Peru)</i>
<b>FEDEPAZ</b>	<i>Ecumenical Foundation for Development and Peace / Fundación Ecueménica para el Desarrollo y la Paz (Peru)</i>
<b>FMLN</b>	<i>Farabundo Martí National Liberation Front / Frente Farabundo Martí para la Liberación Nacional (El Salvador)</i>
<b>IACHR</b>	<i>Inter-American Commission on Human Rights</i>
<b>ICC</b>	<i>International Criminal Court</i>
<b>IDHUCA</b>	<i>Human Rights Institute of Central American University / Instituto de Derechos Humanos de la Universidad Centroamericana (El Salvador)</i>
<b>IDL</b>	<i>Legal Defense Institute / Instituto de Defensa Legal (Peru)</i>
<b>IUDOP</b>	<i>Public Opinion Institute of Central American University / Instituto Universitario de Opinión Pública Universidad Centroamericana (El Salvador)</i>
<b>MRTA</b>	<i>Túpac Amaru Revolutionary Movement / Movimiento Revolucionario Túpac Amaru (Peru)</i>
<b>NGO</b>	<i>nongovernmental organization</i>
<b>OAS</b>	<i>Organization of American States</i>
<b>ONUSAL</b>	<i>United Nations Observer Mission in El Salvador / Observadores de las Naciones Unidas en El Salvador</i>
<b>PNR</b>	<i>National Reparations Program / Programa Nacional de Resarcimiento (Guatemala)</i>
<b>REMHI</b>	<i>Recovery of Historical Memory / Proyecto Interdiocesano de Recuperación de la Memoria Histórica (Guatemala)</i>
<b>SIE</b>	<i>Army Intelligence Service / Servicio de Inteligencia del Ejército (Peru)</i>
<b>UCA</b>	<i>Central American University / Universidad Centroamericana “José Simeón Cañas” (El Salvador)</i>
<b>UNDP</b>	<i>United Nations Development Programme</i>

## A NOTE ON SOURCES AND TRANSLATION

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Official publications of the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights are available in English on two main Web sites:

Inter-American Commission on Human Rights, <http://www.cidh.org/>

Inter-American Court of Human Rights, <http://www.corteidh.or.cr/>

The majority of documents published by the IACHR and the Inter-American Court exist in official English and Spanish versions. Throughout this volume, quotations from these and other sources have used the official English version whenever possible. In cases where an official English version does not exist or could not be found, translation into English is by the Due Process of Law Foundation.

The Inter-American Commission on Human Rights is abbreviated throughout the source notes as IACHR, and the Inter-American Court of Human Rights as Inter-American Court.

Several articles in this volume were translated from the Spanish. The editors have done their best to conserve the meaning of the original texts through a process of editorial revision.





# INTRODUCTION

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It is with great satisfaction and enthusiasm that the Due Process of Law Foundation (DPLF), with the generous support of the United States Institute of Peace, presents this volume on the impact of the Inter-American human rights system upon transitional justice processes in Latin America.<sup>1</sup> We are gratified to complete a project conceived by DPLF's former executive director, Margaret "Maggi" Popkin (1950–2005), who is dearly missed. And much enthusiasm is also justified as our contributors have produced an innovative and thought-provoking study.

The project examines the influence of the Inter-American Commission on Human Rights (the Commission) and the Inter-American Court of Human Rights (the Court) upon four nations: Argentina, Guatemala, Peru, and El Salvador. All four have struggled for justice after periods of massive human rights violations. The study assesses why the Inter-American system has had varying results with respect to transitional justice processes, despite having developed some of the most progressive jurisprudence in the world on the subjects of accountability, remedies, and due process. The countries were chosen to represent a range of circumstances and experience; El Salvador is at the furthest end of the spectrum, as neither the Court nor the Commission has been able to substantially shape national human rights policies in that country.

This critical effort to scrutinize the role of the Inter-American system within Organization of American States member countries has few precedents. As a result, it will serve as a crucial resource for the many individuals and institutions that apply international human rights norms and foster transitional justice efforts in this hemisphere and beyond. The volume is not overly technical, however, and it is accessible to a broad audience owing to its multidisciplinary nature. The contributors weave together several threads—historical, political, sociological, and, of course, legal—to create a rich tapestry. The fabric is at points dark and discordant, and at others bright and harmonious. Taken as a whole, the tapestry depicts a complex interaction among key actors: the Commission, the Court, the victims of human rights violations, the OAS political organs, and the Latin American states themselves.

Yet, in order to perceive all that drives this dynamic, the state must be carefully dissected. The authors urge us to closely examine a state's components, which are often interlocked and interdependent: the three branches of government, political parties, the military, and civil society in its numerous incarnations. The pages that follow describe alliances, confrontations, courage, and—above all—a growing assimilation of human rights principles at the societal level in Latin America. The human rights triumphs discussed are due both to the principled external pressure generated by the Commission and Court upon governments and to the perseverance and valor of actors within states.

Chapter 1, by Marcie Mersky and Naomi Roht-Arriaza, assesses Guatemala's current relationship with the Inter-American system. The essay takes us to the very front lines, drawing on interviews with individuals from Guatemalan government and civil society who seek to implement the many judgments and settlements emanating from the Commission and Court. The difficulties described and the practical recommendations advanced will greatly serve the work of the system. Of particular note is the discussion of collective reparations measures, an increasingly crucial topic as communities devastated by armed attacks make their way to the Commission and Court in pursuit of justice.

Next, Benjamín Cuéllar's chapter 2 captures the trials and tribulations of El Salvador. The essay chronicles nearly four decades of official resistance to the Inter-American system, despite laudable efforts by the Commission and an important recent judgment by the Court. Notwithstanding the end of the civil conflict and the publication of the Truth Commission's report in 1993, Cuéllar maintains that El Salvador has remained in a state of crisis and near-total impunity. The chapter explores the reasons for this tragic lack of progress, with a view to preventing future internal conflicts and to finally providing victims of state-sponsored rights violations their "turn" for justice.

Focusing upon Argentina, chapter 3 examines the variables that enable the Inter-American system to influence the adoption of human rights policies in a post-authoritarian state. Leonardo Filippini argues that local political alliances have been the critical factor permitting the Commission and Court to have an impact during that state's evolution toward democracy. In this way, flip-flops in official policy over time are attributed to battling political factions with varying access to power. According to Filippini, Argentina's significant human rights advances have occurred when factions supportive of accountability and reparations measures are directly linked to decision makers.

Susana Villarán's experiences as a commissioner of the Inter-American Commission, a leader of the human rights movement in Peru, and a government minister are all reflected in chapter 4. She emphasizes that both domestic and international forces have guided Peru on its turbulent voyage to democracy. According to Villarán, a consolidated national human rights network, the Commission's increasing scrutiny of government and guerrilla excesses, and landmark Court decisions such as *Barrios Altos* have been integral elements of the ongoing pursuit for "truth, justice, and reparations" in that nation.

In chapter 5, Ariel Dulitzky reflects upon the role of the Inter-American Commission in relation to other key actors on the international human rights stage. He explores the fundamental objectives and possibilities of the Inter-American system and underscores that a traditional legal solution, such as that provided by the Inter-American Court, may not always be the most appropriate. Dulitzky highlights the wide "spectrum of alternatives" available through the Commission to advance the goals of transitional justice. These mechanisms provide for, *inter alia*, state-victim dialogue, broader efforts to redress human rights violations, and the promotion of a culture of human rights.

Douglass Cassel, in chapter 6, offers the book's only exclusive study of Inter-American Court case law pertaining to transitional justice themes. The essay centers on three critical principles developed in the Court's jurisprudence: a state's duty to combat impunity, the right of access to justice, and the right to the truth. By considering judgments up to the landmark 2006 decision *Almonacid Arellano et al. v. Chile*, Cassel provides a very current analysis of these three concepts and asserts that they have set the foundation for a "far greater measure of justice, truth, and reparations than in the past."

A central objective of transitional justice is to hold perpetrators of human rights violations duly accountable. Santiago Canton's chapter 7 deals directly with this most difficult legal imperative that Latin American nations face in the wake of authoritarian rule. Canton assesses the widespread passage of amnesty legislation to shield members of oppressive regimes from criminal liability, and then discusses how the Inter-American system has endeavored to overturn these laws. As his study of contrasting experiences in Argentina, Peru, Uruguay, and El Salvador demonstrates, much has been accomplished to limit official impunity, but significant work remains.

Juan Méndez, former president of the Inter-American Commission and current president of the International Center for Transitional Justice, is an ideal person to reflect on the many lessons learned during the tumultuous struggles for justice and democracy in Latin

America. In chapter 8, Méndez affirms that “reconciliation will only come through an honest and full exploration of the truth, the pursuit of justice with respect for due process, a generous offer of reparations, and a serious effort to reform state institutions.”

Méndez points out that the most effective transitional justice policy adapts lessons from foreign experiences to the cultural context of the target region. DPLF underscores that the Inter-American system itself, as a regional system of human rights protection, was founded on that very principle. The Commission and Court have amassed considerable expertise with respect to Latin America’s unique characteristics, and they employ both regional and global human rights norms and jurisprudence to overcome the range of challenges found in the region.

In sum, despite inherent limitations, the Inter-American Commission and the Inter-American Court have proven to be courageous and principled allies of victims, civil society, and states alike, as transitional justice initiatives have both stumbled and succeeded over the years. As emphasized in the chapters of this volume, a multi-level collaboration among all of these actors is as crucial now as it was two decades ago—since the transition to justice in the region is still far from complete.

## NOTE

1 The opinions, findings, conclusions, and recommendations expressed in this publication are those of the authors and do not necessarily reflect the views of the United States Institute of Peace or the Due Process of Law Foundation.

# **Part I** Country Studies





## GUATEMALA

*Marcie Mersky and Naomi Roht-Arriaza*

At first glance, Guatemala seems to be an advertisement for the new effectiveness of the Inter-American human rights system. For many years Guatemala stonewalled and ignored the Inter-American Commission on Human Rights, strenuously defended its innocence in cases before the Inter-American Court of Human Rights, and tried to avoid and minimize on-site visits from the Commission. Things began to change, slowly, after the peace accords were signed in December 1996. In 2000 the situation seemed to shift dramatically when the Alfonso Portillo government decided to admit responsibility in a large number of the cases then before the Commission and the Court. The government pledged a more cooperative attitude, raising hopes for a new era of accountability and justice.

Since then, with some exceptions, the government has sought friendly settlements in cases. It has implemented, at least in part, the decisions of the Court. But this relatively cooperative attitude on the part of the executive branch has not been matched by the country's justice system—the National Civilian Police, the Public Prosecutor's Office, the judiciary, and the penitentiary system. Despite repeated calls from both the Commission and the Court to investigate and prosecute past human rights violations, by the end of 2006 few crimes arising from the internal armed conflict had been investigated, much less prosecuted. The courts remain plagued by intimidation, corruption, and incapacity.

This chapter attempts to explain these phenomena. It traces the government's movement from total rejection to partial collaboration with the Inter-American system machinery and evaluates to what extent the state is following through with respect to different types of reparations. It looks at the impact of several high-profile cases and examines the effects of the actions of the Commission and the Court on a number of local actors, including government officials, prosecutors, judges, private attorneys, nongovernmental organizations (NGOs), and victims' groups. In particular, it focuses on some of the difficulties that arise from awarding large monetary reparations and on intractable problems related to the country's justice system. Finally, we offer some conclusions aimed at improving the effectiveness of the Commission and Court.

## CASES BEFORE THE COMMISSION AND THE COURT

Guatemala became a party to the American Convention on Human Rights in 1978 and accepted the jurisdiction of the Court in March 1987. The country has for years been a major concern of the Inter-American system, which began receiving complaints on the human rights situation in Guatemala shortly after the start of the armed conflict in 1962. By 2001 the Commission had produced five special country reports on Guatemala, conducted at least 10 on-site visits since 1982, and published follow-up reports on the situation in its annual report for each year from 1983 to 1991 and also for 1993, 1994, 1996, and 1997.<sup>1</sup>

The Commission concluded in over 40 individual reports issued between 1993 and 2004 that the state had violated the Convention. It has issued conclusions and resolutions and has overseen amicable settlements between the Guatemalan state and petitioners in another 80 cases in the past few years. Most of these settlements have involved substantial economic reparations as well as commitments by the state to recognize publicly its responsibility, modify legislation that impedes judicial action, and ensure that cases move forward in the national tribunals.

For its part, the Court has issued judgments in 11 contentious cases, the highest number of rulings for any country except Peru. Of the cases in which the Court has issued a judgment, eight were directly related to the internal armed conflict, involving cases of disappearance, torture, and murder during the 1980s and 1990s. Several involved killings by the army, and one involved the local civil patrols, paramilitary structures created by the army in 1981. Another involved police abuse of street children, and the two most recent relate to death penalty and due process issues not directly connected to the internal armed conflict. In chronological order of decision, the cases are:

- The *Panel Blanca* case (*Paniagua Morales et al.*, March 8, 1998). This involved the disappearance of Ana Elizabeth Paniagua Morales and the murder of Erik Chinchilla and others, all apparently arbitrarily detained by the Treasury Police in 1987 and 1988. The Court found violations of Articles 1(1), 4, 5, 7, 8(1), and 25 of the American Convention.
- The *Blake* case (January 24, 1998). Civil patrollers acting as state agents abducted and murdered Nicholas Chapman Blake in 1985. They concealed the body, and the victim's fate was not discovered until 1992. While the Court found that it had no competence to consider the detention and death because they occurred before Guatemala had accepted the Court's jurisdiction, it did find the state in violation of Article 8(1) on right to a hearing and Article 5, based on the suffering of Blake's relatives.



- The “street children” case (*Villagrán Morales et al.*, November 19, 1999). Police abducted and killed five youths in 1990. In addition to violations of Articles 1(1), 4, 5, 7, 8, and 25, the Court found the state had also violated Article 19 on the rights of the child.
- The *Bámaca Velásquez* case (November 25, 2000). In 1992, guerrilla leader Efraín Bámaca Velásquez was captured alive by the army, tortured, and killed, although his detention was never acknowledged by the army and his body was never found. The Court ruled that even as a guerrilla captured during an internal conflict, Bámaca should have been brought before a court, and it ruled that in forced disappearance cases the violation of the mental and moral integrity of the next of kin is a direct consequence of the disappearance. It found that the state had violated Articles 1(1), 4, 5, 7, 8, and 25.
- The *Myrna Mack* case (November 25, 2003). Anthropologist Myrna Mack was murdered by state agents in 1990 because of her research on populations internally displaced by the war. The direct perpetrator was eventually convicted and jailed in Guatemala, but those who ordered the killing eluded justice for years, while witnesses, police, prosecutors, judges, and family members were threatened, exiled, and killed. The Court found there had been a lack of diligence in the criminal proceedings and found violations of Articles 1(1), 4, 5 (in relation to the family members), 8, and 25.
- The *Maritza Urrutia* case (November 27, 2003). Urrutia, allegedly a member of a guerrilla group, was captured in 1993 by armed men and held in an army detention center for eight days where she was interrogated, mistreated, and forced to appear on television to denounce the guerrillas. She was released only after substantial international pressure. The Court found violations of Articles 1(1), 5, 7, 8, and 25 of the American Convention on Human Rights and Articles 1, 6, and 8 of the Inter-American Convention Against Torture.
- The *Plan de Sánchez Massacre* case (April 29, 2004). In 1982, 268 people in the village of Plan de Sánchez, Rabinal, were massacred by army troops and their civilian collaborators. The Court found violations of Articles 1(1), 5, 8, 11, 12, 13, 16, 21, 24, and 25 of the Convention.
- The *Carpio Nicolle et al.* case (November 22, 2004). Newspaper publisher and former presidential candidate Jorge Carpio Nicolle and his associates were ambushed and killed in 1993, apparently by members of a paramilitary civil defense patrol. The Court found violations of Articles 1(1), 4, 13, and 23 with respect to Carpio, and violations of Articles 5, 8, and 25 with respect to the survivors and family members.
- The *Molina Theissen* case (May 4, 2004). Marco Antonio Molina Theissen, 14 years old, was abducted in 1981 by members of the army and never found. His family even-

tually fled Guatemala. The Court found violations of Articles 1(1), 4, 5, 7, 8, 17, 19, and 25 of the American Convention on Human Rights, as well as Articles 1 and 2 of the Inter-American Convention on Forced Disappearance.

- The *Fermín Ramírez* case (June 20, 2005). Fermín Ramírez was sentenced to death in a trial that the Court found violated due process. The Court ordered the state to retry Ramírez and to modify the law on death penalty appeal.
- The *Raxcacó Reyes* case (September 15, 2005). Ronald Ernesto Raxcacó Reyes was sentenced to death for kidnapping under legislation that expanded the scope of the death penalty after Guatemala had ratified the American Convention on Human Rights, which prohibits expansion of the application of the death penalty. The Court ordered Guatemala to suspend Raxcacó Reyes's death sentence and to impose another sentence proportional to the nature and gravity of the crime. The Court also ordered Guatemala not to execute any person condemned to death for kidnapping under the current legislation.

## ACCEPTING RESPONSIBILITY, AND FOR WHAT

Until 1996, Guatemala's overall response to the Inter-American system was characterized by delays, denials, and stonewalling. Perhaps the most significant change since then has been the growing if uneven tendency during the past three governments (of presidents Alvaro Arzú, Alfonso Portillo, and Oscar Berger) to begin to accept responsibility for the "historical" cases involving violations that occurred during the armed conflict. In some instances the Commission has brought the case for hearing before the Court and the government has then conceded (*allanado*) the merits of the case. But the government has also agreed to settle a large number of cases pending before the Commission through amicable settlements, by accepting state responsibility and making reparations.

Why did this happen? The governments, in essence, calculated that the benefits—getting the cases off the international agenda, asserting their own commitment to human rights, marking the "post-conflict" nature of the times, and partially defusing demands for justice—outweighed the costs, both financial and political, of admitting the violations and paying some reparations. This approach, which has often been highly contested within the government and more broadly within the state, seems often to depend more on the individual efforts of a few key people in government than on any consistent policy. At a number of points it has almost been reversed.

The change began during the Arzú government (1996–2000), which presented itself as the government of the peace accords and which needed international legitimacy to obtain support for the accords. With over 200 open individual complaints filed before the Commission or the Court, the representative of the Presidential Commission on Human Rights (COPREDEH), the entity in charge of coordinating human rights issues for the executive branch, began searching for solutions. Negotiations for the first major friendly settlement began in mid-1996 in the *Colotenango/Juan Chanay Pablo* case, and a settlement agreement was signed in February 1997. The settlement included monetary reparations for individual victims, some collective reparations for the community, and a commitment to investigate, try, and punish those responsible for the killings in the case.<sup>2</sup> The government accepted responsibility for the lack of adequate investigation and judicial proceedings.<sup>3</sup>

However, the Arzú administration was not fully committed to this agenda, and the internal jockeying within his government over control of human rights policy set in motion a process that continues today. It appears that during the Arzú government, limits to accountability were defined in practice if not in principle. As a result, the old dilatory measures remained in place and the government declined to take responsibility in any cases that directly involved the military or its intelligence structures.

The Portillo government (2000–4) represented a political coalition led by General Efraín Ríos Montt and his supporters, who had been responsible for the massacres and scorched-earth campaigns of the early 1980s. It therefore had exceptionally little credibility in the human rights field and only limited support among the educated middle class or the press. However, Portillo's advisers included fellow exiles from Mexico and several people with a background in the human rights field; the top staff of COPREDEH also had ties to the human rights ombudsman's office. These people advised Portillo that one way to create international support for a weak regime would be to position himself as a champion of human rights. They argued that leaving the pre-1996 cases unresolved would keep the focus on the past (and on the role of Ríos Montt), rather than on the populist agenda that the government had promised. Additionally, accepting state responsibility could avoid lengthy hearings before the Court in which witnesses, including members of the military, could be called to testify about the extensive violations, and it would permit shorter hearings focused solely on reparations.

Thus in March 2000, in a surprising move, the Portillo government declared that it would comply with the recommendations issued by the Commission concerning 44 cases of extrajudicial execution in 1990 and 1991 and five cases of forced disappearance in the same

period. In April, in those cases, the government formally “accepted responsibility for the facts determined by the Commission and the consequent violations of the Convention (as well as of the Constitution of Guatemala).”<sup>4</sup> In the same period, the president announced his intention to reach friendly settlements with petitioners in several other cases, and these were eventually reached “on the basis of the State’s express acknowledgement of its institutional responsibility for the violations denounced, its commitment to pursue justice, and its commitment to ensure reparations for the victims and their families.”<sup>5</sup> In August 2000, during a visit of the Commission to Guatemala, the government agreed to accept responsibility in nine other well-known cases and then further expanded the list to include other cases for friendly settlements.

Nonetheless, the question of what, exactly, the government was accepting responsibility for remained unclear. The issue came to a head in 2003 with the *Myrna Mack* case. From the beginning, petitioner Helen Mack had been adamant that her main objective was to make the domestic courts work, to indict and try not only the direct perpetrators but also the intellectual authors of the murder of her sister. She saw the proceedings before the Commission, and later the Court, as a means of exerting pressure toward this end, not as a means of obtaining compensation. Thus, when the Commission suggested a friendly settlement in the case, with the state accepting responsibility for failure to properly investigate the crime, she refused. She argued that the domestic proceedings had already established the responsibility of state agents for the killing, convicting one of the material killers, a sergeant in the military, in 1993, so that she gained nothing by the state’s offer. Rather, she wanted the state to acknowledge that the Presidential Guard (Estado Mayor Presidencial) had planned and executed the crime.<sup>6</sup> While refusing a friendly settlement, she eventually negotiated with the government for the creation of a two-person verification commission that would report to the Commission on progress in the domestic case against the intellectual authors of Myrna’s murder. Six months later, Helen Mack herself paid for the two observers to meet with the Commission in Washington, DC, where they duly reported that there was a lack of political will to move the domestic proceedings forward. At that point Helen Mack insisted that the case be taken to the Court.

Although there are differing versions of who carried what instructions, the state appeared before the Court and accepted responsibility as a general matter. But it refused to acknowledge wrongdoing by any specific state organ. The state representatives argued that they could not accept as true facts circumstances that were still being determined by the local courts, and that since they had accepted full responsibility, there was no need to hear wit-

nesses; the case should proceed directly to the reparations stage. When the Court refused, government representatives walked out of the hearing, an unprecedented action, and only returned at the end of the hearing. Eventually, the Guatemalan foreign minister traveled to San José, Costa Rica, to personally deliver a brief acquiescing fully in the case.<sup>7</sup>

Under the Berger administration (2004–present), similar, albeit less dramatic, issues have arisen as the government decides whether to concede the merits of different cases. Like the prior administration, the Berger government has been rather schizophrenic on the issue. While Berger appointed a well-known human rights campaigner to head COPREDEH, he himself has seemed uninterested in the subject, leaving most decisions to the vice president, who has been supportive of settlements. At the same time, however, some Foreign Ministry officials and others in the government continue to resist the acceptance of responsibility.

In the *Plan de Sánchez* case, for example, government officials were reluctant to admit responsibility internationally, especially when the case formed part of a domestic complaint alleging genocide.<sup>8</sup> Up to the brink of the hearing before the Court, it was not clear whether the government would concede the petitioner's case in full, maintain silence, or make a general admission of responsibility. Only at the last minute did the state's representatives receive instructions to fully concede. In the most recent cases involving pre-1996 violations, the state has generally conceded the full merits of the case while trying to minimize the amount of reparations paid.

## CONVERGING INTERESTS, PERSONALITIES, AND POLICY

In all three post-peace accord governments, then, there has been a significant move toward accepting state responsibility to varying degrees and seeking friendly settlements for the pre-1996 cases in the Inter-American system. The state's acceptance of responsibility and its agreement to cooperate with the Commission in resolving cases has been undeniably important to the victims involved, and it has brought important benefits to the government as well.

At the same time, it has helped create some important advantages for the Commission at a key moment. In February 2000, just as Portillo was deciding to accept responsi-

bility and seek friendly settlements in numerous cases, the new secretary general of the Organization of American States proposed a reform of the Inter-American system that would have stripped the Commission of much of its independence. The agreement with the Guatemalan government at that time showed that the Commission could get results and helped strengthen its position in the negotiations around the proposed reforms. Moreover, like the Guatemalan government, the Commission was concerned about the time and resources needed to investigate and hear what could be a large number of cases stemming from the armed conflict. Friendly settlements of these cases would reduce the load on Commission staff.

Virtually all of those interviewed on this issue believed that the question of political costs and the role of individual personalities in key positions explain the advances in this area. No one spoke, really, of a clearly articulated policy with full government support. Rather, intense internal divisions, last-minute decisions, and the somewhat uneasy status of COPREDEH have been constants. In all three of these governments, COPREDEH has been headed by people with a public record of support for human rights. Their differing abilities to work behind the scenes and build alliances appear to have been key to some of the forward and backward motion in government actions during these years.

At the same time, COPREDEH's leadership was often at odds with other cabinet members on its actions in the Inter-American system. While COPREDEH is supposed to coordinate human rights activities from the presidency, as a "presidential commission," it is structurally weak compared to other state institutions. It has often differed with the Foreign Affairs Ministry, which has been much more inclined to defend the state at all costs and deny any responsibility. In addition, even during the last three governments the Foreign Affairs Ministry still handled certain cases before the Commission or the Court. For example, state representation before the Court in the *Carpio* case had long been assigned to the Foreign Affairs Ministry, whose officials were reluctant to accept responsibility and pay out damages. The case was handed over to COPREDEH in 2004, and the state finally accepted the facts in the case and recognized its responsibility under international law.<sup>9</sup> Earlier, during the Portillo government, Foreign Affairs Ministry officials had also vehemently opposed the decision to recognize state responsibility but had lost the battle. Those opposed to any accountability for past violations in that administration eventually created a "security and human rights cabinet," led by the vice president, as an alternative power center to COPREDEH. This internal jockeying explains some of the inconsistencies in the government's public positions and lends a certain sense of tenuousness even to the important advances achieved in recent years.<sup>10</sup>

## REMEDIES IN CASES BEFORE THE COMMISSION AND THE COURT

In the Court cases and in those settled by the Commission before referral to the Court, the remedies agreed to and/or imposed on the state have fallen into four general categories: (a) investigation and prosecution in domestic jurisdictions; (b) individual and collective reparations; (c) actions to dignify the memory of the victim and other moral reparation; and (d) legislative and/or administrative reform.

Compliance with the remedies ordered by the Court or agreed to in a friendly settlement has been mixed. Monetary reparations are almost always paid and there has been some implementation of dignification measures, but reform, criminal investigation, and justice-related advances have been few and far between. We will begin by examining dignification and moral reparations and then turn to the issues of reform measures, monetary reparations, investigation, and judicial actions.

### **Actions to dignify the memory of the victim and make moral reparations**

Most Commission recommendations, friendly settlements, and Court judgments have included measures to dignify the memory of the victims or make other kinds of moral amends.

One constant has been the requirement that the government find the bodies of the disappeared and return them to their families. In the *Bámaca* case, where the state several times tried to pass off an unidentified body as that of the victim, the Court specifically held that the state had to locate the victim's remains, disinter them in the presence of his widow and next of kin, and deliver them to his family. To date, this has not happened. In the *Panel Blanca* and street children cases, the state was also ordered to transfer the victims' mortal remains and bury them in a place chosen by the next of kin.

In many cases, as a means of honoring the victim, the state is directed to name a street or school for the person or to establish a scholarship in his or her name. This has happened in several cases, although compliance has generally depended on the interested parties continuing to exert pressure on the government toward this end. The Court has also required the state to publish its decision on the merits, stating the facts of the case, in local newspapers. In one case it has also asked for publication of the Court's judgment in the newspapers in a Mayan language. By and large, the government has eventually complied.

Where problems have arisen is in some of the friendly settlement cases where the government has agreed as part of the settlement to provide publicity around the facts of the case rather than await an Inter-American Court hearing and decision. Complications arose around the *Dos Erres* case, a government massacre of hundreds of villagers in Petén province in 1982, during the Ríos Montt presidency. As part of a friendly settlement, the government agreed to show a documentary about the massacre on national television during prime time on two separate occasions. The video was to be produced through a collaborative process including COPREDEH and representatives of the victims. In fact, the video was produced, and it included testimony from eyewitnesses as well as from perpetrators of the massacre, all of whom made clear that the army was responsible. It was broadcast for the first time on a Sunday evening in March 2001. The next day the president, enraged, demanded the resignation of the head and deputy head of COPREDEH (Victor Hugo Godoy and Ricardo Alarcón). While Godoy's resignation could be traced to an unrelated incident at the United Nations Human Rights Commission,<sup>11</sup> Alarcón's was apparently linked to the video. The Guatemalan Congress, led by Ríos Montt supporters, denounced the video and called for the dissolution of COPREDEH. The video was pulled and the second showing was cancelled.

In a number of cases, either the Court ordered a government apology or the victims' kin demanded it as part of a settlement, as a gesture dignifying the memory of their loved ones and publicly confirming the state's role in the violations. A number of public apologies have been made during the Berger administration, but problems have frequently arisen regarding who in the government is to apologize, and apologies have often been long delayed.<sup>12</sup>

Unrelated to Inter-American system commitments, all three post-peace accord governments have made general apologies for the excesses committed during the conflict. Arzú apologized a few months before the Historical Clarification Commission (CEH), a body mandated by the peace accords, finished its report.<sup>13</sup> Portillo did so as part of his inauguration speech. Neither made public apologies in specific cases related to Inter-American system proceedings, although as outlined above, both accepted some responsibility in their communications regarding the cases before the Commission. The Berger government, in an attempt to "relaunch" the peace accords in February 2004, shortly after taking office, also publicly accepted general state responsibility for the violations of the past and spoke of the need to "dignify" victims.

Helen Mack, a forceful complainant, insisted that a Court-ordered apology specifically for the assassination of her sister Myrna must come from the president himself. President Berger did apologize in an extraordinary public ceremony organized at the National



Palace, with the presence and participation of the presidents of the judiciary and legislature, cabinet members, and the military high command. He did not, however, attend the related memorial service held a few days earlier at police headquarters for the police investigator who was murdered by the state after his initial report had clearly pointed to military involvement in Myrna Mack's killing.

In some cases, the vice president has made the apology. In others, the government has tried to send lower-level personnel and has occasionally been rebuffed by petitioners, who discount those apologies as worthless. In the *Carpio* case, the government tried to arrange a private ceremony instead of a public one and refused to have the president deliver a public apology, arguing that he "doesn't ask for forgiveness." In still other cases, the government has argued that given the large number of cases, it is unrealistic to expect the president and other high-ranking government officials to participate each time.

Despite these disputes, several apology ceremonies have gone forward, mostly in the local communities where the violations took place. In the *Plan de Sánchez* case, for example, after considerable wrangling within the government, the vice president did attend the public ceremony in the village to apologize. Even so, some petitioners complained about the absence of the president and, more pointedly, any representative of the armed forces. Yet the ceremony was deeply moving, as the children of the town, including children of survivors and perpetrators, reenacted the massacre in front of the community, press, and government officials in attendance. Extensive and generally favorable coverage in the media took the powerful images to a national audience.

The struggles over who will apologize and in what circumstances have left some petitioners questioning the sincerity of the proffered apology.<sup>14</sup> Nonetheless, according to some observers the cumulative effect of the apologies in individual cases has been important for gradually establishing public consensus around state responsibility for human rights violations during the conflict. They have certainly been more effective than the blanket apologies offered by the last three heads of state.

## Reform measures

In most of its judgments, the Court has called for general legislative and/or administrative reforms toward one or both of two main ends: (a) to bring national legislation in line with the Inter-American Convention, or with international human rights law and international humanitarian law more generally (as in the *Bámaca* and street children cases); and (b) to

remove obstacles that maintain impunity in the case, provide sufficient security measures to the judicial authorities, prosecutors, witnesses, legal operators, and victim's next of kin, and expedite the judicial proceedings. However, neither the Commission nor the Court seems to follow up systematically on its resolutions of this kind.

In a number of instances, in their calls for reforms, the Court and the Commission followed the lead of Guatemalan activists who had earlier initiated legislative reform efforts to combat some of the features of the judicial system that facilitate impunity. For example, several years ago, responding to the delays in the *Mack*, *Dos Erres*, and other cases, activists got a bill introduced to reform the *amparo* process so as to limit abuses by defendants. The Inter-American Court, as part of its judgment in the *Mack* case, ordered that reforms be made in this area. However, this legislation is still stalled in the Guatemalan Congress.

Other legislative reforms have also been prompted by the treatment of pre-1996 cases, including a bill, currently under consideration, to allow plea bargaining and protect defendants who turn state's evidence (as did the Special Forces in the *Dos Erres* case). These local reform efforts, developed in response to obstacles confronted while attempting to litigate high-profile cases in the national courts, prompted Inter-American system bodies to include these concerns in later decisions. At the same time, Commission and Court decisions in a few "nonhistorical" cases have indeed prompted local judicial review processes focusing on the death penalty (*Fermín Ramírez* and *Raxcacó* cases) and gender discrimination (*María Eugenia de Sierra* case). In this last case, however, the reform bill promised as part of the friendly settlement still had not been adopted by Congress as of 2005.

A number of Inter-American system cases have also resulted in calls for specific legislative and administrative changes tailored to the nature of the violations. In cases of unrecognized detention (e.g., *Panel Blanca*), the Court has required the state to set up and publicize a register of detainees. In the *Molina-Theissen* disappearance case, the Court called on the state to create an expedited procedure to allow a statement of absence and presumption of death due to forced disappearance, as well as a genetic information system to help identify the parentage of missing children. No such measures have yet been implemented.

## Monetary and service-based reparations

In all cases, whether resolved through friendly settlement or by a Court decision, monetary reparations have been included. For massacre cases, resolutions have also usually included some kind of collective reparations, generally in the form of additional services for the

community. As time goes on, the Court has become more sophisticated and encompassing in its view of appropriate reparations. All the Court cases cited above involved both monetary and nonmonetary reparations, including money for loss of income or earnings, expenses, and, as the largest component, nonpecuniary damages (for pain and suffering or moral damages).

The state has systematically complied with payments of monetary reparations. Yet monetary and service-based reparations have probably caused the most debate and tensions among human rights organizations, victims' groups, and affected communities. By and large, reparation payments have been made relatively quickly, although there have been some complaints that the government has tried to minimize the amount it pays, has haggled over damages showings, and has tried to draw out payment periods beyond the current administration's turn in office.<sup>15</sup> Rather than problems of noncompliance, the issues surrounding monetary compensation have to do with the effects on the beneficiaries, on community solidarity, on the incentives for bringing cases, and on the interaction with the National Reparations Program (PNR) established in 2003.

Individual compensation in the Inter-American system is based on compensatory damages and includes medical and legal expenses, lost earnings, moral damages, loss of life's project, and similar categories. In the kinds of gross violations involved in the pre-1996 cases—loss of life, torture, disappearance, denial of justice—the numbers can be substantial, especially when the victims were young and are survived by large families. Amounts awarded ranged from \$54,000 in the *Urrutia* case, where the victim survived, to a high of \$1.36 million in noneconomic costs plus \$60,000 to \$110,000 for lost wages and \$62,000 in costs for the four individuals killed and one survivor in the *Carpio* case. The average award in the individual cases was well over \$100,000. In cases of massacres, damages were much higher. For example, in the *Plan de Sánchez* case the government was ordered to pay \$25,000 for each of 236 victims and survivors, for a total of \$7.9 million. Collective reparations to the community in the form of money to maintain a chapel commemorating the victims, a health center, roads, teachers, and other services were also ordered, as were physical and mental health services.

In the Guatemalan economic context, an award of between \$100,000 and \$250,000 is an unimaginable sum to most families, even if one fully justified in tort terms. It is considerably larger, by at least an order of magnitude, than the amounts proposed in the National Reparations Program, which will compensate similar abuses. Thus, the sheer size of the amounts and the disparities among similarly situated victims has engendered problems.

Ironically, the friendly settlements seemed to have served in some ways as an incentive for the creation of the PNR. Government officials hoped to get the program underway, begin reparations under domestic legislation—with a much more limited focus on individual monetary compensation—and head off future cases before the Commission, with their enormous financial implications. There has been some attempt by the government to channel Court-ordered or Commission-negotiated payments through the PNR, but the problems in the latter program, and the government's manifest inability to come anywhere close to matching the amounts granted through the Inter-American system for most victims, have impeded such efforts.

Almost all our informants agreed that money, although it represented a victory for human rights in the abstract, had been highly divisive for families, organizations, and communities. Long-lost relatives suddenly appeared, and there is at least one alleged case of fraud. In the massacre cases, it has been difficult to determine who should be listed as a victim, especially where the community no longer exists or many people have moved away. In the *Dos Erres* case, lawyers contacted as many survivors as possible, reaching them through the father of a child witness who survived; the father knew the addresses of some survivors, who in turn contacted others. Still, at least 18 families were not identified in time to be included in the settlement; they included several families living in Petén, who were the most frightened to come forward and identify themselves as survivors. At the same time, other people who had been the victims of unrelated massacres in nearby towns were included in the *Dos Erres* case. In *Plan de Sánchez*, because the massacre had taken place on a market day there were victims from many surrounding communities, and it was difficult to find and organize the survivors. A core group of complainants had been working on the case from at least 1994, but once reparations were ordered these people found themselves marginalized, while newcomers, often from other villages, assumed leadership positions. There were bitter arguments about who should be paid and what the money should be used for.

In several cases, individuals and communities have been woefully unprepared to receive such large sums of money. Some have spent the compensation money on drink or, in one case, on an Evangelical chapel, while their living situations have remained precarious. A proposal by some local leaders in *Plan de Sánchez* that recipients set aside a small portion of their award for a community trust fund never prospered. The state, or at least COPREDEH, has attempted to ameliorate these problems in some cases by offering training in financial management and setting up rudimentary financial arrangements for beneficiaries. Thus, in the *Plan de Sánchez* case, COPREDEH took beneficiaries to the provincial capital to open individual bank accounts before they could receive their money.

The state also hired a consultant to give workshops in money management and investment, although it is not clear whether these were effective. In the *Dos Erres* case, training was promised but apparently was never delivered. Thus, despite some efforts and recognition of the problem among at least some government officials, there seems to have been insufficient support from anyone to help beneficiaries envision and implement plans for using the reparation awards for long-term development.

Some beneficiaries have been threatened or robbed.<sup>16</sup> Fear of such victimization has led some to hire security guards, to change residences, or, in at least one case, to flee the country. Some prefer to avoid any publicity, including public acknowledgement by the state of its responsibility. Security problems were potentially exacerbated in the largest case to date, *Plan de Sánchez*, when the government explained in the newspapers how and when reparations would be paid.

Reparations have occasionally taken the form of land or business training. In the *Chuj* friendly settlement, COPREDEH agreed to provide technical training to family members of the victim on the creation of an association for investment of the funds to be paid in financial compensation. The training was to center on the workings of microenterprises and small businesses, and the state agreed to pay to legally create a business association for the family and to lease premises for it. In at least two of the friendly settlements (*Tec Pop* and *Sucunu Panjoj*), the surviving family was to have been given seeds in addition to money, although in the *Tec Pop* case this had still not happened by 2005, apparently because the victim had moved. In another case the widow was given land.

The *Los Cimientos* case involved the dispossession by the army and civil patrollers of the land owned by some 600 families in Chajul, Quiché during the armed conflict. In the friendly settlement, the petitioners negotiated that the government would buy equivalent lands and resettle them there. In addition to the purchase of two farms, the agreement calls for the community association and the government to “jointly identify and negotiate, within 60 days following the settlement of the community, urgent projects to reactivate its productive, economic, and social capacities, with a view to fostering the community’s development and wellbeing.”<sup>17</sup> Apparently such projects were identified, but as of 2005 the community still lacked electricity, water, and sewage. Thus the development-related aspects of reparations, while sometimes acknowledged, have been less well executed.

Receipt of compensation has also created tensions between lawyers and their clients. In the wake of Hurricane Stan, the government asked to pay the compensation in *Plan de*

*Sánchez* in four installments, the last one extending into the next administration. When lawyers for the complainants advised them to refuse, COPREDEH officials bypassed the lawyers and went directly to the community to convince them to accept the installment plan (they finally accepted three payments). A similar situation occurred during the Portillo administration, during the negotiations around the *Los Cimientos* case, when government officials perceived that the lawyers were delaying a settlement with the community.

Some members of human rights groups also expressed concern that money was overshadowing the demand for justice, both in how the country as a whole perceived the reparations and in victims' motivations for bringing new cases. The government was anxious to stress its compliance with the monetary parts of judgments and settlements and to minimize references to the (unfulfilled) justice-related aspects, so it was happy to publicize checks being turned over to victims. Such ceremonies, these human rights activists feared, merged in the public mind with similar ceremonies, for varying amounts, under the PNR or the program to compensate the ex-civil patrollers for the services they provided to the army, with no distinction as to cause or reason.

Generally speaking, with respect to Inter-American system reparations, the government has been better at providing money than at providing services such as psychological and physical health care. Several cases involving massacres have led to provision for collective reparations for the communities, especially in the form of services, including attention in mental health. Yet the Health Ministry has few mental health specialists trained to work with survivors or communities. The *Dos Erres* friendly settlement, for example, included an agreement for psychological care of the victims. According to the victims' association, the only effort the government made was to send a group of students from the national university's psychology department to Petén; but without any funds to support their stay, the students soon returned home. Admittedly, efforts to provide such services are difficult in the *Dos Erres* case because the community was destroyed and the survivors dispersed throughout the country, with only a few returning to Petén.

The *Plan de Sánchez* case raises other issues around service provision. The government has sent a doctor and a psychologist to the area. However, the psychologist has no experience working with massacre survivors and has not taken into account the large amount of diagnostic and therapeutic work already carried out there by ECAP, a specialized NGO, in the course of preparing the reparations phase of the Court hearing. The medical personnel assigned to nearby Rabinal have stated that they do not intend to "privilege" the victims of

the massacre, but will provide care to all comers, despite the fact that service provision for the victims is part of the Court's judgment. In addition, there are complaints that doctors continue treating people, especially Mayans, in the same paternalistic, racist, and disrespectful mode that has been common in the past. In other words, the supposed reparatory nature of the services has not changed the form of their delivery.

### **The missing link: Investigation, prosecution, and punishment**

In every pre-1996 case before the Court, and as an integral part of every friendly settlement, the Court and the Commission have required that the state carry out a complete investigation and punish the persons responsible. In a number of recent cases (*Mack*, *Plan de Sánchez*, and *Carpio*) the Court has been more specific, requiring the state to remove de facto and legal mechanisms and obstacles that maintain impunity, expedite the proceedings, and provide protection to those involved in them. Similar language was included in the *Dos Erres Massacre* friendly settlement.

The justice system has responded in the two death penalty cases with Inter-American Court judgments: in the *Fermín Ramírez* case, a new trial has been ordered, and in the *Raxcacó* case, the sentence is under review as ordered. In addition, these death penalty cases are among the few instances in which the Court's ruling has had a more general, direct impact on the Guatemalan justice system. The Public Defenders Institute reports that, on their appeals, 17 death penalty sentences have been overturned since December 2005, with long prison terms given instead.<sup>18</sup> Nonetheless, legislative reform on the death penalty as required by the Court judgments in the *Ramírez* and *Raxcacó* cases has not advanced.

The pre-1996 cases are another story. Not one of these cases resolved by the Court or through friendly settlements has advanced under national jurisdiction as a result of actions by the Inter-American system.<sup>19</sup> Rather, the domestic justice system, including the Public Prosecutor's Office (Ministerio Público), remains singularly unresponsive, subject to internal threats and pressures, highly centralized in Guatemala City and provincial capitals, and otherwise opaque and ineffectual.<sup>20</sup> Pressure from the Inter-American system, therefore, seems to have been almost wholly ineffective with regard to the national justice system, despite the Guatemalan government's other efforts to comply with Inter-American rulings. Indeed, the government still often responds that due to the separation of powers, it has no control over the judiciary and can do little to accelerate its processes.

In a very few cases—those in which the petitioners have developed a solid litigation strategy, have managed to enlist the press and diplomatic pressure, and have remained personally and persistently involved in moving the case in the national system—there has been some limited progress in the courts. There have been, for example, a few convictions of civil patrollers or army enlisted men, although even some of these have been overturned on appeal. Only in the *Mack* case has there been even limited success in moving up the chain of command, and even there, the conviction of one major, now a fugitive from justice, was based on witness testimony, not on the chain-of-command arguments put forth by the prosecution. In the *Carpio* case, civil patrollers were convicted, but not the high-ranking army officials that the victim's family has alleged are responsible. In the *Río Negro* case involving a 1981 massacre, civil patrol leaders have been convicted, but the army official who commanded them remains a fugitive.

Representatives of COPREDEH from several administrations expressed frustration about the justice system, which they can do nothing to improve, but for which they are held internationally responsible. In recent years, COPREDEH has made some indirect efforts to use the Inter-American system to create pressure on the legal system. Starting in the Portillo period, they involved representatives of the Public Prosecutor's Office and the Supreme Court in Inter-American Commission meetings in Washington and invited them to present information about their efforts directly when Commissioners came to Guatemala.<sup>21</sup> The idea was that if justice system representatives had to answer questions directly, they would be more concerned about the perennial lack of progress.

Nonetheless, both the Prosecutor's Office and the courts seem to have responded mostly with empty gestures rather than real improvements. Staff and advisors to the Prosecutor's Office told us that it is easy to tell the Commission what it wants to hear, but that a lack of detailed knowledge, questioning, and above all follow-up make the exercise meaningless. Although each prosecutor is periodically asked for information about his or her cases by COPREDEH, no one in the Prosecutor's Office is responsible for coordination, monitoring, or follow-up over time. The state has formally committed to investigating and prosecuting, but this has not translated into more resources for investigators or prosecutors. In addition, prosecutors are routinely rotated off cases, with little continuity over time; the structure of the Prosecutor's Office, especially with regard to human rights-related cases, also changes frequently. Although some workshops have been offered to help prosecutors better understand the Inter-American system, the case load allows little time to study, and there is no real incentive to do so. Treatment of victims and complainants remains heavy-handed, and many human rights advocates consider the Prosecutor's Office to be untrustworthy. Of the few complaints actually registered, only 4 percent reach a convic-



tion, according to press reports.<sup>22</sup> The statistics are even worse for homicide: according to Prosecutor's Office itself, in 2005 only 4 percent of cases even had charges filed and only 1 percent reached trial.<sup>23</sup> There is little in the way of professional forensic or other investigations of crimes, and evidence is routinely mishandled or not sought at all.

The performance of the judiciary has been similarly lackluster. Although a few Supreme Court cases have cited the American Convention, jurisprudence developed in the Inter-American system, as well as the system itself, is poorly understood by members of the court at all levels. In general, judges feel no need to move quickly on cases, and they will often readjudicate the same defense motion alleging constitutional violations multiple times, delaying cases for months each time. High-ranking defendants tend to hire well-placed attorneys who can tie up the system in knots. As mentioned above, there is no apparent difference or preference in the way cases in the Inter-American system are treated by the Guatemalan courts; they are dealt with as poorly as the rest.

Finally, the ineffective nature of the police, prosecutors, and courts has given a prominent role to precautionary measures as a tool of the Inter-American system.<sup>24</sup> Some of the petitioners in these cases, like Karen Fischer (Jorge Carpio's former daughter-in-law) and Helen Mack, have had precautionary measures in place for over a decade. These have been important in protecting the life and security of petitioners and witnesses. They have also been a way of drawing Court attention to a case in its early stages, putting the government on notice that its actions are being monitored. As a result, there has been a tendency for NGOs and petitioners to overuse precautionary measures, to the point where Commissioners have had to ask NGOs to use the procedure more selectively. At the same time, there are complaints about government implementation of the measures. Police tend to appear outside NGO offices when the Commission is in town, but not necessarily at other times; the government offers protection for witnesses but not for their families; it sends guards, but neglects to give them guns; and there is little close supervision of how the measures are implemented.

## THE VICTIMS' VIEWS

The decision by the Guatemalan government to accept international responsibility for human rights violations in many of the cases before the Inter-American system and negotiate friendly settlements was a real advance and a victory for the national and international

human rights movement. Even though victims are generally critical of the government for dragging its feet in one or another aspect of their cases, several do recognize a positive change in COPREDEH, in particular, although not in the attitude of the military or most other government officials.

Despite the high costs, long distances, and years of work involved in litigating their cases in the Inter-American system, victims generally recognize that the system is more “victim-friendly” than the national courts. Victims often stress the importance of the measures of public recognition and apology by the state in compliance with Court judgments and friendly settlements. Some say that the psychological evaluation and counseling that came as part of the damages phase of resolution in their case has been useful.

Almost unanimously, victims mention the lack of justice in the Guatemalan legal system as the biggest single disappointment in relation to the cases before the Commission and the Court. While recognizing the importance of some justice reform efforts, victims’ groups by and large doubt that the government has the necessary political will to make the system work. Indeed, some victims’ groups suspect that the government’s willingness to pay compensation is in large part an attempt to ease pressure on the government regarding the justice question. And in fact, once compensation has been paid many victims do consider the case finished, in part because of everyday experience and deep-seated skepticism about the justice system.

Almost as frustrating is the perception that neither the Court nor the Commission can exert any real leverage on the state to improve the situation. In the case of the Court, the government does provide periodic information on compliance with judgments, as required in Article 65 of the American Convention, but the Court has no effective way of exerting further pressure in response to noncompliance. All it can do is to remind the state that it still has not complied. At the same time, in Guatemalan human rights and victims’ circles, the perception is that because the state is complying with some parts of the judgment, there is little incentive in the Inter-American system to forcefully call it to task on pending issues, even when these are as fundamental as investigation and prosecution.

With friendly settlements, there is no systematic mechanism for verifying compliance at all. The only club the victims retain is the possibility of denouncing noncompliance with the settlement and asking the Commission to take the case to the Court. This is, in effect, what has happened in the *Dos Erres* case.<sup>25</sup> But the whole point of the friendly settlement procedure was to be its speed and simplicity for all parties concerned, and if victims must

repeatedly threaten to take the case back to the Court to get the government to move, those advantages are lost. Nor is it clear what position the government will take if cases are actually reopened, when it has already accepted responsibility, paid compensation, and complied with a good part of the measures the Court would likely impose.

## CONCLUSIONS

The Inter-American human rights system has been used by Guatemalan activists and victims over the past four decades to draw international attention to the human rights situation in the country. Especially in the past 20 years, working with and through the system has been an important part of the strategy of national human rights organizations, which have gained increasing familiarity and sophistication about its workings. It has served as an important venue for censuring the human rights situation and has offered virtually the only potentially effective alternative for seeking justice for victims, given the domestic justice system's inability and, often, unwillingness to act in human rights cases related to the armed conflict.

During the three peace accord governments, the Guatemalan government has gradually increased its willingness to cooperate with the Commission and the Court, to accept international responsibility and the facts in almost all cases, and to seek expeditious means, such as friendly settlements, to close as many cases as possible from the war years. Individual actors in key positions in the government have played a strong role in this process in the absence of a defined and consistent state policy.

This willingness seems to be based on a rather elementary cost-benefit analysis in which the advantages of an improved international image as a result of cooperating with the Inter-American system are seen to outweigh the price of paying out economic reparations and admitting generic responsibility for long-ago actions, especially since the admissions will take place mostly in a far-away venue.

On-site visits have been an important tool of the Inter-American system over the years. They force the government and justice sector institutions to gather information, and they provide a focal point for NGO activity and an occasion to highlight specific issues such as the rights of indigenous people or women. Despite some complaints by ex-government officials and

activists about political manipulation of the Commission for domestic political ends, commissioners' visits have also served to shore up weak support for human rights within government circles. Nonetheless, there is a general sense that the government has been willing to promise anything to the Commission, secure in the knowledge that follow-up and sanctions will be minimal. This is a far cry from the state's open defiance of the pre-1990 period, but it is not all that the victims of human rights violations expect or deserve.

While the number of cases that have moved through the Inter-American system is small compared to the total numbers of violations and victims, its resolutions have provided an important sense of redress in individual cases. At the same time, the cumulative effect has been important in establishing general state responsibility for crimes committed during the internal conflict. In this way it has complemented work by other bodies such as the Historical Clarification Commission and the Recovery of Historical Memory project (REMHI), and has provided an important mechanism to help reverse state denial about those crimes and the state's role in them.<sup>26</sup>

Yet the impact of the Inter-American system on the national administration of justice has been minimal, with the exception of the postwar death penalty issue. Lawyers and judges are largely unfamiliar with the system and its jurisprudence, with the exception of lawyers in specialized legal NGOs, and there are few courses in law schools that discuss it. For most nonspecialized lawyers, the system takes too long and costs too much to be a viable option for their clients. The Inter-American system, to date, has proven to be ineffective at provoking improvements in the workings of domestic institutions in relation to human rights cases from the armed conflict. While it has provided extra leverage in some emblematic cases related to the war, this has not been enough to make the cases move forward nationally without other sources of political pressure and the use of highly honed litigation strategies developed by *parties civiles* to complement work by the Public Prosecutor's Office.

The most specific failing of the Inter-American system, however, seems to be its lack of both adequate follow-up and meaningful sanctions for noncompliance. Guatemala's compliance with Court judgments and friendly settlements in pre-1996 cases has been limited to actions that are carried out by the executive branch. These mainly involve monetary payments and symbolic measures such as delivering apologies, publishing the facts of the cases, and naming streets and scholarships (although the symbolic measures, as well as other commitments like service provision, often require persistent pressures by the petitioners). This represents a very important advance, but it raises questions about more general "state compliance" since neither the legislature, nor the Public Prosecutor's Office,

nor the judiciary has been responsive to requirements from the Inter-American system.

Noncompliance with aspects of judgments and friendly settlements that relate to legislative reform or the prompt and effective working of justice system institutions, including the Prosecutor's Office and the courts, seems to involve little or no political cost for the government. Worse, the government is able to use its compliance with the monetary aspects of judgments to deflect attention from its noncompliance on legislative or judicial issues.

The verification mechanisms for compliance with Court decisions are important but very slow, with months if not years passing between follow-up reports. The lack of additional sanctions in response to persistent noncompliance over time means that there is no incentive for the government to take further steps to comply. This is especially true if compliance might imply internal costs, for example, by creating tensions with the army or other forces in the government that still openly defend the state's actions during the armed conflict.

The lack of a consistent systematic verification mechanism in cases of friendly settlements is a further weakness, since follow-up on problems with compliance depends almost entirely on the petitioners and their initiatives to provide information on their cases to the commissioner responsible for Guatemala. At the same time, the Commission's only real threat with the government is to take the case back to the Inter-American Court, which defeats the purpose for all parties of finding an expeditious solution.

Yet despite these weaknesses, as well as the expense, the distances, and the enormous amount of time it takes to litigate cases in the Inter-American system, victims and activists generally concur that its work has been significant for human rights in Guatemala. While not sufficient to allay frustrations caused by the mammoth difficulties in advancing against the deep-seated workings of impunity in the Guatemalan justice system, victims generally recognize that it provides important redress in the absence of justice in domestic venues.

Finally, monetary reparations, as a part of the measures to provide justice to victims in the Inter-American system cases, present a conundrum, one that has much in common with the problems that arise in other mass tort contexts. On the one hand, these reparations have created unintended negative effects as well as the intended positive ones; on the other hand, it is not clear whether, or how, the system could or should supervise the distribution and expenditure of money conceived as individual compensatory damages. In the Guatemalan case, the extreme poverty and lack of financial literacy of many of the victims and the existence of a National Reparations Program, using different criteria and

with limited resources for monetary compensation, make matters even more complex. Attention to these issues by the Commission and the Court, perhaps in the form of advisory services and training to victims and their communities, could be helpful in minimizing some of the problems.

## NOTES

In addition to analysis of texts, the chapter is based on extensive interviews conducted in Washington, DC in April 2006 and in Guatemala in May 2006. Among those interviewed were the former and current heads of COPREDEH, a former foreign minister, human rights activists, litigating lawyers, mental health workers, and justice system officials, all in Guatemala, as well as people who have worked in differing capacities in the Inter-American system. The authors owe a large debt of gratitude to Mayra Alarcón, Roxana Altholtz, Marta Altolaguierre, Judith Erazo, Aura Elena Farfán, Karen Fischer, Alfonso Fuentes Soria, Juan de Dios García, Edda Gaviola, Victor Hugo Godoy, Angélica González, Claudio Grossman, Edgar Gutiérrez, Domingo Hernández, Frank La Rue, Helen Mack, Mynor Melgar, Miguel Moerth, Claudia Paz, Olga Alicia Paz, Edgar Pérez, Yolanda Pérez, María Claudia Pulido, Willie Ramírez, and María Eugenia de Sierra. All interviews were conducted on a not-for-attribution basis. The authors would like to thank all our informants as well as Simona Agnolucci and Kassandra Kueh for research assistance and Claudia Lissette De Minera for administrative support.

1 The Commission's monitoring during the early years of the conflict led to the publication in 1966 of its "Requests for Information Transmitted to the Government of Guatemala," followed by the publication of special country reports in 1981, 1983, 1985, 1993, 1994, and 2001.

2 IACHR, *Juan Chanay Pablo v. Guatemala*, Report 19/97, Case 11.212, Friendly Settlement, Guatemala, March 13, 1997. In *IACHR Annual Report 1996*, chap. III.

3 Members of the local civil patrols were eventually tried and convicted, but they have since escaped from prison and are living in the community once again.

4 IACHR, *Fifth Report on the Situation of Human Rights in Guatemala*, OEA/Ser.L/V/II.111, Doc. 21 rev. April 6, 2001, chap. II, B7.

5 *Ibid.*, chap. II, B6.

6 The Presidential Guard, while officially in charge of ensuring the security of the president and his family, operated throughout the internal conflict as a key intelligence structure and was extensively involved in human rights violations.

7 Inter-American Court, *Myrna Mack Chang v. Guatemala*, Judgment of November 25, 2003, Ser. C, No. 101, pars. 65–116.

8 That complaint was filed in 2001 by the Association for Justice and Reconciliation, a group of Mayan genocide survivors; as of 2007 it is still under investigation. It names the army leadership as perpetrators. The Public Prosecutor's Office has appointed a prosecutor who has taken a number of statements, but to date no arrest warrants have been issued.

9 See Inter-American Court, *Carpio Nicolle et al. v. Guatemala*, Judgment of November 22, 2004, Ser. C, No. 117, pars. 36 and 38.

10 The jockeying continues. In January 2007, the country's attorney general declared that COPREDEH should be eliminated and that his own office should assume its functions of representing the state on human rights cases in the Inter-American system. Such a decision would almost certainly allow the state to return to the denial and obstruction of more than a decade ago.

11 This unrelated incident purportedly concerned Guatemala's vote on Cuba in the United Nations Human Rights Commission. According to another source in the Portillo government, Portillo thought that the timing of the airplay, right before a major tax reform vote, was a deliberate attempt to weaken the ruling party because of its association with Ríos Montt.

12 For example, in the *Bámaca* case, although the Court included a public state apology as part of its 2002 reparations judgment and has repeatedly called for compliance, the state only complied in the final days of 2006.

13 Arzú was widely criticized by the human rights community for the generic apology he made in December 1998 in Santa Cruz del Quiché. It was considered to be a move to avoid future recognition of the CEH's findings, which were to be made public three months later; his government never produced a formal response to the CEH report.

14 In some friendly settlement cases, the petitioners have not wanted a public apology ceremony, fearing that publicity about their case, and about potential reparations monies, could make them the target of robbery attempts.

15 Part of the more recent difficulties stemmed from the massive damages caused by Hurricane Stan in 2005, which strained government budgets and led to a restructuring of payments to victims over a longer period. Nonetheless, in the current administration, COPREDEH has managed to pay victims by requesting unused portions of budgets from various government institutions at year's end and using them for this purpose.

16 Threats were reported in at least the *Bámaca*, *Plan de Sánchez*, and *Dos Erres* cases.

17 IACHR, *Community of San Vicente los Cimientos v. Guatemala*, Report 68/03, Case 11.197, OEA/Ser. L/V/II.118, Doc. 70 rev. 2 at 642 (2003), par. 36(4).

18 The Inter-American Court judgments came in June and September 2005, respectively, for the *Ramírez and Raxcacó* cases. It is also important to note that there has been significant work by human rights NGOs and the Public Defenders Institute on the death penalty issue, which has been key in moving the death penalty cases forward as well.

19 The first-instance conviction by the Guatemalan courts of one of the army officers involved in ordering the Mack assassination occurred before the Inter-American Court judgment in that case. It could be

argued that the Court ruling was a factor in ensuring that the Guatemalan Appellate Court confirmed the conviction, which was appealed by the defense. The convicted officer then managed to avoid detention and is currently a fugitive.

20 There are many reasons for the ineffective nature of the justice system, but they are beyond the scope of this chapter. For a description of the ills of the Guatemalan police, Public Prosecutor's Office, and judicial system, see the annual reports of Human Rights Watch and Amnesty International. The World Bank, the Inter-American Development Bank, and numerous bilateral donors in recent years have poured millions of dollars into trying to upgrade and reform these institutions, with limited or mixed success. The World Bank-sponsored Guatemala Judicial Reform Project found problems that included deficient performance, limited citizen access to justice, corruption, poor institutional management, and poor public perception. Recently, criticism has focused on the Public Prosecutor's Office, which with few exceptions has shown itself to be unable or unwilling to carry out professional criminal investigation and prosecution in line with its mandate. The investigative deficiencies of the Public Prosecutor's Office mean that many cases never make it to trial; evidence is frequently botched and prosecutors' arguments are totally insufficient at both the pretrial and trial stages.

21 In preparation for these meetings, the prosecutors in charge of cases before the Commission or the Court are asked to prepare a report on the status of the investigations.

22 *Prensa Libre* (Guatemala City), "Jueces y fiscales se inculpan por la falta de fallos condenatorios," March 3, 2006.

23 See Cuadro 12, "Fiscalías de Sección, Actividad Realizada Año 2005," on the Web site of the Ministerio Público, <http://www.mp.lex.gob.gt/documentacion/memorias/memorias/Memoria%202005/cuadros-graficos/cuadros/cuadro12.htm>.

24 Article 25(1) of the Commission's Rules of Procedure provides: "In serious and urgent cases, and whenever necessary according to the information available, the Commission may, on its own initiative or at the request of a party, request that the State concerned adopt precautionary measures to prevent irreparable harm to persons."

25 In July 2006, the Commission accepted the petitioners' request to separate themselves from the friendly settlement because of government failure to comply with two key commitments, namely the commitment to eliminate the de facto and legal mechanisms and obstacles that maintain impunity and the commitment to provide mental health attention for the victims. The case has now been transferred to the Court.

26 The Historical Clarification Commission was the truth commission established under the peace accords. REMHI was a parallel truth-seeking effort sponsored by the Catholic Church.



## EL SALVADOR

Benjamín Cuéllar Martínez

Those who have known best how to  
imitate the fox have come off best . . .  
Men are so simple . . . that,  
the deceiver will always find someone ready to be deceived . . .  
A prince, therefore, need not necessarily have all  
the good qualities . . .  
but he should certainly appear to have them . . .  
if he has these qualities and always behaves accordingly  
he will find them harmful;  
if he only appears to have them they will render him service.

—Machiavelli, *The Prince*

**T**he 12-year war that ended in 1992 left the Salvadoran state with an enormous debt to society from the standpoint of its duty to respect, protect, and promote human rights—a debt that has yet to be paid. Anyone who dared voice such sentiments a few years ago risked being called pessimistic or against the system, among other epithets. Official (and officious) spokespeople assured us that enormous progress has been made since the end of the war and that no one would deny it, unless perhaps they had a “dangerous hidden agenda.” The agreements signed by the parties to the conflict—the government and the insurgent forces—set forth the overarching objectives of the peace process: democratization of the country, complete respect for human rights, and reunification of Salvadoran society, along with mechanisms to achieve them.<sup>1</sup> But the articulation of these objectives was no guarantee that they would be fully realized in practice.

One of the main goals, in principle, was to dismantle the structures that had ordered, carried out, tolerated, and covered up serious violations of internationally recognized human rights and humanitarian law. And yet 15 years have passed since the end of the armed

conflict and the victims are still waiting for truth, justice, and reparations for the harm they suffered. Meanwhile, their victimizers have benefited, and continue to benefit, from an egregious state of impunity. This allows the Salvadoran offenders to present themselves to the world as law-abiding citizens and to take for granted that the probity of their many actions will not be called into question, since there will be no investigation or evidence presented to the contrary, as has occurred in cases of other human rights violators in Latin America. Indeed, many of these twisted characters continue to wield considerable influence in El Salvador's political and economic affairs.

This is the underlying reason for official and de facto resistance to implementing the agreements on respect for human rights, combating impunity, and playing by the "rules of the game" in the domestic and international arenas. The power elite have shown no desire to move in this direction, and civil society has not had the capacity to do so on its own, at least not to the extent required. As a result, the victims of abuses committed before, during, and since the war have been completely abandoned. Although the negotiated settlement unquestionably has had a number of positive outcomes, the Salvadoran people are still seeking prompt and effective justice.<sup>2</sup> In most cases, it has not been forthcoming.

But a light is beginning to shine through this dark cloud, however faintly and belatedly: namely, the efforts of the Inter-American human rights system to change the situation in El Salvador. While this prospect is encouraging, the path toward this goal has been arduous. In their zeal to maintain a firm grip on their many privileges, the formal and real power elite have sought to block any sort of different outcome in the country. It is also important to examine the work of individuals and nongovernmental organizations devoted to the protection and promotion of human rights. To overlook their role would result in a biased assessment and limit the range of initiatives to spur more rapid progress toward the as-yet unfulfilled objectives of the 1990 Geneva Accord.

## **A ROCKY RELATIONSHIP: EL SALVADOR AND THE INTER-AMERICAN SYSTEM, 1969-1992**

The Salvadoran state has found itself in the defendant's chair before the Inter-American system at different moments and for various reasons before, during, and after the political-military conflict between the government and opposition forces. Two periods are of

particular note. The first dates back to 1969, when El Salvador and Honduras, on the eve of their four-day war, presented complaints against each other to the Inter-American Commission on Human Rights (IACHR). The second is from 1971 on, beginning with the first symptoms of political and social violence that would eventually spiral into war.

## **The 1969 “Soccer War”**

By the end of the 1960s, long-standing tensions between El Salvador and Honduras were coming to a head. Heavy emigration from densely populated El Salvador had exacerbated land pressures in Honduras, and Salvadoran immigrants in Honduras had become targets of violence. Both countries were led by nationalistic military regimes, and in both the press played a role in stirring up hatred against the other side. On June 15, 1969, the two nations played a soccer match in El Salvador that culminated in explosive violence between fans, and relations between the two countries deteriorated still further.

On June 25, El Salvador and Honduras each filed a complaint against the other before the Inter-American Commission. The IACHR responded with the appointment of a subcommittee to conduct an in situ examination of the human rights situation. From July 4 to 10 the subcommittee interviewed officials and private individuals in both countries concerning the reports it had received. It also reminded the mass media of “their serious responsibility” to help preserve good neighborly relations as well as internal peace within the countries.<sup>3</sup>

Tempers continued to flare, however, and Salvadoran militias penetrated Honduran territory on July 14, 1969. The Salvadoran regime’s official justification was that it had exhausted “all peaceful means of obtaining guarantees for our persecuted compatriots in Honduras.” The Salvadoran president, General Fidel Sánchez Hernández, complained that he had denounced “the crime of genocide [against Salvadorans] before the conscience of the Americas without obtaining any response.” Therefore, he said, “after the repeated encroachment of our borders, we Salvadorans had no other choice but to defend those rights through our own means.”<sup>4</sup>

In the ensuing 100-hour war, thousands were killed or wounded on both sides.<sup>5</sup> Four days after the war began, it ended pursuant to a resolution issued by the Organization of American States (OAS). But the mutual complaints continued. The IACHR informed both governments that “grave violations of human rights” had occurred and demanded

that they remedy those violations and take steps to prevent future ones. The Commission further recommended that the countries investigate the circumstances outlined in the complaints and determine responsibility. Finally, it reiterated its request for the information originally solicited by the subcommittee between August and October 1969, while reminding the governments that it “would be obliged to assume that the facts were true,” should they fail to forward the information within the allotted time period.<sup>6</sup>

At its 23rd regular session, the IACHR continued to trust that both governments would comply promptly with its recommendations as “the most effective means of preventing future human rights violations.”<sup>7</sup> But both governments clearly were determined not to comply with the IACHR’s requirements, and the Inter-American system’s pressure began to wane.

As a result of the Soccer War, many Salvadorans returned home from Honduras. Poverty intensified, the Central American Common Market collapsed, and popular support for the two military regimes grew, albeit temporarily. The deep aversion between the two countries would persist for years, based on a patriotism blown out of proportion by the mass media.

## **Mounting repression and civil war**

On November 23, 1970, the IACHR received a complaint about the arbitrary arrest and prosecution of several members of the Transportation Industry Union in El Salvador. Their purported crime was having engaged in activities that were “anarchical and contrary to democracy.” Although a court ordered the trade unionists released on bond, the prosecutor refused to execute the order and they remained in prison. In response to the complaint, which was one of the first against El Salvador received by the Commission, the IACHR requested the Salvadoran state to provide information on the case. The government responded that the appropriate investigations had been initiated, and that as soon as information became available it would be forwarded to the Commission.<sup>8</sup> It never sent anything.

Because it had received no information or explanation, the IACHR appointed Angela Acuña de Chacón as rapporteur in the case.<sup>9</sup> Based on her report, the Commission decided to close the file immediately and to notify El Salvador of its dissatisfaction with the state’s attitude.<sup>10</sup>

Why, then, is this case relevant? Because it illustrates the type of relationship established from the outset between the Salvadoran state and the Inter-American human rights

system, a relationship that has persisted over the 22-year period under discussion here. Relations were formal, respectful, and diplomatic on the surface, with occasional moments of tension that did not escalate. Yet successive governments before and during the civil war blatantly disregarded the Commission's indications and made sure to sidestep any difficult situations, while the anguish caused by serious violations of human rights and international humanitarian law was felt throughout the country.

The human rights situation in El Salvador was not included in the Commission's 1973 or 1976 reports in general terms or in the form of individual cases, even as conditions in the country steadily deteriorated.

The national election held on February 20, 1972 was one in a series of electoral frauds. The Central Elections Council, working in tandem with ORDEN, a paramilitary force operating under the auspices of the National Guard, stole the victory from the National Opposition Union. Condemnations rained down from various sectors and the centrist and leftist opposition called for a work stoppage (*huelga de brazos caídos*), which never happened. This was followed by a failed attempt to overthrow the regime, which in turn led to intensified repression and the imposition of martial law. From the office of the president, Colonel Arturo Armando Molina announced a stepped-up fight against "communism," pledging to combat it with "definition, decisiveness, and firmness."

The military intervention at the University of El Salvador 19 days into the new administration was the first brutal sign of this resolve. The state's authoritarian approach combined repression, carried out by the "security forces" and the militias, with manipulation of the rule of law. Campaigns of intimidation targeted various social sectors. Meanwhile, conditions for the impoverished majority worsened as government projects in the areas of infrastructure, agro-exports, and sports failed to produce the economic, legal, social, and political transformation the country so desperately needed.

These repressive methods, carried out with impunity, were the state's chosen strategy to preserve an exclusive regime bent on stifling social organization and mobilization, particularly in the rural areas. If this strategy was to produce results, however, it was necessary to ensure that the judicial system would not pursue investigations of human rights violations.

But this approach led to a backlash. What had started out as small political-military organizations at the beginning of the decade grew steadily, and by the mid-1970s the

“people’s fronts” had emerged.<sup>11</sup> While some opposition sectors attempted to pursue their immediate demands through formal legal channels, the state made no effort to distinguish between these and the social movement linked to the armed insurgency. The state’s repressive tactics were directed against any and all expressions of discontent and were meant to serve as an example and a warning to others. These tactics did not succeed. Instead, violence spiraled out of control, extinguishing any potential for dialogue between the opposing forces aimed at finding viable solutions to the pressing economic, political, and social problems in the country.

By 1975 El Salvador had become a pressure cooker with a blocked safety valve, on the verge of exploding. A massacre of university students and people from other grassroots sectors in the streets of San Salvador on July 30 contributed to the overheated political context that year. Given their lack of success in pursuing demands through legal channels, the organized social opposition stepped up protests, and massive public participation reflected the growing discontent. Existing popular organizations expanded and new ones emerged.

Meanwhile, guerrilla actions intensified. In this violently polarized situation, opponents of the regime regarded political opposition and military insurgency as distinct but complementary means of struggle. From the standpoint of the government and the power elite, the opposition was engaged in a single strategy of social destabilization that required and justified ferocious repression in order to preserve the status quo. This repression was carried out mainly by the security forces and the army, backed up by clandestine criminal organizations that came to be known as death squads.

Every day brought new reports of serious human rights abuses. In late 1975, Socorro Jurídico Cristiano (Christian Legal Aid) documented 22 cases of individuals who were neither brought before a court nor released following their capture by state security forces or agents.<sup>12</sup>

The most burning issue was land. In June 1975, the president announced the establishment of the Salvadoran Institute for Agrarian Reform, and the Legislative Assembly approved the relevant legislation. Matters became complicated the following year, however, when the first agrarian reform project triggered a backlash of relentless attacks against the policy. Large landholding interests denounced the reform as a blow to agricultural production and the spirit of entrepreneurship. The state responded that “while your interests may be affected temporarily, the Agrarian Reform process is a life insurance policy for which your children will one day thank you.”<sup>13</sup> In his fourth year in power, Colonel Molina as-

serted that “nothing and no one will make us take a single step backward in the Agrarian Reform.” Three and a half months later, he “executed a 180-degree turn and raced backward a thousand steps” by reforming the law in question at the behest of private capital.<sup>14</sup>

The government’s failed attempt to lower the temperature of the pressure cooker further eroded the possibilities for a peaceful resolution of the crisis. Violence intensified. The municipal elections and legislative elections of 1976 and the presidential election of 1977 only complicated matters further, effectively closing off the electoral route for addressing the conflictive atmosphere.

Protests by the organized opposition increased, as did repression, political violence, and serious human rights violations. Incidents in 1977 included, among others, the February 28 “San Salvador massacre” in the aftermath of the electoral fraud; the March 12 murder of Jesuit priest Rutilio Grande; the April kidnapping of foreign minister Mauricio Borgonovo Pohl, whose body was found on May 11; the murder of Catholic priest Alfonso Navarro that same day; and the September 16 murder of Carlos Alfaro Castillo, president of the University of El Salvador. By year’s end, Socorro Jurídico had documented 92 cases of forced disappearances.<sup>15</sup> Most were attributed to the security forces, agents in civilian dress, and ORDEN.

General Carlos Humberto Romero assumed the presidency on July 1, 1977. From the outset, he proposed to confront the opposition by using the armed forces and other tools of repression to “guarantee institutional order” and defeat the “communist threat” allegedly posed by religious groups and “front organizations.” The Law of Defense and Guaranty of Public Order, approved in November 1977, criminalized actions that supposedly undermined the established “democratic” and “constitutional” government. Romero also created even more obstacles to the effective enjoyment of many rights and freedoms, opening the door wide to arbitrary actions, abuse of authority, and impunity.

This was the backdrop for a seemingly paradoxical event: General Romero, known as even more hard-line than his predecessors, invited the Inter-American Commission to visit the country. The Commission accepted the offer and conducted an *in loco* visit in January 1978. After a three-year absence from the IACHR’s annual reports, the critical situation in El Salvador was once again documented in a November 1978 country report.<sup>16</sup>

In the report, the IACHR assigned most of the responsibility for the situation to the security forces and to the paramilitary organization ORDEN—a finding of vital impor-

tance. Also encouraging was its validation of constant reports of mistreatment, torture, forced disappearances, and murders, imputed to the state's apparatus of terror. The report made clear that existing laws and formal institutions, particularly in the justice sector, had proved ineffective in practice. It pointed out the enormous obstacles to freedom of assembly and association, particularly in rural areas, and discussed freedom of thought and expression, suffrage, and citizen participation in government, as well as the attacks against the Catholic Church and the exile of Salvadorans who were barred from returning to the country. The IACHR endorsed the dangerous work of nongovernmental human rights groups and activists who were regarded as enemies by the regime. The report concluded:

Many persons, both within and outside the government, cite as one of the principal causes of this tension and polarization the economic and social conditions that have been getting worse throughout the country for a long time. . . . Among the most serious is the tremendous concentration of land ownership and of economic power in general, as well as political power, in the hands of a few, with the consequent desperation and misery of the *campesinos*, who make up a large majority of the Salvadoran population. . . .<sup>17</sup>

The Salvadoran government's extensive response to the Commission's special report is easily summarized: it denied all of the conclusions and carried out none of the recommendations. Its closing remarks are an excellent illustration of the government's cynicism in refuting, or attempting to cover up, the irrefutable:

The Government of El Salvador wishes to state to the Honorable Inter-American Commission on Human Rights that it does not accept the charges that have been made in its Report concerning supposed violations of such rights; most of those charges are for political reasons because of the serious crisis in the county which the Government is trying to overcome. If any abuses of authority have been committed, there are laws and competent courts.<sup>18</sup>

On October 15, 1979, a group of young military officers deposed General Romero. Many observers in the country and abroad were encouraged by the change in government and by the analysis of the national situation that the new regime initially offered. The latter took the position that the ousted regime was illegitimate inasmuch as it was the product of electoral fraud, engaged in systematic human rights violations, and featured a corrupt public administration and justice system. Moreover, it had discredited the country and its



armed forces and created economic and social chaos. The new regime went on to deplore the real and intrinsic ills of Salvadoran society, acknowledging that the root causes were economic, social, and political structures that denied human dignity. It named those it held responsible—by act or omission—for the failure of governance, emphasizing in particular the role of conservative sectors opposed to meaningful changes that would affect their narrow interests.

The IACHR was among the entities that held out hopes for real change in El Salvador, at least at the beginning of this process. After so many years of disregard for human rights, the new government seemed to offer a welcome alternative. It pledged its “firm commitment to the political, social, and economic reforms necessary to ensure full enjoyment of human rights in the country,” and requested the Commission to continue to monitor the human rights situation.<sup>19</sup>

These hopes met with disappointment. Notwithstanding the good intentions of the rebellious officers and those who crafted the initial proposals, no substantive changes were forthcoming, and the status quo ante prevailed. Beginning the very day after the uprising, the forced disappearances continued. Among the victims was the sacristan of the main Catholic church of Soyapango, in San Salvador department, who was abducted by state agents and never seen again.<sup>20</sup>

Accordingly, in late December 1979 and early January 1980, the civilian members of the government junta resigned, along with much of the cabinet. A second junta was forged out of an alliance between the army and the Christian Democratic party. It was a product of the pressure brought to bear by the most powerful sectors of the society, who were intent on blocking the structural changes that had been promised in October 1979. Far from abating, the repression intensified, leading some high-level Christian Democrats to resign.

The next decade was dominated by the conflict between the government and the insurgent forces united in the Farabundo Martí National Liberation Front (FMLN). Throughout the war years, El Salvador experienced systematic, politically motivated human rights violations. But the routine never changed: The Commission would denounce the violations and recommend actions to investigate them, punish those responsible, make reparations to the victims, and prevent new abuses. The Salvadoran state would then deny any blame and refuse to carry out the recommendations. The Salvadoran situation was addressed in every IACHR annual report issued up until 1995, whether in the form of individual petitions or assessments of the general circumstances of violence and impunity.

## THE POSTWAR PERIOD, 1992–2007: CONTINUING VIOLENCE AND IMPUNITY

Of peace, in supreme happiness  
El Salvador has always nobly dreamed  
To achieve it her eternal test  
To preserve it her greatest glory.

—El Salvador's national anthem

Achieving a true and durable peace based on truth, justice, and respect for the rule of law was and remains El Salvador's "eternal test." It has not been achieved for a number of reasons. And what was proffered as peace 15 years ago has in fact turned out to be a prolonged and extremely violent postwar period.

This section examines the attitudes of successive Salvadoran governments in power since the end of the armed conflict and their reactions to the Inter-American human rights system, looking beyond the level of formal discourse. We can distinguish two main obstacles to achieving the goals of democratization, respect for human rights, and the reunification of Salvadoran society, as set forth in the Geneva Accord. The first dates to the start of the supposed peace process and relates to the state's failure to comply with the Truth Commission's recommendations and its passage of an amnesty law in March 1993. The second has to do with the individual cases brought before the IACHR and the Inter-American Court of Human Rights.

### **The Truth Commission report and the amnesty law**

The Truth Commission established under the Geneva Accord was supposed to investigate serious human rights violations and recommend a governmental response. On March 15, 1993, the Truth Commission presented its final report, documenting many of the human rights violations committed by both government and insurgent forces before and during the armed conflict.<sup>21</sup> Along with an analytical chronology, the report included recommendations for combating impunity through the proper functioning of the institutions responsible for ensuring justice for the victims. But the title, *From Madness to Hope*, was more aspiration than reality. The end of the war and the agreements between the parties were just a beginning: only if all sides complied fully with their com-

mitments could generalized violence give way to a durable and peaceful coexistence. There was still a long way to go.

Over an eight-month period, the Truth Commission had received over 25,000 testimonies concerning serious acts of violence.<sup>22</sup> The great majority of cases it documented fell into three main categories: extrajudicial executions (55 percent), forced disappearances (21 percent), and torture (21 percent). The responsibility for these violations was distributed among the armed forces of El Salvador (47 percent), the “security forces” (21 percent), paramilitary groups (17 percent), death squads (7 percent), “unidentified men in civilian dress” (5 percent), and the FMLN (3 percent).

The ceremonial presentation of the final report was held at United Nations headquarters in New York. In attendance were the United Nations secretary general, representatives of the UN Security Council, and delegates of the Salvadoran parties to the peace agreement, among others. Conspicuous by their absence were representatives of the victims.

The report identified individuals, groups, and institutions whose acts or omissions had led to brutal violations of international human rights and humanitarian law. Its publication was an important step toward the long-desired reunification of Salvadoran society. To date, however, the victims are still waiting for this grand objective to be achieved. That the system has failed them, there can be no doubt. No reparations of any kind, moral or material, were made to those directly or indirectly affected by the violence. The victims, moreover, are still waiting for official acknowledgement of who exactly was responsible for the pain they suffered, a lacerating pain that continues, particularly for those whose relatives disappeared and have never been found, dead or alive.

The Truth Commission report was not widely disseminated, although it was attacked in the national media. President Alfredo Cristiani laid out the official response on March 18, 1993, three days after report was published. Noting that the report covered only a portion of the incidents that had occurred, he declared it necessary to “erase, eliminate, and forget the past in its entirety” through a “global” formula. He also appealed forcefully for “a general and absolute amnesty, to turn that painful page of our history and seek a better future for our country.”<sup>23</sup>

Two days later, on March 20, 1993, the Salvadoran legislature rushed through the Amnesty Law for the Consolidation of Peace. The new law guaranteed that those who had directly

engaged in murder, disappearance, captures, and torture would go unpunished, along with those who had ordered the commission of such barbarous acts, financed the perpetrators, and covered up the deeds. The amnesty came just five days after the Truth Commission had delivered its indictment.

In a communication to President Cristiani six days after the law's enactment, the IACHR warned that "the political agreements concluded among the parties in no way relieve the State of the obligations and responsibilities it has undertaken by virtue of its ratification of the American Convention on Human Rights and other international instruments."<sup>24</sup> It underscored the state's duty to investigate the facts, punish those responsible, and compensate the victims.

The Commission received no response. It was not until May 11, 1993, three months later, that President Cristiani's secretary of national communications forwarded a note containing the official position. It defended amnesty as the path toward reconciliation and as a means to avoid a recurrence of past incidents. It pledged to fulfill the Truth Commission's recommendations as long as they were not at odds with the country's Constitution and secondary laws. It insisted that most of the population wanted to forgive and forget. Lastly, it appealed to the national and international communities to support the amnesty law so as to turn that page of history and advance toward a better future.

That page of history was indeed turned, but it was never read, and the painful lesson written there has not been learned. The next year, in February 1994, the IACHR issued a new report on the situation of human rights in El Salvador. In its discussion of the Truth Commission report, it pointed out that "some sectors that were indicated as responsible by the United Nations experts, objected to the findings, as did the executive branch of the government, the armed forces and the Supreme Court." The IACHR found such reactions troubling. Recalling the Salvadoran state's international commitments (under the American Convention on Human Rights, for example), the IACHR demanded punishment of the perpetrators and compensation for the victims. "Gradual implementation of the Truth Commission's recommendations," it urged, "will help to achieve genuine consolidation and strengthening of institutions, especially in the judiciary, which are essential to put an end to crimes going unpunished in El Salvador."<sup>25</sup> The IACHR report characterized the amnesty law as the most negative of the state's responses to the Truth Commission report, and noted the widespread opposition to the law on the part of individuals and institutions in El Salvador and abroad.

In his final evaluation of the Salvadoran peace process in July 1997, the UN secretary general pointed to poor compliance with some of the Truth Commission's recommendations and outright failure to comply with others. Some of those who abused their power in order to condemn the victims to silence were present at the launching of the Truth Commission report in New York, 13 years ago. They may even recall the words of Boutros Boutros-Ghali at that event: "There can be no reconciliation without public knowledge of the truth." Yet they chose the opposite course.

The Salvadoran peace process has been touted as a resounding success, particularly by those outside the country. Yet more than 16 years following the Geneva Accord and nearly 15 years since the war's end, this optimistic or perhaps overly presumptuous view of the national reality has not taken root, much less become widespread, inside the country.

In 2002, a decade after the end of the armed conflict, public opinion about the situation in the country was not encouraging. Surveys showed that 54 percent of the population thought the situation had improved, while 31 percent believed it was worse; about 15 percent said things had stayed the same. The first group based its opinion largely on the fact that the war had ended. Those who stated that the situation was worse cited an increase in violence and crime, coupled with economic and social deterioration. The third group believed that nothing had changed because the country was just as violent as before, if not more so. Four in 10 respondents believed that an authoritarian government, "an iron fist," was needed to solve the country's problems.<sup>26</sup>

Today, 15 years after the official "farewell to arms," El Salvador is considered the most violent country in Latin America. Economic and social inequalities are widespread and deeply rooted, political polarization is palpable, and crime is pervasive.<sup>27</sup> The state is held hostage by the real power elite. For much of the population, the only hope for a better standard of living is found abroad.

It could have been otherwise, had the peace process been managed responsibly. The land was fertilized for many years by the sacrifice of its people; that, and the expectations raised by the so-called peace accords, nourished hopes that justice would soon flourish. But it was not to be. Under a misguided postwar process, what grew and flourished instead was an insolent brand of impunity that punished the victims and rewarded the victimizers. Today it threatens to intensify the current social crisis, pushing the country headlong toward political instability and another eruption of violence whose form is unpredictable, if not its consequences.

## Individual petitions before the Inter-American system

The war's end and the commitments to transform society made by the parties to the conflict were widely hailed in the country and abroad. The Inter-American Commission was among those welcoming the new developments, although it also sounded a note of caution. While characterizing El Salvador as a new country, it stated that it trusted that the government and the former guerrillas would continue to exhibit, during this critical juncture of the country's history, the disposition they had shown during the negotiation process.<sup>28</sup> It pledged to continue monitoring the situation as it developed.

This appears in the first report issued by the IACHR after the guns were silenced, and was not simply a rhetorical statement. Indeed, the Commission continued to follow the situation in the country from a general standpoint, through its thematic work on issues such as gangs, prisons, and impunity, and in its individual casework. This section examines certain aspects of the IACHR's active monitoring and the reaction of the Salvadoran state.

Let us begin with the report on the merits of a case attributed to the military forces and included in the IACHR's first annual report on the post-conflict period. The crime occurred on February 22, 1983 in canton Las Hojas, Sonsonate department. Nearly 80 people belonging to a cooperative called the National Association of Salvadoran Indigenous Peoples (ANIS) were murdered in a premeditated action carried out with the participation of the "civil defense" forces.<sup>29</sup> The corpses showed evidence of having been executed at close range. Thirteen people were indicted in internal legal proceedings, among them several high-ranking officers. None was convicted, even though it was established that the military operation had been carried out with their participation.

The Inter-American Commission requested official information on three separate occasions (September 19, 1989, March 13, 1990, and November 9, 1990), particularly concerning details of government investigations into the case. The government did not respond until October 9, 1992, when the IACHR decided to publish confidential Report 17/92. The contents of the government's note did nothing to change the Inter-American Commission's decision and the report was published along with the Commission's recommendations, which the Salvadoran authorities ignored.

In February 1994, two years after the end of the armed conflict, the IACHR approved its special report on the human rights situation in the country.<sup>30</sup> Tellingly, the title of the report's first section, "From conflict to the quest for peace," characterized peace

as an elusive objective rather than a done deal. This quest entailed two enormous challenges: to improve the quality of life for the vast majority of the population and to make the administration of justice a reality through the proper functioning of the country's institutions.

The report examined 29 individual cases—most involving multiple victims—in which the Commission had issued reports on the merits during the armed conflict. It expressed disappointment at the lack of any official response to its recommendations in these cases. The report also included certain cases in which the Salvadoran government alleged that its responses had not been taken into account by the IACHR. In the Commission's view, these responses were "mere formalities" and did not reflect "serious and independent judicial investigations." It was the same old story: either the Salvadoran state failed to respond or it did so with falsehoods and bureaucratic evasion, while the IACHR called upon it time and again to comply with its international obligations. In the flurry of official notes and other communications, with deadlines extended beyond the prescribed periods, the victims remained deprived of justice. Nonetheless, the IACHR expressed its "hope that the transition period in El Salvador would bring fulfillment of its international obligations and justice for the victims who had for so many years waited for some response concerning the violations that they reported to the Commission."

In hearings held on November 15, 2001, the Commission examined the situation in the country and heard three individual cases to follow up on recommendations it had issued: *Lucio Parada Cea et al.* (Report 1/99); *Archbishop Oscar Arnulfo Romero* (Report 37/00); and the massacre at the Central American University (UCA) (Report 136/99).

The third case accurately depicts the official Salvadoran position toward the Inter-American system. In the early morning hours of November 16, 1989, army troops entered the UCA campus and murdered six Jesuit priests, including the university president, as well as their cook and her 14-year-old daughter. Americas Watch (now Human Rights Watch/Americas) reported the incident to the IACHR on the same day. At this writing, 17 years later, the perpetrators remain unpunished.

In its 1999 annual report, the IACHR included a report on the merits of the case in which it found the state responsible for the eight extrajudicial executions and for failing to fulfill its obligation to investigate the violations and to prosecute and punish the perpetrators. The Commission also determined that the Salvadoran state had "violated the right to know the truth, to the prejudice of the victims' relatives, the members of the religious and

academic community to which the victims belonged, and Salvadoran society as a whole.” It recommended “a full, impartial and effective investigation in an expeditious manner, consistent with international standards in order to identify, prosecute and punish all the material and intellectual authors of the violations determined, without reference to the amnesty that was decreed.” The report ended by calling upon the state to make full reparations to the victims and to render null and void the amnesty law.<sup>31</sup>

At the November 2001 hearing, the petitioners in the case were the Human Rights Institute of Central American University (IDHUCA) and the Center for Justice and International Law (CEJIL). They opted not to exercise their right to present opening arguments and requested that the state delegation use the additional time to report on how the state had complied with the Commission’s recommendations. The state was not able to demonstrate that it had complied with the recommendations, nor could it justify its failure to comply. One government representative even went to the ludicrous extreme of asserting that the authors of the crime had been prosecuted, referring to two people convicted at a September 1991 public hearing and subsequently released under the March 1993 amnesty. It was necessary to remind him that the IACHR’s recommendations had been issued in December 1999 and therefore the matters under discussion at the hearing had to do exclusively with actions carried out by the state since that time.

Observers at the hearing witnessed the shoddy and demagogic behavior of the Salvadoran government delegation, particularly when the representative of the attorney general asserted that the authorities had made their “best efforts” to investigate the intellectual authorship of the crime. He went on to say that the expiration of the statute of limitations was “the fault of the victims, who had not acted properly,” and he added that the amnesty law “had brought stability and tranquility to the country.”

Such arguments were immediately questioned not only by the victims’ representatives but also by members of the IACHR, who reminded the state that the position of the Inter-American human rights system toward amnesties was one of explicit condemnation. They also demanded explanations for the state’s audacity in blaming the victims for the expiration of the statute of limitations. If the time period for prosecuting this crime had indeed expired, then the state should explain how the office of the attorney general of the Republic could have allowed such a thing to happen. Could it not have acted in its official capacity to prevent it? The official delegation did not know what to say. To make matters worse, the petitioners presented evidence that even under Salvadoran law it was not true that the statute of limitations in the case had expired; instead, the judicial official



was using a specious argument in an attempt to prevent the prosecution of the intellectual authors of the massacre.

The victims' representatives displayed newspaper articles quoting the Salvadoran president's disparaging remarks about the IACHR's recommendations.<sup>32</sup> Other articles provided by the petitioners reported the intimidation and threats experienced by the victims and their representatives in their attempts to prosecute those ultimately responsible for the murders of the Jesuits and their employees. The government's total lack of political will to respect human rights in this case was obvious.

The petitioners requested that the IACHR obtain an advisory opinion from the Inter-American Court of Human Rights on the compatibility or incompatibility of the amnesty law and the alleged statute of limitations in this case with the American Convention on Human Rights, so as to secure a resolution that would be binding on the state.

The petitioners were encouraged and hopeful following the hearing before the Commission. They assumed that the Salvadoran government's failure to advance sound legal arguments in the regional venue would create an opening: the wall of impunity shielding the intellectual authors of the massacre would soon crumble, and they would eventually be brought to trial. But 15 years after the war's end and 17 years after the massacre itself, the hour of justice has still not come in El Salvador. While they insolently flaunt their disregard for the truth in international forums, inside the country, Salvadoran government institutions remain at the service of those responsible for serious human rights violations.

The case of Archbishop Romero had been lodged before the IACHR by the legal aid office of the Archdiocese, known as Tutela Legal. At the hearing, government representatives failed to explain why the persons allegedly responsible for this most high-profile of murders were never investigated or prosecuted. In the case of *Lucio Parada Cea et al.*, the state confirmed that it had not carried out the Commission's recommendations. It noted that investigations into the participation of a low-level member of the armed forces conducted years before had come to nothing, and that another suspect had been freed in one of the many amnesties decreed in the country.

The head of the official delegation spoke of the "political will" of her government to "broaden protection for its citizens." The delegation also trotted out well-worn arguments concerning the supposed danger to peace should those suspected of intellectual authorship of these and other crimes be investigated and prosecuted. "It would open the doors

to another conflict,” she asserted.<sup>33</sup> The petitioners, in contrast, were clear and focused in their discussion of the amnesty issue. They demanded legal rather than political responses to their positions and denounced the threats, both veiled and blatant, against those who dared to demand the truth so that justice could be done.

The session concluded with hearings on two cases in proceedings before the IACHR: the murder of Ramón Mauricio García Prieto Giralt (No. 11.967) and the disappearance of the Serrano Cruz sisters (No. 12.132). In the former case, the petitioners—the parents of the victim, IDHUCA, and CEJIL—alleged a lack of serious investigation into the intellectual authorship of the crime and serious acts of intimidation, including threats, attacks, and other forms of harassment against the García Prieto family and its representatives in El Salvador. The government again offered no convincing response and only expressed its “will to investigate”—a “will” that has failed to produce any concrete results whatsoever in the 13 years since the incident occurred.

In view of government efforts to impede the investigations—with obstruction evident even within the National Civilian Police force—and the lack of progress in the domestic courts, the García Prieto family decided to present a complaint to the Office of the Human Rights Ombudsman. That office issued an important resolution on July 23, 1996, finding numerous human rights violations.

The family then turned to the Inter-American Commission in late 1996. The pressure brought to bear by the IACHR led to a reopening of the investigation, and a suspect was convicted as a material author in the crime. No progress was made, however, in determining the identity of the intellectual authors. On March 9, 1999, the Commission issued Admissibility Report No. 27/99 and offered its good offices to the parties to seek a friendly settlement in the matter.

The IACHR held another hearing in the case on November 15, 2001. At that time, the petitioners reiterated that more than seven years had passed and that domestic mechanisms had failed to respond effectively. The result was a persistent state of impunity in the case. While acknowledging that two of the material authors in the crime had been convicted, the petitioners underscored that this was achieved only through the tireless efforts of the victim’s family and the international pressure brought to bear by the IACHR and the United Nations Observer Mission in El Salvador (ONUSAL), and after overcoming enormous procedural barriers. The petitioners also pointed out that no serious investigation had been undertaken to prosecute the intellectual authors

of this arbitrary execution or those directly responsible for the subsequent threats against the García Prieto family.

The official delegation present at the hearing claimed that it was unaware of ongoing threats against the family, since the family had not reported them in a timely fashion.<sup>34</sup> It also mentioned a retired military officer who had been identified as an intellectual author of the crime. The officials stated that the government had not succeeded in obtaining any evidence against this person and, consequently, had closed the case.

To this, the petitioners replied that they had sent a note dated August 21, 1999, to the minister of foreign affairs asking her to appoint a high-level liaison with the authority to handle matters concerning the security of the affected individuals, the police investigation, and the court proceedings; to designate the appropriate police personnel, equipped with adequate technical resources to perform their duties; and to consider the possibility of collaboration by foreign investigators in the identification of all those responsible for the crime. More than two years later, there had been no response to those petitions. The supposed official investigations into the retired military officer's involvement as an intellectual author were shown to be a fiction. It became clear that no friendly settlement was possible due to the palpable lack of interest on the part of the state.

The report on the merits of this case, which the IACHR approved on October 24, 2005, found the state responsible for violations of the rights to life, personal integrity, judicial guarantees, and judicial protection to the detriment of the victim and his relatives. It recommended that the state conduct an investigation into the death of Ramón Mauricio to identify the authors at all levels and punish those found guilty. It also recommended an investigation into the alleged threats and other acts of harassment. Lastly, it asked that moral and material reparations be made to the victims.

On February 9, 2006, the IACHR submitted the case to the Inter-American Court of Human Rights. It was no simple task to reach this level in the search for justice. In addition to acts of intimidation against the family, the domestic and international proceedings had featured abusive and offensive behavior on the part of the state. To give just one example, in an official communication to the IACHR dated December 16, 2002, the Salvadoran government asserted that "the main thing for them [the parents of Ramón Mauricio] is the dilemma in which they find themselves, because they have to choose between the value of grief over their son's death and that of revenge for the act committed;

the latter has prevailed in order to avenge by whatever means possible the ‘family honor,’ just as at the height of medieval times.”

There are numerous examples of the state’s hypocrisy in its efforts to defend the indefensible, even if that meant victimizing the family members once again. This sort of offensive behavior in the context of the process before the Inter-American Commission served only to confirm that, 10 years after the war’s end, the formal and de facto power elite still held the victims in the same contempt.

Despite the Salvadoran state’s many maneuvers and tactics, it finally faced a judgment handed down by the Inter-American Court on March 1, 2005. The Court found the state liable for violating the human rights of Ernestina and Erlinda Serrano Cruz, age seven and three respectively, and their next of kin. The girls were abducted by army soldiers and disappeared on June 2, 1982, in the course of a military operation. During the March 1 hearing, the state displayed its characteristic disrespect toward the family, to the point of asserting that the girls never existed and that the mother was only after money.

Nonetheless, the Court ordered an investigation into the incident, the punishment of those responsible, and a serious search for the victims. It also ordered the state to establish, with the participation of civil society, a “national commission to search for young people who disappeared as children during the armed conflict; to hold, within one year’s time, a public act acknowledging its responsibility in relation to the violations set forth in the instant judgment and to make amends to the victims and their relatives.” Finally, the state was to decree, within no more than a six-month period, “a day dedicated to boys and girls who, for various reasons, disappeared during the armed conflict.”<sup>35</sup> Given the pervasive institutional responsibility in the *Serrano Cruz* case, the public ceremony scheduled for March 22, 2006, was to include the participation of high-level government authorities.

But public declarations by President Elías Antonio Saca one day before the ceremony had nothing to do with making amends to the victims. “Although this resolution did not condemn the state,” he declared, “there are certain economic commitments that we must fulfill as a country.” The president was referring to another of the obligations derived from the Inter-American Court’s judgment, namely, monetary compensation to the girls’ relatives and their advisers. The president thus completely disregarded the scope of the resolution and his duties in the area of human rights before Salvadoran society and the international community. The judgment in this case did indeed obligate the state to make monetary reparations for the harm incurred. But most importantly, it enjoined the state to

acknowledge its responsibility for the crime, ensure that justice was done, and prevent any recurrence of such incidents.

Other governments in the region displayed very different reactions in cases similar to that of the Serrano Cruz sisters, asking forgiveness of the victims' relatives.<sup>36</sup> In these cases, military participation was proved, the human rights of relatives were violated following the death and disappearance of the primary victims, and there was a breakdown in domestic mechanisms for the protection of human rights. However, there is a huge gap between the formal attitudes of other states in the region and that of El Salvador, where forgiveness has become an impossibility. Those with the legal and moral obligation to ask forgiveness, notably President Saca, fail to do so. And the Serrano Cruz family cannot grant forgiveness because it has no idea whom to forgive. Those responsible for the disappearance of Erlinda and Ernestina remain shielded by impunity.

The handling of the matter became increasingly offensive. When the public act was held, supposedly to comply with the orders of the Inter-American Court, the state neither acknowledged liability nor made amends to the victims or their relatives. The official speech focused on singing the praises of a commission established by executive decree; this commission flew in the face of the Court's judgment by failing to include the active participation, with voice and vote, of nongovernmental human rights groups. What is more, the most extensive and relevant portion of the speech involved the presentation of the new commission's only case of a successful family reunification as of that date.

The "grand gesture" of the foreign minister presiding over the event was limited to the following paragraph of the speech:

The state of El Salvador profoundly regrets all of the incidents that occurred during the armed conflict that reigned in our country for over 12 years and directly affected each and every Salvadoran family, and particularly those involving our children; it especially regrets the incidents related to Erlinda and Ernestina Serrano Cruz and the findings of the Judgment, and expresses its solidarity with them and with their family . . .

Expressing regret is not the same as acknowledging responsibility. The most regrettable aspect of the March 22 event, which was more publicity stunt than true public act, is that forgiveness continued to be demanded of the victims even though the victimizers had not asked for it nor acknowledged their guilt. Thus the state further insulted the Serrano

Cruz family and all Salvadoran victims while showing its true colors to the international community committed to human rights.

As Salvadorans continue to struggle for justice, their cases gradually are reaching the Inter-American human rights system. It is becoming increasingly clear that El Salvador's "peace" is not peace built on justice, as the cases of 75,000 arbitrary executions and over 8,000 disappeared men, women, and children remain unresolved. It is a peace built, above all, on impunity.

## IMPACT OF THE INTER-AMERICAN SYSTEM IN EL SALVADOR

The Salvadoran state has been on the Inter-American Commission's radar screen for the past 36 years. During this period, terrible acts of violence and serious human rights violations have been carried out against broad swaths of the population, mainly at the behest of the government authorities. In a context that stood out in Latin America for the scale of the brutalities committed, the IACHR received and admitted individual petitions denouncing the state as a human rights violator. It also conducted *in loco* visits, albeit very few relative to the magnitude of the situation, and published special country reports based on those visits.<sup>37</sup> The Commission consistently reported on the atrocities taking place and, within the parameters imposed by its mandates, used its influence to mitigate the suffering caused by indiscriminate political violence and war. Throughout, it appealed over and over again for dialogue and a peaceful solution to the conflict.

The beginning of the end of the national tragedy came with two important meetings of Central American heads of state held in Esquipulas, Guatemala in 1986 and 1987. The process of dialogue and negotiations gained impetus in a changed geopolitical context brought about by the end of the Cold War. Also essential were the mediation of the United Nations and the secretary general's "group of friends" (Mexico, Venezuela, Colombia, Spain, and the United States).

When the war ended in 1992, the IACHR was attuned to the potential for a radical transformation of society. This contrasted sharply with the position of the United Nations, whose substantial mission in the country was engaged in verifying the "pacification" process. The amnesty law provides an important example of this in terms of the fight against

impunity. While ONUSAL's Human Rights Division offered a lukewarm response to the government's furious attacks against the Truth Commission report and refrained from condemning the arbitrary amnesty law that had been decreed, the IACHR forcefully criticized the government's reactions and the amnesty measure.<sup>38</sup>

In the postwar period, the IACHR has continued to hold hearings on the situation in the country and has conducted an in loco visit. In December 2004, the Commission participated in a joint mission to El Salvador, Guatemala, and Honduras with the United Nations Children's Fund (UNICEF) "to gather information on the situation of boys, girls, and adolescents involved with groups known as *maras* or *pandillas* (gangs), and to study the living conditions of persons deprived of freedom."<sup>39</sup> The IACHR has held a number of hearings at the request of nongovernmental human rights organizations seeking to inform the Commission on the general situation in the country, in particular the vicious and perverse circle of violence and impunity. At the hearings, these groups repeatedly have brought up the need for the Commission to make another in loco visit to the country. Lastly, as described earlier, the Inter-American Court issued its first ruling against the Salvadoran state for human rights abuses in the case of *Serrano Cruz* in 2005 and in January 2007 returned state officials to the defendant's chair in the *García Prieto* case.

For better or for worse, the human rights organs of the Inter-American system have made an effort to contribute to substantive transformation in El Salvador. But the changes to date have been largely in form rather than substance.

The case of Jorge Odir Miranda and others infected with the HIV virus is an exception, the sole positive experience. After granting precautionary measures in favor of the victims and declaring the petition admissible, the IACHR opted not to present the case to the Inter-American Court.<sup>40</sup> The government's position was to comply acceptably with the recommendations. The initiative of the victims and the Commission's intervention in this case had an impact both inside and outside the country. Significant achievements in-country included improved access to treatment and follow-up examinations and the approval of the Law of Prevention and Control of Infections caused by the Human Immunodeficiency Virus. This had the effect of placing the issue on the public agenda. Beyond El Salvador's borders, in the aftermath of this case, the IACHR began to receive other cases like it from around the region.

Of course, El Salvador's acceptance of the competence of the Inter-American Court was a key development. But this acceptance was essentially imposed, and for this reason it was

accompanied by a reservation stating that the Tribunal could only consider facts occurring subsequent to the declaration of acceptance, which took place on June 6, 1995. This became the basis for the Court to declare, in the *Serrano Cruz* case, that it was not competent to take up the issue of violations of the right to life (over the dissenting vote of Judge Antônio A. Cançado Trindade). The Salvadoran state thus escaped condemnation for the forced disappearance of the victims and successfully shielded the perpetrators. In this context, El Salvador's resistance to signing and ratifying the Inter-American Convention on Forced Disappearance of Persons should be interpreted as a move to deny justice to those who suffered such violations and to ensure that those responsible will remain unpunished.

Other more benevolent interpretations of El Salvador's attitude hold that while the Court judgment in the *Serrano Cruz* case has been only partially carried out, the anticipated forceful opposition to it has not materialized. But while not explicitly defiant, the official position has been a betrayal of the Court and one more outrage for the victims. High-level government officials have privately acknowledged that the state complied with the least important aspects of the judgment while ignoring its most essential provisions. They have alluded to powerful resistance, particularly from within the armed forces.

Optimists also cite the hosting of the 24th Special Session of the Inter-American Court in El Salvador and active state participation in the debate over certain advisory opinions in the 10 years since the country accepted the adversarial jurisdiction of the Court. El Salvador has also responded to some of the surveys distributed by the IACHR on particular subjects, such as the situation of human rights defenders in the country.

But are these advances substantive? What fundamental changes have really taken place? Much has changed in form, but aside from the fact of the war's end, nothing, or next to nothing, has changed in terms of substance. This can be seen in two areas of particular concern to the Inter-American Commission: the economic and social situation of the population and access to justice.

With respect to the first area, poverty reduction initiatives are not attacking the structural causes of poverty. Instead, the battle against poverty is being waged by "contingents" of compatriots who leave the country on a daily basis, usually for the United States, despite the dangers and human rights abuses that await them en route and at their destination. Their remittances to family members left behind in El Salvador are an important source of income for the population.<sup>41</sup>



Inequality remains severe. According to the United Nations Development Programme (UNDP), in 2002 the income of the richest 20 percent of the population was 24 times that of the poorest 20 percent. In 1961 the richest quintile had income 11 times that of the poorest quintile, and the figure rose to 33 times immediately prior to the outbreak of the armed conflict.<sup>42</sup> This means that current levels of inequality in the country are far from the historically lowest rates (1961) and actually approach the highest, in other words, the levels that contributed to the onset of armed conflict. This scenario is exacerbated by the stigmatization of young people, particularly those from disadvantaged sectors, and the application of the “mano dura” (“iron fist”) policy.

With respect to the second key area, there is a persistent denial of justice at two levels—institutional and political. At the institutional level, the Truth Commission’s recommendations, which the state ignored, included critical reforms aimed at reducing the high concentration of functions in the Supreme Court of Justice and adopting measures to make effective the remedies of amparo and habeas corpus. Substantive reforms to the Constitutional Procedures Law constitute another unfulfilled mandate. The state did, however, carry out legislative reforms to eliminate judges’ powers with respect to the constitutional oversight of secondary laws and—through a majority ruling by the Supreme Court—to relieve the probity section of the Supreme Court of its powers to investigate the financial situation of public officials.

Those responsible for criminal investigations are often hand-picked by the political elite, and thus the criminal process is quite partisan. Furthermore, the investigations actually carried out are rife with scientific and technological deficiencies. The same is true of the judiciary, particularly at the highest levels. While private and public complaints of corruption and cronyism are daily fare, they are not investigated. In the rare cases that are investigated, nothing comes of it unless there is an overriding interest emanating, for example, from the White House in Washington. This is compounded by the case backlog, the lack of transparency and accountability, and the overall inefficiency of the system.

The proverbial last straw is a vigorous campaign to discredit a group of judges who are working independently and in strict adherence to the Constitution. The executive branch, through the president and officials in the Ministry of Government, has blamed these judges for the surge in crime rates and public insecurity. The attacks intensified when the judges refused to apply unconstitutional standards that contravened human rights safeguards, such as the “anti-gang law,” and when the population was asked to “identify bad judges who set criminals free.” This was the real reason behind the move to relieve the judiciary of its constitutional oversight functions.

René Fortín Magaña, a Supreme Court of Justice magistrate until May 31, 2006, summed up the problems in the judiciary:

The most important aspect of the [Peace] Accord was that it raised up the judicial branch, heretofore only consigned to a piece of paper known as the Constitution. But since then, the judiciary, rather than operating at the level assigned to it by history, increasingly has languished, tremulous before the prepotency of the executive.<sup>43</sup>

This institutional weakness has enabled the state to continue to display the highest contempt for victims of past and present human rights abuses, whether they live in the country or abroad. It has done so with absolute impunity. This is the most visible and troubling aspect of the relationship with the Inter-American human rights system, even though the latter has advocated on behalf of the victims for nearly 40 years and has sought to combat the official attitude bent on shielding the victimizers.

In this context, the armed forces have not been compelled to cooperate in the clarification of past human rights violations, most of which have been attributed to them. Former commanders retain significant power and conspire against a society that aspires to peace. In its first public appearance, on September 9, 2003, the Association of Military Veterans (ASVEM) swore in its executive board. On that occasion it highlighted the presence of retired officers who had formed part of the military high command during the war and who have been implicated in serious human rights violations. Also present were representatives of the traditional economic power elite and the Nationalist Republican Alliance (ARENA), including then-president of the Republic Francisco Flores. Several months later, in February 2004, ASVEM met with the successful ARENA candidate and current president, Antonio Saca. During that encounter, General René Emilio Ponce—a former minister of National Defense and a leader of ASVEM—requested that Saca not repeal the amnesty law. President Saca agreed, asserting that he had been elected for the future, not the past.

Applying pressure in this way is typical of the powerful figures who are responsible for the atrocities committed in the country before, during, and even after the war. Shielded by an appalling impunity, they have accepted no substantive change that might jeopardize their privileges. Instead they block, by whatever means necessary, any actions, internal or external, that might benefit their victims.

The victims' perspective is reflected in the following comment by an individual whose case is pending before the Inter-American system:

The ability to come before international entities to denounce the lack of justice, the impunity, and other government abuses helps ease the frustration, the anger, and the indignation that any civilized person feels when the institutions responsible for upholding the law in one's country do not function or only function to consolidate impunity. In the international arena, we can hope to be heard and understood by those unbiased entities.

Ignacio Ellacuría, the president of the UCA murdered in November 1989, wrote a commentary on the IACHR's special report on the situation in El Salvador following the Commission's in loco visit of January 1978. In his conclusion, the Jesuit educator affirmed the value of such efforts by the Inter-American human rights system in cases such as El Salvador:

It amasses a large amount of objectively verified information and formulates carefully weighed conclusions. It achieves a good overall vision and takes into account a range of points and information. [The special report] is a critical document for arriving at an ethical-political judgment of the country and for securing the solid support of all those concerned about and fighting for respect for the fundamental rights of persons in El Salvador.<sup>44</sup>

Ellacuría attributed an "extrinsic authority" to the report and referred also to its "tremendous internal authority." His review sums up the support the Inter-American system attempts to provide the groups who fought and continue to fight "for respect for the fundamental rights of people in El Salvador." Nonetheless, the existence of a virtually absolute power, unrestrained by any significant pressure to balance the scales of justice, continues to cause tremendous damage.

## HUMAN RIGHTS YESTERDAY AND TODAY: A QUESTION OF POWER

El Salvador today is not the country for which so many brave people sacrificed so much. It continues to be plagued by the same ills that the Inter-American Commission and human rights groups have pointed out time and again. These problems are not in the past; they are the main obstacles that today prevent the majority of the population from

enjoying a decent standard of living. And they continue to constitute a threat, because they are the very same conditions that caused the country to explode in violent conflict just a few decades ago.

Salvadoran history is painful, but it is also rich in lessons, and we can learn from the past in order to begin now, in earnest, to build a better tomorrow. We must examine the national reality of the past four decades to understand why and how this war came about, and we must look closely at what is happening today.

As stated earlier, El Salvador before the war was a pressure cooker. The ingredients: a small territory that is the most densely populated in the Americas, except for the Caribbean islands; high poverty rates and deep inequality, especially in land tenure<sup>45</sup>; and pervasive violence affecting the majority of the population.<sup>46</sup> There was no alternation of the political parties occupying the presidency, and public administration was controlled by an economic, political, and social power elite that ran the country according to their whim and with absolute impunity.

The pressure cooker at one time had a safety valve: emigration to Honduras and the countries of the Central American Common Market. But this safety valve was closed off when the Soccer War caused the common market to fail, stopped the exodus of Salvadorans to Honduras, and triggered the return of many who had been living in that country. The temperature rose as El Salvador saw a sharp increase in the number of people without jobs and with no hope of obtaining one, growing poverty and discontent, a burgeoning and increasingly united political opposition, electoral fraud, and the emergence and activities of guerrilla groups. It rose still more with official repression in the form of individual and collective murders, forced disappearances, prison, torture, and exile. The inevitable finally happened: the pressure cooker exploded, blowing the country to pieces.

What is El Salvador like today? Its territory was further reduced by a 1992 International Court of Justice ruling in a long-standing litigation process with Honduras concerning demarcation of the border. The population has grown from approximately 3 million in the 1960s to 7 million today, with half living below the poverty line.<sup>47</sup> As noted above, income inequality is severe and is approaching prewar levels. The daily crime rates have reached obscene proportions and El Salvador “at peace” rivals Colombia at war for the shameful position of first place in that macabre contest.<sup>48</sup> The same party has held the presidency of the country for four consecutive terms; its founder is described by the Truth Commission as the organizer of the death squads, and some of the people who assisted him in that ef-

fort continue to hold positions of leadership.<sup>49</sup> Lastly, the rest of the country's institutions, with rare exceptions, are controlled by the most powerful social sectors, which also enjoy the backing of the most influential media outlets.

Does this scenario seem familiar? While the situation today differs in certain formal aspects from the one four decades ago, it is the same or worse in other respects, for example, in the level of violence. Furthermore, certain dangerous ingredients have been added to the mix that were not present before.

One is the number of firearms in civilian hands. According to the Public Opinion Institute of Central American University (IUDOP), some 75,000 weapons and 20 million units of ammunition entered the country legally between 1994 and 2001. At that time El Salvador was the seventh-largest importer of firearms from the United States, and in 2005 it became the fifth-largest importer of firearms in the world. Data from the firearms registration department in the Ministry of National Defense indicate that the total number of legal weapons in the country exceeds 200,000. According to the IUDOP, that figure could triple if illegal weapons are taken into account. If that is the case, based on the number of legal and illegal firearms in the country, one in eight Salvadorans owns or carries a weapon. It is perhaps not surprising that 80 percent of homicides in the country now involve firearms, in contrast to past years when bladed weapons predominated in acts of violence.

A second factor is official contempt for the victims of abuses and the lack of justice for them, which contrasts acutely with the tolerance and impunity enjoyed by their victimizers. The amnesty punished the former and rewarded the latter. The provision of amnesty for serious acts of political violence, crimes against humanity, and war crimes sent a clear message: in El Salvador there will be no punishment of those crimes to the extent that punishment might affect the interests of powerful individuals, institutions, or groups. This is true despite the fact that, in the words of one victim's relative, "he who kills with impunity will kill again."<sup>50</sup> By the same token, he who steals and is not punished will steal again, and he who lies will continue to lie. The Salvadoran people, robbed of their wealth, were killed when they demanded that the spoils be restored to them, and those crimes have been cloaked in lies. All of this has gone unpunished.<sup>51</sup>

When the reasons to kill lie close to the surface and the weapons are close at hand, one must wonder whether the pressure cooker will once again explode if the safety valve is shut off. As before, that safety valve largely consists of emigration, today directed mainly to the United States. At the very least, the danger is there.

What can be done then, to prevent another explosion? The solution today is no different from what it was before: genuine democratization of Salvadoran society, unrestricted respect for human rights, and social reconciliation—the three overarching and as-yet unrealized objectives of the Salvadoran peace process born in Geneva in April 1990. But the power elite that control the economy, politics, and mass communications show no signs of budging. Why should they? Why would they expose themselves by ending the impunity that shields some of them and many others who served them well, before and during the war? The objectives of the peace accords constitute too high a risk to the interests of this sector.

The peace process came about because the power elite was confronted with a countervailing power that could compel them to sit down, negotiate, and reach agreements. The political and military power of the FMLN, the Salvadoran people's determination to achieve peace, international solidarity, and United Nations mediation efforts all converged into a counterforce that was able to silence the guns and rein in official practices involving politically motivated human rights abuses. Yet this confluence of forces was not potent enough to achieve more far-reaching goals, and it gradually broke apart without leaving behind a durable counterforce to ensure full compliance with all of the commitments made.

According to Margaret Popkin, an expert on the Salvadoran reality:

El Salvador still risks accomplishing only an incomplete transformation, which could leave some gains reversible and many reforms either never approved or, at best, inadequately implemented. The obstacles are real: erratic political will, an enormous need for technical and economic resources, weak or incipient state institutions charged with safeguarding human rights, the tendency for old vices to reassert themselves in new forms, the lack of oversight mechanisms within institutions, a weak civil society, and enormous economic exclusion.<sup>52</sup>

Popkin also stressed that progress in justice and human rights was contingent upon “a mobilized civil society and an adequate level of international participation.”

What is needed, then, is to create a new force based on the struggle of the victims to defend their human rights, in all of their manifestations. As Fr. Ellacuría said 10 days before his death, “One must be utopist and hopeful to believe and to be willing to try, together with all the poor and oppressed of the world, to reverse history, to subvert it, and to set it on a different course.”<sup>53</sup> This entails making use of all available internal and external

resources to achieve truth, justice, and reparations. Nearly 15 years after the war's end, the advances have been few and far between and the setbacks enormous. That is why the Salvadoran people are looking outward, not only in search of individual and family subsistence, but also in search of judgments—particularly from the Inter-American human rights system—and the protection that is denied them inside the country.<sup>54</sup>

It is through this lens that the strengths and weaknesses of nongovernmental human rights advocacy in El Salvador should be assessed. The work of this sector is notable for its longevity and for the sacrifice of noted human rights defenders who gave their lives in the course of their labors. In August 1975, Fr. Segundo Montes, together with a group of young lawyers and law students, founded Socorro Jurídico Cristiano. Ten years later he established IDHUCA, the Human Rights Institute at Central American University, before being killed with his fellow Jesuits at the university in November 1989. Archbishop Oscar Arnulfo Romero y Galdámez took over the Socorro Jurídico in 1977, making it a centerpiece of his prophetic mandate in the Archdiocese of San Salvador. He was assassinated in 1980. In 1982 his successor, Archbishop Arturo Rivera y Damas, founded the highly respected legal aid office of the Archdiocese. In March 1983 Marianella García Villas, then president of the nongovernmental Human Rights Commission of El Salvador (CDHES), was killed by government troops as she was investigating the situation in rural areas.

Many other lay and church-based organizations carried out courageous work in defense of life and dignity during the years of political violence. In addition to those whose names are well known, many anonymous individuals made equally valuable contributions, some giving their lives to the cause. More than anything else, this human sacrifice of solidarity in defense of the victims helped place El Salvador high on the international agenda.

Since the war's end, however, while these human rights groups have not disappeared, their presence and impact has diminished greatly. There are many possible explanations: insufficient vision to identify the challenges of a new reality; lack of resources after the previous period of abundant support; the enormous burden in terms of staff and resources of ONUSAL's human rights division; the lack of orientation or "political guidance" in the case of groups with close ties to the FMLN; and the profusion of specialized organizations described as nongovernmental, founded and staffed largely by former guerrillas.

It cannot be said that a coordinated human rights movement existed in El Salvador either before or during the war. This was mainly because conceptual and methodological differences impeded any collaboration beyond a few declarations or very specific initiatives.

This state of affairs has continued into the post-conflict period. After a long history of struggle and the loss of many committed individuals, civil society in El Salvador embraces a broad array of human rights initiatives. It is not possible, however, to speak of a coalition of groups—although one is urgently needed—much less a social movement united under a banner of human rights promotion, protection, and defense.

This poses an enormous challenge in at least four areas. The first is to develop a common effort in favor of the victims, one in which the victims themselves are the principal actors. The second is to expand the technical capacity for strategic litigation in the domestic and international venues in order to educate social groups about their rights and how to exercise them. Dissemination of successful cases in the battles waged by the victims will encourage others to follow their example. Third, steps should be taken to organize and consolidate the counterforce discussed earlier. Such a force must be able to negotiate and reach agreements on a level playing field with those who have blocked the achievement of the three overarching objectives still pending from the peace process; equally important, it must act to ensure fulfillment of the commitments already made. The fourth challenge is to deploy imagination and creativity, breaking with traditional models in order to speed up progress and achieve more successful outcomes in the first three areas.

Article 6 of the Inter-American Democratic Charter of the OAS recognizes citizen participation as a right and a responsibility, as well as a “necessary condition for the full and effective exercise of democracy.” This is a useful formal foundation for rising successfully to this challenge. In practice, however, it is important to recall that

there are many victims who do not report what has happened either in the country or internationally out of fear, lack of guidance, or their absolute moral prostration before the terrible acts they have suffered that continue to victimize them. There are so many victims in these circumstances that one enters into a dangerous stage of conformity toward state-sponsored abuses, which enables the latter to persist in its arbitrary, repressive, and deadly practices.<sup>55</sup>

This is the voice of those who are called to change the course of Salvadoran history to avoid a repetition of the tragedies carried out with impunity. This is the voice of those who, by their actions and example, can truly democratize the country, ensure absolute respect for human rights, and transform today’s society into one that is genuinely reconciled and peaceful, rooted in truth and justice.



But the burden cannot and should not be placed on the victims' shoulders alone. National and international human rights groups must participate in the construction of this social and ethical counterforce, each to the extent of its capabilities, pushing internal institutions to honor the mandates set forth in the Constitution and the law. It is also important to engage the democratic media in the country and abroad in a strategy to publicize successful and exemplary cases, highlighting not only the role of the victims but also of those government officials who do justice to their offices.

## CONCLUSIONS

In El Salvador, then, “the Prince” still feigns virtues that he does not possess. He cannot do so to the same extent as before, thanks to the struggle of the victims, but he remains set on the same course. He does not want the truth to be revealed, and he uses every possible means to keep his true face hidden. The Prince is panicked by the truth and its potential legal repercussions because he is responsible for the deaths of so many people, whether through economic and social exclusion or through violent repression and brutality. And he is responsible for the lies that cover up these crimes.

That is why he tried to bury the Truth Commission report under the gravestone of amnesty. That is why today he continues to install padlocks so that the doors of truth leading to justice cannot be opened. On June 6, 2006, a resolution on the right to truth was approved by the 36th OAS General Assembly meeting in the Dominican Republic. No objection was raised when the resolution was approved—except for the following statement by El Salvador:

The content of this draft resolution should not be considered an instrument that affects the form and methods used in the different national reconciliation processes in states that have experienced armed conflicts in their territory, and particularly those in which peace and national reconciliation accords are based on amnesties requested and negotiated by the parties to the conflict and supported by the international community. . . . The Salvadoran state . . . is not bound by the content of international instruments, resolutions, conclusions or recommendations to which it is not a state party or which have emanated from forums or meetings in which

it has not participated . . . It expresses its support for the aforementioned resolution in the terms indicated, as long as its content does not affect the internal legal framework of the Salvadoran state.

This is the most recent example of the Salvadoran government's "esteem" and "respect" for the efforts of the Inter-American human rights system to bring about profound changes in El Salvador. The height of this cynicism is found in six words: "amnesties . . . supported by the international community." This assertion was made despite the consistent international criticism of the March 20, 1993 amnesty law, such as the IACHR's declaration that

the very sweeping General Amnesty Law passed by El Salvador's Legislative Assembly constitutes a violation of the international obligations it undertook when it ratified the American Convention on Human Rights, because it makes possible a "reciprocal amnesty" without first acknowledging responsibility (despite the recommendations of the Truth Commission); because it applies to crimes against humanity, and because it eliminates any possibility of obtaining adequate pecuniary compensation, primarily for victims.<sup>56</sup>

But the victims' turn will come, as Salvadoran poet Roque Dalton reminds us in "El turno del ofendido." For years, El Salvador has borne "the silent burden of their cries." And as the human rights institute IDHUCA wrote in 1992, "The truth is life and [the Salvadoran] people want no more death; truth is the solid basis for peace and our people want no more war; truth is truth only when it is revealed to all and our people deserve to be no longer the victim of the lie."<sup>57</sup>

## NOTES

1 Human Rights Institute of Central American University (hereafter cited as IDHUCA), *La agenda pendiente, diez años después: De la esperanza inicial a las responsabilidades compartidas* (San Salvador: Universidad Centroamericana, 2002), pp. 25–99.

2 Positive outcomes include the end of the armed conflict and of widespread, state-sponsored, politically motivated human rights violations; the dismantling of repressive forces incongruously termed security forces; and the establishment of new institutions intended to uphold human rights, such as the National Civilian Police and the Human Rights Ombudsman's Office.

3 IACHR, *Informe sobre la situación de los derechos humanos en El Salvador y Honduras*, OEA/Ser.L/V/II.23, Doc. 9 rev., April 29, 1970.

4 General Fidel Sánchez Hernández, speech, July 18, 1969.

5 Some observers report 6,000 dead and 20,000 wounded in the violence preceding and during the four-day war. See Juan Miguel Reyes, “Riszard Kapuscinski: El periodismo como conocimiento y divulgación de la historia,” <http://www.tuobra.unam.mx/publicadas/030704231912.html>.

6 *IACHR Annual Report 1970*.

7 *Ibid.*

8 *IACHR Annual Report 1971*.

9 Acuña de Chacón was a member of the subcommittee named to handle the dispute between Honduras and El Salvador.

10 *IACHR Annual Report 1972*.

11 People’s fronts were social organizations that functioned openly in society, as opposed to clandestine groups such as the guerrillas. They comprised large numbers of people, such as rural farmers, students, or workers, united around sector-specific interests.

12 Socorro Jurídico del Arzobispado de San Salvador, *El Salvador: La situación de los derechos humanos: Octubre 1979–Julio 1981* (Mexico: Consejo Mundial de Iglesias, 1981), p. 393.

13 Asociación Nacional de la Empresa Privada, “1er. Pronunciamiento de ANEP,” *Revista Estudios Centroamericanos* (Universidad Centroamericana) 31, nos. 335–336 (September–October 1976): 611–18.

14 “A sus órdenes, mi capital,” editorial, *Revista Estudios Centroamericanos* (Universidad Centroamericana) 31, no. 337 (November 1976): 638.

15 Socorro Jurídico del Arzobispado, *El Salvador*, p. 399.

16 IACHR, *Report on the Situation of Human Rights in El Salvador*, OEA/Ser.L/V/II.46, Doc. 23 rev. 1, November 17, 1978.

17 *Ibid.*

18 *Ibid.*

19 *IACHR Annual Report 1979–80*.

20 Socorro Jurídico del Arzobispado, *El Salvador*, p. 406.

21 *From Madness to Hope: The 12-Year War in El Salvador: Report of the Commission on the Truth for El Salvador* (San Salvador: Editorial Universitaria, Universidad de El Salvador, 1993).

22 Over 2,000 people presented their testimonies directly, in addition to 23,000 indirect complaints.

23 Quoted in IACHR, *Report on the Situation of Human Rights in El Salvador*, OEA/Ser.L/V/II.85, Doc. 28 rev., February 11, 1994.

24 *Ibid.*

25 *Ibid.*, p. 46.

26 IUDOP, “Los ciudadanos opinan sobre los Acuerdos de Paz y la democracia en El Salvador,” *Boletín de Prensa* 17, no. 1 (2002).

27 The Forensic Medicine Institute under the jurisdiction of the Supreme Court of Justice registered a total of 3,812 felonious homicides in 2005, up from 2,933 in 2004. Firearms are involved in approximately 80 percent of these murders.

28 *IACHR Annual Report 1992–93*.

29 The “civil defense” was established by Executive Decree 498 of April 9, 1976. In theory, it was designed to protect the population and help deal with the consequences of public disasters and calamities; in practice, these groups were devoted to espionage, intelligence, and repression under military orders, particularly in rural areas.

30 *IACHR, Report on the Situation of Human Rights in El Salvador*, February 11, 1994.

31 *IACHR Annual Report 1999*.

32 *El Diario de Hoy*, one of El Salvador’s leading newspapers, quoted President Francisco Flores’s reaction to the IACHR report on the merits of the UCA case: “The declaration of this organization [the IACHR] is a recommendation to the government and we receive it as such, just as we have received many other recommendations . . . To heed the suggestions in the document would jeopardize peace in the country” (January 7, 2000).

33 This was not an off-the-cuff comment but was consistent with the official position expressed by President Flores at an October 18, 2002 press conference. When asked about a possible repeal of the amnesty law, he stated that “the amnesty law is the cornerstone of the peace accords, it’s what enables us to grant ourselves forgiveness . . . The prosecution of war crimes would have led to another war; it would have closed the doors to the possibility of reconciliation among us . . . It seems to me that those who want to remove that cornerstone of the peace accords are capable of immersing us in another serious conflict.”

34 The IACHR granted precautionary measures to the victims and their attorneys only days after this hearing, on November 20, 2001.

35 Inter-American Court, *Serrano Cruz Sisters v. El Salvador*, Judgment of March 1, 2005, Ser. C, No. 120.

36 For example, Ricardo Maduro of Honduras asked forgiveness of the relatives of Juan Humberto Sánchez and Dixie Miguel Urbina, who were murdered in 1992 and 1995 respectively, after having been disappeared and tortured by Honduran military personnel. Guatemalan president Oscar Berger did the same on April 22, 2005 for the 1990 murder of anthropologist Myrna Mack Chang, a crime allegedly committed by members of the Presidential Battalion. He apologized in the presence of the heads of other state entities and the ranking military official in the National Palace at an event attended by invited guests and open to anyone who wished to attend.

37 One report was published in 1969, on the eve of the conflict with Honduras, and another in 1978, in the context of escalating political violence and human rights abuses.

38 IDHUCA, “VII informe de ONUSAL: Ingenuidad o diplomacia,” *Proceso: Informativo Semanal* 14, no. 574 (August 11, 1993): 13–16. Centro de Información, Documentación y Apoyo a la Investigación, Universidad Centroamericana, San Salvador.

39 IACHR Press Release 26/04, “Inter-American Commission on Human Rights and UNICEF express concern over situation of boys, girls and adolescents involved with gangs in El Salvador, Guatemala, and Honduras,” Tegucigalpa, December 4, 2004. In *IACHR Annual Report 2004*.

40 See IACHR Report 29/01, Case 12.249, *Jorge Odir Miranda Cortez et al.*, El Salvador, March 7, 2001, in *IACHR Annual Report 2000*.

41 According to the United Nations Development Programme, remittances sent during 2002 prevented a growth of 6.3 percentage points in extreme poverty, 8.6 percentage points in rural poverty, and 4.7 percentage points in urban poverty. Asociación de Mujeres por la Dignidad y la Vida, et al. *El Salvador por dentro: Juicio al modelo, 1989–2005* (San Salvador: Centro para la Defensa del Consumidor, Fundación de Estudios para la Aplicación del Derecho, Instituto de Derechos Humanos de la UCA, and Asociación de Mujeres por la Dignidad y la Vida, 2005), p. 47.

42 UNDP, *Human Development Report: El Salvador 2003* (San Salvador: UNDP, 2003), p. 10.

43 René Fortín Magaña, in a speech at the launching of the “Pro-transparency and Judicial Excellence in El Salvador” project, May 29, 2006.

44 Ignacio Ellacuría, “La OEA y los derechos humanos en El Salvador,” *Revista Estudios Centroamericanos* (Universidad Centroamericana) 43, nos. 363–364 (January–February 1979): 54.

45 According to a 1961 estimate, just six wealthy families owned 71,923 hectares. At the other end of the scale, approximately 305,000 families occupied 42,692 hectares, according to the 1971 census. More than one-third of the latter families did not own the land they were cultivating. IACHR, *Report on the Situation of Human Rights in El Salvador*, November 17, 1978.

46 “In the 1970s, El Salvador had the highest homicide rate of all of Latin America, fed by excessive alcohol consumption and easy access to bladed weapons and firearms, but caused probably by the deeply rooted social and economic inequalities and insecurity.” Knut Walter, “La desmilitarización de la economía: El caso de El Salvador” (San Salvador: Facultad Latinoamericana de Ciencias Sociales, 2002).

47 UNDP, *Human Development Report: El Salvador 2003*.

48 The annual homicide rate exceeds 50 per 100,000 population; the Pan American Health Organization considers 10 per 100,000 to be a murder epidemic. Some studies indicate that social and criminal violence in El Salvador has reached unprecedented levels in the past 10 years. See Knut Walter, “La desmilitarización de la economía.”

49 The prime example is Major Roberto D’Aubuisson, who is also accused of having the final responsibility for the murder of Archbishop Romero. He has taken on the proportions of a cult figure in many ways. An avenue and a plaza bear his name, and one of his famous quotes engraved in that plaza is “Fatherland yes, communism no!” Meanwhile, a monument to all the victims—his and others—has yet to be built, even though it was among the Truth Commission’s recommendations in the context of measures for national reconciliation.

50 Gloria Giralt de García Prieto, mother of Ramón Mauricio García Prieto Giralt.

51 There is a third factor that should be taken into account, namely the callous destruction of natural resources.

52 Margaret Popkin, *Peace Without Justice: Obstacles to Building the Rule of Law in El Salvador* (University Park: Pennsylvania State University Press, 2000), p. 263.

53 Fr. Ignacio Ellacuría, speech delivered in Barcelona, November 6, 1989.

54 In 2005, the IACHR received 16 petitions concerning alleged human rights violations in Salvadoran cases; there were two cases open and 23 cases and petitions pending. See *IACHR Annual Report 2005*.

55 Interview with a victim whose name has been withheld because of a pending legal petition.

56 IACHR, *Report on the Situation of Human Rights in El Salvador*, February 11, 1994.

57 IDHUCA, “En busca de la verdad y la justicia,” *Proceso: Informativo Semanal* 13, no. 534 (October 14, 1992): 15. Centro de Información, Documentación y Apoyo a la Investigación, Universidad Centroamericana, San Salvador.

## ARGENTINA

*Leonardo G. Filippini*

Since the 1983 restoration of democracy, Argentina has demonstrated sustained progress in human rights that is generally in keeping with the principles of the Inter-American system. Indeed, Argentina offers a number of arguably successful experiences relating to democratic transition, among them the criminal prosecutions of cases involving serious human rights violations, reparations for victims of state terrorism, and the establishment of mechanisms to uncover the truth and preserve memory. On the whole, the Inter-American system has exercised significant influence over these developments.

Nonetheless, in the three decades following Argentina's last military dictatorships, progress in the various areas associated with transitional justice has been uneven. Despite an overall trend toward increased adherence to Inter-American standards, progress has been intermittent and has often been marred by serious setbacks. Moreover, advances in different areas have not necessarily occurred contemporaneously. The 1985 prosecution of the military commanders, for example, was undone by the presidential pardons granted by the Carlos Menem administration (1989–99). The situation was not reversed until 2001 with the first ruling on the unconstitutionality of the Full Stop (Punto Final) and Due Obedience (Obediencia Debida) laws. Paradoxically, the national reparations policy to redress the abuses of the “Dirty War” was expanded considerably even as these impunity laws remained in force, especially during the period immediately following their enactment.<sup>1</sup>

The influence of the Inter-American human rights organs has also been intermittent in recent decades. At times it has been significant and tangible, such as when the Inter-American Commission on Human Rights visited the country in 1979 at the height of the military dictatorship.<sup>2</sup> On other occasions Argentina has taken important steps consistent with Inter-American human rights doctrine but without any explicit or direct backing by the Inter-American system. This was true of the work of the National Commission on the Disappearance of Persons (CONADEP).<sup>3</sup> It was also the case in the first military acknowledgments of the institutional responsibility of the armed forces,<sup>4</sup> and in more recent developments in the preservation of historic sites connected to state terrorism.<sup>5</sup>

The Argentine state occasionally has resisted Inter-American efforts to influence its transition policies. A telling example of this was its non-response to the Inter-American Commission's Report No. 28/92, which declared that the Full Stop and Due Obedience laws, as well as the presidential pardons, contravened the American Convention on Human Rights. The Commission's report clearly documented its consistent position on impunity laws, one that it had sustained in its situation analyses of other countries. Yet its conclusions evidently had little impact in Buenos Aires. Indeed, the Commission's recommendations were ignored for years, and it is difficult to argue that the Commission had any significant influence whatsoever on the judicial, and later legislative, repeal of those laws.

The Argentine experience, then, illustrates the challenge of identifying the factors and circumstances that enable the Inter-American system to effectively influence states. Of course, the matter of how states conduct themselves with respect to their international commitments is well beyond the scope of this chapter. I shall simply try to point out some of the factors that help account for the Inter-American human rights system's influence—or lack thereof—on the Argentine transition.

Authors working from a range of different perspectives have examined the many factors that can influence the ability of the international community, or of international law, to shape the conduct of states.<sup>6</sup> Their conclusions may be generally applicable to the Inter-American human rights system, although little work has been done to date on its specific role. In her research on the ratification of human rights treaties, for instance, Oona Hathaway points out the importance of a state's belief that it can enhance its international reputation by signing a treaty; in her view, this factor helps account for a state's decision to ratify an international instrument.<sup>7</sup> Other authors perceive a correlation between the type of local political structure and its degree of permeability or openness to an international system of standards and principles. There is a general tendency to associate political systems that ensure respect for civil and political liberties with a higher degree of acceptance of systems for international supervision.<sup>8</sup> Similarly, Andrew Moravcsik has argued that the need to solidify a democratic transition increases the likelihood of acceding to an international human rights protection regime, although his analysis is drawn from the European experience.<sup>9</sup> Some authors have applied tools for economic legal analysis to international human rights systems, while others have taken the opposite approach by stressing the value assigned to the system's underlying principles as a reason for adherence.<sup>10</sup> Still others, such as Harold Koh, focus on the dynamics of transnational standards-setting processes or on the unique role played by transnational activist networks.<sup>11</sup>



This chapter offers a modest contribution to these efforts by focusing on another possible rationale for adherence to Inter-American standards and decisions, one that has not been widely explored in the specialized human rights literature touching on the Argentine case. I suggest that local political alliances might be the critical factor in determining the extent of the Inter-American system's influence over the behavior of the Argentine state. Drawing from several paradigmatic examples concerning reparation policies and criminal prosecutions during the Argentine transition, I argue that identifying the interests of groups politically situated to shape the state's foreign policy is key in predicting the influence that the Inter-American system will have. As I explain in more detail below, this should persuade us to pay more attention to local political dynamics in our attempts to explain and predict the behavior of a given state in relation to the Inter-American human rights system.

The first section of the chapter offers a general overview of the conduct of the Argentine state in relation to the Inter-American human rights system. Because this chapter covers a protracted period of Argentina's recent history, I will limit my discussion to those aspects that best illustrate relevant developments. The second section briefly summarizes various theories concerning the transition process in Argentina. Here I examine factors commonly associated with the human rights system's influence on national states and describe some of the obstacles encountered by these sorts of approaches to the Argentine transition. The third section introduces an interpretation of the Argentine transition that is perhaps more instructive than the approaches described in the preceding section. My intention is to show that the influence wielded by internal political factions over the governing party is a powerful determinant of an administration's behavior in relation to human rights and transitional justice. I conclude by suggesting that identifying those factions able to shape the decisions of the governing party and analyzing how they articulate their options is critical for understanding the Inter-American human rights system's influence over the Argentine transition.

## OVERVIEW OF ARGENTINA'S RESPONSE TO THE INTER-AMERICAN SYSTEM

As Ariel Dulitzky points out in this volume, the discussion of the Inter-American human rights system's influence over states should not be confined strictly to juridical considerations. In many places—in the United States and Canada, for example—its influence is manifested in other ways, such as through the debate over the possible ratification of the

American Convention. Still, a state's formal acceptance of certain rules of international law may to a certain degree reflect its permeability to the substance of those rules. In the case at hand, I think that the Inter-American human rights system's influence on the democratic transition in Argentina is tied to the latter's ratification of Inter-American human rights instruments and its formal acceptance of the decisions taken by the system's organs over the past three decades.

Since the reinstatement of a democratic system in 1983, Argentina consistently has been receptive to Inter-American human rights law and to the decisions and doctrine of the system's organs. Despite the inevitable ups and downs, the overall trend has been toward an increasingly vigorous response to those organs.<sup>12</sup> This relationship is marked by three clearly defined periods. The first encompasses the military dictatorship from 1976 to 1983, prior to Argentina's ratification of the American Convention. The second period was ushered in by the reinstatement of the rule of law, ratification of the Convention, and acceptance of the jurisdiction of the Inter-American Court of Human Rights. The third period—actually a deepening of the second—began with the 1992 Supreme Court of Argentina ruling in the *Ekmekdjian v. Soforovich* case, which gave Inter-American law precedence over domestic law. Against this backdrop, the 1994 constitutional reform consolidated the legal landscape by incorporating the American Convention and other Inter-American instruments into domestic law with the same status as the constitution.

### **The military dictatorship (1976–83)**

An examination of the Inter-American system's role in the Argentine transition during the military dictatorship of 1976–83 is particularly interesting in that it demonstrates a number of ways to influence a state besides those of a purely legal nature. During this period, the only legal commitments in force for the Argentine state were defined by its obligations as a member of the Organization of American States, detailed in the American Declaration of the Rights and Duties of Man. Despite the latitude of this legal framework, the Inter-American human rights system played a relatively significant role, mainly through the political work of the Inter-American Commission, which acted as a source of pressure on the military regime.

The most notable event during this period was the Commission's 1979 visit to Argentina, the result of international pressure brought to bear on the regime. The Commission was able to take thousands of testimonies, which subsequently were corroborated by CONADEP

in its 1984 report *Nunca Más* (Never Again).<sup>13</sup> This visit had a significant impact on public opinion and helped consolidate some of the human rights initiatives taking place inside the country. It is not clear why the military regime allowed the visit. Several authors have suggested that as an incentive to the army, the US Export-Import Bank (Eximbank) released a loan to spur investments in Argentina.<sup>14</sup> Other observers have drawn attention to the prominent role played by the Commission relative to the generally less effective efforts of the United Nations human rights organs. To explain this difference, David Weissbrodt has suggested that in addition to the economic incentive, the public nature of the proceedings brought before the Commission and the speed of its responses made it an ideal mechanism to influence the Argentine government.<sup>15</sup>

Transnational activist networks also played a significant role during this period. By the late 1970s, the situation in Argentina was beginning to come to light through the collective efforts of many individuals who denounced the abuses to the international community with the assistance and collaboration of groups such as Amnesty International and Americas Watch. International activist networks became even more crucial as local channels for protest were curtailed. This process clearly illustrates the protagonism of transnational activist groups in influencing the will of states.<sup>16</sup>

## **Return to democracy (1983–92)**

The 1983 restoration of democracy signaled a completely new stage in relations between the Inter-American system and the Argentine state. The democratic government of President Raúl Alfonsín (1983–89) presided over the ratification of a number of international human rights treaties and encouraged regular reporting to their supervisory organs. The government also promoted the work of the historical clarification commission, CONADEP, which published *Nunca Más* in 1984. During the historic trials of the military juntas in 1985, Argentina prosecuted members of the first three juntas that had governed the country from 1976 to 1983. The conviction of five of these military commanders was a rare occurrence in the context of transition processes. There are very few instances in history in which a democratic regime that has taken power following a dictatorship has tried and convicted former heads of state.

Building on the foundations of the trials and the *Nunca Más* report, an international commitment to respect human rights and a condemnation of state terrorism were cemented as core values of Argentine democratic life. There have been setbacks along the way, notably

the enactment of the Full Stop and Due Obedience laws in a bow to military pressure in 1986–87. President Carlos Menem’s pardon of many of those tried for human rights violations, including the junta leaders convicted in the 1985 trials, was another significant setback. Despite this, the relationship with the Inter-American system has been solidified, and the Inter-American Commission and Inter-American Court gradually have asserted themselves as relevant actors in the debate over fundamental rights in Argentina.

### **The primacy of Inter-American law (1992–present)**

In its 1992 ruling in the *Ekmekdjian v. Sofovich* case, the Supreme Court of Argentina upheld the possibility of arguing liability under the provisions of Article 14 of the American Convention in the absence of a regulatory law.<sup>17</sup> The human rights community welcomed the ruling, having fought to establish a standard recognizing the domestic legal effect of the American Convention since its ratification. Since then, judicial decisions and other government measures increasingly have reflected the standards and recommendations of the Inter-American human rights system and the decisions of its organs. This is not to say, however, that all such decisions necessarily have been motivated by the defense of fundamental rights.<sup>18</sup> On many occasions, adherence to international human rights obligations, or the imperative to comply with them, has been used to justify actions that may have had other motives. As Martín Abregú has pointed out, in the *Ekmekdjian* case and on other occasions the Argentine state has made good decisions, but not necessarily for the best reasons.<sup>19</sup>

That said, to imply that the authorities have manipulated the scope of their international obligations to suit other purposes would be an overstatement. More accurately, since the restoration of democracy, the Argentine authorities have regarded compatibility with the Inter-American human right system as a relevant factor in their decision-making processes. As a rule, each successive administration has regarded fulfillment of Argentina’s international human rights commitments as a positive thing to do. For this reason, and even though flagrant violations of international law have been verified, there has never been an overt attack on the system or its organs, as has occurred in Peru and Trinidad and Tobago, for instance, nor has there been a display of absolute indifference, as is the case with the United States. Moreover, every government since the return to democracy generally has sought to ensure that its political interests and needs are compatible with fulfillment of its human rights commitments. Therefore, while the Argentine transition has not followed Inter-American guidelines to the letter, it has been more or less consistent in its efforts to ensure that local processes are compatible with international requirements.

## FACTORS RELEVANT TO THE INFLUENCE OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM

As described earlier, various studies on international law, international relations, and human rights have sought to pinpoint factors that can help explain or predict the ways in which an international organization or set of standards such as those of the Inter-American human rights system might influence a state to modify its attitudes. In this section I will discuss some of the factors addressed by these studies insofar as they clarify important aspects of the behavior of states. I will touch on the role of international activist networks and human rights principles, as well as domestic political structures and international enforcement measures. Each of these elements plays a significant role in defining state action, yet taken in isolation, each one falls short in explaining the evolution of the Argentine transition process and predicting future behavior. In the following section I will suggest that a fuller understanding may be obtained by rounding out the analysis with a careful reading of the political dynamics at play in Argentina.

### Transnational activist networks

Transnational activist networks have played a critical role in Argentina, as Margaret Keck and Kathryn Sikkink demonstrate in their authoritative book *Activists beyond Borders*, which has been cited frequently by political scientists and international relations experts. Many other observers of the Inter-American human rights system have concurred in affirming the importance of such networks. A paradigmatic example was the dissemination of the Inter-American Commission's report on its 1979 visit through informal channels (under the title "Informe Prohibido"). According to Emilio Mignone, a leading human rights activist in Argentina, if not for the intervention of the human rights organizations—despite their structural weaknesses—and the involvement of the international solidarity movement, "Argentine history would have been different. The truth about what occurred during that dark period . . . would not have come to light and the political parties would not have felt compelled to heed those social grievances."<sup>20</sup>

The activist networks' important role in influencing the state's behavior has not always been described in a positive light, however. They have been criticized, for example, for advocating criminal prosecutions of serious human rights violations. As Daniel Pastor points out disapprovingly, "the euphoria over the advantages of public penalties as the

primary and immutable solution to serious (and not so serious) human rights violations has led international organs and activists to preach and practice inexorably the violation of the fundamental rights of those accused of such acts.”<sup>21</sup>

While nongovernmental organizations (NGOs) are clearly relevant as pressure groups with respect to state authorities, they are not the decisive factor when it comes to shaping transition policies. Recent decisions of the Néstor Kirchner administration, for example, are part of an active, government-led human rights agenda. The same could be said of CONADEP’s work, which initially met with resistance from human rights organizations. Even during the military dictatorship, when the obstacles to political representation ostensibly bolstered the role of activist networks, the events leading up to the democratic transition cannot be attributed so much to their work as to the internal erosion of the military regime, the economic crisis that undermined its legitimacy, and the military defeat in the Malvinas war. Therefore, while activist networks have a critical role to play, they probably should not be the focal point for studies on the influence of the Inter-American system.

## Human rights principles

According to some authors, justice, or the value placed on its underlying principles, is the primary motive for compliance with international obligations: the greater the perception of the justice of an international obligation, the higher the level of compliance. This is a recurrent explanation in the field of international human rights law, with its limited and often symbolic array of sanctions, such as damage to a state’s international reputation. It has a certain appeal since it would seem to account for the general inclination of states to adhere to human rights standards in the absence of sanctions. This viewpoint, however, offers few nuances to explain violations by states otherwise committed to the defense of fundamental rights.

In the Argentine case, there clearly is a powerful connection between the values framing the human rights conventions—particularly those emanating from the Inter-American system—and the democratic system of government. The deeply rooted conviction in Argentine society concerning the importance of respecting basic rights must be one of the main reasons behind the Inter-American human rights system’s growing influence over the behavior of the Argentine state. It would be a mistake not to attribute any significance to the correlation between national and Inter-American values since the restoration of democracy.

Nonetheless, while this might explain adequately the overall trend toward acceptance of an international system of rules and principles, it does not account for the variations within a single administration or between successive governments that have shared an overall interest in adhering to Inter-American standards. The governments of Raúl Alfonsín and Carlos Menem, for example, made significant progress in some areas—to varying degrees of course—even as they presided over serious setbacks in criminal prosecutions of human rights abusers. A general acceptance of democratic principles may have led both administrations to adhere to the Inter-American system, but this does not explain why both passed impunity laws, nor does it account for differences in the scope of these laws. Alfonsín’s democratic commitment is indisputable, as is his interest in situating Argentina in the universe of nations that respect human rights. The harmony between domestic and Inter-American standards, however, does little to explain certain aspects of his tenure that merit clarification, such as the enactment of the Full Final Stop and Due Obedience laws. A study of the Inter-American system’s influence, then, must go further to examine more subtle elements.

## **Typologies of state and government**

Numerous authors believe that variations in permeability to international pressure can be attributed to differences in state typology, that is, to whether the state is a liberal democracy or an authoritarian government.<sup>22</sup> They argue that governments that aspire to transparency tend to be less resistant to external controls and, unlike authoritarian regimes, tend to believe that the openness associated with their policies serves as an additional source of legitimacy. It is an argument with a number of good examples to support it. However, it fails to account for the nuances posed by Argentina, since, despite the uneven quality of Argentine democracy since its restoration, there are no major differences between the administrations in power since 1983 with respect to human rights. This is not to say that there has been no significant variation from one to the other. Rather, in terms of basic human rights obligations, all of the governments in power since 1983 must be regarded as democratic, as suggested, for example, by a reading of the annual reports of *Freedom House*.<sup>23</sup> What is required, then, is an approach that will shed light on policy variations during democratic transitions.

The issue of federalism is also germane to this discussion, since it is frequently cited as an obstacle to compliance with international human rights obligations.<sup>24</sup> Perhaps this is due in part to the importance many US academics place on the question of the relation

between international law and the laws of US states, particularly in death penalty cases. Or it may relate to the growing difficulties associated with carrying out Inter-American judgments and recommendations in federated states—such as Argentina.<sup>25</sup>

The problem of federalism, however, is at best of only moderate relevance to Argentine transitional justice. This issue has not acquired the same dimensions in Argentina as in other countries where this debate has been engaged. Moreover, since transition issues have been handled at the national government level in the areas of criminal prosecutions and reparations, federalism has not been a major issue.

### Coercive measures

Finally, I would like to examine the role of coercive measures in shaping the relationship between the Argentine state and the Inter-American system. Many observers have noted that the system's lack of enforcement mechanisms limits its effectiveness. For this reason, some support the establishment of an international mechanism that would restore the parity between the state and the petitioner during the execution phase of a decision.<sup>26</sup> This perspective is appealing and certainly economic coercion seems to have worked in the most difficult periods, such as when it helped persuade the military government to accede to the Commission's visit in 1979.

The Supreme Court of Argentina often has alluded to the possibility of a ruling giving rise to the international liability of the state as one reason to comply with Inter-American judgments. It has repeatedly invoked this argument, linked to the national interest, to promote the incorporation of international human rights law. This line of reasoning began to gain traction following the 1994 constitutional reform, beginning with the *Girolodi* case:

It falls to this Court, as the supreme organ of one of the branches of the Federal Government—within its jurisdiction—to apply international treaties that are binding on the country . . . since a failure to do so could give rise to the liability of the Nation with respect to the international community.<sup>27</sup>

It appears to be true that the desire to avoid potential negative consequences can motivate a state to comply with its international commitments. It follows, then, that an entity with superior international standing and the authority to impose penalties could temper the fluctuations brought about by local tensions and help ensure consistent compliance with Inter-American obligations.



In my view, however, an analysis of the influence of the Inter-American system centered on coercive methods is useful yet insufficient to explain the issue at hand. First, Inter-American enforcement mechanisms have not varied significantly since the restoration of democracy, yet Argentina has oscillated between periods of substantial compliance and strong resistance. The absence of coercive mechanisms seems to help elucidate why Argentina fails to comply on occasion, but does not explain the many instances of compliance. In other words, the absence of penalties might be a factor in a specific situation of noncompliance, but given that the enforcement situation has remained relatively constant over the past 30 years, this analysis fails to account for the occasions and circumstances in which Argentina has indeed complied. Likewise, it should be recalled that international pressure has been used to promote compliance with the Inter-American system's decisions and recommendations as well as egregious human rights violations.<sup>28</sup> As a result, even in cases where coercive measures are an aspect of the international pressure on states, it is still necessary to flesh out this analysis with other elements.

## THE ROLE OF FACTIONS WITHIN GOVERNING POLITICAL PARTIES

Argentina's two main political parties, the Peronists and the Radicals, have alternated in power since 1983, although occasionally they have participated in elections under different names as part of various alliances with minority parties. In general terms, both have broad-based grassroots constituencies and a commitment to the democratic system restored following the last of the military regimes. With members spanning the political spectrum, however, both parties comprise various subgroups with often disparate ideologies. Interestingly, soon after the restoration of democratic life, both the Radical and Peronist parties included senior members with extremely divergent positions on the criminal prosecution of military officials.<sup>29</sup> Both parties contain factions with a past and ongoing commitment to the criminal prosecution of serious human rights violations and reparations for victims of state terrorism, a commitment that is consistent with the doctrine and practice of the organs of the Inter-American human rights system. Because the positions of these factions in both parties dovetail with the specific actions that the Inter-American system requires of states, I shall refer to them as human rights factions.<sup>30</sup>

People join such factions for many different reasons. They frequently have a direct connection to the victims or to their defense. Others may feel a powerful sense of empathy

toward the victims or see supporting them simply as an ethical choice. It is not my intention to explore these variables, but rather to establish the fact that such factions are present in both political parties. Some might argue that the human rights factions in the Peronist party are in a stronger position than their counterparts in the Radical party, the reason being that the repressive military dictatorship targeted working-class militants with long-standing ties to the Peronist party as well as members of the Montoneros group, also of Peronist affiliation. But the fact remains that both of these historically broad-based political parties include substantial human rights factions.

My premise is that the most important factor in understanding the interaction between the Inter-American human rights system and the Argentine state—at least with regard to criminal prosecutions, the search for truth, and the reparations policy—is the presence of human rights factions, either within the leadership of the party in power or in a position to influence that leadership.<sup>31</sup> Whenever these factions have failed to influence the leaders of their governing party, there have been no significant advances and indeed there have even been setbacks in the transition process.<sup>32</sup> I would further argue that other variables traditionally viewed as causal factors in transitions actually serve to facilitate or hamper the actions of these human rights factions and do not play a decisive role in and of themselves.

Of course, it is not only these factions in the majority parties that have advocated for criminal prosecutions and a far-reaching reparations policy for victims or have sought to uncover the truth. Leftist and left-of-center groups and parties have espoused these same positions, as have some center-right parties, albeit to a lesser degree. These entities, however, have not had the same critical impact as the factions operating within the governing parties.

I will now briefly discuss the circumstances surrounding the most relevant developments in the Argentine transition, highlighting the apparent role of human rights factions in the dynamics of each political moment. The following is not an exhaustive discussion, nor is it intended as a value judgment of the different administrations. It is a deliberately partial description intended solely to illustrate how Inter-American standards are assimilated. It will be left to other works to evaluate the motives that drove the major actors in each development, the civic-mindedness of these actors, the moral probity with which they defined their actions, and the impact each one had on the consolidation of democracy in Argentina.

## The Radical governments

*The Alfonsín administration (1983–89).* There have been two Radical governments since 1983, the first led by Raúl Alfonsín and the second by Fernando de la Rúa. The Alfonsín administration pursued an active human rights policy during its first two years in office, but this began to wane as the main faction backing this policy gradually lost its capacity for leadership within the party. At the same time, the Radical government's constituency and political power floundered under pressure from the military, the rival Peronist party, and certain economic sectors.

In its early years, the Alfonsín administration launched two landmark initiatives in the history of democratic recovery in Argentina. It founded CONADEP, the historical clarification commission that investigated and then delivered a forceful condemnation of state terrorism with the publication of its report *Nunca Más* (Never Again). It also promoted the trials of the military leadership, culminating in the convictions of five military commanders in 1985. Although both of these events were critical to the Argentine transition, Alfonsín's government never succeeded in striking a balance between the social demands for justice and the military's defense of the Dirty War.<sup>33</sup>

During the early years of Alfonsín's Radical government, the human rights movement, sectors of the judiciary, and human rights factions within the Radical Party advocated measures that went further than the president and his inner circle had planned in terms of prosecuting the perpetrators of abuses. As a result, in 1985 all of those implicated were subjected to criminal prosecutions in civilian courts, but against the judgment of the executive branch, which believed it more prudent to confine prosecutions to superior officers.<sup>34</sup>

Over time, however, military pressure became the rationale for (or triggered) the passage of the Full Stop and Due Obedience laws, which severely curtailed the government's ability to prosecute alleged perpetrators. Alfonsín did not have total control over the military forces. The latter, in turn, while quite capable of obstruction, did not have enough power to bring about another coup, due largely to the impact of the *Nunca Más* report and the trial of the commanders. Ironically, although the two laws restricted criminal prosecutions along the lines of Alfonsín's original plan, they were perceived as a concession to military pressure.<sup>35</sup> The human rights movement regarded the enactment of those laws as a failure to keep campaign promises; in practice, the laws closed hundreds of investigations. Radical Party factions favoring criminal prosecutions saw

their influence dwindle internally and confronted a serious dilemma. In one way or another, many of these party members faced the quandary of whether to support their leader politically or remain steadfast in their call for criminal prosecutions.<sup>36</sup> By its third year, the administration had lost its political clout. The rupture of the human rights faction, one of Alfonsín's principal backers, was just one more symptom in the dismemberment of his support structure.<sup>37</sup>

*The de la Rúa administration (1999–2001).* Inaugurated in 1999, Fernando de la Rúa presided over the Radical Party's second stint in government as the head of Alianza, a coalition of center-left political parties, including a group of dissident Peronists. While many members of these groups formed human rights factions, they were never able to penetrate the government's most influential inner circle. The de la Rúa administration's policy was quite resistant to efforts to investigate human rights violations or secure reparations. Among the more noteworthy measures taken during his term was Decree 1581/01, which required the rejection of any extradition requests brought against Argentine citizens in the course of criminal investigations abroad. Following the 1998 arrest of Augusto Pinochet in London, several countries had opened criminal cases against Argentine oppressors; the most high-profile of these cases, and ultimately the rationale for the decree, were those pursued by Spanish judge Baltasar Garzón. Notwithstanding the resounding success of international activism and even pressure by foreign governments, Fernando de la Rúa's decree brought all expectations of criminal prosecution crashing down.

*The Radical opposition during the administration of Néstor Kirchner.* One of the many actions taken by Peronist president Néstor Kirchner, as discussed below, has been the revocation of the Full Stop and Due Obedience laws enacted under the Alfonsín administration. This move is a reflection of the political alignments that continue to operate within the Radical Party. Several party affiliates have criticized the revocation of measures taken by their government and have justified the laws passed during that period, while others have supported Kirchner's policy with a depth of conviction that was not necessarily shared by all of the Peronist legislators.

## **The Peronist governments**

Just as the approach of different Peronist administrations to transition policies has varied, so has their receptivity to the influence of the Inter-American human rights system.

As with the Radical Party, generally speaking, there has been no outright rejection of the system's inherent value; therefore, the changeover in administrations has not led to abrupt changes in basic attitudes toward the Inter-American system itself. Nonetheless, the Peronist party in power has zigzagged between fervently supporting transition policies and virtually ignoring them, adjusting its position depending on which internal faction has the upper hand. Thus the Peronist Party ran a presidential candidate who opposed the trials of the military commanders in 1983, opposed CONADEP's work, and pardoned the commanders convicted of human rights violations. Conversely, it also implemented a sweeping reparations policy, acquiesced to the trials of Argentine citizens abroad, and, in 2003, revoked the Full Stop and Due Obedience laws.<sup>38</sup>

*The Peronist opposition during the Alfonsín administration (1983–89).* Peronism in the 1970s embraced paramilitary groups and armed grassroots militants alike. The intricacies of this situation have informed the life of the party in the democratic system. It is a political force with tremendous capacity to bring together its cadres despite profound ideological differences. Therefore, in terms of its internal party dynamics while in power, the Peronist party provides an even starker example than the Radical Party of the way in which a particular faction's ability to control the governing party largely determines the government's interactions with the Inter-American system.

Italo Lúder's 1983 run for the presidency offers a clear example of these fluctuations. Lúder ultimately lost the election to Alfonsín, an outcome that took many observers by surprise. Alfonsín had pledged to revoke the self-amnesty declared by the last of the military juntas to shield its personnel, and he vowed to prosecute them. In contrast, Lúder argued that the civilian government should respect the military regime's amnesty since criminal law could not be applied retroactively. The Peronist Party also abstained from participating in CONADEP, to which it was required to send representatives. Yet shortly thereafter, several Peronist legislators voted against passage of the Alfonsín administration's Full Stop and Due Obedience laws. It is clear, then, that different factions coexist within Peronism and that their alternating hold over the party leadership when the party is in power is the decisive factor in developments relating to transitional justice.

*The two administrations of Carlos Saúl Menem (1989–95 and 1995–99).* The transition policy of Menem's first administration was marked by the pardons of the military commanders convicted in 1985. At the same time, he implemented a far-reaching reparations policy. Presidential discourse justified the pardons in the name of national

pacification; Menem pointed out that he himself had been deprived of his freedom under the military dictatorship and asserted that this accorded him the moral authority to make such a decision.

Here again, the human rights faction within the Peronist party lacked any relevant influence over its leadership. Similar to what occurred with certain Radical party sectors when the Full Stop and Due Obedience laws were enacted, the Peronist factions most committed to human rights faced the dilemma of whether to continue to support a president from their own party or advocate a different course of action. Some officials of the Undersecretariat for Human Rights, which implemented the reparations policy, had close relationships with victims of state terrorism. In a compromise move, no Peronist faction openly broke with Menem over the pardons. There were powerful disagreements, but the human rights advocates never lost sight of the fact that another faction of their own party was running the country.

Against this backdrop, the Inter-American Commission issued its reports 28/92 and 1/93. The former harshly criticized the amnesty laws, while the latter acknowledged the value of the reparations policy. Report 28/92 had no significant impact although naturally it was welcomed by human rights groups who perceived at least the possibility of coordinating an international strategy, given the dearth of local mechanisms. In terms of effectiveness, the real change would not come until much later, under the Kirchner administration, with a different faction at the helm of the governing Peronist party.

Ironically, several events occurred during the Menem presidency that by all appearances deepened the Inter-American human rights system's influence over the Argentine transition. As I mentioned earlier, in 1992 the Supreme Court issued its ruling in the *Ekmekdjian v. Sofovich* case, and in 1994 a constitutional reform incorporated some 10 human rights instruments with the same status as constitutional provisions. The matter of the primacy of international law had been settled and, by decision of the Argentine constituent assembly, from 1994 on international human rights law would take precedence over domestic law and enjoy the same stature as the national constitution. The Menem administration, however, came to a close having paid no notice at all to Report 28/92, despite its forceful conclusions.<sup>39</sup>

*The transitional presidency of Adolfo Rodríguez Saá (2001).* Adolfo Rodríguez Saá governed for just one week in an extremely convulsive climate. While he never managed to consolidate a power structure, in the frenetic dynamics sweeping Peronism during those

days he secured the support of certain human rights factions. Despite his extraordinarily brief tenure in office, this generated intense expectations among the human rights community, particularly after the appointment of Alberto Zuppi as minister of justice and Jorge Taiana to the Human Rights Secretariat, both prominent advocates of the prosecution of crimes committed under the dictatorship.

*The administration of Eduardo Duhalde (2002–3).* Rodríguez Saá was succeeded in office by Eduardo Duhalde, at the time a senator representing Buenos Aires province. The human rights factions were far removed from Duhalde's inner circle and consequently no relevant developments occurred during his administration. The decree blocking the extradition of military personnel issued under the de la Rúa administration remained in force during this time.

*The administration of Néstor Kirchner (2003–).* President Kirchner's administration introduced the most vigorous period of criminal prosecutions since the first two years of the Alfonsín government. He presided over such significant measures as the revocation of the Full Stop and Due Obedience laws, a reparations policy for children born during their parents' captivity, the extension of reparations to those in exile, and a series of related legislative initiatives.<sup>40</sup> President Kirchner is probably the head of state with the strongest identification and relationship with the human rights factions in his party and the human rights community in general. His appointments have included numerous officials who suffered political persecution or who have been very close to victims of state terrorism. Similarly, the president enjoys more support from human rights organizations than any other president in Argentine history.

The executive branch under Kirchner has been proactive in taking into account past links to the military dictatorship when evaluating candidates for public posts. For example, shortly after taking office, in one of his more compelling moves, Kirchner retired 27 Army generals, 12 Air Force brigadiers, and 13 Navy admirals.<sup>41</sup> Some observers viewed this as a maneuver to remove from active service several high-ranking military men, in part because of their allegiance to the former dictatorship.<sup>42</sup> Something similar has occurred in other areas of government, such as when vacancies were filled in the federal court system. This trend continued and even intensified with the governing party's victory in the 2005 legislative elections.

## SUMMARY AND FINAL OBSERVATIONS

This chapter is a reflection on the conditions that have enabled the Inter-American human rights system to influence Argentina's transition process. I have argued that this influence is determined by the degree to which internal factions committed to the work of the Inter-American system have had access to leadership within the governing party. This conclusion appears to be consistent with Emilio Mignone's depiction of the Argentine political scene, when he said that under the military dictatorship the political class "generally kept its distance from the human rights movement in the most intense years of repression."<sup>43</sup>

It would be a truism to say that certain events that depend on a collective political decision only occur when those who are in a position to shape that choice do so. This discussion, however, has sought to portray the issue from a number of different angles. First, it is clear from the detailed description of the different scenarios that the ability to shape the Argentine state's decisions vis-à-vis the Inter-American human rights system is vested mainly in political party factions with the vocation and ability to govern, rather than in other actors. If this argument is correct, then the Argentine transition can help demonstrate that political parties and their internal factions are the actors that determine the Inter-American system's capacity to influence states. Neither the tenacity of the NGOs nor the consistent work of the Commission or the Court can account for the discrepancies observed in the transition policies of Alfonsín, Menem, and Kirchner. Rather, the key factor has been the choices made by the internal factions backing each of these governments in power. The NGOs and the Commission have acted more or less consistently when changes have occurred in Argentina and have done nothing in particular that would directly cause some of the principal variations evident throughout the transition.

Similarly, the Argentine experience shows that while institutional factors such as federalism, the type of government, or the existence of institutional mechanisms establishing the primacy of international law and of the decisions of international organs can facilitate the system's influence over national states, they do not determine the extent of that influence. In the Argentine case, such factors have remained constant in moments of profound change during the transition process yet have been altered during the realignment of forces within a governing party.

I am not saying that the influence wielded by these factions is sufficient in all cases to enable the Inter-American system to have influence, although in some instances it



would appear that it is. The Argentine experience seems to suggest that, at the very least, it is a necessary condition. None of the relevant developments in the Argentine transition have occurred in the absence of a group committed to promoting a human rights agenda, whether that group is in power or in a position to influence those in power. Indeed, the current administration of President Kirchner seems to suggest that when such a faction acts from a position of authority it is capable of promoting an agenda as robust as that of the NGOs, if not more so. While NGO networks seem to be essential vehicles for change in states under authoritarian regimes, it remains debatable whether they play the same role in states governed by the rule of law. With regard to the recognition of fundamental rights, at least, it seems natural that the state would be responsible for spearheading a human rights agenda.

In the Argentine case, there is no question that the NGOs have provided critical collaboration in furthering transition policy. Yet while this role of sustained promotion of human rights must be recognized, it can only be fully understood in relation to the internal dynamics within governing parties. Viewed through this lens, perhaps the NGOs' influence resides not so much in what they have done and continue to do in pursuit of their inherent mission, but rather in their ability to increase the political capital of one or another of the internal factions within the governing party.

If the observations outlined here are correct, they may offer some tools to strengthen the work of those seeking to broaden the influence of the Inter-American human rights system. As organs of the Inter-American system deepen their understanding of the political reality in each area, they will be able to act in such a way as to increase their influence, thereby reinforcing the political capital of groups willing to be open to the system. By the same token, certain frequently used strategies—such as promoting reforms of Inter-American procedures or more receptive domestic standards of jurisprudence, producing more international instruments, and encouraging NGO efforts—ultimately may be less effective than working more intensively with groups that aspire to government.

## NOTES

- 1 María José Gueembe, “Economic Reparations for Grave Human Rights Violations: The Argentine Experience,” in *The Handbook of Reparations*, ed. Pablo de Greiff (New York: Oxford University Press, 2006), pp. 21–54.
- 2 Marcos Novaro and Vicente Palermo, *La dictadura militar (1976–1983): Del golpe de estado a la restauración democrática*, Historia Argentina 9 (Buenos Aires: Paidós, 2003), pp. 278–322.
- 3 CONADEP was established by presidential decree and initially met with resistance from human rights groups. The Peronist party never appointed legislative representatives to the commission. See Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (New York: Routledge, 2002), pp. 33–34, 236–37, 322–26; and Emilio F. Mignone, *Derechos humanos y sociedad: El caso argentino* (Buenos Aires: Centro de Estudios Legales y Sociales/Ediciones del Pensamiento Nacional, 1991), pp. 158–61.
- 4 See Horacio Verbitsky, *The Flight: Confessions of an Argentine Dirty Warrior* (New York: New Press, 1996), pp. 3–11.
- 5 “State terrorism” refers to the many human rights abuses that the Argentine state perpetrated on its own citizenry during this period.
- 6 See, among others, Oona A. Hathaway and Harold Hongju Koh, *Foundations of International Law and Politics* (New York: Foundation Press, 2005); Anne-Marie Slaughter, “International Law and International Relations Theory: A Prospectus,” in *The Impact of International Law on International Cooperation: Theoretical Perspectives*, ed. Eyal Benvenisti and Mose Hirsch (Cambridge: Cambridge University Press, 2004); Beth A. Simmons, “Compliance with International Agreements,” *Annual Review of Political Science* 1 (1998): 75–93; Beth A. Simmons, “International Law and International Relations: Scholarship at the Intersection of Principles and Politics,” *American Society of International Law Proceedings* 95 (2002): 1–9; José Alvarez, *International Organizations as Law-Makers* (New York: Oxford University Press, 2005); and Robert O. Keohane, “International Relations and International Law: Two Optics,” *Harvard International Law Journal* 38 (1997): 487–502.
- 7 Oona A. Hathaway, “Between Power and Principle: An Integrated Theory of International Law,” *University of Chicago Law Review* 72 (2005): 469.
- 8 Anne-Marie Slaughter, “International Law in a World of Liberal States,” *European Journal of International Law* 6 (1995): 503–38; Simmons, “Compliance with International Agreements,” p. 83.
- 9 Andrew Moravcsik, “The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe,” *International Organization* 54, no. 2 (2000): 217–52.
- 10 For the former approach, see Jack L. Goldsmith and Eric A. Posner, *The Limits of International Law* (New York: Oxford University Press, 2005); for the latter approach, see Simmons, “Compliance with International Agreements,” p. 87.

11 See, for example, Harold Hongju Koh, "International Law as Part of Our Law," *American Journal of International Law* 98 (2004): 43; Harold Hongju Koh, "Transnational Legal Process," *Nebraska Law Review* 75 (1996): 181–206; Harold Hongju Koh, "Why Do Nations Obey International Law?" *Yale Law Journal* 106 (1997): 2599; Kathryn Sikkink, "Human Rights, Principled Issue-Networks, and Sovereignty in Latin America," *International Organization* 47, no. 3 (1993): 411–41; Margaret Keck and Kathryn Sikkink, *Activists beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY: Cornell University Press, 1998); and Alison Brysk, *The Politics of Human Rights in Argentina: Protest, Change, and Democratization* (Stanford, CA: Stanford University Press, 1994).

12 Our discussion does not extend to the relationships prior to the last military coup of 1983. Although the Inter-American system was created in 1948 with the American Declaration of the Rights and Duties of Man, in our view it was not until the 1970s that it became a relevant regional entity with respect to Argentina.

13 CONADEP, *Nunca Más: Informe de la Comisión Nacional Sobre la Desaparición de Personas* (Buenos Aires: Editorial Universitaria, 1984). Published in English as *Never Again: The Report of the Argentine National Commission on the Disappeared* (New York: Farrar Straus Giroux, 1986).

14 Iain Guest, *Behind the Disappearances: Argentina's Dirty War against Human Rights and the United Nations* (Philadelphia: University of Pennsylvania Press, 1990), p. 174; Brysk, *Politics of Human Rights in Argentina*, p. 54; and Novaro and Palermo, *La dictadura militar*, p. 290.

15 Maria Luisa Bartolomei and David Weissbrodt, "The Effectiveness of International Human Rights Pressures: The Case of Argentina 1976–1983," *Minnesota Law Review* 75 (1991): 1009.

16 Keck and Sikkink, *Activists beyond Borders*, pp. 110, 199–203.

17 Supreme Court of Argentina, *Ekmekdjian v. Sofovich* (Fallos 315:1492, July 7, 1992).

18 In the *Ekmekdjian* case, for example, the matter was triggered when writer Dalmiro Sáenz made a comment about the Virgin Mary on a television program. In response to a complaint brought by a Catholic constitutionalist, the Court compelled the head of the program to read an apology to that religious congregation on the air. In doing so, the Court upheld not only the applicability of the American Convention but also a highly debatable interpretation of the right to rebuttal that potentially runs counter to freedom of expression.

19 Martín Abregú, "La aplicación del derecho internacional de los derechos humanos por los tribunales locales: Una introducción," in *La aplicación de los tratados sobre derechos humanos por los tribunales locales*, ed. Martín Abregú and Christian Courtis (Buenos Aires: Editores del Puerto/Centro de Estudios Legales y Sociales, 1997), pp. 3–32.

20 Mignone, *Derechos humanos y sociedad*, pp. 99–100.

21 Daniel Pastor, "La deriva neopunitivista de organismos y activistas como causa del desprestigio actual de los derechos humanos," *Nueva Doctrina Penal* 1 (2005): 92.

22 Slaughter, “International Law in a World of Liberal States,” p. 10. According to Slaughter, “Liberal theory explicitly takes domestic regime-type into account in its analysis of State behaviour. If the relevant universe for scholarly analysis is State–society relations, then the scope and density of domestic and transnational society, as well as the structure of government institutions and the mode and scope of popular representation, will be key variables.”

23 Available at <http://www.freedomhouse.org>. Of course there are more robust conceptions of democracy than those informing the Freedom House reports. See, for example, United Nations Development Programme, *Democracy in Latin America*, available at <http://democracia.undp.org/Informe/Default.asp?Menu=15&Idioma=2>. While I cannot do justice to all of the arguments here, in light of these conceptions it would be difficult to assert that there are significant differences, for the purposes of this work, among the successive governments in power since 1983.

24 Ariel E. Dulitzky, “Federalismo y derechos humanos: El caso de la Convención Americana sobre Derechos Humanos y la República Argentina,” in *Anuario Mexicano de Derecho Internacional* 6 (2006): 199–249. <http://www.juridicas.unam.mx/publica/librev/rev/derint/cont/6/art/art5.pdf>.

25 In the case of Mendoza prison, for example, see Supreme Court of Argentina, “Lavado, Diego Jorge y otros c/ Mendoza, Provincia de y otro s/ acción declarativa de certeza” (L. 733, XLII, Originario, September 6, 2006).

26 Martín Abregú and Olga Espinoza, “La eficacia de la Comisión Interamericana de Derechos Humanos y la aplicación de sus decisiones por los estados partes,” in *La aplicación de los tratados de derechos humanos en el ámbito local: La experiencia de una década (1994–2005)*, ed. Víctor Abramovich, Alberto Bovino, and Christian Courtis (Buenos Aires: Editores del Puerto/Centro de Estudios Legales y Sociales, forthcoming).

27 Supreme Court of Argentina, *Giroldi* (Fallos 318:514, at 12, April 7, 1995). In general, the criterion seems to have remained intact in subsequent jurisprudence, although always without further expansion on the particulars of that potential international liability. The idea has not been abandoned even in cases where the Court has decided not to accept the criterion set forth by the Inter-American Commission on Human Rights in its reports concerning the Argentine state in the terms of Article 51 of the American Convention. In such cases, the Court simply clarified there was no risk of incurring international liability even if it executed a sentence other than the one stipulated by that international organ. In this regard, *Whereas* 13 from the majority decision in *Acosta* stands out: “the interpretation made . . . of the scope the judges must accord the recommendations of the Inter-American Commission . . . is attuned to that issued by the Inter-American Court.” Supreme Court of Argentina, *Acosta Claudia Beatriz y otros s/bábeas corpus* (Fallos 321:3555, December 22, 1998). My point of view can be found in Leonardo Filippini, “Los informes del Artículo 51 de la Convención Americana sobre Derechos Humanos en la jurisprudencia de la Corte Suprema Argentina,” *Revista de Ciencias Jurídicas ¿Más Derecho?* 4 (Buenos Aires: Fabián J. Di Plácido, 2004).

28 Kathryn Sikkink, *Mixed Signals: U.S. Human Rights Policy and Latin America* (Ithaca, NY: Cornell University Press, 2004). In addition, numerous examples can be found on the Web site of the National Security Archive at George Washington University, <http://www.gwu.edu/~nsarchiv/>.

29 In the Radical party, Raúl Alfonsín met with the Inter-American Commission during its visit, while Ricardo Balbín took a much more conciliatory position toward the military regime. In the Peronist party, Italo Lúder came out in favor of an amnesty for the military, while Deolindo Bittell and Vicente Saadi were far more receptive to the appeals from human rights organizations. See Mignone, *Derechos humanos y sociedad*, pp. 131–36; Novaro and Palermo, *La dictadura militar*, pp. 296–99; and Carlos Santiago Nino, *Juicio al mal absoluto: Los fundamentos y la historia del juicio a las Juntas del Proceso* (Buenos Aires: Emecé, 1997).

30 This is an arbitrary term. I am not asserting that those who do not belong to such factions cannot be human rights advocates. Rather, I use the expression to describe factions that have chosen to promote a democratic transition model consistent with the criteria set forth by the Inter-American Commission and the Court in the areas of criminal prosecutions, truth, and reparations, including the criteria set forth following the measures taken by the Argentine state. For a discussion of a democratic transition model other than the one promoted by the Inter-American system, see, for example, the debate between Carlos Nino and Diane Orentlicher in *Yale Law Journal*: Orentlicher, “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime,” *Yale Law Journal* 100 (1991): 2537; Nino, “The Duty to Punish Past Abuses of Human Rights Put into Context,” *Yale Law Journal* 100 (1991): 2619; and Orentlicher, “A Reply to Professor Nino,” *Yale Law Journal* 100 (1991): 2641.

31 For a defense of this approach, see Andrew Moravcsik, “Taking Preferences Seriously: A Liberal Theory of International Politics,” *International Organization* 51, no. 4 (1997): 513–53.

32 Here again the terms “advance” and “setback” relate to the agenda suggested by Inter-American doctrine. Whenever the state deployed measures in keeping with, or conducive to, implementation of the recommendations of Inter-American organs, I speak of an advance; when the converse is true, I refer to the event as a setback.

33 Carlos H. Acuña and Catalina Smulovitz, “Militares en la transición argentina: Del gobierno a la subordinación Constitucional,” in *Juicio, castigos y memorias: Derechos humanos y justicia en la política argentina* (Buenos Aires: Nueva Visión, 1995), pp. 50–76.

34 Acuña and Smulovitz, “Militares en la transición argentina,” pp. 50–65; Raúl R. Alfonsín, *Democracia y consenso: A propósito de la reforma constitucional* (Buenos Aires: Corregidor, 1996), pp. 86–95.

35 Elizabeth Jelin, “La política de la memoria: El movimiento de derechos humanos y la construcción democrática en la Argentina,” in *Juicio, castigos y memorias*, pp. 101–46; Marcelo Sancinetti, *Derechos humanos en la Argentina post-dictatorial* (Buenos Aires: Lerner Editores Asociados, 1988).

36 “El voto del otro Congreso,” *Diario Clarín*, February 3, 1998.

37 The Radical government’s reparations policy was moderate. Numerous laws were passed reinstating civilian personnel who had been dismissed during the military regime, and the time that had elapsed since their dismissal was included in pension calculations. Many exiles returned to the country, and the official policy, in general terms, served as a sort of symbolic reparation (see Gueembe, “Economic Reparations”). The provision of economic reparations, however, encountered numerous snags such as the legal application of rigid statute-of-limitation criteria (see Inter-American Commission Report 1/93).

38 Probably on account of its heterogeneous makeup, the Peronist party also has supplied perhaps the only exception to the overall acceptance of the Inter-American system. In his gubernatorial campaign in Buenos Aires province, Carlos Ruckauf actually proclaimed the need to denounce the American Convention on Human Rights for being too benevolent, in his view, with regard to the prosecution of common crime. Ruckauf won the election and later was appointed minister of foreign affairs. Fortunately, he did not succeed in translating his diatribe into action.

39 The 1998 imprisonment of former de facto president Jorge Rafael Videla seemed to bode well for the prosecution of crimes committed under the dictatorship. The dynamics surrounding this arrest, however, are far from illustrative of state policy. Faced with an impending meeting with his French counterpart and the latter's expressions of concern over the disappearance of two French nuns during the dictatorship, Menem decided to make a gesture of goodwill and suggested to a partisan judge that he issue an arrest warrant.

40 Regarding recent initiatives, see Leonardo Filippini and Carolina Varsky, "Desarrollos recientes de las instituciones de la justicia de transición en Argentina," *Nueva Doctrina Penal* 1 (2005): 115–68.

41 "Kirchner relevó a toda la cúpula militar y adelantó los cambios," *Diario Clarín*, May 28, 2003.

42 Nora Veiras, "La casa se reserva el derecho de admisión," *Página/12*, May 25, 2003; Horacio Verbitsky, "Voz de mando," *Página/12*, June 1, 2003. Available in the *Página/12* archive, <http://www.pagina12.com.ar>.

43 Mignone, *Derechos humanos y sociedad*, p. 131.

## PERU

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*Susana Villarán de la Puente*

“**H**ow could they possibly pay attention to us as far away as Washington or Costa Rica, when here in Peru they refuse to listen to us at all?” asked Rosa Rojas, a sidewalk ice cream vendor. Rojas is the mother of little Javier Ríos and the wife of Manuel, both murdered in the Barrios Altos massacre in Lima in November 1991.

She was clearly at the limits of her endurance, and justifiably skeptical. I, too, was distressed. The *Barrios Altos* case had been taken up by the Inter-American human rights system a good while before, with little result. Neither of us could have predicted then that five years later the Inter-American Court of Human Rights would declare invalid one of the worst amnesty laws ever enacted in the hemisphere, or that the Court’s decision would have enormous repercussions, even beyond Peru’s borders. A case like this epitomizes the Inter-American human rights system’s remarkable contribution to transitional justice in the region.

In our efforts to understand the unique case of Peru and the decisive role played by the Inter-American Commission on Human Rights (IACHR) and the Court in the recent transition to democracy, we must scroll back many years. Through this historical lens we can observe that the Inter-American system does not act alone. Despite the importance of the *Barrios Altos* case, the judgment handed down by the Inter-American Court was insufficient in and of itself. To understand the key role played by the Court and by the IACHR in Peru’s recent democratic transition, it is also essential to scrutinize the role of other crucial players. Without their combined efforts, Barrios Altos would have remained just another dark, unpunished episode in an endless history of injustices committed against tens of thousands of Peruvians. Truth, justice, and reparations seem much more attainable for Peru in 2007.

## THE PERUVIAN REPUBLIC'S MOST DEVASTATING WAR

Peru is located in the Andes, perhaps the most starkly unequal region on the planet. Like many other countries, it is beset by poverty, inequality, ethnic and racial discrimination, and weak institutions. Bisected north to south by the Andean mountain range, the country is geographically, ethnically, and culturally diverse. National cohesion is fragile, and the government is absent from vast swaths of the national territory.

For two decades, Peru was ravaged by an internal armed conflict. It was, ironically, on the eve of the first democratic elections held after 12 years of military government that the guerrilla movement known as Sendero Luminoso, or Shining Path, burst violently onto the scene. On May 17, 1980, the day before the vote, members of the group burned ballot boxes in the Ayacuchan town of Chuschi, inaugurating a period of political violence that is remembered as one of the most sorrowful eras of Peruvian history.

The Truth and Reconciliation Commission estimates that approximately 69,280 people were killed or disappeared during the internal armed conflict. It described this conflict as having

the longest duration, the most extensive impact on the national territory, and the highest human and economic cost in our history as a republic. The number of deaths caused by this confrontation vastly exceeds the figures on human lives lost in the war of independence and the war against Chile, the two major conflicts in which the Nation has been involved.<sup>1</sup>

In contrast to conflicts in other countries such as Guatemala, the political violence in Peru was not ended through negotiations or a peace accord. Nor did its end coincide with the conflictive and difficult inception of a democratic government. Rather, the violence spanned two democratic administrations, those of Fernando Belaúnde Terry (1980–85) and Alan García (1985–90), as well as the autocratic regime of Alberto Fujimori (1990–2000). The worst abuses began in 1982, when the democratic government of Belaúnde Terry ordered the armed forces to spearhead an attack against the Shining Path and the Túpac Amaru Revolutionary Movement (MRTA).<sup>2</sup>

Violence only began to decline when prominent leaders of the Shining Path—which committed the majority of the killings in that period—and the MRTA were routed, and almost all of their operational units dismantled throughout the country. This process began under the Fujimori administration, which was an authoritarian political regime cloaked



in the trappings of a democracy. Fujimori cemented his hold on power in April 1992 by means of an *autogolpe*, or self-coup, in which he shut down both Congress and the judiciary. The self-coup was perpetrated with the backing of the country's power elite, most notably the armed forces.<sup>3</sup>

As a result, human rights violations associated with the period of armed violence, characterized by extrajudicial executions, forced disappearances, torture, and population displacement, gave way to a new pattern. This featured arbitrary detention, "faceless" judges, the use of military courts to try civilians, the takeover of the judiciary, and curbs on the mass media. The government imposed protracted states of emergency in which fundamental protections were suppressed.<sup>4</sup>

The Inter-American Commission's first comprehensive report on the human rights situation in Peru was published in 1992, 12 years after the outbreak of internal armed conflict. It is therefore safe to say that the Commission was not present during the years when the most egregious and massive human rights violations were committed. Its impact only began to be felt during the period that began with Fujimori's 1992 self-coup, when it evolved into a key actor in the restoration of democracy. In this way, years after the fact, the Commission and the Court finally fulfilled the obligation they incurred during that earlier disastrous period of political violence.

Local human rights organizations in Peru, however, had already begun to interact with the Inter-American human rights system during the initial period of conflict. The first individual petitions were submitted by the Association for Human Rights (APRODEH), the Episcopal Commission for Social Action (CEAS), and the Ecumenical Foundation for Development and Peace (FEDEPAZ). Peruvian human rights organizations were relentless in their pursuit of truth, justice, and reparations for the victims of abuses. Their international activism, particularly in the sphere of the Inter-American system, accounts to a large extent for the impact that the system, and the Commission's decisions in particular, eventually had on the recovery of democracy in Peru and the ability of victims to seek justice.

Peru has been subject to the supervision of the Inter-American Commission on Human Rights since the IACHR's founding in 1960. The Peruvian state ratified the American Convention on Human Rights in 1978, and in 1981 it acceded to the jurisdiction of the Inter-American Court of Human Rights without reservations. This coincided with the transition from a military government to a democracy—and with the outbreak of the internal armed conflict.

The human rights organizations that emerged in this period came together in 1985 as the National Human Rights Coordinating Committee, known as the *Coordinadora*.<sup>5</sup> The group's relationship with the Commission, and later the Court, reinforced its work and impact and boosted the credibility of human rights advocates in general. The Peruvian human rights community was strengthened by its participation in numerous hearings before the Commission on the general human rights situation in Peru and on individual cases, and by ongoing litigation in the Court. Also important in this respect were collaborations with international nongovernmental human rights organizations such as Human Rights Watch and the Center for Justice and International Law (CEJIL). For the Inter-American system, the human rights groups represented valuable and reliable interlocutors in the form of qualified petitioners and evaluators of the human rights situation in that country. This in turn strengthened the negotiating position of those groups vis-à-vis the state.

The earliest cases of human rights abuses associated with the internal armed conflict began to reach the Commission in 1983, three years after the conflict began.<sup>6</sup> During that period, Amnesty International and Human Rights Watch published their respective reports on serious human rights abuses in Peru. During the bloodiest years of the conflict, 1983–85, information regarding nearly 1,300 disappeared persons reached the United Nations Human Rights Committee. Peru earned the tragic distinction of holding first place worldwide with respect to forced disappearances.

Human rights abuses committed in the framework of the armed conflict also included a grisly series of extrajudicial executions, torture, and sexual violations. In its annual report for 1986–87, the Commission included seven individual cases of forced disappearance and murder committed by the security forces in Ayacucho state, the site of the Shining Path's earliest actions. During the ensuing years, the IACHR resolved and published a growing number of petitions and cases concerning Peru. Of the 23 cases included in its 1987–88 annual report, 13 corresponded to Peru.

As human rights organizations became increasingly familiar with the Inter-American system and with the Commission in particular, the number of individual petitions increased, with complaints coming from across the national territory. Still, the number of individual cases was relatively small, since at that time the Commission's political advocacy (through *in loco* visits) predominated over the case system. The most active period for individual cases was documented in the Commission's 1990–91 annual report, in which 51 of 85 cases involved Peru.

The IACHR visited Peru for the first time in 1989, the final year of the Alan García administration. The visiting delegation, known as the Special Commission, was chaired by then-vice president Elsa Kelly and included commissioner John Stevenson and members of the executive secretariat. Although the delegation was not received by the Peruvian president, it was able to meet with representatives from the Congress, the armed forces, the office of the attorney general, civil society organizations, the Catholic Church, and human rights groups, as well as the International Committee of the Red Cross.

The visitors found a country devastated by a conflict that had produced nine years of horror and countless victims. The IACHR referred specifically to the actions of the armed groups in its account of the May 1989 visit, published in its 1988–89 annual report:

[It is] imperative to put an end to the activities of irregular groups; they are causing an escalation and spreading of the violence, which is taking a dire toll of human lives, and eroding the country's basic institutions. There is no circumstance in which either the alleged struggle to overcome poverty and build a new state or the need to take justice into one's own hands can justify recourse to selective assassination, summary execution, the destruction of production plants, torture, forced disappearance of persons or the use of terror as an instrument of social control.

In the same report, Commission also expressed its “profound concern” about the persistent use of “terror and indiscriminate violence” for the settlement of social and political disputes. It pointed out the “urgent need, in the measures taken to combat subversion, to be mindful of the human rights of the population that might be affected.”

Also in 1989, Amnesty International published a report on human rights in Peru. Entitled *Caught Between Two Fires*, it chronicled the effects of the conflict on the civilian, primarily rural, population that had been targeted for forced disappearances and massacres.<sup>7</sup>

The discussion regarding irregular armed forces and subversive groups was of utmost importance in the Peruvian case. The Commission discussed at length the activities of irregular armed groups, such as the Sendero Luminoso and the MRTA, in chapter 5 of its 1990–91 annual report. The chapter clarified the position expressed in the resolution of the Organization of American States (OAS) General Assembly on this subject.<sup>8</sup> The Commission's discussion is particularly notable because Shining Path was characterized as a subversive organization by the state and also by the Peruvian human rights organizations

of the Coordinadora, as evidenced in their annual reports on the human rights situation in Peru.<sup>9</sup> The Truth and Reconciliation Commission also discussed this critical issue in its final report.<sup>10</sup> Years later, following the September 11, 2001 terrorist attacks in the United States, the IACHR published an excellent report on terrorism and human rights that sets forth standards that states should adhere to when combating terrorism in peacetime, in states of emergency, and in situations of internal armed conflict.<sup>11</sup>

In the Peru section of its 1992–93 annual report, the IACHR discussed the serious violations perpetrated by the Shining Path:

Those actions are grave violations of principles and norms of international humanitarian law and transgress individual rights protection under the American Convention and the Universal Declaration of Human Rights.<sup>12</sup>

The report documents the murder of Italian lay missionary Giuglio Rocca Oriana in October 1992 in Jangas, Ancash department; the massacre of 44 people in the village of Huayo, Ayacucho department, on October 10, 1991; and the murders that same month of five municipal officers, including the mayor, in the village of Palca, Puno department. The Shining Path's bloody objective during that period was to target social leaders who stood in the way of its totalitarian control over territory and communities. María Elena Moyano was murdered with extraordinary cruelty on February 15, 1992 for resisting the "armed stoppage" called by the Shining Path in the Villa El Salvador neighborhood of Lima. Bernardina Maldonado Quispe, coordinator of the social program known as Vaso de Leche (Glass of Milk), in El Agustino, Lima department, was murdered in a similar fashion.

The issue of terrorism or subversion of the sort carried out by the Shining Path was on the Commission's agenda when it monitored the human rights situation in Peru, and the IACHR clearly articulated its position concerning such groups. At the same time, the Commission pointedly reminded the political organs of the OAS (and, indirectly, the Fujimori government) that regimes such as those in Chile and Argentina had attempted to justify their repression as a necessary response to terrorist attacks. This statement is of particular importance in light of the IACHR's later actions concerning Peru:

The Commission has often heard the argument that human rights violations are inevitable because they are a consequence of the "war" created by armed groups, who are generally portrayed as terrorists. Thus, human

rights violations are being justified as a necessary byproduct of an armed conflict that the authorities and security forces do not admit to having provoked. In the Commission's judgment, this is an invalid argument; consequently, it has repeatedly asserted that unqualified respect for human rights must be a fundamental part of any anti-subversive strategies.<sup>13</sup>

The IACHR made an in loco visit to Peru on May 17–21, 1993, in the aftermath of Fujimori's self-coup. The report of the visit begins with a reference to the irregular armed groups:

*The Commission has repeatedly denounced—and will continue to denounce—the activities of groups like the Peruvian Communist Party (Shining Path) and the Tupac Amaru Revolutionary Movement . . . that routinely use violence to terrorize the public. While statistics show a substantial drop in the number of assaults and other criminal activities by such groups, unfortunately the same cannot be said of the brutality always associated with their activities, particularly in the case of the Shining Path.*<sup>14</sup>

The Commission scrutinized key aspects of the human rights situation in Peru related to the internal armed conflict, such as the “emergency zones” that remained under military control for years.<sup>15</sup> In the 1993 annual report, it also explicitly criticized the new anti-terrorist legislation enacted just one month after Fujimori's coup:

The State must fulfill its obligation to combat terrorism and subversion but must at the same time comply with its duty to respect fundamental rights to the fullest. The new anti-terrorism laws do not even come close to satisfying the minimum requirements set by international human rights law to protect and guarantee those rights.

But we will come back to that later.

## FORCED DISAPPEARANCE IN PERU: PROGRESS IN TRANSITIONAL JUSTICE

State agents used the systematic forced disappearance of persons to confront the subversive violence of the Shining Path and the MRTA. While this practice was observed in

several regions of the country, it was most prevalent in Ayacucho, according to the Truth Commission report.<sup>16</sup>

The Inter-American system has described forced disappearance as cruel, inhuman, and degrading treatment in the Inter-American Convention on the Forced Disappearance of Persons, as well as in reports published by the Commission and in the jurisprudence of the Inter-American Court. In its first case on this subject, *Velásquez Rodríguez v. Honduras*, the Court defined forced disappearance as a “complex form of human rights violation.” It is a continuing violation that may be concurrent with other violations, as for example in the *Velásquez Rodríguez* case, where it was presumed that an execution had taken place.<sup>17</sup> In other cases, the Court has described the prolonged harm also visited upon the relatives of victims of this particularly egregious practice.

As already mentioned, the first petitions concerning the Peruvian conflict to reach the IACHR had to do with forced disappearance and extrajudicial executions. In a press release issued at the end of its second in loco visit to Peru, from October 28 to November 1, 1991, the IACHR stated:

As for the right to life, the Commission has been informed that although the number of violations of this most basic of all human rights is said to be on the decline, the number of summary executions and forced disappearances is still very disturbing. Indeed, according to informed sources, Peru still has the highest number of forced disappearances in the world. The way this phenomenon develops in the immediate future will be a meaningful indicator of what effects the Government’s measures have had in practice.<sup>18</sup>

Beginning in 1986, the IACHR began to publish in its annual reports cases of forced disappearances dating back to 1982. Most of these cases occurred in the Ayacucho region. Certain detention sites were mentioned repeatedly in these reports, including the notorious Los Cabitos army base in Huamanga, Ayacucho.<sup>19</sup> Political violence pervaded other areas as well, including Apurímac, Huancavelica, San Martín, and Lima departments. While the IACHR’s earliest reports describe extrajudicial executions, its 1990–91 annual report depicts a systematic pattern of forced disappearances in 49 cases.

The sections on Peru in the 1990–91 annual report discuss the decisions in cases of forced disappearances that occurred from 1986 to 1989, as well as one case dating back to 1983. The IACHR continued to publish cases of forced disappearances in the ensuing years.

With the change in the political regime and the decrease in political violence, however, other human rights problems came to the fore, primarily with regard to the rule of law under the Fujimori government, as discussed below.

In a 1999 report, the IACHR discussed five cases of forced disappearance.<sup>20</sup> These alleged events, it noted, “suggest a pattern of disappearances brought about by Peruvian state agents around the same time period (1989–1993) within the context of what are called anti-subversive activities, and employing the same *modus operandi*.” In the report, which was published after the passage of the amnesty laws discussed below, the IACHR asserted that “cases of disappearance in Peru were not seriously investigated. In practice, those responsible enjoyed almost total impunity, since they were carrying out an official State plan.” In this report, the IACHR finds the Peruvian state responsible for the violation of Articles 3, 4, 5, 7, 25, and 1(1) of the American Convention on Human Rights.

Fujimori resigned and fled the country in November 2000. In its 2001 annual report, the IACHR attempted to close a chapter of Peruvian history with the publication of a considerable number of older petitions concerning forced disappearances. Report 101/01 combined 23 cases of forced disappearances and extrajudicial executions of 119 people that had occurred from 1984 to 1993.<sup>21</sup> This report is extremely important in that the IACHR ruled on the admissibility and merits of the cases and found the Peruvian state responsible for the extrajudicial execution of some of the victims and the forced disappearance of the rest. It found that Peru had violated the human rights to personal liberty and personal integrity, judicial guarantees and judicial protection, special protection measures and judicial personality, and the rights of the child, protected in Articles 3, 5, 7, 8, 19, and 25 of the American Convention.

In this report, the Commission urged the Peruvian state to revoke its internal provisions and judicial decisions that impede the investigation, prosecution, and punishment of the perpetrators of these crimes, and to conduct serious, exhaustive, and impartial investigations to determine individual responsibility and to compensate the victims’ next of kin. It also recommended that the Peruvian state become party to the Inter-American Convention on the Forced Disappearance of Persons.<sup>22</sup>

With the return to democracy and a new transition government in place, the position of the Peruvian state shifted dramatically. In March 2001, the government sent a communication to the IACHR concerning the installation of a mechanism for implementing the Commission’s recommendations. The same missive also reported the establishment of an

inter-institutional working group on the creation of the Truth Commission and noted the participation of Dr. Diego García Sayán, then Peru's minister of justice, at the IACHR's 110th regular session on February 22.<sup>23</sup> On that occasion Dr. García Sayán presented a document in which the Peruvian state acknowledged its responsibility for the human rights violations addressed by the IACHR in its final reports.

## CASTILLO PÁEZ: FIRST JUDGMENT ON FORCED DISAPPEARANCE IN PERU

Meanwhile, developments in the Inter-American Court took the form of judgments issued in the cases of *Neira Alegría et al.* (1995) and *Durand and Ugarte* (2000)—both involving forced disappearances during the quelling of a June 1986 riot in El Frontón prison—and in the matter of university student Ernesto Castillo Páez, who was detained in 1990 and never seen again.

However, it was not until a few years after the Inter-American Court handed down its 1997 *Castillo Páez* judgment that justice was administered by Peruvian courts. In September 2001, 16 police agents were tried for the crime in domestic courts. In 2005 the National Criminal Court sentenced retired national police colonel Juan Carlos Mejía León to 16 years in prison. Subordinate officers Juan Aragón Guivobich, Carlos De Paz Briones, and Manuel Arotuma Valdivia were sentenced to 15 years in prison as the material authors of the crime. This was a landmark ruling in the history of transitional justice, marking the first time a case of forced disappearance was prosecuted and punished in Peru. It was also the first case presented by the Truth and Reconciliation Commission that resulted in a conviction.

The court, composed of sitting judges Pablo Talavera, Jimena Cayo, and David Loli, stated in its verdict that crimes of forced disappearance—and that of Castillo Páez in particular—were not isolated incidents. Rather, they occurred in the context of a policy of systematic and widespread human rights violations in Peru. The court held that since Ernesto Castillo Páez's mortal remains were never found, his forced disappearance is an ongoing crime that continues to be perpetrated to this day.

Clearly, many different actors have played a fundamental role in achieving truth, justice, and reparations. The Inter-American Court judgments in the specific cases of *Castillo Páez*



and *Barrios Altos* were insufficient in and of themselves. The Truth and Reconciliation Commission played a critical role by documenting and handing over to the Public Ministry enough information to open investigations in 47 cases. And in another landmark decision, the Peruvian Constitutional Court recognized the right to truth in its decision in the *Genaro Villegas Namuche* case. A Specialized Court (Sala Especializada) was established to hear cases of human rights crimes. Finally, Peruvian human rights groups have made a crucial contribution through their tireless defense of victims and their expertise in litigating in the domestic and international venues.

## THE CAYARA CASE: A LINGERING “THORN”

Massacres also were committed in the context of political violence in Peru. While they are outnumbered by the more than 630 massacres reported by Guatemala’s Historical Clarification Commission, the figures are nonetheless significant. Peru’s Truth and Reconciliation Commission reported 337 massacres committed during the years of violence, implicating three administrations. The commission attributed 215 of these massacres to the Shining Path and 122 to state agents; the attacks were perpetrated throughout the countryside.<sup>24</sup>

In its report, the Truth Commission defines these heinous crimes as collective multiple murders committed with tremendous cruelty against defenseless people. The killings in a massacre are typically carried out in conjunction with other egregious violations of human rights such as torture and mutilation. According to the report, massacres constitute one of the most dramatic expressions of armed violence inasmuch as their intent is to deliver a warning to a particular social group. In other words, they are acts of terror designed to serve as an example to others.

Prominent state-sponsored massacres included the La Cantuta massacre of July 18, 1982; the 1983 murders of 32 rural farmers in Soccos; the Accomarca massacre in 1985; the massacre of villagers from Parco and Pomabambo in October 1986; the massacres in the Lurigancho, El Frontón, and Santa Bárbara prisons in Lima in 1986; the 1990 Chumbivilcas massacre in Cusco and the student killings in Huancavelica that same year; and the Barrios Altos massacre of November 1991. These are, unfortunately, only the most prominent among a much larger number of cases.

One of the most horrific of these state-sponsored massacres was the one that occurred at Cayara, in the Víctor Fajardo province of Ayacucho. On November 17, 1988, the Inter-American Commission received a petition from Human Rights Watch/Americas, a US-based nongovernmental organization, concerning the massacre of 37 people.<sup>25</sup> In its report on the case, the IACHR described attacks carried out during three successive incursions into the area by members of the Peruvian armed forces, on May 14 and 18 and June 29, 1988. These were followed by threats against the public prosecutor in the case, Carlos Enrique Escobar, and the murder or disappearance of witnesses and others who had reported the incident. In its conclusions, the IACHR found the Peruvian state responsible for violations of the American Convention for the murder, torture, arbitrary detention, and disappearance of 37 people perpetrated by the armed forces in the area of Cayara.

Three investigations were opened in Peru concerning the Cayara massacre. The first was before the military justice system, which dismissed the case on January 31, 1990. The second was an ordinary criminal investigation that resulted in a preliminary report establishing criminal liability; formal charges were filed in September 1988. However, the attorney general of the nation postponed the investigation and the case was permanently set aside in January 1990. A multiparty investigatory committee was also established in the national Senate, but found no liability.<sup>26</sup>

The case was finally submitted to the Inter-American Court of Human Rights on February 14, 1992. In the suit, the IACHR identified 40 people as victims of arbitrary execution and forced disappearance and eight people as victims of torture. It also described damage to private and public property.

However, because of procedural errors, the case was set aside in the preliminary objections stage of the proceedings before the Court. The Court ruled that the IACHR—by withdrawing the case and submitting it again—had failed to comply with certain deadlines with regard to its presentation. As a result, there was never an opportunity to examine the merits of one of the best-known and most controversial of all Peruvian cases in the Inter-American human rights system. Nevertheless, on March 12, 1993, the IACHR circulated a narrative of the case's facts, and at its 83rd Regular Session it decided to publish the petition, together with Report 29/91.

Juan Méndez, who served as counsel to the IACHR in the case on behalf of Human Rights Watch, commented, "The truth is that the real losers in all this were the victims of

Cayara, who never were able to see justice done, although no one could have accused them or their representatives of any improper conduct or manipulation of the process.”<sup>27</sup>

Recalling the saga of the *Cayara* case before the Inter-American Court, Méndez continued:

The case was presented to the Court, but at the same time, a letter reached Washington from the Peruvian government requesting that it not be submitted, offering legal and procedural arguments that alleged the case was null and void. The arguments centered on trivial matters, such as no record of notification for an exhibit that had been added to the file months or years before, when throughout the process the government had full access to the file and was informed of everything. Nevertheless, the IACHR executives panicked and decided (over our objections) to travel to Costa Rica and withdraw the file.

The Court found the matter somewhat suspect but it allowed the withdrawal, and left a written record. The Commission subsequently reopened the file under the impression that Peru would have another opportunity to present its arguments. But it came as no surprise that Peru then responded that the case could not be sent to the Court at all because the 60-day time limit stipulated in the American Convention had now expired.

The Court’s decision is also questionable for a number of reasons. Primarily, it fails to take into account that procedural errors should be interpreted in light of the principle of good faith. Otherwise, one falls into that rigid formalism for which we lawyers are often criticized, sometimes for good reason, as in this case.

Méndez was certainly correct when he asserted that the losers in all of this were the victims of Cayara, who never were able to see justice done. The 40 victims and their relatives are still waiting for truth, justice, and reparations. Francisco Soberón Garrido, an internationally recognized human rights advocate, represented the victims in his capacity as a member of APRODEH. In his words, “There is no question that Cayara was the most emblematic case in which we participated. It was a bad move on the part of the Commission to withdraw the case against our judgment.”<sup>28</sup> Pablo Rojas, another human rights advocate actively involved in the case, stated, “It is a perpetual thorn—the quashing of the *Cayara* case over procedural matters.”<sup>29</sup>

## THE SYSTEM “AT ITS BEST”

As mentioned, the IACHR’s work on Peru was most significant nationally and internationally in the aftermath of Fujimori’s 1992 self-coup. During this period it made four of its six in loco visits, prepared special reports, and published cases. The Commission also forwarded petitions to the Inter-American Court on seminal cases such as *Barrios Altos*, *Ivcher Bronstein*, and the Constitutional Court matter, described below. The Commission also confronted Fujimori’s threat to withdraw from the contentious jurisdiction of the Court and took a position on the fraudulent elections of April 2000. All of this had a tremendous impact on the course of events in Peru by helping expose the breakdown in the rule of law and buttressing the efforts of those on the inside struggling for a return to democracy. Within the country, human rights organizations were joined by democratic political parties and the student movement, thereby broadening and legitimizing the cause of human rights, democracy, and justice.

The Commission reacted much more quickly during this period than in previous years. Within days of the April 5, 1992 coup, as the petitions began to flow in, the IACHR decided to send its executive secretary to the country on April 23–24. This was followed by the IACHR president’s trip to Peru on May 11 and 12, at the invitation of the Peruvian state. He then presented his report to the ad hoc meeting of foreign ministers held in the Bahamas later that month.

The ensuing decade was marked by several interrelated events that culminated in Fujimori’s flight to Japan and the installation of a transitional government that would preside over the establishment of the Truth and Reconciliation Commission and the reinstatement of Peru’s relations with the Inter-American Commission and the Court.

These events occurred in rapid succession beginning in 1992, just as the rule of law began to crumble. They included the anti-terrorist legislation of 1992; the amnesty laws of 1995; the matter of Ivcher Bronstein, whose Peruvian nationality was revoked, causing him to lose his television station; the dismissal of three members of the Constitutional Court because of their opposition to Fujimori’s reelection; the attempt to withdraw from the jurisdiction of the Inter-American Court of Human Rights; and the election fraud of 2000. Also, in December 1996, members of the MRTA took over the residence of the Japanese ambassador in Lima, taking dozens of people hostage in a move that kept the international spotlight trained on Peru for four long months.<sup>30</sup>

The thread tying all of these events together was Alberto Fujimori's need to defend at all costs an autocratic, corrupt regime that ran roughshod over human rights. As president, he set off on a collision course with the Inter-American system and with the international community as a whole. In this high-intensity conflict, the Inter-American Commission on Human Rights "showed itself at its best," as Robert K. Goldman, a former president of the IACHR, put it.<sup>31</sup>

It was also during this period that Peruvian society in general, not just human rights defenders, began to regard the Commission as a valuable ally. Its presence during moments of national turmoil was welcomed by students, trade unions, and civic organizations of all stripes. Ordinary citizens, hearing of the Commission's presence in Lima or Ayacucho, would approach the visitors directly to deliver petitions of various sorts. They saw the Commission as an institution that offered them protection. That is also how it was portrayed in the media, at least those outlets that had not been co-opted by the Fujimori regime.

The IACHR's visit in November 1998 was particularly important. The press release read before a packed room at the end of the visit was unprecedented.<sup>32</sup> Among other matters of concern, it mentioned the role of the judiciary and the temporary nature of judges, a status affecting some 70 percent of judges at that time. "This poses a grave threat to the independence and autonomy of the judiciary vis-à-vis political power, and it has in numerous cases given rise to complaints of undue interference." Furthermore, the statement characterized the amnesty laws as providing "impunity for human rights crimes." It also mentioned the serious due process problems posed by the national security decrees, pointing out that

in such cases, the individual's basic rights and guarantees are affected, in that the [presumption] of innocence and the guarantees of due process are undermined. The underlying confusion in this new legislation between "national security" and "civic security" confuses the arenas to which the two belong. Mixing the two concepts into a single idea militarizes the criminal justice system and, at the same time, gives military and intelligence agencies powers that do not correspond to them, thus invading the arena of individual basic rights.<sup>33</sup>

In addition, the IACHR statement addressed the extended jurisdiction of the military justice system. "The Commission repeats its doctrine that military justice must be applied only to active service personnel and solely for service crimes. Thus, crimes against human rights must be investigated and punished in accordance with the law by ordinary

criminal courts.” On the dismantling of the Constitutional Court and the impact of the government’s arbitrary move to block the public referendum against the third reelection of Alberto Fujimori, the IACHR stated: “According to these complaints, the earlier decision by the National Elections Jury and the subsequent refusal by Congress to approve the referendum call constitute a serious violation of Peruvians’ human rights as set forth in the American Convention.” The Commission concluded its press release by noting the serious violations of freedom of expression in Peru.

The darkest recesses of the Fujimori regime were thus brought to light in the Commission’s reports and press releases during this harsh period of Peruvian history.

## **ANTI-TERRORIST LEGISLATION UNDER FUJIMORI**

Let us turn our attention to the anti-terrorist legislation. In its 1992–93 annual report the IACHR placed Peru, for the first time, in chapter 4, a section reserved for discussion of critical human rights situations. It referred to the new anti-terrorist legislation, comprising 13 laws enacted between May 6 and December 2, 1992, and described many complaints dealing with the rights to a fair trial, due process of law, and judicial guarantees.<sup>34</sup> The Commission stated:

In relation to the right to a fair trial, to due process of law and judicial guarantees, the Commission has received extensive information on the reservations that individuals and agencies charged with protecting human rights have expressed in regard to the new anti-terrorist laws. It has been said that in the summary trials of persons charged with being members of the Peruvian Communist Party (Shining Path) the rights of the accused have not been respected. Their right to defend themselves has been particularly impaired as their defense attorneys are given little time to acquaint themselves with the charges, confer with their clients, and prepare their arguments. Some prisoners were placed under military jurisdictions far from their places of residence.

Few would dispute the need of the Peruvian government and society to drastically punish those who, like the Shining Path and the MRTA, have committed horrendous crimes. In its

second report on Peru, the IACHR clearly acknowledges this, but it also affirms that “States do not have a free hand to use any method they please to combat violence and terrorism.”<sup>35</sup> The critical issue for the IACHR and for national and international human rights entities was the violation of basic guarantees that the Peruvian state had pledged to uphold.

The IACHR made pointed recommendations to Peru in its 1992–93 annual report, calling on the government to adapt the anti-terrorism legislation to conform to the principles of the American Convention on Human Rights. Among other specific points, the Commission said that crimes of treason and terrorism and other cases of human rights violations should be tried in the ordinary criminal justice system, even when the alleged authors are members of the armed forces. Prisoners should be guaranteed the right to an attorney, and defendants should be permitted to question witnesses. Noting the large number of people held in custody for long periods without trial, the Commission called for conditional release to be granted in some cases.

## “IN THE NAME OF THE INNOCENT”

Despite these recommendations and others, thousands of innocent people were arrested, prosecuted, and sentenced to harsh punishments under the anti-terrorist legislation throughout the 1990s. This is documented in numerous publications by the Lima-based Legal Defense Institute (IDL) and by the Coordinadora, as well as in Ernesto de la Jara’s important book, *Memoria y batallas en nombre de los inocentes*.<sup>36</sup>

“To defend the innocent is to defend the honor of the Nation, and we are naïve enough to believe that this is worthwhile.” These words spoken by Father Hubert Lanssiers appear in de la Jara’s book. De la Jara describes the main problems with the new laws governing arrests and prosecutions for the crime of terrorism: vague criminal definitions, the concept of “treason” as a catch-all for the more serious forms of terrorism, the abuse of military jurisdiction, the use of “faceless” judges, arrest without a court-issued warrant or an *in flagranti* situation, the time limit for pretrial detention extended to 30 days, and so forth. Under these laws, the police are granted exceptional powers, many freedoms are restricted, and arbitrary deadlines and time periods are imposed. The opportunities to present *habeas corpus* or *amparo* petitions are limited and the measures are draconian, including life imprisonment, the criminal prosecution of minors, conviction *in absentia*, and bench warrants that do not expire.

To spotlight these abuses, the Coordinadora mounted a national and international campaign, “In the Name of the Innocent.” The campaign drew support from a report by Robert K. Goldman for the International Commission of Jurists,<sup>37</sup> as well as reports issued by the IACHR. But it must be acknowledged that the latter was slow to act.<sup>38</sup>

As the years passed and evidence mounted that many imprisoned people were actually innocent, the Fujimori government felt obliged to create an Ad Hoc Commission that freed 502 people from 1996 through 2000.<sup>39</sup> Because 291 of these prisoners had a definitive judgment of conviction against them, a presidential pardon was the only way out. Human rights advocates welcomed the move, believing that an irregular pardon is better than unfair imprisonment and that legal coherence was less important than ensuring that hundreds of people in complicated political situations would not remain in the purgatory of unwarranted imprisonment.

By then, there had been some improvements to the legislation and to prison conditions. The use of “faceless” judges, whose identities are concealed, was eliminated in 1997. The provision allowing for the criminal liability of minors was subsequently derogated, while other provisions made it possible to issue an order of appearance for those individuals whose acquittals had been vacated by the Supreme Court.

During the period in which the Ad Hoc Commission was functioning, prosecutions for the crime of terrorism resulted in 606 acquittals.<sup>40</sup> This is a clear indication of what human rights advocates had known all along: that such laws constituted an enormous risk for people who had nothing to do with terrorist organizations. It would be impossible to include the moving testimonies of the many people falsely accused in this short chapter. I have heard them; I can attest to the fact that they are heart-rending and that the stigma toward these people, their families, and their communities persists to this day.

As of 2007, other innocent people remain imprisoned. And while certain substantive aspects of the law have been changed, all of the necessary modifications to Fujimori’s anti-terrorism law have not been made. Among other issues, there are still serious problems with prison conditions, in particular in the Challapalca Prison, which was the subject of a special report by the IACHR.<sup>41</sup>

Nongovernmental and intergovernmental entities brought critical pressure to bear against the anti-terrorism law during this period. The very fact of the Ad Hoc Commission’s ex-



istence also was crucial. The ombudsman of Peru, Jorge Santistevan, along with Catholic priest Hubert Lanssiers played an extremely important role in raising public awareness of this commission through the “Name of the Innocent” campaign. The effort was largely successful in changing attitudes toward a very complicated issue. In surveys of businesses, when asked whether they believed that innocent people had been unfairly accused of terrorism, over 60 percent of the respondents answered “yes.”

On July 4, 2002, the Truth and Reconciliation Commission devoted a public hearing to the subject of the anti-terrorism law and due process violations. In attendance were Mary Robinson, then United Nations high commissioner for human rights, and Robert Goldman, former president of the Inter-American Commission. Goldman’s observations, based on the doctrine and jurisprudence of the Inter-American human rights system, were subsequently reflected in the Truth Commission’s recommendations and are still relevant today.

At that same hearing, Truth Commission chairman Salomón Lerner reflected upon this difficult period in Peruvian history:

Can a system be considered fair or effective if, on the one hand, it convicted and ordered the well-deserved confinement of many guilty people, while on the other, it consigned hundreds of innocent individuals to the same fate? How to comprehend that the same State that issued the harshest of sentences should find itself obliged to create an Ad Hoc Commission for pardons that would find . . . nearly six hundred prisoners who were innocent of all crimes? Peru has been living in a state of denial of justice.

## THE LA CANTUTA CASE: OFFICIAL IMPUNITY

The Fujimori administration was buttressed by powerful constituencies, most notably the armed forces. The president’s closest ally in the army high command was intelligence chief Vladimiro Montesinos. The infamous Colina Group, made up of members of the Army Intelligence Service (SIE), emerged during this period. Its members are currently being tried for their involvement in prominent cases like the Barrios Altos massacre, the forced disappearances of El Santa, and the disappearance of Pedro Yauri.<sup>42</sup> Regarding the La

Cantuta massacre, only those who were not prosecuted by the military courts under the Fujimori regime are currently being tried before national courts.

Although the Barrios Altos massacre was the first to occur (in November 1991) and provided the impetus for the enactment of the domestic amnesty laws four years later, it is important to begin with the *La Cantuta* case, which illustrates the context of official impunity in which the laws were enacted.

In the early morning hours of July 18, 1992, members of the SIE and the Army Intelligence Directorate (DINTE) invaded the homes of students and professors at the National Education University Enrique Guzmán y Valle in La Cantuta. Nine students and one professor were seized and murdered, and their bodies were secretly buried in a common grave. The victims' charred remains were found months later.

National and international pressure regarding the case was so intense that the perpetrators were tried. But the trial was carried out under military jurisdiction and was extremely short. Only the material authors of the atrocity were convicted, not the intellectual authors who held positions of power at the time. In 1994 a military court acquitted Montesinos; General Nicolás de Bari Hermoza Ríos, chief of the Armed Forces Joint Command; and General Luis Pérez Documet, military commander of the zone in which the university was located. Convicted were majors Martín Rivas and Carlos Pichilingüe (sentenced to 20 years in prison); technicians Jesús Sosa Saavedra, Julio Chuqui Aguirre, and Nelson Carbajal García (15 years); and SIE chief General Juan Rivero Lazo (5 years). According to rumors at the time, the convicted men were appeased with assurances that they should “just be patient, you’ll be out within a year.” Which is exactly what happened.

Finally, in November 2006, the *La Cantuta* case was decided by the Inter-American Court.<sup>43</sup> Among other important aspects, the Court emphasized Peru’s obligation to “immediately” act to end the impunity surrounding the case’s serious human rights violations.

## BARRIOS ALTOS AND THE 1995 AMNESTY LAWS

The Barrios Altos massacre took place on the night of November 3, 1991, in central Lima. On that night, two informal fundraisers or *polladas* were underway in an old mansion whose

small rooms now housed many families. The fundraisers were to raise money for plumbing repairs to the aging structure. People had gathered, and there was music and beer.

At 10:30 p.m., men appearing to be military, their faces covered by stocking caps, burst violently onto the scene. They had arrived in two double-cabin pickup trucks topped with rotating police lights. According to a description provided by one witness, they belonged to the 25th Headquarters of the National Police. The intruders fired 111 cartridges and 33 projectiles from automatic pistols against the unarmed gathering, leaving 15 people dead, including a child. Four people were critically injured. It was the first massacre to occur in the heart of the Peruvian capital.

Investigations by journalists and during the first stage of judicial proceedings strongly suggested that the perpetrators of this massacre worked with the military intelligence services. The Colina Group was particularly committed to combating subversion.<sup>44</sup> A criminal indictment was finally made before the 16th Criminal Court, and Judge Antonia Saquicuray opened a formal investigation on April 19, 1995. She attempted to take statements from members of the Colina Group, but the military high command prevented her from doing so.

It was precisely at this moment—when the center of power was being investigated by a prosecutor and a judge—that the Peruvian Congress, in the early morning hours of June 14, 1995, secretly approved an amnesty law. The language for the law had been transmitted directly from the Government Palace, and there was no congressional debate. This law exonerated from any responsibility the military and police forces and civilians who had committed or participated in any human rights violations between 1980 and 1995. As a result, the few investigations that had been opened up to that point were set aside.

On June 28 the Congress passed a second law ensuring that the amnesty law would not be subject to judicial review. It also broadened the scope of the original law by conferring a general amnesty on all military or police officers or civilians who might be subject to prosecution for human rights violations committed between 1980 and 1995, even if they had not yet been accused of a crime—thereby precluding any investigations of such cases.

Undaunted, Judge Saquicuray pursued her inquiry into Barrios Altos. She asserted that the amnesty law violated constitutional guarantees and Peru's international commitments, particularly its obligations under the American Convention on Human Rights. The attorney general countered by declaring the *Barrios Altos* case closed and pronouncing the am-

nesty law constitutional. In response to Judge Saquicuray's courageous stance, the attorney general's pronouncement was challenged, and a hearing was scheduled for July 3.<sup>45</sup>

One month after the approval of the first amnesty law, on July 14, 1995, the Criminal Chamber of the Superior Court of Justice in Lima definitively terminated the proceedings in the *Barrios Altos* case. I was present in the courtroom, which was packed with victims and relatives from Barrios Altos along with human rights advocates. The judges ruled that the amnesty law was not incompatible with the basic law of the land or with international human rights treaties. They asserted that they could not choose to disregard laws that had been adopted by the Congress, as that would violate the principle of separation of powers. Ultimately they ordered that Judge Saquicuray be investigated by the judiciary's internal oversight body for her allegedly erroneous interpretation of the law.

Students, human rights organizations, and national personalities mobilized against the amnesty law from the moment it was passed. One of these demonstrations, the first of its kind since the Fujimori coup, brought together thousands of people who marched to the Congress holding lighted candles and a banner proclaiming, "We cannot forget the unforgettable." But Fujimori remained unmoved. The amnesty laws cemented his relationship with Montesinos and with the armed forces, his political and institutional base of support.

As part of its campaign to combat the impunity that the amnesty laws entailed, on June 30, 1995, the Coordinadora sent a petition concerning Barrios Altos and the amnesty laws to the Inter-American Commission on Human Rights.<sup>46</sup> It was the only case in the 21-year history of the Coordinadora in which the entire network of Peruvian human rights organizations together submitted a petition to the Commission.<sup>47</sup>

The case was opened on August 28, 1995. During the course of the protracted process in the Inter-American system, the relatives, survivors, and attorneys associated with the *Barrios Altos* case were constantly followed and threatened. The Colina Group sent a funeral wreath to the APRODEH office bearing the names of 10 people (including mine). The Commission granted precautionary measures on behalf of APRODEH attorney Gloria Cano and several other individuals involved in the case.

The *Barrios Altos* case took center stage in the increasingly difficult relationship between the Fujimori government and the Inter-American system. The very underpinnings of the Fujimori regime were at stake. This accounts for the removal of three members of the

Constitutional Court and the state's threat to withdraw from the contentious jurisdiction of the Inter-American Court, which we will discuss at more length below.

After fraudulent elections on June 8, 2000 awarded Fujimori a third presidential term, the Inter-American Commission submitted an application before the Court in the *Barrios Altos* case. The application contained three fundamental points: reopen the investigation into the events, make comprehensive reparations to the relatives and survivors, and abrogate or annul the two amnesty laws.<sup>48</sup> In its closing arguments, the Commission and the petitioners recognize the laudable role of the Inter-American system in achieving democracy in Peru:

The Inter-American Commission and the Inter-American Court of Human Rights led the international community in condemning the practices of horror, injustice and impunity that occurred under the Fujimori Government. Those of us present at this hearing recognize the desire of the next of kin and of the Peruvian human rights community to obtain justice and truth in that country. This desire is shared by the whole Inter-American system and, in this respect, we would like . . . to request the Honorable Court that . . . by virtue of the State's acquiescence, it should not only establish the specific violations of the articles of the Convention in which the State has incurred . . . , but also, in the operative paragraphs of the judgment, specifically establish the need to clarify the events so as to protect the right to truth, the need to investigate and punish those responsible, . . . the incompatibility of amnesty laws with the provisions of the American Convention and . . . the obligation of the state to annul amnesty laws.<sup>49</sup>

The Inter-American Court ruling in the *Barrios Altos* case was a historic decision. In view of the Peruvian state's acknowledgment of its international liability, the Court ruled on March 14, 2001, that it was responsible for violations of Articles 4, 5, 8, and 25 of the American Convention, and that the amnesty laws lacked legal effect:

Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention. This type of law precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the

victims and their next of kin from knowing the truth and receiving the corresponding reparation. . . . Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect.<sup>50</sup>

But the Peruvian state interpreted the judgment as applying only to the *Barrios Altos* case. On June 20, 2001, the Commission and the petitioners submitted an application for an interpretation of the judgment on the merits under Article 67 of the American Convention. In a judgment issued on September 3, the Court responded that “given the nature of the violation that amnesty laws No. 26479 and No. 26492 constitute, the effects of the decision in the judgment on the merits of the *Barrios Altos* Case are general in nature.”<sup>51</sup>

The Inter-American Court’s ruling on the Peruvian amnesty laws had an immediate and profound impact in Peru and throughout the region. The Constitutional Court, which in 1997 had dismissed as groundless an unconstitutionality suit brought by the *Coordinadora*, corrected its own jurisprudence six years later by establishing the right to truth in its judgment in the *Genaro Villegas Namuche* case.<sup>52</sup>

## WITHDRAWAL FROM THE INTER-AMERICAN COURT

In 1999, toward the end of the second Fujimori administration, in a band-aid attempt to avoid international censure in the *Constitutional Court*, *Ivcher Bronstein*, and *Barrios Altos* cases then before the Inter-American Court, Peru took an unprecedented step in the history of the regional protection system. Legislative Resolution 27152 of July 7, 1999 approved Peru’s withdrawal, effective immediately, from the contentious jurisdiction of the Inter-American Court. The official justification was that Peru sought to avoid having to comply with future judgments that “would open the prison gates” for terrorists, including Shining Path leader Abimael Guzmán, who was convicted in 1992. Peru’s move was a partial renunciation of the American Convention; as such, it was legally unsustainable inasmuch as the Convention contains no provisions expressly stipulating the partial renunciation of the treaty.

The Commission responded immediately:

The Commission deplores this unprecedented decision by the Peruvian state, which is intended to restrict the protection afforded by the

hemispheric human rights system as regards the inhabitants of Peru . . . The decision in question neither alters in any way the obligation of the Peruvian State to comply fully with the judgments of the Inter-American Court nor affects the competence of the Court to hear the cases of Baruch Ivcher, the Constitutional Tribunal, and the others pending in the system. . . . In any case, the Peruvian State remains obligated to comply with its international human rights obligations under the jurisdiction of the Commission.<sup>53</sup>

The Peruvian government became an international pariah. A high-level mission from the Fujimori government led by Prime Minister Alberto Bustamante visited nearly all of the governments in the hemisphere, as well as the political organs of the OAS, in an effort to explain this nonsensical measure. In response, the Coordinadora took the unprecedented step of organizing its own mission, in which I had the honor of participating, to present the opposing view. We visited one country after another, explaining the ominous repercussions of the withdrawal and requesting that governments, legislatures, and civil society speak out against this decision by the Peruvian state.

Peru's withdrawal did not prevent the Court from taking up the *Ivcher* and *Constitutional Court* cases. Ultimately, the Court clearly ruled that it was competent to hear these cases despite Peru's attempts to evade the Tribunal.

Let us then embark on the last part of the saga, which begins in 2000. That year marked the end of the Fujimori regime, the return to the rule of law, and Peru's full reinsertion into the Inter-American human rights system.

## FUJIMORI'S ENDGAME: THE FRAUDULENT 2000 ELECTIONS

In April 2000 Fujimori sought to orchestrate a third reelection, seeking to remain in power and ensure continued impunity for himself and his cronies. The process leading up to the vote was plagued by irregularities. But international scrutiny this time was intense. An OAS observer mission led by Eduardo Stein, former foreign minister and current vice president of Guatemala, set in motion an extraordinary process and raised the bar for the OAS role. Unlike earlier OAS missions to Peru, this one would be neither silent nor

complacent.<sup>54</sup> The mission succeeded in lending coherence to the ambiguous stance of the OAS political organs during those tumultuous months.<sup>55</sup>

The eyes of the entire hemisphere were trained on the elections. The Inter-American Commission acted resolutely at the OAS General Assembly that began on June 4, 2000 in Windsor, Canada. It did not mince words with regard to the fraudulent elections:

The criticisms regarding the illegitimacy of President Fujimori's candidacy must be seen in conjunction with a series of grave irregularities in the electoral process itself. These serious faults were reported by the electoral observation mission of the Organization of American States and by numerous independent agencies from Peru . . . and other countries. In spite of being filed on time and with due documentation, these complaints were not addressed by the Peruvian authorities, which decided instead to conduct the election with the irregularities in place. The documents published by the OAS observation mission, as well as those of observers from Peru and numerous other countries, agree that the recent general election in Peru took place without meeting the applicable international standards. In its report the Commission concludes that this situation constitutes a serious violation of the political rights enshrined in Article 23 of the American Convention.

The IACHR concluded in a clear, searing tone with a statement made by Eduardo Stein before the electoral observer mission left Peru:

The IACHR believes that the lack of judicial independence, the serious restrictions on free expression, the harassment and intimidation of opponents, and the serious irregularities in the election represent a clear violation of the basic foundations for the rule of law in a democratic system under the terms of the American Convention. . . . The recent election in Peru clearly constitutes an irregular interruption of the democratic process. . . . the Commission calls for the reestablishment of the rule of law in Peru and the organization of free and sovereign elections that meet the applicable international standards, and to this end it offers the Peruvian State its cooperation.<sup>56</sup>

By 2001 the democratic transition was well underway in Peru. The *Barrios Altos* judgment coincided with the establishment of the Truth and Reconciliation Commission. A process



was set in motion through which all cases of human rights violations could be aired in the courts, ushering in a new chapter in the history of human rights in Peru. Transitional justice and the right to truth, justice, and reparations were a reality that had been hard to imagine a few years before.

Thus ended a 20-year saga in which Peruvians suffered an internal armed conflict of enormous proportions and a regime that destroyed the rule of law in Peru. The repercussions of this experience are still being felt by Rosa Rojas and tens of thousands of other Peruvians whose loved ones were killed or have never been found.

While it is true that the OAS institutions were guilty of inaction during certain periods of that era, the Inter-American Commission on Human Rights eventually became a critical actor.<sup>57</sup> For the first of the two decades its presence was less significant, as we have seen. Yet during the second decade, the Commission exhibited the best of what the Inter-American system for the protection of human rights is capable of. In Peru's complex drama, many national and international actors have played pivotal roles in the effort to bring truth, justice, and reparations within the reach of victims. What is certain is that Peru's debt to the Inter-American human rights system will be very difficult to repay.

## NOTES

1 Comisión de la Verdad y Reconciliación, *Informe Final* (Lima, August 2003), vol. I, chap. 1. (Hereafter cited as Truth Commission Report; all translations of excerpts from this report in this chapter are by the Due Process of Law Foundation.)

2 The Truth and Reconciliation Commission determined that most violations were committed from 1983 to 1985 and from 1988 to 1993.

3 “The descent into political violence that began with the strategic defeat of the Shining Path and the MRTA in the late 1980s—and intensified following the 1992 capture of Abimael Guzmán—coincided with the emergence and consolidation of an authoritarian political regime. The regime became a dictatorship buttressed by the intervention and control of all State institutions and the development of an intelligence network devoted to persecuting and threatening the regime's critics and enemies and to the control and manipulation of most of the mass media, among other things.” Ernesto de la Jara, “Derechos Humanos, un movimiento hecho en el Perú (1980–2003).” Essay prepared for the Ford Foundation project “Agenda nacional e internacional para el trabajo de derechos humanos en América Latina (2002–2003).”

4 Carlos Basombrío, *La paz: Valor y precio: Una visión comparativa para América Latina* (Lima: Instituto de Defensa Legal, 1996), pp. 13–14.

5 On the creation and activities of the Coordinadora, see Coletta A. Youngers, *Violencia política y sociedad civil en el Perú: Historia de la Coordinadora Nacional de Derechos Humanos* (Lima: Instituto de Estudios Peruanos, 2003); Patricia Tappatá de Valdez, “Evaluación de las respuestas de las organizaciones no gubernamentales de derechos humanos a la violencia política en el Perú durante el período 1980–1986: Recomendaciones para su acción futura” (unpublished manuscript, Lima, 1991); and Joanna Drzewieniecki, “The Coordinadora Nacional de Derechos Humanos: A Case Study,” in *Sociedad civil, esfera pública y democratización en América Latina*, vol. 1, *Andes y Cono Sur*, coord. Aldo Panfichi (Mexico: Fondo de Cultura Económica; Lima: Pontificia Universidad Católica del Perú, 2002).

6 According to APRODEH’s current director, Francisco Soberón, “The first petitions prepared by APRODEH were submitted around 1983, after the state of emergency was declared in Ayacucho in 1982. In February we received nearly 70 complaints of forced disappearance and we began to explore the route of the Inter-American system.” He spoke with the author in 2006.

7 Amnesty International, *Caught Between Two Fires: Peru Briefing* (London: Amnesty International Publications, 1989).

8 Organization of American States, AG A/RES.1043(XX-0/90).

9 As Carlos Basombrío, a prominent Peruvian human rights advocate, explained, “We decided to denounce each and every crime committed by the Shining Path with the same energy and conviction with which we denounced violations by the State. What is more, distinguishing ourselves from most human rights groups in Latin America, we broke with the notion of neutrality or mere attempts to humanize the conflicts. . . . we felt solidarity with civil society’s desire to defeat the Shining Path and we supported the legitimate efforts of the State to achieve that objective.” Quoted in Youngers, *Violencia política y sociedad civil*, p. 229.

10 “The inability to consider terrorist acts as human rights violations, then, is exclusively a juridical limitation and refers only to the jurisdictions of organs supervising State practices and the scope of the international obligations set forth in legal conventions. It does not refer to the concept of ‘human rights,’ to its moral scope, nor to the factors that may be taken into account when characterizing an act within a community. This being the case, the objection based on the content of legal treaties and jurisdictional limitations has no merit in the social sphere. In other words, this restrictive legal definition is meaningless to those who are not concerned with issues relating to legal jurisdiction, but rather are contemplating terrorist action from an ethical standpoint. Attempting to use a juridical definition in this context is similar to employing legal arguments to resolve an ethical problem.” Truth Commission Report, vol. I, chap. 4, “La Dimensión Jurídica de los Hechos.”

11 IACHR, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., October 22, 2002. On June 3, 2002, the General Assembly of the OAS approved and opened up for signature the Inter-American Convention against Terrorism.

12 *IACHR Annual Report 1992–93*, chap. IV.

13 *IACHR Annual Report 1990–91*, chap. V.

14 *IACHR Annual Report 1993*, chap. IV (emphasis added).

15 According to the Coordinadora's annual reports on this situation, cited in *IACHR Annual Report 1996*, over 40 percent of the Peruvian population was living in a state of emergency in zones under military control for a protracted time period.

16 Truth Commission Report, vol. VI, chap. 1, 1.2, "Desaparición forzada de personas por agentes del estado."

17 Inter-American Court, *Velásquez Rodríguez v. Honduras*, Judgment of July 29, 1988, Ser. C, No. 4, pars. 150, 155, 157, and 188.

18 IACHR Press Release 7/91, Lima, October 31, 1991. Years later, the investigation carried out by the Office of the Public Defender before the Public Ministry resulted in the identification of 7,762 cases of disappeared persons. Defensoría del Pueblo de Perú, *La desaparición forzada de personas en el Perú 1980–1996*, Informe no. 55 (Lima, 2002), p. 693. In addition, COMISEDH, Peru's Human Rights Commission, published *Memoria para los ausentes: Desaparecidos en el Perú, 1982–1996* (Lima, 2001), containing important testimony on the issue of forced disappearances.

19 Twenty years later, when the *Los Cabitos* case was opened, the mortal remains of 15 people were found at the site by a team of forensic experts team under the Specialized Prosecutor's Office for Human Rights (Fiscalía Especializada de Derechos Humanos) in Ayacucho. An incinerator with the remains of bones was also found. Work still needs to be done on an additional seven hectares of the previously impregnable military headquarters. This case is sponsored by APRODEH in conjunction with other Peruvian human rights groups including Paz y Esperanza.

20 *IACHR Annual Report 1998*. The report covered the cases of *Eudalio Lorenzo Manrique* (10.824), *Pedro Herminio Yauri Bustamante* (11.044), *Eulogio Viera Estrada* (11.124), *Héctor Esteban Medina Bonet* (11.125), and *Justiniano Najarro Rúa* (11.175).

21 IACHR Report 101/01, Case 10.247 et al., *Extrajudicial Executions and Forced Disappearances of Persons in Peru*, October 11, 2001.

22 The Peruvian state only deposited its ratification instrument of this convention on February 13, 2002, eight years after the convention's adoption in Belém do Pará, Brazil in June 1994 and its entry into force in March 1996.

23 The working group was established by Supreme Resolution 304-2000-Jus of December 9, 2000. Dr. García Sayán is currently a judge of the Inter-American Court of Human Rights.

24 Truth Commission Report, vol. VI, chap. 1, "Patrones en la perpetración de los crímenes y de las violaciones de los derechos humanos," 1.1, "Los asesinatos y las masacres."

25 On May 18, 20, and 24 of that year, the IACHR received petitions and information from APRODEH on the incidents that occurred in Cayara, as documented in cases 10.264, 10.206, 10.276, and 10.446, which were joined in the *Cayara* case.

26 See the account of this case and the investigations referred to in IACHR Resolution 1/91 of March 12, 1991, particularly the report by Dr. Carlos Enrique Escobar Pineda to the chief penal prosecutor (*fiscal superior en lo penal*). Reported in OEA/Ser.L/V/II.80 Doc. 44, October 27, 1991.

27 Méndez is the current president of the International Center for Transitional Justice and an adviser to the United Nations on prevention of genocide. He spoke with the author in 2006.

28 APRODEH and the International Federation of Human Rights co-published a report entitled *Alegato por Cayara: Enjuiciando la verdad oficial* (Lima, 1999). In their introduction, the editors set forth several reasons why the Cayara case is so significant. In the first place, “It represents a turnaround in terms of human rights violations by a government that came into office saying it would not tolerate such violations.” It was, moreover, an emblematic case in terms of the enormous impunity surrounding it: “the facts were clear and there was little doubt as to the responsibility of the perpetrators . . . despite the evidence, the entire State machinery lent itself to the cover-up.” The authors point out anecdotally that it was this case that enabled Vladimiro Montesinos, an obscure lawyer who had been expelled from the Peruvian army in 1976, to reestablish his ties with military commanders and prevent the prosecution of the perpetrators of this massacre.

29 Rojas is the current executive secretary of the Coordinadora and was for many years director of COMISEDH. He spoke with the author in 2006.

30 Vladimiro Montesinos, then head of Peru’s intelligence services, masterminded the freeing of the hostages. Many observers deemed the operation a strategic military success, since all of the hostages except one were rescued alive. We now know, however, about the summary executions of surrendered MRTA members, among whose unarmed corpses a triumphant Alberto Fujimori paraded.

31 Robert K. Goldman, “History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights,” speech on the occasion of the 45th Anniversary of the Inter-American Commission on Human Rights (copy provided to the author).

32 *Revista Ideele* noted, “In the opinion of experts on the Inter-American system, very rarely has there been such an extensive, unequivocal and critical declaration at the end of a visit.” “No hay estado de derecho en el Perú,” *Revista Ideele* 130 (September 2000).

33 IACHR Press Release 20/98, November 13, 1998.

34 See the very solid analysis by Ronald Gamarra, a jurist with the Legal Defense Institute (IDL), *Terrorismo: Tratamiento jurídico* (Lima: Instituto de Defensa Legal, 1999). The 13 laws are Decree-Law 25475 of May 6, 1992; Decree-Law 25499 of May 16, 1992; Decree-Law 25564 of June 20, 1992; Decree-Law 25643 of July 25, 1992; Decree-Law 25659 of August 13, 1992; Decree-Law 25659 of August 13, 1992; Supreme Decree 114-92-JUS of August 14, 1992; Decree-Law 25708 of September 10, 1992; Decree-Law 25728 of September 18, 1992; Decree-Law 25744 of September 21, 1992; Decree-Law 25824 of November 1992; Decree-Law 25880 of November 26, 1992 (treason); and Decree-Law 25916 of December 2, 1992.

35 IACHR, *Second Report on the Situation of Human Rights in Peru*, OEA/Ser.L/V/II.106, Doc. 59 rev., June 2, 2000.

36 Ernesto de la Jara Basombrío, *Memoria y batallas en nombre de los inocentes: Perú 1992–2001* (Lima: Instituto de Defensa Legal, 2001).

37 *Report of the Commission of International Jurists on the Administration of Justice in Peru* (Lima: Instituto de Defensa Legal, 1994).

38 In *Memoria y batallas*, Ernesto de la Jara states, “The Inter-American human rights system can be criticized for its inability to develop the capacity to obtain a rapid and effective response that would prevent or stop a legal framework that is blatantly incompatible with the Convention and with a series of decisions, recommendations, and decisions emanating from that System from being applied to thou-

sands of people over several years. Clear, unequivocal and emphatic pronouncements coming from the Commission and the Court warning of the accumulated illegitimacy of all those cases, accompanied by very precise recommendations to be fulfilled, could have had a dissuasive effect.” With respect to the application of anti-terrorism laws and their serious effects, de la Jara urges the Commission to play a preventive role, warning in 2001 that “they’re only beginning to see such cases.”

39 Law 2665, August 17, 1996. The Commission’s mandate was extended through the eight-month tenure of the Transitional Government.

40 The Ad Hoc Commission’s final report indicated that 28 percent of the 3,878 people imprisoned for terrorism were freed, 12 percent because they were pardoned and 16 percent because they were acquitted.

41 IACHR, *Special Report on the Human Rights Situation at the Challapalca Prison, Department of Tacna, Republic of Peru*, OEA/Ser.L/V/II.118, Doc. 3, October 9, 2003.

42 In December 2005, Amnesty International reported that 57 people linked to the Colina Group, including Montesinos, were on trial in Peru for crimes of criminal association, aggravated kidnapping, first-degree murder, and forced disappearance in relation to the cases of *La Cantuta* and *Barrios Altos*, as well as the kidnapping and murder of nine inhabitants of El Santa, Ancash, in 1992 and the disappearance and murder of journalist Pedro Yauri Bustamante in that same year. In September 2005, three people accused of belonging to the Colina Group acknowledged that they were guilty of the charges against them. Their statements confirmed not only the existence of the paramilitary group but also its links with the Army Intelligence Service and with Fujimori. Amnesty International, “Peru/Chile: Fujimori Facing Justice: The Victims’ Right,” public statement, December 5, 2005.

43 *La Cantuta v. Peru*, Judgment on the Merits, Reparations, and Legal Fees, November 29, 2006, Ser. C, No. 162.

44 The Truth Commission Report examines the emergence and purposes of the Colina Group: “Since 1989, the National Intelligence Service (SIN) and the Army Intelligence Service (SIE) have engaged in following [Shining Path] activists in Lima. According to a document disseminated in the Congress on November 11, 1991, the SIE implemented a plan called ‘Ambulante’ to watch pro-subversive activists and properties in the zone of Barrios Altos, in the center of Lima, including a tenement house located at Jirón Huanta no. 840” (vol. VII, chap. 2).

45 The attorney general, Blanca Nélica Colán, was later sentenced to 10 years in prison for concealment of offenders, failure to report a crime, general misrepresentation, and illicit enrichment.

46 See Youngers, *Violencia política y sociedad civil*, pp. 328–34.

47 On June 11, 1997, the petitioners requested that CEJIL be added as a co-petitioner in the case.

48 Inter-American Court, *Barrios Altos v. Peru*, Judgment of March 14, 2001, Ser. C, No. 75, par. 1.

49 *Ibid.*, par. 36.

50 *Ibid.*, pars. 43–44.

51 Inter-American Court, *Barrios Altos* Case, Judgment of September 3, 2001, Ser. C, No. 83, par. 18.

52 The Constitutional Court held that “it falls to the State to prosecute those responsible for crimes against humanity and, where necessary, to adopt restrictive laws to prevent, for example, statutes of limitation for crimes against human rights. The application of such laws is conducive to the effectiveness of the legal system and is justified by the prevailing interests of the struggle against impunity. The

objective, evidently, is to impede certain mechanisms in the criminal law system, which are applied for the repulsive purpose of securing impunity. This must be prevented and avoided, since it encourages criminals to repeat their behaviors, becomes a breeding ground for vengeance, and corrodes the underlying values of democratic society: truth and justice.” *Villegas Namuche Case*, 2488-2002-HC/TC, judgment of March 18, 2004.

53 IACHR Press Release 21/99, July 9, 1999.

54 In an interview published in *Revista Ideele*, the monthly magazine of the IDL, Stein stated, “Peru, as I then discovered, had already had four OAS observer missions. These in large part were evaluated by the political opposition as complacent missions, missions that had come to give their blessing to an electoral situation and endorse it, without any sort of critical participation beyond reporting a few anomalies. What is more, the OAS electoral observer missions were traditionally very silent. This mission could not be accepted in those terms. In any case, I would not have accepted it.”

55 It should be remembered that OAS secretary general César Gaviria determinedly set out to find a state in the hemisphere willing to accept Vladimiro Montesinos, who is now being prosecuted for crimes against humanity and serious corruption offenses against the state. In contrast, during the turbulent OAS General Assembly held in Windsor, Canada, on June 4, 2000, the Canadian government played a very important role by supporting the OAS Dialogue Roundtable that included civil society and that was created in Peru to attempt some sort of co-existence, an impossible task, with the illegitimate Fujimori government. Such “lights and shadows” in the behavior of the political organs of an organization like the OAS also demonstrate the autonomy of the Inter-American human rights system vis-à-vis those organs.

56 IACHR Press Release 06/AG/00, “Report by the IACHR on the Situation of Human Rights in Peru,” June 4, 2000.

57 A critical view of the work of the political organs of the OAS is set forth in an article published in *Revista Ideele*: “It falls to us as Peruvians to find a speedy civic, peaceful, unifying, and successful alternative for a return to democracy (NOW!). But this process will be longer and more costly if the OAS persists in its current timidity, which does nothing more than strengthen those responsible for the problem and encourage them to stage new disruptions . . . its plan for democratization . . . in 29 points just about covers the whole range of ills, much like a pharmacy, with the sole exception of the main problem at the heart of its presence in Peru: the elections. Worse yet, the way some of the recommendations are formulated should make the authors blush. For example, one recommendation is to ‘study the possibility of the return to the Court.’ The OAS thus disregards . . . the Court’s declaration that it did not recognize Peru’s withdrawal from its jurisdiction; it is unnecessary to return to something from which one has never withdrawn, much less ‘study the possibility’ of doing so. This attitude is frankly discouraging. Their proposal for an ‘independent commission’ on respect for human rights is a truly undeserved and uncalled-for slap in the face of the independent human rights organizations in the country . . .” Carlos Basombrío, “La responsabilidad de la OEA,” *Revista Ideele* 130 (September 2000).

## **Part II** Thematic Studies







## THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

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Ariel E. Dulitzky

What is the relevance of the Inter-American human rights system in strengthening transitional justice processes in the region of the Americas? Most informed observers would begin by citing the Inter-American Court of Human Rights judgments in the *Barrios Altos* case from Peru and the *Almonacid* case from Chile.<sup>1</sup> Similarly, if pressed to cite a contribution that the Inter-American Commission on Human Rights (IACHR) has made toward transitional justice in Latin America, they might recall Reports 28 and 29 of 1992, concerning the so-called amnesty laws in Argentina and Uruguay.<sup>2</sup>

The contribution of the Inter-American human rights system, however, cannot be examined solely through the actions and decisions of the Commission and the Court. The system comprises four essential groups of actors: states, as the architects and executors of their international obligations; the political organs of the Organization of American States (OAS), in theory the collective guarantors of the system itself;<sup>3</sup> the Commission and the Court; and finally, victims and civil society organizations. One must therefore scrutinize the interactions between these four sets of actors, at minimum, together with the conditions that allow these interactions to advance the goals of truth, justice, and reparations.

A vision of the system through the lens of resolved cases is limited and problematic. A purely legalistic case-centered approach to the Inter-American system, focusing on the *Barrios Altos* and *Almonacid* cases, fails to elicit its true contribution. Can the mere examination of a judgment's content be sufficient to establish whether the Inter-American system is in fact fulfilling the role it is called upon to perform? Can an exclusively juridical Inter-American approach truly address victims' demands for truth, justice, and reparations? Even if one believes that an Inter-American juridical response is the ideal means to meet the needs of transitional justice, it is still relevant to ask just what the role of the Commission may be in this legalistic, case-centered approach.

The Inter-American system should therefore be regarded from the standpoint of the powers ascribed to the Court and, in particular, to the Commission. A look at the Commission

reveals how it has employed the various tools at its disposal to participate in the public debate over transitional justice. We may ask whether the IACHR's signal contribution derives from its resolution declaring Chile's self-amnesty law incompatible with the American Convention on Human Rights, which it reiterated in numerous cases before finally sending a Chilean case to the Court.<sup>4</sup> Or was it perhaps more important that three commissioners testified before the Truth and Reconciliation Commission in Peru,<sup>5</sup> or that the Commission turned over the entirety of its historical archives to Panama's Truth Commission?<sup>6</sup> What about the provisional measures it requested on behalf of children who had been adopted illegally by their parents' captors under the military dictatorship in Argentina? Perhaps more relevant still was its adoption of a report on El Salvador following publication of the Salvadoran Truth Commission's findings and the enactment of the amnesty law, or its resolutions on asylum and international crimes, the prosecution of such crimes, and universal jurisdiction.<sup>7</sup>

There are no pat answers to these questions or to others that could be posed. At least I do not profess to have such answers. The essays included in this volume are a collective reflection intended to deepen the debate over the prerequisites for the success of a regional human rights system. They offer a critique of how success is measured and explore the type of profile the Inter-American system should have if it is to address the demands currently emanating from the region. What is clear is that transitional justice—and in a broader sense, the transition from dictatorships and civil wars to weak democratic systems with still-unresolved structural and institutional deficiencies in the area of human rights—requires a reflection on the Inter-American system. We must examine the types of cases taken up by the Commission and the Court, the way both organs operate and the tools they employ, as well as the new ways in which the different actors of the Inter-American system relate to each other. What follows is a rough sketch of certain elements for reflection which, rather than purporting to offer conclusive answers, is intended to spur a broader debate.

## OBJECTIVES OF THE INTER-AMERICAN SYSTEM

As reflected in the chapters that follow, it is not possible to answer all these questions without first determining the aims, objectives, and mandates that govern the actions of the Inter-American human rights system. It could be argued that the most important contribution the Inter-American system has made to transitional justice is the Court's judgment

in the *Barrios Altos* case, considering that the fundamental role of an international tribunal is to set forth the appropriate interpretations of the American Convention on Human Rights, together with the applicable reparations, in addition to resolving cases through binding legal judgments. Conversely, it could be argued that the Inter-American system is only effective to the extent that domestic courts apply the Convention or adhere to the interpretations handed down by the Inter-American organs. One might also assert that the Inter-American system was effective when it monitored developments in the search for truth, justice, and reparations in Argentina for nearly two decades, consistently following up on the recommendations from Report 28/92 concerning that country's impunity laws until the Argentine Supreme Court finally found them unconstitutional.<sup>8</sup> This transpired without the direct intervention of the Inter-American Court in Argentine cases on the subject. Could it be that the best example of the Commission's effectiveness is the space it created in Argentina, previously nonexistent in that country, for civil society organizations to hold the state accountable for its actions before an independent third party such as the IACHR, rather than allow the demand for truth, justice, and reparations to be confined to a single social sector?

This section offers a brief outline of what I consider to be the fundamental objectives of the Inter-American system. By identifying these basic objectives we change the way the Inter-American system's role in transitional justice is evaluated.

## Protecting individuals

International protection of the individual may be construed as the concrete ability to remedy a human rights violation and to safeguard the right or freedom at stake in a particular case. Obviously, in terms of transitional justice this translates into the system's ability to guarantee truth, justice, and reparations for specific individuals. The entire Inter-American system revolves around this core objective. The American Declaration of the Rights and Duties of Man, for example, establishes among its principles that "the international protection of the rights of man should be the principal guide of an evolving American law."<sup>9</sup> Likewise, the American Convention establishes that the Commission and the Court are the "means of protection" of the rights set forth therein.<sup>10</sup>

From this perspective it would appear obvious that the case system, in conjunction with the protective mechanisms of precautionary and provisional measures, offers the best tool for attaining this objective. The Inter-American system's contribution should be mea-

sured in terms of whether it has achieved truth, justice, and reparations in the case of specific victims who have sought its assistance. Toward this end, one can examine all of the Commission's reports on individual cases, as well as the judgments issued by the Court, that document that the rights of the victims were violated because the state failed in its obligation to guarantee truth, justice, and reparations, and that ultimately it was the decision of the international organs that protected those rights.<sup>11</sup>

In a formalistic sense, one could argue that the Commission and the Court have been effective to the extent that a decision issued by these organs *per se* constitutes a remedy of sorts. Of course, we consider the Inter-American system to have been completely effective for specific victims if, once a favorable decision has been obtained from an international organ that partly restores their honor and dignity, that decision is fully carried out by the states involved. But we do not believe that the protection of rights is secured solely through individual cases. It is also achieved when the Commission requests the adoption of precautionary measures or the Court grants provisional measures to protect judges, public prosecutors, witnesses, and victims in their attempts to see justice done.<sup>12</sup> Other examples include situations in which a report on the general situation of human rights in a particular country, or a public declaration, helps to prevent or mitigate a situation of impunity to the detriment of specific victims,<sup>13</sup> or when the authorities take action based on the recommendations or statements issued by the Commission.

## **Promoting awareness of the human rights situation**

The organs of the Inter-American system promote awareness of the human rights situation by providing credible, reliable information on the overall human rights strategy in a particular country in terms of general patterns of behavior, their rationale, and their motives.<sup>14</sup> The American Convention states specifically that one of the Commission's roles is to "develop an awareness of human rights among the peoples of America."<sup>15</sup>

One of the Inter-American Commission's primary tools is the preparation of country reports, usually following an on-site visit.<sup>16</sup> One purpose of these reports is to "mobilize international public opinion to bear witness credibly, as a basis for opinions on situations of massive and systematic violations" of human rights.<sup>17</sup> Another objective is to develop specific policy recommendations for states.

An example of the Commission's timely action in this regard was its 1994 *Report on the*

*Situation of Human Rights in El Salvador*, which harshly criticized the enactment of the amnesty law just days after the publication of the Truth Commission's report.<sup>18</sup> Another relates to Guatemala, when the IACHR approved a report five years after the signing of the peace accords to verify the progress and problems in implementation to date. The Commission also may promote awareness through its analysis of the general situation in a country. In response to the incipient democratic opening in the Southern Cone, for instance, the IACHR pointed out in 1986 that "the urgent need for national reconciliation and social pacification must be reconciled with the ineluctable exigencies of an understanding of the truth and of justice." It reiterated that "every society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future."<sup>19</sup> The IACHR also fosters understanding by making recommendations in specific areas, such as the resolutions on universal jurisdiction and international crimes mentioned earlier.

Lastly, besides doing justice in a specific case, individual case work exposes the underlying context. Returning to the narrow argument that the Inter-American system's primary task consists of processing cases, it is evident that every time the Commission adopts a final report or the Court issues a judgment on a core aspect of transitional justice, those decisions transcend the individual case involved. They serve as a reminder to the state that the practice at issue is incompatible with international standards and should be corrected before the situation deteriorates. At the same time, the Commission and the Court alert the international community to certain circumstances in that state that contravene international human rights standards. An important advantage of raising awareness through individual cases is that the issue is depoliticized: that is, the conclusions reached by the Commission and the Court derive from a legal debate between the petitioner and the state.

The credibility of the organs of the Inter-American system must be ensured if they are to effectively fulfill the objective of raising awareness. To have an impact, the message of the Commission and the Court must be heard and accepted as objective, impartial, well-founded, logical, and reasonable. The power of the Inter-American organs hinges solely on their capacity for persuasion. For this reason, their message must be clear with respect to the legal imperatives associated with truth, justice, and reparations. It must also be realistic, meaning that these organs must be able to adapt general legal principles to different political and social contexts, while always preserving their independence and impartiality.

The Commission and the Court, therefore, must continually remind themselves exactly who it is they wish to persuade and who constitutes their target audience. Is it the state itself and, if so, only the direct interlocutor with the system's organs, in other words, the ministry of foreign affairs? Or is the main audience judges, or legislators, or perhaps the OAS or the international community? What about human rights groups, the victims themselves, or the press? Does the audience include all of these actors or only some of them? The country case studies presented in this volume show that the strategy of persuasion must cast the widest possible net. Only when a wide range of actors are persuaded by the legitimacy of the Inter-American message—its impartiality, rationality, and apolitical nature—will genuine progress be made in the sphere of transitional justice.

### **Creating space for democratic dialogue**

Even today, many Latin American countries lack a broad public space for the safe and democratic debate of human rights issues. Weaknesses and gaps in the functioning of legislatures and judiciaries frequently make it difficult to take up such issues in the context of parliamentary or legal debates. In many countries in the hemisphere, human rights defenders and journalists who report human rights violations or official corruption and abuses become targets of threats, assassinations, and kidnappings.<sup>20</sup> In this context, one of the primary objectives of the Inter-American system is to create a safe space for civil society and the government to engage the debate over human rights and—of particular interest in the context of this volume—the best strategies for truth, justice, and reparations.

This space may be found in individual case processing, which entails an egalitarian discussion of whether the state has fulfilled its duty to ensure the right to truth, justice, and reparations. The state and the victims engage in a legal debate before impartial actors such as the Commission and the Court. Moreover, the state may not take reprisals against the complainants and it is obligated to respond to, and cooperate with, the organs of the system. In theory, through the case system the dialogue can be depoliticized in the sense of averting any perception that it is geared to partisan political benefits.

General public policy debate occurs mainly in connection with the Commission's advocacy role, in particular its general thematic hearings. In recent years, for example, the Commission has scheduled hearings on implementation of the recommendations of the Truth and Reconciliation Commission in Peru, on progress made by the Uruguayan

administration in limiting the effects of the impunity law in that country, and on the national reparations program in Guatemala.<sup>21</sup> Some might say that such hearings have facilitated dialogue between governments and human rights groups and enabled states to benefit from the cooperation of the Inter-American system in developing human rights policy or in determining the available remedies. In many instances these hearings have served simply to keep an issue on the radar screen of the international community until such time as the conditions in-country are more conducive to advancing the debate on specific aspects of transitional justice.

## **Legitimizing actors**

Victims of human rights violations in Latin America, especially during periods of dictatorship or civil war, have not been distributed randomly among the population. In a general sense, victims tend to be concentrated disproportionately among the poor, the landless, the disenfranchised, and members of ethnic, racial, cultural, and political minorities.<sup>22</sup> Victims have been, and in some cases continue to be, silenced not only by force and fear but also by efforts to delegitimize their right to criticize. The same holds true for human rights groups and attorneys who defend the rights of victims and who, in countless instances, have been discredited by the government. In the case of transitional justice, more than once national authorities have accused those demanding truth, justice, and reparations of seeking vengeance, reopening old wounds, dredging up the past, or serving foreign interests.

The Inter-American system has a key role to play in this regard by acting as a channel of access for the silenced majorities and by lending legitimacy to the victims and their representatives. By listening and attending to the claims brought by different sectors, an international entity such as the Commission lends credence to these sectors. In doing so, the Commission sends a clear signal to states: these sectors have a valid message that must be heeded. Moreover, the Inter-American system legitimizes actors by ensuring that they are not censured for the mere act of approaching an international forum. As the Inter-American Court consistently has affirmed, beginning with its first contentious case, “some of the Government’s arguments are unfounded within the context of human rights law. The insinuation that persons who, for any reason, resort to the Inter-American system for the protection of human rights are disloyal to their country is unacceptable and cannot constitute a basis for any penalty or negative consequence.”<sup>23</sup>

Finally, the Commission and the Court have been extremely receptive to the need to protect members of civil society and thereby legitimize their work. In 2005, for example, the Commission adopted precautionary measures to protect witnesses of human rights violations, members of human rights organizations, indigenous leaders, and members of social organizations, especially trade unions. In its recently published *Report on the Situation of Human Rights Defenders in the Americas*, the Commission underscored the crucial role these actors play in democratic societies. It affirmed that “the work of human rights defenders, protecting individuals who are victims of human rights violations, publicly denouncing the injustices that affect large sectors of society, and pointing to the need for citizen oversight of public officials and democratic institutions, among other activities, means they play an irreplaceable role in building a solid and lasting democratic society.”<sup>24</sup>

## **Building a culture of human rights**

A consolidated, accepted, and widespread culture of human rights is still missing in Latin America. The region lacks a social atmosphere in which human rights standards are part of the daily life of citizens, the authorities are accountable for violations of fundamental freedoms, and the judiciary offers genuine remedies when abuses occur. The Inter-American system must act as a guide for domestic courts, legislatures, and governments in their efforts to build democratic societies based on respect for individual rights and the rule of law.

In this regard, it is crucial to develop jurisprudence by establishing precedents and monitoring countries. The case system helps broaden and deepen democracy by creating a culture of legality through the interpretation of Inter-American standards. Moreover, when the organs of the system adhere to these same standards, they act as a model for domestic governments. Their own procedures, therefore, must ensure transparency, reduce discretionary actions, and promote equality of the parties. The serious and prompt consideration of each petition is another important prerequisite derived from this objective.

The Commission’s hearings, thematic studies, country reports, and advocacy efforts also help to strengthen this democratic culture by seeking dialogue with social sectors, politicizing the debate, formulating recommendations, reporting problems in a timely manner, and training government officials.



## ROLES AND INTERACTIONS OF THE COMMISSION AND THE COURT IN TRANSITIONAL JUSTICE

The notion that the Inter-American human rights system's main contribution to transitional justice consists of the *Barrios Altos* or *Almonacid* decision is based on the premise that the best approach to human rights is an Inter-American juridical one. From this standpoint it would appear that scant relevance is accorded the work of the Inter-American Commission, not only in the exercise of its general powers but in terms of individual casework as well. The implication seems to be that a fragmented approach based on the 15 or so cases decided annually by the Court is more important than a more comprehensive approach encompassing all the demands for truth, justice, and reparations in the region and the different ways in which the system addresses them.

From the standpoint of individual cases, one might ask whether the 15 decisions issued by the Inter-American Court in periods of transitional justice can really meet the needs of our countries or whether, to the contrary, they will simply mirror the problems of unequal access to justice. Over 300 massacres were committed during the course of the scorched-earth policy in Guatemala. Is a legal ruling in one of them—the Plan de Sánchez massacre—the best strategy available to the Inter-American system to put an end to the prevailing state of impunity for all these atrocities?<sup>25</sup> Or does it merely reflect the ability of a nongovernmental organization, one familiar with the system and endowed with sufficient resources, to document and process this case before the Commission and later the Court? What happens with regard to the other 300 massacres and the victims who do not have access to the system?

Similar questions arise when we examine the amounts of compensation granted by the Court in the form of reparations. What are the consequences of asserting that the Inter-American parameters established in connection with a particular case should be applied as national standards? An estimated 69,000 murders were committed in Peru during the internal armed conflict. If the amounts granted by the Court as reparations for violations of the right to life were to be used as the yardstick for reparations at the domestic level, the Peruvian state would owe between \$80,000 and \$200,000 for every murder. This comes to a grand total of \$5.5 billion to \$13.8 billion, a significant portion of the country's gross domestic product and nearly its entire annual budget.<sup>26</sup>

Such concerns suggest that the Inter-American system and those who use it should take

a more comprehensive approach to transitional justice, based on the regional situation in general and on the limitations, strengths, potential, and opportunities offered by each Inter-American tool. The Commission and the Court should be regarded as having complementary, nonhierarchical mandates to take up matters relating to the fulfillment of the commitments acquired by the states parties to the Convention (Article 33). A legal judgment in a case should not always be viewed as the most effective way to further the objectives of truth, justice, and reparations in a particular country. The intention here is not to undercut the case system, but rather to place it in its proper context and avoid making it into more than it is.

An analysis of the Inter-American system and its effectiveness should encompass the myriad roles assigned to it. In certain circumstances processing an individual case may not be as important as issuing a resolution to help combat impunity in a particular country, influence a parliamentary debate over a particular bill, or perhaps facilitate the extradition of individuals accused of serious human rights violations. The Commission can also offer general guidelines on how to address broader issues such as the situation of children of disappeared persons.<sup>27</sup> It can insist on the appointment of a central figure to direct implementation of a reparations program in a country, rather than process a particular case concerning a specific situation that may not be representative of the broader problems facing that society.<sup>28</sup> In a system beset by chronic financial problems, it is not always realistic to argue that the best strategy is to employ all of these tools at once.

Regarding interactions between the Commission and the Court, it is important to consider the different means by which the Commission can facilitate the Inter-American Court's contribution to transitional justice. For example, the Commission may choose to refer cases to the Court, request provisional measures, or request advisory opinions.<sup>29</sup> The American Convention on Human Rights has assigned an important role to the Commission, requiring its presence in all matters taken up by the Court.<sup>30</sup> There are two bases for this requirement. First, the Convention regards the legal system of individual petitions as just one aspect of one of the tools designed to promote and protect human rights in the region. It is important, therefore, that the Court listen to the Commission as an organ empowered to utilize the entire remaining spectrum of alternatives in cooperation with OAS member states. Second, the Commission represents an Inter-American interest that transcends the parties to a particular case. It is essential that the Court respond to this overall vision rather than to a particular point of view.<sup>31</sup> In terms of transitional justice, the Commission must present the true dimensions of the specific case under consideration by the Court in the context of existing national and regional efforts.

With regard to individual cases, it is significant that the Commission is one of the principal organs of the OAS Charter (in contrast to the Court, which is Convention-based). It therefore represents all member states of the OAS. This has two implications for transitional justice. First, the Commission has competence to evaluate the human rights situation in each and every member state of the OAS and not just in those that have ratified the American Convention and accepted the jurisdiction of the Court. This affords the Commission broader geographic coverage relative to the Court.

Second, the Commission has competence to examine situations that have occurred since its founding in 1959, and it can apply the American Declaration of the Rights and Duties of Man to circumstances that predate the ratification of the American Convention. Hence, the Commission exercises broader temporal competence than the Court, which may only examine events that followed the declaration by the respective state accepting the Court's competence. This distinction is critical in countries such as Argentina, Chile, El Salvador, and Brazil, which ratified the Convention and/or accepted the Court's jurisdiction only after the restoration of democracy or the end of a civil war, thereby barring the Court from taking up the serious, massive, and systematic violations that occurred during those periods. In those countries the Court, unlike the Commission, may take up only procedural violations or due process violations; it may not consider the violation of a substantive right such as a massacre, extrajudicial execution, or torture.<sup>32</sup> Forced disappearances constitute a limited exception to this insofar as they are defined as a continuous crime, although the Court has been extremely restrictive in this regard.<sup>33</sup>

The American Convention of Human Rights grants the Commission the authority to decide whether a case should be taken up by the Inter-American Court or whether it should be resolved through a decision of the Commission itself.<sup>34</sup> According to the American Convention, the decisions of the Court and the Commission are equally valuable and effective for the protection and promotion of human rights, and the Convention therefore confers upon the main OAS advisory organ—the Commission—the authority to decide which of the two will have the final say. In my view, this is a clear indication that the Convention does not necessarily consider a judicial decision to be the only or the best possible solution. Indeed, for years the Commission chose to publish its decisions regarding amnesty laws in cases from Argentina, Uruguay, Chile, and El Salvador, rather than refer them to the Court. Only after many years did it begin to send some, though not all, cases concerning similar issues to the Court. In this way the Commission established a series of precedents on the incompatibility of self-amnesty laws with the Convention. Once the various Inter-American actors had assimilated this groundbreaking work, the

Commission decided that the optimum human rights protection should be consolidated juridically through a Court decision, which it subsequently obtained with the *Barrios Altos* judgment.

## COMMISSION-STATE RELATIONS: THE NEED FOR DIALOGUE

State entities have a critical role to play in the application of international law. International provisions are only operational to the extent that states activate their domestic legal systems to give them effect. This is the weakest link of international law insofar as compliance with its obligations is ultimately in the hands of domestic organs. The authors of this volume illustrate several of these weaknesses in their national case studies.

With regard to transitional justice, the Inter-American system relies on the establishment of a dialectical relationship with domestic legal systems. These must give effect to their international commitments through legislative, administrative, or judicial means, or any other necessary and effective means to ensure truth, justice, and reparations. At the same time, the Inter-American system, using the methods outlined earlier, monitors state actions relevant to these international obligations to determine whether justice is being served.

These two aspects, application and monitoring, establish—or at least should establish—a dialogue among the relevant actors. The Inter-American system's experience with transitional justice has shown that communication occurs in varying forms and degrees, ranging from simple monologues to complex forms of interaction.

The country chapters illustrate the spectrum of possibilities for dialogue and communication. For instance, Inter-American organs and government actors may have an excellent relationship with each other, yet one that is characterized by parallel discourse. An example of this might be El Salvador, where the Commission's consistent decisions on that country's amnesty law have failed to find echo in the discourse and actions of successive administrations. It is also safe to say that, in the case of El Salvador, the Inter-American discourse has failed to produce a strong, effective social demand for the implementation of Inter-American decisions.

The Chilean case offers a similar example. Despite its many decisions on the Chilean self-amnesty law, the Inter-American system has been only a bit player in the human rights

debate of recent years, in the political sphere as well as in legal deliberations regarding individual cases. Of course, the recent judgment in the *Almonacid* case could alter this assessment by demonstrating that the voice of the Court can sometimes help deepen communication and dialogue.

The Uruguayan example illustrates different patterns of communication. Interaction between government actors and the Inter-American organs, at times nonexistent, has occasionally been tense and confrontational, to the point where the government has attempted to silence the Commission.<sup>35</sup> More recently, an incipient dialogue suggests that there may be some interest in strengthening communication, an impression that is reflected in the growing number of hearings on Uruguay during the Commission's last three sessions.

Argentina offers the most complex example of a continuous back-and-forth, featuring an interplay between national efforts and Inter-American responses through the cases before the Commission, hearings, and the application of Inter-American precedents in the domestic venue. When Inter-American voices have not been, or are not, heeded internally, domestic actors, particularly human rights defenders and nongovernmental organizations but some state actors as well, have turned and continue to turn to the IACHR to facilitate and broaden the space for this dialogue.<sup>36</sup>

A more specific analysis may be applied to the communication between Inter-American organs of international supervision and local judiciaries on issues of truth, justice, and reparations. National tribunals take on a special dimension in their role as guarantors of the rights enshrined in the American Convention, which requires that domestic remedies be exhausted before activating a supervisory mechanism.<sup>37</sup> In other words, in virtually all international complaints concerning the lack of truth, justice, and reparations, some domestic tribunal is implicated for having failed in its obligation to ensure the effective enjoyment of recognized rights. In addition to this, the American Convention stipulates that "everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights . . . even though such violation may have been committed by persons acting in the course of their official duties."<sup>38</sup> This confirms the critical role that domestic tribunals play in the application of human rights treaties.

In general, judges handling cases concerning truth, justice, and reparations base their decisions primarily on political constitutions, laws and decrees, regulations, and domestic case law. Yet the courts also should take into account the Inter-American

human rights system. The experience of transitional justice has shown that courts tend to be more receptive when the domestic legal community invokes international human rights instruments in its legal arguments and demands that the courts apply these instruments in their daily proceedings, in accordance with their hierarchical standing in the respective legal system. While it is true that in the domestic venue most Latin American judges habitually ignore the human rights treaties in force, one of the reasons for this, though it is not necessarily the main one, is that attorneys do not invoke these treaties often enough. While judges should be familiar with the law, it is also incumbent upon the attorneys to call the court's attention to applicable laws and to invoke legal standards that support their clients' interests. The most promising outcomes in the dialogue between Inter-American and domestic jurisprudence occur when attorneys routinely invoke international norms and judges apply them. This leads to a mutually reinforcing dynamic in which judges apply international standards because they are invoked by attorneys, while attorneys continue to invoke them because they are being applied by judges. For its part, the IACHR closely follows such positive developments and is therefore situated to monitor and react to domestic rulings concerning truth, justice, and reparations and to encourage, to the extent possible, rulings that adhere to international standards.<sup>39</sup>

Of course, there are various ways in which the decisions made by the Inter-American system are received at the national level, understood as a reference by a domestic court to an international ruling on a case submitted for a hearing. But essentially this process can be reduced to two sequential steps: (a) domestic courts review international jurisprudence to determine whether any existing international norms are applicable to the case to be resolved, and (b) they evaluate how that norm has been interpreted in international jurisprudence. For example, if a court must decide a case in which a victim of human rights violations is claiming civil damages, it must determine whether any Inter-American norm establishes the duty to make reparations, as well as how that norm has been interpreted.

There are many ways in which local courts and international organs interact in the sphere of transitional justice. While this not intended to be an exhaustive list, we can begin with the aforementioned requirement of prior exhaustion of domestic remedies. Local courts must rule on matters relating to international human rights treaties before it is possible to resort to an international venue. For their part, before declaring a case admissible, international supervisory organs must verify whether the relevant tribunals have indeed exhausted all existing effective and appropriate remedies, or whether an exception to the requirement applies.

At the same time, Inter-American organs examine domestic court proceedings to determine whether they are consistent with the state's international obligations and, where possible, to establish the state's international responsibility. There are two main issues here: first, whether the courts have acted in accordance with the principles of due process, impartiality, and fairness, and second, whether the ruling itself is consistent with the American Convention. With regard to the former, the Inter-American Commission and the Inter-American Court have intervened when Supreme Courts have upheld the constitutionality of amnesty laws or rejected petitions seeking compensation for human rights violations.<sup>40</sup> Another scenario is when investigations have been characterized by impunity, or when an investigation into what has transpired has been assigned to a military court.<sup>41</sup> In all of these circumstances, the Commission and the Court have been highly critical in their messages to domestic courts.

Lastly, there are scenarios in which domestic courts must implement the decisions handed down by international organs in specific cases. In other words, after a case has been processed at the international level and the Commission or the Court has ruled, the victims turn to their own courts to request that those rulings be given effect or carried out. One significant example of a best practice in this regard is a specific case in which the Argentine Supreme Court carried out an order handed down by the Inter-American Court despite its profound disagreement with that order.<sup>42</sup>

Clearly, the most effective dialogue between international organs and local courts is one characterized by permeability, osmosis, and functional synergy, in which the courts demonstrate a marked inclination to bring their decisions into line with those of the international mechanisms.<sup>43</sup> With respect to transitional justice, the domestic courts in Argentina, Colombia, and Peru have been most receptive to Inter-American jurisprudence. We might mention here the *Simón* case in Argentina, in which the Supreme Court revoked the Punto Final (Full Stop) and Obediencia Debida (Due Obedience) laws, basing its ruling on the Commission's proceedings and the jurisprudence of the Inter-American Court.<sup>44</sup> Another important example comes from Peru, where the Constitutional Court, drawing from the Inter-American interpretation, upheld the right to know the truth.<sup>45</sup> In Colombia, in a tutela action (action to protect a fundamental right), the Constitutional Court ruled that the review remedy permitted the reopening of investigations should the Commission or the Inter-American Court so require, and that the principles of *res judicata* and *non bis in idem* did not constitute obstacles to this.<sup>46</sup>

## SOME PREREQUISITES FOR THE EFFECTIVENESS OF THE INTER-AMERICAN SYSTEM IN TRANSITIONAL JUSTICE

Throughout much of its history, Latin America has favored legal form over substance. Most Inter-American treaties were ratified when states emerged from military dictatorships or civil wars, signaling a new political approach that places fundamental freedoms at the center of the legal landscape. But this does not go far enough, inasmuch as human rights treaties require the effective exercise of the rights they protect, particularly the right to effective legal recourse. To this end, it is sometimes necessary to enact new laws—to ensure that reparations are made, for example—or repeal others, such as self-amnesty laws or laws establishing military jurisdiction over cases involving egregious human rights violations. What is required in all instances, and without fail, is absolute respect for treaty and conventional provisions.

Human rights and democracy are inextricably linked. There can be no effective respect for human rights in the absence of democratic conditions. A state cannot be considered democratic if human rights are not respected. Adherence to international human rights treaties requires as a *sine qua non* the existence of a democratic society, and at the same time helps to consolidate such a society. A democratic society and a culture of human rights cannot be built if the foundations of truth, justice, and reparations are missing. The chapters that follow show that significant progress in the sphere of justice and reparations has indeed been achieved in democratic settings.

For this to happen, however, the authorities must demonstrate unwavering political will to ensure and respect these rights. No legal or political reform, ratification of international human rights treaties, or decision by the Court or the Commission will lead to change if those staffing the three branches of government lack a collective and profound commitment to that enterprise. The case of Uruguay is a present-day example of the need for a confluence of wills. While the executive branch has generated new momentum and created opportunities for progress, at least in the area of truth, the judiciary is blocking many of its initiatives.

If they are to comply fully with the American Convention, the three branches of government must be proactive in their promotion and respect for rights. The authorities and society must establish mechanisms, enact laws, train public officials, publicize the contents of the Convention, eliminate areas of authoritarianism, and reform repressive institutions.



It will not do to wait until human rights violations occur, or until the Commission and the Court point them out, and then suddenly recall those international obligations. The oft-mentioned triad of truth, justice, and reparations must be a daily working agenda that is nourished by Inter-American inputs.

As they tackle this enormous task, the national authorities and societies of our countries have important allies in the Inter-American organs, and therefore, as noted in the preceding section, they must establish and solidify a constructive dialogue with those organs. The Commission and the Court should not be regarded as enemies of a misplaced national pride, but rather as strategic allies in the common struggle to ensure truth, justice, and reparations and to combat impunity.

This task, moreover, cannot be accomplished solely through the efforts of national authorities and the organs of the Inter-American system. Civil society has a crucial role to play in many areas, including training and dissemination, oversight and monitoring, and uncovering and reporting of abuses. What is more, civil society organizations have amassed invaluable experiences and technical expertise on these issues. In the quest for ever more effective ways of ensuring truth, justice, and reparations, civil society must be a protagonist in any policy undertaken. The experiences described in the ensuing chapters demonstrate that the Inter-American system has been more effective where there has been greater demand, and more spaces, for dialogue between the government and civil society and between government, civil society, and the Inter-American system. It is also in those same countries where the greatest progress has been made in truth, justice, and reparations.

I conclude with a very brief reference to certain operational, current, and specific factors that could facilitate implementation of the decisions made by the Inter-American organs in relation to transitional justice. The following, while not intended as an exhaustive list, are examples of measures that could contribute to this process. In my view, it is important to begin by enacting comprehensive legislation to ensure that decisions are carried out, by establishing an inter-institutional mechanism that brings together all government agencies and entities that may have jurisdiction over such matters, and by adopting legal mechanisms to ensure adequate compliance.

In the sphere of legislative reform or review, it is clear that amnesty laws are a recurring issue during periods of transitional justice. Therefore, when there has been an Inter-American decision that a particular law is incompatible with the American Convention, the executive should be required to exercise immediately its legislative prerogative to

initiate a process for the reform or repeal of that law. Similarly, in countries whose congresses are authorized to fast-track certain legislative initiatives, Inter-American decisions should be considered sufficient grounds to activate such measures. An unconstitutionality by omission proceeding should be initiated if the legislature, within a designated time period, fails to repeal or reform a particular law in keeping with the requirements of the Inter-American organ.

With regard to monetary compensation, the annual budget should include specific amounts earmarked for the payment of reparations ordered by the Commission or the Court. Should this procedure not be followed, it should be stipulated, for example, that the annual budget for the year following the Inter-American decision include the necessary line items to proceed with the relevant outlays. The decisions of both organs should be executable in the domestic venue as suggested by Article 68 of the American Convention.

A number of proposals can be made with respect to criminal investigations into cases of human rights violations. First, when there has been a definitive ruling from a local court closing an investigation, a Court judgment or recommendation from the IACHR should serve as grounds for the review of such decisions to preclude a claim of *res judicata*. Secondly, the organic law of the public ministry could include a provision making it incumbent upon the respective prosecutor to initiate, deepen, reactivate, or undertake anew such investigations as the Commission or the Court might require.

Lastly, procedural laws can be reformed, particularly *amparo* and *habeas corpus* laws, so that they can be used to request compliance with the decisions of the Commission or the Court. A final proposal is that, in countries where they exist, the people's defender, human rights ombudsman, or similar figure should be invested with the authority and the obligation to monitor state compliance with the decisions of the Inter-American organs.

## NOTES

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the Inter-American Court issued its judgment in the Almonacid case from Chile (see note 1). Therefore, while references to the judgment appear in several sections of the essay, its potential impact is not examined.

1 Inter-American Court, *Barrios Altos v. Peru*, Judgment of March 14, 2001, Ser. C, No. 75; *Almonacid Arellano et al. v. Chile*, Judgment of September 26, 2006, Ser. C, No. 154.

2 *IACHR Annual Report 1992–93*, Report 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309, and 10.311, Argentina, October 2, 1992, and Report 29/92, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, 10.374, and 10.375, Uruguay, October 2, 1992.

3 The assumption here is that the political organs of the OAS—the General Assembly, the Permanent Council, the Committee on Political and Juridical Affairs, and the General Secretariat—represent more than merely the sum of the individual will of each member state.

4 See *IACHR Annual Report 1996*, Report 34/96, Cases 11.228, 11.229, 11.231, and 11.282, Chile, October 15, 1996. On July 11, 2005, the Inter-American Commission on Human Rights, in accordance with Articles 51 and 61 of the American Convention on Human Rights, lodged a complaint against the state of Chile in the case of *Luis Almonacid Arellano* (No. 12.057); see note 1.

5 The three commissioners were Marta Altoaguirre, Robert K. Goldman, and Juan Méndez.

6 See IACHR Press Release 10/01, issued following the IACHR’s visit to Panama.

7 See Inter-American Court, *Reggiardo Tolosa Case*, Order of the Court of November 19, 1993, Ser. E, No. 1; IACHR, *Report on the Situation of Human Rights in El Salvador 1994*, OEA/Ser.L/V/II.85, Doc. 28 rev., February 11, 1994; “Recommendation on Asylum and International Crimes,” in *IACHR Annual Report 2000*, chap. VI; IACHR, *Resolution No. 1/03 on Trial for International Crimes*, October 24, 2003; “Recommendation on Universal Jurisdiction and the International Criminal Court,” in *IACHR Annual Report 1998*, chap. VII.

8 See note 2.

9 Third *Whereas* of the American Declaration of the Rights and Duties of Man, Resolution XXX of the Ninth International Conference of American States, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L/V/II.82 doc.6 rev.1 at 17 (1992).

10 American Convention on Human Rights, part II.

11 By contrast, certain United Nations organs have ruled that they lack temporal competence to take up certain Argentine cases.

12 In 2005 the Commission granted 11 precautionary measures to protect such victims.

13 Perhaps the IACHR’s *Report on the General Human Rights Situation in Argentina 1980* (OEA/Ser.L/V/II.49, Doc. 19 corr.1, April 11, 1980) is the most paradigmatic example; it publicized a situation that previously had not been well documented. Another example is the recently issued IACHR Press Release 23/06, “IACHR Expresses Concern over Guatemalan Constitutional Court Decision,” July 3, 2006.

- 14 See Tom J. Farer, "The Future of the Inter-American Commission on Human Rights: Promotion versus Exposure," in *El Futuro del sistema interamericano de protección de los derechos humanos*, ed. Juan E. Méndez and Francisco Cox (San José: Instituto Interamericano de Derechos Humanos, 1998), p. 524.
- 15 American Convention on Human Rights, Art. 41(a).
- 16 Regarding in loco visits, see Tom Farer, "No Longer a Unicorn, Not Yet an Ox," *Human Rights Quarterly* 19, no. 3 (1997): 510–46.
- 17 "Submission of the Annual Report of the Inter-American Commission on Human Rights 1995, by its Chairman, Dean Claudio Grossman to the Committee on Juridical and Political Affairs of the OAS Permanent Council," April 30, 1996, in *IACHR Annual Report 1996*.
- 18 *IACHR, Report on the Situation of Human Rights in El Salvador*, February 11, 1994.
- 19 *IACHR Annual Report 1985–86*, chap. V.
- 20 In its *Annual Report 2005*, the IACHR reported that during that year attempts were made on the lives of human rights defenders, some of whom were, at the time, under protection ordered by the organs of the Inter-American system. See also IACHR, *Report on the Situation of Human Rights Defenders in the Americas*, OEA/Ser.L/V/II.124, Doc. 5 rev.1, March 7, 2006.
- 21 Specific examples of general public policy debate are drawn from hearings during the Commission's 123rd Regular Session, held October 11–28, 2005, and its 124th Regular Session, held in February–March 2006. Information about Colombia presented at those hearings focused primarily on the demobilization process, violations of the cease-fire declared by leaders of the United Self-defense Forces of Colombia (Autodefensas Unidas de Colombia), and application of this policy by civil society organizations and the state. With respect to Uruguay, the Commission, together with the state and the respective petitioners, examined compliance with the recommendations found in its Report 29/92 on the Ley de Caducidad de la Pretensión Punitiva (Expiry Law of the Punitive Powers of the State) in that country. The IACHR was informed of various initiatives undertaken by the administration of President Tabaré Vázquez to ascertain the whereabouts of individuals disappeared in Uruguay under the military dictatorship. During the hearing on Peru, attended by representatives of the state and nongovernmental organizations, the discussion included the Peruvian state's compliance with the recommendations of the Truth and Reconciliation Commission and its obligation to investigate and prosecute international crimes. Another example of general public policy debate is found in the information obtained during the Commission's 118th Regular Session held in October 2003 on the implementation of the national reparations program in Guatemala.
- 22 *IACHR Annual Report 2005*, introduction, pars. 3 and 4.
- 23 Inter-American Court, *Velásquez Rodríguez v. Honduras*, Judgment of July 29, 1988, Ser. C, No. 4, par. 144.
- 24 IACHR, *Report on the Situation of Human Rights Defenders in the Americas*, par. 23.
- 25 Inter-American Court, *Plan de Sánchez Massacre v. Guatemala*, Judgment of April 29, 2004, Ser. C, No. 105.
- 26 Pablo de Greiff, "Justice and Reparations." In *The Handbook of Reparations*, ed. Pablo de Greiff (New York: Oxford University Press, 2006), chap. 12.

27 “A study about the situation of minor children of disappeared persons who were separated from their parents and who are claimed by members of their legitimate families,” in *IACHR Annual Report 1987–88*, chap. V.

28 In Paraguay, the IACHR insisted on the appointment of a people’s defender (*defensor del pueblo*) legally empowered to implement the reparations program in the country. See IACHR, *Third Report on the Human Rights Situation in Paraguay*, OEA/Ser.L/V/II.110, March 9, 2001.

29 American Convention on Human Rights, Art. 51, 61, 63(2), and 64(1).

30 American Convention on Human Rights, Art. 57.

31 American Convention on Human Rights, Art. 35. The Commission represents all members of the OAS.

32 See, for example, Inter-American Court, *Moirwana Village v. Suriname*, Judgment of June 15, 2005, Ser. C, No. 124.

33 Inter-American Court, *Blake Case*, Preliminary Objections, Judgment of July 2, 1996, Ser. C, No. 27; *Serrano Cruz Sisters v. El Salvador*, Preliminary Objections, Judgment of November 23, 2004, Ser. C, No. 118.

34 According to Articles 51(1) and 61, only the Commission and the states have the authority to refer cases to the Court. To date, the Commission alone has exercised this authority, with two exceptions: the matter of Viviana Gallardo, in which Costa Rica lodged a petition against itself before the Court, and the case of Lori Berenson, in which Peru brought a complaint before the Court after the IACHR had lodged its own petition. Inter-American Court, *In the Matter of Viviana Gallardo et al.*, Ser. A, No. G 101/81; *Lori Berenson Mejía v. Peru*, Judgment of November 25, 2004, Ser. C, No. 119.

35 It did so through a request for an advisory opinion in which it questioned the Commission’s authority to examine the compatibility of the Expiry Law Limiting the Punitive Powers of the State with the American Convention. Inter-American Court, Advisory Opinion OC-13/93, July 16, 1993, Ser. A, No. 13.

36 See, among others, Martín Abregú, “La Tutela Judicial del Derecho a la Verdad en la Argentina,” *Revista IIDH* 24 (1996): 11–47.

37 American Convention on Human Rights, Art. 46(1)(a).

38 American Convention on Human Rights, Art. 25.

39 See, for example, IACHR Press Release 28/06, “Statement on Constitutional Court’s Decision regarding Application of Law of Justice and Peace in the Republic of Colombia,” August 1, 2006.

40 On amnesty laws, see, for example, IACHR Report 136/99, Case 10.488, *Ignacio Ellacuría, S.J. et al.*, El Salvador, December 22, 1999; and Report 25/98, Cases 11.505 et. al., Chile, April 7, 1998. On petitions for compensation, see IACHR Report 1/93, *Report on the Friendly Settlement Agreement in Cases 10.288, 10.310, 10.436, 10.496 10.631, and 10.771*, Argentina, March 3, 1993; and Report 59/05, Petition 381/04, *Admissibility, Magdalena Mercedes Navarrete et al.*, Chile, October 12, 2005.

41 See IACHR Report 101/01, Case 10.247 et. al., *Extrajudicial Executions and Forced Disappearances of Persons*, Peru, October 11, 2001; and Report 32/04, Case 11.556, *Merits, Corumbiara*, Brazil, March 11, 2004.

42 See Supreme Court of the Nation, “Espósito, Miguel Ángel re/statute of limitations to file a suit brought in his defense based on a ruling by the Inter-American Court in the Bulacio case,” December 23, 2004.

43 Thomas M. Franck and Gregory H. Fox, “Introduction: Transnational Judicial Synergy,” in *International Law Decisions in National Courts* (Irvington-on-Hudson, NY: Transnational Publishers, 1996), 3.

44 Supreme Court of Justice of the Nation, “Simón, Julio Héctor et. al., on the illegitimate deprivation of liberty, etc.,” Case 17.768C.

45 Constitutional Court of Peru, Judgment in the *Genaro Villegas Namuche Case*, file 2488-2002-HC/TC, March 18, 2004.

46 Constitutional Court of Colombia, Judgment C-004/03, January 20, 2003.

## THE INTER-AMERICAN COURT OF HUMAN RIGHTS

*Douglass Cassel*

In the two decades since its first judgment in a contested case, the Inter-American Court of Human Rights has focused its jurisprudence on efforts to curb impunity for gross violations of human rights. Its judgments define and denounce impunity. They document and decry its societal and familial consequences. They articulate a wide-ranging right of access to justice and truth for victims and families and, in practical effect if not in formal doctrine, for societies as well.

The Court's remedial orders go even further, mandating states to adopt legislative, judicial, and administrative measures to publicize past violations and to prevent their repetition, not only in the individual cases before the Court but far more broadly.

The Court's substantive and remedial jurisprudence thus seeks to institutionalize national safeguards against impunity throughout the Americas in four broad ways:

- by the exemplary force of the Court's interpretations of the human rights guarantees of the American Convention on Human Rights, as inspirations for the jurisprudence of national courts;
- by encouraging national courts to exercise a "control of conventionality," that is, by supervising compliance with human rights conventions by their national governments;<sup>1</sup>
- by ordering that the Court's judgments be publicized, in part to help societies learn from past abuses; and
- by requiring states to train security forces, adopt adequate criminal laws, and take other measures to promote prevention and prosecution of future human rights violations.<sup>2</sup>

How much and how soon these measures will contribute to curtailing impunity in the too-often lawless environments of the hemisphere is an empirical question. Other chapters in this volume address the early results in a sampling of countries. But most of the Court's relevant judgments, along with the expansion of its reparations orders, have been rendered

only since 2001. More time, and more comprehensive and systematic analysis, will be needed for a full answer.

Much of the direct impact of the Inter-American human rights system on national polities and judiciaries in the 1980s and 1990s was thus generated not by the Court but by the Inter-American Commission on Human Rights.<sup>3</sup> In 1988 the Court did articulate state duties under the American Convention on Human Rights to investigate, prosecute, and punish gross violations of human rights in *Velásquez Rodríguez*.<sup>4</sup> Yet generally it was the Commission that pioneered Inter-American jurisprudence on the duties of states and the rights of victims and societies to justice and truth, as well as on the unacceptability of amnesties for gross violations of human rights.<sup>5</sup>

Since 2001 the Court has used its limited resources and powers energetically and creatively to leverage institutional reforms and cultural change. The scope and ultimate effect of the reforms, however, will depend largely on factors beyond the Court's control. Will democratic checks and balances survive in Venezuela and Ecuador? Will economic failure drive populations in Bolivia and Peru away from democracy and toward demagoguery? Will drug traffickers and organized crime be fatal to the rule of law in Colombia and Guatemala? Will the global superpower support or subvert human rights throughout the region?

The following sections discuss aspects of the Court's jurisprudence on impunity, justice, truth, and, finally, transitional justice and truth commissions. This brief essay does not undertake a comprehensive summation of the many relevant judgments, but relies selectively on recent judgments that stake out the limits reached by the Court's published opinions through the end of 2006.

## IMPUNITY

The Court has repeatedly defined impunity as a systematic failure to investigate, prosecute, arrest, adjudicate, and convict those who are responsible for violations of rights protected by the American Convention.<sup>6</sup>

The Court condemns impunity for two main reasons, one societal and one familial. For societies, impunity "fosters the chronic repetition of human rights violations." For fami-



lies, impunity fosters “the total defenselessness of the victims and their next of kin, who have the right to know the truth about the facts.”<sup>7</sup>

The Court recognizes that the effectiveness—or ineffectiveness—of the judicial system lies at the heart of the problem. Impunity is “promoted and tolerated by the absence of judicial guarantees and the ineffectiveness of the judicial institutions to deal with or contain the systematic human rights violations.”<sup>8</sup>

The Court has been educated as to the devastating psychic cost inflicted on family members by impunity, independently of the harm caused by the original crime. For example, when Guatemalan authorities impeded the clarification of facts pertaining to the murders of street children, the Court described the impact on the families as “the feeling of insecurity and impotence caused to the next of kin by the failure of the public authorities to fully investigate the corresponding crimes and punish those responsible.”<sup>9</sup>

Likewise, in the case of the brutal murder of Guatemalan anthropologist Myrna Mack Chang, the Court recognized that “the impunity prevailing in this case has been and continues to be a source of suffering for the next of kin. It makes them feel vulnerable and in a state of permanent defenselessness vis-à-vis the State, and this causes them deep anguish.”<sup>10</sup>

## **States’ duty to combat impunity**

In its very first merits judgment in the case of *Velásquez Rodríguez v. Honduras* (1988), the Court pioneered the creative doctrine that the duty of states to “ensure” human rights, under Article 1.1 of the American Convention, necessarily imposes broadly defined organizational and law enforcement duties with respect to human rights violations. The organizational duty of states parties is “to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.”<sup>11</sup>

The law enforcement duty, which follows from the broad organizational duty, is to investigate, prosecute, and punish persons responsible for gross violations. While it does not require successful results, which are sometimes not possible, it does require serious and reasonable effort.<sup>12</sup> What matters to the Court is not the formality but the effectiveness of state efforts to ensure that crimes against human rights do not go unpunished. Moreover, the law enforcement duty must be assumed by the state on its own initiative; it cannot be made to depend on the private efforts of victims and families.<sup>13</sup>

More recently the Court has specified that the general duties set forth in *Velásquez Rodríguez* oblige states to combat impunity “by all possible means.”<sup>14</sup> This encompasses a range of positive state duties:

- States must seek to prosecute and punish human rights crimes; payment of monetary compensation is not sufficient to discharge the state’s duty.<sup>15</sup>
- Both state responsibility under international human rights law and individual responsibility under criminal law should be engaged to combat impunity.<sup>16</sup>
- State criminal laws on human rights crimes such as torture must be no less inclusive of criminal conduct than are international conventions on the subject.<sup>17</sup>
- States must investigate, prosecute, and punish not only the material but also the intellectual authors of crimes against human rights.<sup>18</sup>
- States also have a duty to prosecute those who seek to cover up the crimes or to obstruct or delay justice.<sup>19</sup>
- All state agencies have a duty to cooperate with the investigation and prosecution by detaining suspects, turning over documents, making available witnesses, and carrying out appropriate investigative measures.<sup>20</sup>
- States have a duty to seek to extradite fugitives accused of human rights crimes from other countries to which they have fled.<sup>21</sup> (The Court has not extended this duty so far as to require states to conduct trials *in absentia*.<sup>22</sup> Trials *in absentia* may raise human rights issues of due process and fair trial.<sup>23</sup>)
- Other states parties to the American Convention have an *erga omnes* duty (a duty owed universally by all states to each other) to cooperate to ensure that human rights crimes do not go unpunished. They should either extradite a fugitive to the requesting state or prosecute the fugitive themselves.<sup>24</sup>
- States have a duty to remove all obstacles, de facto or de jure, that maintain impunity.<sup>25</sup>

In addition, under Article 2 of the American Convention, which requires states to take legislative and other measures where necessary to give effect to Convention rights, states have a twofold duty: both to repeal laws incompatible with Convention rights and to enact laws needed to give effect to Convention rights.<sup>26</sup>

## **Amnesty laws and other legal mechanisms of impunity**

In recent years the Court has strengthened its interpretation of the law enforcement duties of states to combat impunity for serious crimes against human rights. It has done so

by prohibiting states from using “self-amnesties,” statutes of limitations, absolute bars on double jeopardy, and other devices whose effect is to shield perpetrators.

The Court began its jurisprudence on amnesties in the *Barrios Altos v. Peru* judgment of 2001. It ruled that two self-amnesty laws granted by the Alberto Fujimori regime to itself violated the victims’ rights of access to justice. The Tribunal linked this right to Peru’s duties under Articles 1(1) and 2 of the American Convention to ensure and give effect to human rights.<sup>27</sup>

The case involved the extrajudicial execution of 15 victims. However, the Court’s stated rationale was broader, barring self-amnesties for “serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.”<sup>28</sup>

Peru’s self-amnesty laws, declared the Court, were “manifestly incompatible with the aims and spirit of the Convention” and with the Convention itself and, “consequently, lack legal effect.”<sup>29</sup>

Two questions remained as to whether the Court’s ruling extended beyond the particular case. First, was Peru required to give the ruling “general effect”? After all, rulings in international adjudication are traditionally binding only as between the parties and in the particular case.<sup>30</sup> Second, was Peru obligated not merely to refrain from applying the self-amnesty laws in other cases, but to repeal them?

The Court answered the first question in responding to a request for interpretation by the Inter-American Commission on Human Rights: “given the nature of the violation that amnesty laws No. 26479 and No. 26492 constitute, the decision in the judgment on the merits in the Barrios Altos Case has generic effects.”<sup>31</sup> It must therefore be applied in any other case to which those laws might be applicable.

Still, the second question remained: Was it enough to leave the laws on the books, but not to apply them in other cases? Or must the laws be repealed? The Court answered this further question in 2006 in *Almonacid v. Chile*, involving the self-amnesty law decreed by the Augusto Pinochet regime in Chile in 1978. In 1996 the Inter-American Commission had condemned Chile’s amnesty law for violating the American Convention on Human Rights in multiple respects.<sup>32</sup> Before the Inter-American Court, Chile acknowledged that its law was incompatible with the Convention and explained that its national tribunals refrained from applying the law.<sup>33</sup>

This was not enough, ruled the Court. The very existence of a law incompatible with the Convention was, in itself, a violation of Chile's duty under Article 2 of the Convention to repeal incompatible laws. The law must be repealed.<sup>34</sup>

In the Peruvian case, as the Court noted, the offending amnesty laws were "self-amnesties" granted by the Fujimori regime to itself. The judgment in *Barrios Altos* thus left open the question of whether an amnesty adopted democratically, not by the beneficiary regime but by a successor democratic government, for reasons of national reconciliation and with provisions for reparations and truth telling, might be deemed compatible with the Convention.

That open question still has not been clearly resolved by the Court. However, in the Chilean case, the Court may have answered it, albeit obliquely. Or, perhaps inadvertently, the Court may have added a new question: Are amnesties incompatible with the Convention only when they apply to crimes against humanity?

In the Peruvian case, the Court reasoned that self-amnesty laws are incompatible with the Convention when they legalize impunity for "torture, extrajudicial, summary or arbitrary execution and forced disappearance" and other crimes "prohibited because they violate non-derogable rights recognized by international human rights law."<sup>35</sup>

Nothing in that *Barrios Altos* judgment purported to require that the amnestied crimes be crimes against humanity, that is, that they be part of a widespread or systematic attack against a civilian population.<sup>36</sup> The fact that Peru's amnesty laws sheltered those responsible for the extrajudicial execution of 15 people in a single incident was sufficient to condemn the amnesty, independently of any widespread or systematic pattern of crimes committed by the Fujimori regime.

But in the Chilean case, decided five years later in 2006, the Court was at pains to note that the illegal detention, torture, disappearance, and murder of Luis Almonacid Arellano was part of a broader pattern, and hence was a crime against humanity. The Court had to decide whether Chile's maintaining its amnesty law in force, even after accepting the Court's contentious jurisdiction, violated the American Convention. The Court explained that it would decide, first, whether the murder constituted a crime against humanity.<sup>37</sup>

The Court answered this question in the affirmative: the crime was indeed a crime against humanity. Observing that the prohibition of crimes against humanity is a *jus cogens* norm (an international law norm overriding any contrary norm), the Court reasoned that crimes against humanity cannot be amnestied and that therefore the murder could not be am-

nestied.<sup>38</sup> The operative paragraph of the judgment concluded: “By purporting to amnesty those responsible for crimes against humanity, Decree Law No. 2.191 is incompatible with the American Convention and, therefore, lacks legal effects, in light of that treaty.”<sup>39</sup> The fact that the crime was a crime against humanity was, then, essential to both the reasoning and the operative judgment of the Court.

Why was the commission of a crime against humanity essential in the Chilean case, but apparently not in the Peruvian case? The Court did not explain. The Court did not purport to narrow the scope of the ban on self-amnesties for serious human rights crimes, as articulated in the Peruvian case, to bar amnesties only for crimes against humanity. On the contrary, the Court quoted the key language from the Peruvian case verbatim, with no hint of disapproval.<sup>40</sup>

The most likely explanation for the Court’s novel emphasis on crimes against humanity relates to the second question left open by the Peruvian case, namely, how the Court would treat an amnesty that is not a self-amnesty. Originally the Chilean amnesty was a self-amnesty, bestowed by the Pinochet regime upon itself in 1978. However, the case before the Inter-American Court concerned only Chile’s actions after the fall of the Pinochet regime in 1990. Chile did not accept the Court’s contentious jurisdiction until August 21, 1990, and it did so then only with respect to “circumstances which arose after March 11, 1990” (when democracy was restored in Chile).<sup>41</sup>

Thus the case before the Court concerned only the actions of a democratic government—the maintenance in force of the amnesty laws after 1990.<sup>42</sup> Moreover, the effect of keeping the amnesty law on the books after 1990 was to shield not the democratic government but its predecessor regime. Insofar as the Chilean amnesty law was before the Court, the law was thus no longer a “self-amnesty.”

Seen in this light, the judgment in the Chilean case means that even when an amnesty law is maintained (and presumably when one is adopted) by a democratic government, not as a self-amnesty but as an amnesty for the crimes of a prior regime, international law limits the crimes that can be amnestied. And among the international crimes that cannot be amnestied are crimes against humanity.

So interpreted, far from narrowing the Peruvian case’s ban on self-amnesties for serious human rights violations, the Chilean case actually broadens the ban to prohibit non-self-amnesties as well, at least when they pertain to amnesty crimes against humanity.

In addition to barring self-amnesties, the judgment in the Peruvian case also barred the use of statutes of limitation and other measures “designed to eliminate responsibility” for serious human rights crimes.<sup>43</sup> By invoking the concept of crimes against humanity, the judgment in the Chilean case strengthened the legal basis of this additional bar. Prosecution of crimes against humanity cannot be barred by statutes of limitation, the Court ruled, not only because of the treaty against prescription (i.e., time-barring of prosecution) of such crimes, but also because the imprescriptibility of crimes against humanity is a *jus cogens* norm, barring prescription even by countries like Chile that are not party to the treaty.<sup>44</sup>

Similarly, the Court ruled, the *non bis in idem* principle against double jeopardy, or the concept of *res judicata*, is not an absolute bar to the second prosecution of a person previously acquitted of a serious human rights crime. The Court noted that the International Criminal Court (ICC) is not barred from retrying suspects previously found not guilty by national courts of crimes against humanity in certain dubious circumstances.<sup>45</sup> Citing the ICC statute, the Inter-American Court ruled that national courts, too, may retry suspects where the earlier prosecution was tainted by a purpose to shield the perpetrator, or where it was conducted by a court that lacked independence or impartiality, or where there was otherwise apparently no real intention to bring the accused to justice.<sup>46</sup>

The Court’s jurisprudence limiting amnesties and other devices for shielding perpetrators of serious human rights crimes from prosecution has a double basis in law. It rests on both the state’s duties under Articles 1.1 and 2 of the American Convention and on the victims’ and families’ rights of access to justice.<sup>47</sup> The broader basis is the state’s duty, since it requires nullification of such amnesties even if, say, the victims have died and there are no survivors.

The state’s duties were discussed in the preceding section. The next section addresses the rights of victims and families.

## RIGHTS OF ACCESS TO JUSTICE

Article 8 of the American Convention guarantees every person the right to be heard by a tribunal in the determination of his or her legal rights; Article 25 guarantees the right to a simple and prompt judicial remedy for violations of rights. The Court interprets these two articles to provide victims and family members a right of access to justice.<sup>48</sup>

The Court further interprets this right of access to justice to include a right of victims and family members to procedural participation in the trial, sentencing, and reparations phases, at least to the extent permitted by applicable national law:

During the investigation and judicial proceedings, the victims or their next of kin must have ample opportunity to take part and be heard, both in the elucidation of the facts and the punishment of those responsible, and in the quest for fair compensation, in accordance with domestic law and the American Convention.<sup>49</sup>

It is not clear to what extent this right of procedural participation is an autonomous right under international law, mandated by the Convention even in the hypothetical case of a country whose national laws bar such participation. Since the Latin American states parties to the Court all permit such participation to varying degrees, the Court has not yet been called on to clarify the point.

The Court's reparations orders in cases of denial of justice largely reflect the broad scope of states' duties to pursue justice for human rights violations and of victims' and families' rights of access to justice. That is, the Court orders states to do what they were required to do in the first place. Its reparations orders thus invariably require genuine investigation and prosecution of those responsible and, where appropriate, conviction and proportional punishment.

In some cases the reparations orders go further than the arguable reach of the victims' substantive rights, but not of the state's all-encompassing duty to "ensure" respect for human rights. The Court may order states, for example, to conduct training programs for police and security personnel, designed to prevent future violations.<sup>50</sup>

## RIGHT TO TRUTH

Two decades ago the Inter-American Commission on Human Rights opined that when gross violations of human rights have been committed, there exists a right to know the truth about what happened, a right that contains both a personal and a societal dimension. "The family members of the victims are entitled to information as to what happened to their relatives." In addition, "every society has the inalienable right to know the truth

about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition . . .”<sup>51</sup>

The Inter-American Court accepts the personal dimension of the right to truth. The Court considers this personal right to be “subsumed” in the right of victims and families to obtain clarification of the facts through judicial investigation and adjudication under Articles 8 and 25 of the American Convention on Human Rights.<sup>52</sup> As early as its 1988 judgment in *Velásquez Rodríguez*, the Court recognized that even where the perpetrator of a disappearance “cannot be legally punished under certain circumstances, the state is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains.”<sup>53</sup>

On the other hand, the Court does not formally accept that society has a right to know the truth. To be sure, there is some tension in the Court’s rulings, and at times its language appears to embrace a societal right to the truth. In the case of two young sisters who disappeared during the war in El Salvador, for example, the Court stated that “everyone, including the families of victims of serious violations of human rights, has the right to know the truth. As a consequence, the families of the victims, *and society as a whole*, ought to be informed about what happened in connection with such violations” (emphasis added). This language, however, was *dictum*; it merely preceded a conclusion that the families in that case had a right to know the truth.<sup>54</sup>

In other cases, after noting that the Commission or a party asserts a societal right to truth, the Court concludes that any right to truth is subsumed in the right of family members to access to justice, “in the circumstances of this case.”<sup>55</sup>

When the Court does squarely address the issue of a societal right to truth, it rejects claims that the “so-called” (*llamado*) right to truth is an “autonomous” right under the American Convention.<sup>56</sup> In other words, there is no societal right to truth, only a right of victims and families that is “subsumed” in their right of access to justice.

Even so, other aspects of the Court’s jurisprudence go far toward indirectly ensuring a public right to truth in practical effect. First, the Court recently ruled that the right to receive information under Article 13 of the American Convention includes a presumptive right of public access to state documents.<sup>57</sup> This would appear to require states to make public, upon request, the results of investigations of gross violations of human rights, at least once the investigations are closed.



Second, the Court's reparations orders now routinely require states to publicize the results of investigations in the cases adjudicated by the Inter-American Court. In part this is to benefit victims and families, "who have the right to know the truth about the facts. When this right to the truth is recognized and exercised in a specific situation, it constitutes an important measure of reparation, and is a reasonable expectation of the victims that the state must satisfy."<sup>58</sup> However, the Court explains that an additional purpose of the publicity is "so that the . . . society may know the truth about the facts of the present case."<sup>59</sup>

Similarly, the Court routinely orders states to publish the findings and conclusions of its judgments in newspapers of national circulation. The Court's current president, Judge Sergio García Ramírez, explains that such publication relates to "the advisability that public opinion should learn" about the Court's judgment. He adds:

The purpose of publication and amends is threefold: a) . . . the moral satisfaction of the victims or their successors, the recovery of honor and reputation that may have been sullied by erroneous or incorrect versions and comments; b) . . . the establishment and strengthening of a culture of legality in favor, above all, of the coming generations; and c) . . . serving truth, to the advantage of those who were wronged and of society as a whole. . . .

In brief, the reparation . . . has remedial and preventive effects . . .<sup>60</sup>

As this reasoning illustrates, the personal and societal dimensions of the right to truth are not entirely separate and distinct, but are overlapping and interrelated. Even if the Court finds no substantive, societal right to truth in the American Convention, it recognizes that for both "compensatory and preventive" reasons, adequate reparation for victims and families demands that society know the truth about gross violations of human rights.

Without articulating a general right of society to know the truth, then, the Court has nonetheless in practice, if not entirely in doctrine, gone far to require states both to find and to make known the truth, not only to victims and families in the case at hand, but to society as well.

## TRANSITIONAL JUSTICE AND TRUTH COMMISSIONS

The Court has not developed a specific jurisprudence of transitional justice. The reason may be that the Court is cognizant that its judgments must guide all states parties to the American Convention, not merely those undergoing transitions from military to civilian rule, or from authoritarian regimes to democracies, or from war to peace. The Court is aware that all states commit human rights violations. It has perhaps not wished to limit or tailor its mandates of justice and truth to states undergoing transitions.

This by no means implies that the Court fails to appreciate the importance of justice and truth in transitional situations. In a case originating during the Alfredo Stroessner dictatorship in Paraguay, the Court stressed the importance of “preserving historical memory,” both through the state’s acceptance of its responsibility and through publication of the evidence and findings of fact in the Court’s judgment.<sup>61</sup>

The Court praised Paraguay’s establishment of a truth commission as a sign of the state’s willingness to investigate and provide reparations for human rights violations.<sup>62</sup> The Court further lauded an “important effort” to establish the “historic truth,” stating that it

assesses positively the creation of the Center of Documentation and Files for the Defense of Human Rights, known as the “Terror Files,” which has contributed to the search for the historic truth not only of Paraguay, but of the entire region. The preservation, classification and systematization of these documents constitutes an important effort for establishing and acknowledging the historic truth of the events that occurred in the Southern Cone during several decades.<sup>63</sup>

In *Almonacid* the Court also stressed the importance of Chile’s truth commissions as collective mechanisms to reconstruct the truth of what happened during the Pinochet regime.<sup>64</sup> The Court relied on the findings of one such commission for contextual facts important to the ruling that the crime in *Almonacid* was a crime against humanity.<sup>65</sup> On the other hand, the Court quite properly pointed out that the “historical truth” of truth commissions is no substitute for judicial truth.<sup>66</sup> Truth commissions, in other words, are not a substitute for courts.

The Court has also treated the findings of the Peruvian truth commission with respect.<sup>67</sup>

## CONCLUSION: LOOKING AHEAD

The Court's jurisprudence on the rights to justice and truth, and on amnesties and transitional justice, has been developed largely in the last six years with respect to events that took place mainly in the 1970s and 1980s in countries such as Chile, El Salvador, Honduras, Paraguay, and Peru, and more recently in Colombia and Guatemala. In many of these cases the Court had the institutional advantage of not having to confront the current government of a state with regard to its own misdeeds; rather, the actions at issue are those of a prior regime.

The result of the Court's jurisprudential labors is now a broad net of duties of states, rights of victims and families, and reparations orders requiring states to publicize the truth to entire societies. If the Court's judgments are followed in future state practice, victims and their families will thus enjoy a far greater measure of justice, truth, and reparations than in the past.

Now that this structure of duties and rights has been built, human rights advocates will seek to bring it to bear on future violations as soon as they occur, not decades afterward. The Court will thus face a greater challenge in the future, as increasingly it may be asked to confront governments with their own, contemporaneous violations of human rights.

The intellectual groundwork, then, is largely in place. The more delicate tasks in the future may be institutional, political, and diplomatic: to persuade governments to comply with the recommendations of the Inter-American Commission and the judgments of the Inter-American Court, even when their own current or recent crimes are at issue.

## NOTES

All cases cited are Inter-American Court cases unless otherwise noted.

1 *Almonacid Arellano et al. v. Chile*, Preliminary Objections, Merits, Reparations and Costs, Judgment of September 26, 2006, Ser. C, No. 154 (hereafter cited as *Almonacid*), par. 124.

2 For a survey of all the Court's reparations orders through 2004, see Douglass Cassel, "The Expanding Scope and Impact of Reparations Awarded by the Inter-American Court of Human Rights," in *Out of the Ashes: Reparations for Victims of Gross and Systematic Human Rights Violations*, ed. K. De Feyter, S. Parmentier, M. Bossuyt, and P. Lemmens (Antwerp: Intersentia 2005), pp. 191–223.

3 For my previous analysis of the Commission's reports, see Douglass Cassel, "La Lucha Contra la Impunidad ante el Sistema Interamericano de Derechos Humanos," in *Verdad y justicia: Homenaje a Emilio F. Mignone*, ed. Juan Méndez, Martín Abregú, and Javier Mariezcurrena (San José: Instituto Interamericano de Derechos Humanos, 2001), pp. 57–410, and "Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities," *Law and Contemporary Problems* 59, no. 4 (1996): 197–230.

4 *Velásquez Rodríguez v. Honduras*, Judgment of July 29, 1988, Ser. C, No. 4.

5 See, for example, *IACHR Annual Report 1985–86*, chap. V, for guidelines on the responsibilities of democratic governments to investigate and remedy human rights violations under prior regimes. Also see *Garay Hermosilla et al. v. Chile*, Report 36/96, Case 10.843, and *Irma Reyes et al. v. Chile*, Report 34/96, Cases 11.228 et al., both in *IACHR Annual Report 1996*, chap. III.

6 See, for example, *Almonacid*, par. 111 (quoting earlier cases).

7 *Goiburú et al. v. Paraguay*, Merits, Reparations and Costs, Judgment of September 22, 2006, Ser. C, No. 153 (hereafter cited as *Goiburú*), par. 164.

8 *Ibid.*, par. 73.

9 *Villagrán Morales et al. v. Guatemala*, Judgment of November 19, 1999, Ser. C, No. 63, par. 173.

10 *Myrna Mack Chang v. Guatemala*, Judgment of November 25, 2003, Ser. C, No. 101, par. 264.

11 *Velásquez Rodríguez v. Honduras*, Judgment of July 29, 1988, Ser. C, No. 4, par. 166.

12 *Ibid.*, pars. 174–81.

13 *Ibid.*, par. 177.

14 *Goiburú*, par. 164.

15 *Pueblo Bello Massacre v. Colombia*, Judgment of January 31, 2006, Ser. C, No. 140, pars. 205–9; *Goiburú*, par. 121.

16 *Goiburú*, par. 131.

17 *Ibid.*, par. 92.

18 *Ibid.*, par. 192.5.

19 *Serrano Cruz Sisters v. El Salvador*, Judgment of March 1, 2005, Ser. C, No. 120, par. 173.

20 *Almonacid*, par. 156.

21 *Goiburú*, par. 130.

22 *Ibid.*, par. 161.

23 Unlike the American Convention, the International Covenant on Civil and Political Rights in Article 14.3(d) expressly safeguards the right of the accused to be "tried in his presence." The UN Human Rights Committee that monitors adherence to the covenant recognizes that "When exceptionally for justified reasons trials *in absentia* are held, strict observance of the rights of the defence is all the more necessary." CCPR General Comment No. 13, "Equality before the courts and the right to a fair and public hearing by an independent court established by law" (Art. 14), April 13, 1984, par. 11.

24 *Goiburú*, pars. 132, 166, 192.6.

- 25 *Pueblo Bello Massacre v. Colombia*, Judgment of January 31, 2006, Ser. C, No. 140, par. 268.
- 26 *Almonacid*, par. 118.
- 27 *Barrios Altos v. Peru*, Judgment of March 14, 2001, Ser. C, No. 75, par. 43.
- 28 *Ibid.*, par. 41.
- 29 *Ibid.*, pars. 43, 51.4.
- 30 See, for example, *Statute of the International Court of Justice*, Art. 59: “The decision of the Court has no binding force except between the parties and in respect of that particular case.”
- 31 *Barrios Altos Case*, Interpretation of the Judgment on the Merits (Art. 67, American Convention on Human Rights), Judgment of September 3, 2001, Ser. C, No. 83, second operative paragraph.
- 32 Report 36/96, Case 10.843, *Garay Hermosilla et al. v. Chile*, and Report 34/96, Cases 11.228 et al., *Irma Reyes et al. v. Chile*, both in IACHR Annual Report 1996, chap. III.
- 33 *Almonacid*, par. 121.
- 34 *Ibid.*, pars. 118, 121.
- 35 *Ibid.*, par. 41.
- 36 See, for example, Rome Statute of the International Criminal Court, Art. 7.1.
- 37 “Primero, habría que calificar si el homicidio del señor Almonacid Arellano constituye o no un crimen de lesa humanidad.” *Almonacid*, par. 90.
- 38 *Ibid.*, pars. 104, 99, 114, 129.
- 39 “Al pretender amnistiar a los responsables de delitos de lesa humanidad, el Decreto Ley No. 2.191 es incompatible con la Convención Americana y, por tanto, carece de efectos jurídicos, a la luz de dicho tratado” (*ibid.*, par. 171.3, translation by author).
- 40 *Ibid.*, par. 127, quoting *Barrios Altos v. Peru*, Judgment of March 14, 2001, Ser. C, No. 75, par. 43.
- 41 *Ibid.*, par. 42.
- 42 *Ibid.*, par. 49.
- 43 *Barrios Altos v. Peru*, Judgment of March 14, 2001, Ser. C., No. 75, par. 41.
- 44 *Almonacid*, pars. 152–53.
- 45 Rome Statute of the International Criminal Court, Art. 20.
- 46 *Almonacid*, par. 154.
- 47 *Barrios Altos v. Peru*, Judgment of March 14, 2001, Ser. C., No. 75, par. 43.
- 48 See, for example, *Almonacid*, par. 127, quoting *Barrios Altos*, par. 43.
- 49 *Goiburú*, par. 117.
- 50 See, for example, *Goiburú*, par. 178.
- 51 IACHR *Annual Report 1985–86*, chap. V.
- 52 See, for example, *Almonacid*, par. 148.

- 53 *Velásquez Rodríguez v. Honduras*, Judgment of July 29, 1988, Ser. C, No. 4, par. 181.
- 54 *Serrano Cruz Sisters v. El Salvador*, Judgment of March 1, 2005, Ser. C, No. 120, par. 62. Translation by author.
- 55 See, for example, *Bámaca Velásquez v. Guatemala*, Judgment of November 25, 2000, Ser. C, No. 70, pars. 197–201.
- 56 *Pueblo Bello Massacre v. Colombia*, Judgment of January 31, 2006, Ser. C, No. 140, par. 219; *Blanco Romero et al. v. Venezuela*, Judgment of November 28, 2005, Ser. C, No. 138, par. 62.
- 57 *Claude Reyes et al. v. Chile*, Judgment of September 19, 2006, Ser. C, No. 151.
- 58 *Goiburú*, par. 164 (footnotes omitted).
- 59 *Almonacid*, par. 157; *Goiburú*, par. 165.
- 60 *Bámaca Velásquez v. Guatemala*, Judgment of February 22, 2002, Ser. C, No. 91, Concurring Opinion of Judge Sergio García Ramírez, p. 3.
- 61 *Goiburú*, pars. 81, 93.
- 62 *Ibid.*, par. 68.
- 63 *Ibid.*, par. 170.
- 64 *Almonacid*, par. 149.
- 65 *Ibid.*, pars. 82, 82.3–82.7, 82.26, 82.27, 103.
- 66 *Ibid.*, par. 150.
- 67 *Miguel Castro-Castro Prison v. Peru*, Judgment of November 25, 2006, Ser. C, No. 160; *La Cantuta v. Peru*, Merits, Reparations and Costs, Judgment of November 29, 2006, Ser. C, No. 162.

## AMNESTY LAWS

*Santiago A. Canton*

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

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

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

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

In the cases discussed here—El Salvador, Uruguay, Argentina, and Peru—each state reacted differently to the demand for justice for human rights violations. All four

countries, however, passed laws that curtailed the scope for investigations, prosecutions, and convictions, as well as for making reparations to the victims.<sup>1</sup>

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

This chapter examines the Inter-American Commission's response to petitions alleging that the amnesty laws enacted in the region violated the American Convention on Human Rights.<sup>2</sup> It also discusses the governmental response to the Commission's actions.

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

In Argentina, the civilian-military regime had been seriously discredited, mainly because of the failure of the "national reorganization" process and the military defeat in the war over the Malvinas islands. Although the armed forces attempted to avoid trials for human rights crimes by approving a self-amnesty law, the law was declared unconstitutional shortly after the Raúl Alfonsín administration took office.<sup>3</sup> The newly installed govern-



ment acted immediately to try members of the military juntas that had governed the country from 1976 to 1983. It also created the National Commission on the Disappearance of Persons (CONADEP), which conducted an exhaustive investigation before publishing its report *Nunca Más* (Never Again). Shortly thereafter, however, at the urging of the executive and bowing to the pressure of the armed forces, the Congress passed the amnesty laws known as Due Obedience (*Obediencia Debida*) and Full Stop (*Punto Final*).

The government of Alberto Fujimori in Peru, which had little or no democratic legitimacy in terms of its origins or actions, issued amnesty laws 26.479 and 26.492 in June 1995. These laws were intended to grant amnesty to military, police, and civilian personnel implicated in human rights violations committed between 1980 and the date the laws were enacted. A high-level bribery scandal, international pressure, and civil society mobilizations combined to hasten the fall of the Fujimori-Montesinos regime. A parallel can be drawn between the discredited civilian-military sector in Peru and the similarly disgraced Argentine armed forces. In contrast, the outgoing Uruguayan dictatorship retained greater negotiating power, which enabled it to reserve certain privileges for itself in the future.

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

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

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

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

## THE DOCTRINE AND JURISPRUDENCE OF THE INTER-AMERICAN COMMISSION

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

Following that annual report, the IACHR continued to develop its jurisprudence in relation to amnesty laws in its reports on individual petitions. The first three of these to find that the amnesty laws contravened the American Convention were approved at the Commission's regular session of September–October 1992. In the *Las Hojas* case from El Salvador, the Commission concluded based on a very narrow legal analysis that an amnesty law in effect in that country violated the American Convention.<sup>6</sup> In the other two

cases, from Uruguay and Argentina, the Commission offers a more in-depth analysis.<sup>7</sup> It concludes that the amnesty laws violate the judicial guarantees and protections embodied in Articles 8 and 25 of the American Convention by depriving the victims of their right to an effective investigation and prosecution of the responsible parties. These decisions by an international entity with jurisdictional powers were perhaps the first to find that amnesty laws constitute a violation of international human rights law. The Commission relied on the same legal arguments in 12 other cases that establish the incompatibility of amnesty laws with the American Convention.<sup>8</sup>

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

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

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

In principle, international law prohibits general amnesties in cases of serious violations of international law. This includes serious violations of the Geneva Conventions of 1949 and its first Additional Protocol, as well as other violations of international humanitarian law, genocide, and crimes against humanity. Progress has also been made in recent years

in defining what constitutes a crime against humanity; the statutes of the aforementioned tribunals and the International Criminal Court include murder, extermination, slavery, deportation, deprivation of liberty, torture, and rape, when they are systematic, generalized, and target the civilian population.<sup>10</sup>

Neither the Commission's decisions nor the recent developments in international law preclude the use of amnesty as a mechanism for achieving peace in conflict situations or for resolving conflicts that jeopardize normal democratic functioning. In such situations, amnesties continue to be a valuable political negotiating tool that can be used by states to resolve conflicts that impinge upon the rule of law. Amnesty laws, however, must adhere rigorously to international standards lest they be declared invalid by domestic and international tribunals. The core objective of these important developments in international law is to restore human dignity, which entails recovering an essential component of the rule of law: the fight against impunity.

## COUNTRY CASE STUDIES

### **El Salvador**

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

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

In its report *From Madness to Hope: The 12-Year War in El Salvador*, the Truth Commission underscored the need for justice in cases of human rights abuses that it had documented:

“Public morality demands that those responsible for the crimes described here be punished.” However, the Truth Commission saw this as unlikely, noting that “El Salvador has no system for the administration of justice which meets the minimum requirements of objectivity and impartiality so that justice can be rendered reliably.” Finally, the Commission expressed its hope that the judicial system would be restructured so as to “administer justice in a full and timely manner.”<sup>12</sup>

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

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

As noted above, before Law 486 was enacted the IACHR had ruled in a case concerning a previous amnesty law passed during the Napoleón Duarte administration. In Report 26/92, the IACHR found the Salvadoran state responsible for the massacre at Las Hojas, where government security forces murdered approximately 74 people in February 1983. The Legislative Assembly passed an amnesty law in October 1987, after a criminal proceeding was initiated and it appeared possible that a colonel implicated in the massacre might be charged. As a result, the Salvadoran Supreme Court definitively closed the case, thus ensuring that the material and intellectual authors of this massacre would not be punished. During the subsequent process before the Inter-American Commission, the government of El Salvador did not respond to a single request for information issued by that entity.

In the *Las Hojas* case, which relied on a narrower analysis than the individual reports from Argentina and Uruguay issued during the same regular session, the IACHR found that by approving the amnesty law, the government of El Salvador had “legally eliminated the

possibility of an effective investigation and the prosecution of the responsible parties, as well as proper compensation for the victims and their next-of-kin by reason of the civil liability for the crime committed.”<sup>16</sup>

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

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

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

Peace was achieved in El Salvador with endeavor and great sacrifice, and in the viable and effective course for trying to secure it, improve the human rights situation, and build democracy, necessary measures were agreed upon based on the new national consensus and the political will of those who signed the Peace Accords, which were aimed at stabilizing the conditions of the Nation’s spirit, with a view to the much-sought reconciliation.

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

This mechanism, unprecedented in El Salvador, and with United Nations verification, reviewed a part of the violence of the armed conflict, and made clear the need to close a tragic chapter of our history and in so do-

ing avoid opening wounds just recently beginning to heal, or, in the worst of cases, forestall a chain of acts of revenge that could have led to a new polarization of Salvadoran society.

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

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

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

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

report, arguing that the Inter-American system already had established the incompatibility of the amnesty laws with the American Convention on Human Rights.<sup>18</sup>

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

## Uruguay

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

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

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

Enrique Rodríguez Larreta Piera appeared before the Commission during the first democratic government following the dictatorship, after the passage of the Law of Expiry as well as Uruguay's ratification of the American Convention on Human Rights. In light



of the government's failure to comply with the Commission's recommendations of 1981, he requested that the IACHR "urge the Government of Uruguay to adopt the necessary measures to comply, without delay, with the Commission's 1981 resolutions." The Commission decided to take up the request and combine it with seven other cases for a total of 17 victims of human rights violations.

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

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

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

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

The government's stated willingness to pursue an active human rights policy opened the door for human rights groups to revisit the possibility of promoting compliance with the recommendations in Report 29/92. The Institute of Legal and Social Studies of Uruguay (IELSUR) requested a hearing before the IACHR, which was granted on October 17, 2005. A second hearing was held on March 10, 2006. At both hearings the government modified considerably its policy of rejecting the conclusions of Report 29/92. The Uruguayan ambassador to the OAS stated that he had accepted the invitation to the hearing "for the essential purpose of highlighting information on significant developments in relation to compliance with the recommendations issued to the government of my country in Report 29/92." The new government was also seeking to bring about a "fundamental change of direction" and an "unprecedented turnaround" in Uruguay's policy in this area.<sup>20</sup>

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

## Argentina

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

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

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

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

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

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

In its response, the government hoped to prevent the Commission from finding the "nascent democracy" in violation of human rights, yet it chose not to confront the Commission, mainly because of the tremendous prestige that the latter enjoyed in Argentina. The government, then led by President Carlos Menem, argued that Argentina was the country that had been most effective in dealing with the "difficult problem" of finding solutions to past human rights violations. It further contended that it was the country's democratic institutions and "the affected national sectors themselves" that had come up with solutions based on the urgent need for national reconciliation and consolidation of democratic government. The government went on to describe all the activities carried out under its mandate, as well as those of the previous administration of Raúl Alfonsín. It mentioned, among

other things, the National Commission on the Disappearance of Persons (CONADEP) and various laws and decrees on reparations for the victims of past serious human rights abuses and their relatives, including monetary compensation, benefits, and pensions.

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

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

Three years passed before the process began that would not only have a powerful impact in Argentina but also bring about changes to the follow-up procedures for cases before the Commission. This process owed much to the efforts of individual petitioners in conjunction with Argentine and international human rights groups, the Inter-American system, and the Argentine state. On June 19, 1995, the Commission received a petition requesting the reopening of Report 28/92 based on new events that had taken place in Argentina.<sup>23</sup> These new events were public statements by military officers acknowledging the violations committed during the dictatorship. Although the Commission initially was reluctant to reopen the case, the petitioners reiterated on several occasions their request for a hearing to explain the new circumstances. Finally, on October 9, 1996, the Commission granted a follow-up hearing.<sup>24</sup> After that initial experience, the Commission continued to hold follow-up hearings related to Report 28/92, and in so doing it provided an important forum for dialogue between civil society and the state.

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

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

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

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

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

The ruling begins by alluding to IACHR Report 28/92. With that report, the ruling states, it was established that the amnesty laws violated the American Convention, and therefore

the Argentine state should have adopted “all necessary measures to clarify the facts and identify those responsible.” However, continued the Supreme Court, the Commission’s recommendation did not make clear whether successfully “clarifying” the facts was sufficient in trials or whether it was necessary, in addition, to completely invalidate the laws. In the opinion of the Supreme Court, the Inter-American Court filled this gap in the *Barrios Altos* case, where it explicitly stated that “all amnesty provisions . . . designed to eliminate responsibility [for serious human rights violations such as torture, forced disappearance, and extrajudicial, summary, or arbitrary execution] are inadmissible.” Based on this Supreme Court ruling, several cases have been opened against individuals accused of serious human rights violations during the dictatorship.<sup>30</sup>

## Peru

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

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

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

prosecution of those responsible for the grave violations that occurred in *La Cantuta* and *Barrios Altos*.

In July 1992, the Commission received a petition reporting the torture and extrajudicial execution of a professor and nine students from the National Education University Enrique Guzmán y Valle in the La Cantuta section of Lima. After a number of parallel processes in Peruvian criminal and military courts, proceedings that were rife with irregularities, the prosecution went forward in the military venue. On May 3, 1994, the Supreme Council of Military Justice (CSJM) handed down a judgment of conviction against several members of the Peruvian army.

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

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

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

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

Cognizant that the rule of law in Peru had been severely weakened under the Fujimori government, the Commission forwarded to the Inter-American Court a number of cases

directly related to certain structural deficiencies in Peru's democratic institutions. They included cases involving extrajudicial executions and forced disappearances, as well as those related to military tribunals, freedom of expression, due process, and the administration of justice. The *Barrios Altos* case, which sought a ruling on the incompatibility of amnesty laws with the American Convention, reaffirmed and deepened the Commission's existing jurisprudence. The Court ultimately resolved that

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

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

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

But the Fujimori government had no intention of complying with the Commission's recommendations or the decisions of the Court. Its responses to individual cases, its presentations during hearings before the Commission, and its discourse before the political organs of the OAS always sought to limit the capacity of the Inter-American system to fulfill its mandates to protect the human rights of the hemisphere. This policy was taken to an extreme with a July 1999 legislative resolution to withdraw Peru from the contentious jurisdiction of the Inter-American Court of Human Rights. In response to this move by the Fujimori government, the Court ruled two months later that "Peru's purported withdrawal, with immediate effect, from the declaration recognizing the contentious jurisdiction of the Inter-American Court of Human Rights is inadmissible."<sup>33</sup>



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

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

## CONCLUSIONS

The 1970s and 1980s, and in some countries the 1990s as well, have left a daunting legacy. The tens of thousands of people who died as a result of state repression can never be brought back. We must address this recent history if we aspire to a peaceful and democratic future for Latin America. When the trend toward the restoration of democracy began in the 1980s, many voices were raised to suggest alternatives for dealing with that tragic past. For reasons beyond the scope of this work, the voices that prevailed were those arguing that the search for justice for serious human rights violations could jeopardize the transition to democracy. As a result, the political debate revolved around the need to choose between democracy and justice, on the assumption that it was impossible to obtain justice without causing the nascent democracies to crumble.

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

The Commission provided one such avenue. From the 1970s to the present, the Inter-American Commission on Human Rights has been a critical actor, working together with

the people of the Americas to protect human rights. At certain times this meant exposing abuses and facing up to dictatorships that violated human rights by virtue of their very existence. Once democracy was restored, the Commission engaged states and societies in dialogue to find ways to address the legacy left by the dictatorships.

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

In each of the cases examined here, the state response to the Commission was eminently political. The government of Argentina asserted that it had found “solutions based on the urgent need for national reconciliation and for the consolidation of democratic government.” Peru indicated that both its amnesty laws were approved by the Congress “in the discharge of duties entrusted to it by the Political Constitution in the context of the pacification policies undertaken by the Peruvian state.” El Salvador insisted that its amnesty law was “aimed at ensuring the existence of a democratic state at peace as the only way to preserve human rights.” For its part, Uruguay argued that “justice is a value, but so is peace. It is not possible to sacrifice peace for the sake of justice.”

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

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

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

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

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

## NOTES

The opinions expressed in this chapter are exclusively those of the author and do not necessarily represent the views of the OAS General Secretariat or those of the Inter-American Commission on Human Rights.

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

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

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

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

5 *IACHR Annual Report 1985–86*.

6 IACHR Report 26/92, Case 10.287, *Las Hojas Massacre* (El Salvador), September 24, 1992.

7 IACHR Report 29/92, Cases 10.029, 10.036, 10.145, 10.305, 10.372, 10.373, and 10.375, Uruguay, October 2, 1992; Report 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309, and 10.311, Argentina, October 2, 1992.

8 IACHR Report 26/92, *Las Hojas Massacre* (El Salvador); Report 28/92 (Argentina); Report 29/92 (Uruguay); Report 34/96 (Chile); Report 36/96, *Héctor Marcial Garay Hermosilla et al.* (Chile); Report 25/98, *Mauricio Eduardo Jonquera Encina et al.* (Chile); Report 1/99, *Lucio Parada Cea et al.* (El Salvador); Report 133/99, *Carmelo Soria Espinoza* (Chile); Report 136/99, *Ignacio Ellacuría et al.* (El Salvador); Report 37/99, *Monseñor Oscar Arnulfo Romero y Galdámez* (El Salvador); Report 61/01, *Samuel Alfonso Catalán Lincoleo* (Chile); Report 28/00, *Barrios Altos* (Peru); Report 30/05, *Luis Alfredo Almonacid* (Chile).

9 This includes the reports on El Salvador (1994), Peru (2000), and Colombia (2004), among others. In its Colombia report, the Commission stated: “While the adoption of provisions aimed at granting an amnesty to persons responsible for the crime of taking up arms against the state may be a useful tool in the context of efforts to achieve peace, amnesty laws as well as similar legislative measures that impede or consider concluded the investigation and prosecution of crimes of international law impede access to justice and render ineffective the obligation of the states party to respect the rights and freedoms recognized in the Convention and to ensure their free and full exercise.”

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## LESSONS LEARNED

*Juan E. Méndez*

**T**ransitions to democracy in Latin America have now yielded a wealth of experience and principles of universal applicability. It has been almost a quarter century since the start of a clear trend in which military dictatorships have given way one by one to elected governments. In some of these new governments the military establishment has retained a high concentration of power, acting as a state-within-a-state. But as time goes on, these have also made way for governments that better reflect the will of the people and the requirements of the rule of law.

For a variety of reasons, however, democracy has been a disappointment in the region. Its advent has coincided with rising levels of poverty and a widening of the gap in income distribution. With rare exceptions, economies cannot be relied upon to perform consistently well. Rising crime and a growing perception of insecurity are breeding authoritarian tendencies in large segments of the electorate. A steady stream of elections has not resulted in strengthened institutions of control or in separation of powers. In this context corruption has flourished.

Given these discouraging trends, it is surprising that most Latin American countries still attempt to solve seemingly intractable crises through the ballot box instead of through military coups or armed insurrection. One obvious reason for this preference for democracy, with all its weaknesses, is that Latin Americans are keenly aware of how much worse the performance of military dictatorships has been on all of these issues. People are also conscious of the high cost in human suffering that our countries paid when they allowed authoritarian and totalitarian military elites to exercise uncontrolled power.

In making efforts to reckon with the legacy of human rights violations left by the dictatorships, our societies have contributed to the stability of democracy. Clearly those efforts have not been 100 percent successful in any country. Even in countries that have achieved the greatest advances, there is an enormous unfinished business of justice for past crimes. But the effort itself—to recover the memory of the abuses, to hold individuals and institutions accountable, to recognize the inherent worth of each victim through reparations,

and to tell the truth where denial and oblivion have long prevailed—has convinced broad majorities in the region that even the worst democracy is preferable to a de facto regime.

## EMERGING NORMS IN INTERNATIONAL LAW

The Latin American experience is noteworthy not only because of the creativity and innovation that has been applied in dealing with difficult issues of public policy. This process has also yielded important guideposts in the way human rights obligations should be interpreted. The struggle against impunity has been waged at the level of public opinion and in the principal arenas where policy is formulated: in legislative and administrative bodies, in the courts, and even in constitutional assemblies. Most often, the courts of newly democratic regimes have been called upon to resolve complex matters in which the rights of individuals to see justice done must be balanced against the rights of the accused to full due process. In weighing rights of access to justice against impunity laws, or in adjudicating claims for compensation for human rights violations, Latin American judiciaries have applied treaty-based obligations of the state, thus giving domestic force to rules of international law.

This rule-making process was greatly aided by the existence of a well-established and prestigious system of international human rights protection under the umbrella of the Organization of American States (OAS). Even during the military dictatorships, the Inter-American Commission on Human Rights (IACHR) played a significant role in exposing human rights crimes and gradually isolating the criminal regimes from the rest of the international community. In particular, the Commission took strong positions against the “self-amnesty” decrees that the dictators passed for themselves with impressive regularity. Later, in the early years of the transition to democracy, nongovernmental organizations from the region would come to the IACHR to denounce those laws as well as additional impunity statutes that the fledgling democracies passed, sometimes almost literally under the gun. The Commission refined its analysis of the obligations states acquire when they sign and ratify human rights treaties, and as early as 1992 it found blanket amnesties to be incompatible with those obligations. Since then, the IACHR has had many occasions to ratify and insist on this principle, one that has been adopted by human rights bodies in other regional systems as well as at the universal level.



The Inter-American Court of Human Rights has significantly strengthened this fundamental principle through a long and uniform series of rulings. These started with its very first adversarial case, *Velasquez-Rodriguez v. Honduras* (1988), in which it established the duty of due diligence to investigate, prosecute, and punish forced disappearances and reveal the truth about them. Several years later the Court amplified the rule in *Barrios Altos v. Peru* (2001), stating not only that blanket amnesty laws are invalid under international law but also that the state is obligated to deprive them of legal effect in the domestic jurisdiction as well. In late 2006 the Court again ratified this principle in dealing with the self-amnesty law that General Augusto Pinochet of Chile passed in 1978.

Decisions of the twin organs of protection in the OAS carry great legal and moral weight. This is because the Commission and the Court have established a reputation for thorough analysis and fair procedures, just as they have become the highly authoritative interpreters of fundamental treaties like the American Convention on Human Rights. States and civil societies alike recognize the leadership of these organs (as well as the leading promotional role of the system's research and educational body, the Inter-American Institute on Human Rights) and look to them for guidance on how to implement their international obligations. Increasingly, domestic courts are willing to give domestic force to the state's international obligations, precisely by adopting and implementing the Inter-American system's jurisprudence as applied to cases arising in domestic law.

It is hardly surprising, therefore, that Latin American practitioners and experts on Latin America from other countries have frequently been called to offer their views about transitional justice in vastly different cultural contexts. Professor Douglas Cassel, a contributor to this volume, has appeared as *amicus curiae* before Indonesia's Supreme Court in a case challenging that country's truth and reconciliation statute for its expansive amnesty provisions. Javier Ciurlizza, the former executive secretary of the Peruvian Truth and Reconciliation Commission, has advised the Moroccan commission on operational and policy challenges faced by both bodies. In preparation for the landmark South African policy on truth and reconciliation, its framers repeatedly invited Latin Americans to share their experiences and visited Latin America with the same purpose. Luis Moreno Ocampo, who prosecuted the junta members in Argentina in the 1980s, is currently the prosecutor for the International Criminal Court. Forensic anthropologists from several Latin American countries have conducted exhumations and provided expert testimony on every other continent, often under the auspices of the United Nations.

## REDEFINING THE “TRANSITION”

It would be a mistake, however, to conclude that the focus on transitional justice has shifted from Latin America to other regions of the world. Equally wrong would be to assume that the tasks of transitional justice in our region have been largely accomplished, or that the time for them has come and gone. The level of activity around these issues has varied widely from country to country within the Americas. In some places, the sectors that favor impunity have largely succeeded in preventing implementation of policy initiatives to reckon with legacies of abuse. Even there, however, the struggle for truth and justice is not necessarily over, although the lock on public policy options remains in place. Civil society initiatives have compensated, albeit only in part, for the failure of the state to live up to its obligations. Exemplary instances of such efforts are the church-sponsored project in Brazil in the 1980s that resulted in the groundbreaking report called *Tortura Nunca Mais* (Torture Never Again), and a similar effort in Uruguay by civil society organizations to organize a plebiscite that almost succeeded in overturning the impunity law called Ley de Caducidad.

In several countries, pressure from civil society and democratic sectors has led to important efforts by governmental institutions to investigate and disclose the truth, to prosecute perpetrators, to offer reparations to victims and their families, and to reform the armed forces and security forces and exclude from their ranks persons who are known to have abused their authority and committed serious human rights violations. In all cases, the stiffest challenge has been the existence of amnesty or pseudo-amnesty laws, sometimes enacted by the dictators to forgive themselves, sometimes promulgated by weak or complicit civilian governments under pressure from or in the service of military elites. Over the years, the struggle against impunity has succeeded in limiting the effect of amnesties, both by declaring existing laws unconstitutional for violating the state's international law obligations and by making the enactment of broad, blanket amnesties a thing of the past.

As the country-specific chapters in this book describe, even twenty-five years after the transitions to democracy began there are continual new developments in law and practice as our societies pursue objectives of truth and justice. Perpetrators of abuse still face the possibility of prosecution in many countries. In some of them, those perpetrators are in custody and awaiting trial, or they have been convicted and are serving long sentences. In others, courts and prosecutors face enormous challenges even though the possibility of prosecution remains technically open.

The truth commissions have been stunningly effective in their search for truth—in Argentina and Chile early on; in El Salvador and Guatemala with the assistance and sponsorship of the United Nations; and most recently in Peru, where the process produced a remarkable report. But truth commissions are not the sole mechanism by which this is accomplished: courts and legislative bodies have also contributed to the search for that which is denied and hidden by the powers that be. A “right to truth” has emerged, and our societies and state institutions have been creative and inventive in finding new ways to get at the truth. Reparations schemes of an administrative nature have been put in place in some countries, although the majority of victims have yet to be recognized in their worth as citizens through a policy to compensate them for the harm they have suffered. Institutional reform and “vetting” of perpetrators of abuse has been slow and is hampered by a misplaced *esprit de corps*. And yet it has happened on a case-by-case basis, or by attrition, to the point where our armies and security forces are now noticeably less powerful and more subordinate to democratic controls than at any previous time in history.

At the beginning of this latest wave of democratization it was assumed that the “spring of democracy” would not last long. For that reason, it was believed that what could be accomplished in the struggle against impunity would have to take place in the small window of opportunity, or it would never happen. To their credit, victims’ organizations and human rights activists never let this assumption become an excuse for cutting corners or attempting any form of rough justice. On the contrary, they always insisted on the highest standard of respect for due process and fair trial guarantees as conditions of legitimacy for any process of reckoning with the past. Also to their credit, they never ceased to demand accountability, even when the political forces were stacked against them.

In the process, these advocates have contributed to new understandings of what the transition to democracy means. To begin with, such transitions cannot be defined by a fixed time frame or an artificial milestone (like the transfer of power between elected governments). A transition is only over when its objectives have been achieved and, most emphatically, when the rule of law has been reestablished—not only for the present and the future, but also for state crimes committed in the recent past. In the end, the struggle against impunity is intimately linked to the quality of the democracy to be built because this struggle aims to establish the fundamental principle of equality before the law and absence of privilege. And it seeks to ensure that institutions—especially those designed to protect citizens from abuse and offer them redress—play their role without undue interference.

The fact that accountability continues to be at the center of Latin American political agendas also amends our understanding of transitions in another important way. There is no reason to believe that accountability can only be accomplished in a short time frame at the beginning of the restoration of democracy. Demands for justice will not go away, regardless of the attitude of the newly elected government. Of course, this does not mean that human rights activists and victims can simply sit back and let accountability happen: without a consistent, committed, determined strategy, it will not happen. But it does mean that there is no need to sacrifice any objective of justice for the sake of grasping opportunities. There will always be a need to set priorities and to take advantage of the opportunities that each period presents, but it is also possible to wait for a time in which transitional justice has a better chance to be honored. In an ideal situation there would be no need to resort to sequencing the separate objectives. But transitions never take place under ideal conditions, because by definition the forces that committed the abuses in the recent past still retain considerable power and influence. The reason we talk about *transitional* justice is not because the justice we seek is of a different or lesser quality than ideal justice, but because we must identify obstacles to its realization and ways to overcome them—a process that necessarily unfolds over time.

In the final analysis, the experience has also demonstrated that the principles of transitional justice, especially the obligations that legacies of abuse impose on states, are not limited to the moment of transition or to the struggling newly elected government that is trying to deal honestly with the past. These are permanent obligations of the state, applicable both to governments that are in power at the time the violations are committed and to all successor governments. It is useless, therefore, to imagine policies of “forgive and forget” under the guise of “national reconciliation.” The demands for justice will simply not go away.

## WHAT RECENT EXPERIENCE HAS TAUGHT US

While it is true that demands for justice have a way of emerging in the public policy debate, this does not mean that it is wise to wait for such demands to be voiced and then improvise solutions to them. In fact, an important lesson from the Latin American experience is that transitional justice is first and foremost a set of policy options that require planning and preparation. Governments and civil society must bear in mind the ultimate goals and devise the mechanisms most appropriate to reach them in a reasonable time frame and with the

least possible generation of conflict. For that, it is crucial to analyze the experiences of other societies that have recently met similar challenges, while at the same time recognizing that it is unwise simply to copy mechanisms applied elsewhere. The most effective transitional justice policy is one that learns from foreign experiences but adapts them to the specific context and to the cultural traditions of the country where the policy will be applied.

As the moment of reckoning with the past approaches, each Latin American country typically has discussed the experiences of other countries, especially but not exclusively those of sister nations in Latin America. Unfortunately, much of what is reported about these other experiences is self-serving and superficial and pays no attention to the specific circumstances or to the desired and undesired results of other countries' approaches.

In the name of a supposed "restorative justice," Colombian authorities and supporters of the demobilization plans for the paramilitary groups have made allusions to the South African experience, as well as to peace processes in Northern Ireland and the Basque country. But in presenting those as examples of policies of reconciliation and forgiveness—and as alternatives to supposedly "vindictive" approaches to prosecution and punishment of crimes against humanity—they seriously distort those experiences and their respective legacies. Similarly, in the early 1990s Salvadoran government officials at the end of the war proposed to follow the Chilean model rather than the Argentine one, meaning that they would contemplate a truth commission as long as it would be a complete substitute for any prosecution of human rights violations committed by either side. The current prosecution of hundreds of Chilean military officers for crimes of the Pinochet era shows that the analogy was not only faulty: it was offered in bad faith to justify a policy of impunity. An important conclusion to be drawn from these examples is that a superficial knowledge of other processes can do a great deal of harm; an in-depth analysis of the merits and weaknesses of those processes and their results is absolutely necessary. Even more necessary is to study them with a genuine desire to learn, rather than invoking them in order to borrow the moral legitimacy of human rights heroes like Nelson Mandela and Desmond Tutu.

A second consideration is that the policy to be conceived and executed must be the product of extensive consultation and transparent decision making. Even the best intentions will fail to produce good results if there is no serious democratic discussion of the goals and objectives of the exercise, of the mechanisms to be created and the institutions charged with executing the plan, and of the expectations of victims and other stakeholders. This is not to say that the majority should decide *whether* or not justice in any form will be pursued. The right to justice belongs to each individual or citizen and it cannot be subordinated to decisions of the majority.

This principle is especially important where the victims of human rights violations are counted among a discrete minority in the society. At the same time, the plan has to enjoy legitimacy as a condition of its effectiveness, and in order to be perceived as legitimate it should arise from an open, transparent, democratic debate about *how* to offer satisfaction to the victims.

Once the plan is in place, there should also be the broadest possible participation on the part of victims and other stakeholders. In establishing truth commissions, for example, it is particularly important to create procedures that allow victims and witnesses to be heard in conditions in which their inherent dignity is respected and their stories can be amplified to reach the public at large. In devising a strategy of prosecutions, similarly, courts and prosecutors should allow for the participation of victims and witnesses through the procedures contemplated in the applicable legislation.

Inasmuch as possible, the plan must be comprehensive (*integral* in Spanish), meaning that it should be appropriately balanced among the different pillars of transitional justice. Each should receive resources and attention proportionate to what is needed to accomplish its objectives. Obviously, sequencing the different pursuits in accordance with time frames and targets of opportunity is not contrary to this principle as long as the plan retains a strategic vision of its objective that is indeed balanced and comprehensive, *integral*.

There are four main pillars, or core obligations. First, the transitional justice program should create conditions for a full exploration of the truth, especially in those areas where denial reigns and where the facts are deliberately hidden. Second, it should pursue prosecution of all human rights crimes, starting with the most egregious and focusing first on those persons bearing the highest responsibility for them. Since obedience to orders is not an excuse, the prosecutorial program should also include those who executed manifestly illegitimate orders. At the same time, care should be taken not to engage in scapegoating while the real perpetrators escape punishment.

Third, the policy should create a broad program of reparations for all victims, in accordance with available resources but also respecting the inherent dignity of each beneficiary. The reparations program must include both material and moral dimensions; it must also be general, unconditional, and nondiscriminatory, and avoid generating a new source of social injustice. For that reason it will seldom be wise to leave the matter of reparations to the courts, as that will only reward those victims who are more diligent or who have the wherewithal to litigate. Instead, a comprehensive administrative process with simple and fair procedures should be instituted.

Finally, the plan must include a process by which the armed and security forces are thoroughly reformed so that in the future they cannot be the instruments of despots or of those who abuse their authority. The starting point is *vetting*, or the disqualification and exclusion from the ranks of individuals known to have committed abuses. And yet the reform has to go beyond vetting to institute serious democratic controls that place the armed and security forces firmly under the authority of democratic institutions.

The four preceding obligations must be understood as separate from each other in the sense that if one of them cannot be materially accomplished, the other three remain in place as obligations. For example, if an illegitimate amnesty law precludes prosecutions, the state is still obliged to pursue the truth by various means, to offer reparations, and to separate from the ranks those known to have committed abuses, even if a judicial verdict against them has been rendered impossible. Equally important, governments must be discouraged from thinking that these four obligations are a menu from which they can choose, for example by offering reparations on the condition that no questions be asked about the fate and whereabouts of the disappeared. Each of these obligations must be pursued in good faith and to the best of the government's abilities, and token gestures toward any of the goals must be rejected. On the other hand, we must all understand that these are obligations of means and not of results. For that reason, as long as good faith is applied, we must live with the reality that—unfortunately—not every fact will be completely known. For many violations the evidence to prosecute and convict may well be lost forever.

Finally, all of these measures and activities must be conducted in a manner that upholds major human rights principles; this is an essential condition of their legitimacy. This is especially true in regards to prosecutions, because any shortcut that produces punishment without utmost respect for fair trial and due process guarantees is unacceptable. But due process rules also apply, *mutatis mutandi*, to truth telling. Those who will confront public opprobrium as *prima facie* responsible for the abuses disclosed in the truth report should have at least the opportunity to be heard and to show why they should not be so identified.

## TRANSITIONAL JUSTICE, PEACE, AND RECONCILIATION

By and large, the Latin American experiences with transitional justice have come in the context of transitions from dictatorship to democracy. In all of these transitions there was, to

be sure, an element of armed conflict, either because there was genuine violent resistance to the dictatorship or because the regime employed violence under the pretext of confronting a subversive challenge. But the end of dictatorship in these countries did not come as a result of defeat in the internal war, nor did it happen through negotiations between the government and its armed adversaries.

The cases of El Salvador and Guatemala in the 1990s are important exceptions. The transitional justice experiences in both countries were specifically agreed upon as part of peace processes brokered by the United Nations to put an end to bloody internal conflicts. In neighboring Nicaragua, a similarly cruel armed conflict also ended abruptly in the early 1990s, but that end came as a result of elections, not negotiations. Nicaragua is significant in that no serious effort of any sort was made to settle the many open wounds left in society as a result of the war crimes and human rights violations committed by both sides.

In this regard, the Central American experiences are our region's contribution to the practice of nations on how to end conflict while also reckoning with the expectations of justice held by thousands of victims. This dilemma is today one of the greatest challenges to the human rights movement. Sometimes crudely presented as "peace versus justice," this conundrum poses the risk that the human rights movement will be characterized as the spoiler of a peace process for refusing to accept a deal in which the parties to a conflict offer each other the broadest form of amnesty. In conflict after conflict, warlords and chieftains who fight dirty wars and leave behind inconsolable widows and mothers, victims of rape, and broken families are rewarded with impunity and often also with leadership roles in the government or the "new" armed forces. Conflict resolution specialists and humanitarian organizations often support these deals as the only way to put a stop to the carnage. For that reason, these peace processes give rise to a debilitating argument among persons and organizations that should normally be collaborating with each other in the interests of peace and human rights.

If transitional justice is always difficult and obstacle-ridden, when it comes to putting an end to armed conflict the complications are compounded. There is no point in rejecting peace accords on the grounds that they will eventually make justice more difficult if the immediate result of this rejection is a continuation of the war, with its attending human suffering and more human rights crimes. For that reason it is important to encourage cease-fires and other negotiations that can pave the way for a resolution in the understanding—based on experience—that even a temporary silencing of the guns is always conducive to greater respect for human rights. There is nothing wrong, however, with pointing out that a lasting peace will necessitate consultation with all the stakeholders and especially with the victims of abuse.



Their right to see justice done (in the several ways we call “transitional justice”) should be an integral part of every peace agreement. Ultimately, refusal by the parties to the conflict to countenance any agreement in which they may be forced to account for their crimes is a form of blackmail that should not be tolerated.

In this regard, the resolution of conflicts in Central America offers guidance on practical mechanisms that can be instituted. A few examples are the truth commissions in El Salvador and Guatemala, the Ad Hoc Commission in El Salvador that vetted officers and prevented more than 100 from continuing to serve in the armed forces, and the Guatemalan amnesty law that, as drafted, excluded crimes against humanity and war crimes. There were also significant civil society efforts to combat impunity that are worth studying and emulating. One is the project on Recovery of Historical Memory (REMHI), launched with the support of the Catholic Church, that successfully recorded violations throughout Guatemala that until then had been mired in oblivion and denial.

The way these conflicts ended also offers lessons on what not to do. In Nicaragua, the outgoing Sandinista regime passed a blanket amnesty with the acquiescence and support of the whole political spectrum of the country, including its former armed enemies. In El Salvador, a similarly broad and shameful amnesty was rammed through by the right-wing ARENA government immediately after the UN-sponsored Truth Commission published its exemplary report. And in Guatemala, even if the normative framework did respect the standards of international law, an absence of political will to break the cycle of impunity meant that very little was done to bring perpetrators to justice. The army remained a force unto itself, and within a few years it successfully campaigned for a referendum that nullified all of the lofty principles in the peace agreements that had recognized multiculturalism and promised that indigenous Guatemalans would no longer be treated as second-class citizens.

In conflicts around the world today, the struggle to incorporate justice into peace agreements is now greatly aided by the existence of a permanent institution that can prosecute and try violators under the highest standards of fair trial and due process when domestic judiciaries are not up to the task or when (as in Central America in the 1990s) there is more political will to secure impunity than to end it. The International Criminal Court, created by the treaty known as the Rome Statute of 1998, stands as an objective limitation to the impunity deals that the parties to a conflict are always eager to strike with each other. It is gratifying to note that Latin American countries participated wholeheartedly in the discussions leading to the Rome Statute and have since spearheaded the process of signature and ratification of the treaty. Undoubtedly, the memories of the human rights tragedies that Latin Americans

lived through in the 1970s and 1980s and beyond provided powerful motivation for these fledgling democracies to support a drive for justice in today's world. An active civil society in each country helped secure governmental and diplomatic support and made sure that the lessons learned were translated into institution building on a worldwide scale.

In the debates about peace and justice, human rights practitioners are often accused of vindictiveness when they insist on accountability for human rights crimes. Peace deals between belligerents tend to include impunity for those crimes, and supporters of such deals argue that "reconciliation" is a more urgent and worthy value than justice. They further state that the peoples of the countries where conflict is raging are culturally more inclined to forgiveness than to vengeance. In this last regard, the notion that expectations of justice are culturally relative is simply unacceptable. The principles of transitional justice aim to realize human rights and, like these rights, they are universal. Latin Americans have long heard the invocation to reconciliation as an excuse for impunity. It is for that reason that the word has little currency in regional transitional justice experiences. In fact, it is suspect and with good reason, because it has been the code word used by those who favor impunity and resist justice efforts.

It is worth noting, however, that the uses of the term in specific Latin American contexts are culturally and historically relative. Reconciliation is not, under any circumstance, contradictory with transitional justice, especially when it is a genuine necessity rather than an excuse for impunity and when it is pursued in good faith. On the contrary, reconciliation in the sense of overcoming the conflicts in society that have led to mass atrocities is a specific *objective* of transitional justice measures and mechanisms. What is unacceptable is the pretense that victims should be asked to "reconcile" themselves with their victimizers and torturers, even in the absence of any act of atonement or accountability on the latter's part. Even more intolerable is the attempt to impose reconciliation by decree, which is what makes this form of justification for impunity odious to human rights and victims' groups. But that should not obscure the fact that, in other contexts, reconciliation is a worthy goal to which transitional justice mechanisms can contribute very effectively. Especially when the conflict has had ethnic, racial, or religious overtones, it is necessary to conceive of those mechanisms as a means to put an end to ethnic divisiveness. Even in those cases, however, it is clear that reconciliation will only come through an honest and full exploration of the truth, the pursuit of justice with respect for due process, a generous offer of reparations, and a serious effort to reform the state institutions that have been used against the victims.

## CONTRIBUTORS

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Monsignor Oscar A. Romero Award for Leadership in Service to Human Rights from the University of Dayton, Ohio. He is co-editor of *The (Un)Rule of Law and the Underprivileged in Latin America* (with Guillermo O'Donnell and Paulo Sergio Pinheiro, University of Notre Dame Press, 1998). Méndez holds a law degree from Stella Maris University in Argentina and a certificate from the American University Washington College of Law.

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**SUSANA VILLARÁN** is a Peruvian teacher and journalist who works as a consultant on human rights, justice, citizen security, and public policy. In 2006 she ran for the presidency of Peru. Villarán served in 2003–2005 as a commissioner on the Inter-American Commission of Human Rights, where she was rapporteur on women's rights and was responsible for the Guatemala and Colombia portfolios. She previously was a member of the Commission on Reform and Modernization of the Peruvian National Police and was its first ombudswoman. During the transitional government of Valentín Paniagua (2000–2001), she served as minister of women and human development. She has held leadership positions in Peruvian

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## VOLUME EDITORS

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## ABOUT DPLF

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The Due Process of Law Foundation (DPLF) is a non-profit, non-governmental organization based in Washington, D.C., that promotes the reform and modernization of national justice systems in the Western Hemisphere to ensure that the rule of law becomes the hallmark of these justice systems.

DPLF was founded in 1998 by Professor Thomas Buergenthal, currently a judge on the International Court of Justice, and his former colleagues of the United Nations Truth Commission for El Salvador, who became acutely aware that the failures of the Salvadoran justice system were replicated in other countries of the region.

DPLF began its activities in late 1998 with the organization of a major conference in Washington, D.C., to assess criminal justice reform in the Americas. The organization currently places special emphasis upon:

- strengthening the independence, impartiality, and transparency of the judiciary;
- improving the training and selection of judges, police and other authorities;
- familiarizing lawyers and judges with regional and international human rights principles and institutions;
- providing opportunities to share experiences about the implementation of judicial reforms among experts, academics, civil society groups and government officials;
- supporting civil society endeavors to propose, implement, and monitor justice sector reforms; and
- facilitating dialogue between governmental and non-governmental actors.

In addition, DPLF publicizes and promotes the activities, recommendations, and judgments of the Inter-American human rights institutions, particularly the Inter-American Commission and Court of Human Rights.

DPLF sponsors and organizes seminars, conferences, and training programs. In close partnership with local and regional non-governmental organizations, DPLF carries out

training activities and collaborative research efforts to build the capacity of civil society organizations, effectuate justice reform and implement international and regional human rights standards.

DPLF provides opportunities for learning and exchange among individuals and institutions confronting similar issues in distinct countries. DPLF also undertakes research and produces publications to encourage debate on relevant human rights topics.

DPLF's programmatic areas include:

**Equal Access to Justice, focusing upon the following groups:**

- Indigenous communities
- Detainees
- Women victimized by violence
- The poor and disadvantaged

**Judicial Accountability & Transparency, focusing upon:**

- Judicial independence
- Transparency in the judicial sector
- Access to judicial information
- Judicial corruption
- Appointment, evaluation, and dismissal procedures for judges
- Institutional control mechanisms
- Civil society monitoring

**International Justice, focusing upon:**

- National implementation of international treaties, judgments, and recommendations
- National implementation of the Rome Statute
- National reforms necessary for the effective investigation of human rights violations
- Truth and reconciliation commissions

**DPLF publications and further information may be found at [www.dplf.org](http://www.dplf.org).**





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