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Truth as Right and Remedy in International Human Rights Experience

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STUDENT NOTE

TRUTH AS RIGHT AND REMEDY IN INTERNATIONAL HUMAN RIGHTS EXPERIENCE

*Thomas M. Antkowiak**

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Early this year, the Inter-American Court of Human Rights in San José, Costa Rica, was faced yet again with a seemingly basic question: Does an individual have a legal right to know the truth about the circumstances surrounding the serious human rights violations a loved one has suffered? One might expect to encounter such a privilege in our victim-centered system of international human rights protection—especially within the progressive jurisprudence of the Inter-American Court. Yet, it is simply not to be found as a substantive, explicit right.

This Note seeks to explore the origins, scope, and key possibilities of an evolving right to the truth. It will argue that truth is not only an essential component of the universally recognized "right to an effective

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remedy," but that it also serves as the gateway to a broader reparative framework necessary for victims of gross human rights abuse. The analysis shall span the Inter-American, European, and United Nations systems of human rights protection, and also will treat the burgeoning idea of the truth commission, a very prominent means of extra-judicial inquiry in contemporary transitional societies. At the conclusion, the essay will evaluate the implications of a broader, victim-oriented concept of remedy—in which truth plays a crucial role—for the United States as well.

I. HISTORICAL ANTECEDENTS: DISAPPEARANCES AND IMPUNITY

Dr. Oscar Arias, Nobel Peace Laureate, recollects the sad legacy of the Cold War in Latin America: "[T]he Superpowers provided the weapons, we provided the corpses."[1] For decades, repressive military regimes wiped out domestic opposition through a chilling pattern of forced disappearances.[2] The Inter-American Convention on the Forced Disappearance of Persons defines the elements of this practice:

> the act of depriving a person or persons of his or their freedom, in whatever way, perpetuated by agents of the [S]tate or by persons or groups of persons acting with the authorization, support, or acquiescence of the [S]tate, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.[3]

Those detained are most typically tortured, and then killed.[4]

Government police and State-sponsored death squads would snatch victims from classrooms or drag them from their beds. "Disappearing" actual and perceived opponents in this way was quiet and efficient; military juntas avoided creating martyrs and were spared undertaking the risks and uncertainties of a public trial.[5] Naturally, these tactics produced

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1. Personal Interview with Dr. Oscar Arias, San José, Costa Rica (Mar. 12, 1998).
2. Naomi Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CALIF. L. REV. 451, 453–54 (1990).
3. Inter-American Convention on Forced Disappearance of Persons, Mar. 28, 1996, art. 2, *at* http://www.oas.org/juridico/english/treaties/a-60.html
4. Roht-Arriaza, *supra* note 2, at 454.
5. *Id.* at 455.

widespread terror in the general populace and dramatically chilled political activity.[6]

The sheer scale of disappearances has been overwhelming: in Guatemala alone nearly 40,000 people were lost from the late 1960s to the early 1990s.[7] Over 9,000 vanished in Argentina during the military dictatorship, which ruled from 1976 to 1983. Many thousands more disappeared in Chile, Uruguay, El Salvador, and beyond this hemisphere, in South Africa, Afghanistan, Ethiopia, the Philippines, East Timor, Sri Lanka, Cambodia, and Uganda.[8] Of course, this systematic abuse left many more victims in its wake: the countless grieving and traumatized family members of the disappeared. These individuals often did not know the fate of their loved ones, nor were they handed over the remains; as a result, they were unable even to properly mourn their tragic losses.[9]

After the Cold War, waning military dictatorships in Latin America hastily sought to arrange their own impunity. In at least eleven countries—Argentina, Brazil, Chile, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Peru, Suriname, and Uruguay—incoming civilian leaders have chosen or have been obligated either to decree an amnesty for serious human rights violations, or to accept one already proclaimed by the military.[10]

Yet *de jure* impunity, consisting of amnesty laws, presidential pardons and the like, is not the only means by which military officials have escaped responsibility for their acts. Often overwhelming pressure to "reconcile" is exerted upon new democratic institutions by the still-powerful military, creating a *de facto* amnesty; all meaningful investigations into past violations are aborted or rendered ineffective as a consequence.[11] For very real examples of such intimidation, consider the cases of Guatemala and Colombia, where the military has been implicated in the constant harassment and assassinations of judges and

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6. *See, e.g.*, Viviana Krsticevic, *How Inter-American Human Rights Litigation Brings Free Speech to the Americas*, 4 SW. J. L. & TRADE AM. 209, 209, 218 (1997).

7. Roht-Arriaza, *supra* note 2, at 454.

8. *Id.*

9. *See* Alicia Oliveira & María José Guembe, *La Verdad, Derecho de la Sociedad*, *in* LA APLICACIÓN DE LOS TRATADOS SOBRE DERECHOS HUMANOS POR LOS TRIBUNALES LOCALES [APPLICATION OF HUMAN RIGHTS TREATIES BY LOCAL TRIBUNALS] 541, 549 (Martin Abregú & Christian Courtis eds., 1997) (postulating a victim's "right to mourn").

10. Douglass Cassel, *Lessons from the Americas: Guidelines for International Response to Amnesties for Atrocities*, 59 LAW & CONTEMP. PROBS. 197, 200–01 (1996).

11. Juan Méndez & Javier Mariezcurrena, *Accountability for Past Human Rights Violations: Contributions of the Inter-American Organs of Protection*, 26 SOC. JUST., Winter 1999, at 84, 85–86.

prosecutors.[12] Finally, a third method to preclude accountability is particularly rife in Latin America today: military court jurisdiction is often unjustifiably extended, allowing the army to absolve its own in contexts that should clearly be controlled by civil authorities.[13]

The clamor for a right to the truth was born out of the anguish and indignation caused by these systematic patterns of gross human rights violations and the subsequent impunity enjoyed by perpetrators.[14] Juan Méndez, an illustrious human rights attorney and scholar, has called the right to the truth one of the most important issues in Latin America today.[15] In fact, some commentators have identified this right as the newest human rights construction, denoting a paradigmatic shift from conventional criminal justice models toward victim-oriented remedies for both survivors and the society at large.[16]

That decades of State-sponsored terror in Latin America and elsewhere have opened a new perspective on human rights theory comes as no surprise. Yet, how is this wide-ranging concept defined in practice, and has it served to hinder advocates as merely another "new" right to undermine the moral force of rights long established in the international community? Does a right to the truth have a solid legal foundation recognized by human rights tribunals to which, as a result, the victim and family members may appeal and find redress?

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12. PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY 89 (2001).

13. Méndez & Mariezcurrena, *supra* note 11, at 86 (stating that military jurisdiction must be limited to specifically military offenses committed by members of the armed forces); *see also*, UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, STUDY CONCERNING THE RIGHT TO RESTITUTION, COMPENSATION AND REHABILITATION FOR VICTIMS OF GROSS VIOLATIONS OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS; STATEMENT SUBMITTED BY THEO VAN BOVEN ¶ 130, U.N. Doc. E/CN.4/Sub.2/1993/8 (1993) [hereinafter STATEMENT OF THEO VAN BOVEN] (commenting on the abuses of military jurisdiction).

14. *See* UNITED NATIONS, ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, QUESTION OF THE IMPUNITY OF PERPETRATORS OF HUMAN RIGHTS VIOLATIONS (CIVIL AND POLITICAL): REVISED FINAL REPORT; STATEMENT SUBMITTED BY LOUIS JOINET ¶ 3, U.N. Doc. E/CN.4/Sub.2/20/Rev.1 (1997) [hereinafter STATEMENT OF LOUIS JOINET] (explaining the roles of the Mothers of the Plaza de Mayo and the Latin American Federation of Associations of Relatives of Disappeared Detainees (FEDEFAM), which later extended to other continents).

15. Méndez & Mariezcurrena, *supra* note 11, at 94.

16. *See* Ruti Teitel, *Beyond Vienna & Beijing: Human Rights Theory: Human Rights Genealogy*, 66 FORDHAM L. REV. 301, 315 (1997).

II. LEGAL FOUNDATIONS OF THE RIGHT TO THE TRUTH: THE "EFFECTIVE" REMEDY AND CONCOMITANT DUTIES TO INVESTIGATE AND PROSECUTE

A remedy is defined as "the enforcement of a right or the redress of an injury . . . that a party asks of a court."[17] All of the major international human rights instruments, starting with the Universal Declaration of Human Rights and proceeding to the International Covenant on Civil and Political Rights (ICCPR), the American Convention on Human Rights (American Convention), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) guarantee the right to an "effective" remedy or recourse after a rights violation has occurred.[18]

As explained above, forced disappearances, torture and extra-judicial killings, known as "gross" human rights violations and included under the rubric of "crimes against humanity" or "war crimes,"[19] were the brutal impetus behind a broad-based call for the truth and thus comprise the acts focused upon in this study.[20] What, then, are the "effective remedies" required for such baleful crimes? How may a State adequately provide redress for one life taken in such a fashion, much less thousands? For some time now, scholars have made the case that a State has the duty to investigate and prosecute gross human rights violations as an essential step in the remedial process, and some have even postulated that these duties exist under international customary law.[21]

Yet, speculation on the topic has become largely unnecessary in recent years. The primary international human rights tribunals have traced the explicit contours of an effective remedy in the wake of gross human rights abuse, starting with the Inter-American Court's seminal *Velásquez*

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17. BLACK'S LAW DICTIONARY 536 (Bryan Garner ed., pocket ed. 1996).

18. Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., pt. 1, art. 8, U.N. Doc. A/810 (1948); International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 2.3, 999 U.N.T.S. 171 [hereinafter ICCPR]; American Convention on Human Rights, Nov. 22, 1969, art. 29, 1144 U.N.T.S. 123 [hereinafter American Convention]; European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 13, 213 U.N.T.S. 222 [hereinafter European Convention].

19. STATEMENT OF THEO VAN BOVEN, *supra* note 13, ¶¶ 8–13.

20. *See* Juan Méndez, *Responsibility for Past Human Rights Violations: An Emerging "Right to the Truth"*, *in* TRUTH AND JUSTICE: IN SEARCH OF RECONCILIATION IN SURINAME 43, 44–45 (Alfredo Forti & Georgine de Miranda eds., 1999)

21. *See* Diane F. Orentlicher, *Addressing Gross Human Rights Abuses: Punishment and Victim Compensation*, *in* HUMAN RIGHTS: AN AGENDA FOR THE NEXT CENTURY 425, 426–48 (Louis Henkin & John Lawrence Hargrove eds., 1994); Jo Pasqualucci, *The Whole Truth and Nothing but the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System*, 12 B.U. INT'L L.J., Fall 1994, at 321, 333–37; Roht-Arriaza, *supra* note 2, at 489–501.

Rodríguez case,[22] and have firmly established, at the very minimum, a State's positive duty to investigate.

A. *The European Court of Human Rights*

The legal concept of a positive duty on States to investigate possible human rights violations is a recent development in the case law of the European Court of Human Rights (ECHR), emerging in decisions over the last few years in cases against Turkey.[23] To begin, a positive duty to investigate can be required vis-à-vis article 13 of the European Convention, which guarantees the right to an effective remedy.[24] In *Aksoy v. Turkey*[25] and *Mentes v. Turkey*,[26] the ECHR interpreted article 13 as guaranteeing not only the availability of an effective domestic remedy to be exercised on the initiative of the complainants, but also, in the event of very serious allegations, the carrying out of a full investigation by public authorities on their own motion. In *Aksoy*, "the fundamental importance of the prohibition of torture" demanded independent action by the State;[27] in *Mentes*, it was required after the deliberate destruction of the applicants' homes and belongings by government agents.[28] However, this of course implies that article 13 would not extend an obligation to conduct a *sua sponte* investigation for "less grave" human rights violations. One may rightly ask where such a line could be drawn, or indeed whether it should be drawn at all.

Second, in an interesting approach to safeguard the right to life (article 2 of the European Convention) and bolster the prohibition against torture (article 3), the ECHR may also find a procedural breach of either of the two rights due to an inadequate investigation on the part of the relevant authorities.[29] This interpretation was first developed in *McCann v. United Kingdom*,[30] where British security forces killed three IRA

22. Velásquez Rodríguez Case, Inter-Am. Ct. H.R., ser. C, no. 4, ¶ 91 (July 29, 1988), *available at* http://www.corteidh.or.cr.

23. Paul Mahoney, *A Duty to Investigate Under the European Convention on Human Rights*, *in* 2 LIBER AMERICORUM: HECTOR FIX-ZAMUDIO 1011, 1011–12 (Inter-Am. Court of Human Rights ed., 1998).

24. European Convention, *supra* note 18, art. 13.

25. Aksoy v. Turkey, 26 Eur. Ct. H.R. 2260 (1996), *available at* http://hudoc.echr.coe.int/hudoc/default.asp.

26. Mentes v. Turkey, 59 Eur. Ct. H.R. 2689 (1997), *available at* http://hudoc.echr.coe.int/hudoc/default.asp.

27. *Aksoy*, 26 Eur. Ct. H.R. at 2287.

28. *Mentes*, 59 Eur. Ct. H.R. at 2716.

29. Note that a procedural breach of article 3 is quite rare, as the Court is more inclined to deal with the lack of any effective investigation under article 13 in these instances. *See, e.g.*, Ilhan v. Turkey, Eur. Ct. H.R. ¶¶ 89–93 (2000), *at* http://hudoc.echr.coe.int/hudoc/default.asp.

30. McCann v. United Kingdom, 324 Eur. Ct. H.R. (1995), *at* http://hudoc.echr.coe.int/hudoc/default.asp.

members suspected of a bombing mission in Gibraltar. The ECHR stated in *McCann*:

> The obligation to protect the right to life under [article 2], read in conjunction with the State's general duty under [a]rticle 1 of the Convention to "secure to everyone within their jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by, inter alios, agents of the State.[31]

The European Court was satisfied that the inquest held in Gibraltar, which had lasted nineteen days and involved the interviewing of seventy-nine witnesses, constituted "a thorough, impartial and careful examination of the circumstances surrounding the killings."[32]

In *Kaya v. Turkey*,[33] on the other hand, the ECHR ruled that the procedural right-to-life guarantee had been violated owing to an ineffective investigation, despite what may have been considered to be extenuating political circumstances. "[N]either the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under [a]rticle 2 to ensure that an effective, independent investigation is conducted into deaths arising out of clashes involving the security forces. . . ."[34]

Thus, the ECHR has read the right-to-life guarantee along with article 1 of the European Convention to arrive at a requirement for a complete inquiry into any use of lethal force by State agents, regardless of the context. In the last three years, decisions by the Court have both affirmed this view and expanded it further. In *Tanrikulu v. Turkey*,[35] since there was insufficient evidence implicating the Turkish government in the victim's death, the State argued that its duty to conduct an "effective investigation" did not apply. Furthermore, the State asserted that "there was no record of the applicant at any stage having made any explicit accusation" regarding the State's role in the killing.[36] In response, the ECHR stated:

> [T]he [duty to investigate] is not confined to cases where it has been established that the killing was caused by an agent of the

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31. *Id.* ¶ 161.
32. *Id.* ¶ 163.
33. Kaya v. Turkey, 65 Eur. Ct. H.R. 297 (1998), *available at* http://hudoc.echr.coe.int/hudoc/default.asp.
34. *Id.* at 326.
35. Tanrikulu v. Turkey, 1999-IV Eur. Ct. H.R. 459, 487–88, *available at* http://hudoc.echr.coe.int/hudoc/default.asp.
36. *Id.* at 487.

> State.... [T]he mere fact that the authorities were informed of the murder of the applicant's husband gave rise *ipso facto* to an obligation under [a]rticle 2 to carry out an effective investigation into the circumstances surrounding the death.[37]

In this way, *Tanrikulu* clarifies the significant duty of the State to investigate introduced in *McCann*.[38] In order for the State to fulfill its "general duty" under article 1 to "secure to everyone within its jurisdiction the rights and freedoms" of the Convention, it must act on its own accord upon learning of any murder.

In the ECHR's idiosyncratic approach then, articles 2, 3, and 13 are all capable of triggering a full investigation. However, as explained in *Kaya*, the guarantees under article 13 are significantly broader than a State's procedural obligation under articles 2 and 3:

> [The right to an effective remedy] ... must have implications for the nature of the remedies which must be guaranteed for the benefit of the relatives of the victim. In particular, where those relatives have an arguable claim that the victim has been unlawfully killed by agents of the State, the notion of an effective remedy for the purposes of [a]rticle 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure....[39]

In this way, *Kaya* crystallizes several essential points: first, an "effective remedy" explicitly serves the relatives of the victim unlawfully killed, and redresses their injury with much more than monetary compensation. To be specific, the remedy demands an investigation that must be *capable of identifying and punishing* the offenders, thus defining what an "effective" investigation entails for the purposes of article 13. Further, the family members are given key access to the process. Finally, the absence of any of these elements in an "arguable claim" of a State-involved killing precludes an effective remedy and violates article 13.

In sum, the European Court of Human Rights may not have established a positive duty to investigate every possible rights violation. Nevertheless, procedural article 2 obligations activate an effective investigation as soon as the government becomes aware of any murder. On the other hand, the ECHR has not clarified whether it requires, as a part of

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37. *Id.* at 487–88.

38. *See also* Ergi v. Turkey, 1998-IV Eur. Ct. H.R. 1751, 1778; Yaşa v. Turkey, 1998-VI Eur. Ct. H.R. 2411, 2438, *available at* http://hudoc.echr.coe.int/hudoc/default.asp.

39. *Kaya*, 65 Eur. Ct. H.R. at 330.

an effective remedy, a duty to prosecute violations of a right to life, or whether the investigation must only be "capable" of such a result. To be sure, its stance on article 13 has been largely deferential to Contracting States, affording them "some discretion as to the manner in which they conform to their Convention obligations under this provision."[40] Thus, although a duty to prosecute may emerge in the future, as for now its status is still in question.[41]

B. *The Inter-American Court of Human Rights*

The Inter-American Court of Human Rights (IACHR) took a very expansive and unified approach to the duty to investigate in its groundbreaking *Velásquez Rodríguez* decision.[42] The IACHR reasoned that since, according to article 1.1 of the American Convention, a "State Party is obligated to guarantee the full and free exercise of the rights recognized by the Convention to every person subject to its jurisdiction":[43]

> The State is *obligated to investigate every situation involving a violation of the rights protected by the Convention.* If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty . . . The same is true when it allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.[44]

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40. Mahmut Kaya v. Turkey, 2000-III Eur. Ct. H.R. 151, 185, *available at* http://hudoc.echr.coe.int/hudoc/default.asp. Furthermore, the European Court of Human Rights (ECHR) signaled in this case a reluctance to extend the wider scope of article 13 remedies in *Kaya* to violations not involving loss of life.

41. Although conservative on this front, it is interesting to note that in *Osman v. United Kingdom*, the ECHR established a standard providing for a State's affirmative *protection* of its citizens, rooted in articles 1 and 2. Osman v. United Kingdom, 1998-VIII Eur. Ct. H.R. 3124, *available at* http://hudoc.echr.coe.int/hudoc/default.asp. This expansive guarantee ceased to be mere rhetoric in *Mahmut Kaya* when the Court held that two violations of article 2 had occurred: first, because the government failed to protect the life of the victim; second, on account of the failure of the authorities to conduct an effective investigation into the circumstances of his death. Consider that these violations were found despite the fact that it was not established beyond reasonable doubt that any State agent was involved in the victim's killing. *Mahmut Kaya*, 2000-III Eur. Ct. H.R. at 181, 183. Regarding the duty to protect, the ECHR maintained that there were nonetheless "strong inferences that [could] be drawn on the facts of the case that the perpetrators of the murder were known to the authorities." *Id.* at 177.

42. Velásquez Rodríguez Case, Inter-Am. Ct. H.R., ser. C, no. 4, ¶ 91 (July 29, 1988), *available at* http://www.corteidh.or.cr.

43. *Id.* ¶ 166.

44. *Id.* ¶ 176 (emphasis added).

Thus, the Inter-American Court chose quite a different path than the European Court of Human Rights would in *McCann* a few years later in the ECHR's interpretation of a similar provision to "secure to everyone . . . the rights and freedoms . . . of this Convention."[45] As a result, the State is unequivocally required to investigate every context involving a rights violation of the American Convention, even in situations where the perpetrator of the act is a private person.[46] "An effective search for the truth" must be assumed by the State itself and does not depend upon the initiative of the victim or relatives.[47] Further, the Inter-American Court also demands an effective investigation despite difficult country conditions.[48] And if any doubt were left regarding an express duty to prosecute and punish, subsequent cases have elaborated that article 1.1 also stipulates a clear State obligation to punish all violations of rights recognized by the Convention as a means of guaranteeing those rights.[49]

Inter-American Court precedents also provide extensive opportunities for victims and family members to be actively engaged in both the clarification of facts and the subsequent criminal process as an important way to receive their due reparation.[50] Thus, the "effective remedy" in the Inter-American system even surpasses government investigation and prosecution after gross human rights abuse. It is interesting to note that these remedial rights stem as much from articles 1.1 and 25 (the judicial remedy provision of the American Convention), as they do from article 8, which safeguards the right to a fair trial as well as other fundamental rights of criminal procedure. This anomaly owes to the fact that in some Latin American nations, the victim enjoys a significant role in the criminal proceeding.[51] Thus, article 8 also protects, where applicable, a victim's right to a fair and effective criminal prosecution.[52] Such a provision may prove particularly useful, for example, when military jurisdiction is wrongly asserted over a soldier accused of human rights violations. Article 8 demands, *inter alia*, an "independent and impartial

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45. European Convention, *supra* note 18, art. 1.

46. *Velásquez Rodríguez*, Inter-Am. Ct. H.R., ser. C, no. 4, ¶ 172. The general *Velásquez Rodríguez*, principles as to a duty to investigate have been confirmed in subsequent cases. *See, e.g.*, Godínez Cruz Case, Inter-Am. Ct. H.R., ser. C, no. 5, ¶¶ 175, 188, 191, 198 (Jan. 20, 1989); Fairén Garbi and Solís Corrales Case, Inter-Am. Ct. Hum. Rts., ser. C, no. 6, ¶ 158 (Mar. 15, 1989); Caballero Delgado and Santana Case, Inter-Am. Ct. Hum. Rts., ser. C, no. 22, ¶ 58 (Dec. 8, 1995).

47. *Velásquez Rodríguez*, Inter-Am. Ct. H.R., ser. C, no. 4, ¶ 177.

48. *Id.*

49. *See, e.g.*, Villagrán Morales Case, Inter-Am. Ct. H.R., ser. C, no. 63, ¶ 225 (Nov. 19, 1999), *available at* http://www.corteidh.or.cr.

50. *Id.* ¶ 227.

51. *See* Pasqualucci, *supra* note 21, at 356.

52. *Villagrán Morales*, Inter-Am. Ct. H.R., ser. C, no. 63, ¶ 229.

tribunal." An interested military judge would likely fail to provide a fair trial, and would thus violate article 8.[53]

The Inter-American Court has ruled repeatedly on the phenomenon of forced disappearance and its devastating effects upon a victim's relatives.[54] Since the beginning, the IACHR has been clear that forced disappearances constitute a "flagrant violation of the right to life" and a woeful disregard of human dignity.[55] Moreover, "the duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared."[56] Even when those responsible for violations are protected by amnesty laws,[57] "the [S]tate 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."[58]

Subsequently, the IACHR, taking into account article 1.2 of the United Nations Declaration on the Protection of All Persons Against Enforced Disappearance, recognized that "[a]ny act of forced disappearance places the victim outside the protection of the law and causes grave suffering to him and to his family."[59] As a result, the Court took special pains to emphasize that tormented family members in these circumstances deserve to have those responsible duly prosecuted and punished and also require adequate compensation for the damages and injuries they sustained. Moreover, the IACHR has pointed out that because article 25 guarantees fundamental mechanisms such as *habeas corpus*, the provision supplies an important means both to determine the whereabouts of detained persons and to prevent forced disappearance in any circumstance.[60]

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53. For similar issues of military jurisdiction, see generally, Cantoral Benavides Case, Inter-Am. Ct. H.R., ser. C, no. 69, ¶¶ 110–15 (Aug. 18, 2000), *available at* http://www.corteidh.or.cr.

54. The IACHR's jurisprudence in this area has exerted considerable influence internationally, including upon the European Court of Human Rights. *See, e.g.*, Timurtas v. Turkey, App. No. 23531/94, 33 Eur. H.R. Rep. 147 (2000), *at* http://hudoc.echr.coe.int/hudoc/default.asp.

55. Velásquez Rodríguez Case, Inter-Am. Ct. H.R., ser. C, no. 4, ¶ 157 (July 29, 1988), *available at* http://www.corteidh.or.cr.

56. *Id.* ¶ 181.

57. Last year, the Court ruled that national amnesty laws that "are intended to prevent the investigation and punishment of those responsible for serious violations of human rights such as torture, summary, extra-legal, and arbitrary executions, and forced disappearance" were forbidden. Barrios Altos Case, Inter-Am. Ct. H.R., ser. C, no. 75, ¶ 41 (Mar. 14, 2001), *available at* http://www.corteidh.or.cr.

58. *Id.*

59. Blake Case, Inter-Am. Ct. H.R., ser. C, no. 36, ¶ 97 (Jan. 24, 1998), *available at*, http://www.corteidh.or.cr.

60. *Id.* ¶ 103. The Inter-American system also provides for the affirmative protection of individuals, although in different terms than in European system. In *Velásquez Rodríguez*, the Court described "the duty . . . to organize the governmental apparatus and, in general, all

C. *United Nations Human Rights Committee*

The United Nations Human Rights Committee (UNHRC) has also emphasized that the state has a duty to investigate "thoroughly" cases of disappearance, asserting that, under article 6 of the ICCPR (the right to life)[61]:

> [S]tates parties should also take specific and effective measures to prevent the disappearance of individuals and establish effective facilities and procedures to investigate thoroughly, by an appropriate and impartial body, cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.[62]

Thus, as found in the European system, a "procedural" duty to investigate under article 6 can be required independently of the "effective remedy" provision.

Moreover, under article 2.3 of the ICCPR, the UNHRC goes beyond the European Court in the remedy that it provides victims and relatives, in the event of any alleged violation of the right to life. Besides ordering a "proper investigation" into the fate of the victim and appropriate compensation, the UN body urges the State "to bring to justice" those responsible for the acts "notwithstanding any domestic amnesty legislation to the contrary."[63] Additionally, complaints of torture and inhumane treatment, like claimed violations of the right to life, "must be investigated promptly and impartially by competent authorities so as to make the remedy effective."[64]

Still, a tension exists regarding precisely when a remedy must be "judicial" in order to be considered "effective" under the ICCPR. This is because the treaty itself does not specify when an administrative, legislative, or "any other competent authority provided for by the legal system

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structures through which public power is exercised, so they are capable of juridically ensuring the free and full enjoyment of human rights." Inter-Am. Ct. H.R., ser. C, no. 4, ¶ 166.

Considering the underlying philosophy common to both systems, the Deputy Registrar of the European Court has remarked that it would not be surprising if the European Court were "to move progressively towards a more comprehensive doctrine of a duty to investigate along the lines already traced by the Inter-American Court." Mahoney, *supra* note 23, at 1024.

61. ICCPR, *supra* note 18, art. 6.

62. Laureano v. Peru, U.N. GAOR, Hum. Rts. Comm., 56th Sess., ¶ 8.3, U.N. Doc. CCPR/C/56/D/540/1993 (1996).

63. *Id.* ¶ 10. Regarding amnesties, in *Rodríguez*, the Committee explains that the adoption of blanket amnesty legislation "excludes in a number of cases the possibility of investigation into past human rights abuses and thereby prevents the State Party from discharging its responsibility to provide effective remedies to the victims of those abuses." Rodríguez v. Uruguay, U.N. GAOR, Hum. Rts. Comm., 51st Sess., ¶ 12.3, U.N. Doc. CCPR/C/51/D/322/1988 (1994).

64. Rodríguez v. Uruguay, *supra* note 63, ¶ 12.3.

of the State" may be employed in the place of a judge in determining a remedy and sanctioning the guilty.[65] In *Bautista de Arellana v. Colombia*, a victim was abducted, tortured, and killed by armed men dressed as civilians.[66] In 1995, Colombia's National Delegate for Human Rights, upon completion of its official disciplinary proceedings, held two military officials responsible for the disappearance and requested their dismissal. Following these findings, a national administrative tribunal awarded the victim's family damages, and the President of Colombia dismissed one of the officials from the armed forces. The UNHRC refused to accept the various measures as constituting a sufficient remedy, stating:

> purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies within the meaning of article 2, paragraph 3, of the Covenant, in the event of particularly serious violations of human rights, notably in the event of an alleged violation of the right to life.[67]

In this way, the UNHRC emphasizes that, at least in instances of disappearance and other violations of the right to life, mere administrative steps and the transfer of funds are not sufficient to remedy the seriousness of the offense and the trauma suffered by the victim's family. The UNHRC, like its Inter-American counterpart, is plain in requiring a complete judicial remedy in these contexts, insisting that the State "prosecute criminally, try and punish those held responsible for such violations."[68] Furthermore, according to the UNHRC, "this duty applies *a fortiori* in cases in which the perpetrators of such violations have been identified."[69]

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The foregoing discussion has shown that the State's positive duty to investigate (and perhaps duty to prosecute as well) is invariably required in the major international human rights systems as part of an effective remedy in the event of a gross human rights violation. The

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65. *See* ICCPR, *supra* note 18, art. 2.3(b).

66. Bautista de Arellana v. Colombia, Communication No. 503/1993, U.N. GAOR, Hum. Rts. Comm., 55th Sess. ¶¶ 2.1–2.7, U.N. Doc. CCPR/C/55/D/1993 (1995).

67. *Id.* ¶ 8.2. This holding has been reaffirmed in subsequent communications. *See, e.g.*, Coronel v. Colombia, Communication No. 778/1997, U.N. GAOR, Hum. Rts. Comm., 70th Sess. ¶ 2.25, U.N. Doc. CCPR/C/70/D/778/1997 (2000).

68. Bautista de Arellana v. Colombia, *supra* note 66, ¶ 8.6.

69. *Id.* This also has been reaffirmed in subsequent communications. *See, e.g.*, Arhuacos v. Colombia, U.N. GAOR, Hum. Rts. Comm., 60th Sess., 612th mtg. ¶ 8.8, U.N. Doc CCPR/C/60/D/612/1995 (1997).

Inter-American Court has called such a mandatory investigation "an effective search for the truth."[70] As this Note shall discuss, the elucidation of the State-repressed truth—from the perspective of the victim and/or family members—appears to surpass the criminal process in importance and comprises the most fundamental result of an official response to rights abuse.

III. The Current State of the Right to the Truth in International Case Law

If the truth itself is so crucial, then, why does the victim not explicitly demand from the outset her right to the truth as part of the effective remedy due her? Petitioners have done this very thing in the Inter-American system. Both the Inter-American Court, as mentioned in the introduction of this Note, and the Inter-American Commission of Human Rights have dealt expressly with this right, alternatively known as the "right to know the truth." The following Section considers its brief history.

In the 1997 case *Castillo Páez*, the IACHR was first faced with ruling on a substantive right to the truth, and conceded that it may "correspond to a concept that is being developed in doctrine and case law."[71] Nevertheless, the right was disposed of by merely reiterating the State's continuing obligation to investigate the events that led to the government-sponsored disappearance at issue.[72]

Bámaca Velásquez,[73] decided in November of 2000, presented the issue again, but this time the petitioners and the Inter-American Commission[74] brought along abundant supporting research on the right as well as the political weight of a case long in the international spotlight. Efraín Bámaca Velásquez was a Guatemalan guerrilla commander disappeared by government army forces.[75] Jennifer Harbury, his spouse and a U.S. lawyer and writer, led an active, prolonged campaign to discover his fate.[76] When met with forceful opposition from all levels of the

70. Velásquez Rodríguez Case, Inter-Am. Ct. H.R., ser. C, no. 4, ¶ 177 (July 29, 1988), *available at* http://www.corteidh.or.cr.

71. Castillo Páez Case, Inter-Am. Ct. H.R., ser. C, no. 34, ¶ 86 (Nov. 3, 1997), *available at* http://www.corteidh.or.cr.

72. *Id.*

73. Bámaca Velásquez Case, Inter-Am. Ct. H.R., ser. C, no. 70 (Feb. 22, 2000), *available at* http://www.corteidh.or.cr.

74. The Inter-American Commission, in addition to acting as a quasi-judiciary body, also brings cases before the Inter-American Court on behalf of victims.

75. *Bámaca Velásquez*, Inter-Am. Ct. H.R., ser. C, no. 70, ¶ 18.

76. *Id.*

Guatemalan State and even impeded in her efforts by U.S. government officials, she resorted to hunger strikes to demand attention and justice.[77]

In its decision, the IACHR recognized that continued obstruction by Guatemalan authorities has prevented Harbury from even locating the remains of her husband.[78] Due to these actions and others, the Court asserted that it was unquestionable that Harbury and other family members have been precluded from learning the truth behind the victim's fate.[79] Nevertheless, their explicit right to the truth was considered subsumed by their rights to due process and judicial remedies—protected by articles 8 and 25 of the American Convention, respectively—which, as discussed above, provide for effective investigation and prosecution of the violations.[80] In March of 2001, the Court essentially duplicated the *Bámaca Velásquez* analysis in its *Barrios Altos* ruling.[81]

Clearly, if the right to the truth composed only an element of these judicial guarantees, it would not need to exist as a separate source of human rights protection. Yet, the IACHR's view does not consider why, for example, UN Special Rapporteur Louis Joinet has specifically identified the right to the truth as "inalienable" and "imprescriptible."[82] Nor does the opinion address the emphasis placed by another UN Rapporteur, Theo Van Boven, on "the complete and public revelation of the truth" as the first requirement of justice.[83] A brief study of reports issued by the Inter-American Commission will signal essential aspects of this right that the Court has not yet been willing to endorse officially.

In *Ellacuría*, a case dealing with the shocking assassination of Jesuit priests by Salvadoran military agents in 1989, the Commission did in fact find a violation of a right to know the truth.[84] A crucial framework is advanced here that the Court has been reluctant to recognize. The right to the truth actually consists in two fundamental components: both an

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77. *Id.*

78. *Id.* ¶ 200.

79. *Id.*

80. *Id.*

81. Barrios Altos Case, Inter-Am. Ct. H.R., ser. C, no. 75, ¶¶ 47–49 (Mar. 14, 2001), *available at* http://www.corteidh.or.cr.

82. *See* STATEMENT OF LOUIS JOINET, *supra* note 14, at Annex II.

83. *See* STATEMENT OF THEO VAN BOVEN, *supra* note 13, ¶ 134.

84. Ellacuría v. El Salvador, Case 10.488, Inter-Am. C.H.R., OEA/ser.L/V/II.106, doc. 3 rev. (1999), *available at* http://www.cidh.oas.org/annualrep/99eng/merits/elsalvador10.488.htm. Note that *Lucio Parada Cea v. El Salvador*, offers nearly an identical analysis and presentation of the "right to know the truth." Case 10.480, Inter-Am. C.H.R., OEA/ser.L/V/II.102, doc. 6 rev. (1999), *available at* http://www.cidh.oas.org/annualrep/98eng/merits/elsalvador%2010480.htm; *see also* Romero y Galdámez v. El Salvador, Case 11.481, Inter-Am. C.H.R., OEA/ser.L/V/II.106, doc. 3 rev. (2000), *available at* http://www.cidh.oas.org/annualrep/99span/de%20fondo/elsalvador11481.htm.

individual right, applying to the victim and family members, *and* a general societal right.

Concerning the "private" aspect, the Commission has essentially taken the State's duty to investigate and its obligation under article 1.1 of the American Convention "to use the means at its disposal to inform the relatives of the fate of the victims and . . . [of] the location of their remains,"[85] and redefined them to constitute an expansive *right* of the family members. In the report, it is specified as "the right to know the truth with respect to the facts that gave rise to the serious human rights violations that occurred in El Salvador, and the right to know the identity of those who took part in them."[86] The farthest that the IACHR has been willing to go in this regard is to confer a *right* on a victim's relatives to have the disappearance and death effectively investigated and prosecuted, as well as to receive compensation for the damages and injuries they sustained.[87] Such a right clearly does not furnish the extensive information required by the Commission's right to know the truth, which goes far beyond the scope of the violation suffered in any particular case.

The Commission briefly mentions in *Ellacuría* that the private right to know the truth is also linked to article 25 of the American Convention.[88] Because El Salvador's amnesty law[89] impeded "access to information relating to the facts and circumstances surrounding the violations," the truth was not available for the relatives, and as a result, neither were remedies available under domestic jurisdiction.[90]

Also in support of an individual's right to the truth, the Inter-American Commission cited a key precedent from the UN Human Rights Committee, *Quinteros v. Uruguay*.[91] *Quinteros* in fact deserves more attention than the pithy consideration it received in *Ellacuría*.[92] In that case, the UNHRC found that a mother had endured substantial anguish and stress owing to the disappearance of her daughter and the continuing uncertainty of her fate and whereabouts.[93] In this context of acute suffering, which itself was held to be a form of cruel and inhuman

85. Velásquez Rodríguez Case, Inter-Am. Ct. H.R., ser. C, no. 4, ¶ 181 (July 29, 1988), *available at* http://www.corteidh.or.cr.

86. *Ellacuría*, Inter-Am. C.H.R., OEA/ser.L/V/II.106, doc. 3 rev., ¶ 221.

87. Blake Case, Inter-Am. Ct. H.R., ser. C, no. 36, ¶ 97 (Jan. 24, 1998), *available at* http://www.corteidh.or.cr.

88. *Ellacuría*, Inter-Am. C.H.R., OEA/ser.L/V/II.106, doc. 3 rev., ¶ 225.

89. Note that the Commission in 1992 declared that amnesty legislation in Uruguay, El Salvador, and Argentina all violated the American Convention. *See* Pasqualucci, *supra* note 21, at 348–49.

90. *Ellacuría*, Inter-Am. C.H.R., ¶ 225.

91. Quinteros v. Uruguay, Communication No. 107/1981, U.N. GAOR, Hum. Rts. Comm., 19th Sess., U.N. Doc. CCPR/C/19/D/107/1981 (1981).

92. *Ellacuría*, Inter-Am. C.H.R., ¶ 227.

93. *Id.* ¶ 14.

treatment, the UNHRC ruled that the mother had a basic "right to know" what had happened to her daughter.[94] Toward this end, the UNHCR concluded that the Government needed to take immediate and effective measures to establish the facts, secure the daughter's release (if applicable), bring to justice those found responsible, and ensure that similar violations did not occur in the future.[95]

It is significant for the purposes of this Note to underscore that at some points in *Ellacuría*, the Inter-American Commission presents the right to the truth as a direct remedy in itself. For example, as regarded in *Quinteros*, truth served to assuage the suffering of the mother by at least ending the uncertainty regarding her daughter's fate. Yet, in the Commission's passing reference to article 25, the right is described as a privilege of *access*, a procedural right to initiate domestic legal mechanisms such as an investigation and prosecution; that is, a first step that enables one to seek remedies at all. Indeed, this dual nature of truth sketched by the Commission will remain a constant theme in this study.

Proceeding to the second prong of the Commission's analysis in *Ellacuría*, it asserts the public's right to the truth in broad terms as well:

> [E]very society has the inalienable right to know the truth about what has occurred, as well as the reasons and circumstances in which those crimes came to be committed, so as to avoid a repetition of such events in the future.[96]

Although the report's provided reasoning is somewhat unclear, the primary justification for this societal right may be attributed to article 1.1, which it is recalled provides that "a State Party is obligated to guarantee the full and free exercise of the rights recognized by the Convention to every person subject to its jurisdiction."[97] Thus, in order to ensure such rights for the future, goes the argument, the society must learn from the abuses of its past, and for this to be possible it falls upon the State to keep its citizenry "duly informed."[98]

Directly related to this idea is the Commission's use of article 13 of the American Convention, which protects freedom of thought and expression, to strengthen the case for the right to the truth. Specifically, the article includes "freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers . . . ."[99] The Commission

94. *Id.*

95. *Id.* ¶ 16.

96. *Ellacuría*, Inter-Am. C.H.R., ¶ 226.

97. *Id.*

98. Lucio Parada Cea v. El Salvador, Case 10.480, Inter-Am. C.H.R., OEA/ser.L/V/II.102, doc. 6 rev. ¶ 153 (1999), *available at* http://www.cidh.oas.org/annualrep/98eng/merits/elsalvador%2010480.htm.

99. American Convention, *supra* note 18, art. 13.1.

declares that such access to information "is essential for the workings of democratic systems" but forgoes any justification or explanation for its conclusion.[100]

Commentators, however, have been more forthcoming about how article 13 (perhaps the most generous provision of its kind among international instruments) and the right to the truth interact. Viviana Krsticevic, Executive Director of the Center for Justice and International Law, states that although the right to the truth is grounded in the right to a remedy, it is also an important corollary of the freedom of information.[101] For, not only should individuals be free to receive and impart "information and ideas of all kinds," they must also be assured of obtaining the truth from their government.[102] As the Inter-American Court itself has held, "a society that is not well informed is not completely free."[103] In this way, the right to the truth both facilitates and provides moral force to the essential functions made possible by the freedom of information in a democracy, such as the close monitoring of abuses and the encouragement of public debate and criticism.[104]

This analysis of the Inter-American Commission's jurisprudence on the right to the truth concludes with *Lapacó v. Argentina*, an important settlement reached during February 2000, where the State of Argentina promised to "accept and guarantee the right to the truth."[105] In this case, the petitioner's daughter was abducted by armed men and taken to a detention center from which she never escaped.[106] In response, Carmen Lapacó and many others turned to a collective criminal proceeding against several military officials, but a subsequent amnesty law and presidential pardon exonerated all defendants in the petitioner's case.[107] After the Argentine Supreme Court refused to permit continuing investigations into the matter, though these processes sought only to procure an account of the facts rather than to establish criminal liability, the Inter-American Commission admitted Lapacó's petition.[108] The settlement committed the Argentine Government to "the exhaustion of all means to obtain information on the whereabouts of disappeared

100. *Ellacuría*, Inter-Am. C.H.R. ¶ 224.

101. Krsticevic, *supra* note 6, at 224.

102. *Id.*

103. Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85, Inter-Am. Ct. H.R., ser. A, no. 5, ¶ 50 (1985).

104. Krsticevic, *supra* note 6, at 218–19.

105. Lapacó v. Argentina, Inter-Am. C.H.R., OEA/ser.L/V/II.106, doc. 3 rev. ¶ 17 (Feb., 29, 2000), *at* http://www.cidh.oas.org/annualrep/99eng/friendly/argentina12.059.htm.

106. *Id.* ¶ 9.

107. *Id.* ¶ 11.

108. *Id.* ¶ 15.

persons"; although "it is an obligation of means, not of results," the commitment is not subject to prescription.[109]

Practically speaking, this settlement does not require more than what was already demanded by Inter-American Court case law. Namely, it provides for the State obligation "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," a duty that continues as long as there is uncertainty about the fate of the person who has disappeared.[110] Furthermore, the agreement does not address the societal dimension of the right to the truth, which entails a public revelation of "the reasons and circumstances in which those crimes came to be committed."[111]

Nevertheless, in Argentina's own historical context, this settlement comprises a significant breakthrough. First, it provides a direct manner for family members to access precious information denied to many of them for over two decades, since the country's National Commission on Disappearance of Persons (CONADEP) did not seek to determine the individual circumstances behind every disappearance.[112] Furthermore, the settlement represents the first explicit government recognition of the right to the truth, which in itself constitutes a momentous occasion in the development of the concept.

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Thus, a discussion of the pioneering jurisprudence of the Inter-American system has suggested that an individual and societal right to the truth provides several key remedial possibilities to the victim of gross human rights violations. First, in the case of disappearance, only by determining the truth regarding a victim's fate is the ongoing violation finally stopped and the State's duty to investigate satisfied.[113] Indeed, as article 3 of the Inter-American Convention on Forced Disappearance of Persons declares, "[t]his offense shall be deemed continuous or

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109. *Id.* ¶ 17.

110. Velásquez Rodríquez Case, Inter-Am. Ct. H.R., ser. C, no. 4, ¶ 181 (July 29, 1988), *available at* http://www.corteidh.or.cr.

111. Ellacuría v. El Salvador, Inter-Am. C.H.R., OEA/ser.L/V/II.106, doc. 3 rev., ¶ 226 (1999), *available at* http://www.cidh.oas.org/annualrep/99eng/merits/elsalvador10.488.htm.

112. *Lapacó*, Inter-Am. C.H.R. ¶ 10, *at* http://www.cidh.oas.org/annualrep/99eng/friendly/argentina12.059.htm. Of course, since the amnesty legislation remains in place, the family members would not be able to pursue criminal proceedings against the perpetrators of the crimes. However, some recent prosecutions have been possible based on specific exceptions to these laws, which allow for criminally charging those who kidnapped the children of the disappeared, some of whom were born in captivity. *See* Wilson, *The Inter-American Human Rights System: Activities During 1999 Through October 2000*, 16 AM. U. INT'L L. REV. 315, 335 (2001).

113. *Velásquez Rodríguez*, Inter-Am. Ct. H.R., ser. C, no. 4, ¶ 181.

permanent as long as the fate or whereabouts of the victim has not been determined."[114] In rare instances, of course, this requirement to elucidate the facts immediately may actually even save the detainee's life if the abduction is reported soon enough. Secondly, in the brief reference to *Quinteros*, the truth was cast in a different light: as a way to alleviate the actual suffering caused by the disappearance of a loved one. Third, truth has been recognized as a means to procure *other* remedies. For instance, the truth bolsters the freedom of information in some circumstances. It is also necessary to assess appropriate monetary damages and to facilitate effective prosecutions and other judicial guarantees. Finally, a societal right to know the truth has been regarded as fundamental for a citizenry to prevent the recurrence of widespread atrocities.

IV. THE TRUTH AS A GATEWAY TO AN "INTEGRAL" REMEDIAL PROCESS FOR THE VICTIM

A. *Truth Commissions*

Based upon this Note's review of international jurisprudence, it is certainly reasonable to conclude that, whether as an explicit right or otherwise, the truth comprises an essential component of an "effective remedy" in the wake of gross human rights violations. Parallel to this quiet evolution of the right to truth as remedy in international tribunals, the world has seen an almost explosive movement toward the establishment of truth commissions: State-authorized, temporary bodies that investigate a pattern of human rights violations over a specified period of time.[115] At least twenty-one official truth commissions have materialized since 1974, a phenomenon which apparently affirms truth's inherent value to victims of systematic abuse.[116] The following brief analysis of truth commissions will indicate, however, that truth itself, although essential for victims and society at large, comprises merely the first step of the complete remedial process required after widespread human rights violations.

Some commentators believe that a State's duty to investigate and provide effective remedies, especially in the absence of a functioning judiciary system, mandates the creation of a truth commission to exam-

114. Inter-American Convention on Forced Disappearance of Persons, *supra* note 3, art. 3.

115. Michael Scharf has even proposed an international truth commission. Steven Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 GEO. L.J. 707, 746 (1999).

116. HAYNER, *supra* note 12, at 14.

ine a harshly repressed past.[117] Rob Weiner of the Lawyers Committee for Human Rights, believes that three steps should be considered minimal requisites after a period of long-standing abuse: an inquiry into the facts by proper authorities, an opportunity for victims to come forward and tell their stories, and an official finding of the facts.[118] Some of the first commissions, including those of Chile and Argentina, were primarily founded to pursue such simple fact-finding.[119]

This 'facts only' approach allows a victim's family members to learn the urgent details, ending a state of uncertainty that has itself been determined to be a form of cruel and inhuman treatment.[120] In this way, it at least acknowledges what José Zalaquett, member of the Chilean National Commission on Truth and Conciliation, calls the "absolute, unrenounceable value" of the truth in these circumstances.[121] Weiner's model also leaves open the possibility for accurate and appropriate reparation measures later. After all, "to provide for measures of reparation and prevention," according to Zalaquett, "it must be clearly known what should be repaired and prevented."[122]

It became clear to the Chilean Commissioners early in their work that "a full disclosure of the truth had enormous links with the beginning of a reparative process and in the way we came to understand it."[123] Since the procedure included dimensions unheard of in the usual State investigation of a particular crime—a chance for all victims to come forward and give their testimonies and a general, public determination of the facts—different results were also certainly intended. Priscilla Hayner, in her exhaustive study of the world's truth commissions published last year, has outlined the typical (and substantial) expectations and benefits of these official bodies: 1) to clarify and acknowledge the truth; 2) to respond to the needs and interests of victims; 3) to contribute to justice and accountability; and 4) to promote reconciliation.[124] Each of these aspects in turn constitutes an important remedy for the victim and family members, and, as Hayner points out, the complete reparative process begins by securing the truth.

A victim stepping forward and recounting her story initiates the course of action. This act in itself may produce a cathartic and healing

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117. *See* Pasqualucci, *supra* note 21, at 333; *see also* STATEMENT OF LOUIS JOINET, *supra* note 14, ¶ 18.

118. Robert Weiner, *Trying to Make Ends Meet: Reconciling the Law and Practice of Human Rights Amnesties*, 26 ST. MARY'S L.J. 857, 857–75 (1995).

119. HAYNER, *supra* note 12, at 251.

120. Quinteros v. Uruguay, *supra* note 91, ¶ 14.

121. STATEMENT OF THEO VAN BOVEN, *supra* note 13, ¶ 134.

122. *Id.*

123. Orentlicher, *supra* note 21, at 456.

124. HAYNER, *supra* note 12, at 24.

effect on the deponent.[125] Further, the fact that the victim's story is listened to and publicized gives the victim a public voice and empowers her. Nevertheless, as of yet, there have not been any systematic studies completed on the psychological impact of truth commissions per se and experience has shown both positive and negative consequences to giving testimony. For example, digging into a painful past is a very demanding exercise and could result in retraumatization. The subsequent publicity could also endanger the deponent or even ostracize her from the community.[126] Thus, since truth commissions do not offer long-term therapy, victims take a risk by telling their stories at all.[127]

Moreover, some activists insist that the truth commission does not "establish" a new truth at all. Rather, it merely lifts a veil of denial about generally known but unspoken truths.[128] In fact, most testimonies are published without any further attention or investigation.[129] Why then, does the victim still take great pains to recount her suffering? One of the principal answers is simple: survivors seek *acknowledgement* from the State that their claims are credible and the atrocities were wrong. The truth commission report that is issued, officially sanctioned by the government, will often be their first and last chance for such recognition.[130]

Thus, it is clear that the truth commission's work, despite any inevitable flaws,[131] must be widely diffused.[132] Full circulation allows a society to truly assimilate the information. Comprehensive distribution of the report provides a means of informing *all* those harmed by widespread abuse that the State *accepts responsibility*.[133] In addition, this integration of the truth will establish and preserve an accurate collective memory so

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125. Yael Danieli, *Justice and Reparation: Steps in the Process of Healing*, *in* REINING IN IMPUNITY FOR INTERNATIONAL CRIMES AND SERIOUS VIOLATION OF FUNDAMENTAL HUMAN RIGHTS 304 (Christopher C. Joyner & M. Cherif Bassiouni eds., 1998) (if trauma is not spoken about, it could have negative psychological health consequences).

126. Jeanne Woods, *Reconciling Reconciliation*, 3 UCLA J. INT'L L. & FOREIGN AFF. 81, 102–09 (1998).

127. HAYNER, *supra* note 12, at 135.

128. *Id.* at 25; *see also* Woods, *supra* note 126, at 102.

129. HAYNER, *supra* note 12, at 25.

130. *Id.* at 26; *see also* Woods, *supra* note 126, at 102.

131. Of course, the truth commission's report is bound to human and practical limitations. One of the more significant problems has been that often only political crimes are addressed, leaving significant abuses such as rape outside the focus of the work. *See* HAYNER, *supra* note 12, at 79.

132. *See, e.g.*, Méndez, *supra* note 20, at 49.

133. *See* Juan E. Méndez, *Derecho a la Verdad*, *in* APPLICATION OF HUMAN RIGHTS TREATIES BY LOCAL TRIBUNALS, *supra* note 9, at 538 (in reference to the cases of Haiti and Uruguay, stating that without wide diffusion and clear results a truth commission is a "contradiction in terms").

that the society may avoid historical revisionism and, in turn, the repetition of atrocities in the future.[134]

In exceptional cases, the government may issue an express statement of apology upon accepting the findings of the truth commission or at some point thereafter. In Chile, President Patricio Aylwin made an emotional plea broadcast on national television, in which he begged forgiveness from the families of the victims.[135] Studies have shown that an apology is far superior to a mere acknowledgement of the facts in promoting healing and reconciliation among victims.[136] This is because an apology involves

> the exchange of power between the offender and offended. By apologizing, you take the shame of your offense and redirect it to yourself. You admit to hurting or diminishing someone, and in effect, say that you are really the one who is diminished.[137]

This power exchange is necessary to remove the stigma and inner turmoil often suffered by victims and family members. For example, in Argentina, the *Madres de la Plaza de Mayo*, an outspoken victims' advocacy group, officially refused economic reparations in the absence of explicit social and historical recognition that their disappeared children had been only political opponents and not criminals.[138] Rigoberta Menchú states that for the Guatemalan people to begin reconciliation with perpetrators of rights abuse, the criminals must first recognize their crimes and then must expressly repent.[139] She says that while repentance does not occur, she is condemned to remain a sinner along with the killers of her family because she has not been given the opportunity to forgive.[140]

In this way, amnesty laws and presidential pardons for the sake of "reconciliation"—what Oliver Jackman, currently a judge on the Inter-American Court, once called "forcible amnesia"[141]— should be curtailed

134. *See* STATEMENT OF LOUIS JOINET, *supra* note 14, ¶ 17. Note also that the official Guatemalan truth commission was called the "Commission for Historical Clarification."

135. HAYNER, *supra* note 12, at 26.

136. *See* Danieli, *supra* note 125, at 306; Elizabeth Latif, Note, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U. L. REV. 289, 306 (2001).

137. Latif, *supra* note 136, at 306 (quoting Aaron Lazare, *Go Ahead Say You're Sorry*, 28 PSYCHOL. TODAY, Jan./Feb. 1995, at 40, 42).

138. *See* Danieli, *supra* note 125, at 309.

139. Rigoberta Menchú, Address at the United Methodist Church, Global Ministries Program, New York City (Apr. 23, 2001).

140. *Id.*

141. Orentlicher, *supra* note 21, at 433.

at all costs.[142] First of all, as discussed earlier, they often prevent a State from complying with its fundamental duty to provide effective remedies after rights abuse. Secondly, amnesties and pardons frequently preclude the crucial shift in psychological power to victims, which occurs when the State acknowledges its wrongdoing and perpetrators are brought to justice. Human Rights Watch, in response to Argentine President Carlos Menem's sweeping pardons, protested that "reconciliation is a worthy goal, but cannot be imposed by decree on a society."[143] Menem's actions may have been appropriate, however, if there was evidence that the military was "genuinely contrite about its role during the 'dirty war' and ready to seek reconciliation with their victims."[144]

Thus, the truth about systematic abuses, coupled with official acknowledgement, and ideally an apology, potentially leads to forgiveness, which in turn promotes both individual healing and societal reconciliation.[145] Nevertheless, many insist that the healing process that truth commissions initiate is no substitute for a judicial remedy: perpetrators must be brought to court and duly punished.[146] Indeed, as discussed previously, a judicial process is clearly mandated by the Inter-American Court and the UN Human Rights Committee in circumstances of gross abuse, although the European approach is less certain. It must be conceded, however, that prosecuting a large number of cases, much less all potential cases, would constitute a logistical impossibility for judicial infrastructures newly risen from the ashes of authoritarian rule.[147] Still, some amount of prosecution is essential for deterrence, a general societal benefit, as well as for restoring the dignity of the individual victim.[148] Human Rights Watch underscores the remedial nature of prosecution for the individual: "punishment represents the most powerful way that society can demonstrate to the victims of abuse that their suffering is not taken lightly."[149] Further, without any prosecution, a society runs the risk of turning some of its more angry and desperate victims into private vigilantes, if no other judicial recourse is provided.[150]

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142. Even when such legislation is democratically approved, Méndez cautions, it will probably not represent the interests of victims, who are usually by definition the "powerless minority." *See* Méndez, *supra* note 20, at 52.

143. HUMAN RIGHTS WATCH, TRUTH AND PARTIAL JUSTICE IN ARGENTINA: AN UPDATE 69 (1997).

144. *Id.*

145. *See* STATEMENT OF LOUIS JOINET, *supra* note 14, ¶¶ 17–18, 41–42.

146. Id. ¶ 27; *see* Teitel, *supra* note 16, at 317;

147. *See* STATEMENT OF LOUIS JOINET, *supra* note 14, ¶ 48 (mentioning the case of Rwanda, where over 90,000 people were in prison facing charges during 1997).

148. Orentlicher, *supra* note 21, at 438–39.

149. *See* Pasqualucci, *supra* note 21, at 352.

150. It must be recalled that even when amnesties and pardons ban prosecutions and trials, a family member's right to learn the truth behind a victim's fate still endures, as

Hayner agrees with the importance of trials; in fact, she shows that a stated intention of most commissions has been to contribute to justice in the courts: many have forwarded their files to the relevant authorities and have recommended prosecution.[151] Nevertheless, she emphasizes that, although both trials and truth commissions perform the task of investigating into past crimes, neither can fulfill the essential role of the other. A trial's focus is very distinct: to establish guilt in specific instances, and even the limited truth it may bring to light is further obscured by strict rules of evidence. Thus, a trial does not demonstrate how larger segments of society have been complicit in the crimes under examination; on the other hand, the very purpose of a truth commission is to document and explain pervasive patterns of abuse in order to paint a broader portrait of culpability.[152]

Harvard psychiatrist Judith Herman has noted that more than punishment, many victims are desperate for perpetrators to be obligated "to give something back, or to try to clean up the mess that they made."[153] As indicated above, this response begins with an acknowledgement of the offense and an apology. Further forms of "moral" restitution have also been identified in the truth commission experience as effective in restoring the dignity of the victim and thus key in fostering forms of social resolution.[154] For example, the "purging" of guilty officers from the military, rehabilitative services, educational programs about the events, accessible national archives, memorial services, monuments, and cultural performances all help heal the rupture between victims and society.[155] Even the symbolic value of receiving a regular check from the government is inestimable: "every time a check arrives," a victim in

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recognized, *inter alia*, by the *Lapacó* settlement. Yet many governments still rebuff private efforts to obtain this information; as a result, victims cannot pursue civil proceedings either, since they are unable to establish facts critical to their claim. A recent innovation by the Chilean Supreme Court, however, may in fact allow prosecutions to proceed against those implicated in disappearances, despite amnesty legislation to the contrary. The Court adopted the reasoning that the original offense is still ongoing, and thus extends beyond the cutoff that absolves crimes occurring before 1978. *See* HAYNER, *supra* note 12, at 98 n.30, 239.

151. *Id.* at 90.

152. Of course, the individual characteristics of truth commissions have varied widely. South Africa was the most "judicial," endowed with the power to grant amnesties and obligated to provide the accused with some form of "due process." Further, commissions have differed with respect to the specificity of their findings. For example, Guatemala had a very broad focus and no perpetrators' names were given, while Chile revealed a more "individualized truth." *See* HAYNER, *supra* note 12, at 35–49.

153. *Id.* at 147.

154. This has been called "simultaneously a sociopolitical and psychological process" by the Latin American Institute of Mental Health and Human Rights in Santiago, Chile. Danieli, *supra* note 126, at 306.

155. *Id.* at 305–06; *see also* HAYNER, *supra* note 12, at 157; Méndez & Mariezcurrena, *supra* note 11, at 98–101.

Chile explains, "it's a recognition of the crime."[156] In this regard, psychologist Yael Danieli points out that money *must* accompany other forms of reparation, if only because it is understood that in our system of justice, when damage occurs money is paid.[157] Of course, financial compensation in many cases is also simply indispensable for daily subsistence, especially when a family has lost its primary source of financial support.

B. *International Human Rights Courts as a Means of Providing an "Integral" Remedy*

A truth commission can make general recommendations for a nuanced reparations program that the government may adopt, including wide-ranging nonmonetary measures,[158] and thus greatly serve the complex needs of victims.[159] Such a model, though based only on nonbinding recommendations, has greater potential impact upon a devastated society than the more individualized reparations ordered by the European and Inter-American Courts of Human Rights to date. In fact, only the Inter-American Court has required measures above simple monetary damages to victims of gross abuse.[160]

The European Court, other than demanding an effective investigation in cases of serious rights violations, has not ventured beyond awarding monetary compensation for material and moral damages or payments for cost. In fact, in many cases the ECHR has held that a favorable decision alone constituted "just satisfaction to the injured party" and that, as a consequence, a further award of compensation was not necessary.[161] The ECHR has refused to order or even recommend that the respondent government amend its legislation.[162] Further, as already discussed, the ECHR does not require criminal proceedings to be instituted.[163] Although such a limited framework may have been sufficient in the past, recent cases involving Turkey, where the Court's response to increasingly "serious" violations has been merely to augment the sum of damages ordered,

156. HAYNER, *supra* note 12, at 157.

157. Danieli, *supra* note 125, at 309.

158. See, for example, the case of South Africa. *See supra* note 154; HAYNER, *supra* note 12, at 40–45.

159. *See* HAYNER, *supra* note 12, at 251; Méndez & Mariezcurrena, *supra* note 11, at 97.

160. This discussion does not include the Inter-American Court's "provisional measures," which are very wide-ranging.

161. Theo Van Boven, Reparations: A Requirement of Justice 8 (1999) (unpublished manuscript, on file with author).

162. *Id.* (manuscript at 8).

163. *Id.*

have shown that this conservative approach is in need of revision.[164] In *Selmouni v. France*, even the ECHR conceded that "the victim suffered personal and non-pecuniary injury for which the findings of violations in this judgment do not afford sufficient satisfaction."[165] Moreover, the ECHR was sharply criticized for its *McCann* decision, where it found three violations of the right to life, yet declined to award even compensatory damages since the victims had planned terrorist activities.[166]

On the other hand, there has been a marked development in the Inter-American Court's jurisprudence to order not only monetary damages but also additional remedial and reparative measures for victims of serious human rights abuses.[167] Part of the explanation is found in the IACHR's expansive reparations provision, article 63.1 of the American Convention, which grants it much more latitude than that permitted its European counterpart.[168] In relevant part, article 63.1 provides that the IACHR shall also rule "if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied."[169] The IACHR has shown an increasing tendency to invoke its "social reconstruction competence."[170]

In the very first instance, *Aloeboetoe*,[171] the IACHR ordered, in addition to monetary compensation for the direct victims of abuse, the reopening of a school and medical clinic in a small village of Suriname, thus benefiting the entire community after a brutal military operation. After a lapse of several years the IACHR took up this approach again, requiring legislative reform in *Loayza Tamayo*.[172]

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164. *See, e.g.*, Aksoy v. Turkey, 26 Eur. Ct. H.R. 2260, 2289–90 (1996), *available at* http://hudoc.echr.coe.int/hudoc/default.asp.

165. Selmouni v. France, 1999-V Eur. Ct. H.R. 149, 188.

166. *See* Van Boven, *supra* note 161 (manuscript at 10).

167. It should also be noted that the Court affords victims a high degree of attention by granting them a separate judgment phase, often occurring months after the proceedings on the merits, where reparations alone are argued and determined. Such an elaborate procedure is unparalleled in the European context.

168. Article 41 (a slightly amended version of the earlier article 50) of the European Convention only provides for "just satisfaction to the injured party." European Convention, *supra* note 18, art. 41.

169. American Convention, *supra* note 18, art. 63.1.

170. *See* Van Boven, *supra* note 161 (manuscript at 11).

171. Aloeboetoe Case, Reparations, Judgment, Inter-Am. Ct. H.R., ser. C, no. 15, ¶ 96 (Sept. 10, 1993), *available at* http://www.corteidh.or.cr.

172. Loayza Tamayo Case, Reparations, Judgment, Inter-Am. Ct. H.R., ser. C, no. 42, ¶ 192 (Nov. 27, 1998), *available at* http://www.corteidh.or.cr. The Court's relatively gradual approach to nonpecuniary measures may have been viewed as justified to some, especially after Peru responded to its command for legislative reform in *Loayza* by rejecting the Court's jurisdiction.

Paniagua Morales,[173] a case involving State-sponsored abductions and killings, is representative of the IACHR's current reparative orientation. There, consistent with its first precedents, the IACHR saw fit to award material and moral damages, as well as to mandate that Guatemala investigate the facts that gave rise to the violations, and identify and punish those responsible.[174] Beyond this traditional remedial scheme, the Court also ordered that the State transport the remains of one victim to a burial place chosen by his family members.[175] More interesting still, the IACHR was precise in requiring that Guatemala provide transparency in its official records of detained persons, by taking "legislative, administrative, and any other kinds of measures necessary" toward this end.[176] Also of significance, during the same session but in a different case, the Court required Guatemala to create an educational center in memory of children that were killed by government agents.[177]

Finally, in the *Bámaca Velásquez* reparations judgment of February 2002,[178] the IACHR, although once again refusing to recognize a victim's explicit legal right to the truth,[179] nonetheless made a powerful statement through its remedial orders. In addition to requiring material and moral damages and a full investigation, including the punishment of the perpetrators, the Court demanded that the State publish in two national newspapers the facts proven and the legal conclusions reached two years ago in the judgment on the merits.[180] Furthermore, Guatemala was ordered to acknowledge, through a public presentation, its responsibility in the case and the suffering it had caused the victims.[181]

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In sum, the preceding discussion has shown the capabilities of truth commissions, and to a more limited extent, human rights tribunals to

173. Paniagua Morales, Case 76, Inter-Am. C.H.R. (2001), *at* http://www.corteidh.or.cr.

174. *Id.* ¶ 229.

175. *Id.*

176. *Id.*

177. Villagrán Morales, Case 77, Inter-Am. C.H.R. (2001), ¶ 123, *at* http://www.corteidh.or.cr.

178. Bámaca Velásquez Case, Reparations, Judgment, Inter-Am. Ct. H.R., ser. C, no. 70, ¶ 18 (Feb. 22, 2002), *available at* http://www.corteidh.or.cr.

179. The Court again acknowledged the development of the concept in international human rights law, but referred to its merits decision of 2000 holding that the right to the truth is subsumed by rights to due process and judicial remedies. *Id.* ¶¶ 75–76.

180. *Id.* ¶ 106.

181. *Id.* Other remedies of note ordered in the case include: the State must find and exhume the victim's remains as well as deliver them to the family members; it must also take legislative and all other necessary measures to conform internal legal norms to international standards of human rights and humanitarian law. *Id.*

initiate, in the words of Juan Méndez, an "integral remedy" for victims who have suffered gross human rights violations.[182] Such a reparative scheme, which many commentators demand the State to provide, begins with the cessation of the violation and "full and public disclosure" and acknowledgement of the truth.[183] To be sure, among available forms of reparation, monetary awards are also imperative to meet the practical needs of victims and to underscore the State's responsibility.

Furthermore, according to UN Special Rapporteur Van Boven, the oft-discarded non-pecuniary measures which he defines as "rehabilitation," "satisfaction," and "guarantees of non-repetition" also constitute essential devices "with a view to restore and to repair in a more structural manner, both with regard to individuals and collectivities."[184] An exploration of these necessary remedies, some of which have been encountered above, proves instructive. "Rehabilitation" includes medical and psychological care as well as legal and social services.[185] "Satisfaction" and "guarantees of non-repetition," in addition to putting an end to the violation and disseminating the truth, consist of the following: an official declaration or legal judgment restoring the dignity, reputation, and legal rights of the victim and/or persons closely associated with the victim; apology, including public acknowledgement of the facts and acceptance of responsibility; judicial or administrative sanctions against the perpetrators; commemorations to the victims; educational programs and training about the violations and human rights in general; ensuring effective civilian control of military and security forces; restricting military jurisdiction; and strengthening the independence of the judiciary, among others.[186] In this way, after wide-scale rights violations, a broad range of policy strategies are required to shape an adequate remedial solution for victims. Such strategies must involve the government, judiciary, law enforcement and educational systems, and many other sectors of society.[187]

182. Méndez & Mariezcurrena, *supra* note 11, at 97.

183. *Id.* at 88; *see also* STATEMENT OF THEO VAN BOVEN, *supra* note 13, ¶ 134; STATEMENT OF LOUIS JOINET, *supra* note 14, ¶¶ 17, 24.

184. Van Boven, *supra* note 161 (manuscript at 14).

185. *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, Note by the Secretary-General*, U.N. Commission on Human Rights, U.N. ESCOR, 53rd Sess., app. ¶ 14, U.N. Doc E/CN.4/1997/104 (1997).

186. *Id.* at app. ¶ 15.

187. *See* Van Boven, *supra* note 161 (manuscript at 14).

V. THE UNITED STATES: CURRENT REMEDIES AND PROMISING DEVELOPMENTS

What is the status of such a broader, victim-oriented concept of remedy in the United States? Although experts such as Van Boven originally intended a more extensive framework for large segments of society who have suffered systematic, gross abuse at the hands of the State, there still have been many calls in the United States to provide victims with similar remedial benefits—especially in response to particularly violent crimes.[188] To evaluate the remedies available and possible innovations for the future, a brief review of the victim's changed position in U.S. legal history is necessary.

A. *Background*

Starting prior to the American Revolution, the victim acted as the primary decision maker in the criminal process, effectively functioning as both policeman and prosecutor. While criminal prosecutions were technically brought in the name of the State, they were actually private processes, funded by the victims, in which the State often did not take an active role and did not have a vested interest.[189] Since the aggrieved party was the central actor in the system, her restitution and compensation constituted principal goals of the criminal proceeding.

Yet after the Revolution, the United States began to adopt Enlightenment ideas of criminal justice; most important among them, that crime was an offense against society.[190] If used properly, then, the criminal justice system could deter crime and even rehabilitate criminals from their fallen state. This led to the evolution of a public prosecution bureaucracy that favored State interests in deterrence, punishment, and rehabilitation over addressing harm done to the individual.[191] The fate of victims may have been sealed when the drafters of the Bill of Rights never expressly outlined their rights, leaving them in a very precarious position. Thus, by the nineteenth century, crime came to be dealt with almost entirely as an offense against the State, and a victim's role in the proceeding was reduced to little more than witness. Reflecting this dynamic, the Supreme

188. Sue Anna Moss Cellini, *The Proposed Victims' Rights Amendment to the Constitution of the United States: Opening the Door of the Criminal Justice System to the Victim*, 14 ARIZ. J. INT'L & COMP. LAW 839, 853–54 (1997).

189. William F. McDonald, *The Role of the Victim in America*, *in* ASSESSING THE CRIMINAL: RESTITUTION, RETRIBUTION, AND THE LEGAL PROCESS 295, 295–98 (Randy Barnett & John Hagel III eds., 1977) [hereinafter ASSESSING THE CRIMINAL].

190. *Id.*

191. *Id.* Part of the rationale for expanding the role of the public prosecutor was so that law enforcement would pursue crimes committed against all classes of society, not only the wealthy.

Court ruled many years later that "in American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another."[192]

Since the redress of a victim is no longer regarded as a function of the criminal process, if she wishes to recover her losses she must hire a lawyer and sue in tort.[193] Yet, civil suits, even if they lead to an eventual judgment and damages against an offender, still lack the moral impact and official sanction of criminal trials or, in the experience of other nations, official bodies such as truth commissions.[194] Another crucial distinction to be made is that civil trials place an enormous burden on the victims and their families, who are forced to finance and manage all phases of the litigation. Moreover, even establishing sufficient facts for a civil action in the face of obstruction or conspiracy by the potential defendants may be prohibitive.[195] Yet, in the criminal sphere, once a decision to prosecute is made, the vast resources of the government are readily available for investigation, litigation, and enforcement of the subsequent judgment.

Of course, the tort route is much better than nothing at all. Victims have complete control of the process from the beginning to end, in stark contrast to the criminal proceeding. As one victim lamented, "the State of New York was not kidnapped, beaten, and raped—I was."[196] Furthermore, as in the practice of truth commissions, the victim is given a public voice: she may tell her truth in a formal, State-authorized setting.[197] Finally, a favorable judgment may not only be financially rewarding, but it morally vindicates the victim—serving as an important acknowledgement that she was right and the defendants were wrong.

Thus, victims must turn to the traditional forms of tort remedy for redress. The available remedies at law consist in restitution and compensatory damages, while those in equity are restitution and injunction. Yet in practice, in the event of serious civil rights abuses, U.S. courts, like their international counterparts, generally have awarded only monetary

192. Linda R.S. v. Richard D., 410 U.S. 614, 619 (1973).

193. Many have found this recourse incongruous if the nature of the offense is very serious. This is because a tort is defined as merely a private wrong, while a crime involves moral culpability, as well as both individual *and* societal harm. Yet, in the United States, genocide and war crimes are considered "torts" for the purposes of statutes such as the Alien Tort Claims Act—a legal convenience which some have remarked diminishes the gravity of such transgressions. *See* Beth Stephens, *Conceptualizing Violence Under International Law: Do Tort Remedies Fit the Crime?*, 60 ALB. L. REV. 579, 581 (1997).

194. *See* Ratner, *supra* note 115, at 747.

195. *See supra* note 150 (discussing private efforts to gather information in the context of Argentina and Chile).

196. Cellini, *supra* note 188, at 850.

197. Note that victim impact statements are at times permitted in criminal trials. *See infra* Section V.B.

damages to the aggrieved party. In the landmark case *Bivens*,[198] where federal narcotics agents conducted a flagrantly unlawful arrest and search, the Supreme Court found, for the first time, a cause of action against federal officers for constitutional violations. The Court stated, "[h]istorically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty."[199] In his concurring opinion, Justice Harlan wrote, "[f]or people in Bivens' shoes, it is damages or nothing," underscoring the fact that victims such as Bivens would not benefit from injunctive relief, given the one-time nature of the constitutional violation.[200] By the same token, through a literal reading of the concept of restitution, it would be impossible for the defendants to restore to the victim the intangible rights taken from him, along with the pain and suffering, humiliation, and embarrassment they caused him.[201]

The primary vehicle today for relief against state and local officials who violate the Constitution, 42 USCA § 1983, also generally provides only monetary damages to victims of State-sponsored violence or abuse.[202] In a scenario where a state officer committed a constitutional violation and death results, the decedent's survivors would recover for the various injuries suffered by the decedent.[203] As intimated by Justice Harlan, even numerous incidents of police abuse are resistant to injunctive measures because such behavior does not typically reach a systematic threshold. Further, particular individuals do not encounter the police with enough predictability to be awarded an injunction.[204] On the other hand, actions seeking institutional reform, such as the line of school desegregation cases, or the reinstatement of employment, which fall out of the scope of this note, frequently receive remedies in equity.[205]

Thus, at least in the realm of the State-sponsored rights violations focused upon in this essay, Danieli was right: in our society, cash is doled out for a wrong.[206] Meanwhile, the remedies urged by Van Boven, which would fall under the headings of "satisfaction" and "guarantees of non-repetition," are woefully lacking in the U.S. system of justice.

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198. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

199. *Id.* at 395.

200. *Id.* at 410.

201. *See, e.g.*, Murry N. Rothbard, *Punishment and Proportionality, in* ASSESSING THE CRIMINAL, *supra* note 189, at 259, 262–63.

202. MICHAEL COLLINS, SECTION 1983 LITIGATION IN A NUTSHELL 150–89 (1997).

203. *Id.* at 156.

204. On the other hand, if a widespread practice of forced disappearances were the case, an injunction could be a possibility!

205. COLLINS, *supra* note 202, at 167.

206. Of course, State officials may also be prosecuted, but these processes are generally not conducted with the victim in mind. *See infra* Section V.B.

Nevertheless, some recent developments have the promise to introduce more inclusive reparative schemes in the future.

B. *A Greater Role for Victims in the Criminal Process?*

The 1982 Presidential Task Force on Victims of Crime concluded that "somewhere along the way, the criminal system began to serve lawyers and judges and defendants, treating the victim with institutionalized disinterest."[207] Congress has responded by passing an array of legislation such as the Victims' Bill of Rights,[208] which contains, *inter alia*, provisions for victims' compensation and restitution[209] programs; the inclusion of victim impact statements and testimony; the right to information about all phases of the criminal process, including the release of the offender; and a qualified right to be present at all public court proceedings.[210]

Nevertheless, these privileges are greatly undermined by the victims' lack of standing, which has prevented them from claiming such rights when they are denied or neglected.[211] As a result, in 1997 an amendment to the Constitution was proposed, which would not only further expand a victim's role in criminal proceedings beyond the above-mentioned legislation, but would also grant them the standing necessary to assert such rights.[212] Certainly, such procedural rights are capable of providing important measures of "satisfaction" to the victims, in the Van Boven sense, by empowering them, restoring their dignity, and protecting their safety.

C. *Restorative Models and the Apology*

Some scholars maintain that "moral" and psychological forms of restitution to the victim are consistent with the U.S. legal tradition.[213] Indeed, the early colonial system seems to show characteristics of the restitutionary theory of justice. Randy Barnett explains that this

207. Cellini, *supra* note 188, at 851 (quoting PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 2–13 (Dec. 1982)).

208. 42 U.S.C. § 10606 (1994).

209. Restitution here is understood as the offender providing payments to the victim to cover the actual loss suffered, attorney's fees, and even future wage loss. *See, e.g.*, George Blum, *Measure and Elements of Restitution to Which Victim is Entitled Under State Criminal Statute*, 15 A.L.R. 5TH 391 (1993).

210. Note that victims in many states are afforded indirect participation in the criminal prosecution where statutes authorize a victim's attorney to assist prosecutors. Further, a substantial number of jurisdictions, in an attempt to assist in recovery from the consequences of crime, have also adopted laws which provide for compensation or restitution. *See* Cellini, *supra* note 188, at 868.

211. *See, e.g.*, United States v. Grundhoefer, 916 F.2d 788 (2d Cir. 1990).

212. *See* S.J. Res. 6, 105th Cong. (1997). Compare with the rights secured to individuals under article 8 of the American Convention. American Convention, *supra* note 18, art. 8.

213. *See* McDonald, *supra* note 189, at 296.

paradigm identifies a crime as an unjust redistribution of entitlements by force that requires for its rectification a redistribution of entitlements from the offender to the victim.[214] The restitutionary theory, then, seeks to vindicate the rights of the aggrieved party as was the practice in eighteenth-century America. In doing so, according to Barnett, the rights of all persons will be vindicated, since anything less than a victim-centered system of justice demeans the very notion of individual rights.[215]

Thus, following restitutionary theory, a crime results in an "imbalance" between the offender and victim that cannot be addressed merely by inflicting punishment on the criminal. Rather, Barnett explains, "the criminal act creates a nexus between the offender and his victim that will be removed only when the offender has performed some *constructive act of reparation* for the victim or the victim's heirs."[216] Although Barnett emphasized that reparative measures must be "constructive" for the victim, he admits that the possible remedies may never fully compensate the suffering experienced.[217]

At the very time Barnett was writing on the restitutionary theory of justice in the late 1970s, the key notion of restorative justice was merely in its infancy. Only by the mid-1990s did this movement gain a strong foothold internationally, including a presence in the United States.[218] Restorative justice is an innovative process of bringing together the individuals who have been affected by an offense and having them agree on how to repair the harm caused by the crime—a model that clearly parallels the goals of restitutionary theory.[219]

Restorative justice "conferences" or "sentencing circles" are informed by traditional indigenous practices and involve not only the victim and offender, but also "supporters" of each and even concerned members of the community.[220] In order to heal the suffering of the victim, participants establish a plan of action that includes ways of making amends to the victim and perhaps to the community—measures that could be considered the "punishment" for the offender.[221] The technique has proven to have very broad appeal. Participant (victim, offender,

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214. Randy Barnett, *Introduction*, *in* ASSESSING THE CRIMINAL, *supra* note 189, at 1.

215. *Id.* at 25–26.

216. *Id.* at 27 (emphasis added). Compare with psychiatrist Judith Herman's observations, that victims desire substantive returns from perpetrators, rather than their simple punishment. *See supra* note 153 and accompanying text.

217. Barnett, *supra* note 214, at 27.

218. *See* John Braithwaite, *A Future Where Punishment Is Marginalized: Realistic or Utopian?*, 46 UCLA L. REV. 1727, 1743 (1999).

219. *Id.*

220. *Id.*

221. *Id.* at 1744.

community, police) satisfaction ranges between 90 and 95 percent, owing to its focus on holding offenders responsible for their actions and giving victims' rights a more central place in the system.[222]

Most interesting, according to Professor John Braithwaite's extensive studies of such conferences in the United States, "material reparation was much less important than emotional or symbolic reparation." Moreover, he observes that "victims often wanted an apology more than compensation."[223] Braithwaite states that these one- to two-hour episodes may often attain forgiveness in the victim. Further, she frequently emerges with ways to help her feel safer after the trauma, since the plan of action typically works to prevent a recurrence of the crime.[224] These results confirm the preceding findings of psychologists and truth commissions after gross violations of human rights: the victim most desires recognition of the truth, an apology, and other moral amends from the offender. Certainly the benefits, both individual healing and societal reintegration, are the same sought by Van Boven's framework. In fact, future truth commissions would do well to learn from the restorative justice paradigm while devising their methodologies.

The punitive criminal justice system in the United States would do even better to incorporate restorative principals in a systematic fashion—beginning with the acknowledgement of truth and an apology. The enduring American emphasis on monetary damages is a completely inadequate method of providing a true satisfaction to victims (and even damages may elude victims in many instances). On the other hand, in the restorative justice setting, victims often directly witness an offender's explicit act of repentance,[225] which they have identified as extremely satisfying, clearly helping them "get over [their] sense of loss."[226]

Of course, apologies per se are not a complete rarity in the U.S. legal and historical landscape. Some of the most significant attempts at reconciliation in our nation's past included official requests for forgiveness. For example, apologies were offered by the State to Japanese-Americans for World War II internment and to African-Americans for the Tuskegee experiments. In general legal practice, however, apologies have perhaps functioned most prominently within the field of alternative dispute resolution.[227] Indeed, professors Stephen Goldberg, Frank Sander, and Nancy Rodgers have insisted that the first lesson of dispute resolution is the

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222. *Id.*

223. *Id.*

224. *Id.*

225. See Latif, *supra* note 136, at 294 (one study recorded an apology in 95 percent of conferences observed).

226. *Id.* at 293.

227. *Id.* at 295.

importance of apologizing.[228] Even former Attorney General Janet Reno has remarked upon "the power of an apology sincerely given" in such negotiation settings.[229]

Furthermore, there has been a recent and promising tendency for judges to order apologies as remedies for both civil disputes and criminal offenses, though it is possible their aim seeks to punish the offender more than restore the victim. In 2000, an Ohio judge sentenced defendants convicted of disorderly conduct and petty theft to make public apologies by taking out advertisements in the county newspaper, and another was obligated to sit for two hours at a local YMCA and render apologies to all victims who desired them.[230] In a federal case in Texas, wife batterers were required to apologize to their spouses before women's groups.[231] Other judges as well have given offenders the option to make a public apology rather than serve a prison term.[232] Moreover, seven states currently allow evidence of an apology as a mitigating factor in the determination of punitive and compensatory damages in defamation cases.[233]

It is true that any form of "partial" or coerced apology could have limited value for the healing of the victim, and thus for the fostering of reconciliation within the community. Yet the above discussion has shown that the apology's inherent restorative potential must not be underestimated. Indeed, in Japan a prosecutor will often not even file criminal charges if the offender has apologized.[234] Certainly then, further integrating an acknowledgement of the truth and the apology into the U.S. legal framework is a crucial step toward a more victim-oriented approach to remedy.

* * *

In conclusion, this analysis has located the origins of a vital, and still relatively new remedial concept in international human rights jurisprudence—a right to the truth—within the State's positive duty to investigate. Yet, in response to broad-based demands for information, acknowledgement, and atonement following State-sponsored human rights abuse, this concept has rapidly developed a rich texture and its

228. *Id.*
229. *Id.* at 298.
230. *Id.*
231. *Id.*
232. *Id.* at 297.
233. *Id.* at 298 (Florida, Mississippi, North Carolina, Tennessee, Texas, Virginia, and West Virginia).
234. *Id.*

own established status as part of a universally recognized "effective remedy." Moreover, the dynamic experience of truth commissions has underscored that truth plays an essential role in beginning an "integral" reparative process for victims, which experts now demand after serious abuses of human rights. Thus, one could argue that the restorative nature of truth is as much remedial as it is reparative, as much procedural as substantive, and as much immediate as enduring.

Furthermore, this Note has urged, in response to *all* rights violations, a wider incorporation of truth, apology, and other victim-oriented remedies, both in international *and* U.S. legal fora. Such measures of "rehabilitation," "satisfaction," and "guarantees of non-repetition" will promote individual healing and community restoration, and, in the event of pervasive abuse and societal rupture, will also enable lasting reconciliation processes to take hold in due time.