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The memory of the victims in the XXI century: the challenge of defenders dealing with the reconstruction of the past and the litigation of serious violations of human rights in Latin America.

Author:
Óscar Javier Carbonell Valderrama

Master:
Master's in Human Rights and Democratisation in Latin America and the Caribbean

EIUC
HUMAN RIGHTS VILLAGE

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TABLE OF CONTENTS

Pag. 2 Preface – *Federico Andreu*

Pag. 4 "The memory of the victims in the XXI century: the challenge of defenders dealing with the reconstruction of the past and the litigation of serious violations of human rights in Latin America"- *Óscar Javier Carbonell Valderrama*

Preface

When Óscar Javier Carbonell Valderrama asked me to write the preface to his work, I accepted without a doubt. I did it, not only because I am aware of Óscar's personal and intellectual qualities and his commitment to the victims, but also because his work underlines one of the essential - and often invisible - aspects of the work of human rights defenders, i.e. contribution to the reconstruction of the past and to the recovery of a memory which has always been denied by the elites and the establishment; that of the victims.

In Latin America, the elites and the establishment have created an "official history" about the methods of exercising power that reproduces the patterns of domination and inequality and which is exclusively in force for the vast majority. This "official history" hides the reality regarding serious violations of human rights and denies the existence of State criminality or that of dominant economic sectors. It also denies the key role of that violence, always hidden as a structural part of Latin American history. It is obvious that the defence of human rights unavoidably implies the questioning of this "official history" and, therefore, to denounce and attack the logics and mechanisms of domination and exclusion as well as to reconstruct the memory of the people. According to Óscar Javier Carbonell Valderrama, law, as a tool for human rights defenders, is "one of the options to decolonise the social and political relations in Latin America."

In this context, the fight against impunity and the demand for justice and for a true and full enjoyment of all human rights for all human beings – free from inequality, discrimination or exclusion- become the key elements for the actions of human rights defenders before the courts. From this perspective, the judicial procedure becomes a field of action to transform the "official history" and to help to rebuild the true story; that of the vast majority of the population. It will also contribute to reveal the logics and mechanisms of domination and exclusion and to uncover State criminality which is the structure of domination in our region. How is it possible to continue denying the

genocide in Guatemala, after the recent judgment by a Guatemalan court against the former General Rios Montt? How is it possible to deny the commission of crimes against humanity in Peru after the decision of the former president Alberto Fujimori?

The judicial defence of human rights is not only a legal matter; it also implies interdisciplinary work, as Óscar Javier Carbonell Valderrama points out. Moreover, the defence of human rights through judicial resources is not just a dispute between lawyers: the victims should be the main actors, since it is their story that is at stake, as well as the violations of human rights that they have suffered. In this regard, as noted by Oscar Javier Carbonell Valderrama, "one of the tasks of human rights defenders is to convince victims of serious violations of their status as historical subjects, since those violations are events of historical significance that justify their struggle for the meaning of the past."

The judicial procedure also has a social dimension as well as the aim of providing political education. These fundamental elements in the defence of human rights have an essential role to play in the elaboration of a collective history and memory of the victims, one that can socially stigmatise the exercise of power and domination based on State criminality, exclusion, discrimination and inequality.

Oscar's work delves into all these aspects and clearly exposes the challenges that human rights defenders face. The present work should be studied by all human rights defenders and make them think about these challenges that he rightly exposes.

Federico Andreu

“The memory of the victims in the XXI century: the challenge of defenders dealing with the reconstruction of the past and the litigation of serious violations of human rights in Latin America”

-Óscar Javier Carbonell Valderrama-

Tutor: Martín Aldao

"The memory of the victims in the XXI century: the challenge of defenders dealing with the reconstruction of the past and the litigation of serious violations of human rights in Latin America"

-Óscar Javier Carbonell Valderrama*-

Introduction[1]

The violence used in the perpetration of serious violations of human rights in Latin America is the result of the structural discrimination exercised by power elites to violently respond to the resistance of the unequal, i.e. the dominated ones. Such violations are events of historical significance denied by those who have the power to write the official history when they manage to strengthen their memory and impose it over that of the victims. In this way, the strong memories that narrate the past of Latin American history confirm cultural, social, political and economic inequality.

Taking this idea as the starting point, the first chapter will be focused on the relationship between power, inequality and serious violations of human rights. It starts with patriarchy as the primitive teaching that contributed to the creation of the idea of race, which conceived others as inferiors or imperfectly human. Thus, this idea builds the existential premise as a framework for the occurrence of serious violations of human rights. Despite the indisputable nature of the prejudice of superiority as an obstacle to know others, the prejudice of one-dimensional equality is a greater obstacle, simply because it identifies others with the own self that conceives them. These obstacles to the recognition of the "non-equals" served as an excuse for the

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[1] I thank Juliana Caicedo, Nancy Cardinaux and Martín Aldao for the attentive reading and the suggestions for the elaboration of the present work. I also thank everyone I interviewed for their time.

replacement in Latin America of monarchical authority by that of the Nation-State, while leaving the coloniality of power intact. To be precise, dominant groups of colonial society held the power to tell the official history that masked the serious violations of human rights that occurred in the XIX and XX centuries. Hence, patriarchy and coloniality of power, conceived as social relations of power, have imbued every aspect of daily life until now. Therefore, gender and racial inequalities, among others, influence the State and the Law as its form of expression.

However, since the last quarter of the XX century, the strengthening of organisations of victims and human rights defenders in Latin America through complaints and demands for justice presented to the State, has facilitated the development of an International Human Rights and Humanitarian Law. This resulted, for the first time, in the emergence of a new language that would make it possible to narrate the suffering of the victims. Indeed, after the end of the Cold War, the developed world realised that anti-democratic States were more likely to endanger international peace and security than democracies. Even so, there are still sectors of Latin American colonial society that have been historically discriminated and are now facing a new cycle of violence within the framework of the war against terrorism, since the enemy is conveniently identified with indigenous, African descendants, the poor, members of political parties, members of social movements and even human rights defenders.

In any case, human rights defenders fight against impunity for serious violations before national courts and are at the core of the creation of the state law. They, therefore, support the decolonisation of Latin American state law. Precisely, the commission of serious human rights violations and its subsequent prosecution is an exceptional opportunity to decolonise social relations and to contribute to the guarantee of non-repetition of such violations. Those who defend human rights support the decolonisation of social relations. They understand that the colonial situation is not only something from the past but is still present and contributes to the historical cycle of violence in Latin America. The work carried out by human rights organisations in Latin America demands the public and inalienable law from the State and they bet on defending these rights by means of the state law. Thus, the fight against impunity for serious violations in the past allows us to understand our present as a colonial society, because it turns the judicial process into a scenario where victims can narrate their suffering.

In the second chapter we will start from the idea that the relationship between victims and their legal representatives is also influenced by relations of power, especially when there is no direct connection between them, i.e. any connection of friendship, familiarity or consanguinity. Hence, patriarchy and coloniality of power imbue such relationship, just as they do in every aspect of daily life. This is also the case of the social relationship naturally created between the victims, their defenders and State officials when defending human rights by means of a judicial process.

Given that lawyers defending human rights are the first to know about the expectations of victims concerning reparation before developing the litigation strategy, it is necessary for them to build a relationship of trust that facilitates the reconstruction of the victims' memory. The suitability of the strategy depends on the method used to rebuild the memory, and the methodology depends on the professional training of the person implementing it as well as the field in which it can be implemented. In other words, lawyers address the memory of past events through the only methodology that they have learnt during their training process and apply it in every aspect of social relations so required.

According to the above, they face the challenge of decolonising the relation of power with the victims due, amongst other factors, to their professional training. Hence, in the private sphere, human rights defenders have the option to *talk about* the victims and their rights or *to talk to* the victims about their rights, recognising their status as a subject just as the subject that I am as a lawyer.

Given that the families of the victims have the right to a thorough investigation to discover the truth of the facts, while the identity of perpetrators of the human rights violations is publicly disseminated, the narration of the victims' memory should be subjected to the legal filters that guarantee the right to due process of the parties intervening in a judicial process. Thus, the extensive and comprehensive account of the victims' memory is reduced to what the litigation strategy developed by lawyers deems legally relevant, and afterwards it must adjust to what judicial officials consider pertinent and conducive to the procedure.

Within the task of guaranteeing victims the right to truth, the independence of prosecutors and judges, and even that of lawyers, is a necessary requirement that ensures full exercise of the right of victims to judicial review. However, this is not the

case of impartiality, since the latter is a requisite applicable to prosecutors and judges, but not to lawyers. Lawyers have the ethical obligation to safeguard the interests of the people they represent at all times, which means that, while objectivity is required of prosecutors and judges, lawyers must be partial and subjective, since they must ensure that the expectations of reparation of the victims they represent are met.

Thus, in the private sphere, where the relationship between lawyers and victims develops, subjectivity is the general rule. On the other hand, in the public sphere, where judicial procedures are conducted, objectivity is an obligation for those who have the duty to investigate, prosecute and punish those responsible for serious violations of human rights. However, the method used in the public sphere influences the private as regards the reconstruction of the victims' memory. This influence on the private sphere through the application of a method which pretends to be objective, characteristic of judicial procedures, limits the opportunity of gaining a wider knowledge of the victims' memory as well as their expectations as regards reparation.

Taking this into account, it is necessary to broaden the disciplinary point of view and consider other disciplines apart from law which can identify the risks of victimisation during the elaboration of the litigation strategy. Hence, the combination of a psychosocial perspective of human rights with the methodological tool of oral history is a suitable option for the reconstruction of the memory of the victims, which can reveal their expectations as regards reparation while endeavouring not to cause them any further damage.

For this reason, the third chapter will approach oral history, highlighting its practical specificities in Latin America. To be precise, the application of oral history becomes specific if we take into account the political intention of Latin American historians to transform the colonial society and to contribute to guarantee the non-repetition of violence of serious violations of human rights in the region. In other words, Latin American oral history focuses, in part, on understanding, making visible and transforming the structural problems of a colonial society which legalise repression, violence and exclusion, while allowing the cyclical repetition of serious violations as traumatic experiences. Therefore, authoritarian violence in Latin America is seen as one of the structural elements of our history that must be transformed.

Hence, the way of addressing State repression by oral historians gives specificity to Latin American oral history and, at the same time, connects it with a democratic construction of history. The characteristics of oral history are adjusted to the lawyers' need to reconstruct the traumatic memory of the recent past. Thus, oral sources are historical sources limited in time, whose origin are socially excluded groups, which are the result of a joint creation of the historian and the person interviewed, starting from a relationship of trust through honesty and equality, respecting differences. For this reason, the use of oral history as a method contributes to the decolonisation of social relations.

When the relationship is conceived outside the judicial procedure and emphasis is put on the personal and subjective process, the person being represented is not conceived as a means to an end but as an end in itself, so when he/she is heard, his/her voice is recognised in an environment of equality. It is, therefore, possible to develop a litigation strategy with the victims by taking their expectations of reparation as the starting point. This way, they feel that the need to talk about the past makes sense; not because they know how and who were responsible for the offence, but because testifying about their traumatic experience can be part of the process of grieving that will allow them to give their own meaning to the present. Going beyond the judicial procedure means, convincing the victims that sharing their experiences, apart from whether or not their contribution constitutes valid legal evidence, is also important for the construction of the memory of serious violations of human rights as facts of historical significance. Precisely, the denial by victims of their own historicity is related to gender, context and the type of violation suffered as well as to the degree to which it affected their personal autonomy. Hence, human rights defenders can contribute to the recovery of their personal autonomy, even by how they establish the relationship with them.

However, judicial procedures are a space of conflict where the victims' testimonies are subject to procedural rules and to the principles of probatory law. Therefore, in this context, the narrative of lived experience is split, trimmed and adjusted to the procedural forms. It can be said that the struggle for law goes beyond the judicial field in itself. This involves the questioning and readjustment of interdisciplinary limits. In this way, the use of oral history in the private sphere as a methodological tool for reconstructing the memory of the victims of serious violations of human rights makes it possible to acknowledge the other and to be honest in a relationship of trust. At the same time, it enables the victim to talk while we listen, which becomes an exercise in

the decolonisation of the relationship between victims and lawyers who will represent them before the court. By listening to them, we will be able to reconstruct the memory from their own point of view, i.e. from their personal truth.

Oral history as a bottom-up history, from the excluded, is mainly interdisciplinary, i.e. in practice, oral history is used to question and break free from the artificial limits of academic disciplines. Basically, interdisciplinary work in the defence of human rights is an essential tool for decolonising knowledge. Talking about human rights necessarily refers to law as a discipline. However, interdisciplinary work carried out in the defence of human rights recognises that law is not sufficient to understand the different dimensions of serious violations of human rights.

That having been said, the constant problem of "pure" objectivity appears. This denies subjectivity for the sake of constructing scientific knowledge. Common sense and everyday human experience become an obstacle to the knowledge of the other. Hence, it gives the hegemony of the "scientific self" the opportunity of imposing itself over the conceptions and interpretations of the others. However, oral history defends the scientific nature of subjectivity, created through an exercise of reciprocity between the persons taking part in the interviews. It is about reinterpreting what has been interpreted by returning the lawyer's interpretation to the narrator. Precisely, the hegemony of the "I am the lawyer" can have negative consequences for the victims of serious violations of human rights. Therefore, "non return" can cause more damage to the victims, by not avoiding a revictimisation which allows new violations or the repetition of violent actions against them or secondary victimisations which can stigmatise them or not respect their suffering or rights.

Methodology

This thesis combines two qualitative research methodologies: discourse analysis and interviews. In the course of the research, a critical analysis of the legal discourse has been done, taking the idea of the coloniality of power in Latin America as the starting point. Interviews were semi-structured, since they dealt with issues related to practice and not to theory, i.e. the experience of three men and three women during their work as human rights defenders.

The first person interviewed was Nelly Moreno, a human rights defender from Honduras. She is a lawyer who has worked as a defender of human rights in research strategy as well as accompanying victims. Outstanding among her experience is her work in the Truth Commission in Honduras, where she interviewed dozens of victims of human rights violations committed during the coup in 2009. Her experience contributed with elements of analysis from a practical level, as a research lawyer in human rights whose career has not yet been characterised by judicial litigation.

Diego Albonía is a Colombian human rights defender. He is a psychologist and has worked in different human rights defence strategies amongst which we can highlight: the psychosocial accompaniment of victims and the accompaniment of victims and lawyers during the elaboration of litigation strategies. His work experience includes the representation of victims in hearings before the Inter-American Court of Human Rights. He also worked in medical missions with the French Red Cross in conflict areas in Colombia, as well as in psychosocial organisations specialised in the attention of victims of armed conflict. His interview provided information that shows the interdisciplinary nature in the work of the human rights defence since his story combined elements from his professional training with his practical experience as a defender on the psychosocial and psycho-legal level.

Marcela Páez, a Colombian human rights defender, is a lawyer who has pursued her career as a barrister in national criminal jurisdiction. Her professional experience stands out due to her participation as the representative in court of women victims of the Colombian armed conflict, highlighting facts that imply gender violence during the war. She provided information about landmark cases in the special criminal jurisdiction created by the Law 975 of 2005 (also called “Justice and Peace Law”), where judicial officials acknowledge the serious violations of human rights committed during the Colombian internal armed conflict.

David Medina is a Colombian human rights defender. He is a lawyer who has combined different human rights defence strategies, amongst which we can highlight litigation at national and international levels. His interviews provided elements of analysis about interdisciplinary work during the elaboration of a litigation strategy and its implementation before the court. His experience as a barrister includes cases representing victims of serious violations of human rights as well as the

accompaniment of victims in the follow up of compliance with the decisions by the Inter-American Court of Human Rights.

Rosa Díaz is a Colombian human rights defender. She is a psychologist specialised in legal psychology who has performed psychosocial accompaniment of victims taking part in judicial procedures at national and international levels in Colombia and in national judicial procedures in Argentina. We underline her experience in the work with lawyers documenting human rights violations, contributing with elements for the evaluation of psychological effects of such facts and the drafting of expert reports for criminal proceedings where serious violations of human rights are investigated in Colombia. Her interview contributed to the comparison of the work of a psychologist human rights defender in Colombia and Argentina, which allowed us to contrast the types of violations in different Latin American contexts.

Finally, Cristóbal Carmona is a human rights defender from Chile. As a lawyer, he has combined strategic litigation with human rights research. Outstanding in his professional career is his work as a judicial representative of indigenous peoples in Chile. His experience contributed elements of analysis about the limits between the legal and the political in the exercise of litigation.

All the interviews were carried out in Buenos Aires (Argentina), except for that of Diego Abonía which was done via Skype (Colombia). On average, interviews lasted one hour using a personalised questionnaire (see appendices) with some questions in common. Finally, apart from Rosa Díaz and Diego Abonía, the persons interviewed are interns from the Master's Degree in Human Rights and Democratisation for Latin America and the Caribbean, and, therefore, fellow students of the author of this research.

Chapter 1

Power, inequality and serious violations of human rights

We will first point out that history has power and power transforms strong memories into the official memory. We shall then go on to explain that the first step towards the construction of a strong memory is the historical creation of the inequality of the "other". Here, we will underline the colonising inequality and equality as obstacles for the acknowledgment of unequals in Latin America. Then, we will explain that the change of authority from monarchy to Nation-State did not modify inequality or power. Hence, serious violations of human rights continued to be a structural problem in the history of national consolidation. We will go on to describe why the language of human rights was not amongst State priorities. Afterwards, we will explain that the war between ideologies and its impacts in Latin America, with the addition of the new world order of multilateralism, gave value to human rights and democracy. However, the current pattern of world power perpetuates inequality and, the language of human rights in Latin America appears as an emancipating language in the face of this. Finally, we will highlight the bet on defending rights by means of law as one of the options to decolonise social and political relations in Latin America.

1. The power of history

The occurrence of serious violations of human rights in Latin America emerged as a result of the combination of two independent factors: inequality and power. On the one hand, inequality, which favours the occurrence of serious violations, is that to which specific groups of the population are subjected to through historical or structural processes of discrimination. On the other hand we find power, understood as the co-presence of domination, exploitation and conflict (Quijano, 2000a), that legitimises the perpetration of serious violations and is exercised in an organised or systematic way against historically discriminated groups. The violence used in the perpetration of serious violations of human rights in Latin America is the result of different processes of structural discrimination, where discriminators respond violently to the resistance of the discriminated and the dominated.

Serious violations of human rights, i.e. "*acts that affect unalienable human rights and/or prohibitions of ius cogens" (*ICJ, 2008, p. 21), are events of historical significance,

whose existence can be denied by those who have the power to write the official history. To be precise, the official written history is the development of a "strong" memory maintained by the symbolic power of the State (Traverso, 2007). If we go back into the history of Latin America, we realise that, every time serious violations have occurred, there was always the combination of inequality/power. Discriminated groups have increased throughout the centuries, while the power dominating and exploiting them is still exerted by the same dominant groups. Those serious violations have been hidden under official history, where genocides are concealed under the name of conquests, pacifications, patriotic battles or salvations, amongst others. Consequently, the scientific knowledge of official history is influenced by the dominant power, and its intention of objectivity as a science is no more than an effort to legitimise the narration of a strong memory at the expense of "weak", "underground", "hidden" or "prohibited" memories (Traverso, 2007). In this way, the strong memories that narrate past Latin American history,

> *"while they praise some groups, they devalue others transforming their differences into justifications for them to be subject of discriminatory treatments that consolidate their cultural, social, political and economic inequality. These versions are accepted, or openly or surreptitiously confronted by alternative narrations produced by the excluded or subordinated. Memory, therefore, is a field in tension where hierarchies, inequalities and social exclusions are built, reinforced or challenged and transformed."* (AMH-CNRR, 2009: 34).

The modern history of our continent has different origins. Strong memory describes its origin with the arrival of whites and the exchange of presents with Indians. However, weak memory points out that it started with the genocide of Indians by whites. To be precise, education received at school, indicates that the entire history of our continent starts with the arrival of Columbus, i.e. the encounter of the old, white western world with the new and dark Indian world. In this way, we have been taught, from our childhood, to deny the historical existence of the groups that originally populated the territory of our continent.

For those who accidentally arrived on our continent, the new lands, overall, contained much wealth and were populated by dark-skinned people. In their tales about travels and encounters, they had no doubt about mentioning two things: that the land they found was very rich and that the people living there were inferior, with some similarities,

but definitely imperfectly human. No wonder the conquistadors came to the conclusion that Indians were naturally inferior, as they themselves came from societies of male or patriarchal domination. The patriarchal atmosphere is the primary form of reproductive education and the maintenance of all other forms of power and domination. Therefore, being aware of the differences between the old and the current patriarchy, which is behind all racial, economic, imperial domination, amongst others, patriarchy is the root of all of them (Segato, 2010b). Gender inequality is the oldest and the most current structural discrimination, concealing the domination of the "superior" man over the "inferior" woman. Undoubtedly, it was the same hierarchy of society that influenced their appreciation of the New World.

According to the above, for those who live in a patriarchal society, the way of organising their world is hierarchical, i.e. a superior who dominates and an inferior who obeys. Hence, white conquistadors found the way to differentiate themselves from the Indians, including men and women, by inventing the idea of race. Race is created to facilitate the organisation and domination of the New World. The power to create race and recreate racial inequality is the same used by conquistadors to dominate and exploit Native American people. In this sense, the idea of race was used as the basis of domination, since it created the basic social classification used for the organisation of the world population during the development of the European colonialism. For this reason, "the coloniality of power" is a concept that includes the idea of race as the basis of the classification and social domination which is part of the elements articulating the current world pattern of power (Quijano, 2000a). In this way, the racial inequality of Indians justified the power to take the wealth from the territories that the European conquistadors had seen. Inequality legitimised power and power fuelled inequality.

Hence, the encounter of the two worlds is the start of a genocide of great dimensions that took place in America during decades throughout the conquests. Therefore, the serious violations of human rights that have occurred on our continent for over 500 years have never been named as such; they have been hidden by those who had the power to name them. With reference to the extermination of native populations, Tzvetan Todorov affirms that

> *"if the word genocide has ever been applied to a situation with some accuracy, this is here the case. It constitutes a record not only in relative terms (a destruction in the order of 90 percent or more), but also in*

absolute terms since we are speaking of a population reduction estimated at 70 million human lives. None of the great massacres of the twentieth century can be compared to this hecatomb" (Todorov, 1992: 144).

1.1. The creation of the "others'" inequality in Latin America history

When evaluating some aspects of the indigenous genocide, as the basis of modernity, America, Europe, capitalism and coloniality of power, we can understand the relationship between inequality, power and serious violations of human rights in Latin America. Tzvetan Todorov gives many clues about it, amongst which we will rescue the main one: the creation of inequality (Todorov, 1992).

The first step taken by the conquistadors was to try to understand the world they had in front of them. After quoting several accounts of Hernán Cortés (named as *the Spanish conquistador of the Aztec empire* by traditional history) and other Spaniards, Todorov realises the recurrent comparison between what they saw in America with what they knew from Spain. This demonstrates "*the desire to grasp the unknown by means of the known"* (Todorov, 1992: 138), which is the main basis of eurocentrism (a concept that will be very useful further on when we analyse one-dimensional equality and inequality as obstacles for the knowledge of the other). While Columbus saw Indians as objects, Cortés conceived them as subjects producers of objects, artisans or jugglers, but reduced them solely to their role as producers. In other words, for Cortés, Indians were not objects but subjects, but subjects who had not reached that status in its full sense, i.e. "*subjects comparable to the I who contemplates and conceives them*" (Todorov, 1992: 142).

The way Cortés conceived the different world was similar to that of many erudite people of the period. XVI century authors spoke well *about Indians* but they almost never spoke *to Indians*. Speaking *to the other* is to engage in a dialogue with him or her and in this way, to acknowledge him or her as a subject comparable to myself. Equality implies understanding amongst people, while inequality involves the idea of power and domination: "*unless grasping is accompanied by a full acknowledgment of the other as subject, it risks being used for purposes of exploitation, of "taking"; knowledge will be subordinated to power"* (Todorov, 1992: 143).

This is how Todorov describes the mental universe of Spanish erudites who defended and justified the perpetration of genocide. He proposes, as an example, the chain of mental proportions presented by the arguments of the Spanish humanist, philosopher, jurist and historian, Juan Ginés de Sepúlveda. His opponent was the Dominican bishop of Chiapas, Bartolomé de Las Casas (called *the protector of Indians* in traditional history), who, during the Valladolid debate of 1550, opposed to the printing of the treaties on the just cause of war against the Indians, Sepúlveda's book was inspired by Aristotle's "the Politics" in order to argue hierarchy as the natural way of organising human society. Hence, the chain of proportions that Sepúlveda defends was set out in the following way: "*Indians / Spaniards = children (sons) / adults (fathers) = women (wives) / men (husbands) = animals (monkeys) / human beings = savagery / forbearance = violence / moderation= matter / body = form / soul = appetite / reason = evil / good"* (Todorov, 1992, p. 164).

Thus, inequality was justified from the academic erudite point of view, which, combined with power, prepared the path towards indigenous genocide. The conduct of the Spaniards, apart from the impulse to master and the desire for wealth, was conditioned by their notion of the Indians. Hence, Spanish conquistadors, influenced by an education based on patriarchy, created the idea of race in order to differentiate themselves from Indians and not be considered as equals. This means that, without the existential conception of others as being inferiors or imperfectly human, the genocide of native populations would have never occurred (Todorov, 1992).

1.2. Colonising inequality and equality as obstacles for the acknowledgment of the other

It could be said that Bartolomé de las Casas is one of the oldest human rights defenders due to his egalitarian position as regards Indians. However, while Sepúlveda based himself on hierarchy to dominate the unequal, las Casas used the idea of one-dimensional equality to master equals. Las Casas *did not talk to* Indians but he *talked about* Indians, and he did it using what he knew: Christian thinking. His desire to learn about the unknown through the known allowed him to conceive Indians as non Christian subjects that could potentially become Christians, i.e. Indians were still not comparable subjects with the *Christian I am* who conceived them. His one-dimensional conception about Indians allowed him to develop the following options: Spanish / Indians = believers / non believers = Christians / non-Christians. While Sepúlveda

thinks that not everyone can become a subject in the full sense of the word because nature so decided, las Casas believes that anyone can become a Christian, even Indians.

Thus, Cortés the conquistador and las Casas, the protector of Indians, agree on one idea: Indians can be dominated with the aim of converting them into subjects as we conceive ourselves to be. Therefore, *"if it is incontestable that the prejudice of superiority is an obstacle in the road to knowledge, we must also admit that the prejudice of equality is a still greater one, for it consists in identifying the other purely and simply with one's own "ego ideal" (or with oneself)"* (Todorov, 1992, p. 177,180). On the one hand, Columbus and Sepúlveda conceived Indians as objects and justified domination through the ideology of slavery; on the other hand, Cortés and las Casas conceived Indians as non equal subjects and justified domination using the ideology of colonialism. These two positions are no more than two levels of the same line of thought which justifies a social organisation based on inequality. Thus, las Casas and Cortés did not want the Indians' domination to be finished, but las Casas' idea was different from that of Cortés in the sense that "*he merely wants this to be effected by priests rather than by soldiers"* (Todorov, 1992, p. 184).

Given this, the efficacy of the coloniality of power based on the idea of race as a way of basic and universal social classification, which has existed in the world for more than 500 years, was stronger than that of slavery. In 1573, under Philip II, definitive ordinances concerning "the Indies" were drafted. Their aim was to hide the killings of Indians so, basically, the word *conquest* was replaced by the word *pacification.* In this way, genocide was given a different name. Hence, coloniality of power maintained the subjects producers of objects in the chain of production which indefinitely multiplied objects owned by dominators and exploiters. Naturally, the main task was to maintain these subjects in their role of subjects producers of objects so that they would never achieve the same level as the dominators (Todorov, 1992). In this way, the efficacy of coloniality of power is precisely based on maintaining the unequals in a condition and position that the masters have designed for them.

2. Change of authority; same power and same inequality

The current world pattern of power consists in the articulation of coloniality of power, capitalism, State and eurocentrism. Capitalism is the universal pattern of social

exploitation, eurocentrism is the hegemonic form for the production of knowledge, coloniality of power is the idea of race as the basis of the global pattern of basic social classification, and the State is the universal central form of control of collective authority and the Nation-State is its hegemonic modern variant (Quijano 2000a). If we take into account the historical effectiveness of coloniality of power in Latin America, we ask ourselves what was the role of the independence movement at the beginning of the XIX century and during the process of construction and consolidation of the Nation-State during the XIX and XX centuries, when serious violations of human rights occurred.

We have already pointed out that Bartolomé de las Casas, the protector of Indians, condemned the cruelty of the conquerors against them, which means that he was in favour of Spanish rule by priests rather than the brutality of soldiers. In his letters, las Casas compared the colony to women, trying to justify Spanish domination and not the emancipation of either Indians or women. According to him, it was enough *"to replace the father, who has revealed himself to be cruel, by a husband who it is hoped will be reasonable"* (Todorov, 1992: 185). Essentially, that is what happened with the independence movement in Latin America, since the father was replaced by the husband; in other words, the authority of the king was replaced by the authority of the Nation-State and the coloniality of power remained intact.

Once independence was achieved at the beginning of the XIX century, the new free States of America started to build and consolidate the Nation-State in a colonial society. Independent Latin American States had remained under the domination of a white minority, whose privileges, social position or material resources had been obtained by means of the domination and exploitation of the majority, i.e. Indians, African descendants and mixed races. Differences, inequalities of resources as well as social and racial positions, accomplished the mission of facilitating the imposition of decisions and interests of whites over "non-whites". This is why colonial societies could not have a common social interest during the construction and consolidation of a Nation-State. To be precise, the social interests of the white masters were closer to those of the European white well-off class whom they saw as their peers. In this sense, Aníbal Quijano affirms that Latin American masters continued to be dependent after the independence, since *"the coloniality of their power made them conceive their social interests as equals to those of other white masters, in Europe and in the United States"* (Quijano, 2000b, p. 235).

2.1. The new Nation-State and serious violations

Colonisation is something that has not yet been overcome. Hence, the decolonisation of society in Latin America is a challenge and a task to be done for the construction and consolidation of the Nation-State. The coloniality of power implies an undemocratic and unequal process of homogenisation of society, i.e. a process of nationalisation of society and the building of a countermajoritarian Nation-State, which would therefore be discriminatory and violent. Thus, once independence was achieved and the process of construction and consolidation of the Nation-State was initiated, the new Latin American countries began to write the history of their homeland that generally hid the serious violations of human rights committed in the name of the construction and consolidation of the Nation. Therefore, history, conceived as a positivist discipline and monopolized by dominant groups, had the privileged role of building the *"twentieth century's most powerful collective identity myth: the national myth. While self-disciplines often tried to define guidelines to operate independently from political and ideological demands made by the State (or from those who sought to challenge it), those same demands were the ones which gave it prestige and institutional power in the era of nations*"(Sabato, 2007: 222).

With different levels of violence, systematisation and generalisation, Nation-States were consolidated after independence under a coloniality of power which created new institutional bases. This power, based on inequality, has endured for over 500 years, so *"the coloniality of power still dominates most parts of Latin America, in opposition to democracy, citizenship, nation and the modern Nation-State"* (Quijano, 2000b: 237). Hence, the organised violence from the State was used to build and consolidate the Nation-State. Just to mention some of the serious violations committed in Latin America on behalf of the Nation in the XIX century and at the beginning of the XX century, we find, amongst others: a) the genocide of indigenous peoples in Chile, Argentina and Uruguay during the development of the colonial homogenisation process (racial). We must also mention Colombia, with its variations, where native peoples were almost exterminated during the colonial period and replaced by African descendants. b) The unfinished cultural genocide of Indians, African descendants and mixed races in Mexico, Peru, Ecuador, Guatemala, Central America and Bolivia. c) "The racial democracy" imposed in Brazil, Colombia and Venezuela masking a real discrimination and a colonial domination of African descendants (Quijano, 2000b).

Hence, national history stopped mentioning the ignominy to which the majority of the population in Latin America was subjected to. History was only told by people who had access to the hegemonic form of production of knowledge, i.e. traditional history narrated from a Eurocentric point of view. Other histories, those of the dominated, indigenous, African descendants and mixed races, were deleted from the official history. It was precisely the power to tell the official history that masked the serious violations of human rights that occurred during the XIX and XX centuries. Therefore, the power of Eurocentric knowledge, the same power to name things, was the condition which made it possible to remember what was convenient and to forget what was inconvenient for the history of the Nation.

2.2. Nation-State: consolidation with inequality

The dominant groups of Latin American colonial society find a mechanism in inequality that legitimises their power. On the one hand, the unequal patriarchal influence is the primary origin of reproductive education and the maintenance of all other forms of power and domination. On the other hand, they support the idea of racial inequality to explain the coloniality of power. In addition to that, they base themselves on eurocentrism, by means of which they try to impose the European model of the Nation-State on a colonial society.

Eurocentrism is the basis of the process of construction and consolidation of the Nation-State in Latin America, given that the European model is the one that has been imposed. This means that the theoretical foundations of the State and the imaginary of the Nation are unconnected with Latin American reality, as they are copies of homogenising Nation-States which violently tried to impose themselves over heterogeneous historical realities completely different from that of Europe. Hence, access to knowledge proceeding from Europe will become another factor of power. In accordance with the above, knowledge of European law took on importance for dominant groups since they started from the Eurocentric idea of the symbolic power of law for the construction and raising of “the national identity contrary to the private one” (Fizpatrick, 1998: 218). Consequently, lawyers, men of course, were the first to be called on to govern the State and express their power through laws.

The obstinacy of dominant groups to apply a European Nation-State model in a Latin American colonial society, whose characteristics are inequality within the basic social order and cultural heterogeneity, deepened the hierarchical nature of the European model and marked the anti-democratic nature of the Latin American model of State from the beginning. The Eurocentric perspective of state law fits easily into the unequal concept that dominant groups had of the majority of indigenous, African descendants and mixed races. In this sense, state law is conceived as *"something inherent to (western) civilisation"* (Fizpatrick, 1998, p. 209) and its creation is opposed to the chaotic state of nature in which the majority of dark-skinned, poor, and illiterate people lived. In other words, "*true knowledge is brought by Europeans to savage and inglorious worlds"* (Fizpatrick, 1998: 217).

Therefore, the articulated control of subjectivity and intersubjective relations was built through privileged access to European hegemonic knowledge. The control of knowledge and the national imaginary in the hands of the rulers was used to reproduce, legitimise and naturalise the organised violence collectively imposed on unequals through domination by the State authority (Quijano, 2001). Hence, patriarchy and coloniality of power, conceived as social relations of power, have imbued every aspect of daily life until now. Power is present at work, sex, subjectivity and collective authority, since "*there is not a single space [...] in social relations amongst people of a society in which power is absent". Not even in those social relationships that seem to be the most private and free, such as love or friendship"* (Quijano, 2001: 8).

Moreover, gender and racial inequalities influence the State and the Law as its form of expression. In that respect, Catharine A. MacKinnon points out in her arguments leading to a feminist theory of the State, that *"the Law treats and sees women as men treat and see women"* (MacKinnon, 1995: 288). Following the same idea, it is also possible to say that the Law treats and sees indigenous people, African descendants and mixed races as dominant whites see and treat them.

3. The language of human rights and State priorities

The dominant groups of Latin American colonial societies have transmitted their power to their equals over the centuries, which means that the categories of inequality have broadened according to the circumstances. Over the decades, indigenous people, African descendants and mixed races acquired other categories of inequality: the

materially unequals, i.e. the poor from urban zones and those "without lands" in rural areas. Moreover, there is also the category of ideologically unequals, i.e. members of political parties and social movements belonging to the opposition. In the face of the conflict set out on by the dominated, a violent reaction was imposed by dominators of the colonial society using the systematicity of State terrorism. In this way, Latin America experienced, once again during the XX century, the historical cycle of violence with the occurrence of serious violations of human rights. However, the horror caused by the World War II and the strengthening of organisations of victims and human rights defenders, facilitated the development of International Human Rights and Humanitarian Law. This fact brought as a result the appearance of a new language that would allow the narration of the victims' suffering.

During the first half of the XX century, the world lived twice through the horrors and cruelty of the human race in two World Wars. In 1945, after the World War II, the Organisation of the United Nations (UN) was created with the signing and coming into force of the Charter of the United Nations that same year. The nations which won the war agreed *"to save succeeding generations from the scourge of war, which twice in our life-time has brought untold sorrow to mankind"* (UN, 1945: preamble). At that moment, the priority for nations was to maintain international peace and security. It should be pointed out that the Charter does not mention the word democracy, since at the time of its drafting, democracy did not have a strong political value on the international agenda. However, wars had been possible due to the unequal and anti-democratic social classification of the world population imposed by the world pattern of power.

For its part, the Universal Declaration of Human Rights of 1948 provided clues about the Eurocentric character of the conception of human rights since it partly developed the idea of negative freedom, typical of the European liberal classical ideology. In that regard, the Declaration only mentions the democratic nature of societies in which *"everyone shall be subject only to such limitations as are determined by Law solely for the purpose of securing due recognition and respect for the rights and freedoms of others"* (UN, 1948, article 29, paragraph 2). The categories of inequality based on ideology had already been established at the beginning of the XX century and continued to be consolidated during the second half of the same century. There was an ideological/military/geopolitical conflict amongst the nations which won the World War II, historically referred to as *the Cold War*. In a short period of time, the world was

organised in two blocs: the liberal or capitalist, represented by the United States and the socialist or communist one, represented by the Soviet Union. The world order became bipolar and influenced many aspects of international law, amongst others, the International Human Rights Law. Hence, there is only one Declaration of Human Rights and two international covenants: the International Covenant on Civil and Political Rights, complying with liberal ideology; and the International Covenant on Economic, Social and Cultural Rights, obeying to the socialist ideology.

3.1. Latin America in the middle of the war on ideologies

During the second half of the XX century, the world order was divided in two with a low intensity confrontation between liberalism and socialism. This division became more visible when the United States and the Soviet Union created their zones of influence. The world was then basically divided in two zones whose ideological frontiers were maintained using a balance of terror, i.e. with the threat of a nuclear war that would completely destroy life on earth. As a result of this, Latin America (with the exception of Cuba) remained under the influence of the United States, which meant that there was no room for socialist ideology in the region.

Consequently, as an area under the influence of the United States, liberalism was the ideology planned to be imposed in every aspect of Latin American society through the domination of the State power (understanding liberalism to be the way of thinking that supports capitalism as the universal pattern of social exploitation). Therefore, in that context, every ideology that opposed capitalism had to be fought in Latin American colonial societies by means of organised State violence. Even so, in some specific countries, the State was, at the same time, increasing the rights of some economically useful sectors of the population. Hence, there was a gradual opening of the formal democracy for some sectors of the colonial society other than those in power.

In this way, at the beginning of the XX century, more precisely during the period between the two World Wars, the main Latin American capitalist States initiated their own process of industrialisation.

> *"During the world economic crisis of the 30's, the bourgeoisie with the highest commercial capital in Latin America (Argentina, Brazil, Mexico, Chile, Uruguay and to some extent Colombia), was forced to produce the luxury goods that they used to import for their consumption locally. This*

> *was the beginning of a peculiar Latin American path towards dependent industrialisation: the substitution of imported luxury goods for local products for the consumption of the overlords and their small groups of middle class associates"* (Quijano, 2000b, p. 236).

The State then led the process of industrialisation, which resulted in a change in the patterns of the relations of power between the different social actors, in which the State acted as mediator. Marcelo Cavarozzi called this process "*the configuration of a State-centric matrix […] [that] was based on a new kind of capitalism, defined by him as a State centred- national- developmentalist capitalism*" (Cavarozzi, 2010, p. 38). During this period, the State used mechanisms for social inclusion by providing more social services, expanding the right to vote and eliminating some restrictions of the freedom of association of middle working classes. However, it also used mechanisms of social exclusion by controlling, regulating and minimising the autonomy in areas of production, which "*implied that the State participated in some relations that [...] had remained within the private sphere. Hence, the spread of social citizenship took place"* (Cavarozzi, 2010: 39). The relation between a State centred-national-developmentalist capitalism and democracy made it possible for politics to become a relevant aspect in Latin American societies. Therefore, little by little, the atmosphere for the creation of the speech of social movements based on human rights in Latin America was prepared.

However, in the 70's, the period of State centred- national- developmentalist capitalism started to run out and went into crisis. In the middle of the Cold War, *"the military dictatorships established in the Southern Cone during the mid 70's attempted to provide the first coherent response to the crisis of the SCM [State-centric matrix]"* (Cavarozzi, 1995: 102). The United States established the doctrine of national security in Latin America as the region was within its zone of influence. The aim of this doctrine was to combat and exterminate the national socialist enemy. However, it also served as an excuse to introduce the first neoliberal measures into Latin American and world economies.

For this reason, Latin American States decided to dismantle the interventionist State of the old State-centric matrix. Chile, Argentina and Uruguay were the first countries to do so. In these countries, the anti-State speech was schizophrenic since, on the one hand,

the State was weak as regards economic-related issues and, on the other, strong with regard to social repression. In this respect, Marcelo Cavarozzi points out that

> *"anti-statism provided the rhetoric for achieving a powerful ideological fusion. On the one hand, it offered a coherent interpretation of how the prevailing economic malaise, periodical crises and stagnation were generated by the practices of the State connected to the SCM. On the other hand, the anti-statist ideology concluded that inter- and intra-sectoral disputes over the distribution of State-regulated income were the main cause of increasing social conflict and chronic mobilization of the masses. The natural aversion of the military towards social conflict and "disorder" facilitated even more the perception of both phenomena as underlying causes of communist subversion, which should, therefore, be rooted out" "* (Cavarozzi, 1995, p. 102).

This meant that the economic measures taken by the State during this period created serious financial crises, resulting in the increase of economic and social exclusions of the majority of the population. Domination and exploitation caused the discontent of those who were suffering from it. There were, therefore, sectors that actively opposed domination, creating conflicts through social mobilisation in order to undermine domination and destroy their institutions (Quijano, 2001). However, during the conflict, historically discriminated sectors of colonial society were exposed to a new genocide, which was both economic and ideological.

Hence, during the war against the internal subversive enemy, the latter was conveniently identified with indigenous people, African descendants, the poor and members of political parties and social movements. Coloniality of power and inequality were again combined during the second half of the XX century. State and civil servants participated in serious violation of the human rights of thousands of people in the region. Paradoxically, Latin American States were economically weakened as well as in their ability to protect human rights. However, their efficacy as machinery for repression and extermination increased. Moreover,

> *"The element of racism has also been present in the context of massive violations of human rights, for example, in conflicts such as the war in Guatemala or Peru, where 84% and 75% of victims were Mayan or Quechua speakers. In the case of Guatemala, the Historical Clarification Commission (HCC, 1999) underlined the importance of racism in the way in*

which massacres were carried out since, in most of the cases, identification amongst Mayan communities and the uprising were intentionally exaggerated by the State, based on traditional racial prejudices. It also points out that racism was at the root of the excessive cruelty and anger used to commit these violations (Beristain, 2010, p. 60).

3.2. The new world order and the political value of human rights and democracy

During the last quarter of the XX century, Latin American States were being economically dismantled while the Berlin wall dividing the city was falling. The city was divided in two in the same way as the world had been divided for more than four decades. 1989 marked the start of the fall of the Soviet Union, leaving the United States as the only world super power. The end of the Cold War meant the victory of capitalism over socialism and the strengthening of the political value of democracy and human rights. At the peak of neoliberalism, as the form of expression of this triumphant ideology, States met in Vienna for the 1993 World Conference on Human Rights (WCHR). During the Conference, they agreed that human rights and democracy were a priority for maintaining international peace and security. It was for this reason that States committed themselves to include human rights into their public policies. Thus, the last decade of the XX century can be defined as the period of multilateralism, since the Heads of States held several world conferences as the expression of the optimism created by the end of the Cold War. This optimism allowed them to agree on the new priorities to be included in the international agenda.

Therefore, the 1993 Vienna World Conference on Human Rights became an example of the optimism experienced at the end of the Cold War. At that moment, it solemnly adopted the Vienna Declaration and the Programme of Action "i*nvoking the spirit of our age and the realities of our time which call upon the peoples of the world and all States Members of the United Nations to rededicate themselves to the global task of promoting and protecting all human rights and fundamental freedoms"* (WCHR, 1993, preamble). It also meant the elimination of the division of the International Law on Human Rights provoked by the Cold War. In that sense, the States declared that

> *"All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and*

> *various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms"* (WCHR, paragraph 5, 1993).

In turn, the Secretary-General of the United Nations was able to translate this optimism by suggesting a new role for the international community. Now, democracy and human rights, as basic requirements for the elimination of social inequality, were the necessary conditions to preserve international peace and security. Therefore, Boutros Boutros-Ghali, Secretary-General of the United Nations, declared that

> *"Today, the rapidly changing global scene has set the age-old concept of democracy in a new light [...] democracy is increasingly being recognised as a response to a wide range of human concerns and as essential to the protection of human rights [...] democracy contributes to preserving peace and security, guaranteeing justice and human rights, and promotes economic and social development"* (Butros-Ghali, 1996: 6).

The developed world suddenly realised that anti-democratic States were more likely to endanger international peace and security than democracies.

However, in Latin America, the optimism at the end of the Cold War contrasted with the economic crisis and the serious violations of human rights. The economic crisis was, in part, related to the fact that most Latin American States had irresponsibly contracted an external debt which, combined with the over-revaluation of currencies, resulted in the multiplication of the debt in a short period of time. Payment of the external debt meant the implementation of a "chaotic adjustment", whose aim was to reduce the fiscal deficit at any cost, without taking into account the negative consequences that this process might have on people's lives in the long term. The adjustment measures included, amongst others: wage reductions, tax increases, the postponement of operating expenditures, deferral of the payment of national and international suppliers and running down inventories of public enterprises. Adjustment measures intensified the most negative effects of the exhaustion of the SCM, so it deepened social inequality and the unravelling of public authority (Cavarozzi, 1995).

The international community was aware of the effects of the external debt on democracy and the effective enjoyment of human rights. Hence, the World Conference on Human Rights made reference to this situation when it called upon "*the international*

community to make all efforts to help alleviate the external debt burden of developing countries, in order to supplement the efforts of the Governments of such countries to attain the full realization of the economic, social and cultural rights of their people" (WCHR, 1993, paragraph 12). With the burden of the debt, Latin America acceded to the new global world of multilateralism with broken up States and without any tools for an economic intervention that would allow a social investment and a democratic regulation of social relations.

Consequently, structural inequalities, generalised poverty and continuous violation of human rights, caused a generalised citizen unbelief on State and democracy. Therefore, to a large extent, politics stopped being important for Latin American societies. For this reason, Guillermo O'Donell affirms that *"[i]mpressed by its inefficacy, and even by the recurring violations of many of the fundamental rights in Latin America, several authors question the validity of the definition of "democracy" by most Latin American countries in that region"* (O'Donell, 2001:1).

* * *

3.3. The current world pattern of power and inequality

Latin American States, economically weak and dismantled, discovered the end of multilateralism at the beginning of the XXI century. The 9/11 terrorist attacks against the United States in 2001 marked the start of a new world order. In this context, Pedro Brieger points out that

> *"there is no doubt that the 9/11 attacks against the Twin Towers and the Pentagon marked a milestone". In light of the invasion and the subsequent occupation of Iraq, it is possible to affirm that this 'aftermath' has arrived faster than expected and is defined by the reaffirmation of the U.S. as the global hegemonic power capable of challenging the United Nations in the establishment of an American Peace wherever its political and economic interests deem it necessary"* (Brieger, 2003: 2).

The invasion of Iraq by the United States, going over the head of the United Nations, marked the start of international unilateralism.

A world reorder started during the first decade of the XXI century, tending towards unipolarity, linked to the appearance of sub-State actors with an international impact (for example, the Al Qaeda terrorist network). In this context, the United States and its

allies start a war against terrorism on a global scale. The difference between this war and the Cold War is that, this time, the enemy is supposedly invisible. Hence, according to the United States and its allies, it is possible to start a war that seriously violates human rights anywhere in the world under the pretext of exterminating terrorism. The lacklustre role of the United Nations in the light of the United States' unilateral acts deepened scepticism about the State and even about the role of the international community in the fulfilment of human rights.

The world order, marked by bipolarity after World War II, the brief period of multilateralism, and the current trend of a unipolar world order, found a weak and undemocratic State in Latin America, which does not guarantee human rights. Consequently, historically discriminated sectors of colonial society are now exposed to a new cycle of violence within the framework of the war against terrorism, since the enemy is conveniently identified with indigenous peoples, African descendants, the poor, members of political parties, members of social movements and even human rights defenders. Coloniality of power and inequality were again combined during the first decade of the XXI century. Civil servants participated in serious violations of human rights of thousands of people in the region, for example, in the North American prison located in the military base of Guantánamo (Cuba), whose existence is justified by the war against terrorism.

4. The language of human rights in Latin America

During the war of ideologies which started in the second half of the XX century, the intention of Latin American military dictatorships and authoritarian governments was to provide an answer to the crisis of the State-centric matrix by combining the implementation of economic measures with State terrorism. In that context, the consequence of the application of generalised and systematic State violence was the perpetration of serious violations of human rights. The victims, their families and people interested in the cessation of State terrorism, organised themselves and explored different strategies for the defence of human rights, amongst which were the research and documentation of processes of victimisation, victim support, public protests, international accusation of serious violations, advocacy or lobbying of non-judicial State authorities and demand for their rights through national and international judicial litigation.

The combination of the different strategies for the defence of human rights resulted in the theoretical development of International Human Rights Law. This meant that the language of human rights was enriched by its demands, precisely, by those carried out by its defenders using the very instruments provided by the States, through international law. Therefore, the task of defending human rights implies an ideal for the change from a violent and authoritarian State model which tolerates structural inequalities, to a State "which is the anchor for guaranteeing the human rights of its citizens" (O'Donell, 2008); i.e. a democratic State which, "*apart from sanctioning and supporting the rights of political citizenship implied by a democratic regime, through its legal system and institutions, also sanctions and supports a wide range of rights emerging from the civil, social and cultural citizenship of its inhabitants*" (O'Donell, 2008: 9). In this way, the use of human rights language by organisations of victims and human rights defenders in Latin America contributed to the development of an International Human Rights and Humanitarian Law.

The implementation of State terrorism, as the expression of violence through which the power of domination in a colonial society is exercised based on an unequal conception of society, resulted in the perpetration of serious violations of human rights that caused resistance in some sectors of society, which actively mobilized against it. This made it easier to create a human rights language emanating from the victims, its defenders and other forms or social organisation. This language, used to narrate the victims' suffering, involves an idea of the way to interpret rights based on equality, in order to get closer to the elimination of structural inequality in Latin America which goes beyond the classical conception of some rights as being mere freedoms. Hence, the language of human rights acquires an emancipatory power, since it allows social movements to reconceptualise the role of the State as regards structural inequalities.

Social mobilisations started during the last quarter of the XX century, create the atmosphere to question the bases of colonial society, profoundly criticising the role of the State as regards the respect for, guarantee and promotion of human rights. Therefore, once social mobilisation begins to interpret the language of human rights in terms of equality, it bets on the decolonisation of social and political relations. In this context, it was therefore possible to raise awareness about human rights with social movements as the authors of a cultural transformation in Latin America.

The demand for the State to respect, guarantee and promote human rights was made through the efforts of both social movements and organisations of human rights defenders. This made possible the theoretical and practical development of state law in Latin America. However, the Eurocentric perspective of human rights is an obstacle for the formation of their ethical sensitivity towards them, since it can result in a Eurocentric imposition, especially in a region where different cultures live together in the same space, some of which have been historically victimized through the coloniality of power. This means that they have different ways of conceiving human rights.

In this regard, the multicultural proposal of Boaventura de Sousa Santos (2002), highlights and supports the emancipatory potential of human rights in the context of globalisation, cultural fragmentation and identity politics. Universal human rights are a localised globalism. Through the process of globalisation, Western human rights, succeeded in extending their influence over the globe, as a condition or local entity, and, by doing so, they developed the capacity to establish a rival cultural condition or entity as local. In this context, through cross-cultural dialogue, it is necessary to reconceptualise the notion of the human being and human rights, by using cosmopolitanism as a counterhegemonic way of defining them (Santos, 2002). Consequently, cross-cultural dialogue based on equality for the defence of human rights, points to the decolonisation of social and political relations to the extent that it is accepted that people have the right to be equal whenever difference makes them inferior. However, they also have the right to be different whenever equality jeopardises their identity (Santos, 2002).

One of the bets for human rights defence work is to go through litigation, i.e. by using the tools that the State offers, more precisely, the judicial branch of the State. The defence of human rights by means of calling upon the State to comply with its international human rights obligations strengthens State and democracy. The role of the defence of human rights is to strengthen the sustainability of democracy in Latin America. Hence, the Inter-American Commission of Human Rights declares in that respect that

> *"the work of human rights defenders is fundamental for the universal implementation of human rights, and for the full existence of democracy and the rule of law. Human rights defenders are an essential pillar for the strengthening and co nsolidation of democracies, since the purpose that motivates their*

work involves society in general, and seeks to benefit society" (ICHR, 2011, p. 5, paragraph 13).

Therefore, the State becomes stronger to the extent that it protects human rights and human rights movement helps in this. The work of human rights defenders is to bet, each day, on the construction of a democratic State in Latin America (O' Donell, 2008).

By going to the courts, human rights defenders contribute to the creation of state law. However, while they approach State jurisdiction, they are also betting on the decolonisation of Latin American state law. To be precise, serious violations of human rights as the reflection of structural inequalities and the coloniality of power that reproduces them, represent an exceptional opportunity to decolonise social relations as well as to contribute to the guarantee of non-repetition of grave violations of the same. Human rights organisations help to rescue one of the basic dimensions of the State: the legal one. In this regard, Guillermo O'Donell explains that

> *"the State is also a legal system, a maze of rules that permeate and co-determine a great number of social relations. Nowadays, especially in democracies, there is a close connection between State bureaucracies and the legal system: the first supposedly acts in terms of faculties and responsibilities legally assigned by the relevant authorities- the State expresses itself using legal language. This is how the effectiveness of a State legal system is measured. Together, State bureaucracies and legality, are presumed to generate, the great common good of the general order and of the foreseeability of a large range of social relationships, for the inhabitants of their territory"* (O'Donell, 2008: 6).

Hence, the aim of the judicial work of human rights defenders is that the State, through the symbolic power of law, is democratically built on a real social equality.

Even so, work for the defence of human rights is rejected by dominant groups, since they consider it as a threat to their power. For this reason, they use organised State violence to control defenders. Of course, the best way to exert control is by justifying it with arguments such as national security or the fight against terrorism. Hence, the Inter-American Commission of Human Rights declares in that respect that

> *"in the case of organisations dedicated to the defence of human rights, in invoking national security it is not legitimate to use security or anti-terrorism legislation to suppress activities aimed at the promotion and protection of human rights.*

The concept of civil society must be understood by the States in democratic terms, in such a way that organisations dedicated to defending human rights may not be subject to unreasonable or discriminatory restriction" (ICHR, 2011, pp. 67 and 68, paragraph 167).

4.1. The bet on defending rights through legal channels

Those who defend human rights support the decolonisation of social relations. They understand that the colonial situation is not only something belonging to the past but is also still exists in the present and its *"repeated instrumentalisation throughout history and its permanent updating not only within the duly constituted State powers, but also in the civil and private spheres of society"* is also effective (Vega, 2011: 111). They then approach the State, understood to be the central form of control of collective authority which regulates social relations, in order to contribute to the construction of a democratic rule of law in Latin America. This means, a State that truly protects, promotes and makes effective the human rights of historically discriminated sectors of society, i.e., a State that does not tolerate structural inequalities and acts positively to overcome them.

The current world pattern of power articulates; capitalism as the universal pattern of social exploitation, eurocentrism as the hegemonic form for the production of knowledge, coloniality of power with the idea of race as the basis of the global pattern of basic social classification and the State as the universal central form of control of collective authority (Quijano 2000b). However, the opening of formal democracy, gives some sectors of the population, other than the traditional dominant groups, the possibility of acceding to the control of the State. From this perspective, State control is an opportunity to destroy resources and institutions traditionally dominated by colonial society.

For this reason, given the enormous economic power of the ruling minority and its control of subjectivity and intersubjective relations through Eurocentrism, the State becomes the only option available to the excluded and discriminated majority within a colonial society to decolonise social and political relationships. In this regard, Guillermo O'Donnell warns that human rights do not exist in the air or in discourses, but that they actually exist and can be claimed when they are registered and implemented by a truly democratic State. Hence, he concludes one of his works by saying, "*I think that a new*

right should be proposed, one that, to my knowledge, has not yet been recognised in the literature, or in political and legal theory: we, citizens, have a public and inalienable right to the State" (O'Donnell, 2008: 23).

The work of social movements and human rights organisations in Latin America demands the public and inalienable right to the State. The bet on defending rights through legal channels is "*the struggle for law*" (Ihering, 2003). However, when human rights defenders decide to do their work through judicial procedures, i.e. by going to the State legal system in representation of victims of serious violations, the first obstacle that they face are State officials. Power impregnates all social relations, which means that the relationship between the victims' representatives and judicial officials is no exception to this. On the one hand, we have the power of officials as *legal agents* and, on the other, the power of lawyers representing the victims as "*agents of the legal discourse"* (Segato, 2010a: 5).

According to the above, lawyers defending human rights have the power to be agents of the discourse of human rights. Added to this, serious violations have, amongst others, the characteristic of being imprescriptible. According to the International Law on Human Rights, this means that the State has the obligation to investigate, prosecute and punish the guilty party and that the obligation to carry out a criminal investigation does not expire with the passage of time. Imprescriptibility basically implies the impossibility of pardon. Although the penalisation of serious violations does not exhaust the victims' right to reparation, litigation or legal debate is a scenario for narrative dispute. Thus, imprescriptibility provides the opportunity to give a legal appropriation of a memorable historical event: the unforgivable that is yet to be told.

Imprescriptibility is the State appropriation of the victim's right to not forgive. Victims of serious violations have the right to know the truth about what happened and one of the ways offered by the State are judicial procedures. Although the investigation, prosecution and punishment of the guilty party is a State obligation, compliance with the obligation of not forgiving depends on the political decision of those who control State power. Thus, from a purely political point of view, imprescriptibility becomes the right to not forgive enemies of State power, which, at the same time, becomes the prohibition of forgiving allies of State power involved in the perpetration of serious violations of human rights.

Therefore, the State finds it irrelevant for the victims of serious violations of human rights to forgive their victimizers since it has, at the very least, the obligation to open criminal proceedings to investigate what happened. Some States took the political decision of not complying with their obligation to investigate, prosecute and punish serious violations. Hence, victims have exercised their right to know the truth, which also becomes the right not to forgive, so they went to international courts to call upon States to comply with their international obligations as regards human rights. Not to forgive serious violations is an obligation of the State and the victims' right. Therefore, imprescriptibility is the opportunity that victims have to remind and require the State to comply with its obligation to investigate, prosecute and punish perpetrators.

From the perspective of State power, memory, i.e. the memories and the forgetting of serious violations of human rights, responds to a political decision. This means that memories are strategically narrated and oblivion is methodically applied. Memory can, therefore, be used and abused. When calling upon the State to fulfil its obligation to investigate, prosecute and punish those responsible for serious violations of human rights, human rights defenders have the opportunity to convert a weak memory (Traverso, 2007) into a strong one when narrated by the legal branch of the State through a court ruling. Thus, the symbolic strength of the State can be combined with the use of memory. Since memory is a selection of memories and oblivion, the uses of memory can be criticised from the difference between the two ways of interpreting it: the literal or the exemplary. A remembered event can be interpreted literally when all its literalness has been preserved, in an intransitive way, without going beyond itself. Once the remembered fact has been recovered, it can be read in an exemplary manner to be used as a manifestation of a more general category that serves as a model to understand new situations; which means that the past becomes a principle of action for the present (Todorov, 2000).

Consequently, the investigation, prosecution and punishment of those responsible for serious violations in the recent past, makes it possible to understand our present as a colonial society, while making easier to understand how coloniality of power invades and encourages new situations of social inequality. Due to the fact that victims of serious violations have the right to know the truth about what happened and one of the ways offered by the State are judicial channels, the courts become a scenario that allows victims to narrate their suffering. Consequently, the struggle for law consists in *"the double dispute for access to legal codes in their capacity as the master narrative of*

nations and our ability to become plaintiffs in them; and to assert, not only in courts but also, face to face, in everyday relationships, in the terms authorised by the Law." (Segato, 2010a: 1).

Chapter 2

The defence strategy, the methodology for reconstruction and the memory of the victims of serious violations of human rights

Relations of power permeate every social relationship in all aspects of daily life. This means, relations created during the development of the struggle for law are also influenced by power. There are two areas influenced by relations of power when elaborating a litigation strategy for the defence of human rights: the State public area of judicial procedures, and the private sphere dedicated to the reconstruction of the memory of the victims of serious human rights violations. Indeed, this chapter will approach judicial procedures as a State public sphere. It will also explain the reasons why victims have the right to file an appeal for reparation. The appeal should fulfil certain requirements without which it would be ineffective for the victims. One of them is the impartiality of the judicial officials in charge of the investigation of serious violations of human rights. . Soon, we will address the issues of objectivity and subjectivity in the struggle for law, i.e. in both the State public sphere of judicial procedures and the private sphere of the reconstruction of the memory. We will also explain the case of the Armenian genocide as an example of the right to be heard in the public sphere of the legal discourse. Finally, we will explain the problem of objectivity in the private sphere in order to approach the reconstruction of the memory in the same.

1. Relations of power in the struggle for law

The occurrence of serious violations of human rights in Latin America emerged as a result of the combination of two independent factors: inequality and power. Serious violations are events of historical significance that can be narrated in the development of a strong or a weak memory. As already mentioned in the first chapter, a strong memory is, for example, one that is told through an official or State history, which, as scientific knowledge, is influenced by power and its intention of providing it with scientific objectivity is none other than an effort to legitimise the narration of one memory at the expense of others.

Weak memories, generally those of the victims, can be recounted by its main actors and/or their defenders in different spaces and timeframes of social life. To be precise, in the private sphere, the narration of memory by victims or their families is the main

requirement to elaborate a strategy for the defence of human rights. Afterwards, once the process of reconstruction of the memory has been carried out in the private sphere, different strategies for the defence of human rights are explored, amongst others: research and documentation of processes of victimisation, victim support, public protests, international accusation of serious violations, advocacy or lobbying of non-judicial State authorities and the demand of their rights through national and international judicial litigation.

Specifically, one possibility for the victims is to bet on the defence of their rights through national and international litigation strategies. It was exactly this alternation between national and international scenarios which made it possible to develop legal knowledge specialised in human rights in Latin America. In Argentina, for example, for legal professionals, access to expertise in human rights meant having a specialised knowledge together with the condition of being a victim of State terrorism or being a direct relative of a victim, as well as his/her participation in the internationalisation of human rights causes between 1970 and 1980. The same happened in Colombia, with the internationalisation of the indigenous cause, which resulted in its introduction, as one of the most important issues, in the international debate on human rights between 1990 and 2000 (Santamaría and Vecchioli, 2008). Consequently, victims accept their memory being narrated in the public sphere of the judicial procedure by lawyers defending human rights in the course of judicial representation.

However, the relationship between victims and their legal representatives is also influenced by power. This influence intensifies when, as already mentioned, there is no direct connection between lawyers and victims, i.e. any connection of friendship, familiarity or consanguinity, unlike the case of Argentinean lawyers who have access to a human rights specialisation. This is why it is essential to emphasize the relations of power created during the development of the struggle for law. Hence, patriarchy and coloniality of power, conceived as social relations of power, imbue the latter, just as they affect every aspect of daily life. This is also the case of the social relationship necessarily created between victims, their defenders and State officials when defending human rights by means of a judicial process.

Consequently, victims remain at the centre of a game of power where, on the one hand, we have the power of officials as legal agents and, on the other, the power of lawyers representing the victims as agents of the legal discourse. In addition to the

above, serious violations have, amongst others, the characteristic of being imprescriptible, which means that the State has the obligation to investigate, prosecute and punish the guilty party and that the obligation to carry out a criminal investigation does not expire with the passage of time. Thus, imprescriptibility becomes the fight to narrate the unforgivable that has not yet been told, either by initiative of the victims and their representatives or officiously by the State through a legal litigation or debate as the scene for how the story has been told.

1.1. The scenario of relations of power as part of the litigation strategy

Lawyers who defend human rights are the first to know about the expectations of victims concerning reparation before developing the litigation strategy. While narrating their memory, victims intertwine their wishes and expectations of reparation. This means that the method of addressing events from the past and their meaning becomes a key element in the litigation strategy. The suitability of the strategy depends on the method used to rebuild the memory. At the same time, the method of approach depends on the professional training of the person implementing it as well as the field to which it can be applied. In other words, lawyers address the memory of past events by means of the only methodology that they have learnt during their training and apply it in every aspect of social relations where it is required.

The suffering and expectations of reparation of victims are something unconnected with human rights defenders before establishing a relationship of trust. Afterwards, in the private sphere, and in order to establish a legal representation, it is possible to know part of the victims' memory. In this sense, the suffering and expectations of reparation of victims are something alien to judicial officials before the establishment of a relationship during the judicial procedure. Afterwards, in the public sphere of the judicial procedure and during the respective procedural times, judicial officials will come to know those parts of the victims' memories which are relevant and conducive to the aims of the procedure.

Both, the lawyer and the judicial official, wish to learn the unknown with the help of what is known, i.e. the need to learn by means of the knowledge acquired at the faculty of law. This means that the methodology used to reconstruct the victims' memory will follow the judicial procedure, since it is the only tool taught and learnt at the faculty of law. In conclusion,

> *""in the faculty, they do not teach you how to treat people. What is more, I think that [...] until my final year at university, I never came into contact with people. It's always about theory, what courts are like, but we never get to know the survivors or victims involved in human rights cases, even though, according to law, they are the clients, which means that no-one teaches you how to deal with them, and you treat them like merchandise"* (Moreno, interview).[2]

However, while judicial officials have the legal obligation to apply the methodology learned at Law school in the public sphere of judicial procedure, lawyers defending human rights have the option to apply the judicial methodology in the private sphere. Thus, the objective methodology of the public sphere is an option for lawyers defending human rights when addressing events of the recent past in the private sphere.
Therefore, the first thing that lawyers face is the challenge of decolonising the relations of power with the victims due to their professional training. Their specialised knowledge of the language of state law imposes a relationship of inequality between them and their clients. Hence, in the private sphere, human rights defenders can either *talk about* the victims and their rights or *talk to the victims about their rights. To talk to the victims* is to dialogue with them, thus recognising their status as subjects just as the subject that I am as a lawyer. It involves ensuring that legal knowledge is made available to the victims and enriching that knowledge with the descriptions that they provide during a dialogue between equals, which makes it even possible to question and reconsider the limits of the law.

However, equality, as a starting point, should not be confused with the one-dimensional equality of expert knowledge, which becomes the desire to learn the unknown with the help of the known. This would be translated in adjusting the narration of the suffering and the expectations of the victims to the legal forms. At the beginning of this work, we warned that the prejudice of superiority is an obstacle in getting to know each other, yet the prejudice of one-dimensional equality is a major obstacle when it identifies purely and simply the other with the own-self, annihilating and suppressing any possibility of establishing a dialogue.

For this reason, the demand for the State to investigate, prosecute and punish those responsible for serious violations of human rights carried out through judicial litigation

[2] Interview with Nelly Moreno held on the 31st of August 2012.

strategy can come up against the barrier of one-dimensional equality in the private sphere. This occurs when the concept of human rights results in the imposition of only one way of conceiving them. This is exacerbated if you consider the multiculturalism existing in Latin America, where coexisting cultures establish different ways of conceiving human rights. It is necessary to remember that, cross-cultural dialogue based on equality pointing to the decolonisation of social relations, implies that people have the right to be equal whenever differences make them inferior. However, at the same time, they also have the right to be different whenever equality jeopardises their identity.

On the other hand, lawyers defending human rights face the challenge of decolonising the relations of power with judicial officials. Eurocentrism has been the basis of the process of construction and consolidation of the Nation-State in Latin America. For this reason, the language of law through which the State expresses itself, implies an unequal conception and is, therefore, hierarchical between the dominant groups and a majority comprised of indigenous people, African descendants and mixed races. It is in this sense that the law was first conceived as intrinsic to civilization and modernity, as opposed to "uncivilized" or "non-modern" concepts of rights different from those dictated by the State. Therefore, gender and racial inequalities influence the State and the Law as its form of expression.

Consequently, it can be pointed out that the Law treats and sees women, indigenous people, African descendants and mixed races as dominant whites see and treat them. Thus, the relationship between judicial officials, as experts in state law, and victims of serious violations, is influenced by power inequalities. In other words, *"symbolic violence understood as that which naturalises relations of domination is easily reproduced in situations of asymmetries between the possessors of socially valued knowledge as well as between State officials and citizens"* (CELS, 2011: 4).

In turn, the intermediary role in the public sphere of lawyers as subjects bearers of specialised knowledge influences the hierarchical construction of the relationship with the victims. Concerning the issue of gender and coloniality, Rita Laura Segato (2010b) points out that there is a "hyperinflation of men in the community setting" when, added to their ancestral domination of the public sphere in the village, they act as intermediaries with the modern outside world. In this way, the language of the village which was originally hierarchical, becomes super-hierarchical when intermediaries

make contact with the egalitarian language of modernity and are equated with the power of white man. It is possible to apply this same idea to the relationship between victims and lawyers. However, this happens in the context of the public sphere where judicial representation is developed. Thus, the hierarchical language of state law in contact with the hierarchical language of expertise in law, which is the language of lawyers, becomes super-hierarchical when they are the intermediaries between the victims and the State.

However, by going to the courts, human rights defenders are the main actors of the creation of state law. They, therefore, bet on the decolonisation of Latin American state law with the aim of contributing to the guarantee of non-repetition of such violations. They bet on the construction of a democratic State which, through its legal system and institutions, sanctions and supports a wide range of rights emerging from the civil, social and cultural citizenship of its inhabitants. In other words, *"[it] is all about subverting the relationship with the State, to modify the terms and the functioning of the State in the face of the various forms of social life [...] This pragmatic change makes it possible to perceive how flexible and transformable can the issue and the State matter be" (Vega, 2011:* 118).

Consequently, judicial litigation for the defence of human rights of victims consists in a double dispute: on the one hand, the struggle for the procedural and material access to legal codes; on the other, the struggle to assert in judicial procedures and in everyday social relations the victims' own words, in order to appoint emerging rights and support them with state law.

2. Introduction to the judicial procedure as part of the State public sphere

The imprescriptibility of serious violations of human rights obliges the State to investigate, prosecute and sanction those responsible. This means that they cannot remain unpunished. Impunity means

> *"the impossibility, de jure or de facto, of bringing the perpetrators of violations to account -whether in criminal, civil, administrative or disciplinary proceedings since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparation to their victims"* (ICJ, 2008: 89).

When there is impunity of perpetrators of serious violations of human rights, the State is not complying with its international human rights obligations, i.e. impunity itself is a violation of the duty to guarantee, which is a State responsibility. Impunity can be de jure or de facto. The first comes directly from legal norms, such as those of amnesty or pardon. The second is presented in different forms, and includes, amongst others; complicity of public authorities, indifference of investigators, partiality, intimidation and corruption of the judicial power (ICJ, 2008).

A general principle of international law is that any violation of an international obligation entails the obligation to provide reparation. International Human Rights Law also applies this principle when

> *"a State violates the obligation to respect human rights internationally recognised. This obligation has its legal basis in international agreements, in particular international human rights treaties, and/or international customary law, including the rules of international customary law which are peremptory in nature" (ius cogens)"* (ICJ, 2008: 77).

Therefore, victims of serious violations of human rights have the right to obtain reparation for the damages caused. It shall be full reparation and shall include restitution, compensation, rehabilitation and satisfaction as well as the guarantee of non-repetition. It shall also be appropriate, fair and prompt and, according to the nature of the right violated and the group of persons affected, it can be individual or collective (ICJ, 2008).

The State obligation to investigate, prosecute and sanction those responsible is closely linked to the right to reparation of victims. Hence, judicial procedures are an essential channel for the bet on obtaining reparation. Moreover, impunity is fought by means of judicial procedures with the aim of discovering part of the truth about these violations. Indeed, victims of serious violations of human rights have the right to the truth, whose compliance is not exhausted in truth commissions that seek to know *"the historical truth".* The right to truth also aims to know the truth through judicial procedures.

Therefore, victims' relatives have the right to a thorough investigation to discover the truth of the facts parallel to the public dissemination of the identity of direct perpetrators of the violation of human rights suffered.

"Additionally, truth is essential to make an appropriate evaluation of the compensation originated by the responsibility for the human rights violations. However, the State obligation to guarantee this right to the truth is neither a substitute nor an alternative to other obligations it has to comply with in the context of its duty to guarantee, i.e. those of investigating and prosecuting. This obligation exists and remains independently of the compliance or not with the others" (ICJ, 2008: 87).

2.1. The judicial procedure as the right to a remedy to claim reparation

The judicial procedure is legal remedy that guarantees people the opportunity to claim for their rights before an independent and impartial authority, whose aim is to obtain their recognition as victims of a violation, the cessation of the violation if it is still continuing and full reparation (ICJ, 2006). In order to be effective, the authority competent to investigate and decide on the case must be independent and impartial. An independent assessment constitutes the first step in obtaining reparation for the victims, especially because in cases of serious violations of human rights, *"States have an obligation to guarantee a remedy of a judicial nature"* (ICJ, 2006: 58). This is why we profoundly analyse this issue.

The seriousness regarding the investigation of serious violations of human rights is the guarantee for the effectiveness of a judicial remedy. The right of victims to a remedy includes, amongst its essential elements; the right to take an active part in the investigation and the right to know the truth about violations (ICJ, 2006). The State's obligation to investigate means that authorities must take into account international standards regardless of whether or not the investigation leads to the complete elucidation of the facts and legal consequences surrounding a violation, since it is a duty of conduct and not of result.

Concerning investigation, international requirements or standards include, amongst others, the following: prompt, impartial, thorough and independent official investigation which allows identification and if possible, the sanction of those responsible; independence of the person or authority that carries out the investigation; effective participation of victims and their relatives in the judicial procedure; protection of participants against threats and intimidations; that the inquiry collects and documents all evidences, while explains the facts and causes of the violation, as well as the

methods, evidence and the results of the investigation to the victim, their relatives and the general public (ICJ, 2006).

However, the right to a judicial remedy, understood as a fundamental human right, not only protects victims of serious violations, but also potential perpetrators. Understanding that potential perpetrators have been duly linked to the judicial procedure, the right to a judicial remedy means for them the right to be investigated, prosecuted and sanctioned through a due judicial process. Thus, independence and impartiality are enormously important when victims and perpetrators are subjected to the rules of judicial procedure; the first, with the aim of obtaining full reparation, the second with the need to be judicially declared non-guilty.

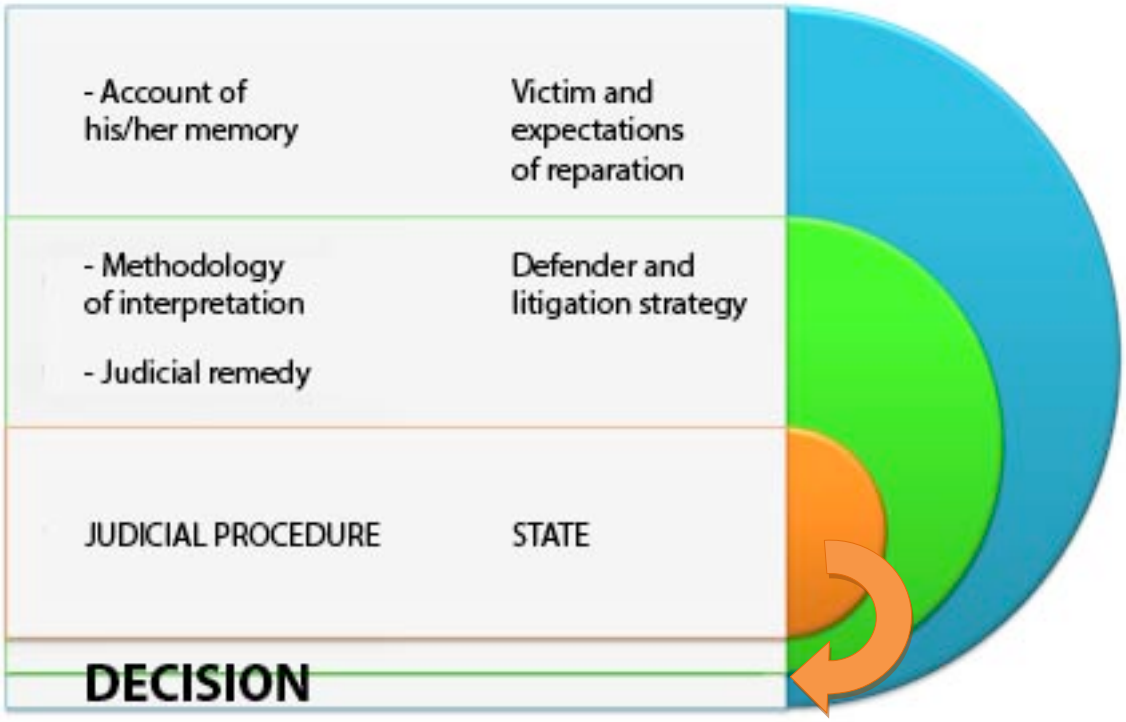
Consequently, the narration of the victims' memory, involving a story of suffering and expectations of reparation should be subjected to the legal filters that guarantee the right to due process of the parties intervening in a judicial process. In other words, in the public sphere of the same, parts of the victim's memories which are relevant and conductive to the aims of the process will be evaluated. Hence, expectations of reparation and litigation strategy will adjust to the respective procedural rules and times.

Therefore, as it appears in Figure Nº. 1, the extensive and comprehensive account of the victims' memory is reduced to what the litigation strategy developed by lawyers deems "legally relevant", and afterwards it must be adjusted to what judicial officials consider "pertinent and conducive to the procedure".

* * *

Figure Nº 1

Adjustment of the subjective account to the legal-objective account



2.2. Impartiality in the investigation of cases of serious violations of human rights

An appropriate investigation should be independent and impartial. Independence of authorities carrying out the inquiry means that they are not involved in the alleged violations. For example, an inquiry is not independent if a case in which military personnel involved in the perpetration of the alleged violations is investigated by a military court. In this case, an impartial investigation would be carried out by civilian authorities, which are independent from the military hierarchical order. On the other hand, impartiality *"presupposes a lack of pre-conceived ideas and prejudice by those who carry out the investigation"* (ICJ, 2006: 73). To be precise, serious violations of human rights are the violent expression of prejudices of gender, racial, ethnic, religious or another nature, which obey to stereotypes rooted in colonial society. Therefore, its investigation generates specific problems of impartiality (ICJ, 2006).

If we take into account the parties intervening in a judicial procedure, the first to act are public prosecutors, who accuse those presumably responsible for the serious violations of human rights before a judge. Public prosecutors, who "*have an essential role in the administration of justice when investigating serious violations of human rights" (*ICJ, 2006: 81), have the obligation to guarantee a due process acting impartially and

objectively. They are in charge of starting judicial process ex-officio in case of serious violations, in an objective manner, i.e. *"free from subjectivity when carrying out its professional duties". They also have special duties related to human rights protection and must guarantee the due process"* (ICJ, 2006: 78).

Impartiality is also required to judges, who will ultimately take a judicial decision in which they will narrate facts with legal relevance. The impartiality of the judges is the guarantee of a due process for the parties, and the decisions that they take must rely on facts and *"according to law, with no restriction"* (ICJ, 2006: 29). The impartiality of the judges, i.e. lack of partiality, animosity or friendliness towards any of the parties, must be examined from two perspectives: subjective and objective impartiality. The first is related to the personal conviction of a particular judge against a specific cause, i.e. the lack of prejudices; while the second has to do with "appearance of impartiality", i.e. the offering of sufficient guarantees in order to dispel any reasonable doubt as to his impartiality.

In addition to this, lawyers, as parties of the procedure, also have professional obligations when they practise their work as judicial representatives. Together with judges and public prosecutors, they have an essential role in the protection of human rights guaranteeing compliance with the respect of due process when representing victims, even potential perpetrators, before a court. It is necessary that lawyers can practise their profession in a free an independent manner, and the State is obliged to protect them when illicit interferences are affecting their work. Even lawyers have basic obligations towards their represented. Amongst their duties, two are to be highlighted: to guarantee at all times the interests of people whom they represent and, according to principle 13 of the *United Nations basic principles on the role of lawyers,* that to *"provide legal assistance with the diligence of a father of a family"*[3] (ICJ, 2007: 71).

To sum up, independence of public prosecutors and judges, even that of lawyers, is a necessary requirement to guarantee the full enjoyment of the right to a judicial remedy. However, the same does not occur with impartiality, since it requires to public prosecutors and judges, but not to lawyers. Judges have the ethical obligation to be impartial and objectives, while lawyers have the ethical obligation to safeguard the

[3] This principle of law taught at university presumes that the diligence of a family father is by nature something good, unquestionable and desirable. Therefore, only this principle shows that law, its teaching and the legal practice are permeated by patriarchy.

interests of the people they represent at all times, with the due diligence of a “family father”. Thus, while objectivity is required to public prosecutors and judges, lawyers must be partial and subjective, since they must ensure that the expectations of reparation of the victims they represent are met.

2.3. Objectivity and subjectivity in the struggle for law

As explained above, judicial litigation for the defence of human rights of victims consists in a double dispute which includes, the struggle for the access to a judicial remedy and the struggle to assert in it the victims’ own words, in order to appoint emerging rights and support them in the legal language, as the way of expression of the State. While narrating their memory with its own words, victims intertwine their wishes and expectations of reparation. Victims’ narration is essentially subjective and seeks, through litigation strategy, to be recognised by the State by means of judicial power.

Thus, in the private sphere, where the relationship between lawyers and victims develops, subjectivity is the general rule. On the other hand, in the public sphere, where judicial procedures are conducted, objectivity is an obligation for those who have the duty to investigate, prosecute and punish those responsible for serious violations of human rights. However, the judicial State power can become the main actor in the struggle for narrating the victim’s suffering, since its role, together with the legislative power, is “*to give legitimacy to certain subject positions through their appointing authority -in the sense of having authority [...] to award names through its judgmental role-, thus acting as an anchor, reference or guarantor that the discourse is valid and the social suffering which nominates is officially recognised*” (Segato, 2010a: 4).

2.3.1. Objectivity and subjectivity in the struggle for law

The "right to be told in the legal discourse" (Segato, 2010a) that victims have when they exercise their right to a judicial remedy for reparation, collides with the obligation of objectivity of public prosecutors and judges. In other words, the right to narrate of victims collides with the obligation of public prosecutors and judges to be impartial, i.e. that there is no partiality, animosity or friendliness towards any of the parties in the procedure relationship, since its decisions must be based on facts and state law. Therefore, both victims and perpetrators will have a dispute for his/her story to come

first over the others in the public sphere of the judicial procedure; and judicial officials, objectively, are obliged to take into account the legally relevant aspects of the stories of each party, i.e. parties relevant and conducive to the procedure of the narrative dispute.

Now, if we recognise the exceptional nature of serious violations of human rights and its historical mutability, and besides, the subjective nature of the narrative of the suffering of the victims as the only people who know, live and tell their own suffering, then, the objectivity of the decisions of judicial officials which depend on legal precepts, becomes an aspiration or desire when the reality of lethal human cruelty surpasses the reprehensible human cruelties named in Law.

Essentially, in cases of serious violations of human rights, the meaning of legal rules becomes uncertain, i.e. it is difficult to distinguish the core from the penumbra of the Law, and therefore "problems of the penumbra" arise (Hart, 1958). The intention of objectivity in cases of serious violations means an increase in the degree of discretion used by judicial officials, since the legal system understood as being positive, or a positivist jurisprudence system, must respond to cases where the cruelty of human actions has been transformed and become more complex. This means that when the norms are unable to describe the suffering of victims of serious violations, public prosecutors and judges face, in practice, cases which have *"a 'penumbra' of uncertainty where officials have discretion in applying them*" (Fitzpatrick, 1998: 222).

For a start, pure objectivity is presented as an obstacle in the struggle for law, but becomes an obvious hindrance when conceived as an aspiration. Precisely, the idea of pure objectivity means that public prosecutors and judges should be neutral, impartial, dispassionate and impersonal. Morals and politics should be separated from decisions or interpretations of the Law, because what is ideal is for judicial officials to show no inclination towards any of the parties, and that their own interests are not involved.

However, this idea of pure objectivity has the appearance of a settled society, governed by laws and whose modification becomes so difficult that they become immovable (MacKinnon, 1995). Thus, state law, conceived as part of social sciences, appeals to a pure and universal objectivity which has contributed to the pursuit of overcoming traditional and pre-modern characteristics, conceived by traditional dominant elites in Latin America as being obstacles to the progress of colonial society.

This means a progress in the transition towards becoming like liberal industrial societies (Lander, 2000). Then, *"by characterising cultural expressions as 'traditional' or 'non-modern' in the process of transition to modernity, they are denied any possibility of cultural logics or their own worldviews. By interpreting them as an expression of the past, they are denied any possibility of contemporaneity* (Lander, 2000: 26).

Therefore, the starting point of eurocentrism as the basis of the process of construction and consolidation of state law in Latin America, the evolving history of the XIX century impregnated the vision of state law as a way of achieving the progress of colonial society. Hence, in order to know if law has evolved in a Latin American country it has to be compared with that of developed countries, i.e. those with an advanced legal system. Once the law has been considered to have progressed the "*creativity of the mass of society is exhausted and, from then on, the legal dynamic is thereafter confined to the ranks of State officials*" (Fitzpatrick, 1998: 209).

Even so, the officials' discretion increases in cases of serious violations of human rights, since the nature of these violations brings prosecutors and judges face to face with difficult cases or the penumbra of uncertainty. Indeed, the narrative uncertainty of law constitutes a test of the unresolved character of society's ability to create the necessary regulations. It is, in turn, an exceptional opportunity for victims, through their legal representatives, to relate, their sufferings and expectations of reparation through the authority of the State officials; because "*only they can recognise Law in an appropriate way and our relationship with the Law is definitely through State officials"* (Fitzpatrick, 1998: 220). Since objectivity becomes an aspiration, "*exactly the same as in the colonial situation, the authority of the State official is supreme, comes from the external authority and acts according to it*" (Fitzpatrick, 1998: 215-216).

Consequently, the outstanding feature of serious violations of human rights increases the discretion of the judiciary, so that their power to nominate increases when they take the decision to allow the victims to explain their suffering and express their expectations of reparation in their own words. This means that its only limit is the right of presumed perpetrators to due process. The struggle for law thus becomes a narrative strategy, where the aim is for judicial officials to defend and acknowledge the words of the victims, at their discretion and with the authority of the State.

2.3.2. The case of the Armenian genocide as an example of the right to be heard in the public sphere of the legal discourse

On the 29th of December 2000, Gregory and Luisa Hairabedian (the participation as plaintiffs of several organisations of the Armenian community in Argentina was later recognised), direct descendants of survivors of the Armenian genocide, filed a criminal complaint in which they requested the federal Justice of the City of Buenos Aires to start proceedings for the right to the truth, with the aim of clarifying the events known as *the Armenian genocide*, which occurred between 1915 and 1923. This act was committed as a consequence of a genocidal policy dictated by the people who then ruled the Ottoman Empire (PJNA, 2011)[4].

On the 15th of March 2001, the Office of the Public Prosecutor dismissed the plaintiffs' motion, but that decision was appealed by the same and resolved by the Second Chamber of National Clearinghouse for Criminal and Correctional Matters of the city of Buenos Aires. On the 10th of October 2002, the Chamber, as a Court of appeal, ordered the examining magistrate to focus on the plaintiffs' motion, consisting in the inquiry and elucidation of the facts exempt from punitive claim. In other words, to conduct a trial based on the victims' right to the truth, better known as a "Truth Trial."

On the 23rd of October 2002, the National Federal Criminal and Correctional Court No. 5 of the city of Buenos Aires, decided to dismiss the punitive criminal charges and to start an investigation of the facts in order to clarify the truth of what happened. The activities of the inquiry initiated by the court included, amongst others: the sending international letters rogatory and collecting evidences in court, activity that was complemented, amongst other documents, with testimonies of survivors living in Argentina and included in the complaint.

This case establishes a new way of interpreting the obligation of the State to investigate serious violations of human rights. At first sight, the facts suggest that it is not possible to start criminal proceedings when the events to be investigated occurred outside the territory of the State undertaking the investigation. However, the gravity of the crime of genocide implies that there is an international obligation of every State to

[4] National Federal Criminal and Correctional Court No. 5 pertaining to the Autonomous City of Buenos Aires. Case N. 2.610/200 entitled "*Imp. N.N. su denuncia. Querellante: Hairabedian, Gregorio*", 1st April 2011.

investigate, prosecute and sanction those guilty of the crimes since the victims have the right to know the truth about what happened, the final destiny of their relatives and the place where their remains are located.

The legal problem focuses on the possibility of demanding compliance with the international State obligation to investigate, prosecute and sanction the perpetrators of international crimes of genocide. Given that it is an obligation of the State to fulfil the victims' right to know the truth, it is possible to ask how to comply with this obligation when the actual genocides were committed outside the territory of the State investigating the case. The answer to the legal problem is the possibility to carry out a criminal investigation exempt from any punitive claims, focusing on the existence of the genocide and on the causal relationship with the victims as plaintiffs.

For this reason, the court decided to render a declaration as final judgment, declaring that the State of Turkey committed the crime of genocide against the people of Armenia in the period between 1915 and 1923. It also declared as proven that the paternal and maternal families of Gregorio Hairabedian were victims of the same. The main argument of the decision was the gravity of the facts as being characteristic of the crime of genocide, which can therefore be considered as a crime against humanity. If we take into account international customary law and human rights treaties, the gravity of the crime of genocide means that the States have the obligation to guarantee criminal prosecution of perpetrators of such crimes.

Indeed, the gravity of the crime justifies imprescriptibility of the criminal State action in the face of facts constituting genocide. Given that the victims have the right to know the truth about what happened, the impossibility of applying a punitive claim in the personal or territorial field did not suppose an obstacle for the Argentinean State to guarantee the right to the truth to which victims are entitled. Therefore, the aim of the victims as plaintiffs in the investigation, and the declaration of Argentinean justice affirming the existence of the Armenian genocide, thus recognising their status as victims, is valid in law (PJNA, 2011).

In turn, the judge pointed out in his decision that the existence of the Armenian genocide had already been recognised by the State of Argentina through National Law N. 26.199, sanctioned by the Congress of Argentina on the 13th of December 2006 and published on the 11th of January 2007. This law institutes the 24t^{h} of April as the "day of

action for tolerance and respect between peoples", in commemoration of the Armenian genocide. I.e. the judicial decision reinforced the veracity of the genocide.

In consequence, the judge considers that the interest of the victims for the facts to be investigated by the law and the declaration of the existence of genocide is legitimate, since the gravity of the crime means that it is necessary to carry out a more thorough investigation, even more so taking into account that State criminal action does not prescribe when dealing with acts of genocide. The result of the case is a judicial decision responding to a claim with the sole aim of clarifying the same and a declaration confirming the existence of genocide. This means that the non-existence of a punitive claim is not an obstacle for the criminal process to move forward and conclude with a final judgment. Moreover, the exceptional nature of the case implies that the judge must adjust to all the evidence presented by the plaintiff, validate it following procedural rules and, at the same time, make a decision according to the purposes of the process and the evaluation of the plaintiff with all its probative value.

The case of the judicial declaration of the existence of the Armenian genocide is of special relevance because, here, several key factors were combined during the process of reconstruction of the victims' memory. Although the facts that constituted the genocide were initially committed on the Asian continent, the case is an example of the use of oral history as a methodological tool for judicial documentation to declare the existence of genocide.

The State declaration of the existence of genocide was a need for justice and identity on the part of the Armenians, since it confirmed their existence as a people and claimed their capacity to have an influence on the national arena in Argentina. This, amongst other reasons, is why many people of Armenian origin living in Argentina facilitated the conducting of oral history interviews to reconstruct the recent past, narrate the facts and their consequences in the present.

The combination of knowing victims' expectations, the litigation strategy and the use of the International Human Rights Law, helped the Argentinean government to declare the existence of genocide, a declaration which responded to the petitions presented in the demand. The action essentially sought justice and, as a first step, that another State affirms what the State of Turkey has refused to say for more than ninety years, i.e. that there was a genocide against the Armenian people. In Turkey, "*the memory*

and history of Armenian genocide could never be elaborated or registered in the public sphere. It has been constituted elsewhere, within the diaspora and the exile, with all the risks that this entails" (Traverso, 2007: 83)

Even the judicial decision regarding the case of the Armenian genocide was taken according to the evidences presented following procedural rules. In the face of the denial and concealment of genocide by the present Turkish political regime, the closing of files and the obstacles that several States placed in the way of the investigation by refusing to answer international letters rogatory, the judge took particularly into account the evidence provided by the plaintiff. Although the judge made special mention of the testimonies presented in court by the victims, he decided to include the oral history interviews held with the plaintiffs when they documented the case and developed a litigation strategy as part of the judgment. In this way, the report elaborated by the Program of Oral History of the Faculty of Philosophy of the University of Buenos Aires, concerning oral testimonies of survivors of the genocide was accepted as valid evidence. It can also be highlighted that the testimonies heard before the court were made at the suggestion of the plaintiff.

The exceptional nature of this judicial decision made it possible for a court to assume as its own, reasons in fact of a criminal complaint, to approve and assume as it own the victims' assessments and give them the strength of a final decision. In this sense, the judge assured in his decision that, in this case, the court operates as an instrument for obtaining evidences to get closer to the truth, whose real construction is known by the plaintiff and victims represented (PJNA, 2011).

Given that the plaintiff reconstructed the memory of some of the victims using the methodology of oral history, the decision concerning the historical facts known as the genocide of the Armenian people, is useful to support the idea that the exceptional nature of serious violations of human rights imposes on human rights defenders the need to apply methodologies and concepts which go beyond the law in for the development a legal strategy in the defence human rights.

* * *

2.3.3. The problem of objectivity in the private sphere

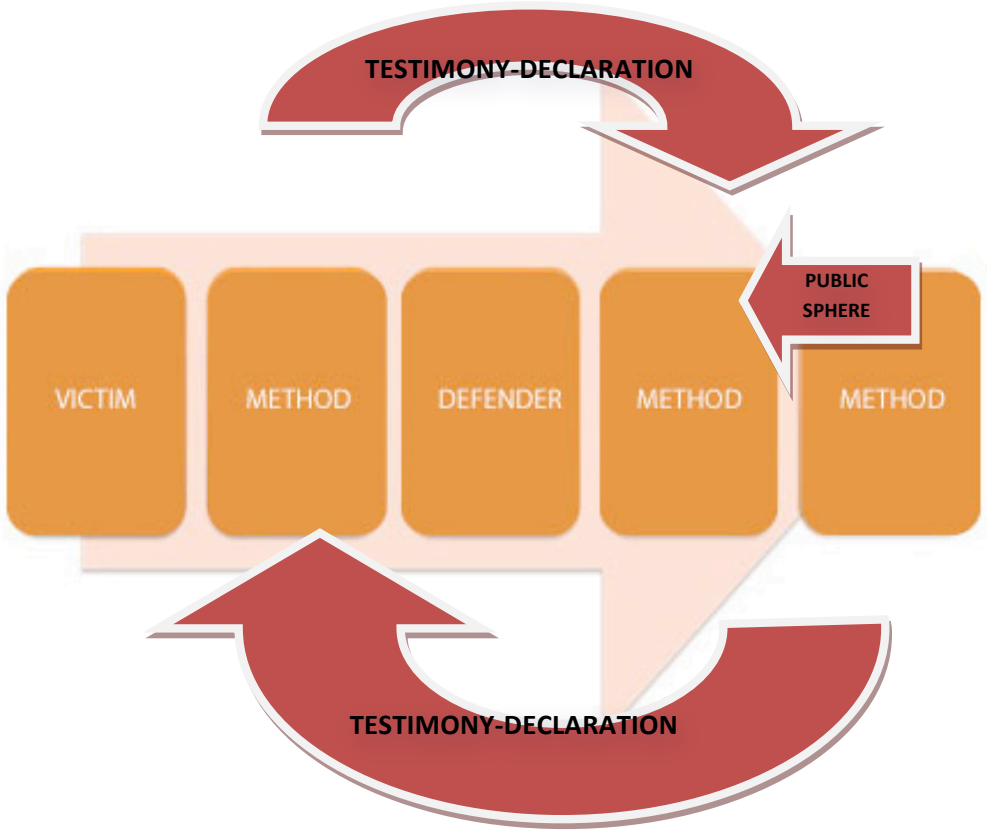
As already mentioned, it is in the private sphere, where the relationship between lawyers and victims develops that subjectivity is the general rule. Lawyers have the ethical obligation to safeguard the interests of the people they represent at all times. Thus, while objectivity is required of public prosecutors and judges, lawyers must be partial and subjective, since they must ensure that the expectations of reparation of the victims they represent are met.

However, the objective method of the reconstruction of the events of the past of the judicial procedure, i.e. the "testimony-declaration" method, influences the private sphere when it is applied by lawyers in the same (see figure N. 2). In the private sphere, formal education in law, i.e. the expert knowledge of state law, is used as the only tool to recover the victims' memory, which is the unknown. In this area, social relations of power emerge and the inequality of social relations that characterises Latin American colonial society is brought to the fore. Hence, the *self* that has the knowledge tends to prevail over the *other*, which becomes the object of knowledge. In this respect, Carlos Martín Beristain affirms that one of the frequent mistakes of lawyers defending human rights is to turn the interview with the victim into an interrogation, i.e. the associative memory of the person being interviewed is interrupted when there is a succession of very leading questions, which "*turns the interview into something which transmits narrow-mindedness or that the person who is carrying out the interview is following his/her own interest, and is not really concerned about other's experience*" (2010a: 175).

Therefore, the influence on the private sphere of applying a method which pretends to be objective, which is that used in this area and characteristic of judicial procedures, limits the opportunity of gaining a wider knowledge of the victims' memory and their expectations as regards reparation. The private interview is a preferred scenario to build a relationship of trust making it possible to create a litigation strategy, giving voice to the victims and allowing them to tell their memory in their own words, based on the whole dimension of subjectivity, without the need to adjust the story to the legal narrative.

Figure Nº 2

Influence of the public judicial method in the private sphere



Moreover, serious violations of human rights,

> *"involve traumatic experiences in the sense that they imply a feeling of rupture of the continuity of life, and mark a before and after in the lives of people affected. Frequently, the person suffers a damage of long duration or, in some cases, this damage becomes permanent. On the other hand, these experiences cause the person to lose control over his/her life, which frequently remains in the hands of other people*" (Beristain, 2010a: 12).

When we take all the above into account, it is obvious that we must broaden the interdisciplinary point of view and include other disciplines apart from law which can identify the risks of victimisation during the elaboration of the litigation strategy. For example, some risks would be causing more damage to the victims and not preventing revictimisation, thus allowing new violations or the repetition of violent actions against them or secondary victimisations which can stigmatise them and do not respect their suffering or rights (Beristain, 2010a).

Hence, a psychosocial perspective to understand serious violations of human rights appears as an interdisciplinary option to work towards the defence of human rights. In this sense, it should be understood that

> *"from a psychosocial point of view, the impact of violations can be seen as a trauma, i.e. as a specific psychological wound. However, this happens in a certain context and also calls up social meanings. This is why we prefer to talk about a psychosocial trauma. We must also take into account that this is not a universal explanation, given that, for example, in some indigenous cultures, trauma is not considered as a wound, but as a rupture of the balance with the community, nature or ancestors. All of this has implications for the assessment of the damage but, especially, as regard the measures for reparation" (Beristain, 2010b:* 4).

The psychosocial perspective in cases of serious violations makes it possible to broaden the private and the public spheres, since its general and systematic nature demands a perspective that goes beyond individual and private trauma. This perspective makes it possible to approach the traumatic experience of a collective or social nature, which refers to the impact that general and systematic violence may have on the historical processes of a country, an ethnic group or the identity of a community (Beristain, 2010a). Therefore, we are talking about a perspective that allows the transformation of the public sphere, since it is no longer about conceiving the public as opposed to the private, but as "the non-State"; because it is "*the only characterisation that truly questions, from the community or the various forms assumed by the community, the records and policies of the legal, social, economic and cultural fields and therefore, the idea of development, work and productivity."* (Vega, 2011: 113).

3. The method of reconstruction of the memory in the private sphere

To think first about people who will be represented in a judicial procedure means being aware of the psychosocial impact of the litigation strategy. Hence, lawyers defending human rights must identify the risks of victimisation during the strategy. Therefore, the first step in the relationship of trust is to identify the difference between the personal, family or community process and the legal or judicial proceedings. The first refers to how people process their suffering, how they face victimisation and the assimilation of the loss. The second points to the demands of the claim, the documentation required

by the case, the negotiations with international organisations in charge of monitoring human rights, the presentation of evidence and the participation in judicial procedures (Beristain, 2010a).

From the beginning, the relationship between the lawyer and the victim suffers a process of decolonisation in the private sphere when the relationship goes beyond the judicial procedure and emphasises the personal and subjective process. When the person represented is not conceived as a means to an end but as an end in itself, his/her voice is recognised in an environment of equality. This means that we must respect the victims' own words as they use them to narrate their story , as well as their way of understanding the context in which the facts occurred and its consequences in their current life. Moreover, in most cases, the interview in the private sphere becomes the first opportunity they have had to narrate their personal history in their own context, which means that the relationship of trust established between lawyers and victims acquires an essential role. In addition, all the above takes on greater importance if we take into account that these people have suffered stigmatisation, discredit campaigns and disdain. "*Although listening to the needs and expectations of the victims is important throughout the process, it is essential at the beginning. Perhaps one of the first assessments carried out by the victim is the contrast between the possibility of having support and vulnerability.*" (Beristain, 2010b:23)

Therefore, getting to know the memory and expectations of reparation of the victims is the first step towards a responsible litigation strategy, i.e. one that does not cause further damage to them, prevents revictimisation and avoids secondary victimisation. "H*uman rights defenders can potentially contribute to the reparation of victims, but they can potentially cause harm. It depends on how they work, what principles they apply and what type of relationship they establish with the victims"* (Díaz, interview)[5]. In this sense, it is crucial to assess the method used to know the memory and the expectations of reparation of the victims of serious violations of human rights, since it is necessary to build an ideal litigation strategy that respects their expectations.

These expectations can be general and specific, they are changeable and debatable (depending on how lawyers have explained the aims of the litigation to victims) and can be periodically assessed (Beristain, 2010a). Hence, the application of the testimony-declaration method, typical of the public sphere of the judicial procedure, is not the

[5] Interview with Rosa Díaz on the 5th of September 2012.

appropriate to reconstruct the memory of the victims in the private sphere, especially when we run the risk of turning the interview into an interrogation, which, from the psychosocial point of view, could cause secondary victimisation of the persons being interviewed. In addition, getting to know the expectations of reparation is crucial during the preparation of the litigation strategy,

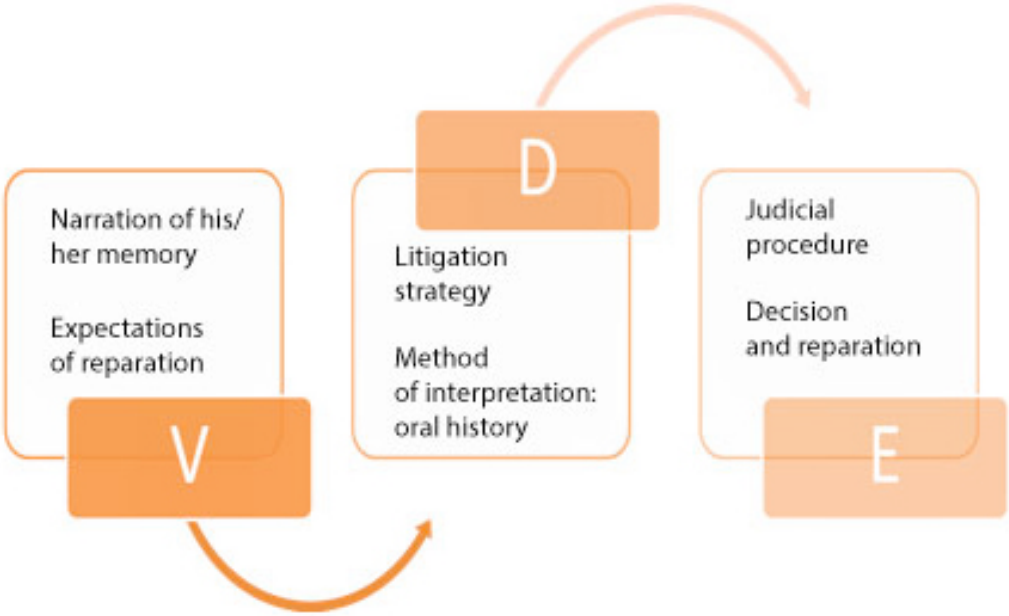
> *"given that repairing measures do not depend as much on themselves, but on how they are articulated with the impact, their needs or processes. In legal terms, this implies that when presenting the claim, and throughout the process, damages of any nature suffered by direct or indirect victims as a result of the violation, must be suitably accredited" (Beristain, 2010b:* 24).

As already mentioned, the use of a succession of very leading or closed questions, typical of the objective method of the State, interrupts the associative memory of the victim. Thus, the process of reconstruction of the memory is incomplete. Therefore, when the interview turns into an interrogation or a testimony-declaration, it is not possible to gain better knowledge of the expectations of reparation, converting the interview into something which is adjusted to the personal interests of the person who is conducting it and who is not really concerned about the experience of the interviewee. This is why our proposal of methodology (see figure N. 3) consists in addressing and interpreting the narration of the memory and expectations of the victims (V) through the methodology of oral history. In this way, victims and human rights defenders (D) work together to create a litigation strategy in accordance with expectations, in order to initiate the judicial procedures that the State (S) offers for obtaining legal decisions consistent with the same.

* * *

Figure Nº 3

Flow of narration and transmission of expectations



It is consequently necessary to broaden the disciplinary point of view, i.e. to include other disciplines different from law which make it possible to reconstruct the memory of the victims of serious violations of human rights in the private sphere, leading to the elaboration of a responsible litigation strategy by human rights defenders. Hence, the methodological tool of oral history (whose characteristics will be explained later on) is a suitable option for the reconstruction of the memory of the victims and to reveal their expectations as regards reparation. This has its root in the subjectivity of the narration as an essential requirement for the reconstruction of the facts that took place in the recent past and to interpret what they mean in the present.

Chapter 3

The methodological proposal of the reconstruction of the memory of the victims and the defence of human rights as a tool for decolonisation

We will continue to explain the need for an alternative method to create a responsible litigation strategy that causes no further damage to the victims of serious violations of human rights. To this end, we will approach the origins of oral history and its specificity in the Latin American context. Later on, we will address the characteristics of oral history and its relation with the narration of traumatic memory, i.e. the memory of serious violations. We will then go on to describe how oral history becomes closer to the judicial procedure. Finally, we will compare the methodology of oral history with that of the judicial procedure in the private sphere, taking into account conflicts that arise from the interpretation in the context of a Latin American colonial society.

1. The need for an alternative method to create a responsible litigation strategy

By going to the courts, human rights defenders contribute to the creation of state law. At the same time, they bet on the decolonisation of social relations, hence, of the Latin American state law, since they back the construction of a democratic State starting from a conception of human rights based on equality. Consequently, judicial litigation in the defence of human rights of victims consists in a double dispute: on the one hand, the struggle for access to State justice and, on the other, that to assert their narrations in the public sphere of the legal discourse.

The judicial process, which guarantees the victims of serious violations of human rights the opportunity to claim their rights before courts, is effective when the authority in charge of the investigation is independent and impartial. The impartiality of judicial officials in charge of investigating and prosecuting those responsible for serious violations is partly expressed through their obligation to be objective in their work. Therefore, in the public sphere of the judicial procedure, those parts of the victims' memories which are relevant and conducive to the aims of the proceeding will be evaluated. Hence, expectations of reparation and litigation strategy will be adjusted to the respective procedural rules and times. In other words, the account of the victims'

memory, apart from being reduced to what the litigation strategy developed by lawyers deems to be "legally relevant", will later be adjusted to what judicial officials consider "pertinent and conducive to the procedure".

However, impartiality is required of public prosecutors and judges, but not of lawyers. Even impartiality has its own limits, given that

> *"judicial officials must be impartial in their work during the different procedural stages, but not when they are dealing with people [...] If you have no legal evidence, you can't invent it, which means that they must be objective. However, this doesn't mean that they do not have a duty to respect this person, that in order to do their work well they must be empathetic, they should approach the person, just as they should do with perpetrators, i.e. have equal respect. I do not think that one thing excludes the other"* (Páez, interview).[6]

Hence, while judges have the ethical obligation to be impartial and objective, lawyers have the ethical obligation to safeguard the interests of the people they represent at all times. This means that lawyers must be partial and subjective, since they must represent the interests of the victims and ensure that their expectations of reparation are met through the judicial procedure.

The victims' narration is essentially subjective and seeks, through litigation strategy, to be recognised by the State by means of judicial power. Thus, in the private sphere, where the relationship of trust between lawyers and victims develops, subjectivity is the general rule. On the other hand, in the public sphere of the judicial procedures, both victims and potential perpetrators will have a narrative dispute for his/her story to take precedence over the others, as a consequence of the evaluation, with the intention of the objectivity of judicial officials. The latter are obliged to take into account the legally relevant aspects of the stories of each party, i.e. segments involved in and conducive to the procedure.

In the previous chapter, we explained *the case of the judicial declaration of the existence of the Armenian genocide* as an example of the exceptional nature, both of the serious violations of human rights and of the judicial decisions dealing with them. Hence, this decision made it possible for a court to assume as its own, reasons in fact of a criminal complaint, to approve and assume as its own the victims' assessments

[6] Interview with Marcela Páez on the 3th of September 2012.

and give them the strength of a final decision. On this occasion, the judge assured in his decision that the court operates as an instrument for obtaining evidence to come closer to the truth, whose real construction is known by the victims. Moreover, in the case mentioned, the plaintiff reconstructed the memory of some of the victims using the methodology of oral history, which supports the exceptional nature of serious violations of human rights that imposes on human rights defenders the need to apply methodologies and concepts which go beyond the law for the development of a legal strategy in the defence of the victims' human rights.

There are other cases where oral history has been used as methodological tool for the reconstruction of the memory of the victims of serious violations of human rights which took place in Latin America. We have, for example, the case of *Latin American Nikkei* (Japanese Latin American residents and citizens), who were kidnapped (ICHR, 2006: paragraph 2) and deported from their countries of residence to concentration camps in the United States during the World War II. The memory of the victims was reconstructed through interviews used for the development of the Japanese Peruvian History Project, based in California, USA. Apart from narrating what happened, this made it possible to present legal claims in the United States and a petition presented before the Inter-American Commission of Human Rights. This made it possible to verify that Bolivia, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama and Peru, helped the United States in the kidnapping and deportation of residents of Japanese origin to that country during the war. Victims said that,

> *"while on the way to the concentration camps in the United States, many of the Nikkei men were forced to work in the area of the Panama Canal. Entire families were also deported. Many Nikkei women married to deported men, considered that it was their duty to accompany their husbands to concentration camps, not only because they wished to keep the family together, but also because they had no way of maintaining it due to the freezing of bank funds of the so called "Axis nationals", living in Latin America. When they arrived in the United States, the captured Nikkei from Latin America were received by representatives of the U.S. Justice Department, who took their passports, and afterwards, declared them as "illegal foreigners" and sprayed them with DDT before sending them to camps for foreigners from enemy countries"* (Moore, 2007).

In any case, the objective method for the reconstruction of the events of the past of the judicial procedure, i.e. the “testimony-declaration” method, influences the private sphere when applied by lawyers at the time of reconstructing the memory of the people they represent. The aforementioned is one of the frequent mistakes made by lawyers, since they turn the interview with the victim into an interrogation. Hence, this influence on the private sphere through the application of a method which pretends to be objective (characteristic of judicial procedures), limits the opportunity of gaining a wider knowledge of the victims' memory as well as their expectations as regards reparation.

If we take all the above into account, it is necessary to broaden the interdisciplinary point of view and explore other disciplines apart from law which can identify the risks of victimisation during the elaboration of the litigation strategy. This means that, on the one hand, we have the psychosocial perspective as a discipline which makes it possible to identify the risks of damage to victims and, on the other, the methodological tool of oral history as an adequate option to better know the memory and expectations of reparation of the victims.

* * *

2. Introduction to the history of oral history

Oral history is defined by Ronal Fraser as the “account from the bottom up”, since, through its practice, non-hegemonic groups that have been traditionally deprived of creating their own sources, are given the possibility of recounting their experiences and creating their own historical sources (Fraser, 1993). In social sciences, we sometimes face situations related to issues that put a strong emphasis on “the historical experience” of people (Scribano, 2008). However, if these people belong to an excluded social group, historians do not take them into account. This means that, oral history, as a work methodology, is presented as the opportunity to give voice to those without voice, giving them access to subjective historical experience (Barela, 2009).

Oral sources were gradually abandoned and discredited to the extent that positivist history became more and more solid. In mid XIX century, traditional historians consolidated their positions as the elite, and their function was to be the ideological agents for the consolidation of bourgeois Nation-States. The privileged role of traditional historians in the construction of the national myth, i.e. the most powerful

collective identity myth of the XX century, explains its contempt and suspicion towards oral tradition, since it was identified with the uncivilised, i.e. with “illiterate societies" which could only be known through oral tradition. They were "people without history” (Scribano, 2008). Around the 40’s, oral sources were again used in England, France and the United States, and in the 70’s it spread towards Europe. However, its emphasis was not on the elites, but on the construction of a useful historical source for contemporary social history.

On its part, “*in Latin America, oral history has been oriented towards the study of subordinate classes and the link between social practices and wisdom*” (Scribano, 2008, p. 107). To be precise, Latin America oral history differs from that of Europe, the U.S. and Africa in the specificity of its context and intention. On the one hand, the Latin American context, on which numerous oral history studies have focused, refers to State repression during the second half of the twentieth century whose method, intention and purpose were similar throughout the whole region. On the other hand, the intention of oral historians is to focus on individuals, topics and problems not included in official histories, i.e. on the experiences of subordinated classes (Necoechea, 2011).

One of the purposes of oral historians has been the democratisation of production, individuals and topics of history. This, sometimes, converts oral history into “*a history of denunciation and, more frequently, one that makes anonymous people equal to visible history*” (Necoechea, 2011: 3). However, while in Europe, making anonymous people equal to visible history would only be a way of having access to the public sphere of history, in Latin America, “*we do not take democracy for granted. Therefore, the mere fact of widening the public sphere is not enough and our concern is not only how to make the invisible apparent, but also to understand the mechanisms and causes of anonymity and transform them*” (Necoechea, 2011: 3). Obviously, oral history in Latin America becomes specific if we take into account the political intention of historians: to transform the world and not only to understand it. Therefore, for example, while in Europe there is a tendency to conceive the Jewish *Shoá* caused by Nazis as an exceptional fact, in Latin America, authoritarian violence has been considered as one of the structural elements of our history. (Necoechea, 2011)

This means that the way oral historians deal with State repression gives specificity to Latin American oral history and, at the same time, connects it to a democratic construction of the history of the region. It should be remembered that State terrorism,

which characterised the second half of the XX century, as the expression of the violence used to exercise the power of domination in a colonial society, based on an unequal conception of society, resulted in the perpetration of serious violations of human rights. Hence, oral historians are aware that "*genocide has existed in the Indo-American region for centuries, and in the others, intense violence based on class, race and gender has been the continuous engine for historical development and not only one isolated atrocity. Thus, the idea of curing through the memory or the demand for the never again, has very different connotations and are reflected in the ways that oral history is constructed"* (Necoechea, 2011: 3). Therefore, Latin American oral history focuses, in part, on understanding, making visible and transforming the structural problems of a colonial society which legalise repression, violence and exclusion, while allowing the cyclical repetition of serious violations as traumatic experiences.

2.1. The characteristics of oral history and its relation with the narration of traumatic memory

Oral sources are historical and limited in time, since they depend on the witnesses being alive and with the necessary faculties to exteriorise their account. However, their extension is almost endless, since they address human experience. As already mentioned, they are historical sources elaborated from the bottom up, i.e. created from excluded and marginalised social groups. On the one hand, they are the joint creation of the historian and the interviewee, and, on the other, they are based on the memories of the witness in the form of a narration. Finally, oral sources deal with the experiences of one specific person (Fraser, 1993).

It is neither a documentary history nor an oral tradition. The former is that of traditional historians and is based on documentary records (registry of specific transactions), which assumed that history should be the art of governing, i.e. political history. Oral traditions are based on cultural dynamics, i.e. they are those that

> *"emerge organically within and outside the cultural dynamics of a society [...] Are transmitted orally and, in fact, are really only passed on from one person to another [...]. They arise and exist with complete independence from any written language or method of recording and do not depend on them to endure [...] They are not usually the direct and immediate experiences of those who keep them in their memories, but rather*

experiences of the ethos encompassing the previous generations" (Moss, 1991: 27-28).

However, oral history is focused on the direct experience of human life. The oral historian participates, together with the narrator, in the assessment and recording of immediate experiences lived by the latter, stored in his/her memory. Therefore, the obtaining, recovery and recording of memory is carried out by means of oral history interviews (Moss, 1991). According to Alessandro Portelli (1991), what makes oral history different is that what is important is not so much the event as how it affected people's lives. This does not imply resting importance from oral history, given that "*the interviews normally reveal unknown events or unknown aspects of known events; they always shed light on unexplored areas of daily life of non-hegemonic classes*" (Portelli, 1991: 42). Oral sources are, by nature, subjective. They not only narrate what happened, but also what the narrator wanted to do, what he thought he was doing and what he currently thinks he did. Oral sources might possibly not add much to what we know, but they can tell us a lot about the psychological consequences of these events on people (Portelly, 1991).

For this reason, it is necessary to remember that, from the psychosocial perspective, serious violations of human rights involve traumatic experiences in the sense that they imply a feeling of rupture of the continuity of life, and mark a before and after in the lives of people affected. This means that interviews with the victims necessarily imply the reconstruction of traumatic memory. Due to this condition, it is necessary to take into account that traumatic memory "*has codes that are different from other kinds of memories. I.e. any interview with someone who has suffered a trauma implies facing a difficult situation, not only for the interviewee but also for the interviewer who must be prepared*" (Barela, 2009: 21). Hence, according to Dora Scharzste, traumatic memory imposes on the person dealing with it the task of accessing traumatic experiences of the past, with consequences in the present, in a different way and even with the possibility of not being able to access them (Schwarzstein, 2001).

This means that dealing with traumatic memory presents oral historians with a challenge in the face of "the impossibility to narrate and the symbolic gaps in the trauma" (Jelin, 2006). It is also a challenge for the lawyers who will start the process of reconstruction of the memory of victims of serious violations. Therefore, if we take into account that the said reconstruction is done for the sake of a litigation strategy and a potential participation in judicial procedures, the place of the personal testimony is put

into question. Elizabeth Jelin affirms that the word “witness” has a double sense: on the one hand, the witness who experienced the event and who has lived to tell the tale and on the other, the witness who observed it, but that was not personally involved, which means that his/her testimony only serves to verify the existence of the fact (Jelin, 2006). From a legal point of view, taking into account the difference between direct victims of the violation and indirect victims who experienced the suffering as relatives of direct victims (ICJ, 2006), it is possible to affirm that all victims are witnesses of their own suffering. However, it is not always possible to verify the existence of the offence by means of their testimonies, nor by that of the alleged perpetrators. In other words, there exists the possibility of a person being a (direct or indirect) victim and eyewitness at the same time. However, it is also possible that he/she is an eyewitness and that he/she has not suffered any damage nor is considered to be a victim.

Having said this, as regards expectations of reparation, each victim is a witness of his/her own suffering. Even in relation to compensation as a measure of full reparation in cases of serious violations of human rights, national and international norms take into account moral damage (affecting the mental health) of direct victims and their close relatives as indirect victims (ICJ 2006). This distinction develops legal-procedural significance when we take into account that in the case victims of serious violations of human rights who are not necessarily eyewitness, the Law presumes an emotional damage. Hence, the option of participating in judicial procedures could be, depending on the case, not focused on narrating their suffering, but on proving with other probatory evidence different from testimony, their condition as direct victims (according to the type of violation) or their degree of consanguinity as an indirect victim.

Moreover, the case of *Las Palmeras vs. Colombia* decided by the Inter-American Court of Human Rights, specifically in relation to *NN Moses Ojeda*, is an example that shows that from presumptions of Law (including legal presumptions admitting evidence to the contrary), it is possible to be considered a victim and to obtain reparation consistent in compensation without the need to tell your own suffering in the public sphere of international judicial procedures. In the aforementioned case, a person and his relatives, whose identities are still unknown, were recognised as victims and the Colombian State was obliged to give them economic compensation (IACHR, 2002).

Taking expectations of reparation into account, the impossibility to narrate depends on two factors: the type of human rights violation and the nature of the narrator as a victim.

For example, direct victims who are still missing cannot narrate or give testimony of their experience (Jelin, 2006). However, their relatives, as indirect victims of the violation, can give testimony of their suffering, recounting the experience of having a missing relative. In any case, "*the need to tell the tale can fall into silence and the impossibility of doing so because no-one is ready to listen*" (Jelin, 2006: 66).

We already explained that the relationship between lawyer and the victim goes through a process of decolonisation in the private sphere when the relationship goes beyond the judicial procedure and emphasises the personal and subjective process. When the person represented is not a means to an end but an end in itself, listening to him/her is to recognise his/her voice on an equal basis. This means that it is possible to elaborate a litigation strategy with victims that were eyewitnesses of the event that victimised them, hence, they are not legally qualified to provide direct testimony of the events being investigated and judged. However, they are witnesses of their suffering and want to narrate it in the public sphere of judicial procedures. Therefore, taking their expectations of reparation as the starting point, it is again necessary for them to talk about the past, not because they know how or why this happened and who were responsible for the offence, but because testifying about their traumatic experience can be part of the process of grieving that will allow them to give the present its own meaning.

Moreover, going beyond the proceedings means, convincing the victims of their "own historicity", i.e. that their experiences, apart from whether or not their contribution constitutes valid legal evidence, is also important for the construction of the memory of serious violations of human rights as facts of historical significance. Hence, lawyers, as well as oral historians, will frequently meet *"people who do not visualise or accept their own historicity because they feel that they did nothing important nor directly participated in a heroic deed. This conviction brings them to refer to other people and official and national facts considered historically important and to refuse to narrate their own experience because they do not consider it to be relevant*" (Adleson, 2008: 43).

Precisely, the denial by victims of their own historicity is related to gender, the context and the type of violation suffered as well as to the degree to which it affected their personal autonomy. Hence, human rights defenders can contribute to the recovery of the personal autonomy of the victims, even in the way they establish their relationship with them, since

"when one of your rights has been violated, in such difficult contexts [internal armed conflict in Colombia], it is as if they take away your full autonomy and the full power of making decisions regarding yourself, especially when we are dealing with a sex offense. We have always tried to manage the process in such a way they are the ones who have autonomy over it. Then I think that, in some way, it comforts them [...] these are measures that somehow give them back their dignity" (Páez, interview).

2.2. The memory of serious violations, oral history and its approach to the judicial procedure

The current emergence of issues related to the memory is, in part, due to political interventions as well as to the narrative struggle of the recent past that social movements and groups from civil society (even from the State itself) are carrying out (Franco and Levin, 2007). During the last decades, the recent past of Latin America has become relevant in the public space. Given different spaces in which human rights violations have been dealt with, we have the public sphere of judicial procedures, where those responsible for serious crimes are investigated, prosecuted and sanctioned. An example is the procedure against the dictator Jorge Rafael Videla in Argentina as well as that of the democratically elected ex-president Alberto Fujimori in Peru. To be precise, the recent past is linked to judicial procedures because its main actors are still alive and can give their testimonies, both to oral historians and judicial officials. Therefore, this means that this is about *"the existence of a social memory of the past which is still alive, contemporaneity between the experience lived by the historian and that past that he/she is dealing with*" (Franco and Levín, 2007: 33).

There is a strong predominance of topics and issues related to traumatic memory in investigations about the recent past (Franco and Levin, 2007). This means that various oral historians have taken it upon themselves to investigate serious violations of human rights in the context in which they occurred. For example, wars, massacres, enforced disappearances, genocides, dictatorships, social crisis and "*other extreme situations that threaten the maintenance of social coexistence and that are lived by their contemporaries as moments of deep rifts and discontinuities, both in the individual and collective experience*" (Franco and Levin, 2007: 34). Hence, we have a revaluation of witnesses as oral sources of recent history (Franco and Levin, 2007). However, oral sources are based on memory and this fact necessarily depends on their veracity or

credibility as historical sources (Carnovale, 2007). The veracity or credibility of the oral source is something that must be addressed by the historian, since, as a social scientist, he/she must be objective. The same occurs in the case of judicial officials, given that the veracity or credibility of the victim's testimony must be assessed from the intention of objectivity (impartiality). They must even be submitted to controversy on the part of the alleged perpetrator when he/she acts in the development of his/her fundamental right to due process.

Memory and history are two different fields which are constantly interrelated because they have the same aim, i.e. to elaborate the past. However, history is a part of memory, is born from it, because it is an account of the past which tries to separate itself from the subjectivity of the memory in order to become an objective science with its own rules and modalities (Traverso, 2007). History is obviously based on the aspiration for veracity, while memory is based on need for loyalty. Therefore, *"within this logic of mutual interrelation, memory has an essential role regarding history, since it permits negotiation in the field of ethics and politics as regards what should be preserved and transmitted by history*" (Franco and Levin, 2007: 42). This means that, when victims of serious violations of human rights gain access to State justice through their lawyers, their aim is not to write history, since "*telling the story is not within the sphere of Law*" (Todorov, 2000: 17). Even so, they go to the courts because it might be possible for the Law, through judicial officials, to give a name to their own suffering. In other words, the judicialization of serious violations of human rights is another field in the public sphere where it is possible for victims to narrate their stories and, should they be awarded a favourable decision, judicial officials and the State authority will, at their discretion, support and recognise this personal narrative.

Yosef Yerushalmi (1989) affirms that before talking about oblivion, it is necessary to relate the memories and to make a distinction between memory and reminiscence. Memory *(mnemne)* refers to everything which remains continuous or uninterrupted, while reminiscence *(anamnesis)* refers to the recovery or remembering of something that was already forgotten. This means that, "oblivion" is a combination of events from the past that were not transmitted from generation to generation and that they could not, therefore, be learnt in their proper sense. He also indicates that real learning is the result of the effort to recover and remember something that cannot be forgotten. Therefore, the aim of education is not to forget the Law, which is what is "remembered", because memory only retains part of the history that can be integrated

into a system of values. The Law, beliefs and rituals combine *mnemne* with *anamnesis*, i.e. they retrieve and transmit a past whose loss or oblivion we might regret. However, history, as a profession, may retrieve a past, but not necessarily a past that we regret having forgotten (Yerushalmi ,1998).

According to the above, if we start from an egalitarian approach or from a decolonising concept of human rights, it is possible to affirm that the compliance, guarantee and promotion of international human rights standards by States (carried out, precisely by means of the denunciation of the violation of human rights during authoritarian governments), is translated into a single right: "*the fundamental right of human groups that were formerly unrepresented or misrepresented to speak for and represent themselves in politically and intellectually defined domains from which they are normally excluded, usurping their significant and representative functions, thus annulling their historical reality*" (Said, 1985: 91). This means that denying human rights through impunity, i.e. the lack of criminal, civil, administrative or disciplinary responsibility, aimed at the detention, trial and sentencing of the authors of serious violations of human rights (ICJ, 2008), contributes to forgetting the past and the Law, whose loss is regretted in the present, since serious crimes of the past still happen in the present.

Memory and history are not separated, they have a permanent interaction and the tie that binds them is their relationship with the concept of justice and truth. In this sense, there is a growing trend towards the "judicialization of the memory" (Traverso, 2007). The judicial procedures opened with the intention of investigating, prosecuting and sanctioning those responsible for serious violations of human rights have made it easier for historians and lawyers (public prosecutors, judges and defence lawyers) to coincide in the task of knowing the truth about events that took place in the recent past, especially with regard to judicial officials if we take into account that the truth is a victims' right that must be guaranteed throughout judicial procedures (ICJ, 2008). In the same way, gaining knowledge of the context in which violations of human rights have occurred is part of "*the role of human rights defenders and has to do with an attempt or an approximation to clarity in the social or political context in which we find ourselves with the different people we are accompanying throughout the defence of human rights*" (Abonía, interview).[7]

[7] Interview with Diego Abonía on the 2nd of September 2012.

All serious violations of human rights occur in a historical context of generalised and systematic violence, which means that, due to the exceptional character of serious violations, judicial and the historical truth necessarily come into conflict. Having said that, the exceptional nature of serious violations has different connotations depending on the point of view, that is to say, how it is seen by history or by the Law. As already mentioned, on the one hand, from a historical point of view, we have serious violations that are a structural part of Latin American history, which means they are not exceptional, as opposed, for example, to the Jewish *Shoá* that took place during the World War II. On the other hand, from a legal point of view, serious violations are exceptional, given that the Latin American legal system, true to the continental or Roman-German-French tradition of Law, provides formulas for the resolution of routine private or unconnected conflicts, and is not conceived from the point of view of structural violence. It is, therefore, exceptional to deal with cases which imply generalised and systematic criminal practices.

Judicial procedures dealing with serious violations are a combination of *mnemne* and *anamnesis*, i.e. an effort to recover and remember something that cannot be forgotten. Therefore, the aim of those is not to be forgotten by Law. In other words, the purpose of judicial procedures aimed at investigating, prosecuting and sanctioning those responsible of serious violations, is to remember national and international norms of human rights, since it is understood that memory only retains the part of history liable of being integrated into the value system. Hence, from this perspective, judicial procedures (the non-impunity) gives meaning to the full reparation that victims search by going to State justice and, more exactly, with reference to the guarantee of non-repetition (ICJ, 2006), since impunity does not make it possible to retrieve or transmit a traumatic and violent recent past, whose loss or oblivion we will regret if it is repeated.

According to Enzo Traverso, these processes *"account for the anamnesis already described and these have been extraordinary moments in a public review of history where the past has been, literally, revived and judged in a courtroom* (Traverso, 2007: 89). However, we must also remember that, when victims of serious violations of human rights resort to State justice, their aim is not to write history; they do so because it is possible that the Law can give a name to their own suffering, through judicial officials. In addition, "*this is not about identifying justice and memory, but frequently, serving justice also means bringing justice to the memory*" (Traverso, 2007, p. 92).

To be precise, as we indicated at the end of the first chapter, memory and justice are related when we make a distinction between the ways of reminiscence, recovery or retrieval of the forgotten: *literal* and *exemplary* memory. The literal interpretation of the memory makes the past even insurmountable, which means that the present is subjected to the past, i.e. it becomes intransitive and passive. The exemplary interpretation of the memory makes it possible to use events recovered from the past to interpret and give meaning to the present. In this way, lessons of past injustices become lessons to combat today's injustices. Thus, the "I-victim" defines its passive condition and becomes an example for the struggle of today's' victims (Todorov, 2000).

Thus, based on the expectations of reparation (and, more precisely, on the guarantee of non-repetition), it can be asserted that the victims' demands for justice are directly related to the fight against for the impunity of serious violations of human rights in Latin America. The justice sought by the victims goes beyond compensation as part of full reparation. In judicial procedures, they demand their right to know the truth about what happened, and not only to know about the criminal acts of the specific case, but also about the historical context in which they were systematically committed. Thus, in a context of impunity, judicial procedures promoted by victims are necessary to keep the exemplary memory alive aimed at the non-repetition of serious violations of human rights. In other words, past victims demand justice from the State so that serious violations are not repeated in order to ensure that there will be no victims in the future. According to the above, through their demands for justice, victims convert their situation into landmark cases, i.e. into cases that

> *"reveal a practice that violates human rights and becomes widespread and systematic [...], that exemplifies a problem that affects many, that is, that not only affects the group or the person who was, in that case, the victim of that violation, but represents the situation of many people; and accounts for a change that should take place, but is still not happening, that is, it's as if something is going wrong and the case is being used to change and transform that situation"* (Díaz, interview).

However, we must be aware that the public sphere of the judicial procedure, the same as occurs in the different public spheres, is a space of conflict and debate. It is in courts where the narrative struggle (the struggle for law) and the debate about imposing a narration of the past at the expense of others take place. In this regard, Elizabeth Jelin affirms that the State plays an essential role in these struggles, since *"it is in that*

institutional sphere where claims for justice are considered. The struggle against impunity always takes place in the institutional sphere, confronting the State" (Jelin, 2011: 556).

Therefore, judicial procedures are a space of conflict where the victims' testimonies are subjected to procedural rules and to the principles of probatory law. Since feelings and suffering cannot be measured, the Law presumes the moral damage of the victims. In this way, feelings are liable to be omitted by judicial officials when they excise their discretion. Hence, the victims' experience cannot be completely narrated nor heard (Jelin, 2006). The context of judicial procedures splits the narrative of lived experience, reduces it and adjusts it to the procedural forms. In this way, *"the speech of the witness has to become detached from the experience and be transformed into evidence. If disappearance is an experience for which there is no Law and no rule, in which the victim ceases to exist as a right holder, the testimony before the court (of the victim him/herself and of those who have been looking for him/her) becomes an act which insists on the recognition and legitimisation of his/her word" (*Jelin, 2006, p. 75). Therefore, the struggle for law implies one that goes beyond the presumptions of law, i.e. the aim is to avoid that the presumption of moral damage in serious violations silences victims and closes the ears of judicial officials.

3. The methodology of oral history vs. the methodology of judicial procedure in the private sphere

The application of the methodology of oral history in a colonial society injects the method with an epistemological and theoretical potential. It makes it possible to progress from the instrumentation of the "other-interviewee" to the mutual and honest recognition of those who participate in the interview, thus, pointing towards the decolonisation of history (Rivera, 2006). Silvia Rivera Cusicanqui states that the colonial character of Latin American societies is today a relevant fact, because for more than three decades, strong processes of ethnic self-awareness have been emerging in the region. This resulted in the establishment of organisations *"claiming for themselves the right to generate their own ideological and political systematisations, displacing intellectuals and social scientists from different disciplines from their role as intermediaries"* (Rivera, 2006: 16). The mediation of intellectuals, including those acting in good faith, reproduced inequalities between "a knowing subject" and a "passive object" through the instrumentation of the expectations of scientifically studied excluded

groups. Combined with the above, the presumption of “translatability" of what has been experienced, characteristic of the cultural and social homogenising ambition of the dominant groups in colonial society, completely denied the typical heterogeneous reality of Latin America, because to deny structural inequalities gives continuity to colonial domination and discrimination (Rivera, 2006).

Within the epistemological implications that the application of the methodology of oral history implied in a colonial social context, it is possible to highlight the unconscious reproduction of the colonial order of westernised researchers. When social researchers base their main scientific concerns on social homogeneity theories, they are unconsciously reproducing the colonial order as “the underlying hidden structure” of Latin American societies (Rivera, 2006). In this way, for example, in what refers to indigenous peoples,

> *“they are also externally attributing identities and imposing modifications on the Indian self-perception. They then become accomplices of the ethnocide and the plundering, and perpetuate the alienated condition of society as a whole, including their own alienation, transforming them into second hand tributaries of an external and adverse conceptual and rational order”* (Rivera, 2006, p. 20).

Oral history becomes an exercise of de-alienation when it starts from a mutual recognition during the interview, apart from the honesty of the interviewee and the interviewer as well as when they are conscious of the inequalities that influence the relationship of trust, i.e. they know the place they occupy in the “colonial chain” (Rivera, 2006). Therefore, the use of the methodological tool of oral history recovers the “*cognitive status of human experience, [and] the process of systematization takes the form of a dialectical synthesis between two (or more) active centres of reflection and conceptualization, not between a 'knowing ego' and a ‘passive other', but between two subjects that mutually reflect on their experience and the vision that each one has of the other”* (Rivera, 2006: 21).

Consequently, the use of oral history as a methodological tool for the reconstruction of the memory of victims of serious violations of human rights in the private sphere of the relationship between lawyers and people represented, gives coherence to the task of the defence of human rights through judicial litigation. In other words, to recognise the other and be honest in a relationship of trust, enabling him/her to talk while we listen

becomes an exercise in the decolonisation of the relationship between victims and the lawyers who will represent them before the court. Hence, by listening to the victims, we will be able to reconstruct the memory from their own point of view, i.e. from their personal truth. Thus, the right to truth is exercised by victims from the outset of the relationship with lawyers in the private sphere, whose narrative (respectfully evaluated and negotiated) will afterwards be presented in the public sphere of judicial procedures.

The memory of serious violations of human rights in Latin America from the victims' point of view has the purpose of "*supporting the right to truth, since insincerity destroys any type of identity, as well as the moral and cultural integrity of communities. Social reparation which emanates from the fundamental right to truth, aims at the reconstruction of group and interpersonal relations damaged by the official lie"* (Gaborit, 2006: 666 and 667). Mauricio Gaborit points out that it is possible to transform history from victims' memories. It is therefore necessary for their memory to appear in the public sphere. Victims of serious violations of human rights are historical subjects, since serious violations are events of historical importance, as they are not exceptional but a structural part of Latin American history. Those who defend the objective rationality of the State and social sciences (amongst which are the law and history), deny the condition of the victims as historical subjects merely due to the fact that they have a subjective memory influenced by feelings. Therefore, *"victims or survivors must keep their feeling of pain, loss or injustice a secret. This is precisely where the perpetrators wish them to be, since those places lack legitimacy and, by definition, publicity"* (Gaborit, 2006: 272).

However, oral history as a bottom-up history, from the excluded, is mainly interdisciplinary, i.e. in practice, oral history is used to question and break free from the artificial limits of academic disciplines (Fraser, 1993). To be precise, interdisciplinary work in the defence of human rights is an essential tool for decolonising knowledge. Talking about human rights necessarily refers to law as a discipline, but interdisciplinary work carried out in the defence of human rights is

> *"to recognise that the law is not enough to understand the different dimensions of a fact; for example, sometimes it is necessary to resort to economics, sociology, political science, psychology and anthropology to understand what happens within a group of individuals or what happens to a person, and to be able to report what occurred and find a way to resolve it. It is necessary to resort to different disciplines"* (Díaz, interview).

Moreover,

> *"interdisciplinary work in the defence of human rights demonstrates that this is not just about a violation of human rights connected to a legal framework, but that, behind all of this, there is a person, a family, with feelings and who live seeing that their own identity has been affected and has to be reconstructed from what they have had to experience [...] this then brings the human dimension of the situation to the fore"* (Abonía, interview).

Therefore, the aim of a litigation strategy, created from the beginning with oral history and from the perspective of participation in judicial procedures for the defence of the human rights of victims, is for their narrative to prevail over that of the offenders. The "struggle for the meaning of the past" (Jelin, 2001) in the judicial sphere, questions, amongst others, the consequences of the presumptions of law, the limits between judicial and historical truth, the impartiality (objectivity) and discretion of judicial officials, the principles of probatory law and the limits of the right to due process of potential perpetrators.

This questioning can only be made by the excluded groups, those who have not received social or political recognition in society, i.e. those whose human condition has been denied due to the fact that they have been the victims of serious violations of human rights (Jelin, 2001). The struggle for the meaning of the past is political and legal, *"it exists based on the current political struggle and future projects. When it is considered collectively as historical memory or tradition, as a process of shaping the culture and searching for the roots of identity, the space of the memory becomes an arena for political struggle"* (Jelin, 2001: 99).

Thus, in practice, when they represent victims of serious violations of human rights in judicial procedures, lawyers combine what is political and legal. Hence, "w*hen theory and practice come together, you start to understand that the legal field is just one part of the puzzle, and that you also have to learn how to act in a political context, since the defence of human rights is the defence of a strong political position"* (Carmona, interview).[8] Moreover, not only lawyers face the collision between theory and practice, but also every person defending human rights:

> *"when I started working in the field of human rights there was a rupture with my formal education [as a psychologist] [...] when it is time to go into the*

[8] Interview with Cristóbal Carmona on the 10th of September 2012.

field to work amidst the conflict and to listen to the farmers, this had nothing to do with my university education. It was a deconstruction and a reconstruction of theory, to refute concepts, to start creating tools in order to begin to understand what people affected by violence were talking about" (Abonía, interview).

According to the above, it is possible to compare methodologies dealing with events from the recent past in their corresponding sphere (see table N. 1). It can therefore be said that the public sphere of judicial procedures is a space for struggle in which victims, potential perpetrators (with their corresponding legal representatives) and judicial officials participate. Procedural rules limit the opportunity of victims to narrate their memories. Hence, it is the judicial official who guides the judicial procedure and actively interprets, according to his/her research hypothesis, the evidence with intention of objectivity as a legal obligation. In the public sphere of judicial procedures, testimony is evaluated from the falseness or truthfulness of the statements of the witness, acting as a passive narrator who only responds to the questions asked by the judicial official (and sometimes by the alleged perpetrator according to the principle of contradictory evidence).

On the other hand, only victims and their defenders participate in the private sphere where memory of the victims is reconstructed through the use of oral history. There are no legal deadlines or procedural rules, so there are multiple opportunities for the victims to narrate their memory, especially considering that their expectations of reparation vary and may change as time passes and the relationship with the human rights defenders progresses. Hence,

"expectations of reparation is a subject which varies. Although there is one clear reparation, people also have different ways of conceiving what serves as reparation for them. This means that it is not something expressed as an immediate formula, because it can vary. In fact some people [...], especially in Colombia, where the issue of justice is always linked to the issue of compensation, [...] begin later on to realise that reparation has other connotations" (Medina, interview).[9]

[9] Interview with David Medina on the 4th of September 2012.

Meanwhile, trust, mutual recognition and honesty allow the interview to be carried out through consensus, where good faith, subjectivity, commitment and empathy are the starting points, since

> *"commitment and knowledge of different legal aspects of human rights are part of the role of human rights defenders, but without giving preference to human rights over the human condition in itself [...] not placing them as part of a knowledge and rational action, rather than that, in addition and prior to that, we place the connection with the human condition [...] the acknowledgment that there is a condition that makes us equal and brings us to demonstrate solidarity"* (Abonía, interview).

It is in the private sphere where the expectations of reparation of victims are evaluated and the meaning that every measure of reparation to be claimed has for them is made known. Finally, the methodology of oral history allows the narrator to take an active part, since there is a negotiation between the person narrating and the person asking questions. In the same way, those who interpret the results of the reconstruction of the memory are people participating in the interviews on a basis of equality and respect for the differences.

Table Nº 1 Comparative of methodologies

	**Oral history**	**Judicial procedures**
Participants	Victims and defenders	Victim, perpetrator and judicial official
Sphere	Private interaction	Public
Time space	Multiple and deregulate opportunities	Limited procedural-regulatory opportunity
Direction of the process	Victims and defenders	Judicial official

Position of the interpreter	Subjective and committed	Intention of objectivity (legal obligation)
Evaluation	Meanings	False or true (judicial truth)
Narrator's performance	Active	Passive
Interpreter's performance	Passive and active, egalitarian	Active

However, we must highlight that lawyers are not oral historians, so it is necessary to establish differences and similarities when they deal with serious violations of human rights from their corresponding disciplinary field (see table N. 2). By taking expectations of reparation as a starting point, lawyers defending human rights have a temporary interest about the past, present and future, since the claim for justice implies that measures of judicial reparation fully meet with expectations. On their part, oral historians deal with the past and the present, but they address the future in a different way. Oral history emphasises one of the elements of full reparation: the guarantee of non-repetition. In other words, with their work, the aim of oral historians is that the recovered past is exposed in the public sphere in a wide sense (not necessarily in the public sphere of the judicial), so that their research work serves as a guarantee of non-repetition of serious violations of human rights.

Human rights defenders and oral historians share the need to create a link of trust and empathy with the interviewees. However, this kind of relationship poses oral historians with a problem of objectivity, since their work as researchers must be of a scientific nature. On the contrary, lawyers have the ethical obligation to be partial and subjective, as they must represent the interests of their clients. Now then, the intention of objectivity appears in the work of defence lawyers when their work is human rights research and not litigation. Hence, their task is not to legally represent the person but to document cases of serious violations of human rights. In this case, *"if we consider ourselves as merely legal researchers, we will be objective, because we need the case to be within a typified crime and as part of the judicial procedure. This definitely limits all the freedoms that we might have. However, if we are talking about research, which is a bit more human and anthropological, it will obviously be very different. It depends on the kind of research you're going to carry out"* (Moreno, interview).

The historian and the lawyer also share an interest in the facts of the recent past. Even so, the lawyer is interested in recent legal facts and is worried about the passage of time that damages and erases the testimony as legal evidence, since the last depends on the life of those who can narrate their lived experiences. On their part, for historians, recent facts pose a problem of objectivity, since they desire temporal distance. The more time passes and hence, we distance ourselves from the facts, the stronger the objectivity of the research becomes.

On the other hand, both the historian and the lawyer share a subjective interest in the interviews, since they focus on facts and the meanings they have in people's lives. Still, the lawyer has an added interest: the expectations of full reparation. Objectivity also becomes a problem for historians in their position as interpreters of the story of those being interviewed, as is also the case with the special relationship that is created, since their interpretation is subjective and committed and, at the same time, scientific. Finally, the axis of evaluation in the face of the results of the process of reconstruction of the memory marks the differences between the lawyer and the historian. Hence, while the lawyer evaluates the result from the perspective of a possible participation of victims in judicial procedures, the oral historian does it from the confirmation or not of his/her research hypothesis.

To sum up, the application of oral history in the process of reconstruction of the memory in cases of serious violations of human rights in the private sphere is the first step towards the decolonisation of the relationship between victims and lawyers, whose common aim is the participation in judicial procedures as one of the ways to develop the struggle for law.

* * *

Table N. 2. Comparative of interviewers

	**Lawyer defending human rights**	**Oral historian**
Temporary interest	Past, present and future (full reparation)	Past, present and future (guarantee of non-repetition)
Relationship with the interviewee	Empathy- legal representative	Empathy-researcher (problem of objectivity)
Factual interest	Recent legal facts	Recent facts (problem of objectivity)
Subjective interest	Meanings, facts and expectations of reparation	Meanings and facts
Position of the interpreter	Subjective and committed	Subjective and committed (problem of objectivity)
Axis of evaluation	Litigation strategy	Research hypothesis

4. Interpretation and conflict

All social relations are permeated by power, so the relationship between lawyers and victims is influenced by inequalities that create, on the one hand, the monopoly of specialised knowledge, and on the other, the exclusive knowledge of the lived traumatic experience. Therefore, it can be said that, while lawyers have the technique of accessing law, victims have rights and facts. Precisely, lawyers defending human rights are aware that "*people themselves do know their rights; they simply don't call them by the same name as we do. They do not understand the concept of "typification", but they know what their rights are, even more so, rights are expressed by the people and not by lawyers"* (Moreno, interview).

However, gender, economic and racial inequalities also permeate the relationship of trust and empathy necessary for the reconstruction of the victims' memory and the elaboration of the litigation strategy. This is the reason why the use of the method of oral history in the private sphere is proposed, since it offers elements that can help to decolonise the relationship. The starting point of oral history is honesty, i.e. the awareness of the differences and positions of the interviewer and the interviewee within the organisation of Latin American colonial society. Hence, the relationship becomes a permanent negotiation between people with different points of view as regards the facts, meanings and law.

Therefore, the process of reconstruction of the memory of victims of serious violations is not exempt from conflicts related to the interpretation of the narration. The same occurs in oral history and other disciplines in which interviews are used as a means to obtain information and to know the unknown. Jacqueline Held explains that conflicts of interpretation in oral history arise when the starting point is the recognition of the researcher's command of the interpretation of the interviewee's narration. To be precise, she warns that her formal education, her imagination and even the public to which she addresses herself, mark her interpretation of the stories that she listens to. Therefore, the conflict of interpretations is settled when, *"by making connections between the narrations and the social-historical aspect, with greater cultural patterns, we can, sometimes, separate the narration from the intentions of the oral narrator"* (Held, 2006: 55).

The problem of pure objectivity appears once more, again denying subjectivity in favour of the construction of scientific knowledge. Common sense and everyday human experience become an obstacle for the researcher. It therefore gives the "hegemony of the scientific self" the opportunity of imposing itself over the conceptions and interpretations of others. Thus, oral history defends the scientific nature of subjectivity (Held, 2006), which is created through an exercise of reciprocity between the persons taking part in the interviews. It is about reinterpreting what has been interpreted by returning to the narrator the interpretation of the researcher. In this way, once the interpretation has been done, it is presented to the narrator. This exercise is *"not very common amongst researchers who, in general, finish the research after the elaboration of the interpretation and the publication of the academic text, therefore confirming the hegemony of the I researcher over the other, the narrator"* (Held, 2006: 56).

The non-return of what has been interpreted to the narrator also occurs in the relationship between lawyers and victims. Precisely, the hegemony of the "I am the lawyer" can have negative consequences for the victims of serious violations of human rights. If we take all the above into account, it is necessary to broaden the interdisciplinary point of view with the aim of identifying the risks of victimisation during the elaboration of the litigation strategy. Therefore, "non-return" can cause more damage to the victims, by not avoiding a revictimisation which allows new violations or the repetition of violent actions against them or secondary victimisations which can stigmatise them or not respect their suffering or rights. In this sense, Jacqueline Held warns: *"I think that if our expert representations are not shown in a human way, showing sensitivity towards the narrator, a deep wound can appear in his/her emotional profile"* (Held, 2006, p. 58).

Having said that, since the relationship between the lawyer and the victim is influenced by power and inequalities, characteristic of Latin American colonial society, so the starting point is the consciousness regarding differences and positions between the interviewer and the interviewee, the private sphere becomes a permanent space for negotiation between people with different points of view in relation to the facts, meanings and law. Precisely, human rights defenders are aware that,

> *"people know what they want and what they are looking for, even though they do not know the legal or technical forms [...], but it depends on how the relationship is built, because if you present a written request before any jurisdiction or depending on the way the strategy is prepared [...] you can assume the role of a spokesperson and obviously have the role of legal spokesperson with a legally signed power of attorney [legal representation contract], but not by consulting the person [...]. In my case, the relationships that I build with people are horizontal [...], i.e. I'm not an isolated figure who represents them without them being involved, on the contrary, these people take an active part in the process"* (Medina, interview).

This is the reason why it is necessary for the people participating in the interviews to understand each other, avoiding the hegemony of the lawyer-interpreter over the victim who narrates. The aim is not for the lawyers' interpretations to be recognised by the narrating victim, but for the interpretation to be the result of an agreement ensuring mutual respect, as Jacqueline Held points out: *"I am suggesting that we, as*

researchers, do not shut ourselves up within our medieval walls, but that we dialogue with the narrator, recognise that we have a lot to learn from them and not only to collect information that will reinforce the paradigms of the meaning of the science we defend" (Held, 2006: 60).

Conclusions

Serious violations of human rights are events of historical significance that form a structural part of the history of Latin America. These events have repeatedly occurred, partly because the memory of what had happened in the past was not passed on from one generation to another and, therefore, they have not been learnt in their essence nor integrated into society's system of values. The short circuiting of transmission of the past is caused by those who have the power to name serious violations, meaning that only part of the history is passed on through the generations at the expense of weak memories, i.e. those of the marginalised and the unequal. This means that Latin American society is still colonial, since the countries in the region represent the model of a homogenising State that tolerates different structural inequalities when it conceives the idea of development to the detriment of those who are "different", because it sees them as obstacles on the road to civilisation and modernity. When inequalities are combined with power and conflict, a violent reaction is generated on the part of the dominant groups, thus provoking serious violations in a context of generalised and systematic violence in which the victims are the "imperfectly human" and the excluded.

However, in the last quarter of the XX century, groups of people emerged with the intention of ending the violent cycle of Latin American history. One of the strategies to transform the history of the region is the strengthening of the language of human rights by means of the struggle against impunity, a task carried out by social movements, the victims and their families who demand justice from the State. Nevertheless, this is based on the interpretation of human rights in terms of equality, which goes beyond their conception as simple freedoms. The said demand creates an atmosphere of questioning the very basis of colonial society, since it deeply challenges the passive role of the State as regards the respect, guarantee and promotion of human rights. Therefore, the demand for human rights, interpreting its language in terms of equality, bets on the decolonisation of social and political relations.

As a consequence of this work for the defence of human rights, different routes were opened making possible to transmit the traumatic memory of the events in the recent past from one generation to another. In this way, the intention is to integrate the reproach of serious violations within the Law, i.e. into society's system of values. Their purpose is to convert a weak memory into a strong one by means of a court ruling and

to contribute towards guaranteeing, through the symbolic power of the State, that these abhorrent crimes are not repeated. One of the strategies for integrating the reproach of serious violations into society's system of values is, precisely, judicial process. It is possible to use the judicial review even when a long time has passed since the serious violations occurred, because one of its characteristics is imprescriptibility. This means that victims have the opportunity of demanding justice from the State without the passage of time favouring impunity. Therefore, in the development of the narrative struggle, they exercise their right to know the truth about what happened through judicial procedures by means of which the guilty parties are investigated, judged and punished.

However, the coloniality of power, even with (or precisely because of) its five centuries of antiquity, impregnates all social relations, even those that exist in the most intimate and everyday aspects of the private sphere. This means that the victims of serious violations are trapped in the middle of a game of power where, on the one hand, there is the power of judicial officials as operators of the law and, on the other, that of their legal representatives as operators of the discourse of the law. Hence, gender, racial, economic, ethnic inequalities and even those provoked by having expert knowledge of state law, penetrate the relation between victims and judicial officials. The same happens with the lawyers who defend human rights and will act in representation of victims during judicial procedures (the struggle against impunity). Thus, the reconstruction of the victims' memory in the XXI century is a challenge for the defenders in the face of judicialization of serious violations of human rights.

They also face the challenge of decolonising social and political relations. As already stated above, the task of decolonisation is first of all carried out by means of the struggle against impunity, since the said task leads to the strengthening of State legality which advocates for the transformation of the State, i.e. that it progresses from the stage of tolerating structural inequalities to become the principal actor in the eradication of the same. This means that the work in the defence of human rights demands public and inalienable rights from a democratic State.

Secondly, in connection with the bet on defending rights through the law, the decolonisation of social relations is carried out through a judicial process. From the point of view of the legal system, the exceptional nature of serious violations converts them into difficult cases in judicial practice, where the meaning of the Law faces judicial

officials with problems of the penumbra in its interpretation. This means that the discretion of judicial officials increases when interpreting the Law in cases of serious violations of human rights. In consequence, their power to nominate increases and becomes a presumption when they take the decision to allow the victims to explain their suffering and express their expectations of reparation in their own words. Thus, the struggle for law becomes a narrative strategy where the goal is that judicial officials, as State authorities, take into account the victims' words with discretion and with intention of objectivity.

However, given that Eurocentrism has been the foundation of the process for the construction and consolidation of the State model in Latin America, the language of law on which it is based implies an unequal conception and, therefore, a hierarchy in the interpretation and application of the Law in specific cases. Moreover, in the public sphere of judicial processes, pure and simple objectivity submits the narration of the victims' memories to legal filters, which guarantee the right to due process of the parties involved in a judicial procedure. This means that only the fragments of the victims' memory which are pertinent and conducive to the aims of the procedures are analysed objectively (impartially), which means that the expectations of reparation and the litigation strategy will be adapted to the spaces and times of procedural rules.

Thirdly, defenders are faced with the challenge of the decolonisation of the relation with victims of serious violations. This challenge takes place in the private sphere and starts with the questioning of one-dimensional equality, which purely and simply identifies the other with the own-self, annihilating and suppressing any possibility of establishing a dialogue. Therefore, what one-dimensional equality pretends is to establish a relationship of trust and get to know the memory and the expectations of reparation without entering into a dialogue with the victims. This is why it is affirmed that the lack of recognition of "the other" dehumanises that person and converts him/her into a means to an end, denying his/her differences and showing no respect for their way of conceiving the world and its norms. It is within this sphere where the limits of the knowledge of an expert in law are questioned, given that the hegemony of the lawyer tends to apply the only objective method he/she knows: the method of judicial procedure. Thus, the application of the objective method in the private sphere turns the interview into an interrogation, shortening the victims' narration and making it impossible to obtain a complete idea of their expectations of reparation. The lack of dialogue, honesty and awareness in the position that the parties involved in the relation

have in the colonial chain, generates negative consequences for the victims, given that it puts them in danger of suffering more damage than that caused by the serious violations. This means that subjectivity is the general rule in the private sphere, given that the victims' memory is essentially subjective. Hence, lawyers are not obliged to be objective in their relationship with them as they will legally represent their interests.

In accordance with the above, we reaffirm the need for the interdisciplinary nature of human rights work, as a key factor for the decolonisation of social and political relations. The first step towards the decolonisation of the relation between lawyers and victims is to accept the limits of law as a discipline. Its method of addressing past events, applicable in the public sphere, brings negative consequences when applied to the private one, given that it limits and hinders the narration of the victims' memory. Moreover, it makes it possible to question the limits of the legal system, given that serious violations of human rights demonstrate the permeability of law as a discipline and admit the need to go to other disciplines to guarantee the right to truth that victims have.

It can, therefore, be affirmed that all serious violations of human rights take place in a historical context of generalised and systematic violence and that, due to the exceptional nature of the serious violation, judicial and historical truth necessarily come into conflict. However, this exceptional nature has different connotations depending on the point of view of the discipline, given that, historically, they form part of the structure of the history of Latin America. Therefore, their character is not something exceptional. Nevertheless, from the point of view of the law, given that the Latin American legal system was only designed to resolve everyday, specific and unconnected conflicts and is not conceived to deal with structural violence, considers them as exceptional, since serious violations involve systematic and generalised criminal practices.
Moreover, interdisciplinarity in the work for human rights in cases of serious violations makes it possible to put into evidence the relationship between some concepts of the law and those of other disciplines. Thus, for example, the guarantees of non-repetition as part of the right of the victims to full reparation is related to the concepts of memory and history, since the judicial procedures that address serious violations constitute a combination between *mnemne* and *anamnesis,* i.e. an effort to retrieve and remember something that cannot be forgotten: the Law (national and international human rights standards).

Therefore, from this perspective, the judicial procedures (the non-impunity) give meaning to the full reparation sought by the victims when they go to the State justice, since impunity does not make it possible to retrieve or transmit a traumatic and violent recent past, whose loss or oblivion we will regret if it is repeated. On the other hand, the search for the non-repetition of serious violations is part of the struggle to change history starting from the victims' memory. This is why the memory of the victims must be shown in the public sphere. For this reason, one of the tasks of the defenders is to convince the victims of their condition as historical subjects, since serious violations are events of historical importance which justify their struggle to give a meaning to the past.

Consequently, we propose an interdisciplinary approach to a methodology for the reconstruction of the victims' memory in the private sphere, different from that of judicial proceedings. The proposal points to the creation of a litigation strategy consistent with the recognition of the voice of the other in the relationship of trust, i.e. it should be the product of a dialogue between people who are aware of the differences between them. We therefore propose the methodological tool of oral history as an option for the reconstruction of the memory of victims of serious violations. Moreover, combined with the psychosocial perspective of human rights, oral history makes it possible to identify the risks of causing future damage to the victims. The sincerity on which oral history is based makes it possible recognise "the other" as an end in itself, given that it acknowledges the human condition of that person and the respect for his/her own conception of the world and its norms.

The reconstruction of the victims' memory takes place in the private sphere by means of the use of oral history, with the sole participation of the victims and their defenders. Judicial officials do not take part in this, there are no legal terms or procedural rules, which means that there are multiple opportunities for the victims to narrate their memory; especially if we take into account that the victims' expectations of reparation change with the passage of time and the development of their relation with the defenders. Meanwhile, trust, mutual recognition and honesty make it possible for the interviews to be carried out in an atmosphere of consensus, based on good faith, subjectivity, compromise and empathy. It is also in the private sphere where the expectations of reparation of victims are evaluated and the meaning that every measure of reparation to be claimed has for them is made known. Finally, the methodology of oral history makes it possible for the narrator's role to be active and not passive, since there is a negotiation between the narrator and the person asking the

questions. In the same way, those who interpret the results of the reconstruction of the memory take part in the interviews as equals, respecting differences.

In consequence, the decolonisation of social relations is converted into a process of eliminating alienation, i.e., to start from mutual recognition and honesty when we are conscious of the inequalities between us. The elimination of alienation is to know and be aware of the place we have in the colonial chain. Decolonisation also makes it possible to question disciplinary limits and the attitude of the knowing subject. To be precise, objectivity is re-evaluated as the rule in the public sphere, when its pure and simple application becomes the negation of the victims' rights to tell their story in the legal discourse, always supposing that this does not imply the denial of the right of potential perpetrators to due process. This last idea will be left to be developed in the future. However, what cannot wait is the recognition of the personal process towards the elimination of their alienation as holders of expert knowledge of law.

It was, precisely, the struggle together with the academic requirement of "being objective" that impregnated the writing of this research. Objectivity in academic research aims to persuade, given that the more efforts we make to be credible investigators, the more we strive to be objective. However, this requirement obliges us to omit personal experience and set it aside as a mere experience with no scientific relevance, given that it is contaminated by subjectivity. This means that the investigators' own narration of their experience is restricted and adjusted to the demands of the scientific method. Therefore, the position of narrators changes when they write the research work, moving away from the reality being described in the interest of objectivity and in order not to contaminate the object of knowledge. Of course, if this were not the case, it could not be called a research thesis or would have a different name closer to that of a literary genre. Despite this, my own experience and that of the six people interviewed during the research work indicated that absolute objectivity is humanly impossible, which means that it must necessarily be an ambition.

Consequently, the intention of objectivity is no more than a guarantee of authenticity and of our responsible discretion, given that our responsibility is to interpret and confirm without discrediting the rights of someone else who has talked about the same subject. So, to sum up, in an act of sincerity, I declare, using the first person singular, that I am copying the words of someone else when I say that *"[and] my intention was not to write an objective work. I neither wanted to nor could. Nothing is neutral in this*

account of history. I am incapable of distancing myself, I take sides: I confess it and don't regret it. However, each fragment of this vast mosaic is supported by a solid documentary base. What I tell here happened, although I tell it in my own way" (Galeano, 2010, p. XVI).

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APPENDICES

1. Nelly Moreno interview guide

Place and date: Buenos Aires (Argentina), 3[1st] of August 2012.
Nationality: Honduran

1) Do you consider yourself a human rights defender? In your opinion, what characteristics make a good human rights defender and, on the other hand, which can hinder his/her work?
2) Which moments would you highlight from your academic and professional biography? How are both interrelated?
3) What do you think about the following statement: "there is a relation of power between human rights defenders and victims"?
4) In which strategies for the defence of human rights have you participated? What similarities and differences have you noted between these strategies?
5) What do you think about the following statement: "only lawyers know the victims' rights"?
6) How is a human rights research hypothesis prepared?
7) Please, tell us about an experience that has contributed to obtaining reparation for a victim. Kindly, narrate an experience which has NOT contributed to obtaining reparation for a victim.
8) What do you think about the following statement: "in a human rights investigation, the defender must be objective"?
9) What do you understand "interdisciplinary work in the defence of human rights" to mean?
10) What do you understand "landmark case" to mean?

""in the faculty, they do not teach you how to treat people. What is more, I think that [...] until my final year at university, I never came into contact with people. It's always about theory, what courts are like, but we never get to know the survivors or victims involved in human rights cases, even though, according to law, they are the clients, which means that no-one teaches you how to deal with them, and you treat them like merchandise."

“people themselves do know their rights, they simply don’t call them by the same name as we do. They do not understand the concept of “typification”, but they know what their rights are, even more so, rights are expressed by the people and not by lawyers”.

"if we consider ourselves as merely legal researchers, we will be objective, because we need the case to be within a typified crime and as part of the judicial procedure. This definitely limits all the freedoms that we might have. However, if we are talking about research, which is a bit more human and anthropological, it will obviously be very different. It depends on the kind of research you’re going to carry out.”

“interdisciplinary work in the defence of human rights means that it can be carried out within the same sphere, i.e. that we do not have separate legal, health or social areas, but that the same lawyer can have mechanisms within the social, psychological, even medical areas, to discover what is happening. The psychologist should also have some knowledge in the legal, social and medical fields in order to be aware of what is happening, because when you do things the way it was explained to me, “you first have to go through judicial procedures and then go to the psychological”, this means that you are telling the same story to four different people at same time and all four of them give you different solutions”.

2. Diego Abonía interview guide
(vía skype)

Place and date: Bogota (Colombia), 2nd of September 2012.
Nationality: Colombian

1) Do you consider yourself a human rights defender? In your opinion, what characteristics make a good human rights defender and, on the other hand, which can hinder his/her work?
2) Which moments would you highlight from your academic and professional biography? How are both interrelated?
3) What do you think about the following statement: "victims do not know their rights"?
4) In which strategies for the defence of human rights have you participated? What similarities and differences have you noted between these strategies?
5) In which jurisdictions have you acted representing the victims? What similarities and differences have you noted between these jurisdictions?
6) What do you think about the following statement: "human rights defenders contribute to the victims' reparation"?
7) Have you participated in the preparation of a litigation strategy?
8) Please, tell us about an experience that has contributed to obtaining reparation for a victim. Kindly, narrate an experience which has NOT contributed to obtaining reparation for a victim.
9) What do you think about the following statement: "only victims as individuals know the suffering they have experienced"?
10) What do you understand by "interdisciplinary work in the defence of human rights"?
11) What do you understand "landmark case" to mean?

"commitment and knowledge of different legal aspects of human rights are part of the role of human rights defenders, but without giving preference to human rights over the human condition in itself [...] not placing them as part of a knowledge and rational action, rather than that, in addition and prior to that, we place the connection with the human condition [...] the acknowledgment that there is a condition that makes us equal and brings us to demonstrate solidarity."

“the role of human rights defenders has to do with an attempt or an approximation of clarity in a situation of social or political context of the space in which one is with different people that he/she is accompanying in the defence of human rights”.

“when I started working in the field of human rights there was a rupture with my formal education [as a psychologist] [...] when it is time to go into the field to work amidst the conflict and to listen to the farmers, this had nothing to do with my university education. It was a deconstruction and a reconstruction of theory, to refute concepts, to start creating tools in order to begin to understand what people affected by violence were talking about.”

"interdisciplinary work in the defence of human rights demonstrates that this is not just about a violation of human rights connected to a legal framework, but that, behind all of this, there is a person, a family, with feelings and who live seeing that their own identity has been affected and has to be reconstructed from what they have had to experience [...] this then brings the human dimension of the situation to the fore.”

"interdisciplinary work on human rights is the collective construction of a bet, a strategy or an action where there is a conscious summation of different ways of looking, while betting on the same goal or objective, but when I say that it is a summation I mean [...] how these different disciplines together build a strategy from the point of view of the different contributions each one of them can make in order to have a collective reflection on an issue.”

3. Marcela Páez interview guide

Place and date: Buenos Aires (Argentina), 3rd of September 2012.
Nationality: Colombian

1) Do you consider yourself a human rights defender? In your opinion, what characteristics make a good human rights defender and, on the other hand, which can hinder his/her work?
2) Which moments would you highlight from your academic and professional biography? How are both interrelated?
3) What do you think about the following statement: "the relationship between human rights defenders and victims develops on the basis of inequality"?
4) In which jurisdictions have you acted representing the victims? What similarities and differences have you noted between these jurisdictions?
5) In which strategies for the defence of human rights have you participated?
6) What do you think about the following statement: "the expectations of reparation of victims are measured through interviews"?
7) How is a litigation strategy prepared?
8) Please, tell us about an experience that has contributed to obtaining reparation for a victim. Kindly, narrate an experience which has NOT contributed to obtaining reparation for a victim.
9) What do you think about the following statement: "human rights defenders must commit themselves to the victims in their relationship with them"?
10) What do you understand by "interdisciplinary work in the defence of human rights"?
11) What do you understand by "landmark case"?

"when one of your rights has been violated, in such difficult contexts [internal armed conflict in Colombia], it is as if they take away your full autonomy and the full power of making decisions regarding yourself, especially when we are dealing with a sex offense. We have always tried to manage the process in such a way they are the ones who have autonomy over it. Then I think that, in some way, it comforts them [...] these are measures that somehow give them back their dignity."

"judicial officials must be impartial in their work during the different procedural stages, but not when they are dealing with people [...] If you have no legal evidence, you can't invent it, which means that they must be objective. However, this doesn't mean that they do not have a duty to respect this person, that in order to do their work well they must be empathetic, they should approach the person, just as they should do with perpetrators, i.e. have equal respect. I do not think that one thing excludes the other."

4. David Medina interview guide

Place and date: Buenos Aires (Argentina), 4th of September 2012.
Nationality: Colombian

1) Do you consider yourself a human rights defender? In your opinion, what characteristics make a good human rights defender and, on the other hand, which can hinder his/her work?
2) Which moments would you highlight from your academic and professional biography? How are both interrelated?
3) What do you think about the following statement: "human rights defenders do not know the victim's suffering"?
4) In which jurisdictions have you acted representing the victims? What similarities and differences have you noted between these jurisdictions?
5) In which strategies for the defence of human rights have you participated?
6) What do you think about the following statement: "the victims' expectations of reparation coincide with the litigation strategy"?
7) How is a litigation strategy prepared?
8) Please, tell us about an experience that has contributed to obtaining reparation for a victim. Kindly, narrate an experience which has NOT contributed to obtaining reparation for a victim.
9) What do you think about the following statement: "only lawyers know victims' rights"?
10) What do you understand by "interdisciplinary work in the defence of human rights"?
11) What do you understand by "landmark case"?

"expectations of reparation is a subject which varies. Although there is one clear reparation, people also have different ways of conceiving what serves as reparation for them. This means that it is not something expressed as an immediate formula, because it can vary. In fact some people [...], especially in Colombia, where the issue of justice is always linked to the issue of compensation, [...] begin later on to realise that reparation has other connotations."

"people know what they want and what they are looking for, even though they do not know the legal or technical forms [...], but it depends on how the relationship is built, because if you present a written request before any jurisdiction or depending on the way the strategy is prepared [...] you can assume the role of a spokesperson and obviously have the role of legal spokesperson with a legally signed power of attorney [legal representation contract], but not by consulting the person [...]. In my case, the relationships that I build with people are horizontal [...], i.e. I'm not an isolated figure who represents them without them being involved, on the contrary, these people take an active part in the process."

5. Rosa Díaz interview guide

Place and date: Buenos Aires (Argentina), 5th of September 2012.
Nationality: Colombian

1) Do you consider yourself a human rights defender? In your opinion, what characteristics make a good human rights defender and, on the other hand, which can hinder his/her work?
2) Which moments would you highlight from your academic and professional biography? How are both interrelated?
3) What do you think about the following statement: "there is a relation of power between human rights defenders?"
4) In which strategies for the defence of human rights have you participated? What similarities and differences have you noted between these strategies?
5) In which jurisdictions have you acted representing the victims? What similarities and differences have you noted between these jurisdictions?
6) What do you think about the following statement: "only psychologists know the suffering of the victims"?
7) Have you participated in the preparation of a litigation strategy?
8) Please, tell us about an experience that has contributed to obtaining reparation for a victim. Kindly, narrate an experience which has NOT contributed to obtaining reparation for a victim.
9) What do you think about the following statement: "human rights defenders contribute to obtain victim's reparation"?
10) What do you understand by "interdisciplinary work in the defence of human rights"?
11) What do you understand by "landmark case"?

"reveal a practice that violates human rights and becomes widespread and systematic [...], that exemplifies a problem that affects many, that is, that not only affects the group or the person who was, in that case, the victim of that violation, but represents the situation of many people; and accounts for a change that should take place, but is still not happening, that is, it's as if something is going wrong and the case is being used to change and transform that situation."

“human rights defenders can potentially contribute to the reparation of victims, but they can also potentially cause harm. It depends on how they work, what principles they apply and what type of relationship they establish with the victims."

“to recognise that the Law is not enough to understand the different dimensions of a fact; for example, sometimes it is necessary to resort to economics, sociology, political science, psychology and anthropology to understand what happens within a group of individuals or what happens to a person, and to be able to report what occurred and find a way to resolve it. It is necessary to resort to different disciplines.”

6. Cristóbal Carmona interview guide

Place and date: Buenos Aires (Argentina), 10th of September 2012.
Nationality: Chilean

1) Do you consider yourself a human rights defender? In your opinion, what characteristics make a good human rights defender and, on the other hand, which can hinder his/her work?
2) Which moments would you highlight from your academic and professional biography? How are both interrelated?
3) What do you think about the following statement: "the relationship between human rights defenders and victims develops on an equality basis.
4) In which jurisdictions have you acted representing the victims? What similarities and differences have you noted between these jurisdictions?
5) In which strategies for the defence of human rights have you participated?
6) What do you think about the following statement: "the expectations of reparation of victims overtake the litigation strategy"?
7) How is a litigation strategy prepared?
8) Please, tell us about an experience that has contributed to obtaining reparation for a victim. Kindly, narrate an experience which has NOT contributed to obtaining reparation for a victim.
9) What do you think about the following statement: "during the litigation strategy, the defender must be objective"?
10) What do you understand by "interdisciplinary work in the defence of human rights"?
11) What do you understand by "landmark case"?

"w*hen theory and practice come together, you start to understand that the legal field is just one part of the puzzle, and that you also have to learn how to act in a political context, since the defence of human rights is the defence of a strong political position."*