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RIGHT TO THE TRUTH AND INTERNATIONAL JURISPRUDENCE AS THE
“CONSCIENCE” OF HUMANITY.
COMPARATIVE INSIGHTS FROM THE EUROPEAN AND INTER-AMERICAN
COURTS OF HUMAN RIGHTS**

SUMMARY: 1.- Introduction; 2.- Principles of Humanity, Dictates of Public Conscience and Recognition of Truth as a Right in the International Arena; 3.- Gross Violations of Human Rights and the “Right to the Truth” in the European Court of Human Rights Case-Law; 4.- The Reconstruction and Evolution of the Right to the Truth in Inter-American Court Jurisprudence; 5.- The Human Rights Courts’ Insights on the Right to the Truth in a Comparative Perspective: The Procedural and Substantial Yardsticks to Honour the Conscience of Humanity; 6.- Final Remarks: *Crimina Juris Gentium*, Right to the Truth, and the “Conscience” of Humanity.

I am a firm believer in the people.
If given the truth, they can be depended upon to meet any national crisis.
The great point is to bring them the real facts.
Abraham Lincoln

Pending publication of this article, the body of Italian PhD student Giulio Regeni was discovered in Cairo with signs that he had suffered “inhuman, animal-like violence”. Suspecting that Egyptian security forces may have been involved, the victim’s family, the media, human rights activists and society at large have demanded knowing the truth about the brutal murder of the young researcher and identifying and punishing those responsible according to law.

In pursuing the right to the truth, the role of judges is central to ensure that acts of torture and other abuses that offend the human conscience are not justified in the name of ‘reasons of State’.

1.- Introduction

In two judgments of 24 July 2014, the European Court of Human Rights (ECtHR) unanimously convicted Poland for cooperating in secret transfer and detention operations conducted within the US Central Intelligence Agency’s (CIA) so-called “extraordinary renditions” to the detriment of Mr Zayn Al-Abidin Muhammad Husayn (also known as Abu Zubaydah) and Mr Abd Al Rahim Hussayn Muhammad Al Nashiri,

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respectively a Saudi Arabian national and a stateless Palestinian, both suspected of terrorist acts¹.

According to the European Court, the respondent State did not conduct effective investigations in violation, *inter alia*, of Article 3 (prohibition of torture and inhuman or degrading treatment) in both its substantive and procedural aspects, Article 5 (right to liberty and security), Article 8 (right to respect for private and family life) and Article 13 (right to an effective remedy) of the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). Moreover, in failing to comply with the obligations to furnish all necessary facilities for its examination of the case as laid down in Article 38 of the ECHR, the Polish State wilfully obstructed the ECtHR in the objective establishment of the truth².

The Strasbourg Court's assessment in these Polish cases echoes the ECtHR Grand Chamber's 2012 *El-Masri* judgment against the Macedonian Government constituting a landmark ruling both in terms of sentencing the participation of a Council of Europe member State in secret counterterrorism programs conducted by the CIA and its contribution in determining the nature and content of the "right to the truth". Notably, failing to ensure the adequate transparency of the serious violations of human rights suffered by Khaled El-Masri (secret detention, torture, ill treatment), Macedonia deprived the applicant and other victims of similar offenses as well as the general public of "the right to know what had happened"³.

When the ECtHR is faced with such arbitrary, persistent, cruel and gross human rights abuses that offend the conscience of humanity and while maintaining the ECHR's rule-of-law standards, it is also guided by broader principles regarding the right to the truth and prohibition of impunity at the level of the presentation of facts and the choice of methodologies and issues⁴.

¹ Both Mr Al Nashiri and Mr Husayn alleged that they fell into the category of "High-Value Detainees" (HVD) - terrorist suspects likely to be able to provide information on current terrorist threats against the United States - against whom the "enhanced interrogation techniques" (EITs) were being used, which included the "waterboard technique", confinement in a box, wall-standing and other stress positions. See ECtHR, Case of Al Nashiri v. Poland, Application No. 28761/11, Former Fourth Section, Judgment (July 24, 2014); ECtHR, Case of Husayn (Abu Zubaydah) v. Poland, Application No. 7511/13, Former Fourth Section, Judgment (July 24, 2014).

² In the 2014 Polish cases, the ECtHR also held that there had been a violation of the principles of fair trial guaranteed by Article 6 of the ECHR on account of the transfer of the applicant from the respondent State's territory despite the existence of a real risk that he could face a flagrant denial of justice, such as the torture evidence. See respectively ECtHR, Case of Al Nashiri and ECtHR, Case of Husayn (Abu Zubaydah) *cit.*, paras. 561 *et seq.*, paras. 551 *et seq.* In the case of Mr Al Nashiri, the Court found that Poland also violated Articles 2 and 3 of the Convention taken together with Article 1 of Protocol No. 6 by having enabled the CIA to transfer him to the jurisdiction of the military commission and thus exposing him to a foreseeable serious risk that he could be subjected to the death penalty following his trial. *Id.*, paras. 570 *et seq.*

³ ECtHR, Case of El-Masri v. The Former Yugoslav Republic of Macedonia, Application No. 39630/09, Grand Chamber, Judgment (Dec. 13, 2012), paras. 191-192.

⁴ ECtHR, Case of Vasiliauskas v. Lithuania, Application No. 35343/05, Grand Chamber, Judgment, (Oct. 20, 2015), Dissenting Opinion of Judge Ziemele, para. 27

This is clear in cases of “historical sensitivity” where the Strasbourg Court acts as the “conscience of Europe” and not pursuing the line of formalistic reasoning⁵ while finding itself “at the centre of a complex social process in a society seeking to establish the truth about the past and its painful events”⁶.

Similarly, Inter-American jurisprudence contributed to awakening the world’s conscience on mass human rights abuses such as forced disappearances and other *ius cogens* crimes by granting the victims and society at large the right to the truth about these violations. More precisely, the right to the truth enabled the Inter-American Commission (IAComHR) and Inter-American Court of Human Rights (IACtHR) to look beyond legal and juridical obstacles in assessing past violations of human rights and humanitarian law and consider the principles of humanity and the dictates of the public conscience as a suitable interpretative yardstick.

As this analysis will show, the right to know what happened has been the focus of attention of the Inter-American Court of Human Rights (IACtHR) since the 1988 *Velásquez Rodríguez v. Honduras* judgment that established the existence of the right of the next of kin of victims of enforced disappearance to know their fate and, where possible, the location of their remains⁷. The Inter-American Court mainly ascribed such right to the right to a fair trial (in particular, the fullest possible procedural ascertainment of the historical truth) and the right to judicial protection, enshrined respectively in Articles 8 and 25 of the 1969 American Convention of Human Rights (the so-called Pact of San José)⁸.

In the November 2010 judgment in the *Gomes Lund v. Brazil* case, beyond confirming the jurisprudence on the “right to know the truth”, IACtHR for the first time identified its legal basis in Article 13 of the 1969 Convention concerning the right to seek and receive information⁹.

In the case in question, the Court unanimously convicted Brazil for the violations committed by the national army during the military regime to the detriment of the members of a guerrilla group (extrajudicial acts of torture and executions) considering the laws of amnesty approved by the military dictatorship as incompatible with the provisions of the American Convention¹⁰. The Court also expressly excluded that reasons of public interest and national security could justify denial of access to information relevant to seeking the historical truth¹¹. According to the San José judges, in denying and/or delaying access to important military archives and other information to the next of kin of victims, Brazil violated Article 13 together with Articles 8 and 25 of the American Convention¹².

⁵ ECtHR, Case of Lambert and Others v. France, Application No. 46043/14, Grand Chamber, Judgment, (Oct. 20, 2015), Joint Dissenting Opinion of Judges Villiger, Power-Forde, Pinto De Albuquerque and Kūris, para. 18.

⁶ ECtHR, Case of Lambert and Others v. France, Application No. 46043/14, Grand Chamber, Judgment, (Oct. 20, 2015), Dissenting Opinion of Judge Ziemele, para. 27.

⁷ IACtHR, Case of Velásquez-Rodríguez v. Honduras, Judgment (July 29, 1988), para. 181.

⁸ IACtHR, Case of Bámaca-Velásquez v. Guatemala, Judgment (Nov. 25, 2000), para. 201.

⁹ IACtHR, Case of Gomes Lund *et al.* (“Guerrilha Do Araguaia”) v. Brazil, Judgment (Nov. 24, 2010), para. 196 ss.

¹⁰ *Id.*, para. 325.

¹¹ *Id.*, para. 202.

¹² *Id.*, para. 212.

The *Gomes Lund* case provided IACtHR with the opportunity to establish a series of guiding principles on access to information on serious violations of human rights and to remark on the individual and collective nature of the right to the truth, examining its judicial-procedural and historical-cultural dimensions.

These guidelines, together with the more recent Strasbourg case-law, have contributed to the evolution of the right to the truth, developing a synergistic relationship between the systems of enforcement of human rights and repression of crimes. Notably, the growing body of ECtHR and IACtHR jurisprudence guaranteeing access to information (and judicial remedies) on grave human rights abuses has directed both international and internal judiciary to overcome the legal or *de facto* obstacles standing in the way of prosecuting those responsible for grave violations that affect society as a whole.

Thus, jurisprudential assessments on the right to the truth of victims, their families and the larger society provided a type of “historical imprescriptibility”¹³ responding to the “profound human need to acknowledge” past suffering offending the human conscience and “press for accountability as a means of building for the future”¹⁴.

Moving from the recognition of truth as a right in the international arena (section II) and further exploring the reconstruction and evolution of the right to the truth in the case-law of the international human rights courts¹⁵ (sections III and IV), the following analysis focuses on these ECtHR and IACtHR insights in a comparative perspective¹⁶ (section V) to conclude on the emerging trends of the Strasbourg Court and the Court of San José to interpret and apply the right to the truth, acting as the “conscience” of the whole of humanity (section VI).

2.- Principles of Humanity, Dictates of Public Conscience and Recognition of Truth as a Right in the International Arena

First affirmed in the “Martens Clause” included in the preamble to the Hague Conventions on the Laws and Customs of War on Land, the “principles of humanity” and “dictates of public conscience” concepts have been reiterated in humanitarian law instruments, international jurisprudence and international criminal tribunal statutes and increasingly associated with grave violations of human rights, acts of genocide and other atrocities that offend the human conscience.

Towards the middle of the 70s, the General Assembly of the Organization of American States expressly declared the practice of disappearances as “an affront to the conscience of the Hemisphere”. In the same period, with resolution 3220 of 1974, the United Nations General Assembly recognized the lack of information on the disappearance or death of persons in the course of hostilities as one of the most tragic consequences of

¹³ A. De Baets, *Historical Imprescriptibility*, in *Storia della Storiografia/History of Historiography* 59-60 (2011) 128-149.

¹⁴ International Human Rights Law Institute, *The Chicago Principles on Post-Conflict Justice* (2007), principle 2.5.

¹⁵ On the ECtHR and IACtHR case law, see *Introductory Note in The Global Community Yearbook of International Law and Jurisprudence* 2001-2015.

¹⁶ On the ECtHR and IACtHR case law in a comparative approach see L.Cassetti, A. Di Stasi, C. Landa Arroyo (cur.), *Diritti e giurisprudenza. La Corte Interamericana dei diritti umani e la Corte europea di Strasburgo/Derechos y Jurisprudencia. Corte Interamericana y Tribunal Europeo de Derechos Humanos*, Napoli 2014.

armed conflicts, considering “the desire” to know the fate of loved ones as “a basic human need which should be satisfied to the greatest extent possible”¹⁷.

However, the 1977 Additional Protocol I to the Geneva Conventions of 1949¹⁸ replicating the principle of public conscience¹⁹, expressly identifies “the right” of families to know the fate of their relatives who disappeared as a result of armed conflicts (Article 32) and the corresponding obligation of the parties to the conflict to search for persons reported as missing (Article 33)²⁰.

The forced disappearances perpetrated under the dictatorial regimes of Augusto Pinochet in Chile and the junta military in Argentina induced the United Nations to dedicate studies and documents to the matter and appoint special commissions of inquiry known as Truth Commissions²¹. In parallel, Inter-American jurisprudence developed the most striking pronouncements in this domain²².

International scholars and institutions that have addressed the right to the truth have prevalently examined this as an instrument to fight the impunity of criminals,²³ as an expression of the right of victims (and their families) to have access to information on the violations suffered and to actively participate in the proceedings related to the crimes committed²⁴ or in the context of remedial measures for serious violations of human rights²⁵.

Nevertheless, the right to the truth does not only concern the right of access to information (both individual and collective)²⁶, but also the positive obligation of States to adopt all necessary measures to protect such human right²⁷, particularly through

¹⁷ GA Res. 3220 (XXIX) *Assistance and Cooperation in Accounting for Persons Who Are Missing or Dead in Armed Conflicts* (Nov. 6, 1974).

¹⁸ See Art. 16 and 26 of the IV Geneva Convention and Art. 12 *et seq.* of the II Geneva Convention; see also Office of the United Nations High Commissioner for Human Rights, *Study on the Right to the Truth*, E/CN.4/2006/91 (Feb. 8, 2006), para. 6.

¹⁹ See T. Meron, *The Martens Clause, Principles of Humanity and Dictates of Public Conscience*, in *American Journal of International Law* 94.1 (2000) 78.

²⁰ See É. David, *Principes de droit des conflits armés*, Bruxelles 1994, 502. See also Res. II of the XXIV International Conference of the Red Cross and Red Crescent (Manila 1981); Rule 117 in J. M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules*, Cambridge 2005, 421.

²¹ J. M. Pasqualucci, *The Whole Truth and Nothing but the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System*, in *Boston University International Law Journal* 12 (1994) 321.

²² K. Dykmann, *Impunity and the Right to Truth in the Inter-American System of Human Rights*, in *Iberoamericana* 7.26 (2007) 45ss. See also Inter-American Commission on Human Rights (IACoHR), *The Right to Truth in the Americas*, OEA/Ser.L/V/II.152 Doc. 2 (Aug. 13, 2014), available online at <<http://www.oas.org/en/iachr/reports/pdfs/Right-to-Truth-en.pdf>>.

²³ D. Cassel, *La lucha contra la impunidad ante el sistema interamericano de derechos humanos*, in J. E. Méndez, M. Abregú, J. Mariezcurrena (eds.), *Verdad y Justicia. Homenaje a Emilio F. Mignone*, San José (2001), 357ss.; M. Crettol, A.-M. La Rosa, *The Missing and Transitional Justice: The Right to Know and the Fight Against Impunity*, in *International Review of the Red Cross* 88.869 (2006) 355ss.

²⁴ D. Groome, *The Right to Truth in the Fight against Impunity*, in *Berkeley Journal of International Law* 29 (2011) 189ss.

²⁵ T. M. Antkowiak, *Truth as Right and Remedy in International Human Rights Experience*, in *Michigan Journal of International Law* 23 (2002) 977ss.

²⁶ J. E. Méndez, *The Right to Truth*, in C. C. Joyner (ed.), M. C. Bassiouni (spec. ed.), *Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference, 17-21 September 1998*, Toulouse 1998, available online at <www.mpepil.com>.

²⁷ IACoHR, Report No. 136/99, para. 221 (Dec. 22, 1999).

conducting effective investigations²⁸. In Juan Mendez’s definition, the right to the truth is described as “a State obligation to reveal to the victims and society everything known about the facts and circumstances of massive and systematic human rights violation of the past including the identity of the perpetrators and instigators”²⁹.

The “composite” content of this right also emerges in the multitude of terms used, such as *right to know*, *right to the truth*, *right to know the truth*, *right to the historical truth*, *right to truth and information*, to name but a few.

At the universal level, the UN *Working Group on Enforced or Involuntary Disappearances* (WGEID) in 1981 recognized the “indisputable” existence of the “right to know” of the next of kin of victims of enforced disappearances³⁰. More recently, in the *General Comment on the Right to the Truth in Relation to Enforced Disappearances* submitted in 2010, the Working Group established that the State’s refusal to provide information concerning the fate of victims of enforced disappearances constitutes a limitation to the right to the truth³¹.

A first evolution of the right to the truth can be ascribed to Louis Joinet’s final report on the *Question of Impunity of Perpetrators of Human Rights Violations* of 1997 that included the “right to know” of victims of serious violations of human rights³² among the principles for the fight against the impunity of criminals while disjoining it from armed conflicts and from international humanitarian law, and examining its “collective” dimension.

Recalling the preliminary report submitted to the Sub-Commission in 1993, the Special Rapporteur remarked “the history of impunity is one of perpetual conflict [...] between the human conscience and barbarism”, ascribing four principles to the “right to know”: *the inalienable right to the truth* recognized to every people, *the duty to remember* corresponding to State obligation, *the victims’ right to know* the circumstances of the violation and the fate of persons who have died or disappeared, and finally, *the guarantees to give effect to the right to know* through judicial commissions of inquiry, truth commissions and access to archives.

Updated in 2005 by Diane Orentlicher, the *Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity* includes the “right to

²⁸ ECtHR, Case of Kurt v. Turkey, Applications Nos. 15/1997/799/1002, Judgment (May 25, 1998), para. 140.

²⁹ Méndez, *The Right* cit. 255ss.

³⁰ “[...] There can be no doubt that the families of the disappeared are anxiously hoping that the Group will be able to obtain information for them on that which they have been unable themselves to discover; the fate or present whereabouts of the disappeared. Unquestionably, their right to know can be neither denied nor ignored”, UN Commission on Human Rights, *Question of the Human Rights of All Persons Subjected to any Form of Detention or Imprisonment, in Particular: Question of Missing and Disappeared Persons*, Report of the Working Group on Enforced or Involuntary Disappearances, E/CN.4/1492 (Dec. 31, 1981), para. 5.

³¹ See Working Group on Enforced or Involuntary Disappearances, *General Comment on the Right to the Truth in Relation to Enforced Disappearances*, A/HRC/16/48, para. 3 (2010): “[...] [T]he relatives of the victims should be closely associated with an investigation into a case of enforced disappearance. The refusal to provide information is a limitation on the right to the truth. Such a limitation must be strictly proportionate to the only legitimate aim: to avoid jeopardizing an ongoing criminal investigation. A refusal to provide any information, or to communicate with the relatives at all, in other words a blanket refusal, is a violation of the right to the truth [...]”.

³² UN Commission on Human Rights, *Question of Impunity of Perpetrators of Human Rights Violations (Civil and Political Rights)*, Final Report prepared by Mr L. Joinet, E/CN.4/Sub.2/1996/18 (June 20, 1996), paras. 17-25.

know” within the “effective measures” to fight the impunity of criminals also in contexts other than enforced disappearances such as summary executions and acts of torture³³. The first principle establishes that “[i]mpunity arises from a failure by States to meet their obligations to investigate violations [and] to ensure the inalienable right to know the truth about violations”. Similarly, Resolution 9/11 adopted in 2008 by the United Nations Human Rights Council recognizes “the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights”³⁴.

The search for truth through investigations and the punishment of those responsible is also mentioned in the commentary of Article 37 of the *Draft Articles on State Responsibility* adopted by the International Law Commission in 2001, which lists conducting adequate investigations and the criminal prosecution of individuals whose behaviour leads to internationally unlawful acts among the possible forms of satisfaction³⁵.

However, in 2006, the UN High Commissioner for Human Rights completed a detailed study on the matter, describing the “right to the truth” as an “inalienable and autonomous” mandatory right and not subject to limitations (albeit closely linked with other rights), characterized by both an individual and social dimension and directly connected to the obligation of States to protect human rights, to conduct adequate investigations and to guarantee effective remedies and restitutions³⁶.

On a regional level, the Parliamentary Assembly of the Council of Europe reaffirmed the right of families to know the fate of their loved ones in the recommendations concerning political prisoners who disappeared in Chile (adopted in 1979)³⁷ and national refugees, and those who disappeared in Cyprus (adopted in 1987)³⁸.

In 1983, the European Parliament also dedicated a resolution to the missing persons in Cyprus, confirming the inalienable right of all the families to know the fate of their loved ones who disappeared as a result of the governments’ or their agents’ actions³⁹.

The link between right to the truth, access to justice and fighting against the impunity of criminals also emerged in the *Guidelines on Eradicating Impunity for Serious Human Rights Violations* that the Committee of Ministers of the Council of Europe adopted in 2011⁴⁰, as well as in the *General Report 2003-2004* of the European Committee for the

³³ UN Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity*, Report prepared by D. Orentlicher, E/CN.4/2005/102/Add.1 (Feb. 8, 2005).

³⁴ Human Rights Council, Res. 9/11, *Right to the Truth*, A/HRC/9/L.12, para. 1 (2008). See also Human Rights Council, Res. 12/12, *Right to the Truth*, A/HRC/RES/12/12 (2009), para. 1.

³⁵ “[...] The appropriate form of satisfaction will depend on the circumstances and cannot be prescribed in advance. Many possibilities exist, including due inquiry into the causes of an accident resulting in harm or injury, a trust fund to manage compensation payments in the interests of the beneficiaries, disciplinary or penal action against the individuals whose conduct caused the internationally wrongful act [...]”, International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Article 37 (Commentary)* (2001), at 106.

³⁶ Office of the United Nations High Commissioner for Human Rights, *Study on the Right to the Truth*, cit..

³⁷ Council of Europe, Parliamentary Assembly, Rec. 868 (June 5, 1979), paras. 7-12.

³⁸ Council of Europe, Parliamentary Assembly, Rec. 1056 (ii) (May 5, 1987), para. 17.

³⁹ European Parliament, Resolution on Missing Persons in Cyprus (Jan. 11, 1983), para. (E), (H)(2).

⁴⁰ Committee of Ministers of the Council of Europe, *Eradicating Impunity for Serious Human Rights Violations*, Guideline VII (March 30, 2011).

Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)⁴¹ and in the European Council Framework Decision on the standing of victims in criminal proceedings adopted in 2001⁴².

The right to the truth and to memory (*el derecho a la verdad y a la memoria*) was also debated by Mercosur member States in the 2005 summit within the context of affirming the high priority attributed to the protection and promotion of fundamental rights and freedoms⁴³.

With regard to binding international instruments, the right to the truth is not expressly covered by the European Convention on Human Rights nor the Pact of San José. It was first recognized in the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (entered into force in 2010) that clarified the content of the right “to know the truth”⁴⁴. The notion of “victim” in the 2006 Convention refers to both a disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance. Under Article 24, the right to the truth concerns the right to know: i) the circumstances of the enforced disappearance, ii) the progress and results of the investigations, and iii) the fate of the disappeared person. Moreover, it entails the corresponding obligation of State parties to adopt “appropriate measures in this regard”. The cited WGEID *General Comment* expands the content of the right to the truth and includes the right to know the identity of those responsible and, in the case of the disappeared person being found dead, the right of the family to receive the remains, clearly and indisputably identified including through DNA testing, and to dispose of them according to their tradition, religion or culture⁴⁵.

3.- Gross Violations of Human Rights and the “Right to the Truth” in the European Court of Human Rights Case-Law

A. *The Right to the Truth in the ECtHR Jurisprudence before the El-Masri Case*

Prior to the *El-Masri* case, the ECtHR did not directly address the issue of the right to the truth, preferring to implicitly surmise it from the right to life, the prohibition of torture and the right to effective remedy expressly enshrined in the ECHR. This approach characterized the 1998 *Kurt v. Turkey* case⁴⁶ (concerning the alleged disappearance of a detainee), the 2001 *Cyprus v. Turkey*⁴⁷ and, more recently, the 2009 *Varnava and Others v. Turkey*⁴⁸ cases (both concerning the violations of human rights of missing Greek Cypriots and their relatives since the 1974 Turkish invasion of

⁴¹ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *14th General Report on the CPT's Activities, covering the period of 1 August 2003 to 31 July 2004*, para. 36 (Sept. 21, 2004).

⁴² European Council, *Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings*, 2001/220/JHA, Article 4 (2001), para. 2.

⁴³ MERCOSUR, *Comunicado Conjunto de los Presidentes de los Estados Partes del Mercosur y de los Estados Asociados* (June 20, 2005).

⁴⁴ T. Scovazzi, G. Citroni, *The Struggle against Enforced Disappearance and the 2007 United Nations Convention*, Leiden/Boston 2007.

⁴⁵ Working Group on Enforced or Involuntary Disappearances, *General Comment on the Right to the Truth in Relation to Enforced Disappearances* cit., para. 6.

⁴⁶ ECtHR, Case of Kurt, cit.

⁴⁷ ECtHR, Case of Cyprus v. Turkey, Application No. 25781/94, Judgment (May 10, 2001).

⁴⁸ ECtHR, Case of Varnava and Others v. Turkey, Applications Nos. 16064/90; 16065/90; 16066/90; 16068/90; 16069/90; 16070/90; 16071/90; 16072/90; 16073/90, Judgment (Sept. 18, 2009).

Cyprus) where the Court ascribed the absence of effective investigations of the fate of the disappeared persons to a violation of the procedural obligation to protect the right to life enshrined in Article 2 of the ECHR that imposes “a continuing obligation” to give account of the fate of the victims of enforced disappearances.

The pronouncement in the *Cyprus v. Turkey* case also linked the absence of effective investigations to forms of inhuman treatment suffered by the victims’ families. In the Court’s view: “The silence of the authorities of the respondent State in the face of the real concerns of the relatives of the missing persons attains a level of severity which can only be categorised as inhuman treatment within the meaning of Article 3”⁴⁹.

According to the ECtHR, in cases of serious violations of human rights (i.e., torture), the notion of “effective remedy” under Article 13 of the ECHR imposes, in addition to compensation, the implicit obligation to proceed to a “prompt and impartial investigation”⁵⁰ capable of leading to the identification and punishment of those responsible and the applicant’s access to such investigation proceedings⁵¹.

Indeed, still under debate is whether the names of the perpetrators of violations of human rights should be disclosed in exercising the right to know the truth⁵² and thus whether the right to learn the progress and results of the investigation can be considered absolute. When ascertaining the facts is left to non- or quasi-judicial organs (i.e., Truth Commission), this aspect of the right to the truth runs the risk of conflicting with the right to a fair trial (and particularly with the presumption of innocence) scarcely guaranteed in such contexts. If, instead, the right to the truth is established within the criminal procedure framework or after determining criminal responsibility by a court, no conflict with the principles of fair trial arises⁵³.

At times, political considerations can limit the right to know the truth of the circumstances of the violations. Indeed, State practice indicates that in some cases, the choice to conceal parts of the truth has been determined by the need to accelerate the reconciliation process. However, the ECtHR has excluded that a “politically sensitive” approach would condition the respect of human rights, clarifying “[t]hat can have no

⁴⁹ ECtHR, *Case of Cyprus v. Turkey* cit., para. 157. The Human Rights Chamber for Bosnia and Herzegovina also applied Article 3 of the ECHR to the suffering caused by the government's failure to provide information to the families of the missing people (Human Rights Chamber for Bosnia and Herzegovina, *Srebrenica Cases*, Case No. CH/01/8365 *et al.*, Decision on Admissibility and Merits (Mar. 7, 2003)). In a similar approach, see the African Commission on Human and People’s Rights: “[H]olding an individual without permitting him or her to have any contact with his or her family, and refusing to inform the family if and where the individual is being held, is inhuman treatment of both the detainee and the family concerned”, African Commission on Human and People’s Rights, *Amnesty International v. Sudan*, Communications No. 48/90, 50/91, 52/91, 89/93 (1999), para. 54. See also the rulings of the UN Human Rights Committee in the cases of *Sarma v. Sri Lanka* (July 16, 2003), para. 9.5 and *Lyashkevich v. Belarus* (Apr. 3, 2003), para. 9.2.

⁵⁰ ECtHR, *Case of Aksoy v. Turkey*, Application Nos. 100/1995/606/694, Judgment (Dec. 18, 1996), para. 98.

⁵¹ ECtHR, *Case of El-Masri* cit., para. 98. See also the African Commission on Human and People’s Rights, *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, DOC/OS (XXX) 247, Principle C (b)(3), (d): “The right to an effective remedy includes: [...] access to the factual information concerning the violations. [...] The granting of amnesty to absolve perpetrators of human rights violations from accountability violates the right of victims to an effective remedy”.

⁵² P. B. Hayner, *Unspeakable Truths. Confronting State Terror and Atrocity*, New York 2001, 139ss.

⁵³ Office of the United Nations High Commissioner for Human Rights, *Study on the Right to the Truth* cit., para. 39.

bearing on the application of the provisions of the Convention”⁵⁴. Rather, it stated that in cases of persons found wounded, dead or who have disappeared in areas under the control of the respondent State, the burden of proof may shift to the national authorities that are obliged to disclose the documents needed to allow the Court to ascertain the facts or otherwise provide satisfactory and convincing explanations⁵⁵, without being able to oppose interests of national security to access information. Interpreting the concept of national security from a democratic perspective, the ECtHR excluded that this could legitimize the secrecy of criminal State activities such as the torture or the enforced disappearance of persons. The Court analysed this latter issue in the context of “lustration” proceedings launched in Eastern Europe as a central element of transition after the fall of communist regimes. In particular, it excluded that secrecy of serious violations of human rights committed by State agencies during an authoritarian regime is an indispensable condition for the national security of the “new” democratic order based on the rule of law⁵⁶.

In two more recent cases of “historical sensitivity”, the ECtHR highlighted the individual and collective “intent” of the right to the truth.

In the *Association “21 December 1989” v. Romania* case, the Court dealt with the absence of investigations of the murders perpetrated by State agents during the 1989 Romanian revolution, condemned by world politics as “revolting and offensive at the address of the international public consciousness”⁵⁷. In this case, the ECtHR recognized the right of victims and their families to ascertain the truth on the circumstances of events causing the widespread violation of human rights⁵⁸. Such right applies not only in cases of massive and systematic abuses but also in singular cases of sufficient gravity⁵⁹. The Court also stressed “[the] importance for Romanian Society” to resolve these cases

⁵⁴ ECtHR, Case of Varnava and Others cit., para. 193.

⁵⁵ *Id.*, para. 184.

⁵⁶ ECtHR, Case of Turek v. Slovakia, Application No. 57986/00, Judgment (Feb. 14, 2006), para. 115: “[I]n proceedings related to the operations of state security agencies, there may be legitimate grounds to limit access to certain documents and other materials. However, in respect of lustration proceedings, this consideration loses much of its validity. In the first place, lustration proceedings are, by their very nature, oriented towards the establishment of facts dating back to the communist era and are not directly linked to the current functions and operations of the security services. Thus, unless the contrary is shown on the facts of a specific case, it cannot be assumed that there remains a continuing and actual public interest in imposing limitations on access to materials classified as confidential under former regimes. Secondly, lustration proceedings inevitably depend on the examination of documents relating to the operations of the former communist security agencies. If the party to whom the classified materials relate is denied access to all or most of the materials in question, his or her possibilities to contradict the security agency’s version of the facts would be severely curtailed. Finally, under the relevant laws, it is typically the security agency itself that has the power to decide what materials should remain classified and for how long. Since, it is the legality of the agency’s actions which is in question in lustration proceedings, the existence of this power is not consistent with the fairness of the proceedings, including the principle of equality of arms. Thus, if a State is to adopt lustration measures, it must ensure that the persons affected hereby enjoy all procedural guarantees under the Convention in respect of any proceedings relating to the application of such measures”.

⁵⁷ See e.g., the Statement of the Senator of Colorado William Armstrong, as mentioned in Duțu (2012: 142).

⁵⁸ ECtHR, Case of Association “21 December 1989” v. Romania, Application No. 33810/07, Judgment (May 24, 2011), para. 106.

⁵⁹ *Amicus Curiae* Submission to the IACtHR from The Open Society Justice Initiative, *La Asociación Pro-Derechos Humanos* and *La Comisión Mexicana De Defensa y Promoción de los Derechos Humanos*, A.C., in the Case of Gudiel Álvarez y Otros (“Diario Militar”) v. Guatemala (May 10, 2012), para. 14.

and discover past abuses, ascribing the “right of numerous victims to know what happened” to the right to an effective investigation and the right to a remedy⁶⁰.

Similarly, in the *Janowiec v. Russia* case, the Strasbourg Court addressed the matter of the truth in a series of mass executions of Polish prisoners of war committed in Katyn Forest in the 40s and affecting “the conscience of the entire civilized world”⁶¹. Ruling on the “Katyn massacre”, the ECtHR examined the absence of adequate investigations and the Russian government’s refusal to provide information on the murders perpetrated by the secret police within the framework of inhuman and degrading treatment prohibited under Article 3 of the ECHR. In the judgment of April 2012, the Court recognized a “double trauma” to the applicants: the loss of their loved ones and the historical distortion imposed by the Soviet and Polish communist authorities over 50 years and thus also after the respondent State’s ratification to the Convention⁶². At the same time, the ECtHR also reaffirmed the unconditional right of judicial organs to examine the information needed to ascertain the truth on alleged violations of human rights and considered the Russian government’s refusal to provide the required documents - specifically, the 2004 decision to archive the case - contrary to the obligation to cooperate enshrined in ECHR Article 38. As the ECtHR has absolute discretion in determining which documents are required to examine the case submitted to it, the Court did not accept the Russian authorities’ evaluation of the irrelevance of the documents as evidence⁶³ nor the justifications linked to the respondent State’s national security interests⁶⁴.

ECtHR jurisprudence has also examined the “right to seek historical truth” within the “cultural rights” framework as a component of the right to freedom of expression enshrined in ECHR Article 10⁶⁵. The Court specifically stated that every country must ensure the open and objective debate of its own history⁶⁶, excluding that the denial and the revisionism of mass crimes that outraged the conscience of mankind and established historical facts (i.e., the Holocaust) fall within the guarantees of ECHR Article 10⁶⁷ and,

⁶⁰ ECtHR, Case of Association “21 December 1989”, cit., paras. 143, 194.

⁶¹ <https://archive.org/stream/TheJournalOfHistoricalReviewVolume01Number1/TheJournalOfHistoricalReviewVolume01Number11980_djvu.txt>.

⁶² ECtHR, Case of *Janowiec and Others v. Russia*, Applications Nos. 55508/07, 29520/09, Judgment (Apr. 16, 2012), para. 156.

⁶³ *Id.*, para. 100: “It is a fundamental requirement that the requested material must be submitted in its entirety, if the Court so requested, and any missing elements must be properly accounted for”.

⁶⁴ *Id.*, para. 109: “The Court is not convinced that a public and transparent investigation into the crimes of the previous totalitarian regime could have compromised the national security interests of the contemporary democratic Russian Federation, especially taking into account that the responsibility of the Soviet authorities for that crime has been acknowledged at the highest political level [...]”. See T. Scovazzi, *Considerazioni in tema di segreto di Stato e gravi violazioni dei diritti umani*, in G. Venturini, S. Bariatti (ed.), *Diritti individuali e giustizia internazionale - Liber Fausto Pocar*, Milano 2009, 885ss., 893.

⁶⁵ Research Division, Report, Cultural Rights in the Case-Law of the European Court of Human Rights (Jan. 2011), paras. 41-43, available online at <http://www.echr.coe.int/Documents/Research_report_cultural_rights_ENG.pdf>.

⁶⁶ ECtHR, Case of *Monnat v. Switzerland*, Application No. 73604/01, Judgment (Dec. 21, 2006), para. 64.

⁶⁷ ECtHR, Case of *Lehideux and Isorni v. France*, Application No. 24662/94, Judgment (Sept. 23, 1998), para. 51; see also ECtHR, Case of *Garaudy v. France*, Application No. 65831/01, Decision (June 24, 2003), at 23: “There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are completely different, the real purpose being to

finally, stressing that access to original documentary sources for legitimate historical research is an essential element of exercising the right to freedom of expression⁶⁸.

B. The ECtHR's Crucial Breakthrough in the Recognition of the Right to the Truth since the El-Masri Case

As mentioned, the *El-Masri* judgment delivered by the ECtHR in 2012 has been hailed as a landmark ruling in cases involving both secret prisons and operations on European soil and the search for the truth. The *El-Masri* rendition also kindled a heated debate on the United States' violations of the international prohibition against subjecting a person to treatments "that shock the conscience of any nation governed by the rule of law"⁶⁹.

As regards the facts of the case, on his way to Skopje (Macedonia) in December 2003, Khaled El-Masri was stopped at the Serbian-Macedonian border due to some doubts on the validity of the German passport he was recently issued. Suspected by Macedonian police of involvement in terrorist activities, El-Masri was held in isolation in a hotel where he was interrogated, beaten, tortured and deprived of the possibility of accessing a judge, contacting a lawyer or communicating with his family. After about a month, he was handed over to CIA agents and transferred (extra-judicially) to Afghanistan into a facility north of Kabul known as the "Salt Pit" where he continued to be the victim of inhuman and degrading treatment for four months. The interrogations, in addition to being poorly understood by Khaled El-Masri, were constantly accompanied by threats, insults and abuse. His repeated requests to meet with a representative of the German government were ignored. On returning to Germany in 2004, El-Masri launched a civil case in the US in 2006, which the local courts - invoking the State secrets privilege - did not pursue. No less favourable were the implications of the criminal and civil complaints presented in Macedonia in 2006 and 2009 that were considered unfounded. In 2008, El-Masri submitted the case to the Inter-American Commission on Human Rights, but the United States, not party to the 1969 American Convention, refused to cooperate and blocked the procedural path⁷⁰.

Turning to the European Court of Human Rights in 2009, El-Masri was finally able to obtain justice from the Strasbourg judges. Although the application referred to events that had occurred 5 years previously, the Court, also due to the "sensitivity of the matter"⁷¹, rejected the respondent State's objection that the application was filed out of time⁷².

rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Their proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention".

⁶⁸ ECtHR, Case of *Kenedi v. Hungary*, Application No. 31475/05, Judgment (May 26, 2009), para. 43.

⁶⁹ <<http://www.theguardian.com/law/2010/jun/15/elmasri-european-court-human-rights>>.

⁷⁰ IACoMHR, *El-Masri v. United States*, Petition No. 419-08 (Apr. 9, 2008).

⁷¹ ECtHR, Case of *El-Masri* cit., para. 142.

⁷² *Id.*, paras. 135-136: "The object of the six-month time-limit under Article 35 § 1 is to promote legal certainty, by ensuring that cases raising issues under the Convention are dealt with in a reasonable time and that past decisions are not continually open to challenge. [...] Where an applicant avails himself of an apparently existing remedy and only subsequently becomes aware of circumstances which render the remedy ineffective, it may be appropriate for the purposes of Article 35 § 1 to take the start of the six-

As to the alleged violations, the Grand Chamber considered the applicant's allegations of abuses as proven beyond any reasonable doubt⁷³, deeming the State of Macedonia responsible for violating ECHR Articles 3 and 5 (on both a substantial and procedural level), Articles 8 and 13, and sentencing it to pay 60,000 euro for the non-pecuniary damages suffered by El-Masri⁷⁴.

Regarding the “substantial” violation of Article 3 of the Convention, the Court concluded that the manner in which the applicant was placed in the custody of US authorities constituted a case of extraordinary rendition, namely, the extrajudicial transfer of a person from the jurisdiction of a State to that of another for purposes of detention and interrogation outside the normal legal system where there is a real risk of torture or cruel, inhuman or degrading treatment⁷⁵.

According to the Grand Chamber, at the material time, the Macedonian authorities: 1) knew or should have known that there was a real risk that the applicant would be subjected to inhuman and degrading treatment⁷⁶, 2) did not ask the United States authorities for any guarantees to ensure that the applicant was not ill-treated⁷⁷, and 3) in transferring El-Masri to the custody of US authorities, knowingly exposed him to the real risk of ill-treatment and to detention in violation of “one of the most fundamental values of democratic societies”⁷⁸.

On the procedural level, the Court reiterated that Article 3 of the ECHR, in conjunction with the general obligation of States to protect human rights in accordance with Article 1 of the 1950 European Convention, implicitly postulates conducting effective investigations leading to the identification and punishment of those responsible.

Knowledge of truth has a specific preventive role in constructing and strengthening a democratic State: the response of national authorities to the serious violations of human rights through conducting proper investigations is essential “in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts”⁷⁹. The summary investigation conducted by the Macedonian authorities prevented ascertaining the truth, and according to the ECtHR, also violated Article 3 of the Convention on a procedural level⁸⁰. In particular, the lack of adequate investigations on the incident had a significant effect on the right to

month period from the date when the applicant first became or ought to have become aware of those circumstances”.

⁷³ *Id.*, paras. 167, 199.

⁷⁴ The Court instead excluded violation of Article 10 (right to freedom of expression) invoked separately, ascribing the matter of the right to be informed of the circumstances of the applicant's proclaimed violation to those previously examined under Article 3 of the ECHR (*see* ECtHR, Case of El-Masri *cit.*, paras. 264-265).

⁷⁵ *Id.*, para. 221; ECtHR, Case of Babar Ahmad and Others v. the United Kingdom, Applications Nos. 24027/07, 11949/08 and 36742/08, Decision (July 6, 2010), para. 113. On the practice of extraordinary renditions, *see* D. Weissbrodt, A. Bergquist, *Extraordinary Rendition: A Human Rights Analysis*, *Harvard Human Rights Journal* 19 (2006), 123ss.

⁷⁶ ECtHR, Case of El-Masri *cit.*, para. 218.

⁷⁷ *Id.*, para. 219.

⁷⁸ *Id.*, para. 195.

⁷⁹ *Id.*, para. 192.

⁸⁰ *Id.*: “The inadequate investigation in the present case deprived the applicant of being informed of what had happened, including of getting an accurate account of the suffering he had allegedly endured and the role of those responsible for his alleged ordeal”.

the truth, preventing the applicant, other victims of similar conduct and the entire collectivity from being informed on what had happened.

“[T]he Court also wishes to address another aspect of the inadequate character of the investigation in the present case, namely its impact on the right to the truth regarding the relevant circumstances of the case. In this connection it underlines the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened [...]. The inadequate investigation in the present case deprived the applicant of being informed of what had happened, including of getting an accurate account of the suffering he had allegedly endured and the role of those responsible for his alleged ordeal”⁸¹.

Applying the same line of reasoning to examining the violation of the right to freedom and security, the Court found that the respondent State did not conduct a proper investigation into the applicant’s allegations of arbitrary detention⁸², thus infringing Article 5 of the Convention on a procedural level⁸³.

In substantive terms, the Court, having highlighted the importance of Article 5 of the ECHR “for securing the right of individuals in a democracy”⁸⁴, considered that the seizure and detention of the applicant constituted a case of “enforced disappearance” as defined by international law⁸⁵, characterized by uncertainty and lack of information on the fate of the person concerned, and that the Macedonian authorities should be held responsible for the violation of the rights recognized to the applicant under Article 5 of the ECHR⁸⁶ during “the entire period of his captivity” and also for the abuse suffered outside the Macedonian territory⁸⁷.

In the Court’s opinion, the acts and omissions imputed to the respondent State also resulted in unlawful interference in the applicant’s private and family life, thus also holding the State liable under Article 8 of the Convention⁸⁸.

With regard to the violation of the right to an effective remedy, the scope of the obligation under ECHR Article 13 varies depending on the nature of the violations claimed by the applicant. In the case of inhuman and degrading treatment, for example, the notion of “effective remedy” entails, in addition to payment of compensation where appropriate, conducting a thorough and effective investigation that can lead to the identification and punishment of those responsible and the applicant’s access to the

⁸¹ *Id.*, paras. 191-192.

⁸² *Id.*, para. 242.

⁸³ *Id.*, para. 243.

⁸⁴ *Id.*, para. 230.

⁸⁵ *Id.*, paras. 95, 100.

⁸⁶ *Id.*, para. 233.

⁸⁷ *Id.*, para. 240: “The applicant’s “enforced disappearance”, although temporary, was characterised by an ongoing situation of uncertainty and unaccountability, which extended through the entire period of his captivity [...]. In this connection the Court would point out that in the case of a series of wrongful acts or omissions, the breach extends over the entire period starting with the first of the acts and continuing for as long as the acts or omissions are repeated and remain at variance with the international obligation concerned [...]”.

⁸⁸ *Id.*, para. 249: “Having regard to its conclusions concerning the respondent State’s responsibility under Articles 3 and 5 of the Convention, the Court considers that the State’s actions and omissions likewise engaged its responsibility under Article 8 of the Convention. In view of the established evidence, the Court considers that the interference with the applicant’s right to respect for his private and family life was not “in accordance with the law””.

investigation procedure⁸⁹. However, the elements aimed at determining the effectiveness of the remedies under ECHR Article 13 are broader than the obligation to conduct an effective investigation under Articles 3 and 5 of the Convention⁹⁰. Given the irreversible nature of the harm that could occur if the risk of ill-treatment reported were confirmed, the notion of effective remedy under Article 13 requires the impartial verification of the facts alleged by the applicant without regard to the cause of State policy (i.e., the behaviour of the person concerned or any threats to national security)⁹¹. The Macedonian judicial authority's superficial approach to the applicant's allegations of ill-treatment and illegal deprivation of freedom thus deprived him of the opportunity to pursue remedies that could lead to the identification and punishment of those responsible and compensation as set forth in ECHR Article 13⁹².

In the 2014 *Al Nashiri and Husayn (Abu Zubaydah)* cases, the ECtHR confirmed the findings of the *El-Masri* judgment, deeming, *inter alia*, that on account of its "acquiescence and connivance" in the "High-Value Detainees" (HVD) Programme, Poland must be considered responsible for violating Article 3 of the Convention in its substantive aspect⁹³. In the Court's view:

"the treatment to which the applicant was subjected *by the CIA* during his detention in Poland at the relevant time amounted to torture within the meaning of Article 3 of the Convention"⁹⁴.

Referring to the *El-Masri* case, the ECtHR also stated that failing to conduct an effective investigation into the circumstances surrounding the applicants' ill-treatment, detention and transfer from the Polish territory, Poland violated ECtHR Article 3 in its procedural aspect. As the ECtHR explained in the *Husayn (Abu Zubaydah)* case:

"where allegations of serious human rights violations are involved in the investigation, the right to the truth regarding the relevant circumstances of the case does not belong solely to the victim of the crime and his or her family but also to other victims of similar violations and the general public, who have the right to know what has happened. An adequate response by the authorities in investigating allegations of serious human rights violations may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of impunity, collusion in or tolerance of unlawful acts"⁹⁵.

4.- The Reconstruction and Evolution of the Right to the Truth in Inter-American Court Jurisprudence

⁸⁹ *Id.*, para. 255.

⁹⁰ *Id.*, para. 256.

⁹¹ *Id.*, para. 257.

⁹² *Id.*, paras. 258, 262: "The Court has established that the applicant brought the substance of his grievances under Articles 3, 5 and 8 of the Convention to the attention of the public prosecutor. Those complaints were never the subject of any serious investigation, being discounted in favour of a hastily reached explanation that he had never been subjected to any of the actions complained of. [...] Accordingly, the Court finds that the applicant was denied the right to an effective remedy under Article 13, taken in conjunction with Articles 3, 5 and 8 of the Convention".

⁹³ ECtHR, Case of *Al Nashiri* cit., para. 516; ECtHR, Case of *Husayn (Abu Zubaydah)* cit., para. 512.

⁹⁴ ECtHR, Case of *Al Nashiri* cit., para. 517; ECtHR, Case of *Husayn (Abu Zubaydah)* cit., para. 511.

⁹⁵ *Id.*, para. 488.

A. The Right to the Truth and the Obligation to Protect Human Rights in Inter-American Case-Law Before the Gomes Lund Ruling

Although the right to the truth is not expressly enshrined in the ECHR or in the Pact of San José, part of the doctrine considers that this can be implicitly deduced from the conventional obligation to protect human rights⁹⁶.

Such orientation is supported by the Inter-American Commission and the Inter-American Court of Human Rights, ascribing to the general obligation to respect human rights foreseen in Article 1 (1) of the 1969 Convention the duty of State parties to meet the legitimate expectations of the next of kin of victims to know their fate and counteract the impunity of those responsible for the violations⁹⁷.

However, while the Inter-American Commission, since the first pronouncements, examined the right to the truth as an autonomous right under the 1969 Convention⁹⁸, the Inter-American Court did not immediately embrace this orientation. In its jurisprudence, “the right to the truth” is often linked to the rights to a fair trial or access to justice, at times “subsumed” in the guarantees established in Articles 8 and 25 of Pact of San José⁹⁹, and at others, as *conditio sine qua non* to make effective the right to a fair trial and judicial remedies. In the dissenting opinion expressed in the *Bámaca Velásquez* case, Judge Cançado Trindade, for example, remarked on the “prevalence” of the right to the truth, intended as the “starting-point for the liberation as well as the protection of the human being”¹⁰⁰.

At the same time, according to the Court of San José, the need to guarantee a fair trial prevails over national security interests. The State secrets privilege can therefore not be invoked to hinder access to information deemed necessary to ascertain the truth and the

⁹⁶ Pasqualucci, *The Whole* cit. 330.

⁹⁷ In IACtHR’s words: “The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation” (IACtHR, Case of Velásquez-Rodríguez *cit.*, para. 174). The Commission stated that, “[t]he interpretation of the generic obligations established in Article 1.1 made by the Court [...] allows for the conclusion that the “right to truth” is a basic and indispensable consequence for every State Party”, IAComHR, Alfonso René Chanfeau Oraycem (Chile), Report N° 25/98, (April 7, 1998), para. 87.

⁹⁸ IAComHR, Annual Reports 1985-86, at 205; Manuel Bolanos v. Ecuador, Report (Sept. 12 1995); and *Bámaca Velásquez v. Guatemala*, Report (Mar. 7, 1996).

⁹⁹ IACtHR, Case of *Bámaca-Velásquez*, *cit.*, para. 201. *See also* L. Burgorgue-Larsen, A. Ubeda de Torres, *The Inter-American Court of Human Rights: Case Law and Commentary*, New York (2011).

¹⁰⁰ IACtHR, Case of *Bámaca-Velásquez*, *cit.*, Separate Opinion of Judge A.A. Cançado Trindade, paras. 29, 32: “The search for truth constitutes the starting-point for the liberation as well as the protection of the human being; without truth (however unbearable it might come to be) one cannot be freed from the torment of uncertainty, and it is not possible either to exercise the protected rights. [...] The right to truth indeed requires the investigation by the State of the wrongful facts, and its prevalence constitutes, moreover, as already observed, the prerequisite for the effective access itself to justice - at national and international levels - on the part of the relatives of the disappeared person (judicial guarantees and protection under Articles 8 and 25 of the American Convention). As the State is under the duty to cease the violations of human rights, the prevalence of the right to truth is essential to the struggle against impunity, and is ineluctably linked to the very realization of justice, and to the guarantee of non-repetition of those violations”.

good administration of justice: “Th[e] refusal [...] to supply all the documents requested by the courts, resorting to official secret, constitutes an obstruction of justice”¹⁰¹.

The right to know “the full, complete and public truth” on past events, their circumstances and those responsible also often emerges in the Inter-American jurisprudence as “part of the right” of the next of kin of victims and society as a whole “to reparation for human rights violations, with respect to satisfaction and guarantees of non-repetition”¹⁰². The analysis of international practice confirms that in cases of serious violations of fundamental rights, pecuniary compensation is not enough to repair the injuries suffered¹⁰³. In such contexts, the right to reparation of victims and their next of kin can only be fulfilled by putting an end to the situation of uncertainty and lack of knowledge: in the words of the Inter-American Commission “by completely and openly revealing the truth”¹⁰⁴.

Including the right to the truth in the notion of reparation does not however circumscribe its entitlement to the victims and their next of kin, nor does it circumvent its collective dimension and the interests of civil society as a whole, as holders of legitimate expectations to access information on serious violations of human rights¹⁰⁵. In this perspective, “access to truth” is closely linked to the right to receive and provide information under Article 13 of the Pact of San José. This approach is also confirmed by the Inter-American Commission in defining the right to know the truth as “a collective right that ensures society access to information that is essential for the workings of democratic systems”¹⁰⁶.

The right of society to know its past, beyond representing a form of reparation and an instrument to shed light on the facts that have occurred, also serves the purpose of

¹⁰¹ IACtHR, Case of Myrna Mack Chang v. Guatemala, Judgment (Nov. 25, 2003), para. 182. *See also* para. 180: “[I]n cases of human rights violations, the State authorities cannot resort to mechanisms such as official secrets or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or proceeding”. *See also id.*, para. 181: “there is a possible conflict of interests between the need to protect official secret, on the one hand, and the obligations of the State to protect individual persons from the illegal acts committed by their public agents and to investigate, try, and punish those responsible for said acts, on the other hand. [...] To solve this tension, it is necessary to take into account the higher interests of justice and therefore the right to the truth”.

¹⁰² IAComHR, Monsignor Oscar Arnulfo Romero y Galdámez (El Salvador), Case 11.481 (Apr. 13, 2000), para. 357.

¹⁰³ UN Human Rights Commission, *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, Subcommission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1993/8 (July 2, 1993), para. 131; UN Commission on Human Rights, *Question of Impunity of Perpetrators of Human Rights Violations (Civil and Political Rights)* cit.

¹⁰⁴ IAComHR, Alfonso René Chanfeau Oraycem (Chile) cit., para. 93.

¹⁰⁵ IACtHR, Case of 19 Tradesmen v. Colombia, Judgment (July 5, 2004), para. 261; Case of Carpio Nicolle *et al.* v. Guatemala, Judgment (Nov. 22, 2004), para. 128; Case of Myrna Mack Chang v. Guatemala cit., para. 274.

¹⁰⁶ IAComHR, Lucio Parada Cea, Héctor Joaquín Miranda Marroquín, Fausto García Funes, Andrés Hernández Carpio, Jose Catalino Meléndez y Carlos Antonio Martínez (El Salvador), Case 10.480, Report No. 1/99 (Jan. 27, 1999) para. 151. The Commission added: “[I]t is also a private right for relatives of the victims, which affords a form of compensation, in particular, in cases where amnesty laws are adopted. Article 13 of the American Convention protects the right of access to information” (IAComHR, Ignacio Ellacuría, S.J.; Segundo Montes, S.J.; Armando López, S.J.; Ignacio Martín-Baró, S.J.; Joaquín López Y López, S.J.; Juan Ramón Moreno, S.J.; Julia Elba Ramos; and Celina Mariceth Ramos (El Salvador), Report No. 136/99, Case 10.488 (Dec. 22, 1999), para. 224. *See also* K. Dykmann, *Impunity* cit., 52.

preventing future violations¹⁰⁷: knowledge of atrocities committed is a necessary condition to avoid the recurrence of abuses perpetrated by promoting responsibility and transparency in public governance and preventing corruption and authoritarianism¹⁰⁸. In this regard, the right to the truth is a corollary of the “duty to remember” that the State must respect in order to avert historical distortions and preserve the historical-cultural “heritage” of a people. The Inter-American Court confirmed this orientation, ascribing to the scope of Article 1(1) of the 1969 Convention the obligation to avoid future violations: “Preventive measures and those against recidivism begin by revealing and recognizing the atrocities of the past [...]” The State must therefore preserve the collective memory of the atrocities committed¹⁰⁹, publicly disclose the results of investigations¹¹⁰, guard the information, protect the archives and allow access to these¹¹¹.

B. The Historical Truth and the Right to Seek and Receive Information: The IACtHR’s Turning Point in the Gomes Lund Case

The *Gomes Lund* case originated from the appeal submitted in 1995 to the Human Rights Commission by the *Centre for Justice and International Law* (CEJIL), Human Rights Watch/Americas, in the name of those who disappeared in the Araguaia Guerrilla War (*guerrilha do Araguaia*) and their relatives, and Brazil’s alleged responsibility for the arbitrary detention, torture and enforced disappearance of 70 people (members of the Brazilian Communist Party and peasants of the region) as a result of operations conducted by the national army to eradicate guerrillas between 1972 and 1975.

Specifically, the applicants claimed the impunity of those responsible for said acts due to the lack of investigation, prosecution and punishment, and the inefficiency of the measures adopted to respect, protect and guarantee “the right to the truth and information”¹¹². In 2009, the Inter-American Commission decided to submit the case to the Court of San José, considering it an important opportunity to strengthen Inter-American jurisprudence on amnesty laws in relation to enforced disappearances and extrajudicial executions, and, consequently, to the State obligation “to provide society

¹⁰⁷ IAComHR, Monsignor Oscar Arnulfo Romero y Galdámez (El Salvador) cit., para. 148; *see also* IACtHR, Case of Ximenes-Lopes v. Brazil, Judgment (July 4, 2006), para. 245: “The knowledge of the truth in human rights violations [...] is an inalienable right and an important means of reparation for the victim and, if applicable, for their next of kin, and it constitutes a fundamental way of learning the truth that allows a society to develop its own methods of reproach and deterrence”.

¹⁰⁸ *Amicus Curiae* Submission to the IACtHR cit., para. 16.

¹⁰⁹ UN Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity* cit., principle 3, The Duty to Preserve Memory: “A people’s knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State’s duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments”.

¹¹⁰ IACtHR, Case of Bámaca Velásquez cit., paras. 77-78.

¹¹¹ Human Rights Council, *Annual Report of the United Nations High Commissioner Human Rights And Reports of the Office of the High Commissioner and the Secretary-General*, A/HRC/12/19 (Aug. 21, 2009) paras. 4-31; *see also* Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the Seminar on Experiences of Archives as a Means to Guarantee the Right to the Truth*, A/HRC/17/2 (Apr. 14, 2011).

¹¹² IACtHR, Case of Gomes Lund *et al.* cit., para. 14.

with the truth, investigate, prosecute, and punish serious human rights violation”¹¹³. Furthermore, the Commission stressed the historical value of the case as well as the Court’s opportunity to affirm the incompatibility of the laws on amnesty and those on the confidentiality of documents with the American Convention¹¹⁴.

Although the violations referred to events that occurred nearly twenty years before the appeal and Brazil had accepted the Court’s jurisdiction only for acts subsequent to 10 December 1998, the Court rejected the exceptions to its *ratione temporis* jurisdiction due to the permanent or continuous nature of the crime of enforced disappearance. According to the Court, the alleged violations relating to the rights to information, to truth and to justice persist even after the ratification of the American Convention and acceptance of its jurisdiction¹¹⁵.

The gravity of the crimes also entails the duty to investigate violations of the conventionally recognized rights: this is not an obligation “of means” but “of results”, requiring member States to take all necessary measures to seek the truth and remove the obstacles to conduct investigations “ex officio, without delay, and in a serious, impartial, and effective manner”¹¹⁶.

Provisions that permit amnesty, statutory limitations and immunity are therefore “an inadmissible affront to the juridical conscience of humanity”¹¹⁷ incompatible with the American Convention: they hinder the search for truth and the punishment of those responsible for gross violations of human rights (such as torture, summary, extrajudicial and arbitrary executions, and enforced disappearances). Such obstacles must therefore be removed by States, which must take the necessary measures to ensure that no one is deprived of the right to judicial protection and to effective remedy within the meaning of Articles 8 and 25 of the 1969 Convention¹¹⁸.

¹¹³ *Id.*, para. 1.

¹¹⁴ The Commission requested the Court to declare that the State is responsible for the violation of the rights established in Article 3 (right to juridical personality), Article 4 (right to life), Article 5 (right to human treatment [personal integrity]), Article 7 (right to personal liberty), Article 8 (right to a fair trial [judicial guarantees]), Article 13 (freedom of thought and expression) and Article 25 (right to judicial protection) of the American Convention on Human Rights, in relation to the obligations enshrined in Article 1(1) (obligation to respect rights) and Article 2 (domestic legal effects) of the same.

¹¹⁵ IACtHR, Case of Gomes Lund *et al.* cit., para. 17: “[T]he Court highlights [...] the continuous or permanent nature of the enforced disappearance [...] [that] commence with the deprivation of liberty of the person and the subsequent lack of information regarding the whereabouts, and continues until the whereabouts of the disappeared person are made known and the facts are ascertained. Therefore, the Court has jurisdiction to analyze the alleged enforced disappearances of the alleged victims as of Brazil’s recognition of the Court’s contentious jurisdiction”.

¹¹⁶ *Id.*, para. 108. *See also* paras. 137, 138: “[T]he prohibition of enforced disappearance of persons and its related obligation to investigate and punish those responsible have, for much time now, reached a nature of *jus cogens*. [...] This investigation must be carried out in all of the available legal venues and be aimed at determining the truth”.

¹¹⁷ IACtHR, Case of Barrios Altos v. Peru, Merits, Judgment, (Mar. 14, 2001), Concurring Opinion of Judge A.A. Cançado-Trindade, para. 26: “No State can be considered to rest above the Law, whose norms have as ultimate addressees the human beings. [...] It should be stated and restated firmly, whenever necessary that in the domain of the International Law of Human Rights, the so-called ‘laws’ of self-amnesty are not truly laws: they are nothing but an aberration, an inadmissible affront to the juridical conscience of humanity.”

¹¹⁸ IACtHR, Case of Gomes Lund *et al.* cit., para. 173: “In a case such as the present, once the American Convention has been ratified, it corresponds to the State to adopt all the measures to revoke the legal provisions that may contradict said treaty [...], such as those that prevent the investigation of serious

As for the legal basis of the “right to know the truth”, according to the Court, in the case of serious violations of human rights, the right to information enshrined in Article 13 of the American Convention limits the margin of State discretion in adopting exemptions or restrictions to the rights conventionally guaranteed and the obligation of public powers to act in good faith and diligently assure the effectiveness of this right¹¹⁹.

In particular, in the case of *jus cogens* crimes, such as enforced disappearances and extrajudicial executions, the national authorities cannot resort to mechanisms such as official secrecy, confidentiality of information, reasons of public interest or national security to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or pending procedures. The decision to classify information as secret or refusing to disclose it cannot be left to the exclusive evaluation of a State organ whose members are accused of committing the alleged violations nor does that organ have discretionary responsibility for the final decision on the existence of the required documentation¹²⁰.

The right to freedom of thought and expression codified in Article 13 of the American Convention thus encompasses, in addition to an individual dimension (the right of everyone to freely express their ideas), a “social” component, i.e., the collective right to access information¹²¹. Ensuring the full and effective exercise of this right, especially when the right to the truth about serious violations of human rights is at stake, requires that State legislation and procedures be governed by the principles of good faith and maximum disclosure, so that all information is presumed public, accessible and subject to a limited regime of exceptions. Similarly, the denial of information must be justified and founded, and the burden of proof is on the State to prove the impossibility of presenting the requested information¹²².

Pursuant to its jurisprudence, the Court also stressed that the continued denial of the truth on the fate of a missing person is a form of cruel, inhuman and degrading treatment for family members¹²³ and that determining the place of death allows the immediate family “to heal from the anguish and suffering caused by uncertainty of the location of their disappeared family member”¹²⁴. In this context, the right of the relatives of victims of serious violations of human rights to know the truth of their fate constitutes a measure of reparation and therefore an expectation “for the next of kin and society as a whole” that the State must satisfy¹²⁵.

More specifically, the right to know the truth creates a legitimate expectation for the victims and requires States to organize the government apparatus (and, in general, all the

human rights violations given that it leads to the defenselessness of victims and the perpetuation of impunity and prevent the next of kin from knowing the truth”.

¹¹⁹ *Id.*, para. 211.

¹²⁰ *Id.*, para. 202.

¹²¹ *Id.*, para. 197. See also IACtHR, Case of “The Last Temptation of Christ” (Olmedo Bustos *et al.*) v. Chile, Judgment (Feb. 5, 2001), para. 67.

¹²² IACtHR, Case of Gomes Lund *et al.* cit., para. 230.

¹²³ IACtHR, Case of Bámaca Velásquez cit., paras. 160, 165; similarly, see ECtHR, Case of Kurt cit., para. 131; and United Nations Human Rights Committee, Quinteros v. Uruguay Communication No. 107/198, Decision (July 21, 1983).

¹²⁴ IACtHR, Case of Gomes Lund *et al.* cit., para. 240.

¹²⁵ See, *inter alia*, IACtHR, Case of Velásquez-Rodríguez cit., para. 181; IACtHR, Case of Contreras *et al.* v. El Salvador, Merits, Reparations and Costs, Judgment (Aug. 31, 2011), para. 170; IACtHR, Case of Las Palmeras v. Colombia, Reparations and Costs, Judgment (Nov. 26, 2002).

structures through which public authority is exercised) to juridically ensure the free and full exercise of human rights¹²⁶.

5.- The Human Rights Courts' Insights on the Right to the Truth in a Comparative Perspective: The Procedural and Substantial Yardsticks to Honour the Conscience of Humanity

Over the last few decades, the right to the truth has increasingly come to the attention of international scholars and jurisprudence.

In the Juan Méndez reconstruction, the “right to the truth” is characterized as an “emerging principle” in international jurisprudence given that it has not been clearly and indisputably codified in an international treaty¹²⁷. The study conducted by the High Commissioner for Human Rights concluded that the main content of the right to the truth has become sufficiently delineated and includes the right to know the “full and complete” truth about the events that occurred, their specific circumstances, those who took part, the conditions in which the violations occurred and their causes. In cases of enforced disappearances and related abuses, the right to the truth also includes the special dimension of knowing the fate of the “direct” victim¹²⁸.

In the European and Inter-American Courts' case-law, the abuses examined in the context of the right to the truth emerge as a “combination” of different violations of conventionally protected rights¹²⁹. These are perceptible on both an individual and collective level, and often involve damage to the procedural and substantive aspects of the right to life, the right of the next of kin of victims to not suffer inhuman treatment due to prolonged pain caused by the lack of news about their loved ones, the right to freedom and security, and the social right to information¹³⁰.

Nevertheless, the nature and constitutive elements of the right to the truth have not been consistently interpreted by the two Human Rights Courts and certain aspects are in progressive evolution¹³¹. The ECtHR's “timid allusion”¹³² in the *El-Masri* case ascribing the right to the truth in the context of procedural violations of ECHR Article 3 would not seem to be in line with the more incisive and courageous pronouncements of Inter-American jurisprudence on the “autonomy” of this right with respect to those conventionally guaranteed and its collective dimension as an expression of the principle of democracy.

¹²⁶ IACtHR, Case of Velásquez-Rodríguez cit., para. 166.

¹²⁷ Méndez, *The Right* cit. 255.

¹²⁸ Office of the United Nations High Commissioner for Human Rights, *Study on the Right to the Truth* cit., para. 59.

¹²⁹ Pasqualucci, *The Whole* cit. 334.

¹³⁰ ECtHR, Case of Aslakhanova and Others v. Russia, Applications Nos. 2944/06 and 8300/07, 50184/07, 332/08, 42509/10, Judgment (Dec. 18, 2012) para. 64. ECtHR refers to the “constant” case-law of IACtHR; see A. A. Cañado Trindade, *Contemporary International Tribunals: Their Continuing Jurisprudential Cross-Fertilization Pertaining to Human Rights Protection*, in *The Global Community Yearbook of International Law and Jurisprudence* 13.I (2013) 158.

¹³¹ Y. Naqvi, *The Right to the Truth in International Law: Fact or Fiction?*, in *International Review of the Red Cross* 88.862 (2006) 245ss., 273: “The truth about the right to the truth is still a matter to be agreed upon”.

¹³² ECtHR, Case of El-Masri cit., Joint Concurring Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller, para. 10.

The Strasbourg judges themselves did not take unequivocal positions in ruling on the right to the truth. The majority's prudence in the *El-Masri* case was not supported, for example, by Judges Tulkens, Spielmann, Sicilianos and Keller, who would have preferred its more explicit admittance within the framework of ECHR Article 13 "which includes a right of access to relevant information about alleged violations, both for the persons concerned and for the general public".¹³³ According to the four Judges, the search for the truth is the objective purpose of the duty to investigate and the *raison d'être* of the requirements of adequate and effective investigations: transparency, diligence, independence, access to results, their dissemination and control over these. For society in general, the desire to search for the truth helps strengthen trust in institutions and the rule of law, breaking "the wall of silence and the cloak of secrecy" that impede people from "making any sense of what they have experienced and are the greatest obstacles to their recovery"¹³⁴. In this perspective, explicit recognition of the right to the truth in the context of ECHR Article 13, far from being superfluous or innovative, would have shed "renewed light on a well-established reality"¹³⁵.

The ECtHR's approach also gave rise to concerns for Judges Casadevall and López Guerra, who instead considered "redundant" a separate analysis on the existence of the right to the truth as "something different from, or additional to, the requisites already established in such matters by the previous case-law of the Court"¹³⁶. The (individual) right to the truth is thus equivalent to the right to an effective investigation guaranteed by the Court's jurisprudence in the case of alleged violations of the right to life and the prohibition of torture or inhuman or degrading treatment. According to Judges Casadevall and López Guerra, the victim (and not society) is entitled to the right to the truth: the adequate and effective investigation required of States in cases of mistreatment or other serious violations of human rights "amounts to finding out the truth of the matter, irrespective of the relevance or importance of the particular case for the general public"¹³⁷.

The *Polish* cases and subsequent case-law would seem to confirm - more explicitly and without any separate opinions on the point - positioning the right to truth within the sphere of "individual" guarantees and, in particular, under the procedural aspect of ECHR Article 3¹³⁸.

¹³³ *Id.*, para. 4.

¹³⁴ *Id.*, para. 6.

¹³⁵ *Id.*, para. 7.

¹³⁶ ECtHR, Case of *El-Masri* cit., Joint Concurring Opinion of Judges Casadevall and López Guerra.

¹³⁷ *Id.* According to some scholars, the positions articulated in the aforementioned *concurring opinions* signal the ECtHR's attempt to adopt an intermediate solution: while not succeeding in fully embracing the interpretation of the right to the truth under ECHR Article 13, it opens up the possibility that the duty to investigate violations of human rights under Article 3 of the ECHR may remedy the individual as well as the social damage. See F. Fabbrini, *The European Court of Human Rights, Extraordinary Renditions and the Right to the Truth: Ensuring Accountability for Gross Human Rights Violations Committed in the Fight Against Terrorism*, in *Human Rights Law Review* 14.1 (2013) 21.

¹³⁸ ECtHR, *Affaire Nasr and Ghali c. Italy*, Requête n. 44883/09, Arrêt (23 février 2016), para. 262: "La Cour rappelle que, lorsqu'un individu soutient de manière défendable avoir subi, aux mains de la police ou d'autres services comparables de l'État, ou en conséquence d'actes commis par des agents étrangers opérant avec l'acquiescence ou la connivence de l'État, un traitement contraire à l'article 3, cette disposition, combinée avec le devoir général imposé à l'État par l'article 1 de la Convention de [...] requiert, par implication, qu'il y ait une enquête officielle effective. Cette enquête doit pouvoir mener à

As for the previous decisions concerning the right to the truth, also in the more recent 2014 cases, the seriousness of the violations determined by the ECtHR restricts the discretion of the respondent State in evidentiary matters, excluding exceptions to the obligation to disclose information and reversing the burden of proof that rests on national authorities¹³⁹.

In addition, the 2014 ECtHR jurisprudence on the right to the truth is particularly remarkable in providing some innovative insights.

Indeed, the 2014 rulings link the right to the truth to the Court's judicial functions and thereby indicate the "general" interest in knowing what happened. Notably, "[t]he specificity of [ECtHR's] task [...] to ensure the observance by the Contracting States of their engagement to secure the fundamental rights enshrined in the Convention - conditions its approach to the issues of evidence and proof"¹⁴⁰. Thus, the fact that investigations on gross human rights abuses may involve national security does not give domestic authorities complete discretion in refusing to disclose evidentiary material "to the victim or the public" nor do the domestic regulations on the secrecy of the investigation constitute a legal barrier to discharging the States' obligation to furnish evidence. According to the ECtHR in the 2014 *Al Nashiri* and *Husayn (Abu Zubaydah)* cases, in failing to submit information in its possession, the respondent State obstructed the ECtHR in the "objective" establishment of the truth and hindered the Court's tasks under Article 38 of the Convention¹⁴¹.

Furthermore, the 2014 Polish findings on the right to know what happened in relation to universally condemned offences (torture, mistreatment, forced disappearances) also highlight - more explicitly than the *El-Masri* judgment - the expansion of the ECtHR's jurisdiction to third States. Notably, the European Court had to necessarily rule on the lawfulness of the conduct of the US (not party to the ECHR) as a prerequisite to deciding on Poland's responsibility¹⁴². The large scale and severity of the human rights violations, but also the suppression or secrecy of information of these practices that the ECtHR ascribed to the US would thus constitute the subject matter of a judgment made in the absence of this State's consent¹⁴³.

As for Inter-American jurisprudence, emerging much more clearly is the trend to interpret the right to the truth in its "social perspective" as an instrument for the

l'identification et, le cas échéant, à la punition des responsables et à l'établissement de la vérité. S'il n'en allait pas ainsi, nonobstant son importance fondamentale, l'interdiction légale générale de la torture et des peines et traitements inhumains ou dégradants serait inefficace en pratique, et il serait possible dans certains cas à des agents de l'État de fouler aux pieds, en jouissant d'une quasi-impunité, les droits des personnes soumises à leur contrôle". See also with regard to the search for the truth within the framework of Article 13 of ECHR, at para. 334: "[L]es requérants auraient dû être en mesure, aux fins de l'article 13, d'exercer des recours concrets et effectifs aptes à mener à l'identification et à la punition des responsables, à l'établissement de la vérité et à l'octroi d'une réparation."

¹³⁹ ECtHR, Case of *Al Nashiri* cit., para. 396; ECtHR, Case of *Husayn (Abu Zubaydah)* cit., para. 396.

¹⁴⁰ ECtHR, Case of *Al Nashiri* cit., para. 394; ECtHR, Case of *Husayn (Abu Zubaydah)* cit., para. 394.

¹⁴¹ ECtHR, Case of *Al Nashiri* cit., paras. 376, 494; ECtHR, Case of *Husayn (Abu Zubaydah)* cit., paras. 369, 488

¹⁴² *Id.*, para. 442: "The Court has taken due note of the fact that knowledge of the CIA rendition and secret detention operations and the scale of abuse to which High-Value Detainees were subjected in CIA custody evolved over time".

¹⁴³ See ICJ, *Monetary Gold Removed from Rome in 1943*, ICJ Reports 1954, at 32. M. Scheinin, *The ECtHR Finds the US Guilty of Torture – As an Indispensable Third Party?*, in *EJIL Talk!* (2014).

construction of democratic systems¹⁴⁴. The importance of the collective dimension of the right to the truth was widely discussed in Judge Ramirez’s concurring opinion in the *Bámaca Velásquez* case: “[T]he so-called right to the truth covers a legitimate demand of society to know what has happened, generically or specifically, during a certain period of collective history, usually a stage dominated by authoritarianism, when the channels of knowledge, information and reaction characteristic of democracy are not operating adequately or sufficiently”¹⁴⁵.

Framing the right to the truth within the context of the right to information enshrined in Article 13 of the 1969 American Convention as established in the more recent *Gomes Lund* case has significantly consolidated this orientation: the “deterrent” effect of the right to the truth in its collective-cultural dimension becomes a prerequisite to protecting human rights and contributes to affirming the principle of democracy¹⁴⁶. It allows a people to know and guard a fundamental part of its heritage (the history of its oppression) and the collectivity to be informed on past events to hamper the development of revisionist and negationist theories.

The IACtHR case-law after the *Gomes Lund* rulings reaffirms the “social” intent of the right to the truth and underlines the State’s “peremptory obligation” to investigate *jus cogens* violations in conformity with international standards¹⁴⁷. In the 2012 *Río Negro Massacres v. Guatemala* case, the IACtHR clarified, for example, that the search, identification, determination of cause of death and returning to the next of kin the remains of those found and identified “reveals an historical truth that contributes to closing the mourning process of the Maya Achí community of Río Negro [and] contributes to the reconstruction of their cultural integrity[.]”¹⁴⁸

6.- Final Remarks: *Crimina Juris Gentium*, Right to the Truth, and the “Conscience” of Humanity

As Judge Cançado-Trindade remarked, when human beings fall victim to *ius cogens crimes*, “humanity as a whole is likewise victimized. [...] Such crimes affect the human conscience [...] -the universal juridical conscience,- and the aggrieved persons as well as humanity itself fall victim to them. [...] This line of analysis developed by International Humanitarian Law and contemporary International Criminal Law must [...] be incorporated into the conceptual universe of International Human Rights Law.”

¹⁴⁴ See IACtHR, Case of Myrna Mack Chang v. Guatemala cit., para. 274: “[T]he next of kin of the victims and society as a whole must be informed of everything that has happened in connection with the said violations”.

¹⁴⁵ IACtHR, Case of Bámaca Velásquez cit., Separate Concurring Opinion of Judge Sergio Garcia Ramírez, para. 19.

¹⁴⁶ “[E]very society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future”. IAComHR, Annual Report 1985-86, OEA/Ser.L/V/II.68, Doc. 8 rev. 1 (Sept. 26, 1986), at 193.

¹⁴⁷ IACtHR, Case of the Massacres of El Mozote and Nearby Places v. El Salvador, Merits, Reparations and Costs, Judgment (Oct. 25, 2012), para. 317. See also IACtHR, Case of the Río Negro Massacres v. Guatemala, Preliminary Objection, Merits, Reparations and Costs (Sept. 4, 2012), para. 193: “The Court also reiterated that the effective search for the truth “is the responsibility of the State and does not depend on the procedural initiative of the victim or their next of kin or on their provision of probative elements.”

¹⁴⁸ *Id.*

In our view, the positions of the European and Inter-American Human Rights Courts on the right to the truth are an important step in this direction. Indeed, their jurisprudential finding on this subject, albeit not entirely convergent, should be interpreted in the perspective of ensuring the values underlying the Conventions they are appointed to interpret: in calling on States to preserve the collective memory and bring the criminals to justice, the Strasbourg Court and the Court of San José have positioned themselves as the “conscience” of the whole of humanity¹⁴⁹. As our comparative analysis shows, international decisions on the right to the truth have a) significantly contributed to highlighting the complex and serious nature of the alleged violations, b) materially strengthened the rule of law, and c) underlined the synergies between national systems of repression, the international system of human rights protection and international criminal law enforcement mechanisms¹⁵⁰.

First, the existing link between the right to the truth and gross violations of human rights has required the two Human Rights Courts to pronounce on the imperative nature of the violated norms¹⁵¹ as an expression of the fundamental values of the international community as a whole and thus prevailing with respect to the sovereign prerogatives of States. In this perspective, the “sensitivity of the matter” in question has enabled the ECtHR and IACtHR to examine the responsibility of respondent States i) overcoming the exceptions of *ratione temporis* jurisdiction¹⁵², ii) reversing the burden of proof of national authorities (which are required to disclose the documents necessary to establish the facts), and iii) reducing the margin of State discretion in adopting derogations or restrictions to conventionally guaranteed rights.

¹⁴⁹ See Joint Partly Dissenting Opinion of Judges Ziemele, De Gaetano, Laffranque and Keller in the ECtHR, Case of Janowiec and Others v. Russia, Applications Nos. 55508/07 and 29520/09, Judgment (Oct. 21, 2013), para. 34: “With this judgment, the Court has missed an opportunity to fulfil this very task and thereby uphold the “Convention values” clause in the Šilih principles. In doing so, it has deprived that clause of its humanitarian effect in the case at hand and potentially weakened its effect in the event of its future application. This approach is untenable if the Convention system is to fulfil the role for which it was intended: to provide a Court that would act as a “conscience” for Europe”. See also *id.*, para. 35: “[...] The interpretation of the humanitarian clause by the majority contradicts this very aim. We regret the majority’s interpretation of the humanitarian clause in the most non-humanitarian way”. See the concurring opinion of Judge Cançado Trindade in the IACtHR *Advisory Opinion on the Juridical Condition and Rights of Undocumented Migrants* (Sept. 18, 2003), para. 81: “One ought to secure a follow-up to the endeavours of greater doctrinal and jurisprudential development of the peremptory norms of international law (*jus cogens*) and of the corresponding obligations erga omnes of protection of the human being moved above all by the *opinio juris* as a manifestation of the universal juridical conscience, to the benefit of all human beings. By means of this conceptual development one will advance in the overcoming of the obstacles of the dogmas of the past and in the creation of a true international *ordre public* based upon the respect for, and observance of, human rights. Such development will contribute, thus, to a greater cohesion of the organized international community (the *civitas maxima gentium*), centred on the human person”.

¹⁵⁰ D. Groome, *The Right to Truth in the Fight against Impunity*, in *Berkeley Journal of International Law* 29 (2011) 198.

¹⁵¹ A. A. Cançado Trindade, *Enforced Disappearances of Persons as a Violation of Jus Cogens: The Contribution of the Jurisprudence of the Inter-American Court of Human Rights*, in *Nordic Journal of International Law* 81 (2012) 507ss.

¹⁵² See ECtHR, Case of Janowiec and Others *cit.*, Concurring Opinion of Judge Dedov: “Recognising that the Court lacks jurisdiction *ratione temporis* does not amount to recognising as lawful a situation entailing a breach of a *jus cogens* rule such as the prohibition of war crimes”.

Second, in ascertaining the truth, the two international Courts recognized the requisite objectivity and impartiality in exercising “public” functions and avoiding abuses¹⁵³, for example, in balancing the different interests at stake: those of victims and society to know the truth about serious violations of human rights, their circumstances and those who took part, and those of the alleged perpetrators of the violations to comply with fair trial and privacy requirements. In line with this approach, the ECtHR and IACtHR have taken a clear and unequivocal position in respect of certain forms of unfairness that could amount to flagrant denial of justice, such as the admission of torture evidence. Information that has been obtained by such barbaric practices as torture is excluded as evidence to protect the integrity of the trial process and, ultimately, the rule of law itself¹⁵⁴.

Finally, the international decisions in support of the right to the truth create a synergistic relationship between the systems of enforcement of human rights and the suppression of crimes¹⁵⁵. Notably, these decisions offer States a legal path to shed light on human rights violations and overcome legal or *de facto* obstacles standing in the way of prosecuting those responsible for grave violations that affect society as a whole. Therefore, as a direct consequence of the international decisions upholding the right to the truth, some countries have taken significant steps in prosecuting cases of serious human rights violations. The Brazilian Attorney General Rodrigo Janot Monteiro de Barros, for example, expressly referred to the IACtHR finding in the *Case of Gomes Lund*, claiming that Amnesty Law cannot be an obstacle to investigating grave crimes. Similarly, the Mexican Federal Judge Fernando Silva García’s ruling on a series of mass murders in north-eastern Mexico that took the lives of hundreds of migrants explicitly cited the *Gomes Lund* Judgment in relation to the “interest of society” in “avoiding impunity and the repetition of such acts in the future”.

To be added is that the ECtHR and IACtHR’s assessment of the *inertia* and/or inadequacy of national systems could legitimate third States to exercise extraterritorial jurisdiction over criminals since, as Professor Ziccardi Capaldo explains, other States could act *uti universi* when the State “that has primary responsibility [...] is unable or unwilling to act to protect the common good”¹⁵⁶.

Referring more expressly to the right to the truth, Professor Galinsoga Jordá clarifies that domestic authorities could state that criminal proceedings are time-barred, crimes are amnestied and international criminal law is not applicable. In these situations, prosecution by a third State may be an adequate alternative: “If permitted by the scope of the principle of legality, these other jurisdictions could qualify the repression as

¹⁵³ G. Ziccardi Capaldo, *The Law of the Global Community: An Integrated System to Enforce “Public” International Law*, in *The Global Community Yearbook of International Law and Jurisprudence* 1 (2001) 71ss.; *Id.*, *The Pillars of Global Law*, Aldershot 2008, especially at 32, 52, 60, 88, 162, 220, 250.

¹⁵⁴ See e.g., ECtHR, *Case of Husayn (Abu Zubaydah)* and ECtHR, *Case of Al Nashiri* cit., paras. 551 *et seq.*, paras. 561 *et seq.*, respectively; IACtHR, *Case of Cabrera García and Montiel Flores v. Mexico* (Preliminary Objection, Merits, Reparations and Costs), Judgment (Nov. 26, 2010), paras. 163-167.

¹⁵⁵ See A. Huneeus, *International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Courts*, in *American Journal of International Law* 107.1 (2013) 1-44.

¹⁵⁶ Ziccardi Capaldo, *The Pillars* cit. 143; see also *Id.*, *Terrorismo globale e garanzie collettive*, Milano 1990, 97.

crimes under international law and directly apply the international law in force at the time of its commission.”¹⁵⁷

However, the conduct of a State that does “not intend to initiate investigations or does not have the ability to conduct them correctly or to institute proceedings” and/or the “refusal or inability of the State to proceed correctly” in relation to violations that amount to *jus cogens* crimes, represents the condition of admissibility of a case before the International Criminal Court (ICC)¹⁵⁸, which is designed to ensure accountability for serious crimes that deeply shock the conscience of humanity¹⁵⁹. In this perspective, we share the opinion that the ICC, “with its innovative, restorative and victim-oriented features” could constitute a suitable alternative/parallel forum for the future realisation of the right to truth¹⁶⁰ with respect to national judicial systems and international human rights courts.

Primarily, the ICC Prosecutor has a “unique” role in international criminal law systems, mandated by the Statute “to establish the truth” and acting objectively by “investigat[ing] incriminating and exonerating circumstances equally”¹⁶¹. Therefore, when this right is to be satisfied through criminal proceedings, to properly balance the different interests at stake¹⁶², “the victims’ central interest in the search for the truth can only be satisfied if (i) those responsible for perpetrating the crimes for which they suffered harm are declared guilty; and (ii) those not responsible for such crimes are acquitted, so that the search for those who are criminally liable can continue”¹⁶³.

The ICC judicial trends confirm the synergies between the international control machineries of the human right to the truth and the mechanism of punishment of *jus cogens* crimes.

In ruling on the victims’ right to the truth, ICC Judge Sylvia Steiner, for example, did not expressly reserve its ascertainment to international criminal mechanism. Rather, in the *Germain Katanga and Mathieu Ngudjolo Chui* case, Judge Steiner preferred “not to

¹⁵⁷ A. Galinsoga-Jordà, *The Activity of the European Court of Human Rights*, in *The Global Community Yearbook of International Law and Jurisprudence* 13 (2013) 753, 787ss.

¹⁵⁸ ICC Statute, art. 17 (1) (a), (b) See Groome, *The Right* cit. 198.

¹⁵⁹ ICC Statute, Preamble.

¹⁶⁰ M. Klinkner, E. Smith, *The Right to Truth, Appropriate Forum and the International Criminal Court*, in N. Szablewska, S.-D. Bachmann (eds.), *Current Issues in Transitional Justice: Towards a More Holistic Approach*, New York 2014, 3, 29.

¹⁶¹ ICC Statute, art. 54. As Webb observed, the role of the ICC Prosecutor differs from that of ICTY/ICTR Prosecutors, “who are obliged to disclose exculpatory information, but not to actively investigate matters that may exonerate the accused. The ICC Prosecutor is not simply a party in the trial, but is supposed to exercise the functions of an impartial “organ of justice”. In this respect, the role of the Prosecutor may be compared with the role of an investigating judge or prosecutor in most civil law systems rather than the role of a typical common law prosecutor”, Philippa Webb, *Challenges and Difficulties of War Crimes Prosecution*, available online at <www.eui.eu/Documents/RSCAS/Research/ETHICS/200606ETHICS-Webb.pdf>, at 4. See also A. Oriolo, *The “Inherent Power” of Judges: An Ethical Yardstick to Assess Prosecutorial Conduct at the ICC*, in *International Criminal Law Review* (2016).

¹⁶² A. Oriolo, *Compulsory Production of Evidence in International Criminal Proceedings: Public Interests at Stake beyond Punishment of the Guilty*, in A. Oriolo, M. C. Bassiouni et al. (eds.), *Global Trends: Law, Policy & Justice: Essays in Honour of Professor Giuliana Ziccardi Capaldo*, New York 2013, 371ss.

¹⁶³ ICC, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, Case ICC-01/04-01/07, Pre-Trial Chamber I, Decision on the Set of Procedural Rights Attached to Procedural Status of Victim at the Pre-Trial Stage of the Case (May 13, 2008), para. 36.

address the question of whether or not this right, and the victims' core interests that underlie it, can at times also be satisfied through mechanisms alternative to criminal proceedings"¹⁶⁴. At the same time, she highlighted the relevant role played by the European and Inter-American Courts of Human Rights' case-law in the development of the right to the truth, understood as the determination of the facts, the identification of the responsible persons and the declaration of their responsibility¹⁶⁵.

Ascribing the principles of humanity and the dictates of public conscience to the domain of *jus cogens* and overcoming legal and juridical obstacles in assessing their grave violations, the international jurisprudence on the right to the truth regrets a "reductionist view of international law [...] marked by pragmatism and 'technicism'"¹⁶⁶, and confirms the "primacy of the *raison d'humanité* over the *raison d'État*"¹⁶⁷.

In this sense, in the ECtHR and IACtHR case-law preserving collective memory and bringing *ius cogens* criminals to justice, the right to the truth is emerging as a new yardstick, both procedural and substantial, to honour the conscience of the whole humanity.

Abstract

Negli ultimi decenni, il diritto alla verità si è rapidamente imposto all'attenzione della dottrina e della giurisprudenza internazionali ancorchè la sua natura e i suoi gli elementi costitutivi non siano stati interpretati uniformemente dalle Corti europea ed interamericana dei diritti umani e siano, per certi aspetti, in progressiva evoluzione. Gli orientamenti delle due corti, sebbene non del tutto convergenti, vanno collocati nell'ottica di garantire i valori sottesi alle Convenzioni che esse sono deputate ad interpretare: richiamando gli Stati a preservare la memoria collettiva ed ad assicurare alla giustizia i criminali, la Corte di Strasburgo e la Corte di San Josè si sono poste infatti come «coscienza» della intera umanità.

In recent decades, the right to the truth has increasingly come to the attention of international scholars and jurisprudence. Moving from the recognition of truth as a right in the international arena and exploring the reconstruction and evolution of the right to the truth in the international human rights courts' case-law, the following analysis focuses on the ECtHR and IACtHR insights in a comparative perspective to conclude on the emerging trends of the Strasbourg Court and the Court of San José in interpreting and applying the right to the truth, thereby acting as the "conscience" of the whole of humanity.

¹⁶⁴ *Id.*, para. 33, footnote.

¹⁶⁵ In Judge Steiner's words: "However, when this right is to be satisfied through criminal proceedings, victims have a central interest in that the outcome of such proceedings: (i) bring clarity about what indeed happened; and (ii) close possible gaps between the factual findings resulting from the criminal proceedings and the actual truth. [...]", *Id.*, paras. 34, 36.

¹⁶⁶ A. A. Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium*, Leiden 2010, 160.

¹⁶⁷ Cançado Trindade, *International Law* cit. 150-152, 275-285.

