Freedom of Expression and the Right to Truth: An Elaboration of their Inter-relationships

A Paper for the UN Special Rapporteur on Freedom of Opinion and Expression

Toby Mendel
Executive Director
Centre for Law and Democracy

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Introduction

The right to truth evolved as a doctrine based on States' obligation to provide effective protection for human rights. If the circumstances surrounding human rights abuses were kept secret, from the victims and their relatives but also from society at large, impunity for the perpetrators would inevitably follow, leading to repetition and ongoing abuse. Exposing and uncovering abuses, on the other hand, would support effective investigations and prosecutions, breaking the cycle of impunity and bringing the abuses to an end, or at least limiting them. The right to truth was seen as being particularly important in contexts of transition from periods of sustained and serious human rights abuses, and in such contexts as being an important anchor for democracy and means of promoting reconciliation and moving forward.

There is a very close substantive overlap between the right to truth and the right to freedom of expression, in particular inasmuch as both impose an obligation on State actors to disclose information. They also share the common underlying objectives of promoting democracy and public accountability. Given that, it is perhaps surprising that the relationship between them has until now not been explored extensively.

This paper seeks to help remedy that problem by looking at the relationships between the rights to truth and to freedom of expression. It starts by providing a brief overview of the development of the right to truth, followed by an elaboration of the current understanding of its base as a human right and its key attributes. The

larger part of the paper explores the ways in which the right to truth and the right to freedom of expression complement and support each other, as well as the ways in which they differ. The paper finishes up by putting forward a possible future understanding of the right to truth as being based on the right to freedom of expression, outlining the main implications of this.

Historical Development of the Right to Truth

Early Developments

The right to truth has its early origins in humanitarian law and, specifically, in the obligation of States to inform families of the fate of their (missing) relatives. Article 32 of the first Additional Protocol to the Geneva Conventions, adopted in 1977,[1] states:

> Art 32. General principle
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> In the implementation of this Section, the activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and in this Protocol shall be prompted mainly by the right of families to know the fate of their relatives.

The other articles in that Section place a positive obligation on States to search for persons who have been reported missing and to transmit information about them to their families (Article 33), and to facilitate access by relatives to graves and to facilitate the return of remains of the dead (Article 34).

A few years later, in 1981, in their very first Report, the UN Working Group on enforced or involuntary disappearances broadened the scope of this beyond situations of armed conflict, stating:

> The Group strongly believes [families of missing persons] have a right to learn what happened to their relatives.[2]

in the context of a contentious case, also lodged in 1981, and decided just a couple of years later, the UN Human Rights Committee also recognised the right of relatives to know the fate of disappeared persons. Indeed, the Committee went beyond mere recognition of this right, and suggested that a failure to respect the right, by not informing a mother of the fate of her daughter, was tantamount to subjecting the mother to torture, stating:

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[1] *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (Protocol I), adopted 8 June 1977, in force 7 December 1978.
[2] Question of Human Rights of all Persons Subjected to any Form of Detention or Imprisonment, in Particular: Question of Missing and Disappeared Persons, UN Doc. E/CN.4/1435, 26 January 1981, para. 192.

> The Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter in particular, of article 7.[3]

A few years later, in the 1988 Velásquez Rodríguez case, the Inter-American Court of Human Rights held that States are under a and continuing positive obligation to investigate cases of disappearances, and to inform the relatives about the fate of the victims:

> The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains.[4]

This right is now codified in Article 24(2) of the *International Convention for the Protection of All Persons from Enforced Disappearance*, as follows:

> Each victim [defined to include everyone who has suffered direct harm, including relatives] has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.[5]

Article 18 of the Convention elaborates in some detail on the kinds of information that should be made available to "any person with a legitimate interest in this information", including relatives.

Although the right to truth has its roots in the phenomenon of missing or disappeared persons, its scope has now been substantially expanded. As elaborated on in more detail below, the right now extends at least to include all gross violations of human rights and grave breaches of humanitarian law. A 2006 Study on the right to the truth, undertaken by the Office of the United Nations High Commissioner for Human Rights (OHCHR Study), noted: "The right to the truth is often invoked in the context of gross violations of human rights and grave breaches of humanitarian law."[6]

Legal Bases for the Right to Truth

The primary early legal grounds for asserting a right to truth were essentially based on the core idea of a right to enjoy human rights, and the corresponding positive

[3] *María del Carmen Almeida de Quinteros et al. v. Uruguay*, 21 July 1983, Communication No. 107/1981, para. 14.
[4] *Velásquez Rodríguez v. Honduras*, 29 July 1988, Series C, No. 4, para. 181.
[5] Adopted 20 December 2006, in force 23 December 2010.
[6] UN Doc. E/CN.4/2006/91, 8 February 2006, para. 3.

obligation of the State to ensure protection of or to give effect to human rights. Closely intertwined with this is the right to an effective remedy for violations of rights, the application of which includes having access to appropriate determination or oversight of remedies. This package is provided for in Article 2 of the *International Covenant on Civil and Political Rights* (ICCPR),[7] as follows:

> 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
> 2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.
> 3. Each State Party to the present Covenant undertakes:
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

The different aspects of this right are found in different articles in the *American Convention on Human Rights* (ACHR),[8] which is important given the pioneering work done within the Inter-American system for the protection of human rights in developing the right to truth (and the resulting language with which it has come to be associated). Thus, Article 1(1) of that Convention is very similar to Article 2(1) of the ICCPR. Article 25 of the ACHR, however, is more explicit than the ICCPR in terms of its focus on judicial protection for rights, stating, in part:

> 1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

This has given rise to references to the right to truth being based on the right to an effective judicial remedy (sometimes called an *amparo* in the Inter-American system).[9] It is also common within the Inter-American system to refer in the context of the right to truth to Article 8 of the ACHR, which protects the right to have one's

[7] Adopted by UN General Assembly Resolution 2200A (XXI), 16 December 1966, in force 23 March 1976.
[8] Adopted 22 November 1969, O.A.S. Treaty Series No. 36, in force 18 July 1978.
[9] See, for example, the OHCHR Study, paras. 10 and 25.

rights determined by an independent tribunal, and in accordance with due process guarantees.

There are different underlying rationales for this. The first is based on simple logical extrapolation. The State has an obligation to ensure protection for human rights, which implies that it must combat impunity, since effective protection cannot exist where impunity is rife. As the Preamble to the 2005 *Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity* (Impunity Principles) states:

> *Considering* that the duty of every State under international law to respect and to secure respect for human rights requires that effective measures should be taken to combat impunity…[10]

Combating impunity, in turn, implies a right to truth, since this is a precondition for the successful investigation and prosecution of human rights abuses. The Inter-American Commission on Human Rights has elaborated elegantly on the link between truth and impunity as follows:

> The disregard for the facts connected with the violations is translated into a system of protection which, in practice, cannot guarantee the identification and eventual punishment of those responsible.[11]

Similarly, Principle 3 of the Impunity Principles states:

> Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.[12]

Protecting the right of victims, including families and relatives directly affected by serious human rights violations, to the truth is also instrumentally important in combating impunity. This is because these individuals have a specific interest in and motivation to support and promote the conduct of investigations and prosecutions. While the primary obligation to do this lies with the State, this sort of instrumentality cannot be ignored.

The right to truth is now widely understood as being vested in society as a whole, linked to States' obligation to protect human rights. This is clear from Principle 3 of the Impunity Principles, quoted above, which refers to 'every people' as benefiting

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[10] E/CN.4/2005/102/Add.1, 8 February 2005.

[11] Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.595, 11.657, 11.705, Report No 25/98, Chile, Alfonso René Chanfeau Orayce, 7 April 1998, para. 87.

[12] See also Human Rights Council Resolution 21/7 of 27 September 2012, the first clause of which recognises "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".

from the right to truth. The Inter-American Court of Human Rights has held that the right to truth, "gives rise to an expectation that the State must satisfy for the next of kin of the victim and Guatemalan society as a whole."[13] Similarly, the European Court of Human Rights has stated:

> [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.[14]

Principle 19 of the Impunity Principles also call for "any person or non-governmental organization having a legitimate interest therein" to be given standing in cases involving serious breaches of human rights. Again, there is an important instrumentality here, since the chance of successful prosecutions clearly increases with this widening of standing.

Although the cases and Principles noted above address serious human rights violations, this rationale for the right to truth would appear to flow from all forms of human rights abuse, for impunity in the face of even minor human rights violations will act as an incentive to others to commit those violations. At the same time, the extent of the obligation of the State to investigate and prosecute, and therefore to ensure the right to truth, increases in scope and depth with the seriousness of the violation.

This rationale for the right to truth assumes particular importance in the context of transitional justice, or the restoration of justice and respect for human rights after a period of dictatorship or widespread human rights abuses. In democratic contexts, investigating human rights abuses is part of the normal system of maintaining the rule of law, rather than being part of a specific and exceptional social need to address the abuses of the past, and to restore and bolster democratic institutions and systems. In transitional contexts, there is a need to reconstruct lost periods of history, as part of the guarantee of non-repetition of the abusive patterns than characterised the past. As the Inter-American Commission on Human Rights has stated:

> [D]uring a transition from a period of authoritarianism or systematic human rights violations to one characterized by the rule of law, freedom of expression and access to information regarding the events of the past are of heightened importance.[15]

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[13] *Myrna Mack Chang v. Guatemala*, 25 November 2003, Series C, No. 101, para. 274. See also OAS General Assembly Resolution 2800 (XLIII-O/13), 5 June 2013, para. 1.
[14] *El-Masri v. the Former Yugoslav Republic of Macedonia*, 13 December 2012, Application no. 39630/09, para. 191.
[15] Case 12.590, Report No. 116/10, Guatemala, José Miguel Gudiel Álvarez and Others ("Diario Militar"), 22 October 2010, para. 455.

Transitional justice also requires special attention to be devoted to the provision of remedies and reparations to victims. Beyond the general goal of ensuring protection for human rights, the right to truth, in the sense of investigating and finding out the facts about violations, is also a prerequisite for the specific right of victims of human rights abuses to a remedy. Discovering the facts about an abuse is essential to any legal or other process by which a remedy may be granted.

There is another aspect to this, however, which is that the truth is itself part of the package of restitution for victims and their families. In this regard, for example, the 2006 UN General Assembly Resolution on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law lists "Verification of the facts and full and public disclosure of the truth" as one of the measures of satisfaction for these sorts of violations.[16] Acknowledgement of the wrong, through a public apology, is another such measure.[17]

Although the UN General Assembly resolution is limited to more serious violations, information about any violation would logically be part of the remedy for it. In this regard, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa recognises "access to the factual information concerning the violations" as part of an effective remedy for any breach of a constitutional, an international or even a mere ‚legal right.[18] And as the Inter-American Court of Human Rights has stated:

> This right to the truth has been developed by International Human Rights Law; recognized and exercised in a concrete situation, it constitutes an important means of reparation.[19] [references omitted]

As noted above, courts and official bodies have gone even further, suggesting that a failure to provide information about the fate of victims to relatives can constitute a separate breach of the right of those relatives not to be subject to "torture or to cruel, inhuman or degrading treatment or punishment" (ICCPR, Article 7).[20] The Inter-American Court of Human Rights, for example, has stated:

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[16] UN General Assembly Resolution 60/147, 21 March 2006, clause 22(b).
[17] *Ibid.*, clause 22(e). See also *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, 24 November 2010, Series C, No. 219, para. 277.
[18] African Commission on Human and Peoples' Rights, DOC/OS (XXX) 247, clause C(b)(3).
[19] *Myrna Mack Chang v. Guatemala*, note 13, para. 274.
[20] See *María del Carmen Almeida de Quinteros et al. v. Uruguay*, note 3, for a statement along these lines from the UN Human Rights Committee. See also from the Human Rights Committee *Staselovich v. Belarus*, 3 April 2003, Communication No. 887/1999, para. 9.2, and *Validzhon Khalilov v. Tajikistan*, 30 March 2005, Communication No. 973/2001, para. 7.7.

> The Court has indicated that the denial of the truth about the whereabouts of a victim of forced disappearance results in a form of cruel and inhuman treatment for the closest family members….[21]

The European Court of Human Rights has taken a more conservative approach on this issue, holding:

> Whether a family member [has been subject to torture or to inhuman or degrading treatment or punishment] will depend on the existence of special factors which gives the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include the proximity of the family tie – in that context, a certain weight will attach to the parent-child bond –, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries.[22]

Even under the Inter-American system, breach of the right not to be tortured through denial of information would only apply to more serious human rights violations. In this respect, it is narrower than prevention and the right to a remedy as legal bases for the right to truth.

In addition to these core bases for the right to truth, a number of other legal bases for the right have been posited. Perhaps surprisingly, the 1981 Report by the Working Group on enforced or involuntary disappearances identified the following rights as bases for the right to truth:

> Their right to a family life may be seen as the principal right involved but other rights of an economic, social and cultural nature can also be directly affected; for example, the family's standard of living, health care and education may all be adversely affected by the absence of a parent. The adverse impact of the disappearance of a parent on the mental health of children has been pointed out elsewhere.[23]

The OHCHR Study also identifies the rights to life, to family life and to health, as well as the rights of the child to preserve his or her identity and not to be separated from his or her parents.[24] The Study also refers to the idea of an 'autonomous' right to truth, although it is not clear what the specific basis of this might be.[25] Finally, while not exactly positing the right to freedom of expression as a basis for the right to truth, the Study does recognise that the former, as well as the included right to information, is closely linked to the latter[26] (this is addressed in more detail below).

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[21] *Gudiel Álvarez et al. ("Diario Militar") v. Guatemala*, 20 November 2012, Series C, No. 253, para. 301. See also *Trujillo Oroza v. Bolivia*, 27 February 2002, Series C, No. 92, para. 114.
[22] *Taş v. Turkey*, 14 November 2000, Application no. 24396/94, para. 79.
[23] Question of Human Rights of all Persons Subjected to any Form of Detention or Imprisonment, in Particular: Question of Missing and Disappeared Persons, note 2, para. 187.
[24] Note 6, paras. 25-27.
[25] *Ibid.*, para. 21. See also *Gudiel Álvarez et al. ("Diario Militar") v. Guatemala*, note 21, para. 268.
[26] *Ibid.*, paras. 43 and 57.

In addition to these formal legal bases, commentators have noted the importance of the right to truth to reconciliation and the wider process of social healing that is needed in the aftermath of serious breaches of human rights or humanitarian law (i.e. in transitional contexts). In its General Comment on the Right to the Truth in Relation to Enforced Disappearances, the Working Group on Enforced or Involuntary Disappearances notes that "reconciliation between the State and the victims of enforced disappearance cannot happen without the clarification of each individual case."[27] The UN General Assembly has even gone so far as to proclaim 24 March as the International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims.[28]

Attributes of the Right to Truth

The primary attribute of the right to truth is the obligation on the State to ensure that information is available about human rights abuses. As noted above, this information should be available to victims, understood broadly to include both immediate victims and their relatives, as well as to the public at large. For victims, specific efforts should be made to ensure that the information is accessible, in terms of physical access but also, where necessary, through translation into a language they can understand and into terms they can understand, where the original information is of a highly technical nature.

The specific information that needs to be provided will depend on the nature of the human rights violation. However, the second Annual Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism describes the scope of information covered by the right to truth in a general way as follows:

> The right to truth entitles the victim, his or her relatives, and the public at large to seek and obtain all relevant information concerning the commission of the alleged violation, including the identity of the perpetrator(s), the fate and whereabouts of the victim and, where appropriate, the process by which the alleged violation was officially authorized.[29]

The OHCHR Study also provides a good overview of the general scope of information covered by the right:

> These may be summarized as the entitlement to seek and obtain information on: the causes leading to the person's victimization; the causes and conditions pertaining to the gross violations of international human rights law and serious violations of

[27] Report of the Working Group on Enforced or Involuntary Disappearances, Document A/HRC/16/48, 26 January 2011, para. 39, Preamble.
[28] UN General Assembly Resolution 65/196, 21 December 2010.
[29] Framework Principles for securing the accountability of public officials for gross or systematic human rights violations committed in the context of State counter-terrorism initiatives, A/HRC/22/52, 1 March 2013, para. 23.

> international humanitarian law; the progress and results of the investigation; the circumstances and reasons for the perpetration of crimes under international law and gross human rights violations; the circumstances in which violations took place; in the event of death, missing or enforced disappearance, the fate and whereabouts of the victims; and the identity of perpetrators.[30]

It is clear that the State must provide access to all of the information that it holds that is relevant to the case, as evidenced by the following quote from the Inter-American Court of Human Rights:

> What draws the attention of the Court is that the State did not proceed to render all of the information under its protection when requested to do so ….[31]

Principle 3 of the Impunity Principles makes it clear that the State must also take steps to preserve the information it holds about serious human rights abuses:

> 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.

However, it is also clear that the State must go beyond simply providing access and take positive steps to collect and/or uncover relevant information. For example, Principle 3 of the General Comment on the Right to the Truth in Relation to Enforced Disappearances by the Working Group on Enforced or Involuntary Disappearances notes that it is not sufficient to provide general information on procedural matters and that States should, "let any interested person know the concrete steps taken to clarify the fate and the whereabouts of the person. Such information must include the steps taken on the basis of the evidence provided by the relatives or other witnesses." Furthermore, Principle 5 provides that States' main obligations include,

> the obligation to investigate until the fate and the whereabouts of the person have been clarified; the obligation to have the results of these investigations communicated to the interested parties under the conditions specified in paragraph 3 of this general comment; the obligation to provide full access to archives; and the obligation to provide full protection to witnesses, relatives, judges and other participants in any investigation. There is an absolute obligation to take all the necessary steps to find the person, but there is no absolute obligation of result. Indeed, in certain cases, clarification is difficult or impossible to attain, for instance when the body, for various reasons, cannot be found.

The *International Convention for the Protection of All Persons from Enforced Disappearance* gives an indication of the scope of these obligations, at least in the context of disappearances. Article 17 requires States to maintain detailed registers

[30] Note 6, para. 38.
[31] *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, note 17, para. 210.

of people deprived of their liberty, including details as to who ordered the detention, who is supervising the individual, the location where the person is being detained and any transfers. Article 18 commits States to guarantee anyone with a legitimate interest in it access to the types of information required to be maintained under Article 17. This attribute of the right to truth is elaborated on in more detail below.

Inter-Relationship with Freedom of Expression

The Right to Information

The aspect of freedom of expression which is mostly closely linked to the right to truth in the right to access information held by public bodies, more commonly referred to as the right to information. The human right to information is now well established under international law. Formal recognition of a general right to information by international courts first came in 2006, with the *Claude Reyes and Others v. Chile* decision by the Inter-American Court of Human Rights.[32] In the case, the Court explicitly held that the right to freedom of expression, as enshrined in Article 13 of the ACHR, included the right to information. In spelling out the scope and nature of the right, the Court stated:

> In respect of the facts of the present case, the Court considers that article 13 of the Convention, in guaranteeing expressly the rights to "seek" and "receive" "information", protects the right of every person to request access to the information under the control of the State, with the exceptions recognised under the regime of restrictions in the Convention. Consequently, the said article encompasses the right of individuals to receive the said information and the positive obligation of the State to provide it, in such form that the person can have access in order to know the information or receive a motivated answer when for a reason recognised by the Convention, the State may limit the access to it in the particular case. The information should be provided without the need to prove direct interest or personal involvement in order to obtain it, except in cases in which a legitimate restriction is applied.[33]

A few years later, in April 2009, the European Court of Human Rights followed suit, recognising a right to information based directly on Article 10 of the ECHR, which guarantees the right to freedom of expression.[34] Interestingly, the respondent State in the case, Hungary, did not even contest the claim that Article 10 protects the right to information, and instead limited itself to arguing that the information in question fell within the scope of the exceptions to this right (i.e. that the refusal to provide it was a legitimate restriction on freedom of expression).

The UN Human Rights Committee was relatively late to recognise clearly the right to information. However, a General Comment on Article 19 of the ICCPR, adopted in September 2011, does just this, stating:

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[32] 19 September 2006, Series C, No. 151.
[33] *Ibid.*, para. 77.
[34] *Társaság A Szabadságjogokért v. Hungary*, 14 April 2009, Application no. 37374/05.

> Article 19, paragraph 2 embraces a right of access to information held by public bodies.[35]

Clear standards on the right to information have been developed through the jurisprudence of international courts and bodies, as well as through authoritative statements by international experts and officials. These include the 2000 *Inter-American Declaration of Principles on Freedom of Expression*, adopted by the Inter-American Commission on Human Rights,[36] the 2002 *Declaration of Principles on Freedom of Expression in Africa*,[37] adopted by the African Commission on Human and Peoples' Rights, the 2004 Joint Declaration[38] adopted by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur on Freedom of Expression, the 2008 *Principles on the right of access to Information*,[39] adopted by the Inter-American Juridical Committee, the 2010 Model Inter-American Law on Access to Public Information,[40] and the 2013 Model Law for AU Member States on Access to Information,[41] prepared by the African Commission on Human and Peoples' Rights.

Some of the key elements of the right to information, as reflected in these documents, and which flow from its status as a human right, are as follows:[42]

- The right applies broadly to all information held by all public authorities.
- States are under a positive obligation to put in place systems for accessing this information, including the proactive publication of information and accessible procedures for making requests for information.
- Exceptions to the right of access, in line with the standards for restrictions on freedom of expression, are legitimate only if they meet the following three-part test:
    - The interests which may justify a refusal to disclose information are limited and narrow, and are set out clearly in law.
    - Access to information may only be refused where disclosure of the information would be likely to harm a protected interest.
    - Information shall be disclosed unless the harm this would cause outweighs the benefits of the disclosure.
- Anyone who believes that his or her right to information has been denied should have a right of appeal to an independent (non-judicial) oversight body.

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[35] General Comment No. 34, 12 September 2011, CCPR/C/GC/34, para. 18.
[36] Adopted at its 108th Regular Session, 19 October 2000.
[37] Adopted at its 32nd Ordinary Session, 17-23 October 2002, Banjul, The Gambia.
[38] Adopted on 6 December 2004.
[39] CJI/RES.147 (LXXIII-O/08), 7 August 2008.
[40] AG/RES. 2607 (XL-O/10). Available at: http://www.oas.org/dil/AG-RES_2607-2010_eng.pdf.
[41] Available at: http://www.achpr.org/files/news/2013/04/d84/model_law.pdf.
[42] International standards, as well as better national State practice, have been carefully distilled into 61 specific indicators in the RTI Rating, available at: http://www.rti-rating.org/index.html.

- States should put in place a package of promotional measures to ensure effective implementation of the right to information.

Freedom of Expression and the Right to Truth

Perhaps surprisingly, given the subject matter of the right to truth, namely access to information, references to freedom of expression as a basis for it in the literature and jurisprudence came rather late and are somewhat limited. The European Court of Human Rights has so far refused to consider the right to truth as part of the right to freedom of expression. In its leading case on the issue, *El-Masri v. the Former Yugoslav Republic of Macedonia*, the Court did find a breach of the right to truth as part of the procedural failures of the State to protect right of the applicant not to be subject to "torture or to inhuman or degrading treatment or punishment",[43] protected by Article 3 of the *European Convention on Human Rights* (ECHR).[44] The Court specifically held, however, that the case did not raise "any particular issue that should be analysed under Article 10 alone" that had not already been covered by the Article 3 analysis.[45]

This may be contrasted with the jurisprudence of the Inter-American Court of Human Rights, which has recognised a breach of the right to freedom of expression in the context of a denial of the right to truth. For example, in the case of *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, the Court held that the facts of the case violated the right to seek and receive information enshrined in Article 13, guaranteeing freedom of expression.[46] However, the reasoning of the Court suggests that this conclusion was based more on a traditional assessment of the right to information than on something specifically relating to the right to truth. Among other things, the Court noted that the State had, without justification, failed to provide all of the information in its possession, which is a direct breach of the right to information (see para. 210).

This conclusion is bolstered by the fact that in the 2012 case of *Gudiel Álvarez et al. ("Diario Militar") v. Guatemala*, the Inter-American Court refused to find a breach of the right to freedom of expression, and specifically of the right to information. The Court held that the State had failed in its duty to investigate serious human rights abuses, and specifically that its refusal to provide information to, and to cooperate with, investigative and oversight bodies had been an obstacle to the elucidation of the facts of the case (i.e. a breach of the right to truth, although the Court refrained from using this term). It distinguished Lund and other cases on the basis that the "alleged violation is not related to a specific request for information address by the presumed victims to the State authorities in order to obtain this information."[47] In

[43] See note 14 and associated quotation.
[44] Adopted 4 November 1950, E.T.S. No. 5, in force 3 September 1953.
[45] Note 14, para. 264.
[46] Note 17, para. 212.
[47] Note 21, para. 269.

other words, a denial of the right to truth through the suppression of information did not amount to a denial of the right to freedom of expression in the absence of a specific and classical breach of the right to information, namely through denying a request for information.

It may be noted that, when deciding the same case two years later, the Inter-American Commission on Human Rights engaged in an analysis of the right to information which was far more closely linked to the right to truth. It noted, for example, that the scope of restrictions on the right to information should be particularly narrow, if available at all, in the context of information relating to serious human rights abuses,[48] and that bodies tasked with investigating serious human rights abuses, such as Truth Commissions, also have a particularly strong right to access information of relevance to their tasks.[49]

The OHCHR Study also declines to identify the right to freedom of expression as a legal basis for the right to truth, instead noting that they are "linked", while also noting the link between the right to truth and transparency more generally.[50]

At the same time, one cannot escape the close links between the rights to truth and to information. In terms of subject matter, the right to truth is, in its essential characteristics, a right to obtain information. As such, it can be seen as a subset of the wider right to information, albeit with some special characteristics. It therefore falls clearly within the ambit of the guarantee of the right to freedom of expression.

The two rights also share deep philosophical bases. To regard the right to truth simply as a functional or instrumental means of securing the protection of human rights or the right of victims to a remedy somehow diminishes its true nature. At least in its social dimension, the right to truth is intimately linked to wider issues, in particular (the restoration of) democracy and accountability of State actors, especially vis-à-vis their human rights obligations.

It shares these wider objectives with the underlying purposes of both the right freedom of expression in general, and the right to information as a specific aspect of that wider right. The Inter-American Court of Human Rights has noted the fundamental importance of democracy to the whole system for the protection of human rights, noting: "Representative democracy is the determining factor throughout the system of which the Convention is a part."[51] It has further noted:

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[48] Note 15, paras. 445-459.
[49] *Ibid.*, paras. 460-465.
[50] Note 6, paras. 43 and 57.
[51] *The Word "Laws" in Article 30 of the American Convention on Human Rights*, Advisory Opinion OC-6/86, 9 May 1986, Series A, No. 6, para. 34.

> Freedom of expression is a cornerstone upon which the very existence of a democratic society rests.[52]

The Court quoted both of these statements in the *Claude Reyes* case, going on to note that "the State's actions should be governed by the principles of disclosure and transparency in public administration that enable all persons subject to its jurisdiction to exercise the democratic control of those actions" and that transparency "promotes the accountability of State officials in relation to their public activities".[53]

Inasmuch as the right to truth goes beyond simply facilitating the exercise or protection of specific human rights, and has wider links to the underlying notions of democracy and accountability, it shares deep philosophical roots with the right to freedom of expression, and particularly the included right to information. Given the intimate links between these two notions – both as to their subject matter and as to their underlying philosophical roots – it seems reasonable to see them as articulated rights.

This would also provide a better explanation for the idea of a right to truth as an autonomous right.[54] While it cannot be fully autonomous unless it has direct roots in either a treaty or customary international law, conceptualising of it as an aspect of freedom of expression gives it more profound roots than seeing it merely as a means to protect other rights.[55]

An Enhanced Right to Information in the Context of the Right to Truth

Several court decisions and authoritative statements suggest that the right to access information is stronger in the context of the right to truth. The most important such enhancement is the narrow scope for restrictions on the right to truth, which has important implications for the right to information.

In the Chang case, the Inter-American Court of Human Rights signalled that it would accept only very limited restrictions on the provision of information in the context of the right to truth, at least to judicial and administrative bodies charged with investigating or prosecuting human rights abuses:

> The Court deems that in cases of human rights violations, the State authorities cannot resort to mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information

[52] *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism*, Advisory Opinion OC-5/85, 13 November 1985, Series A, No. 5, para. 70.
[53] Note 32, paras. 84-87.
[54] See note 25 and surrounding text.
[55] This theme is developed further below.

> required by the judicial or administrative authorities in charge of the ongoing investigation or proceeding.[56]

Others have challenged the very idea of declaring secret, at least on grounds of public order or national security, information needed for the right to truth. The OAS Special Rapporteur on Freedom of Expression has noted that the notion of national security must be understood within a democratic framework and, as a result, it cannot be used to limit access to information about serious human rights abuses:

> [I]t is essential to recall that the concept of "national security" cannot be interpreted at will. This concept should, in all cases, be interpreted from a democratic perspective. It is therefore surprising that the secrecy of serious human rights violations committed by agents of the State during the authoritarian regime from which the State is transitioning should be considered an indispensable condition for maintaining the "national security" of the new order based on the rule of law. Indeed, from a democratic perspective, the concept of "national security" can never include the secrecy of criminal state activities such as torture or the forced disappearance of persons.[57]

In a similar vein, in the General Comment on the Right to the Truth in Relation to Enforced Disappearances, the Working Group on Enforced or Involuntary Disappearances refers to the interest of avoiding "jeopardizing an ongoing criminal investigation" as the only legitimate reason for secrecy regarding disappearances.[58]

The Special Rapporteur on the independence of judges and lawyers highlights a strong underlying rationale for the idea that exceptions to the right to truth should be very limited:

> It would be illogical to accept that for public order reasons a State may suspend rights and guarantees - including the right to the truth - thereby jeopardizing untouchable rights such as the right to life or to the physical and moral integrity of persons. The differences between these two undoubtedly widen as we enter situations in which the nature of the crimes and the rights affected renders the right to the truth untouchable and confers on the obligation the character of *jus cogens*.[59]

This raises the question of whether the right to truth is a norm with the status of *jus cogens*, so that it may not be subject to derogation in times of emergency. The UN Human Rights Committee has noted that while Article 2(3) of the ICCPR, one of the key bases for the right to truth, is not one of those rights specifically listed as being non-derogable in Article 4(2), the obligation to provide an effective remedy persists, even during a state of emergency:

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[56] *Myrna Mack Chang v. Guatemala*, note 13, para. 180. This view was endorsed in *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, note 17, para. 202.
[57] 2010 Report of the Office of the Special Rapporteur for Freedom of Expression to the Inter-American Commission on Human Rights, OEA/Ser.L/V/II. Doc. 5, 4 March 2011, p. 316.
[58] Note 27, para. 3.
[59] Report on Civil and Political Rights, Including the Questions of Independence of the Judiciary, Administration, of Justice, Impunity, UN Doc. E/CN.4/2006/52, 23 January 2006, para. 23.

> Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective.[60]

This idea also finds support in Article 20(2) of the *International Convention for the Protection of All Persons from Enforced Disappearance*, which calls for persons with a legitimate interest to be provided with "an effective judicial remedy as a means of obtaining without delay the information referred to in article 18, paragraph 1", while noting that the right to a remedy "may not be suspended or restricted in any circumstances".[61] Similarly, the General Comment on the Right to the Truth in Relation to Enforced Disappearances notes that the right to truth regarding the fate and location of disappeared persons is absolute and may not be subject to derogation, although the right to know about the circumstances of a disappearance my be limited, in particular insofar as secrecy may facilitate reconciliation.[62]

The list of non-derogable rights includes the rights to life and to be free of torture, both of which often come up in the context of the right to truth. At least to the extent that the right to truth serves to protect one of these rights, it should also be non-derogable.[63] In those cases where the denial of information itself constitutes a breach of the right to be free of torture, non-derogation would clearly apply. The Impunity Principles also assert that the right to truth is imprescriptible.[64]

The European Court of Human Rights has put particular emphasis on the invalidity of national security restrictions in transitional contexts, noting:

> The Court recognises that, particularly in 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.[65]

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[60] General Comment No. 29, States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 14.
[61] Note 5.
[62] Note 27, paras. 4 and 8.
[63] The OHCHR Study also argues that the right is non-derogable. Note 6, para. 44.
[64] Note 10, Principle 4.
[65] *Turek v. Slovakia*, 14 February 2006, Application no. 57986/00, para. 115.

These standards find support in documents and literature on the right to information. For example, Article 45 of the 2010 Model Inter-American Law on Access to Public Information[66] provides: "The exceptions in Article 41 [i.e. all of the exceptions] do not apply in cases of serious violations of human rights or crimes against humanity." In a number of right to information laws at the national level, the regime of exceptions does not apply to information about human rights abuses. In Mexico, for example, the exceptions do not apply to information concerning "grave violations of fundamental rights or crimes against humanity".[67] Similar rules apply in Brazil,[68] Guatemala,[69] Peru[70] and Uruguay.[71] In India, intelligence bodies are generally excluded from the scope of the right to information law, but not in relation to information on corruption or human rights abuse.[72]

The Global Principles on National Security and the Right to Information (Tshwane Principles) provide an authoritative statement of better international practice in the area of access to information and national security.[73] Principle 10(A) states, in part:

> (1) There is an overriding public interest in disclosure of information regarding gross violations of human rights or serious violations of international humanitarian law, including crimes under international law, and systematic or widespread violations of the rights to personal liberty and security. Such information may not be withheld on national security grounds in any circumstances.
>
> (2) Information regarding other violations of human rights or humanitarian law is subject to a high presumption of disclosure, and in any event may not be withheld on national security grounds in a manner that would prevent accountability for the violations or deprive a victim of access to an effective remedy.
>
> (3) When a state is undergoing a process of transitional justice during which the state is especially required to ensure truth, justice, reparation, and guarantees of non-recurrence, there is an overriding public interest in disclosure to society as a whole of information regarding human rights violations committed under the past regime. A successor government should immediately protect and preserve the integrity of, and release without delay, any records that contain such information that were concealed by a prior government.[74]

The Tshwane Principles highlight a number of types of information other than about breaches of human rights and humanitarian law where there is a high presumption against access being denied on national security grounds, including safeguards for

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[66] AG/RES. 2607 (XL-O/10). Available at: http://www.oas.org/dil/AG-RES_2607-2010_eng.pdf.
[67] Federal Transparency and Access to Public Government Information Law, 2002, Article 14.
[68] Law on Access to Information, 2011, Article 21.
[69] Law of Access to Public Information, 2008, Article 21.
[70] Law of Transparency and Access to Public Information, 2002, Article 15C.
[71] Law No. 18.381 on the Right to Access Public Information, 2008, Article 12.
[72] Right to Information Act, 2005, section 24(1).
[73] The Principles were developed by 22 organizations and academic centres in consultation with more than 500 experts from more than 70 countries at 14 meetings held around the world.
[74] 12 June 2013. The Principles are available at: http://www.law-democracy.org/live/national-security-principles-launched/.

the right to liberty and other rights, the structures and powers of government, decisions to use military force or obtain weapons of mass destruction, surveillance, public expenditures, accountability regarding constitutional and other violations, and public health, safety or the environment.

More generally, it is accepted that all exceptions should be subject to a public interest override, whereby information should be provided, even if it would cause harm to a protected interest, if disclosure would serve the larger public interest. All of the information covered by the right to truth would presumptively be covered by the public interest override.

The jurisprudence also highlights some important procedural protections for the right to truth. The Inter-American Court, in Chang, quoted extensively from the brief of the Inter-American Commission on Human Rights in the case, which had stressed the need for independent, and particularly judicial, oversight of any decision that information cannot be disclosed on grounds of secrecy:

> The Court shares the statement of the Inter-American Commission with respect to the following:
>
> > [i]n the framework of a criminal proceeding, especially when it involves the investigation and prosecution of illegal actions attributable to the security forces of the State, 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.
> >
> > [...P]ublic authorities cannot shield themselves behind the protective cloak of official secret to avoid or obstruct the investigation of illegal acts ascribed to the members of its own bodies. In cases of human rights violations, when the judicial bodies are attempting to elucidate the facts and to try and to punish those responsible for said violations, resorting to official secret with respect to submission of the information required by the judiciary may be considered an attempt to privilege the "clandestinity of the Executive branch" and to perpetuate impunity.
> >
> > Likewise, when a punishable fact is being investigated, the decision to define the information as secret and to refuse to submit it can never depend exclusively on a State body whose members are deemed responsible for committing the illegal act. "It is not, therefore, a matter of denying that the Government must continue to safeguard official secrets, but of stating that in such a paramount issue its actions must be subject to control by other branches of the State or by a body that ensures respect for the principle of the division or powers..." Thus, what is incompatible with the Rule of Law and effective judicial protection "is not that there are secrets, but rather that these secrets are outside legal control, that is to say, that the authority has areas in

> which it is not responsible because they are not juridically regulated and are therefore outside any control system..."[75]

The European Court of Human Rights has made substantially the same point:

> 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 thereby enjoy all procedural guarantees under the Convention in respect of any proceedings relating to the application of such measures.[76]

This again strongly correlates with right to information standards, which call for independent oversight of any refusals to provide information.

In Lund, the Court also set clear standards for cases where the State claims it does not hold the information requested, noting that it must make diligent efforts to locate information necessary to fulfil the right to truth:

> [T]he State cannot seek protection in arguing the lack of existence of the requested documents; rather, to the contrary, it must establish the reason for denying the provision of said information, demonstrating that it has adopted all the measures under its power to prove that, in effect, the information sought did not exist. It is essential that, in order to guarantee the right to information, the public powers act in good faith and diligently carry out the necessary actions to assure the effectiveness of this right, particularly when it deals with the right to the truth of what occurred in cases of gross violations of human rights such as those of enforced disappearances and the extrajudicial execution in this case. To argue in a judicial proceeding, as was done in this case, the lack of evidence regarding the existence of certain information, without at least noting what procedures were carried out to confirm the nonexistence of said information, allows for the discretional and arbitrary actions of the State to provide said information, thereby creating legal uncertainty regarding the exercise of said right.[77]

Based on the above, there is a strong, perhaps absolute, presumption in favour of access to information relating to serious human rights and humanitarian law breaches, and a strong presumption in the context of other human rights abuses. These presumptions are particularly strong vis-à-vis national security claims of confidentiality, which must be understood within the wider democratic framework, especially in transitional contexts. They may, however, be overcome in limited circumstances where a supporting interest (i.e. of the right to truth) is involved, such as securing a prosecution. These presumptions are also particularly strong where investigatory or prosecutorial bodies are seeking information on abuses.

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[75] *Myrna Mack Chang v. Guatemala*, note 13, para. 181. Once again, its views were endorsed in *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, note 17, para. 202.
[76] *Turek v. Slovakia*, 14 February 2006, Application no. 57986/00, para. 115.
[77] *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, note 17, para. 211.

Although the general right to information is not a non-derogable right, the subset of that right which falls within the scope of the right to truth is.

These rules are largely consistent with accepted standards regarding the right to information, although they certainly represent a strong and concrete expression of those standards. The invalidity of claiming exceptions to the right to information in the context of human rights abuses is reflected in various international and national laws and instruments. Indeed, the principle behind a public interest override suggests that these presumptions should apply far more broadly than just in the context of human rights abuses, and this is also supported by the Tshwane Principles.

Finally, certain procedural protections are necessary to secure the above. Public bodies being asked to provide information cannot themselves stand as final barriers to its disclosure. There is a need for independent oversight over any refusals to disclose information. Similarly, public bodies cannot simply assert that they do not hold information sought as part of the right to truth. They must demonstrate that they have made diligent efforts to find the information, without success.

Beyond Access: Collecting/Uncovering Information

To serve the goals of protecting human rights and securing democracy requires more than just opening up the archives, as important as this is. As a first step, it also requires effective measures to preserve existing archives. These face the dual challenges of preventing the inadvertent or routine destruction of relevant information, as well as targeted efforts by those who have been involved in abuses, who may well remain in their posts, especially during the early period of a transition, to destroy or hide incriminating information.

Effective protection of the right to truth, however, requires States to go beyond these measures, and to collect or uncover relevant information. As the Inter-American Court of Human Rights stated in the Chang case: "[T]he next of kin of the victims and society as a whole must be informed of everything that has happened in connection with said violations."[78] While 'everything' may be an expansive description, it is clear that extensive information needs to be made available, which may not already be held by State actors. Information about abuses may not have been recorded in the first place, and this may even include very important information such as the location of remains of the dead. In other cases, recorded information may already have been destroyed or hidden.

The standards articulated in the cases and authoritative statements regarding the degree of effort that is required to this end are necessarily somewhat general, because the extent of this obligation depends on the situation and the nature of the human rights abuse. Principles 4 and 5 of the General Comment on the Right to the

[78] *Myrna Mack Chang v. Guatemala*, note 13, para. 274.

Truth in Relation to Enforced Disappearances refers to "all necessary steps" and makes it clear that the obligation to investigate is ongoing "until the fate and the whereabouts of the person have been clarified". The OAS Special Rapporteur has called on States to "make a substantive effort, in good faith, and contribute all the necessary resources" to discover the truth about human rights abuses.[79]

As a general rule, the right to information does not require States to create or collect information, but only to provide access to the information they already hold. To this extent, the right to truth goes beyond and extends the right to information.

From an institutional perspective, the key bodies that serve to uncover the truth are the courts, especially the criminal courts, and, most often in transitional contexts, specialised extrajudicial bodies created specifically for that purpose, such as truth commissions.

The Special Rapporteur on the independence of judges and lawyers has stated: "States have a positive obligation to provide both judicial and extrajudicial means of knowing the truth." He has also elaborated on the sometimes delicate relationship between these two sets of actors, indicating that the role of truth commissions is to "complement the justice system",[80] and noting that in many transitional contexts, "the courts would reach saturation if required to investigate all the violations which occurred in the past". At the same time, independence of the judiciary requires the courts to act in strict independence from truth commissions, which fall within the scope of the powers of the legislative and/or executive branches of government.[81]

These views were largely endorsed by the Inter-American Court of Human Rights in the Lund case, where it stated:

> In regard to the establishment of a National Truth Commission, the Court considers that it is an important mechanism, among others that already exist, to comply with the obligation of the State to guarantee the right to the truth of what occurred. In effect, the establishment of a Truth Commission, depending on its objective, procedures, structure, and purpose of its mandate, can contribute to the construction and preservation of the historic memory, clarification of the facts, and determination of the institutional, social, and political responsibilities of specific historic periods in a society. As such, the Court values the initiative of creating a National Truth Commission and urges the State to implement it, using criteria of independence, competence, and transparency in the selection of its members and with the resources and attributions that permit it to effectively comply with its mandate. Nevertheless, the Court deems it appropriate to highlight that the activities and information that this Commission will eventually obtain do not substitute the obligation of the State to

[79] Office of the Special Rapporteur on Freedom of Expression, Inter-American Commission on Human Rights, *The Inter-American Legal Framework Regarding the Right to Access to Information, Second Edition*, OEA Ser.L/V/II CIDH/RELE/INF.9/12, 7 March 2011, para. 93.
[80] See also Principle 5 of the Impunity Principles.
[81] Note 59, paras. 21 and 35-38.

> establish the truth and ensure the legal determination of individual responsibility by means of criminal legal procedures.[82]

In his first report to the General Assembly, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence highlighted a number of key areas where truth commissions have contributed to the right to truth, including exposing compromised personnel, analysing security and justice failures, promoting access to justice, promoting reforms relating to the independence of the judiciary and other areas, enhancing the visibility and participation of victims, and catalysing debates about the rule of law.[83]

In a 2012 resolution, the UN Human Rights Council called on States to consider "establishing specific judicial mechanisms",[84] a call that has been echoed by the General Assembly of the OAS.[85] Such mechanisms may be needed to supplement the ordinary courts in times of high-volume need, and to ensure sufficient distance from the activities of the former regime. The OHCHR Study also notes the potential role played by other actors, such as national human rights institutions, administrative and civil proceedings, and historical research projects, including those supported by intergovernmental bodies.[86]

An important way in which the right to truth goes beyond 'ordinary' right to information standards is that it requires States not only to provide access to the information they hold, but also to fill in any gaps in that information, through investigations and information collection processes. The exact scope of this depends on all of the circumstances, but it is clear that it is a significant and ongoing obligation, which persists until sufficient information has been amassed.

The courts, and in particular the criminal courts, are the most rigorous institutional mechanism for discovering the truth, and of course they are also able to play an important remedial role in relation to human rights abuses. However, in many transitional contexts, there is a need to go beyond this and create dedicated administrative bodies to help uncover the truth, such as truth commissions.

Blue Skies Thinking: Beyond Human Rights

To date, the focus of debate on the right to truth has been mainly on contexts of human rights abuse and breaches of humanitarian law. This has led to a primary focus on the idea of the right to truth being derived from a package of what might be called framework human rights, including the obligation of States to ensure

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[82] *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil*, note 17, para. 297. See also *Gudiel Álvarez et al. ("Diario Militar") v. Guatemala*, note 21, para. 298.
[83] Promotion of truth, justice, reparation and guarantees of non-recurrence, UN Doc A/67/368, 13 September 2012, paras. 24-26.
[84] Note 12, para. 4.
[85] Note 13, para. 2.
[86] Note 6, paras. 51, 53 and 54.

protection for human rights and the right to judicial and other mechanisms to secure redress when abuses take place. This is natural enough, given the clarion nature of the need for truth in relation to human rights abuses, particularly in the aftermath of long periods of abuse.

A different, potentially more powerful, conception of the right to truth is, however, possible. Envisaged as being based on the right to freedom of expression, and as contributing to the free flow of information and ideas in society, the right to truth would no longer be limited in scope to situations of human rights abuse. In this conception, the powerful attributes of the right to truth outlined above – in particular its powers to prevail in the face of exceptions to the right to information and to oblige States to fill in any information gaps – could be brought to bear on other social situations which, if not quite as imperative as human rights abuses, nevertheless call out for the truth.

Although forward-looking, this idea is not far-fetched. The Tshwane Principles, for example, already call for an overriding presumption of openness (i.e. for minimising exceptions to the right of access) in relation to a number of non-human rights categories of information. In democracies, certain types of events – in particular events in which human failures or natural disasters combined with possible human failures – cannot occur without States conducting focused investigations into why they happened, often relying on special mechanisms, such as commissions of inquiry, which, although less high-profile are not unlike truth commissions. Such events are also accompanied, where relevant, by judicial and often criminal investigations, which the public effectively insist on.

It is clear that these two special features of the right to truth – a presumption against the use of exceptions to render information secret and a requirement to conduct investigations to fill any relevant information gaps – cannot be invoked in every case which can be said to engage the public interest, normally defined quite broadly by courts and other decision-makers. But it is possible to posit threshold criteria beyond human rights abuse for engaging the right to truth, such as significant loss of life, widespread property damage, or major threats to health or the environment.

In these kinds of cases, the rationales that underlie the special attributes of the right to truth are also brought to bear, albeit not necessarily in such imperative forms. Inasmuch as an important goal of national security, for example, is to protect life, it should not be held up as a barrier to the investigation, and thereby prevention of repetition, of events which have caused significant loss of life. While these cases do not involve threats to the very underpinnings of democracy, they do cry out for answers and explanations, in other words, the truth.

To some extent, existing standards and jurisprudential tools can move us towards the same conclusion. The public interest override that applies to defeat exceptions where a broader social is served by the disclosure of information would be engaged

in all of these cases, as relevant (i.e. where the information was claimed to be subject to an exception).

There is a trend towards modern right to information laws imposing ever more extensive proactive publication requirements on public authorities. While these often relate to information that these authorities already hold, in some cases they also require public authorities to collect or at least repackage information. While this is modest compared to the wider conception of the right to truth articulated above, it is at least a form of recognition that the right to freedom of expression can impose positive obligations on States to create information.

This expanded notion of the right to truth is clearly in its infancy. At the same time, democratic States are already approaching delivery of its main features, at least in practice. It was not very long ago that the right to information was in an analogous position: it was recognised in established democracies, but not as a human right. As the information space continues to be radically altered by the onward march of technological progress, it is not unrealistic to envisage an expansion along these lines in our conception of the right to truth.

Conclusion

The right to truth has emerged as an important and widely recognised human rights doctrine. Originally conceived of as a right to find out what happened to missing or disappeared persons, it has gradually expanded in scope to cover all serious human rights abuses and grave breaches of humanitarian law. Consistently with its origins, the right to truth has largely been understood as being rooted in the obligation of States to provide effective protection for human rights and to ensure the provision of redress when rights are violated.

More recently, commentators and even courts have started to focus on the close links between the right to truth and the right to freedom of expression, especially the right to access information held by public authorities, which has now been recognised as being a component of the right to freedom of expression. The two rights involve substantially the same subject matter, namely access to information. They also share deeper philosophical roots, in particular as underpinnings of democracy and public accountability.

The right to truth can be seen as a specialised instance of the wider right to information, one which is narrower – being restricted to contexts of human rights abuse – but deeper, inasmuch as it benefits from a very strong presumption against being overridden by exceptions and it imposes a positive obligation on States to fill in any relevant gaps in the information they hold. At the same time, both of these attributes find some basis in general right to information standards, for example in the public interest override for exceptions to the right of access and in proactive publication obligations.

Given their close substantive scope and underlying objectives, it is reasonable to postulate that our understanding of the right to truth will over time evolve so that it is seen as being based on the human right to freedom of expression. This would liberate the right from its human rights limitations, and open up the possibility of its powerful attributes being applied to other important areas of social failure, such as situations involving serious loss of life, widespread property damage or major threats to health or the environment. While forward looking, these ideas are already largely reflected in the practice of democratic States, for example in the investigations that inevitably follow major accidents or natural disasters. It may only be a matter of time before this practice is reflected in our legal understandings.