

# The right to the truth in international law: fact or fiction?

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## **Abstract**

*The right to the truth has emerged as a legal concept at the national, regional and international levels, and relates to the obligation of the state to provide information to victims or to their families or even society as a whole about the circumstances surrounding serious violations of human rights. This article unpacks the notion of the right to the truth and tests the normative strength of the concept against the practice of states and international bodies. It also considers some of the practical implications of turning “truth” into a legal right, particularly from the criminal law perspective.*

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“The people have a right to the truth as they have a right to life, liberty and the pursuit of happiness.” Epictetus (55 – 135)

“Peace if possible, but truth at any rate.” Martin Luther (1483 – 1546)

## **Introduction: The significance of “legal truth”**

Criminal processes, whether at the national or international level, are primarily about meting out justice for alleged wrongs committed by individuals. The process entered into, at least from a common law perspective, is not so much about

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finding the truth as it is offering evidence that proves guilt or innocence — evidence that is contested, put into question or interpreted in different ways — to win a case. The investigative method of civil law systems is arguably more concerned about finding the truth, but the end result is the same: the case is won or lost by convincing or failing to convince a judge or jury of guilt or innocence. The “legal truth” is merely a by-product of a dispute settlement mechanism.

In trials dealing with international crimes, however, the significance of this by-product of legal truth has taken on a new dimension, owing no doubt to the unique objectives that international criminal law is supposed to fulfil and that go way above and beyond merely finding guilt or innocence of particular individuals. They range from such lofty goals as contributing to “the restoration and maintenance of peace”<sup>1</sup> and “the process of national reconciliation”<sup>2</sup> to others, such as fighting against impunity, deterring or preventing future violations, satisfying victims’ needs and upholding their rights, removing dangerous political players from the political scene, re-establishing the rule of law and reaffirming the principle of legality. They include the symbolic and ritualistic effect of the criminal trial on divided communities, as well as the move away from community blame and toward individual responsibility, reconstructing national identities from interpretations of the past through criminal legal analysis and process, and setting down a historical record with a legal imprint.

How does the right to the truth come into play here? It is argued that this legal concept intersects with international criminal processes in various ways, at times strengthening the intended purpose to prosecute persons accused of international crimes and at times overriding the focus on the individual defendant and instead turning the attention of a case to the broader implications of international criminal trials. The desire for truth may even be used to justify non-prosecution of certain alleged offenders in “amnesty-for-truth” or “use immunity” situations. Some of the responses to the sudden termination of the *Milosevic* case before the International Criminal Tribunal for the former Yugoslavia (ICTY) as a result of the death of the former Yugoslav leader will suffice to explain these implications in simple terms. Svetozar Marovic, the President of Serbia-Montenegro, commented: “With his death, history will be deprived of the full truth.”<sup>3</sup> Milan Kucan, former President of Slovenia, put it slightly differently, stating that: “Now history will have to judge Milosevic.”<sup>4</sup> ICTY Prosecutor Carla Del Ponte, on the other hand, while lamenting the loss of justice for victims of the crimes for which Milosevic was accused, was keen to stress that the testimonies of 295 witnesses and some 5,000 exhibits presented to the court

1 SC Res. 808 (1993), 22 February 1993, on the establishment of the International Criminal Tribunal for the former Yugoslavia, preambular para. 9.

2 SC Res. 955 (1994), 8 November 1994, on the establishment of the International Criminal Tribunal for Rwanda, preambular para. 7.

3 See BBC News, “Former Yugoslav President Slobodan Milosevic has died in the detention centre at the Hague tribunal: Reaction to the news”, 12 March 2006, available at: <http://news.bbc.co.uk/2/hi/europe/4796704.stm#world> (last visited on 23 March 2006).

4 *Ibid.*

during the prosecution case “represent a wealth of evidence that is on the record.”<sup>5</sup> This was presumably to make the point that the lack of a judgment has not deprived the four-year trial from achieving some of its objectives, in particular that of satisfying to some extent the right to the truth or setting down a historical record. The question that remains is whether a legal judgment is necessary to accord such evidence the status of representing “the truth.”<sup>6</sup>

At this point, it is enough to note that a right to the truth, if indeed such a right exists in international law, would intermesh strategically with the broader objectives of international criminal law, arguably including those of restoring and maintaining peace (because by exposing the truth, societies are able to prevent the recurrence of similar events), facilitating reconciliation processes (because knowing the truth has been deemed essential to heal rifts in communities),<sup>7</sup> contributing to the eradication of impunity (because knowing the truth about who was responsible for violations leads to accountability),<sup>8</sup> reconstructing national identities (by unifying countries through dialogue about a shared history)<sup>9</sup> and setting down a historical record (because the “truth” of what happened can be debated openly and vigorously in court, adding credibility to the evidence accepted in a criminal judgment). It could also be contended that the right to the truth underlies the very process of criminal indictment by ensuring proper investigation of crimes and transparency in the form of *habeas corpus* procedures in the detention of individuals by the state, as well as by requiring public access to

5 Press Conference by the ICTY prosecutor, Carla Del Ponte, The Hague, 12 March 2006, available at: <http://www.un.org/icty/latest-e/index.htm> (last visited on 23 March 2006).

6 In the same press conference, the ICTY prosecutor also underscored the Trial Chamber decision of 16 June 2004, which rejected a defence motion to dismiss the charges for lack of evidence, thereby confirming, in accordance with Rule 98bis, that the prosecution case contained sufficient evidence capable of supporting a conviction on all 66 counts. However, this ruling cannot by any means be interpreted as implying that Milosevic would have been found guilty. The only possible interpretation is that it “could” have done so. See *Prosecutor v. Slobodan Milošević*, Decision on Motion for Judgment of Acquittal, IT-02-54-T, 16 June 2004, at para. 9.

7 See Supreme Decree No. 355 of the Chile National Commission on Truth and Reconciliation: “Only upon a foundation of truth will it be possible to meet the basic demands of justice and create the necessary conditions for achieving true national reconciliation.”

8 See the “Report of the independent expert to update the Set of Principles to combat impunity”, Diane Orentlicher, Addendum: “Updated set of principles for the protection and promotion of human rights through action to combat impunity”, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005 (hereinafter “Updated Principles on Impunity”). Principle 2 declares that “[e]very 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.” Principle 4 articulates that “[i]rrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fate.” Principle 1 states that it is an obligation of the state “to ensure the inalienable right to know the truth about violations.” The first draft of these principles is contained in Annex II of the revised final report prepared by Mr. Joint pursuant to Sub-Commission decision 1996/119, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1.

9 See Act No. 12/2597, 14 May 1992, Germany: Law Creating the Commission of Inquiry on “Working Through the History and the Consequences of the SED Dictatorship”, para. I: “To work through the history and consequences of the SED [East Germany Communist Party, known as the German Socialist Union Party] dictatorship in Germany is a joint task of all Germans. It is particularly important for the purpose of truly unifying Germany.”

official documents. Where judgments have been made, the satisfaction of the right to the truth may arguably form part of reparations to victims.<sup>10</sup>

It was all these slightly amorphous considerations that led the UN Commission on Human Rights (CHR), in its 61st session, to adopt Resolution 2005/66, which “[r]ecognizes 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.” Yet it is one thing to recognize the importance of a right and quite another to set out its contours under international law, and for this reason the resolution goes on to request that the Office of the High Commissioner for Human Rights (OHCHR) prepare a study on the right, “including information on the basis, scope, and content of the right under international law,” which will be taken into consideration at the next (62nd) session. The present article seeks to provide some critical analysis of the conceptual underpinnings of this right — to unpack the notion of a right to the truth — and to examine the legal consequences, if any, of this notion. In other words, an attempt is made to determine whether it is a real right — identifiable, with clear parameters and something that can be implemented — or a piece of legal fiction, a narrative device used to fill the void where our current normative systems leave us wanting.

After first outlining its emergence under international law, the article begins the process of unpacking the meaning of the right to the truth, which necessitates delving into fields beyond international law (i.e., philosophy and to some extent historiography). It then looks at how such notions have found their way into international legal texts and jurisprudence and goes on to explore some of the consequences that turning “truth” into a legal right may entail.

## **Brief overview of the emergence of the right to the truth under international law**

The right to the truth has emerged as a legal concept in various jurisdictions and in many guises. Its origins may be traced to the right under international humanitarian law of families to know the fate of their relatives, recognized by Articles 32 and 33 of the 1977 Additional Protocol I to the Geneva Conventions of 1949, as well as obligations incumbent on parties to armed conflicts to search for persons who have been reported missing. Enforced disappearances of persons and

10 See Principle 11 of the “Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights and serious violations of humanitarian law”, CHR Res. 2005/35, 19 April 2005; ECOSOC Res. 2005/35, 25 July 2005, (hereinafter “Basic principles on remedies and reparation”) which states that “[r]emedies for gross violations of international human rights law and serious violations of international humanitarian law include the victim’s right to ... access ... relevant information concerning violations ...” Principle 22(b) provides that the right to reparation of the victim includes, as a modality of satisfaction, the “[v]erification of the facts and full and public disclosure of the truth.” Principle 24 further provides that: “victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law and to learn the truth in regard to these violations.”

other egregious human rights violations during periods of extreme, state-sponsored mass violence, particularly in various countries of Latin America but also in other parts of the world, prompted a broader interpretation of the notion of the right to be given information about missing persons. It also led to the identification and recognition of a right to the truth by various international organs, in particular, the Inter-American Commission on Human Rights and Court of Human Rights, the UN Working Group on Enforced or Involuntary Disappearances and the UN Human Rights Committee. These bodies progressively drew upon this right in order to uphold and vindicate other fundamental human rights, such as the right of access to justice and to an effective remedy and reparation. They also expanded the right to the truth beyond information about events related to missing or disappeared persons to include details of other serious violations of human rights and the context in which they occurred. Broadly speaking, the right to the truth, therefore, is closely linked at its inception to the notion of a victim of a serious human rights violation. Like procedural rights, it arises after the violation of another human right has taken place, and would appear to be violated when particular information relating to the initial violation is not provided by the authorities, be it by the official disclosure of information, the emergence of such information from a trial or by other truth-seeking mechanisms.

The rationale for such a right would appear to lie in the right of victims or of their families to be informed about the events in question so as to aid the healing process. Among other things, it would offer a sense of closure, enable their dignity to be restored and provide a remedy and reparation for violations of their rights and/or the loss suffered. In addition, the right to the truth has been a safeguard against impunity. For this reason, it has been used to contest the validity of blanket amnesty laws shielding perpetrators of gross violations of human rights under international law, as well as to encourage more transparent and accountable government.

In the aftermath of armed conflict or periods of internal strife, the right to the truth has often been invoked to help societies understand the underlying causes of conflicts or widespread violations of human rights. Many countries have sought to implement this right by establishing truth commissions or commissions of inquiry. Arguably, the right to the truth may also be implemented by other processes, such as public trials, the disclosure of state documents and the proper management of archives, and by ensuring public access to information.

## **The concept of truth**

In order to know what a right to the truth would look like or entail there needs to be some understanding as to what is meant by truth. Philosophers have long grappled with the meaning of truth. A traditional distinction has been drawn between truth as a social and as an intellectual matter. The question of whether there exists a “right” to truth would appear to fall into the former category,

namely that of truth as a social matter, given the legal conception of a right owed by the state to the individual.

A commonly accepted definition of truth is the agreement of the mind with reality. This should be distinguished from probable opinion. For William James, “true ideas are those we can assimilate, validate, corroborate and verify.”<sup>11</sup> In other words, the truth is measured by way of evidence. For Locke, “[t]ruth and falsity belong ... only to propositions” — to affirmations or denials that involve at least two ideas. This suggests a more adversarial schema, akin to “legal truth,” which may be decided by a judge or a jury. Kant summarizes this view neatly: “truth and error ... are only to be found in a judgement,” which explains why “the senses do not err, not because they always judge correctly, but because *they do not judge at all*.”<sup>12</sup> Interestingly, like the German word “*Recht*,” the word for truth in Arabic, “*al-Îaqq*” (al-Haq), also means “right” (i.e., as opposed to “wrong,” but also in the sense of a legal right) as well as “justice” and even “law” (although, like the German word “*Gesetz*,” there is also a separate word for that: *qânûn*). This suggests a conception of truth in line with Kant’s summation, although in Islamic theology “the Truth” is one of the inalienable characteristics of God and therefore has an absolute and “a-human” quality.<sup>13</sup>

In Christian doctrine, by comparison, the truth is seen as something that is “done” by a person, and this action has both redeeming consequences (“the truth will set you free,” John 8:32) and represents an act of God (“he who does truth [or: what is true] comes to the light, that it may be clearly seen that his deeds have been wrought in God,” John 3:21).<sup>14</sup> The metaphysical definition of truth as presented by Thomas Aquinas accepts that judgment needs to be involved in ascertaining the truth, but a judgment is only said to be true when “it conforms to the external reality.”<sup>15</sup> This aligns to some extent with Aristotle’s well-known definition of truth: “To say of what is that it is not, or of what is not that it is, is false, while to say of what is that it is, and of what is not that it is not, is true.”<sup>16</sup> This signifies a moral truth — to say what we mean. It indicates the existence of an obligation for the state to say what happened is what happened.

But here we are in the realm of a statement about what happened. If we accept Jacques Derrida’s point that, “[t]here is nothing outside the text; all is textual play with no connection with original truth,”<sup>17</sup> then suddenly the right to

11 William James, *Essays in Pragmatism*, Hafner Publishing Company, Inc., New York, 1948, p. 160.

12 Immanuel Kant, *Critique of Pure Reason*, ed. and transl. Paul Guyer & Allen W. Wood, Cambridge University Press, Cambridge, 1998 (emphasis added).

13 Matthijs Kronemeijer, “An Arab voice of compromise: Hazem Saghih’s *In Defence of Peace* (1997)”, MA thesis, Utrecht University, Department of Arabic, Modern Persian and Turkish Languages and Cultures, p. 71.

14 For these points and quotations on Islamic and Christian theology, I am grateful to Matthijs Kronemeijer for his comments and assistance.

15 This is a restatement of the well-known statement: “*Veritas est adaequatio rei et intellectus*” — Truth is the equation of thing and intellect. See Thomas Aquinas, *De Veritate* Q.1, A.1&3; cf. *Summa Theologiae* Q.16.

16 Aristotle, *Metaphysics*, 1011b25.

17 Jacques Derrida, *Prophets of Extremity*, University of California Press, Berkeley, 1985, p. 3.

the truth starts to look more like a right to an official statement about what happened. This may or may not accord with what did actually happen but still requires an obligation on the part of the state to disclose something. In other words, it becomes a matter of the use of language by the state.

Furthermore, if we take Derrida's view about writing not being confined to the Western notion of writing based on a phonetic alphabet or symbolized in a book, but instead encompassing the myriad forms of human expression, then such "statements" by the state need not be in a particular form but could be expressed aurally, visually, musically, pictorially or through sculpture. This could mean that the right to the truth could also be, at least partially, satisfied through such actions by the state as erecting monuments dedicated to victims or works of art or musical compositions that explain what happened. And we do see this type of recognition in some judgments. To give one example, the Human Rights Chamber for Bosnia-Herzegovina in its judgment in the "Srebrenica cases" ordered the Republika Srpska, *inter alia*, to pay a lump sum to the Srebrenica-Potocari Memorial and Cemetery. But from Derrida's point of view, this would merely be one "trace" entering into a play of differences, subject to different interpretations, always disputed and involved with power and violence, which never really yield final truths.<sup>18</sup> But Derrida did not mean that one can simply give any old interpretation to a "trace". He used certain protocols of reading, and in fact his approach to interpretation is similar to what the famous Italian philosopher/historian Benedetto Croce suggested history is: exploring the historical truth of the past out of a present interest.<sup>19</sup>

This notion — that truth is relative to present interest — reappears in various philosophical and historiographical writings. In his *Principles of Psychology*, James argues that not only must our conceptions or theories be "able to account satisfactorily for our sensible experience," but they are also to be weighed for their appeal "to our aesthetic, emotional, and active needs."<sup>20</sup> This idea recalls Walt Whitman's observation that "[w]hatever satisfies the soul is truth."<sup>21</sup>

The relativism of truth is a concept that becomes important in the legal formulation of the right to the truth, because we can work out what information needs to be provided according to the needs of the right-holder. Also, the pragmatic theory of truth looks mainly to extrinsic signs, thus not to some feature of the idea or thought itself, but to its consequences. This theory is clearly represented in some of the implementing mechanisms of the right to the truth, such as truth and reconciliation commissions, which by virtue of their mandate often formulate their inquiries into the "truth" of past events with an eye to how

18 Jacques Derrida, *Of Grammatology*, transl. Gayatri Chakravorty Spivak (1967), Johns Hopkins University Press, Baltimore, 1976, pp. 7–8, 60–62 ff.

19 Benedetto Croce, *History: Its Theory and Practice*, transl. Douglas Ainslie, Harcourt, Brace and Co., New York, 1921, pp. 11–26, reprinted as "History and chronicle" in Hans Meyerhoff (ed.), *The Philosophy of History in Our Time*, Doubleday Anchor, New York, 1959, p. 45.

20 William James, *Principles of Psychology*, 1890, Harvard University Press, Boston, 1983, p. 940.

21 Walt Whitman, Preface to *Leaves of Grass* (1855), Bantam Books, New York, 1983.



the truth-seeking process will contribute to reconciliation. For example, the stated objective of the Commission of Truth and Friendship established by Indonesia and Timor-Leste in March 2005 is “[t]o establish the *conclusive truth* in regard to the events prior to and immediately after the popular consultation in 1999, *with a view to further promoting reconciliation and friendship*, and ensuring the non-recurrence of similar events.”<sup>22</sup>

Going back to postmodernist accounts of truth, it is also worth pondering Michel Foucault’s assertion that “truth isn’t outside power, or lacking in power: ... Truth is a thing of this world: it is produced only by virtue of multiple forms of constraint.”<sup>23</sup> In other words, “truth” is the construct of the political and economic forces that command the majority of power within the societal web. It is to be understood as “a system of ordered procedures for the production, regulation, distribution, circulation and operation of statements.”<sup>24</sup> So where would such a perspective leave the right to the truth, if truth is nothing more than an expression of power through societal structures?

Postmodernists have been criticized for abandoning truth.<sup>25</sup> A more prevalent criticism among the anti-postmodernists is the extreme relativism that, it has been argued, leaves the door open to fascist or racist views of history, with no way of saying these ideas are false. To give an example of this, one of the famous justifications for the Nuremberg trials was to “establish incredible events by credible evidence” in order that future generations could not doubt that such events took place.<sup>26</sup> Yet despite these and other trials, Holocaust denial has occurred and gained momentum since the mid-1970s, and postmodernism has to some extent been blamed for seeming to encourage these differing interpretations of historical truth.<sup>27</sup>

The question of historical truth about the Holocaust came to a head when David Irving brought a lawsuit against Deborah Lipstadt for defamation.<sup>28</sup> In her book, *Denying the Holocaust: The Growing Assault on Truth and Memory* (1993), she recounted how Irving had become a denier in the late 1980s, convinced by “evidence” that it was chemically and physically impossible for the Germans to

22 Terms of Reference for the Commission of Truth and Friendship Established by the Republic of Indonesia and the Democratic Republic of Timor-Leste, 10 March 2005 (emphasis added).

23 Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972–1977*, Colin Gordon (ed.), Harvester Wheatsheaf, London, 1980, p. 114. See also the translation by Meaghan Morris and Paul Patton (eds.), “Truth and Power”, *Michel Foucault: Power, Truth, Strategy*, Feral Publications, Sydney, 1979, pp. 131–132.

24 Foucault goes on to state that “Truth is linked in a circular relation with systems of power which produce and sustain it, and to effects of power which it induces and which extend it. A ‘regime’ of truth.”

25 Joyce Appleby, Lynn Hunt and Margaret Jacob, *Telling the Truth about History*, W.W. Norton, New York, 1994, p. 213.

26 Report on Robert H. Jackson to the President on Atrocities and War Crimes, 7 June 1945, *Department of State Bulletin*, 10 June 1945, p. 1071.

27 For example, Richard J. Evans has argued that the “increase in scope and intensity of the Holocaust deniers’ activities since the mid-1970s” reflects the “postmodernist intellectual climate”, *In Defence of History*, Granta Books, London, 1997, pp. 238–241. See the discussion of his views in Ann Curthoys and John Docker, *Is History Fiction?*, UNSW Press, Sydney, 2006, pp. 209–211.

28 *David John Cadwell Irving v. Penguin Books Limited and Deborah E. Lipstadt*, [2000] EWHC QB 115.



have gassed Jews on a significant scale. While the defence hired expert historians to work on the case, Irving chose to defend himself. The case ended in a verdict against Irving, with the court finding that the defendant's historiographical criticisms of Irving's work were justifiable:<sup>29</sup> "for the most part the falsification of the historical record was deliberate and ... Irving was motivated by a desire to present events in a manner consistent with his own ideological beliefs even if that involved distortion and manipulation of historical evidence."<sup>30</sup>

Of course, this trial was not to determine the truth about the Holocaust but to examine the validity of Lipstadt's claims about Irving's work on the Holocaust. Nonetheless, the judgment was hailed as a "victory for truth," the *Daily Telegraph* for one proclaiming that "[it achieved] for the new century what the Nuremberg Tribunals or the Eichmann trial did for earlier generations."<sup>31</sup> Yet Lipstadt herself, in the book at the centre of the trial, ironically opposed the option of bringing deniers to court, as this may "transform the deniers into martyrs on the altar of freedom of speech" and also raise the problem of the unpredictability of lawsuits.

The example of this trial takes us back to the notion of truth as an idea that is verifiable and corroborated by evidence, but it also raises the question of how far differing interpretations of the truth should be allowed to go. While some may well caution against the permissive atmosphere resulting from the postmodernist bent, which allows scope for deniers of even the best-documented historical "facts,"<sup>32</sup> a postmodernist would argue that manifold interpretations of the truth are essential to guard against absolutist regimes such as the Nazi one.<sup>33</sup>

From the foregoing discussion, the following points about the concept of truth can be adduced:

- Truth is a social matter. It may be generated by social procedures and structures (suggesting something *agreed upon*). An example of this is a 1997 UNESCO-led project entitled "Writing the history of Burundi," which was designed to establish an official, scientific and agreed account of the history of Burundi from its origin until 2000 "so that all Burundians can interpret it in the same way."<sup>34</sup>

29 Ibid., para. 13.141.

30 Ibid., para. 13.163. See also See Richard J. Evans, *Telling Lies about Hitler: The Holocaust, History and the David Irving Trial*, Verso, London, 2002, p. 198.

31 See <http://www.hdot.org/ieindex.html> (last visited on 26 March 2006).

32 Steven Aschheim, *Culture and Catastrophe*, Macmillan, Basingstoke, 1996, pp. 13 and 193.

33 Dan Stone, *Constructing the Holocaust: A Study in Historiography*, Vallentine Mitchell, London and Portland, 2003, p. 16.

34 This idea originated at the 1997 Conference on the History of Burundi convened by UNESCO with the participation of some 30 Burundian experts of different political tendencies. It was conceived in the spirit of the Arusha Agreement. Article 8, Protocol I of the Agreement sets out the principles and measures related to national reconciliation. Para. 1(c) states: "The [National Truth and Reconciliation] Commission shall also be responsible for clarifying the entire history of Burundi, going as far back as possible in order to inform Burundians about their past. The purpose of this clarification exercise shall be to rewrite Burundi's history so that all Burundians can interpret it in the same way." It was divided by periods among some 50 authors, both Burundians and foreigners, experts in history, geography,

- It is something that can be verified or at least corroborated by evidence.<sup>35</sup>
- It may consist of an official statement or judgment about events that occurred.
- Truth implies an obligation to say that what happened did indeed happen (this implies an action of good faith and takes the form of an obligation of means, rather than result, much in the same way as the obligation to properly investigate crimes).<sup>36</sup>
- Such a “statement” may take various forms of expression: visual, aural, artistic, etc.
- “Truth” is relative to present needs and to its consequences.
- There may be different accounts of “truth” or differing “truths” provided these are verifiable (note, for instance, the report of the Truth and Reconciliation Commission of South Africa, which dealt with four differing types of truth: factual and forensic truth; personal and narrative truth; social truth; and healing and restorative truth).

## The right to the truth in international law

As the “right to the truth” is not enshrined in any universal legal instrument *per se*, there are two possible options to characterize it as a source of law: the right to the truth as a right under customary law or the right to the truth as a general principle of law.<sup>37</sup>

### The right to the truth as a customary right

Characterizing the right to the truth as a customary right under international law entails some difficulties. The Statute of the International Court of Justice describes custom “as evidence of a general practice accepted as law.”<sup>38</sup> Professor Meron points out that the “initial inquiry [into a customary human right] must aim at the determination whether, at a minimum, the definition of the core norm claiming customary law status and preferably the contours of the norm have been widely accepted.”<sup>39</sup> The right to the truth would appear to struggle to meet these

linguistics and anthropology. The project’s main objective was to serve as an educational tool in primary and secondary schools and as a history manual for the public at large. See Report of the assessment mission on the establishment of an international judicial commission of inquiry for Burundi, S/2005/158, 11 March 2005.

35 However, if something cannot be verified by positive evidence, this may be a practical problem rather than an existential one. This element should therefore not be applied strictly but only as a guiding principle within the framework of this discussion.

36 See Juan E. Méndez, “The Right to Truth”, in Christopher C. Joyner (ed.), *Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference 17–21 September 1998*, St. Agnes, Erès, 1998, p. 264 (“...the responsible state must comply ... [with the right to truth] to the limit of its possibilities and in good faith”).

37 See the formal sources of international law, listed in Art. 38 of the Statute of the International Court of Justice.

38 See Statute of the International Court of Justice, Art. 38(1)(b).

39 Theodor Meron, *Human Rights and Humanitarian Law as Customary Law*, Clarendon Press, Oxford, 1989, p. 93.

initial requirements. Beyond the clear norm under IHL of providing victims' families with information about the circumstances of a missing person, the definition of a more general "right to the truth" appears uncertain. And yet the right to the truth has been recognized without question both by a number of international organs and by a number of courts at the international and national level, and has been enshrined as a guiding principle in numerous instruments setting up truth and reconciliation commissions, as well as in national legislation. Some legal experts have also identified the right to truth as a customary right.<sup>40</sup> Clearly, there is a need to look a bit more carefully at these sources to see how they have identified such a right and what contours can be discerned.

In the following brief exposition of state practice and *opinio juris*, Professor Meron's preferred indicators for a customary human right provide a useful framework:<sup>41</sup> "first, the degree to which a statement of a particular right in one human rights instrument, especially a human rights treaty, has been repeated in other human rights instruments, and second, the confirmation of the right in national practice, primarily through the incorporation of the right in national laws."<sup>42</sup> There is no explicit statement of this right in a human rights treaty. The closest to this would be Article 24(2) of the draft International Convention for the Protection of All Persons from Enforced Disappearances adopted by the Inter-Sessional Working Group of the UN Commission on Human Rights on 23 September 2005. It provides that: "[e]ach victim 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."<sup>43</sup> Apart from this, there is, as already mentioned, Article 32 of Additional Protocol I, which

40 See the meeting cited by L. Despouy, Special Rapporteur on States of Emergency in his 8<sup>th</sup> Annual Report, UN Doc. E/CN.4/Sub.2/1995/29 Corr. 1, according to which the experts concluded that the right to truth has achieved the status of a norm of customary international law. For a different view, see Mendez, above note 36, p. 260, fn. 9.

41 See also The Restatement (Third) of the Foreign Relations Law of the United States of 1987, § 701: "Practice accepted as building customary human rights law includes: virtually universal adherence to the United Nations Charter and its human rights provisions, and virtually universal and frequently reiterated acceptance of the Universal Declaration of Human Rights even if only in principle; virtually universal participation of states in the preparation and adoption of international agreements recognizing human rights principles generally, or particular rights; the adoption of human rights principles generally, or particular rights; the adoption of human rights principles by states in regional organizations in Europe, Latin America, and Africa ... general support by states for United Nations resolutions declaring, recognizing, invoking, and applying international human rights principles as international law; action by states to conform their national law or practice to standards or principles declared by international bodies, and the incorporation of human rights provisions, directly or by reference, in national constitutions and laws; invocation of human rights principles in national policy, in diplomatic practice, in international organization activities and actions; and other diplomatic communications or action by states reflecting the view that certain practices violate international human rights law, including condemnation and other adverse state reactions to violations by other states. The International Court of Justice and the International Law Commission have recognized the existence of customary human rights law.... Some of these practices may also support the conclusion that particular human rights have been absorbed into international law as general principles common to the major state legal systems."

42 Meron, above note 39, p. 94.

43 UN Doc. E/CN.4/2005/WG.22/WP.1/REV.4, Art. 24(2).

codifies the right to know the fate of relatives during an international armed conflict. The analysis of customary international humanitarian law by the International Committee of the Red Cross (ICRC) has confirmed that this is a rule of customary law and is applicable in both international and non-international armed conflicts.<sup>44</sup> In the transference of this right under IHL to a right under human rights law, the wheel has, as it were, turned full circle. In fact, it was numerous resolutions of the UN General Assembly since 1974 on the rights of families of missing persons or those subjected to enforced disappearances that referred to “the desire to know” as a “basic human need” and prompted the elaboration of Article 32 of Protocol I additional to the 1949 Geneva Conventions.<sup>45</sup> This provision was then used by human rights mechanisms — the *ad hoc* Working Group on the Situation of Human Rights in Chile, the UN Working Group on Enforced and Involuntary Disappearances and the Inter-American Commission on Human Rights — as the basis for developing a right to the truth in relation to the crime of enforced disappearances<sup>46</sup> and later to other human rights violations.<sup>47</sup> Apart from these sources, however, human rights treaties do not explicitly codify the obligation of the state to provide information to victims of serious human rights abuses.

Despite this apparent hurdle to customary law status, the right to the truth has been inferred from a number of other rights of human rights treaties. The Human Rights Committee (HRC), the monitoring body of the International Covenant on Civil and Political Rights (ICCPR) of 1966, has recognized the right to know as a way to end or prevent the occurrence of psychological torture (ICCPR, Article 7) of families of victims of enforced disappearances<sup>48</sup> or secret executions.<sup>49</sup> The HRC also found that in order to fulfil its obligation to provide an effective remedy, states party to the ICCPR should provide information about

44 Rule 117 in *Customary International Humanitarian Law, Volume I, Rules*, ICRC, Cambridge University Press, 2005, p. 421.

45 See resolutions of the General Assembly: 3220 (XXIX) of 6 November 1974, 33/173 of 20 December 1978, 35/193 of 15 December 1980, 36/163 of 16 December 1981, 37/180 of 17 December 1982, 38/94 of 16 December 1983, 39/111 of 14 December 1984, 40/147 of 13 December 1985, 41/145 of 4 December 1986, 42/142 of 7 December 1987, 43/159 of 8 December 1988, 44/160 of 15 December 1989, 45/165 of 18 December 1990, 46/125 of 17 December 1991 and 47/132 of 18 December 1992.

46 “First Report of the Working Group on Enforced or Involuntary Disappearances to the Commission on Human Rights”, UN Doc. E/CN.4/1435, 22 January 1981, para. 187, and *Annual Report of the Inter-American Commission of Human Rights, 1985–1986*, OEA/Ser.LJ/VI/II.68, Doc. 8 rev 1, 28 September 1986, p. 205.

47 Inter-American Commission, Report No. 136/99, of 22 December 1999, Case of *Ignacio Ellacriá et al.*, para. 221.

48 See the explanation by Mr Bertil Wennergren, member of the Human Rights Committee, in his *Individual Opinion* in the cases: *R. A. V. N. et al. (Argentina)*, communication Nos. 343, 344 and 345/1988, Decision of inadmissibility of 26 March 1990, UN Doc. CCPR/C/38/D/343/1988 (Appendix); *S. E. (Argentina)*, communication No. 275/1988, Decision of inadmissibility of 26 March 1990, UN Doc. CCPR/C/38/D/275/1988 (Appendix); see also, *inter alia*: Views of 16 July 2003, *Sarma. Sri Lanka* case, Communication No 950/2000, UN Doc. CCPR/C/77/D/887/1999, para. 9.5; “Concluding observations of the Human Rights Committee: Algeria”, UN Doc. CCPR/C/79/Add.95, of 18 August 1998, para. 10; and “Concluding observations of the Human Rights Committee: Uruguay”, UN Doc. CCPR/C/79/Add.90, of 8 April 1998, para. C.

49 Views of 3 April 2003, Case of *Lyashkevich v. Belarus*, Communication No 887/1999, UN Doc. CCPR/C/77/D/950/2000, para. 9.2.

the violation or, in cases of death of a missing person, the location of the burial site.<sup>50</sup> The right to know the truth has also been invoked in relation to protection of the family guaranteed in Article 23 of the ICCPR, as well as the right of the child to preserve his or her identity, including nationality, name and family relations, as contained in Article 8 of the Convention on the Rights of the Child of 1989 (CRC), the right of the child not to be separated from its parents as laid down in Article 9 thereof, and other provisions of that convention.<sup>51</sup>

At the regional level, the European Court of Human Rights has also inferred a right to the truth as part of the right to be free from torture or ill-treatment, the right to an effective remedy, and the right to an effective investigation and to be informed of the results.<sup>52</sup> Similarly, the Court has held that a state's failure to conduct an effective investigation "aimed at clarifying the whereabouts and fate" of "missing persons who disappeared in life-threatening circumstances" constitutes a continuing violation of its procedural obligation to protect the right to life (Article 2 of the European Convention on Human Rights).<sup>53</sup> The African Commission on Human and Peoples' Rights has followed a similar approach to that of the European Court of Human Rights.<sup>54</sup> The Commission's "Principles and guidelines on the right to a fair trial and legal assistance in Africa"<sup>55</sup> infers a right to the truth as a constitutive part of the right to an effective remedy.<sup>56</sup> The Inter-American Commission on Human Rights stands apart as having presented the right to know the truth as a direct remedy in itself, based on Article 9(1) of the Inter-American Convention, which stipulates that "a State party is obligated to guarantee the full and free exercise of the rights recognized by the Convention."<sup>57</sup> Its view is that ensuring rights for the future requires a society to learn from the abuses of the past. For this reason, this right to know the truth entails both an individual right applying to the victim and family members and a general societal right.<sup>58</sup> However, the Inter-American Commission

50 *Ibid.*, para. 11; Views adopted on 30 March 2005, *Khalilova v. Tajikistan* case, Communication No. 973/2001, UN Doc. CCPR/C/83/D/973/2001; and Views adopted on 16 November 2005, *Valichon Aliboev v. Tajikistan* case, Communication No. 985/2001, UN Doc. CCPR/C/85/D/985/2001.

51 UN Doc. E/CN.4/Sub.2/1991/20, Annex I, p. 45.

52 See, *inter alia*, Judgment of 25 May 1998, *Kurt v. Turkey*, Application No. 24276/94; Judgment of 14 November 2000, *Tas v. Turkey*, Application No. 24396/94; and Judgment of 10 May 2001, *Cyprus v. Turkey*, Application No. 25781/94.

53 Judgment of 10 May 2001, *Cyprus v. Turkey*, Application No. 25781/94, para. 136; see also, *inter alia*, Judgment of 18-12-1996, *Aksoy v. Turkey*, Application No. 21987/93; and Judgment of 28 March 2000, *Kaya v. Turkey*, Application No. 22535/93). This also applies where non-state parties may be involved: *Tanrikulu v. Turkey*, 1999-IV Eur. Ct. H.R. 459 (1999).

54 *Amnesty International vs. Sudan* case, Communications No. 48/90, 50/91, 52/91, 89/93 (1999), para. 54. See Art. 19(3) of the African Charter on the Rights and Welfare of the Child.

55 African Union Doc. DOC/OS(XXX)247).

56 Principle C) states that "the right to an effective remedy includes: ... 3. access to the factual information concerning the violations."

57 Inter-American Commission, Report No. 136/99, of 22 December 1999, Case of *Ignacio Ellacría et al. v. El Salvador*, para. 221.

58 See also *Annual Report of the Inter-American Court of Human Rights, 1985–1986*, OEA/Ser.L/V/II.68, Doc. 8 rev 1, of 28 September 1986, p. 205; *Annual Report of the Inter-American Court of Human Rights, 1987–1988*, OEA/Ser.L/V/II. 74, Doc. 10 rev 1, of 16 September 1988, p. 359.

has also linked the right to truth to other obligations contained in the American Convention on Human Rights, such as the prohibitions of torture and extrajudicial executions<sup>59</sup> and the right to simple and prompt recourse for the protection of the rights enshrined in the Convention (Article 25). The latter provision has been used as the basis for inferring the right to the truth both for the relatives of victims and for society as a whole.<sup>60</sup> The Inter-American Court of Human Rights has recognized the right of relatives of the victims of forced disappearance to know their fate and whereabouts.<sup>61</sup> It has also recognized the right of victims and their next of kin to obtain clarification of the facts relating to the violations and the corresponding responsibilities of the competent state organs through investigation and prosecution established in Articles 8 (right to a hearing by a competent, independent and impartial tribunal) and 25 (right to an effective remedy and judicial protection) of the American Convention on Human Rights.<sup>62</sup> The Court has held that the right to the truth is not limited to cases of enforced disappearances but also applies to any kind of gross human rights violation.<sup>63</sup>

Does the repeated inference of a right to information about the circumstances of serious human rights violations as a way to vindicate other codified rights fulfil Meron's requirement of a repeated statement of a particular right in human rights instruments? Or are we dealing with a narrative device used by courts and human rights bodies to merely strengthen and give detail to those rights codified in the conventions? To seek further guidance on whether the right to the truth is a customary source of law, it may be useful to look at other instances of international practice, such as General Assembly and Security Council resolutions. The latter have repeatedly underlined the importance of establishing the truth,<sup>64</sup> whether by truth commissions or by establishing commissions of inquiry that may lead to prosecutions, for the consolidation of peace and reconciliation and to fight impunity.<sup>65</sup> General Assembly resolutions have also noted these crucial links

59 Inter-American Commission, Report No. 136/99, of 22 December 1999, *Case of Ignacio Ellacría et al. v. El Salvador*, para. 221.

60 *Ibid.*, para. 255; Report 1/99 of 27 January 1999, *Lucio Parada et al. v. El Salvador*, para. 153.

61 Inter-American Court of Human Rights Judgment of 29 July 1988, *Velásquez Rodríguez case*, in *Series C: Decisions and Judgments*, No. 4, para. 181, p. 75; Inter-American Court of Human Rights, Judgment of 20 January 1989, *Godínez Cruz case*, in *Series C: Decisions and Judgments*, No. 5; Judgment of 3 November 1997, *Castillo Páez case*; Judgment of 24 January 1998, *Blake case*; and Judgment of 25 November 2000, *Bamaca case*.

62 Inter-American Court of Human Rights, Judgment of 24 January 1998, *Blake case*, para. 97 and Judgment of 25 November 2000, *Bamaca case*, para. 201.

63 Judgment of 14 March 2000, *Barríos Altos case*, para. 48.

64 See also Madeleine Albright, US Ambassador to the UN, in her statement to the Security Council at the time of the adoption of Resolution 827: "Truth is the cornerstone of the rule of law, and it will point towards individuals, not peoples, as perpetrators of war crimes. And it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process", Provisional Verbatim Record of the 3217th Meeting, 25 May 1993, SC Doc. S/PV 3217.

65 See e.g. SC Res 1606 (2005) on Burundi, preambular paras. 2 and 7; SC Res. 1593 (2005) on Darfur, Sudan, para. 5; SC Res. 1468 (2003) on the Democratic Republic of Congo, para. 5; SC Res. 1012 (1995)



and have on several instances called for the setup of investigatory bodies to properly investigate serious violations of human rights and to inform victims and society of the results of these investigations.<sup>66</sup> The UN Secretary-General has explicitly referred in public statements to a right to the truth for victims,<sup>67</sup> as has the High Commissioner for Human Rights in relation to the right to truth both for society and for individual victims.<sup>68</sup> Moreover, a number of the reports of the Secretary-General or reports submitted to him by commissions established under his auspices have reiterated the need for the truth to be the basis of reconciliation and peacemaking efforts.<sup>69</sup> The Secretary-General has also recognized the need for the truth in cases where the UN failed to protect persons from serious human rights abuses (e.g. by instituting an independent inquiry into the actions of the UN during the 1994 genocide in Rwanda).<sup>70</sup> The General Assembly also called upon the Secretary-General to provide a comprehensive report on the fall of Srebrenica and the failure of the “safe area policy.”<sup>71</sup> However, the most explicit recognition of a “right to the truth” may be found in the study of the independent expert on impunity appointed by the UN Commission on Human Rights, Mr Louis Joinet, who in his final report of 1997 identified an inalienable right to the truth:

“Every people has the inalienable right to know the truth about past events and about the circumstances and reasons which led, through the consistent pattern of gross violations of human rights, to the perpetration of aberrant

on Burundi, preambular para. 8; SC Res. 935 (1994) on Rwanda; and SC Res. 780 (1992) on the former Yugoslavia.

- 66 See GA Res. 57/105 (2003) on East Timor, para. 12; GA Res. 57/161 (2003) on Guatemala, para. 17; GA Res. 55/118 (2001) on Haiti, para. 7; GA Res. 53/187 (2000) on Haiti, para. 8, GA Res. 48/149 (1993) on El Salvador, para. 4; GA Res. 42/147 (1987) on Chile, para. 10; GA Res. 40/145 (1985) on Chile, para. 6; GA Res. 35/188 (1980) on Chile, paras. 6–8; GA Res. 34/179 (1979) on Chile, GA Res. 33/172 (1978) on Cyprus, para. 1; GA Res. 32/128 (1977) on Cyprus, para. 1; GA Res. 32/118 (1977) on Chile, para. 6; GA Res. 3450 (XXX) on Cyprus, preambular para. 5 and para. 1; GA Res. 3448 (XXX) on Chile, para. 2.
- 67 See Press Release SG/SM/9400, Secretary-General Urges Respect for Ceasefire as Colombia Peace Talks Open, 1 July 2004: “The Secretary-General reiterates his belief that the rights of truth, justice and reparations for victims must be fully respected.”
- 68 Statement by Mary Robinson, United Nations High Commissioner for Human Rights, at the 55<sup>th</sup> Annual DPI/NGO Conference, “Rebuilding Societies Emerging from Conflict: A Shared Responsibility”, 9 September 2002: “[Mechanisms such as TRCs] respects the right of nations to learn the truth about past events. Full and effective exercise of the right to the truth is essential if recurrence of violations is to be avoided.”
- 69 See the “Report of the assessment mission on the establishment of an international judicial commission of inquiry for Burundi”, S/2005/158, 11 March 2005; “Report of the International Commission of Inquiry on Darfur to the Secretary-General”, S/2005/60, 1 February 2005, para. 617; “Report of the International Commission of Inquiry on East Timor to the Secretary-General”, January 2000, UN Doc. A/54/726, S/2000/59, 31 January 2000, para. 146.
- 70 “Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda”, UN Doc. S/1999/1257, 16 December 1999.
- 71 Report of the Secretary-General pursuant to General Assembly Resolution 53/35, “The fall of Srebrenica”, UN Doc. A/54/549, 15 November 1999. See para. 7: “I hope that the confirmation or clarification of those accounts [of the fall of Srebrenica contained in books, journal articles and press reports] contributes to the historical record on this subject.”



crimes. Full and effective exercise of the right to the truth is essential to avoid any recurrence of such acts in the future.<sup>72</sup>

According to Joinet, this right applied both to the individual victim and his or her family and was also a collective right. The corollary to the latter is a “duty to remember” on the part of the state: “to be forearmed against the perversions of history that go under the name of revisionism or negationism, for the history of its oppression is part of a people’s national heritage and as such must be preserved.”<sup>73</sup> These principles were recently updated by Professor Diane Orentlicher, appointed for this purpose by the Commission. As well as affirming that “[e]very people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes...”<sup>74</sup> the Updated Principles on Impunity also recognize an imprescriptible right of victims and their families to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fates.<sup>75</sup> The Updated Principles, therefore, set out differing contours of the right to the truth for victims and victims’ family members and for society in general. For victims and family, the right entails an obligation for the state to provide specific information about the circumstances in which the serious violation of the victim’s human rights occurred, as well the fate of the victim. This information may include the place of burial if the victim was killed. For society in general, the right to the truth imposes an obligation on the state to disclose information about the circumstances and reasons that led to “massive or systematic violations,”<sup>76</sup> and to do so by taking appropriate action, which may include non-judicial measures.<sup>77</sup> Such duality in the contours of the right to the truth is consistent with the two-track evolution of this concept in regard to (1) single violations of human rights that entail individual and case-specific remedies (i.e., for the victim or victim’s family), as reflected in the jurisprudence of human rights courts and monitoring bodies, and (2) mass violations of human rights that necessitate a broader inquiry into the reasons and causes for such violence (i.e., for society in general) as established by the practice of truth commissions or commissions of inquiry and in resolutions of the UN General Assembly and Security Council.

Other special procedures of the CHR have also utilized the legal value of truth in their sets of principles, particularly with regard to the right to a remedy and reparation for victims of gross violations of human rights and IHL.<sup>78</sup> Clearly,

72 “Question of the impunity of perpetrators of human rights violations (civil and political)”, final report prepared by Mr Joinet pursuant to Sub-Commission decision 1996/119, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1., Annex I, Principle 1.

73 *Ibid.*, para. 17.

74 Updated Principles on Impunity, above note 8, Principle 2.

75 *Ibid.*, Principle 4, “The victims’ right to know”.

76 *Ibid.*, Principle 2, “The inalienable right to the truth”.

77 *Ibid.*, Principle 5, “Guarantees to give effect to the right to know”.

78 See “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”, CHR Res. 2005/35, Annex, Principle 22.

the weight of general statements of international bodies as evidence of custom cannot be assessed without considering the actual practice of states. At the same time, the community values reflected in such statements generally enjoy strong public support and states are unlikely to face the political consequences of refusing the norm and becoming a persistent objector.<sup>79</sup>

With regard to Meron's second indicator for a customary norm of human rights — confirmation of the right in national practice — a first and obvious instance of national practice is the establishment of truth commissions in more than 30 countries in all regions of the world where serious human rights violations have been perpetrated on a massive scale. However, while this fact may provide evidence of widespread practice, the real question for the purposes of this paper is whether the establishment of these mechanisms flows from a sense of a legal obligation to provide the truth. Most of the constitutive instruments setting them up refer to the need of the victims, their relatives and society to know the truth about what has taken place in order to facilitate the reconciliation process; to contribute to the fight against impunity; to re-install or to strengthen democracy, the rule of law and public confidence in the ruling authority; and to prevent the repetition of such events.<sup>80</sup> But the right to the truth, in its individual or collective dimension, has only been explicitly cited as a legal basis in two of the instruments setting up "truth commissions" or other similar mechanisms.<sup>81</sup> The other constitutive instruments, while underlining the importance of revealing the truth about serious violations of human rights, refer more to the expediency of such an approach to achieve the aforementioned goals, rather than to an obligation for the state to establish the truth.<sup>82</sup> For example, the recently adopted Act to Establish the Truth and Reconciliation Commission of Liberia, enacted on 12 May 2005, refers to the recognition "that introspection, national healing and reconciliation will be greatly enhanced by a process which seeks to establish the truth through a public

79 Meron, above note 39, p. 89.

80 See the Peace Agreement between the government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Art. XXVI) and The Truth and Reconciliation Commission Act 2000 of Sierra Leone (Art. 6); the Chilean Supreme Decree [*Decreto Supremo*] No. 355 of 25 April 1990, establishing the Truth and Reconciliation Commission; El Salvador: Mexico Peace Agreements — Provisions Creating the Commission on Truth, Mexico City, 27 April 1991; German Law No. 12/2597 of 4 May 1992, establishing the Commission of Inquiry on "Working through the History and the Consequences of the SED Dictatorship"; the Terms of Reference for the Commission of Truth and Friendship of Timor-Leste, of 10 March 2005; The National Reconciliation Commission Act of Ghana, 2002; and South Africa's Promotion of National Unity and Reconciliation Act No. 34 of 1995. See also Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, Routledge, New York, 2001.

81 Peruvian Supreme Decree [*Decreto Supremo*] No. 065-2001-PCM of 2 June 2001, preambular para. 4; Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer, Oslo, 23 June 1994, preambular para. 2.

82 See Uganda's Legal Notice Creating the Commission of Inquiry into Violations of Human Rights, The Commission of Inquiry Act, Legal Notice No. 5, 16 May 1986, which deems it "expedient" to inquire into the causes of and possible ways to prevent the serious violations of human rights falling under the mandate. The South African Promotion of National Unity and Reconciliation Act 1995, Act 95-34, 26 July 1995, in preambular para. 3, finds that "it is deemed necessary to establish the truth in relation to past events as well as the motives for and circumstances in which gross violations of human rights have occurred, and to make the findings known in order to prevent a repetition of such acts in the future."

dialogue which engages the nation...”<sup>83</sup> In the case of Liberia, the legal obligation to establish a truth-seeking mechanism derived from Article XIII of the Comprehensive Peace Agreement of 18 August 2003.<sup>84</sup> This has also been the case for a number of other states that have instituted truth and reconciliation commissions or similar mechanisms.<sup>85</sup> At the same time, the inclusion of the obligation to set up a truth commission in a peace agreement may itself constitute evidence of state practice acknowledging the right to truth in the aftermath of serious violations. But while the decision to set up a truth commission may be a question to be decided at the national level, there may well be a universal principle requiring states to preserve archives that enable societies to exercise their right to know the truth about past repression, as suggested in the Updated Principles on Impunity.<sup>86</sup>

Assuming that these practices may, by their prolific and widespread use, be considered as evidence of a customary right to truth, it is worth pausing to consider what definition and contours of the right to the truth such evidence affords. First of all, such mechanisms, though they vary greatly in terms of mandate, generally deal with serious violations of humanitarian and human rights law. Secondly, the mandate is generally not limited to specific events but is directed more to periods of armed conflict or serious civil unrest or state repression.<sup>87</sup> It is designed to elucidate the nature, causes and extent of human rights violations, as well as the underlying factors, antecedents and the context that led to such violations, together with identifying those responsible.<sup>88</sup> Third, “the truth” would appear to be owed both to individuals and to society as a whole.

83 Preambular para. 8 of the Act to Establish the Truth and Reconciliation Commission (TRC) of Liberia, enacted by the National Transitional Legislative Assembly on 12 May 2005 and approved by the Chairman of the National Transitional Government of Liberia on 10 June 2005.

84 Art. XIII of the Comprehensive Peace Agreement, City of Accra, Republic of Ghana, 18 August 2003, provides for the establishment of a Truth and Reconciliation Commission to “provide a forum that will address issues of impunity, as well as an opportunity for both victims and perpetrators of human rights violations to share their experiences in order to get a clear picture of the past to facilitate genuine healing and reconciliation.”

85 This was also the case for Sierra Leone (Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Art. XXVI)); Guatemala (the Historical Clarification Commission (CEH) was established on 23 June 1994 as part of peace agreements between the Guatemalan government and the National Guatemalan Revolutionary Unit (URNG)); and El Salvador (the Commission on the Truth for El Salvador was mandated by the UN-brokered peace agreements of 16 January 1992).

86 See Updated Principles on Impunity, Principle 3, and the Report of the independent expert, para. 19, above note 8.

87 The mandate of the Commission for Reception, Truth and Reconciliation in East Timor, which authorizes the Commission to consider human rights violations over a 25-year period from 1974, provides a good example of this. See section 13.2 Regulation No. 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, UNTAET/REG/2001/10, 13 July 2001.

88 See *ibid.*, section 13 entitled “Truth” that identifies six ways in which the Commission should seek to establish the truth, namely by inquiring into: (1) the extent of human rights violations, including those part of a systematic pattern of abuse; (2) the nature, causes and extent of human rights violations, including the antecedents, circumstances, factors, context, motives and perspectives that led to such violations; (3) which persons, authorities, institutions and organisations were involved in the violations; (4) whether the violations were the result of deliberate planning, policy or authorisation on the part of

Fourth, the “truth” to be uncovered by such mechanisms is generally meant to be conducive to reconciliation processes — both the truth-seeking process and the results of the investigations are restorative in character, thus reverting again to the notion that truth is relative to present needs. The reports of these commissions have referred to the truth-telling function, *inter alia*, as “a critical part of the responses of states ... to serious acts of human rights violations,”<sup>89</sup> an “indispensable basis for measures to repair,”<sup>90</sup> the “only way to achieve this objective [of reconciliation]”<sup>91</sup> and a means to give effect to “the inalienable right to truth.”<sup>92</sup> In measuring their actual effect, Michael Ignatieff has famously asserted that “[a]ll that a truth commission can achieve is to reduce the number of lies that can be circulated unchallenged in public discourse.”<sup>93</sup> If that is all it does, it is already a lot for these deeply divided communities, but probably much more is achieved by these mechanisms in the sense of a “collective catharsis” and a “collective conscience” opposed to any repetition of such acts.<sup>94</sup> Moreover, the official public nature of a truth commission transforms the historic truth into official acknowledgement of the harm done to victims — a key value for national reconciliation.<sup>95</sup>

In terms of national legislation, in several countries the right of families to know the fate of their missing relatives has been incorporated in domestic legislation or in military manuals.<sup>96</sup> One country, Colombia, adopted a law in July 2005 recognizing the right to the truth of victims of human rights violations and crimes under international law, and of society in general.<sup>97</sup> Generally speaking, the right to the truth of victims of human rights violations and their relatives has not

any state or any of its organs or of any political organisation, militia group, liberation movement, or other group or individual; (5) the role of both internal and external factors in the conflict; and (6) accountability, political or otherwise, for the violations.

89 *National Reconciliation Commission Report of Ghana*, 16 May 2005, para. 1.1.2.

90 *Report of the Chilean National Commission on Truth and Reconciliation*, University of Notre Dame Press, Notre Dame, Indiana, 1993, Vol. I/II, Part 1, Chapter 1.

91 *Guatemala: Memory of Silence*, Commission for Historical Clarification (CEH), February 1999, Prologue.

92 *Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission*, Vol. I, 5 October 2004, p. 79.

93 M. Ignatieff, “Articles of Faith”, *Index on Censorship*, Vol. 25, No. 5, 1996, p. 113.

94 The former President of the Inter-American Court of Human Rights, Pedro Nikken, has argued that the discovery of truth fulfils a dual function: “First, it is useful for society to learn, objectively, what happened in its midst, which translates into a sort of collective catharsis. And second, it contributes to creating a collective conscience as to the need to impede the repetition of similar acts...”, quoted in *Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission*, Vol. I, 5 October 2004, p. 79.

95 See Méndez, above note 36, at p. 269, citing Thomas Nagel.

96 See *inter alia: Customary International Humanitarian Law, Volume II, Practice, Part. 2*, ICRC, Cambridge University Press, Cambridge, 2005, pp. 2766–2767; Bosnia and Herzegovina, Law on Missing Persons, 2004 (on file with author).

97 Law No. 975 of 25 July 2005, entitled “Law on justice and peace”. In Article 7 it defines the right to truth as belonging to society. However, this legislation has been criticized by the OHCHR as not leading to the truth because there is no condition of truth-telling for judicial benefits, the time allowed for investigations is limited and there are few incentives for the Attorney-General’s office to search for the truth.

been explicitly recognized in national constitutions. However, the majority of constitutional acts do recognize and protect freedom of information, including the right to seek information. Notably, the United States Freedom of Information Act (FOIA) and South Africa's Promotion of Access to Information Act have been used to disclose the truth about human rights violations committed in El Salvador, Guatemala, Peru and South Africa, and to help the work of truth commissions.<sup>98</sup>

National courts have also issued judgments signalling the importance of a right to the truth in relation to enforced disappearances that is based on the right to mourning (*derecho al duelo*),<sup>99</sup> the right to justice,<sup>100</sup> the need for historical clarification, individual and societal healing, and the prevention of future violations,<sup>101</sup> and as a means to ensure a democratic state based on the rule of law.<sup>102</sup> In the "Srebrenica cases," the Human Rights Chamber of Bosnia and Herzegovina based the right of families to know the truth about the fate and whereabouts of some 7,500 missing men and boys on the rights established in the European Convention on Human Rights. In particular, it looked at the right not to be subjected to torture or ill-treatment (because not knowing the truth about the fate of relatives prevented healing and closure and amounted to an ongoing violation of the Convention's Article 3),<sup>103</sup> the right to family life (because when information exists within the possession or control of the state and the state arbitrarily and without justification refuses to disclose it to the family member, it does not protect this right)<sup>104</sup> and the state's duty to conduct effective investigations,<sup>105</sup> which was also linked to a violation of Article 3. Although the decisions of courts are considered only as a "subsidiary means for the determination of rules," according to Article 38 (1)(d) of the Statute of the

98 UN Doc. E/CN.4/2004/88, para. 20. See also Mexican Federal Act on Access of Information (*Ley Federal de Acceso a la Información*) enacted in 2002 that bars the withholding of documents that describe "grave violations" of human rights, and the Stasi Files Act of Germany of 1991, which facilitates individual access to personal data stored by the State Security Service [Stasi – former East German secret police] in order to clarify what influence the service had on the individual's life and ensures and promotes "the historical, political, and juridical reappraisal of the activities of the State Security Service." Stasi Files Act (Stasi-Unterlagengesetz, StUG), *Federal Law Gazette I*, 1991, p. 2272, as amended.

99 See *inter alia*: Agreement of 1 September 2003 of the National Chamber for Federal Criminal and Correctional Matters (*Cámara Nacional en lo Criminal y Correccional Federal*), case of *Suárez Mason*, Rol. 450; Agreement of 1 September 2003 of the National Chamber for Federal Criminal and Correctional Matters, case of *Escuela Mecánica de la Armada*, Rol. 761; Judgment of 8 December 2004 of the National Chamber for Federal Criminal and Correctional Matters, case of *Maria Elena Amadio*, Rol. 07/04-P; and Judgment of the Oral Tribunal in Criminal Federal Matters No. 3 (Tribunal Oral en lo Criminal Federal), case of *Carlos Aléberto Telleidín and others — homicide (Amia Case)*, Rol. 487-00.

100 Chamber for Federal Criminal and Correctional Matters, Decision of 18 May 1995, case of *Maria Aguiar Lapaó*, Rol. 450.

101 Supreme Court of the Nation (Argentina), Judgment of 14 June 2005, S. 1767. XXXVIII, "*Simón, Julio Héctor y otros s/ privación ilegítima de la libertad*" case, Rol. No. 17.768.

102 *Ibid.*, paras. 15 and 19. See *inter alia* Constitutional Court of Colombia, Judgment of 20 January 2003, Case T-249/03; Judgment C-228 of 3 April 2002; and Judgment C-875 of 15 October 2002.

103 Decision on Admissibility and Merits of 7 March 2003, "*Srebrenica Cases*", case Nos. CH/01/8365 *et al.*, para. 220 (4); see also para. 191.

104 *Ibid.*, paras. 181 and 220(3).

105 Decision on admissibility and merits of 11 January 2001, *Palic v. Republika Srpska*, Case No. CH/99/3196; Decision on admissibility and merits of 9 November 2001, *Unkovic v. Federation of Bosnia and Herzegovina*, Case No. CH/99/2150.

International Court of Justice (ICJ), they “play an increasingly important role in the recognition of various human rights as custom,” and the cumulative weight of this case law, together with that of the human rights bodies and courts, “influences and consolidates the development of customary human rights law.”<sup>106</sup>

Going back to Meron’s indicators of a customary human right, he also notes some countering factors: “the degree to which a particular right is subject to limitations (claw back clauses) and the extent of contrary practice.” With regard to limitations on the right to the truth, it was mentioned earlier that certain countries recognize this type of obligation in the sense of the principle of freedom of information. As is known, the right to freedom of information may be restricted under international law where it is necessary to protect the reputation or rights of others or to protect national security, public order, public health or morals.<sup>107</sup> Could similar restrictions pertain to the right to the truth? It has been argued that the inalienable character of that right, together with its material scope (relating to serious violations of international humanitarian or human rights law) precludes any derogation from it. This argument is bolstered by the judgments of courts at national and regional levels that a failure to inform people of the fate and whereabouts of missing relatives may amount to torture — clearly a *jus cogens* crime. One could also argue that the judicial remedies that protect fundamental rights, such as *habeas corpus* and *amparo*, which may also be used as procedural instruments to implement the right to the truth, have now come to be understood as non-derogable.<sup>108</sup> Furthermore, in a similar way, the right to the truth has also been inferred by courts to form part of the state’s duty to protect and guarantee fundamental human rights.<sup>109</sup> If the right to the truth is necessary to vindicate other essential rights, such as the right to life and the right not to be subjected to torture, it is difficult to justify limitations or derogations to its application.

In practice, however, states are not always so keen to tell the truth about serious human rights violations and do seek ways to limit doing so. The justification of protecting national security has been commonly used by governments in recent years to limit the amount of information accessible to

106 Meron, above note 35, p. 89.

107 See ICCPR, Art. 19(3).

108 See *inter alia*: Human Rights Committee, *General Comment No. 29, States of Emergency*; Inter-American Court of Human Rights, *Advisory Opinion OC-8/87 of 30 January 1987*, and *Advisory Opinion OC-9/87 of 6 October 1987*.

109 European Court on Human Rights (Judgment of 25 May 1998, *Kurt v. Turkey*, Application No. 24276/94; Judgment of 14 November 2000, *Tas v. Turkey*, Application No. 24396/94; and Judgment of 10 May 2001, *Cyprus v. Turkey*, Application No. 25781/94); Inter-American Court of Human Rights (Judgment of 29 July 1988, *Velásquez Rodríguez* case; Judgment of 20 January 1989, *Godínez Cruz* case; Judgment of 3 November 1997, *Castillo Páez* case; Judgment of 24 January 1998, *Blake* case, para. 97; Judgment of 25 November 2000, *Bamaca* case; Judgment of 25 November 2003, *Myrna Mack Chang* case; Judgment of 8 July 2004, *Case of the Gómez-Paquiyaury brothers v. Peru*; Judgment of 5 July 2004, *Case of 19 Merchants v. Colombia*; Judgment of 7 September 2004, *Case of Tibi v. Ecuador*; Judgment *Molina Theissen* case (*Reparations*), Judgment of 15 June 2005, *Case of Moiwana Village v. Suriname*; Judgment of 22 November 2004, *Case of Carpio-Nicolle v. Guatemala*; Judgment of 1 March 2005, *Case of Serrano-Cruz sisters v. El Salvador*; and Judgment of 15 September 2005, *Case of the Massacre of Mapiripan v. Colombia*).



the public, even when this information pertains to serious human rights violations. Such behaviour has been borne out in the “extraordinary rendition” cases relating to terrorist suspects. In the *Maher Arar* case concerning a Canadian citizen abducted from John F. Kennedy airport and taken to Syria where he was secretly detained and subjected to torture for 10 months,<sup>110</sup> the American Civil Liberties Union (ACLU) filed proceedings under the Constitution and the Torture Victim Protection Act.<sup>111</sup> In response, the US asserted immunity and state secret defence. The ACLU also tried to get official confirmation of the extraordinary rendition practice through Freedom of Information procedures. Pursuant to this, in 2004, the court ordered the government to make the relevant documents available. On the basis of national security<sup>112</sup> there has thus far been no CIA cooperation with the court’s order. The real potential value can be discerned here of a right to the truth in customary law, separate from the right to seek information, that any citizen could exercise and that can be easily limited, because if the right to the truth is an inalienable right and is necessary to protect other fundamental human rights, the extent to which governments can invoke “national security” or other justifications to limit the right is likely to be curtailed.

Another area where we see contrary practice to a possible right to the truth is in the use of amnesties. Where amnesties exclude the possibility of bringing to trial the perpetrators of serious violations of human rights, one of the most commonly implemented means of finding out the truth is frustrated. The most recent example is the amnesty passed in Algeria in February 2006, which not only blocks prosecution of those accused of politically motivated human rights violations but also muzzles open debate by criminalizing public discussion about the nation’s decade-long conflict.<sup>113</sup> In fact, amnesties have been ruled by some bodies to be invalid under international law because they prevent the truth from coming out by blocking investigations and preventing those responsible for

110 See Jane Mayer, “Outsourcing torture: The secret history of America’s “extraordinary rendition” program”, *The New Yorker*, 14 February 2005, available at: [http://www.newyorker.com/fact/content/?050214fa\\_fact6](http://www.newyorker.com/fact/content/?050214fa_fact6) (last visited 4 April 2006).

111 In a decision on 16 February 2006, a US District Court dismissed the complaint of Maher Arar, based on lack of standing to bring a claim under the Torture Victim Protection Act. Citing foreign policy and national security concerns, the court rejected the plaintiff’s Bivens claim for substantive due process violations owing to his removal and torture in Syria. Although the court also dismissed the plaintiff’s procedural due process and denial of access to counsel claims based on his detention within the United States, the court granted the alien leave to re-plead these matters. See *Maher Arar v. John Ashcroft and others*, 414 F. Supp. 2d 250; 2006 US Dist. LEXIS 5803, 16 February 2006.

112 See also *Khaled El-Masri v. George Tenet, et al.*, 2006 US Dist. LEXIS 34577, 12 May 2006, in which the plaintiff, a German citizen, claimed to be an innocent victim of the United States’ “extraordinary rendition” program and, through three causes of action, sued defendants, including the former Director of the Central Intelligence Agency (CIA), private corporations and unknown employees of both the CIA and the corporations. The District Court ordered that the government’s claim of the state secrets privilege was valid and granted the motion to dismiss.

113 On 27 February 2006, Algeria’s full cabinet, with President Abdelaziz Bouteflika presiding, approved the “Decree Implementing the Charter for Peace and National Reconciliation”. The amnesty excludes those who “committed, or were accomplices in, or instigators of, acts of collective massacres, rape, or the use of explosives in public places.”



violations from being identified and prosecuted.<sup>114</sup> On the other hand, amnesties tied to obligations to disclose information about violations, such as in South Africa, not only allow the truth to be told, but are facilitative of this process.<sup>115</sup> A certain doctrine seems to be emerging in scholarship that these types of “accountable amnesties”<sup>116</sup> may be considered valid and can be recognized under international law, which adds leverage to the notion that a right to the truth has a legal value, not merely a moral or narrative one. At the same time, a general de-legitimization of any amnesties for international crimes in the international community is slowly closing the window on this limitation to truth-seeking.<sup>117</sup>

Thus, in conclusion to the proposition that the right to the truth is a customary right, it can be argued that although there is no explicit statement of the right in any human rights instrument, save for the Updated Principles on Impunity, there have been repeated inferences of this right in relation to other fundamental human rights by human rights bodies and courts. Cumulatively, the effect of these decisions, taken together with the widespread practice of instituting mechanisms to discover the truth in countries where serious crimes have been committed, as well as some national legislation and the constant reiteration of the importance of knowing the truth by international and national organs, suggests the emergence of something approaching a customary right (though with differing contours). It should also be borne in mind that those rights most crucial to the protection of human dignity and of universally accepted values of

114 See *Garay Hermonsilla et al. v. Chile*, Case 10.843, Report No. 36/96, Inter-Am, CHR, OEA/Ser.L/V/II.95 Doc. 7 rev. at 156 (1997).

115 See *The Azanian Peoples Organization (AZAPO) v. The President of the Republic of South Africa and others*, Case CCT 17/96, (South Africa), 1996 (hereinafter the *AZAPO* case ), para. 22.

116 The term “accountable amnesty” is borrowed from Professor Ronald C. Slye, “The Legitimacy of Amnesties Under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?”, *Virginia Journal of International Law*, Vol. 43, p. 173, at p. 245, to refer to an amnesty that provides some accountability and more than minimal relief to victims. According to Prof. Slye, such an amnesty, which could be accorded foreign recognition, must be created according to democratic structures and cannot apply to those most responsible for serious international crimes, among other conditions. See also William W. Burke-White, “Reframing Impunity: Applying Liberal International Law Theory to an Analysis of Amnesty Legislation”, *Harvard International Law Journal*, Vol. 42, No. 2 (2001), (emphasising the legitimising effect of democratically elected governments enacting amnesties); Michael P. Scharf, “The Amnesty Exception to the Jurisdiction of the International Criminal Court”, *Cornell International Law Journal*, Vol. 32 (1999), (noting the factors the ICC should consider in deciding whether to recognize an amnesty: whether an offence attaches to a duty to prosecute, whether the armed conflict would have ended without the recourse to amnesty and whether the state has instituted a truth mechanism); and John Dugard, “Dealing with Crimes of a Past Regime: Is Amnesty Still an Option?”, *Leiden Journal of International Law*, Vol. 12, No. 4 (1999), p. 1001 (suggesting that amnesties accorded by a Truth and Reconciliation Commission, such as that in South Africa, after investigation “may contribute to the achievement of peace and justice in a society in transition more effectively than mandatory prosecution”).

117 See Principle 7 of the Princeton Principles on Universal Jurisdiction, adopted by a group of international law experts in 2001, which proposed that “Amnesties are generally inconsistent with the obligation on states to provide accountability for serious crimes under international law”, Principle 7, Princeton Principles on Universal Jurisdiction 28 (2001), Princeton University Program in Law and Public Affairs, Princeton University, Princeton, 2001.

humanity require a lesser amount of confirmatory evidence of their customary character.<sup>118</sup>

## The right to the truth as a general principle of law

What about a right to the truth as a general principle of law? Juan Méndez, one of the principal legal experts on the right to truth, has characterized the right as one of the “emerging principles in international law” in view of the fact that “the precept has not been established as a norm clearly and unquestionably validated in an international treaty.”<sup>119</sup> It may be argued that the right to the truth can be discerned as a principle of law deriving from sources at both the international and the national levels. In terms of the former, it may be used as a means of inferring the existence of broad rules from more specific rules by means of inductive reasoning.<sup>120</sup> The jurisprudence of the human rights courts, which seem to identify a broader right to truth in their analysis of specific conventional rights, would appear to provide some evidence for this. In the latter, as a principle derived from sources at the national level, it is able to “fill gaps” when treaties and custom do not provide enough guidance. Many general principles borrowed from national systems are based on “natural justice,” such as principles of good faith, estoppel and proportionality. It could be held that the right to the truth has similar roots, based as it is on human dignity and fairness. It can also be observed that a real transplantation of domestic law principles to the international level is limited to a number of procedural rules, such as the right to a fair hearing, and procedures to address the denial of justice or the exhaustion of domestic remedies. The right to the truth is analogous in a sense to these procedural rules by being tied to the protection of fundamental human rights and by emerging as an expected response by a state to a violation. As is known, general principles of law are particularly useful in “new” areas of international law, and it is clear that the concept of the right to the truth could be instrumental to the complex and emerging field of transitional justice, although it should not only apply in the transitional context.<sup>121</sup> More broadly, general principles of law, particularly those reflecting considerations of humanity, may reveal certain criteria of public policy.<sup>122</sup> In this respect, it is easy to discern the public policy implications of a right to the truth recognized at the international level.

118 Meron, above note 35, pp. 35 and 113. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), Merits, Judgment, ICJ Reports 1986, 14 (1986)*, pp. 98–108.

119 Méndez, above note 36, p. 255.

120 Peter Malanczuk, *Akehurst's Modern Introduction to International Law*, 7<sup>th</sup> edition, Routledge, London, 1997, p. 48.

121 See Méndez, above note 36, at p. 256 (“...these obligations are of universal application and are fed by experiences that have little to do with the transition to democracy”).

122 See Ian Brownlie, *Principles of Public International Law*, 3<sup>rd</sup> edition, 1979, p. 29.

## Consequences of a right to the truth: truth and the criminal trial

As noted in the introductory comments to this article, revealing the truth has become strategically important to many of the objectives of the international criminal trial. However, certain commentators have cautioned against this approach. Professor Koskenniemi, for example, has described how in trials seeking to deal with international crimes perpetrated in highly political contexts, “[t]he line between justice, history and manipulation tends to become all but invisible.”<sup>123</sup> He argues that the objective of “‘educating’ people of ‘historical truths’ through law emerges from our contemporary wish to accommodate the Realist insight about the need to take into account of the context, but also from our rejection of the Realists’ conclusion — namely that law cannot be of use here.” In line with Hans Morgenthau’s scepticism about the ability of the international legal process to deal with large events of international politics because of the inevitable distortion that occurs when political contexts are subject to legal process,<sup>124</sup> Koskenniemi points out that “individualization” of international criminal guilt may provide an alibi to a criminal state system (and abiding population),<sup>125</sup> while the very structure of a tribunal designed to try perpetrators for such crimes is implicitly grounded in preconceived notions about the (contested) context in which the crimes were committed, making a “show trial” almost inevitable.<sup>126</sup> Other commentators have also warned about the “moralizing over-simplification” of international criminal law, which “runs the risk of falling into Manichaeian approaches.”<sup>127</sup> In her famous book on the Eichmann trial in Jerusalem, Hannah Arendt also criticized the trial for introducing historical, political and educational objectives into the proceedings:

“The purpose of the trial is to render justice, and nothing else; even the noblest ulterior purposes — ‘the making of a record of the Hitler regime...’ can only detract from the law’s main business: to weigh the charges brought against the accused, to render judgment and to mete out due punishment.”<sup>128</sup>

123 Martti Koskenniemi, “Between impunity and show trials”, 6 *Max Planck UNYB* (2002), p. 34.

124 See the discussion on Morgenthau’s argument as enunciated in “Die internationale Rechtspflege, ihr Wesen und ihre Grenzen”, 1929, pp. 62–72, in Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960*, Cambridge University Press, Cambridge, 2002, pp. 440–445.

125 Koskenniemi, “Between impunity and show trials”, p. 32. See also the criticisms of the individualization of responsibility for acts of genocide committed in Rwanda, which may be oversimplifying the situation and distorting the group element in the perpetration of crimes: Jean Marie Kamatali, “The challenge of linking international criminal justice and national reconciliation: The case of the ICTR”, *Leiden Journal of International Law*, Vol. 16, No. 1, March 2003, p. 124.

126 Thus, Koskenniemi points out that in the case of the Milosevic trial in The Hague, “...because the context is part of the political dispute, the trial of Milosevic can only, from the latter’s perspective, be a show trial participation which will mean the admission of Western victory.” Koskenniemi, *ibid.*, pp. 17–18.

127 Antoine Garapon, “Three Challenges for International Criminal Justice”, *Journal of International Criminal Justice*, Vol. 2, No. 3 (2004), p. 724.

128 Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil*, Penguin Books, New York, 1994, p. 253.

Because of its overtly didactic purposes, Arendt felt that the *Eichmann* trial had become a show trial staged by the Israeli Prime Minister, David Ben-Gurion, to support political motives linked to justifying and unifying the state of Israel.

Turning to more practical implications for a right to the truth in relation to criminal processes, one of the areas where recognition of such a right may impact upon the functioning of trials is the relationship between truth-seeking processes and judicial processes.<sup>129</sup> In principle, these are supposed to be complementary, but there are also possibilities for conflict, as was shown in the decision of the Special Court for Sierra Leone (SCSL) when it rejected the application for Samuel Norman to appear at the Truth and Reconciliation Commission (TRC) before his trial at the SCSL, on the basis of a lack of procedural safeguards of the accused.<sup>130</sup> The implication was that fair trial rights of the accused would override the truth-seeking function of the TRC. On appeal, Justice Robertson put forward a compromise solution, allowing Norman to give written evidence or to meet with the TRC in private but denying a public hearing.<sup>131</sup> In fact, this never happened, but the resolution of the jurisdictional conflict in favour of the court meant that the potential for a broader investigation of some elements of the conflict in Sierra Leone was lost. One question to consider is whether the decision could have been resolved differently had the “right to the truth” of victims and of Sierra Leonean society been recognized and weighed against the rights of the accused.<sup>132</sup> Taking into account the fact that truth and reconciliation commissions generally consider facts and evidence of a much wider scope than those merely of concern in a criminal trial, and given the crucial importance that has been attributed to ascertaining this “truth” for reconciliation purposes and the prevention of future violence, courts faced with similar situations should perhaps take a more lateral view in their weighing up of competing interests.

The problem of whether the “use immunity for testimony”<sup>133</sup> mechanism can be applied to truth commission procedures also remains unresolved. In other words, should witnesses who give testimony before a truth commission be able to

129 For a discussion of this relationship, see William A. Schabas & Shane Darcy, *Truth Commissions and Courts: The Tension Between Criminal Justice and the Search for Truth*, Kluwer Academic Publishers, Dordrecht, 2004.

130 *Decision on the Request of the Truth and Reconciliation Commission of Sierra Leone to Conduct a Public Hearing with Samuel Hinga Norman* (SCSL-2003-08-PT) [3257-3264], 29 October 2003.

131 *Decision on Appeal by the Truth and Reconciliation Commission of Sierra Leone (“TRC” or “The Commission” and Chief Samuel Hinga Norman JP against the Decision of His Lordship, Mr Justice Bankole Thompson, delivered on 20 October 2003, to Deny the TRC’s Request to Hold a Public Hearing with Chief Hinga Norman JP*, (SCSL-2003-08-PT), 28 November 2003.

132 In this regard, it should be noted that Principle 9 of the Updated Principles on Impunity, above note 8, puts forward some guidelines for safeguarding the rights of persons implicated in the course of investigations by truth-seeking mechanisms.

133 Before the Special Court for Sierra Leone, a witness may request that testimony delivered in proceedings before that Court will not be used in a subsequent prosecution of that witness (Rule 90(E) of the SCSL Rules of Procedure and Evidence). The Rule is derived from Rule 90(E) of the ICTR Rules of Procedure and Evidence, in accordance with Art. 14(1) of the SCSL Statute.

request that such information not be used to prosecute them?<sup>134</sup> If one takes into account a right to truth owed to society or to victims, the arguments for such a principle to be applied to truth commission procedures may well be strengthened.

Another area that merits attention is the use of plea bargaining in trials dealing with international crimes. Despite an initial reluctance to enter into this type of arrangement, given the nature of the crimes covered by their mandates, the *ad hoc* international criminal tribunals have gradually come to accept the use of plea bargaining as a means to make international criminal processes more efficient.<sup>135</sup> This began with sentence bargaining but now includes charge bargaining.<sup>136</sup> On the one hand, a guilty plea is important for establishing the truth because it removes the source of conflict over responsibility and evidence, and it provides an incentive to defendants to provide information that may otherwise remain unknown. The best example of this is the plea agreement of Momir Nikolic before the ICTY. In his Statement of Facts and Acceptance of Responsibility attached to the plea agreement, Nikolic stated that the executions of thousands of Muslim men and boys at Srebrenica were planned and known about at the highest levels in the Bosnian Serb Army (VRS), thereby countering the denials that had been issued regarding responsibility at the individual and state level for the massacre.<sup>137</sup> However, “charge bargaining,” where more serious charges are dropped in return for a defendant’s guilty plea, also has the potential to distort the historical record. In this sense, one could well ask whether charge bargaining is compatible with the right to the truth of society and of victims. In the case of *Plavšić* at the ICTY, the accused also admitted the facts supporting the charge in a five-page document appended to the plea agreement, which may serve to develop a generally accepted historical record. On the other hand, *Plavšić* only had to admit to facts relevant to the remaining charge of persecution so that her involvement in any acts of genocide, the original charge, remains unknown. In fact, many Serbs did not see the plea bargain as an act of truth-telling but as a self-interested compromise in return for judicial benefits.<sup>138</sup>

134 For arguments in this direction, see William A. Schabas, “A Synergic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone”, in William A. Schabas & Shane Darcy, *Truth Commissions and Courts: The Tension Between Criminal Justice and the Search for Truth*, Kluwer Academic Publishers, Dordrecht, 2004, pp. 30–35.

135 On 12 July 2001, the ICTY added Rule 62ter of the Rules of Procedure and Evidence, which sets forth the procedure for accepting a plea arrangement.

136 Sentencing Judgment, *Plavšić* (IT-00-39&40/1-S), Trial Chamber III, 27 February 2003.

137 As Assistant Commander for Security and Intelligence of the Bratunac Brigade of the VRS, Nikolic was ordered to coordinate and supervise “the transportation of the women and children to Kladanj and the separation and detention of able-bodied Muslim men,” which he did. He was asked to help identify sites for detention where the men and boys were to be held pending their execution. Nikolic passed this information on to his commander and co-accused, Vidoje Blagojevic, who appeared to be “fully informed of the transportation and killing operation”. He also admits his involvement in exhumation of mass graves and reburial — and names those who ordered him to do it. In addition, he relates the intentional destruction of compromising evidence by officers of the VRS Drina Corps, as well as meetings with VRS officers and a visit from the State Security Service to encourage his silence after he was summoned for questioning by the ICTY.

138 Michael P. Scharf, “Trading justice for efficiency”, *Journal of International Criminal Justice*, Vol. 2, No. 4 (2004), pp. 1070–1081, at p. 1080.

Indeed, negotiated justice has been justified on the basis of postmodern philosophical thought which, as mentioned earlier, sees the most appropriate concept of truth as one that defines “truth” as that version of facts acceptable to all concerned.<sup>139</sup> A general principle of a “right to the truth,” therefore, may help courts to attune their use of plea-bargaining and other measures of negotiated justice better to the overriding objectives of international criminal justice. It is a delicate balance to achieve: while agreement and compromise may not be the most reliable path to accurate fact-finding, a defendant may be induced to provide important evidence that may otherwise not come to light.<sup>140</sup>

Finally, the difficult question of whether a truth commission or other non-judicial truth-seeking mechanism should name names of those found responsible for serious human rights violations remains a thorny issue. Clearly, there is a clash here between the individual victim’s and society’s right to truth and the alleged perpetrator’s due process rights, not least the presumption of innocence and the right to defend oneself against criminal charges. The practice of truth commissions has varied on this point.<sup>141</sup> The Updated Principles on Impunity provide some guidelines on the matter,<sup>142</sup> but debate is likely to continue.

## Conclusion

The right to the truth is a notion that seems at once idealistic and obvious to the human condition. Truth is a concept that is notoriously hard to pin down. It implies objective credibility but also requires subjective understanding. It suggests agreement about factual reality but also space for differing interpretations. It takes on value in the public sphere while remaining an intensely private matter for the

139 Mirjan Damaška, “Negotiated Justice in International Criminal Courts”, *Journal of International Criminal Justice*, Vol. 2, No. 4 (2004), pp. 1018–1039, at p. 1029.

140 For its part, the ICC Statute allows “admissions”, which have to follow the strict conditions required for admission statements. They must be supported, *inter alia*, by materials supplementing the prosecution’s charges as well as any other evidence presented by the parties. A judge can request that the prosecution present additional evidence, including the testimony of witnesses (ICC Statute, Art. 65).

141 Truth commissions in El Salvador and South Africa named alleged perpetrators in their final reports. The commission in Guatemala was explicitly prohibited from doing so. Argentina’s National Commission on the Disappeared operated under an ambiguous mandate in this regard, but it did not release the names of those who were said to have committed crimes. Although the mandate of Chile’s National Commission on Truth and Reconciliation did not prohibit the body from naming those alleged to have committed crimes, the commission nonetheless chose not to do so, citing pragmatic concerns about stability and due process questions of evidentiary sufficiency.

142 Principle 9 of the “Updated Principles on Impunity” provides that: “[b]efore a commission identifies perpetrators in its report, the individuals concerned shall be entitled to the following guarantees: (a) The commission must try to corroborate information implicating individuals before they are named publicly; (b) The individuals implicated shall be afforded an opportunity to provide a statement setting forth their version of the facts either at a hearing convened by the commission while conducting its investigation or through submission of a document equivalent to a right of reply for inclusion in the commission’s file.”

individual, and it is honed on the past but may change our perception of the present and teach lessons about what to do with the future.

By way of a tentative conclusion to the question posed in the title of this article, it may be argued that the right to the truth stands somewhere on the threshold of a legal norm and a narrative device. Its clear link to human dignity means that nobody will deny its importance, but lingering doubts about its normative content and parameters leave it somewhere above a good argument and somewhere below a clear legal rule. The truth about the right to the truth is still a matter to be agreed upon.