

LUND UNIVERSITY

European Master's Degree in Human Rights and Democratisation

A.Y. 2014/2015

THE BEST WAY TO PROTECT THE RIGHT TO THE TRUTH

Set-alone or under the framework of other rights or obligations?

Author: Yang Gao

Supervisor: Radu Mares

ABSTRACT

The premises of the research are rooted in the debate about the legal status of the right to the truth in the international law. Since 1980s the right to the truth emerged as a form of remedy for victims of gross human rights violations and a weapon to fight against impunity. It offers individual victims and their relatives a way to gain closure, restore their dignity and experience at least some remedy for their losses. It also helps prevent violations from recurrence in the future. However, the right to the truth is merely explicitly provided for in the Additional Protocol I to the Geneva Conventions and the International Convention for the Protection of All Persons from Enforced Disappearance, although it recognized by a series of international instruments, resolutions of intergovernmental bodies and national laws. In majority of cases, international criminal court and regional human rights courts outlined the right to the truth under other human rights or the obligations of state. In order to provide victims and their families with complete protection, it is vital to conduct an in-depth research on the right to the truth. The thesis mainly analyzes two feasible approaches to realize the right to the truth: regarding it as an independent right or outlining it under other rights or obligations. Finally, I will draw a conclusion by presenting evidences.

ACHPR	African Commission on Human and People's Rights
ACHR	American Convention on Human Rights
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
ECOSOC	UN Economic and Social Council
EU	European Union
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTJ	International Centre for Transitional Justice
IHL	International Humanitarian Law
OHCHR	Office of the High Commissioner for Human Rights
UDHR	Universal Declaration of Human Rights
UN	United Nations

TABLE OF CONTENTS

5	Introduction
8	1. What is the Right to the Truth?
9	1.1 The Development of the Right to the Truth
9	1.1.1 Historical Basis of the Right to the Truth
12	1.1.2 Legal Basis of the Right to the Truth
16	1.2 Application Scope of the Right to the Truth
21	1.3 An Inalienable and Non-derogable Right
25	1.4 Individual and Collective Dimension
29	1.5 The Content of the Right to the Truth
32	2. The Right to the Truth as a Right Set-alone
32	2.1 The Right to the Truth as an International Custom
36	2.2 The Right to the Truth as a General Principle of Law
38	2.3 The Requirements of the Right to the Truth as an Independent Right
39	2.3.1 Two Phases of Realization
41	2.3.2 Benefits from the Right to the Truth
43	2.3.3 Obligations from the Right to the Truth
44	3. The Right to the Truth under the Framework of Other Rights or Obligations
44	3.1 Overview of the Situation in Regional Areas
44	3.1.1 Inter-American Area
46	3.1.2 European Area
46	3.1.3 African Area
47	3.2 Related Rights

48	3.2.1 The Right to Effective Remedy
49	3.2.2 The Right to Justice
50	3.2.3 The Right to Fair Trials
51	3.2.4 The Freedom of Expression
52	3.2.5 The Relationship among the Rights
55	3.3 Case Laws on Related Rights and Obligations
56	3.3.1 The Right to the Truth under the Right to Effective Remedy
60	3.3.2 The Right to the Truth under the Right to Justice and Right to a Fair Trial
62	3.3.3 The Right to the Truth under the Freedom of Expression
63	3.3.4 The Right to the Truth under the Right to Humane Treatment
66	3.3.5 Relying on States' Obligation under Specific Articles
70	Conclusion
73	Bibliography

INTRODUCTION

On 21 December 2010, the United Nations General Assembly declared the 24 March as the International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims.¹ From this date, problems surrounding this right have been paid close attention to worldwide. In addition to this promotion of the importance of the right to truth and justice, according to official accounts, another purpose for the United Nations (UN) to set up this anniversary is to recognize the achievement of Archbishop Oscar Arnulfo Romero², who was assassinated on 24 March 1980, after denouncing violations of the human rights of El Salvador and defending the principles of protecting lives, promoting human dignity and opposition to all forms of violence.³ The Commission on the Truth for El Salvador was established as early as 27 April 1991 to investigate serious acts of violence that had occurred since 1980 and whose impact on society was deemed to require an urgent public knowledge of the truth.⁴ Subsequently, the United Nations expressed its attitude to the right to the truth through a series of measures, which include supporting fact-finding missions⁵, establishing commissions of inquiry⁶ as well as encouraging the establishment of the national truth commission to uncover the truth surrounding gross violations of human rights and serious violations of international humanitarian law. As a result, the right to the truth has gained popularity with the concerned efforts of international organizations and civil society. Furthermore, the notion of the right to the

¹ See at <http://www.un.org/en/events/righttotruthday/index.shtml> (consulted on 1 July 2015).

² See Archbishop Oscar Arnulfo Romero's biography at

<http://www.un.org/en/events/righttotruthday/romero.shtml> (consulted on 1 July 2015).

³ See at <http://www.un.org/en/events/righttotruthday/index.shtml> (consulted on 1 July 2015).

⁴ Report of the Commission on the Truth for El Salvador, S/25500, 1 April 1993, available at http://www.un.org/en/ga/search/view_doc.asp?symbol=S/25500&referer=/english/&Lang=E.

⁵ See at

<http://www.ohchr.org/EN/HRBodies/HRC/SpecialSessions/Session9/Pages/FactFindingMission.aspx> (consulted on 1 July 2015).

⁶ <http://www.ohchr.org/EN/HRBodies/HRC/CoIDPRK/Pages/AboutCoI.aspx> (consulted on 1 July 2015).

truth began to appear in the decisions of regional human rights courts. In most judicial practice, the right to the truth is considered as a notion outlined under other human rights, but not an independent legal right. Different judicial subjects also choose to outline the right to the truth under different rights according to their legislations. Although theoretical circles have formed some basic ideas and reached a consensus in some aspects, has the current theoretical framework of the right to the truth still failed to answer what should be the status of the right to the truth in international law? In other words, the right to the truth is an independent right or a right outlined under other human rights is still questionable.

So why does it matter whether this right is independent or not? For one thing, the right to the truth itself is a notion has to do with vital interests of individual and society. The realization of this right greatly influences whether the victims and their family could obtain effective relief or not when gross violations of human rights happen. For another, this issue still has effect on the success or failure of the democratic revolution in some transitional societies. The lack of independent status in international law may mean the states are unable to take the right to the truth as a weapon against amnesty laws and other political dictatorship. Therefore, it is necessary to conduct an objective and analytical research on this issue. The uncertainty of the existing theories brings about unprecedented challenges to practice, and therefore opportunity. No longer is it necessary to talk about its independence or not at a purely theoretical level, which has, as an argument, produced no results. Efforts and actions should involve discovering what are the reasons and implications of treating the right to the truth as an independent right as opposed to a right included within other rights. This is exactly the central argument I want to clarify in this thesis.

The issues of the right to the truth as a dependent right can be analyzed under the framework of judicial practice by comparing different elements of rights and different decisions of cases. Nevertheless, the difficulty lies in how to deal with the issues if the

right to the truth is regarded as an independent right. The thesis first analyzes the possibility of the right to the truth to become a legal source of international law. Then it tries to construct a theoretical assumption of the right to the truth as an independent right on the basis of existing theories, in order to satisfy the needs of individuals and society to the utmost extent. This thesis is divided into three parts. Chapter 1 aims at establishing the main theoretical framework of the right to the truth, whereas Chapter 2 and Chapter 3 illustrate two possible ways of protecting it. To be specific, Chapter 1 outlines the historical basis, legal basis as well as four important elements of right to the truth, which forms the foundation of this full text. On the basis of Chapter 1, Chapter 2 primarily assumes the first approach to protect right to the truth: as an independent legal right under international law. Accordingly, this part analyzes whether the right to the truth can be regarded as a “legal source of international law” now, which usually indicates international conventions, international customs and the general principles of law. Chapter 2 further argues the theoretical considerations and merits of right to the truth as an independent right, placing emphasis on the benefits that individuals and society should obtain from the independent right to the truth. Chapter 3 illustrates an alternative way to protect the right to the truth: outlined under other rights or state obligations, by analyzing the relationship between the right to the truth and the other rights. After clarifying the relationship between different rights, the thesis further explores the judicial practice and attempts to summarize advantages and disadvantages of different ways. In the conclusions chapter, I will identify a final critical conclusion by comparing these two approaches of protecting the right to the truth.

1.

WHAT IS THE RIGHT TO THE TRUTH?

The theory of the right to the truth, which is established by the resolutions of UN General Assembly, reports of UN organisations (including the Human Rights Council (UNHRC)⁷, Working Group on Enforced or Involuntary Disappearances (WGEID)⁸, the Special Rapporteur on the independence of judges and lawyers⁹), cases in regional human rights courts, domestic practice, as well as opinions of IGOs and NGOs, is much richer compared with the provisions shined in international laws. In 2006 and 2009, at request of UNHRC, the Office of the High Commissioner for Human Rights (OHCHR) conducted two important reports on right to the truth, which illustrate basic theories of the right to the truth, practices relating to archives and records concerning gross violations of human rights, and programs on the protection of witnesses and other persons involved in trials connected with such violations.¹⁰ Although some issues are still controversial, we must concede that its core elements are well established. One of the most representative descriptions of this right can be found in a study of the OHCHR. It provides that:

“The right to the truth about gross human rights violations and serious violations of human rights law is an inalienable and autonomous right, linked to the duty and obligation of the State to protect and guarantee human rights, to conduct effective investigations and to guarantee effective remedy and reparations. This right is closely

⁷ UNHRC, Decision 2/105, 27 November 2006; Resolution 9/11, 18 September 2008; and 12/12, 1 October 2009.

⁸ E/CN.4/1435, 22 January 1981, para. 187

⁹ E/CN.4/2006/52, 23 January 2006.

¹⁰ E/CN.4/2006/91, A/HRC/12/19.

linked with other rights and has both an individual and a societal dimension and should be considered as a non-derogable right and not be subject to limitations.”¹¹

This definition highlights some important characteristics of the right to the truth, including application scope, inalienability and non-derogation, individual and societal dimension, and of course, its contents. For a thorough analysis, I will discuss these four points separately in order to consider each carefully and pinpoint the nature and interrelationship of all parts.

1.1 THE DEVELOPMENT OF THE RIGHT TO THE TRUTH

The development of the right to the truth has its historical and legal bases. Historical basis determines some vital elements of the right to the truth such as function of remedy and fighting against impunity while legal basis shows how does the existing laws stipulate the right to the truth.

1.1.1 Historical Basis of the Right to the Truth

To find the historical basis of the right to the truth, we must first understand the context, in which people possess a strong desire to seek the “truth”. Usually, the context may be one in which States have experienced a change of power from authoritarian or military rule to some form of democracy, or states racked by civil or ethnic strife.¹² The right to the truth is, as it were, a concept with the emergence of the practice of enforced disappearance in transitional situations. It will not be difficult to imagine the urgent demand of establishing the right to the truth, if one recalls the phenomenon of enforced disappearance in Latin American dirty war in 1970s and 1980s, and especially with the Southern Cone countries of Argentina and Chile. This phenomenon, however, is not

¹¹ E/CN.4/2006/91, 8 February 2006, p. 2.

¹² Parlevlie, 1998, p. 141.

limited to that geographic region or unique period of time.¹³ In short, the emergence and development of the right to the truth, as a product of a specific historical stage of transition, meets individual needs as well as collective demands. The clamor for a right to the truth was born out of the anguish and indignation caused by these systematic patterns of gross human rights violations and the subsequent impunity enjoyed by perpetrators.¹⁴

On the one hand, systematic enforced disappearances made stakeholders, especially victims' families eager to learn about what had happened to missing persons. The right to the truth therefore provides these stakeholders with an effective way of demanding that the states investigate the crimes and find out the truth of the cases. Statistics show that, in Chile, the systematic practice of "disappearances" lasted from 1973 to 1977, with about 1,300 disappearances.¹⁵ During the military dictatorship in Brazil from 1964 to 1985, the government acted against citizens who violently opposed the military rule by way of political arrests, torture against those in state custody, forced disappearances, summary executions, and hiding of corpses.¹⁶ In Argentina, the number of people believed to have been killed or disappeared, depending on the source, ranges from 7,158 to 30,000 in the period from 1976 to 1983, while the number of those that disappeared claimed by the National Commission on the Disappearance of Persons is to be around 13000¹⁷. A large group of grief-stricken families of victims are anxiously

¹³ Human Rights Advocacy and the History of Human Rights Standards website, available at <http://humanrightshistory.umich.edu/problems/disappearances/> (consulted on 16 June 2015).

¹⁴ Antkowiak, 1991 p. 980 (explaining the roles of the Mothers of the Plaza de Mayo and the Latin American Federation of Associations of Relatives of Disappeared Detainees (FEDEFAM), which later extended to other continents).

¹⁵ The Emergence of "Disappearances" as a Normative Issue, presentation by José (Pepe) Zalaquett, Proceedings of a Research Workshop Gerald R. Ford School of Public Policy University of Michigan, October 2010.

¹⁶ Glafira, 2013, p. 1.

¹⁷ Una duda histórica, no se sabe cuántos son los desaparecidos, available at <http://edant.clarin.com/diario/2003/10/06/p-00801.htm>.

waiting for any possible information of their relatives. From this point of view, pursuing “truth” about their close kin is requirement and expression of human being’s instinct.

On the other hand, the right to the truth derives from a struggle against impunity. It is an important tool of the protecting the right to justice, which is considered as the last guarantee against political violence and human rights violation. In other words, except for fulfilling individual’s instinctive demand, the emergence of the right to the truth is also a result of a series of national or social problems that occurred after gross human rights violation. Let us revisit a time in the history where the autocratic governments chose to adopt amnesty laws in order to shield their depredations behind a fortress of impunity, and then defended its actions on the ground that there was a “compelling need for national reconciliation and consolidation of the democratic system”¹⁸. Take Brazil as an example, the Amnesty Law of 1979 was signed into law during the transition to democracy as a deliberate move to protect military actors during and after the dictatorship.¹⁹ Similarly, Argentina in 1980s, two amnesty laws—The Punto Final Law (laws N 23,492) of December 1986²⁰ and The Due Obedience Law (N 23,521) of June 1987²¹—were passed, which are considered as “De facto amnesties”. It means while not explicitly ruling out criminal prosecution or civil remedies, a law, decree or regulation may have the same effect as an explicit amnesty law.²² However, despite its nature against the right to judicial protection, amnesty law in both Brazil and Argentina was ruled constitutional by the decision of the Supreme Court. It is these amnesty laws that

¹⁸ Inter-American Commission on Human Rights, *Alicia Consuelo Herrera et al. v. Argentina*, cases 10.147, 10.181, 10.240, 10.262, 10.309, 10.311, Report No. 28/92, 2 October 1992, para. 25.

¹⁹ The Emergence of “Disappearances” as a Normative Issue, presentation by José (Pepé) Zalaquett.

²⁰ The Punto Final Law of December 1986 sets a 60-day limit on the initiation of new criminal complaints relating to Argentina’s “dirty war”.

²¹ The Due Obedience Law of June 1987 established a presumption that military officials other than certain commanders committed human rights abuses under coercion and rendered them immune from prosecution on this basis. It, too, was later annulled.

²² OHCHR, Rule-Of-Law Tools For Post-Conflict States-Amnesties, United Nations Publication Sales No. E. 09. XIV. 1, p. 8.

blocked the revelation of the truth and denied the chances for families to learn about the fates of their relatives through criminal justice. Under various sources of international law and under United Nations policy, the international community has actually reached an important consensus that “amnesties are impermissible if they restrict victims’ and societies’ right to know the truth about violations of human rights and humanitarian law”.²³ In 1992, the Inter-American Commission on Human Rights (IACHR) issued a conclusion that the amnesty laws in Argentina were incompatible with Article XVIII (right to a fair trial) of the American Declaration of the Rights and Duties of Man and Articles 1, 8 and 15 of the American Convention on Human Rights (ACHR).²⁴ After Argentina experienced 1994 constitutional reform and was profoundly influenced by an internationally promoted policy of struggle against impunity, we finally witnessed the repealing of the 1986-87 laws by parliament (2003)²⁵. This was followed by the declaration of their unconstitutionality by the Supreme Court in the significant *Simón* ruling²⁶ of 2005.²⁷ Hitherto, the majority of countries including Peru, Brazil, Uruguay, and Chile have abandoned amnesty law and made strides towards the right to the truth. The period between adoption of amnesty laws and their final repeal witnessed the emergence and application of the right to the truth.

1.1.2 Legal Basis of the Right to the Truth

With the emergence of the right to the truth at the international, regional and national levels, this right has acquired legal value that has an ambivalent nature that

²³ The Due Obedience Law of June 1987 established a presumption that military officials other than certain commanders committed human rights abuses under coercion and rendered them immune from prosecution on this basis. It, too, was later annulled.

²⁴ Inter-American Commission on Human Rights, *Alicia Consuelo Herrera et al. v. Argentina*, cases 10.147, 10.181, 10.240, 10.262, 10.309, 10.311, Report No. 28/92, 2 October 1992, para. 25.

²⁵ Law 25.779 promulgated 2 September 2003.

²⁶ Ruling 328:2056 of 14 June 2005 (case no. 17.768).

²⁷ Garibian, 2015, pp. 70-71.

situates the right to the truth, “somewhere on the threshold of a legal norm and narrative device.”²⁸ As it is such a complicated issue that should be dealt with in another section below, it is necessary to make a brief overview of its emergence under international law.

From 1970s, the United Nations General Assembly and the Human Rights Council adopted a series of resolutions, which recognize the importance of the right to the truth and set out an outline before being given implicit recognition in international law. Actually, the right to the truth finds its real roots in international humanitarian law. Article 32 and Article 33 of Additional Protocol I to the Geneva Conventions of 12 August 1949²⁹ are considered to be the earliest legal basis for this right, although it fails to put forwards the concept explicitly. With regards to the right of families to know the fate of their relatives³⁰ and the obligation of parties to armed conflict to search for missing persons³¹, they only apply in the context of section “missing and dead persons”. Actually, the application scope of these provisions is rather limited as their application is restricted to “international conflict”, which means “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them”³² as well as “armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes”³³. That is to say, missing persons, whose information should be searched for under Geneva Convention, refer mainly to combatants from whom there has been no news, or civilians in occupied territory or enemy territory, even not including prisoners of war or civilian internees.³⁴ The International Committee of the Red Cross (ICRC)

²⁸ Naqvi, 2006, p. 273.

²⁹ Protocol I to the Geneva Conventions was adopted on 8 June 1977, relating to the protection of victims of international conflicts.

³⁰ Article 32 of Additional Protocol I to the Geneva Conventions of 12 August 1949.

³¹ Article 33 of Additional Protocol I to the Geneva Conventions of 12 August 1949.

³² Article 2 common to Geneva Conventions.

³³ Article 1 of Additional Protocol I to the Geneva Conventions of 12 August 1949.

³⁴ ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949, Article 33-Missing persons, available at ICRC website:

extended the application scope of the right to the truth to both international and non-international armed conflict by considering that state practice establishes this rule as a norm of customary international law.³⁵

The right to the truth that was initially referred to solely within the context of enforced disappearances has been gradually extended to other serious human rights violations, such as extrajudicial executions and torture.³⁶ As there is no official universal right to truth in regional or international levels during this period, the right can only be protected through articles of domestic constitutions or expanding interpretation of other articles under conventions. Take the International Covenant on Civil and Political Rights (ICCPR) as an example; it is stated in a Concluding Observation of the Human Rights Committee that State party “should take all pertinent measures to avoid cases of impunity and, especially, to allow the victims of human rights violations to find out the truth about those acts, to know who the perpetrators of such acts are and to obtain appropriate compensation”³⁷. The Special Rapporteur also considers that Law 26.479 and Law 26.292, the two “amnesty laws” as adopted by the Peruvian Congress in 1995, are in violation of the State’s obligations under the international Covenant on Civil and Political Rights.³⁸ As stated by the Human Rights Committee, it is the obligation of the State to investigate violations of human rights.³⁹ In addition, the right to the truth had been explicitly recognized in several international instruments and by various international bodies, by intergovernmental bodies and national practices at the

<https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=B9AC1957F13CFC98C12563CD0051DA78> (consulted on 14 May 2015).

³⁵ ICRC, 2005, p. 421. Rule 117. Each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate.

³⁶ E/CN.4/2006/91, 8 February 2006, p. 8.

³⁷ CCPR/C/79/Add.63, 3 April 1996, para. 25.

³⁸ E/CN.4/1998/39/Add.1, 19 February 1998, para. 131.

³⁹ *Ibidem*.

universal and regional levels.⁴⁰ By no means a direct legal basis, these acknowledgements changed the status and expanded it 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.

As a milestone in the history of the right to the truth, the 2006 International Convention for the Protection of All Persons from Enforced Disappearance first explicitly stipulates it as an enforceable right in its Article 24, stating that: “*Each 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. Each State Party shall take appropriate measures in this regard.*” The treaty entered into force during December 2010. In the transformation of this right under international humanitarian law to a right under human rights law, its scope of application and legal status in jurisprudence represent a historical leap forward. Apart from this, the Updated Set of Principles for the Protection and Promotion of Human Rights (Updated Principles on Impunity) through action to combat impunity reaffirm the inalienable right to the truth in Principle 2, the victims’ right to know in Principle 4 and states’ corresponding obligations in Principle 1.⁴¹

⁴⁰ E/CN.4/1435; E/CN.4/2006/52; E/CN.4/2006/91; A/HRC/12/19; A/HRC/5/7; A/HRC/RES/12/12; A/HRC/RES/18/7; A/HRC/17/21; A/HRC/15/33; E/CN.4/2006/91; A/HRC/RES/21/7; E/CN.4/1999/62; E/CN.4/2006/52; CCPR/C/79/Add.63; CCPR/C/19/D/107/1981; Corte Suprema de Justicia de la Nación [National Supreme Court of Justice], 14/6/2005, “Simón, Julio Héctor y otros s/ privación ilegítima de la libertad”; Constitutional Tribunal of Peru. Genaro Villegas Namuche. Case No. 2488-2002-HC/TC, March 18, 2004; Constitutional Court of Colombia. Gustavo Gallón Giraldo y Otros v. Colombia. Sentencia No. C-370/2006, May 18, 2006.

⁴¹ E/CN.4/2005/102/Add.1, 8 February 2005. Principle 2 [the inalienable right to the truth]: Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations. Principle 4 [the victims’ right to know]: Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the

1.2 APPLICATION SCOPE OF THE RIGHT TO THE TRUTH

As previously talked in the first chapter, under international treaty law the right to the truth only can be definitely applied in the events related to enforced disappearance. In later development, the ongoing egregious human rights violations and the practice of various organisations combined promote a broader interpretation of the notion of the right to the truth. It is not only applied to enforced disappearance, but also other forms of serious human rights violations. The right to the truth, quite naturally, is closely linked at its inception to the notion of a victim of a gross violation of human rights and serious violations of International Humanitarian Law (IHL).

In order to know the application scope of the right to the truth it is necessary to first understand what is meant by “gross violations of human rights and serious violations of international humanitarian law”. Actually, the phrases used in different documents share similarities but are not exactly the same. In a resolution of the General Assembly proclamation of 24 March as the International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims, focus is exclusive to “victims of gross and systematic human rights violations”.⁴² The IACHR believes that the emergence of the right to the truth is in response to the states’ failure to clarify, investigate, prosecute and punish “gross human rights and IHL violations”.⁴³ One may question that placing “IHL violation” in parallel with “human rights violation” is because these two notions share a different denotation, or just a kind of emphasize to IHL? Much has been discussed about the relationship between IHL and international human rights law in the past. However, there is still no substantive consensus in academic circles over this issue. Currently, two theories have been posited in order to

circumstances in which violations took place and, in the event of death or disappearance, the victims’ fate.

⁴² Resolution adopted by the General Assembly, A/RES/65/196, 21 December 2010.

⁴³ IACHR, The Right to Truth in the Americas, OEA/Ser. L/V/II.152 Doc. 2, 13 August 2014.

deal with this relationship.⁴⁴ In one advisory opinion on nuclear weapons, the International Court of Justice (ICJ) set out its famous theory to describe the international humanitarian law as the *lex specialis* compared with international human rights law.⁴⁵ The other theory, advanced by the Human Rights Committee, views the two bodies of law as additive in effect. It means the individual benefits from the more favorable law if both regimes apply.⁴⁶ In the matter of the right to the truth, I am more inclined towards the first theory. That is to say, when someone said the right to the truth is in response to “gross violations of human rights”, this right can be certainly applied in IHL violations. I believe the words used by different organisations are an afterthought and in absence of academic deliberation. Therefore, intentions to find a way to ensure universal coverage for victims of any possible kinds of serious human rights violations and lay an emphasis upon the situations in armed conflict by the reference to IHL. In the following research, it is unnecessary for one to become entangled in the nuances in wording as they are always interchangeable and allude to the same scope.

On international level, the concept of ‘gross’ violations (and, more precisely, the term ‘consistent pattern of gross violations of human rights’) first appeared in Resolution 8 (March 1967) of the UN Commission of Human Rights, principally was used to identify and respond to the ‘most serious’ violations.⁴⁷ However there exists no authoritative definition or criteria used to judge whether an act can be characterized as a serious violation of human rights law. “Serious”, “gross” and “systematic” are subjective concepts, which cannot be quantitated. We can only get an approximate scope by generalization of past experiences. In terms of international human rights law, Article 8 of the Optional Protocol to the 1979 Convention on the Elimination of All

⁴⁴ Schabas & Specialis, 2007, p. 593.

⁴⁵ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. (July 8), at para. 25.

⁴⁶ Schabas & Specialis, 2007, p. 592.

⁴⁷ Geneva Academy of International Humanitarian Law and Human Rights, What amounts to ‘a serious violation of international human rights law’? - An analysis of practice and expert opinion for the purpose of the 2013 Arms Trade Treaty, Academy Briefing No. 6, August 2014.

Forms of Discrimination against Women⁴⁸ and Article 11 of the Optional Protocol to the 1966 International Covenant on Economic, Social and Cultural Rights⁴⁹ refer to the notion of “grave or systematic violation” in a similar way that authorizes committees to launch an inquiry procedure if receiving reliable information indicating grave or systematic violations by a State Party. On a practical level, the UN Economic and Social Council (ECOSOC) successively set up the 1235 and 1503 procedures to “reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission”.⁵⁰ Some key points to interpret “consistent pattern of gross violation” have been summarized by some scholars in reference to debates concerning Resolutions 1235 and 1503. For example, (1) a certain number of breaches to be spread over a minimum period; (2) planning of or sustained will on the part of the perpetrator; (3) According to a qualitative test, inhuman and degrading character inherent in the violation.⁵¹ In addition, the Vienna Declaration and Programme of Action, which was adopted by the World Conference on Human Rights in Vienna on 25 June 1993, explains “gross and systematic violations” by means of enumeration. It states that:

“The World Conference on Human Rights also expresses its dismay and condemnation that gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of all human rights continue to occur in different parts of the world.

⁴⁸ Optional Protocol to the 1979 Convention on the Elimination of All Forms of Discrimination against Women, Article 8(1) If the Committee receives reliable information indicating grave or systematic violations by a State Party of rights set forth in the Convention, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.

⁴⁹ Optional Protocol to the 1966 International Covenant on Economic, Social and Cultural Rights, Article 11(2) If the Committee receives reliable information indicating grave or systematic violations by a State Party of any of the economic, social and cultural rights set forth in the Covenant, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.

⁵⁰ Economic and Social Council Resolution 1503(XLVIII), E/4832/Add.1 (1970).

⁵¹ Tardu, 1980, p. 583.

Such violations and obstacles include, as well as torture and cruel, inhuman and degrading treatment or punishment, summary and arbitrary executions, disappearances, arbitrary detentions, all forms of racism, racial discrimination and apartheid, foreign occupation and alien domination, xenophobia, poverty, hunger and other denials of economic, social and cultural rights, religious intolerance, terrorism, discrimination against women and lack of the rule of law.”⁵²

According to the declaration, not only the violation of some non-derogable rights, but also economic, social and cultural rights can constitute “gross and systematic violation of human rights law”. In an introductory note of the 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, Professor Theo van Boven states that ‘the word “gross” qualifies the term “violations” and indicates the serious character of the violations, but that the term “gross” is also related to the type of human rights that is being violated.’⁵³ Furthermore, the worst violation in the Principles and Guidelines refers to the violations constituting international crimes under the Rome Statute of the International Criminal Court.

On the regional level, the IACHR admits that in the case of “murders, forced disappearances, rapes, forced removals or displacements, torture, inhumane acts intended to cause death or inflict serious injury upon a person’s physical and mental integrity, attacks on a civilian population or their property, and recruitment of children and adolescents, states have a heightened duty to investigate and clarify the facts”.⁵⁴ Furthermore, the Inter-American Court of Human Rights (IACtHR) acknowledged in a case that the violation of non-derogable rights recognized by international human rights

⁵² World Conference on Human Rights in Vienna, Vienna Declaration and Programme of Action, 25 June 1993, para. 30.

⁵³ Boven, The United Nations 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, Introductory Note, p. 2.

⁵⁴ IACHR, The Right to Truth in the Americas, OEA/Ser. L/V/II.152 Doc. 2, 13 August 2014.

law, such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, can be regarded as “serious human rights violations”.⁵⁵

In summary, despite the fact that all violations of human rights entail the right to reparation, the right to the truth is only applied to “serious violation of human rights”. Through the analysis above, we can draw the following conclusions. Firstly, it is not imperative to contain IHL violation into the scope of the right to the truth. As two branches of international law, IHL and international human rights law possess different evolution processes, distinct natures and entailed different obligations. Having said this, the protection of the right to the truth is not intend to stress the difference between these two kinds of violation, but rather to entail redress and reparation to as many victims as possible. Secondly, the violations, which are intrinsically serious, undoubtedly fall into the application scope of the right to the truth, such as four types of serious crimes within the jurisdiction of the International Criminal Court.⁵⁶ In addition, the violation of parts of non-derogable rights is usually considered as “serious human rights violation”. The third concluding remark pertains to whether remaining violations can be considered as “serious”. Such distinctions require comprehensive consideration of the type of human rights, the behavioral nature, the magnitude of violation, in addition to influence, etc. This paper does not aim to provide an exhaustive list of the specific criteria for judging such violations.

⁵⁵ Inter-Am Ct. H.R., *Barrios Altos Case*, 14 May 2001.

⁵⁶ Rome Statute of the International Criminal Court, Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The Statute entered into force on 1 July 2002. Article 5 [Crimes within the jurisdiction of the Court]: The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.

1.3 AN INALIENABLE AND NON-DEROGABLE RIGHT

From a semantic perspective, the adjective “alienable” means “transferable” or “voidable”; therefore, rights are labeled “inalienable” indicate the moral and logical impossibility of transferring and voiding them.⁵⁷ For victims and their families, the right to be informed about the events in question is important and can aid in restoring their dignity, which determines this right to have a strong character of personal attachment. It means only stakeholders deserve this right and must be granted. By doing so, the right to the truth as an inalienable right seems rational and understandable. In fact, the inalienable nature of this right is almost recognized by entire international and national communities. Principle 2 of the Updated Principles on Impunity of 2005 is the earliest written text source I can find to propose the notion of “the inalienable right to the truth”.⁵⁸ Furthermore, the OHCHR’s study on the right to the truth in 2006 and 2007⁵⁹, which conclude that the right to the truth is an inalienable and autonomous right, to some degree, can reflect the extent of social acceptance towards this issue. The IACHR also admits its inalienability by stating that “every society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetitions of such acts in the future”.⁶⁰ In addition, both the Colombian Justice and Peace Act and Constitutional Tribunal of Peru have upheld the right to truth as an inalienable right to “know the truth about violations committed by organized armed groups operating outside the law and about the fate and destiny of the victims of abduction and enforced disappearance”.⁶¹

⁵⁷ Brown, 1955, p. 192.

⁵⁸ E/CN.4/2005/102/Add.1, 8 February 2005.

⁵⁹ E/CN.4/2006/91, A/HRC/5/7.

⁶⁰ IACHR, Annual Report, 1985-86, CHAPTER V, available at <https://www.cidh.oas.org/annualrep/85.86eng/chap.5.htm> (consulted on 14 June 2015).

⁶¹ A/HRC/5/7, 7 June 2007, para. 15.

Before progress to non-derogable right, we should first explore the meaning of Derogation. Derogation is designed to permit states unilaterally suspend parts of their obligations, and thus restrict some rights, under certain circumstance.⁶² However, derogation, usually as a temporary measure, is applicable only if two fundamental conditions are fulfilled: “the situation must amount to a public emergency which threatens the life of the nation, and the State party must have officially proclaimed a state of emergency.”⁶³ That is to say, with the exception of certain non-derogable rights, most rights can be suspended or derogated for the same purpose of protecting the nation, although it is known to all that for the effective realization of human rights, all rights should be protected on equal footing.⁶⁴

The conditions for derogation are not the primary point of this discussion. Surely, in the context of this paper, importance must be placed on why the right to the truth is the non-derogable right? Firstly, from the perspective of history, there is heated argument towards the list of non-derogable rights from the drafting Article 15 of the European Convention on Human Rights (ECHR). The UK’s proposal for non-derogable rights includes the right to life, freedom from slavery or servitude, freedom from torture, cruel and inhuman treatment or punishment and the non-retroactivity of criminal law, while French delegation supports a more extensive list of non-derogable rights, including protection against arbitrary arrest, non-imprisonment for contractual obligations as well as guarantees of the right to emigrate, the right to a fair trial and the right to judicial personality.⁶⁵ Furthermore, the ICCPR and American Convention on

⁶² Steiner, Alston & Goodman, 2008, p. 385.

⁶³ CCPR, General Comments No. 29, States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001.

⁶⁴ Tessema, Belay Frenesh, A Critical Analysis of Non-Derogable Rights in a State of Emergency under the African System: The Case of Ethiopis and Mozambique, available at http://repository.up.ac.za/bitstream/handle/2263/1138/belay_ft_1.pdf?sequence=1 (consulted at 26 June 2015).

⁶⁵ Macdonald, 1997, p225.

Human Rights further expand the list of non-derogable rights, which is established in the ECHR. Take Freedom from discrimination as an example. It is derogable under the ECHR but non-derogable under the ACHR and finally recognized by the UNHRC.⁶⁶ Now non-discrimination constitutes a basic and general principle relating to the protection of human rights.⁶⁷ The instance of freedom from discrimination helps us gain perspective. In other words, even though the right to the truth does not occupy a legitimate position in the list of non-derogable rights in conventions at this moment, it is very likely to achieve the same status as the non-discrimination principle does.

Secondly, we try to seek the basis of rationality as a non-derogable right for the right to the truth. The relevant international law provisions provide a list of rights that in absolute terms cannot be derogated from. According to Article 4(2) of the ICCPR, Article 15(2) of the 1950 European Convention on Human Rights, and Article 27 of the 1969 American Convention on Human Rights, recognized non-derogable rights include: the right to life, the right to be free from slavery, the right to be free from torture and cruel, inhuman or degrading treatment or punishment, and the prohibition of retroactive operation of criminal laws. So why should such rights qualify as non-derogable rights? As the ICCPR mentions in its General Comments No. 29, the proclamation of provisions of the Covenant as being of a non-derogable nature are for two reasons: for some fundamental rights, it can be seen partly as recognition of the peremptory nature ensured in treaty form in the Covenant, like the right to life and freedom from torture, cruel and inhuman treatment or punishment; for other rights, it because the suspension of those that are unnecessary in a state of emergency, like the freedom from prison due

⁶⁶ Tessema, Belay Frenesh, A Critical Analysis of Non-Derogable Rights in a State of Emergency under the African System: The Case of Ethiopia and Mozambique, available at http://repository.up.ac.za/bitstream/handle/2263/1138/belay_ft_1.pdf?sequence=1 (consulted at 26 June 2015).

⁶⁷ Human Rights Committee, General Comment 18, HRI/GEN/1/Rev.1, 26, 29 July 1994.

to debt and the right to freedom of thought, conscience and religion.⁶⁸ Thus if the right to the truth is treated as a non-derogable right, there are only two possibilities—to behave like the most fundamental human right or by no means necessary to be derogated even in the state of emergency. And yet the value of this discussion within this paper is likely to be minimal if not non-productive, as any judgment of human rights value is subjective. I am inclined to believe the recognition of this right’s non-derogable nature is in the interest of its potential to combat impunity.

Thirdly, the right to the truth as a non-derogable right and, thus, not subject to limitation, should not be limited, denied or impaired by amnesties or similar measures.⁶⁹ Human Rights Council, treaty bodies⁷⁰, the OHCHR and special procedures of the Council⁷¹ have placed the right to truth in the context of contributions to end impunity.⁷² Principle 24 (b) of the Updated Principles on Impunity recognized that “Amnesties and other measures of clemency shall not prejudice the right to know.”⁷³ The OHCHR in its report on concerned amnesty reaffirms that amnesties and other limitations on the right to seek information may not be used to limit, nullify or impair the right to truth.⁷⁴ That is to say, it is generally accepted that amnesties may not compromise either individual victims’ or societies’ right to know the truth about human rights violations.⁷⁵ Therefore, international society in return can take “the right to the

⁶⁸ CCPR, General Comments No. 29, States of Emergency (Article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11.

⁶⁹ OHCHR, Study on the right to the truth, E/CN.4/2006/9, summary and para. 60.

⁷⁰ CAT/C/COL/CO/4 (2010), para. 27.

⁷¹ A/HRC/16/48, para. 39; A/HRC/22/52, paras. 23-26, 32-34; A/HRC/7/3/Add.3, para. 82; A/HRC/14/23, para. 34.

⁷² Pablo de Greiff, report of the on the promotion of truth, justice, reparation and guarantees of non-recurrence, A/HRC/24/42, 28 August 2013.

⁷³ E/CN.4/2005/102/Add.1, 8 February 2005.

⁷⁴ OHCHR, Rule-of-Law Tools for Post-Conflict States: Amnesties, HR/PUB/09/1, 2009. Amnesties may not restrict the right of victims of violations of human rights or of war crimes to an effective remedy and reparations; nor may they impede either victims’ or societies’ right to know the truth about such violations.

⁷⁵ A/HRC/16/48, para. 39; A/HRC/22/52, paras. 23-26, 32-34; A/HRC/7/3/Add.3, para. 82; A/HRC/14/23, para. 34.

truth” as an important tool to restrict amnesty laws in cases of serious violations of human rights.

1.4 INDIVIDUAL AND COLLECTIVE DIMENSION

It is acknowledged in several national, regional and international documents that the right to the truth is both an individual right and a collective right. The division of human rights into individual and collective right is initially proposed by the Czech jurist Karel Vasak in his famous “three generations theory”⁷⁶. This theory considers civil and political rights as the first generation; economic, social and cultural rights as the second—collectively called “individual rights”. The most controversial category is named “collective rights” or “group rights” as the third generation. Historically speaking, the starting point of every fundamental right is individual right, which is developed to protect persons from unnecessary, arbitrary and non-proportionate interference by the absolute state, while collective right is considered as a response to global interdependence. In respect of the characteristics of these three generations of human rights, Vasak identified them in turn as “freedom rights”, “equality rights” and “solidarity rights”. At the moment the debate mainly focuses on these rights that apply to people together or as a whole, such as the right of all peoples to self-determination, or the rights to development, a healthy environment, peace or food security. It is stated that their essential feature can be summed up as that they could be realized only by the combined efforts of all social factors: individuals, states, public and private associations, and the international community.⁷⁷ However, there are few human rights that are considered to possess both individual and collective dimensions. The right to the truth is

⁷⁶ Karel Vasak, 1977.

⁷⁷ Algan, 2004, p. 125, note 9.

a special right whose content can be analyzed from the individual and collective perspective.

From the perspective of individual, the right to the truth is the right of any individual victim or his/her nearest and dearest to know the truth about violations that affected him or her. The rationale for such a right would appear to lie in the dignity of victims or of their families to be respected after they suffer from serious violations of human rights. The right to the truth seems to be an effective way to restore their dignity, aid the healing process, and provide a remedy and reparation for violations of their rights and the loss suffered.⁷⁸ And for victims and their relatives, the right to be informed about the events in question is so essential that if it is denied, affected members will experience great sadness, pain and anxiety. In the IACHR's view, the victims' family and friends are considered to subject to a true form of torture and inhuman or degrading treatment because of the uncertainty that they experience regarding the fate of the victim and because they feel powerless to provide legal, moral and material assistance.⁷⁹ Therefore, as an individual right, the right to the truth is concerned more with individual emotions and humanity and mainly designed to provide emotional compensation afterwards.

From the perspective of society, the right to the truth is not simply the right of concerned individuals to know some basic information, but also a collective right. The outcome of all proceedings must be made known to the public in order for "society to know the truth", as stated by the IACtHR.⁸⁰ The Sub-Commission on Prevention of Discrimination and Protection of Minorities in its report explicitly defines the main objectives of the right to the truth (the right to know) as a collective right: it draws upon "history to prevent violations from recurring in the future. Its corollary is a 'duty to

⁷⁸ Naqvi, 2006, p. 249.

⁷⁹ IACHR, Annual Report of the Inter-American Commission on Human Rights 1977, OEA/Ser.L/V/II.43, Doc. 21 corr. 1, 20 April, 1978, Part. II.

⁸⁰ Inter-Am. Ct. H.R., *Myrna Mack Chang*, 25 November 2003.

remember' on the part of the State: to be forearmed against the perversions of history that go under the names of revisionism or negationism, for the history of its oppression is part of a people's national heritage and as such must be preserved."⁸¹

In my opinion, the collective nature of this right can be analyzed from three aspects. Firstly, it is the basic demand of modern democratic nations to guarantee the public access to the important information related to their wellbeing and vital interests. The reason can be traced to democracy where the people are sovereign, namely those served as the highest form of political authority. Power flows from the people to the leaders of government.⁸² In such a society, the legal basis for the right to the truth is similar to the right to know⁸³. Citizens have a right to be informed about public issues, especially some significant events like gross and systematic violation of human rights. At this point, the Constitutional Court of Colombia held that the entire society has an interest in knowing the truth and that such a right is based upon both Colombia's respect for international standards and Article 1 of the Constitution.⁸⁴ Moreover, the IACHR maintained that a society is able to gain access to information essential to the development of democratic systems through the right to the truth.⁸⁵ Yasmin Sooka, Executive Director of the Foundation for Human Rights in South Africa also said the right to the truth was fundamental to the transition to democracy, by combating

⁸¹ The Administration of Justice and the Human Rights of Detainees, E/CN.4/Sub.2/1997/20, available at <http://www.unhcr.ch/Huridocda/Huridoca.nsf/%28Symbol%29/E.CN.4.Sub.2.1997.20.En?Opendocument>.

⁸² Diamond, L., What is Democracy?, Lecture at Hilla University for Humanistic Studies, 21 January, 2004, available at <https://web.stanford.edu/~ldiamond/iraq/WhatsDemocracy012004.htm>.

⁸³ The right to know: of or relating to laws or policies that make certain government or company data and records available to any individual who has a right or need to know their contents. Definition from Dictionary.com Unabridged. Random House, Inc. 14 Jun. 2015. <http://dictionary.reference.com/browse/right-to-know>.

⁸⁴ Javier Giraldo Moreno, Constitutional Court of Colombia, Jan. 20 2003, Case T-249/03.

⁸⁵ IACHR, Lucio Parada Cea, Héctor Joaquín Miranda Marroquín, Fausto García Funes, Andrés Hernández Carpio, Jose Catalino Meléndez y Carlos Antonio Martínez V. El Salvador, 27 January 1999, para. 15.

impunity and overcoming a legacy of massive human rights violations.⁸⁶ The Constitutional Court of South Africa reaffirms that truth telling was the moral basis of a transition from the injustices of apartheid to democracy and constitutionalism.⁸⁷ Secondly, the right to the truth can help to prevent violations from recurrence in the future. This function has been acknowledged as “vital safeguard” in Principle 2 of the Updated Set of Principles.⁸⁸ In this regard, the right to the truth’s collective dimension mainly reflects a prospective impact towards society. This is because only by exposing the truth, are societies able to prevent the repetition of similar events. Thirdly, the establishment of an authoritative record of the past can prevent future manipulation and distortion.⁸⁹ Of course, this right is corresponding to the obligation of the state to preserve archives. Principle 3 of the Updated Set of Principles specifies that the State has a correlative “duty to preserve memory”.⁹⁰ In addition, a report of the OHCHR on archives preservation in 2011 also reaffirms the importance of safeguarding historic memory for the whole society while it admits the impact of archives in criminal accountability processes and non-judicial truth-seeking mechanisms for individuals.⁹¹ In summary, the right to the truth can prevent repressive regimes from deliberately rewriting history and denying atrocities to legitimize themselves by creation of a historical record.

The IACtHR has also pointed out that satisfaction of the collective dimension of the right to the truth requires a procedural examination of the most complete historical record possible, and a judicial determination as to the patterns of joint action and the

⁸⁶ See at <http://www.ohchr.org/EN/NewsEvents/Pages/Therighttothetruth.aspx> (consulted on 28 June 2015).

⁸⁷ Constitutional Court of South Africa, *The Citizen 1978 (Pty) Ltd and others v. McBride*, Case CCT 23/10, 2011, ZACC 11, 8 April, 2011.

⁸⁸ E/CN.4/2005/102/Add.1, 8 February 2005, Principle 2.

⁸⁹ Parlevliet, 1998, p. 147.

⁹⁰ Diane Orentlicher, updated set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1, 8 February 2005, Principle 3.

⁹¹ A/HRC/17/21, 14 April 2011.

identity of all those who, in one way or another, participated in the violations and their respective responsibility.⁹² Only when these obligations are fulfilled can a full reconstruction of the truth and a thorough investigation of the structures in which the human rights violations took place be guaranteed.⁹³

1.5 THE CONTENT OF THE RIGHT TO THE TRUTH

The right to the truth has been broadly interpreted by the numerous national and regional courts, as well as by international supervisory mechanisms for human rights.⁹⁴ It is conceivable that there is no certain official definition towards its content. To put it simply, the content of the right to the truth may be generally defined as a right to access the “truth” of gross violations of human rights and serious violations of international humanitarian law. It’s generally believed the so-called “truth” includes the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fate.⁹⁵ Actually, a report of OHCHR makes a comprehensive summary to this issue, it states the “truth” should contains “*the causes leading to the person’s victimization; the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law; the progress and results of the investigation; the circumstances and reasons for the perpetration of crimes under international law and gross human rights violations; the circumstances in which violations took place; in the event of death, missing or enforced disappearance, the fate and whereabouts of the victims; and the identity of perpetrators.*”⁹⁶

⁹² IACHR, The Right to Truth in the Americas, OEA/Ser.L/V/II.152 Doc. 2, 13 August 2014, para. 82.

⁹³ *Ibidem*.

⁹⁴ Natalija Kukoska M.Sc, The Right to the truth and Truth Commissions.

⁹⁵ E/CN.4/2005/102/Add.1, 8 February 2005, Principle 2.

⁹⁶ *Ibidem*, para. 38.

However, the question of whether the right to the truth entails a right to know the identity of perpetrators raises some difficulties. The Human Rights Committee⁹⁷, IACHR⁹⁸, IACtHR⁹⁹ as well NGOs¹⁰⁰ support that the right to know the truth about the abuse they have suffered should include the identity of perpetrators. The ICTJ (NGO), in its study on truth commission highlights the main objective of truth commission as “*Establishing the truth about crimes and events, what persons and groups are responsible for crimes, the causes of abuses, and historical explanation*”.¹⁰¹ The problem is whether entities lacking judicial powers, such as the truth commission, are able to find out the truth or even reveal perpetrators. The UN is also aware of this issue and foresees the possible conflict between the right to the truth and the principle of the presumption of innocence.¹⁰² In reality, the right to know the criminal offender is only addressed in the frame of criminal judicial procedures. The extrajudicial mechanism, such as truth commission has mandate to do investigation and provides related information to a victim’s family, but has no power to judge whom is the perpetrator.

From the above discussion, the following points about the content of the right to the truth can be adduced:

- the causes leading to the serious violation of human rights;
- circumstances concerning perpetration of crimes, including time of crimes, places of crimes, how the crimes committed;
- the fate and whereabouts of the victims in the event of death, missing or enforced disappearance;

⁹⁷ CCPR/C/51/D/322/1988, 23 July 1988, paras. 12. 3 and 14.

⁹⁸ IACHR, *Monseñor Oscar Arnulfo Romero y Galdámez*, para. 148.

⁹⁹ IACtHR, *the Gómez-Paquiyaury brothers v. Peru*, July 8 2004.

¹⁰⁰ The International Centre for Transitional Justice, *Truth Seeking: Elements of Creating an Effective Truth Commission*, published at 18 March 2013, available at <https://www.ictj.org/sites/default/files/ICTJ-Book-Truth-Seeking-Chapter1-2013-English.pdf>.

¹⁰¹ ICTJ Report, *Drafting a Truth Commission Mandate*, June 2013, available at https://www.ictj.org/sites/default/files/ICTJ-Report-DraftingMandate-Truth-Commission-2013_0.pdf.

¹⁰² E/CN.4/2006/91, 8 February 2006, para. 39.

- the progress and results of the investigation;
- the outcome of all proceedings;
- the identity of perpetrators.

2.

THE RIGHT TO THE TRUTH AS A RIGHT SET-ALONE

Although the right to the truth are well accepted, controversy still surrounds its legal status in international law system. Some argue that the right derives from other well-established rights in international human rights law, such as the right to a remedy, the right to fair trial, the right to justice and the right to freedom of expression. Others consider it an autonomous right, independent of other rights. They claim that the state's obligations deriving from the right to the truth is not an alternative to all other obligations it has in the context of its duty to guarantee.¹⁰³ Such an obligation remains independent regardless of whether the others are fulfilled or not. In my view, this statement is actually an indirect admission of the independent status of the right to the truth. Because the right to truth is not expressly written in most legally binding international or regional conventions, it is unable to, like some human rights included in the ICCPR, certainly obtain protection resting upon international treaty laws. The famous Article 38(1) of *The Statute of the International Court of Justice*, as an authoritative statement of the sources of international law, provides two options where the right to the truth can become an independent legal right: as international custom or as the general principle of law.

2.1 THE RIGHT TO THE TRUTH AS AN INTERNATIONAL CUSTOM

Custom once played a vital role in the formation of the rule of international law. The twentieth century represents a turning point for the reduction of custom, as well as

¹⁰³ Amnesty International, amicus curiae brief submitted to the Inter-American Court of Human Rights in the Case of Benavides Cevallos, Ecuador, 18 December 1997, para. 61, p. 21.

the increase of law-making treaties.¹⁰⁴ Until this point, it is quite difficult to claim a rule to be international custom. Article 38 of The Statute of the International Court of Justice refers to an international custom as “evidence of a general practice accepted as law”. This definition contains two elements, which are essential for the formation of international customary law. The first is to be general practice—an objective requirement of usage. This element requests consistent, recurring practice of states in a certain matter, over the course of time, indicating acceptable and expected conducts of states.¹⁰⁵

The problem, however, is that nobody knows the extent to which the states’ practice will need to be achieved. In other words, there is lack of specific proof standard in this matter. In regards to right to the truth, apparently, it has been recognized by various international, regional and national organisations, especially UN bodies, three regional human rights courts and national truth and reconciliation commissions. Having said, we are now concerned in how these organisations define it, or in other words; whether the right to the truth is regarded as an independent right in practice. As mentioned in Chapter one, Additional Protocol I to the Geneva Conventions and International Convention for the Protection of All Persons from Enforced Disappearance are the only two international treaties explicitly stipulating the right to the truth in the circumstances of the enforced disappearance, but obviously this is a very positive start. While the scope of the right is limited, it represents an international trend of sorts—to recognize the right to the truth as a human right set alone. Apart from this, international and regional as well as domestic judicial tribunals have generally adopted a approach that outline the right to the truth under other human rights or state’s obligation. At the same time it is worth noting that an increasing number of judgments of these courts appear to highlight the norm of right to the truth. In 2000, the Court of

¹⁰⁴ Dr. Walid Abdulrahim, sources of public international law, available at https://sites.google.com/site/walidabdulrahim/home/my-studies-in-english/2-sources-of-public-international-law#_ftn3.

¹⁰⁵ Condä, 2004, p. 270.

San Jose expressly recognized the right to the truth for the first time, but it failed to acknowledge the autonomous character of this right, treating it as one derived from the right to judicial guarantees and protection.¹⁰⁶ It is absolutely a progression from previous judicial practice, although the problem of stating the right to the truth as an independent customary right still exists. That is because we are unable to decipher whether this kind of repeated reference to right to the truth is to promote the admission of it as a human right set-alone, or merely to strengthen other rights codified in the convention. In addition, there are some other practices in favor of right to the truth, such as the ICRC's recognition of such a right as a norm under international customary law¹⁰⁷ and its appearance in a law adopted by Colombia in July 2005¹⁰⁸.

The second element is to be accepted as law—a subjective requirement of existence of *opinio juris*¹⁰⁹ (an opinion of law). The element of *opinio juris* was noted by the ICJ in the case of Nicaragua v. United States and was used to brief an action carried out by states due to a legal obligation. Just as J.L. Brierly describes in his book, “custom in its legal sense means something more than mere habit or usage; it is a usage felt by those who follow it to be an obligatory one. There must be present a feeling that, if the usage is departed from, some form of sanction probably, or at any rate ought to, fall on the transgressor.”¹¹⁰ The definition of this subject element is highly controversial, but in general there are two possible explanations. For some, the subjective element means “consent or will” that represents a rule of customary law, and for others, it means “a belief” that it is a rule.¹¹¹ The “consent theory” actually advocates an intentional

¹⁰⁶ Garibian, 2014, p. 524.

¹⁰⁷ ICRC, 2005, p. 421. Rule 117.

¹⁰⁸ Law on justice and peace, No. 975 of 25 July 2005.

¹⁰⁹ ICJ Reports, 1985, p. 13, 29; 81 ILR, p. 239.

¹¹⁰ Brierly, 1963. p. 59.

¹¹¹ International Law Association, Formation of Customary (General) International Law (1984 - 2000), Conference London Report 2000, p. 30, available at <http://www.ila-hq.org/en/committees/index.cfm/cid/30> (consulted on 3 July 2015).

customary law-making process.¹¹² It requires state voluntarism to being bound by a norm of customary international law. The “belief theory” takes customary law to be a manifestation of pre-existing law.¹¹³ This kind of belief in law that already exists is not constitutive, and thus only declaratory.¹¹⁴ Fortunately, it is possible to achieve an apparent reconciliation of these two approaches by using “accepted as law” in Article 38 of *the Statute of the International Court of Justice*. These complicated arguments are of great importance, but are not the focus of my research. The next unavoidable problem for both approaches is how to distinguish the state’s behavior intention. The state pursues a line of conduct that not always obeys obligation, but out of a series of reasons ranging from goodwill to pique, and from ideological support to political bribery.¹¹⁵ The Updated Principles on Impunity sets out a series of obligations for states, including operation of non-judicial processes and the creation of a truth commission.¹¹⁶ In my view, all reasons cannot be used to definitively conclude the state’s subjective will.

All things considered, in theory, there exists a wealth of literature on international custom, the argument of the value of a customary system in international law and the relative importance of the two elements existing all the while. In practice, even if we ignore the dilemma of proving subjective elements of international custom, the repeated reference of right to the truth and reiteration of its importance have not lived up to the standard of “long-term, consistent, recurring practice”. At least, amnesty law, which is considered as a serious violation of the right to the truth, still exists in some areas. The right to the truth is facing dual challenges from both theory and reality on the path to become international custom.

¹¹² Kammerhofer, 2004, p. 533.

¹¹³ *Ibidem*, p. 534.

¹¹⁴ *Ibidem*.

¹¹⁵ Malcolm Shaw, 2008, p. 75.

¹¹⁶ E/CN.4/2005/102/Add.1, 8 February 2005, Principle 5: Guarantees to give effect to the right to know.

2.2 THE RIGHT TO THE TRUTH AS A GENERAL PRINCIPLE OF LAW

Another source of international law included in Article 38 of the Updated Principles on Impunity is “the general principles of law recognized by civilized nation”. When there is no provision in an international treaty or any recognized customary law available for application in an international dispute, the general principles of law can be used to fill the gap. This means that if the right to the truth can be proved as a general principle of law, it is likely to be applied by the courts even if no convention stipulates such a right. Although these general principles of law can be found in decisions of international tribunals and national courts¹¹⁷, there is no consensus towards their origin. The commonplace perception is that these principles find their origins in the domestic legal systems, which have then been transplanted to the international legal system. Taking the principle of reparation for caused damage and the principles of interpretation of rules or those used for the resolution of conflicts of rules as examples, many of these are known through Latin maxims.¹¹⁸ In the meantime, there is another version of the origin of principles. Some argue that they are inherent principles of natural law, based on natural justice and constituting the method for testing the validity of the positive rules¹¹⁹. Therefore, these principles are grounded in the “universality of the human condition” and thus, should be applied in any legal system. This kind of approach, advocating municipal and international law that form a single legal system, is frequently referred to as monism. Some legal scholars regard the drafting history of Article 38(c) as written evidence to support this approach.¹²⁰ In their opinion, the term “general” is

¹¹⁷ International Legal Research Tutorial, General Principles of Law, at https://law.duke.edu/ilrt/cust_law_10.htm (consulted on 20 June 2015).

¹¹⁸ See at <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0063.xml#backToTop> (consulted on 20 June 2015).

¹¹⁹ Waldock, 1962, p. 54.

¹²⁰ Jain, 2014, p. 22.

used to qualify “principle” not “acceptance” and the real principle ought to be the same among different nations.

The right to the truth seems in accordance with requirements of both of these two origins. It is said that the right to the truth originated from systematic large-scale enforced disappearances in Latin American. States such as Chile, Brazil and Argentina, have a strong need for a new right to guarantee victims of gross violations of human rights and their family access to related information. Thus, the right to the truth may serve as a new principle on the national level, as treaties and custom do not provide adequate protection at that time. Furthermore, the right to the truth as a general principle of law has been transplanted to international level by recognition of all the states. However, “recognition of all the states” in the current stage, apparently, is unrealistic. For others that are, similar to some accepted principles, such as principle of good faith, estoppel, equity, the right to the truth is based on natural law or objective justice. It is not difficult to understand that the value of the nature of the right to the truth lies in respect for human dignity and human feeling. It is content not the presence in a large number of national systems, which enables the right to the truth to form a part of all legal system naturally.¹²¹ Having said that, even if the right to the truth is a fundamental right deriving from natural law, to become a general principle, it should be “disclosed” by states first.

In a conclusion, just as Juan Méndez characterized, the right to the truth is one of the “emerging principles in international law”.¹²² Nobody can deny its close connection with human dignity and legal justice. It still has potential to become a general principle of law in the future, although so many uncertainties about this right leave it below a clear independent right in international legal system now.

¹²¹ *Ibidem*.

¹²² Naqvi, 2006, p. 268.

2.3 THE REQUIREMENTS OF THE RIGHT TO THE TRUTH AS AN INDEPENDENT RIGHT

The right to the truth is at an awkward position in the international law system despite the fact it is experiencing steadily increasing attention and recognition. Various resolutions of UN bodies, reports of different organisations, decisions of international and regional tribunals, practice of domestic legal system as well as research fruits of legal scholars, all of these have already constituted a basic and functional framework of the right to the truth. However, this kind of theoretical framework seems vague or insufficient, in so far as the notion of the right to the truth is still an idealistic hope in current condition. In practice, with the exception of rare cases, the right to the truth is not qualified as a legal source, which can be applied directly in the judgment by the courts. Although the constant reiteration of the importance of seeking for the truth in international, regional and national levels suggests the emergence of trend approaching a customary right or general principle of law, it should be noted that we are a long way from achieving the goal.

By this token, promoting a stipulation in treaties, in contrast, may be the most attainable and practical way. This section will base on the current theory to contour and analyze the requirements of the right to the truth, which should be fulfilled if this right is regarded as an independent legal right. All these requirements are reflected in two-stages realizing process and manifest as benefits for individuals or society and obligations for states. They are the criteria to judge whether it is significant to regard the right to the truth as an independent right as opposed to a right under other rights or obligations. That is to say, if the right to the truth outlined under other rights or obligations cannot meets these requirements, it will be necessary to treat it as a right set-alone.

2.3.1 Two Phases of Realization

The realization process of the right to the truth can be divided into two phases: the first is the truth-seeking process and the second is access to the truth. All of the preinstalled objectives of the right will be fulfilled in these two stages. The focus of this phase is on the “truth”, but the notion of “truth” here is rather broad and complicated. It includes not only “legal truth” found out by competent tribunal but also the information provided by dispute settlement mechanisms, such as the truth commission. Actually, the truth committee is the product of transitions from dictatorship to democracy when these newly installed governments are faced with the difficulties of how to tackle with historical legacy on gross human rights violations and with the problems left over by political violence. Since the new president of Argentina Raul Alfonslin set up Argentina’s National Commission on the Disappearance of Persons in 1983, a commission that charged with investigating the enforced disappearances perpetrated by the military regime¹²³, the notion of “truth commission” began to gain prominence as a mechanism for elucidating history and addressing human rights violations¹²⁴. The OHCHR on one occasion defines the truth commission as “officially approved temporary, non-judicial investigative bodies—that are given a period of time for collecting testimony, holding inquiries, mounting investigations and holding public hearings before publishing the final report”.¹²⁵ Although the mandate of the truth commission varies from each other, they share some common and general characteristics: temporary bodies, focusing on past, aiming at truth seeking. Nevertheless, the “truth” found out by the truth commission or an institution of a similar

¹²³ Garibian, 2014, p. 516.

¹²⁴ Hamber, B. & Kibble, S., *From Truth to Transformation: The Truth and Reconciliation Commission in South Africa*, Catholic Institute for International Relations Report, February 1999, available at <http://www.csvr.org.za/index.php/publications/1714-from-truth-to-transformation-the-truth-and-reconciliation-commission-in-south-africa.html>.

¹²⁵ A/HRC/5/7, 7 June 2007, para. 40.

mandate is merely the first step of the whole “truth seeking process”. After the truth commission draws a conclusion, the follow-up mechanism, such as the Consultative Council on Human Rights in Morocco or the National Reparation and Reconciliation Corporation in Chile, is responsible for putting recommendations into practice.¹²⁶ According to the analysis above, the function of the truth commission here can be interpreted as an assistant for the next official judicial truth-seeking process and a remedy mechanism for providing victims and their next of kin with related information.

Official judicial judgment is an indispensable step in truth-seeking process, whether the state administrative organ has made a decision or not. The competent main bodies of judicature can be the ICJ or regional human rights courts like the IAtCHR, ECtHR, but it can also be national court. They act as defenders of principle of judicial final settlement and make ultimate decisions of conflict and contradiction. Precisely because of the importance of judicial proceeding, investigation results, in whatever form, can only be viewed as real truth after trial activities and as a part of official judicial decision. This kind of legally binding judgment is not only the most authoritative disclosure of truth, but also the best approach to aid the healing process of victims and their family. Only after the perpetrators are brought to court and appropriately punished can victims and their family members’ emotional trauma of long-term suffering when in a state of anxiety be eased. However, none of these theories can elide the fact that judicial independence and procedural justice are prerequisites for the effectiveness of judicial system. That is the reason why due process and fair trial are such core issues within truth-seeking process. So far the whole truth seeking, which is guaranteed by state obligation, is completed.

The other phase is “access to truth”, which means the victims and their families have right to access to related information of serious violations of human rights and to participate in truth-seeking process. Access to truth allows a victim’s family members

¹²⁶ *Ibidem*, paras. 42-44.

to learn the current situation of a disappeared person, ending a state of uncertainty that is likely to be determined as a form of cruel and inhuman treatment. Of course, besides judicial judgment, the so-called “truth” implies the information in any investigation phase, including information from the truth commission, administrative authority as well as follow-up mechanism. In addition, the society also has the right to know the facts concerning gross violations of human rights, which is determined by the collective nature of the right to the truth. I think the information scope that the related individual and public are qualified to involved in should be different. The next of kin of a victim may be able to access to some detailed or personal related information, while civil society access is restricted to the event profiles or the facts concerning public interests.

2.3.2 Benefits from the Right to the Truth

The brief analysis of two phases of right realization indicates that individuals, society and even the state benefit from the realization of the right to the truth. Furthermore, these benefits are the objectives the right to the truth as an independent right intends to achieve. In other words, the right to the truth must guarantee that victims and their family members obtain certain benefits from the realization of this right.

From the perspective of individuals, more accurately only referring to victims and persons close to them, they may only obtain remedies and compensations from the right to the truth, but in different forms. Historically, the original rationale for the right to the truth is to respect human dignity by providing appropriate reparation for the loss suffered, especially mental damages resulting from human rights violations. The remedy in the context of right to the truth manifests as “finding out truth” and I am afraid the material compensation is not included. To be more detailed, the victims and their family have right to:

- request state to conduct an adequate investigation and provide relevant information (the content of information can be found in section 1.5 in this text);
- participate and supervise any truth seeking process;
- initiate judicial procedure for serious violations of human rights;
- oversee the implementation of decision of related subjects.

From the perspective of society, the public has right to know the entire process of major human rights events, which related to each individual's vital interest. In other words, when the government fails to take the initiative to publish some important news, the public can express a necessity of access to this data. Generally speaking, for society, the right to the truth brings two aspects of effects or changes. It reflects society's desire to strengthen confidence in public institutions and hence the rule of law.¹²⁷ This first aspect reflected in reality is the relationship between government information popularization and public trust of the government. In this regard, there seems to be an overlap in effect between the right to the truth and the right to know. As for the second aspect, the right to the truth is regarded as a safeguard against impunity and a defender of rule of law. Both the principle of fairness and justice are the fundamental rules of law, which when reflected in the *Universal Declaration of Human Rights (UDHR)* is "All are equal before the law and are entitled without any discrimination to equal protection of the law" and "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".¹²⁸ However, such significant rules are challenged by amnesty laws, which shield perpetrators of gross violations of human rights under international law. The emergence of the right to the truth is therefore simply in response to the proper historic moment and impunity phenomenon.

¹²⁷ ECHR, *El-masri v. The Former Yugoslav Republic Of Macedonia*, separate opinion p. 83 paras. 6-7.

¹²⁸ Article 7 and 8 of the Universal Declaration of Human Rights.

2.3.3 Obligations from the Right to the Truth

As for the state, it mainly plays a role of the duty-bearer in the entire realization process of the right to the truth, because it is bound by the norms of international human rights law. But what kind of obligations should the state take? The answer is quite simple; it is all in the nature of the right to the truth. Apparently, considering its close link with human dignity as well as social democracy, the right to the truth is definitely classified into the group of “civil and political rights”. Unlike economic, social and cultural rights, which need great amount of available resources to be progressive realized, civil and political rights have immediate effect for all states parties.¹²⁹ The state should undertake positive obligations towards gross violations of human rights concerning the right to the truth. Of course, “positive obligations” here not only indicate different forms of investigations, but also the obligations to preserve and protect all archives pertaining to human rights¹³⁰ and obligations to perfect the witness protection system¹³¹.

¹²⁹ Human Rights Committee, General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13, 2004, para. 5.

¹³⁰ A/HRC/17/21, 14 April 2011.

¹³¹ A/HRC/15/33, 28 July 2010.

3.

THE RIGHT TO THE TRUTH UNDER THE FRAMEWORK OF OTHER RIGHTS OR OBLIGATIONS

Since the right to the truth is still lacking independent legal status in most cases, it can only be achieved by depending upon other human rights. The UNHRC mentions in its resolution that a specific right to the truth may be characterized differently in different legal systems as the right to effective remedy or the right to justice or the right to fair trials or freedom of expression.¹³² However, not all of these legal practices can guarantee the complete realization of the right to the truth. So comes the questions; which right is more related to the right to the truth? In order to promote its realization in the most appropriate way, which other right can one place the right to the truth under?

3.1 OVERVIEW OF THE SITUATION IN REGIONAL AREAS

Currently there there are different opinions and experience about the right to the truth in laws, practices and theories of different areas in the world. Therefore, it is necessary to begin with an overview of related legal practice in Inter-American, European and African areas.

3.1.1 Inter-American area

The Inter-American human rights system has been considered at the forefront of developing jurisprudence on the right to truth of the victim, his or her next of kin, and

¹³² A/HRC/RES/12/12, 12 October 2009.

the whole of society.¹³³ Notwithstanding, the right to the truth is not accepted directly in the system and even today it not expressly recognized in its legal instruments. However, the IACHR and the IACtHR, as two main institutions within the inter-American system for the protection of human rights, promote the development of the right to the truth by establishing a series of cases. In the *Velasquez Rodriguez Case* (1988), one of the earliest case pertaining to the right to the truth, the Inter-American Court acknowledged that the states have duty to investigate facts as long as there is uncertainty about the fate of the person who has disappeared, and the relatives have a right to be informed the fate of victims and, if they have been killed, the location of their remains.¹³⁴ As the related theories evolved in the UN, the commission and the court has established that the right to the truth is a guarantee recognized in both the American Declaration and the American Convention. At this time, the right to the truth is couched in terms of the right to judicial protection¹³⁵ and the right to a fair trial¹³⁶ as well as the obligations of the states¹³⁷. Further, the Report No. 25/98 of the IACHR in a group of cases from Chile refers to that the right to the truth also can be established in Article 13.¹³⁸ In conclusion, the right to the truth in current Inter-American system cannot be regarded as an independent right, while still being able to obtain protection based in Article 1(1), 8, 13 and 25 of the Convention.

¹³³ A/HRC/24/42, 28 August 2013.

¹³⁴ Inter-Am.Ct.H.R., *Velasquez Rodriguez Case*, July 29, 1988, para. 181.

¹³⁵ Article XXIV of the American Declaration, Article 25 of the American Convention.

¹³⁶ Article XVIII of the American Declaration, Article 8 of the American Convention.

¹³⁷ Article 1 of the American Convention: “1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”

¹³⁸ OACHR, Report No 25/98, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.595, 11.657, 11.705., *Chile, Alfonso René Chanfeau Orayce*, 7 April 1998.

3.1.2 European Area

The situation in Europe mirrors those of Inter-America and Africa—The ECHR fails to establish a separate article for the right to the truth. The ECtHR takes an indirect path to protect right to the truth by imposing State Party duty to undertake adequate investigations and uncover the truth in respect of violations when serious human rights violations occurred. According to the ECtHR’s legal practice, Article 2, 3, and 13 of European Convention are capable of triggering a full investigation. In *Aksoy v. Turkey* and *Mentes v. Turkey*, the ECtHR takes Article 13 as a guarantee for both availability of an effective domestic remedy to be exercised on the initiative of the complainants and a full investigation by public authorities on their own motion in the event of very serious allegations.¹³⁹ However, the ECtHR tackles this problem in another way in the case *El-Masri v The Former Yugoslav Republic of Macedonia*. It attributes an inadequate investigation of state under the procedural breach of Article 2 or 3 of European Convention. These two articles are consistently referenced in conjunction with the State’s general obligation under Article 1 to “secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention”, ensuring the adequate effective investigation in particular situations to achieve a goal of truth-seeking. Of course, there are some differences between the guarantees under Article 13 and state procedural obligations under Article 2 and 3.

3.1.3 African Area

In terms of Africa, there is no existing binding instrument, which explicitly protects the right to truth either. Nevertheless there is no doubt that African area accepts and supports the victims’ right to the truth. A resolution of the African Commission on

¹³⁹ Antkowiak, 1991, p. 982.

Human and Peoples' Rights (ACHPR) has specifically recognized that victims of sexual violence in particular in times of conflict have the right to truth.¹⁴⁰ Their access to information is based on Article 25 (right to remedy) of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.¹⁴¹ According to the practice of ACHPR, the right to the truth in Africa is implicitly placed under the right to an effective remedy, which is considered to include "access to justice", "reparation for the harm suffered" and "access to the factual information concerning the violations".¹⁴² However, the right to an effective remedy is still actually not contained in the African Charter. The mainstream view towards this issue is that in a justiciable regime of rights such as that established by the Charter, the right to a remedy is so self-evident that it need not be specifically enshrined.

3.2 RELATED RIGHTS

In essence, from above analysis, all arguments mainly focus on four human rights: right to effective remedy, right to justice, right to a fair trial and freedom of expression. This section will clarify the complex theoretical relationship between these on the basis of illustrating their character respectively. This analysis aids in understanding the theoretical foundation behind different legal practices of outlining the right the truth under these rights, which will be discussed in next part.

¹⁴⁰ ACHPR, Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence, Resolution 111, preamble, p. 1, 28 November 2007.

¹⁴¹ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Article 25: States Parties shall undertake to: (a) provide for appropriate remedies to any woman whose rights or freedoms, as herein recognized, have been violated; (b) ensure that such remedies are determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by law.

¹⁴² ACHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS (XXX) 247, Principle C, page 5, 2001, available at http://www.afrimap.org/english/images/treaty/ACHPR_Principles&Guidelines_FairTrial.pdf.

3.2.1 The Right to Effective Remedy

As a fundamental principle of law essential to the functioning of legal systems, the right to an effective remedy is contained in a number of significant international human rights treaties including the ICCPR, International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Rights of the Child, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Article 2(3) of the ICCPR¹⁴³ highlights two fundamental components of right to remedy: the victims' right to obtain effective remedy and proper compensation as well as the states' obligation to make appropriate reparations for violations of human rights. In regional areas, Article 13 of the ECHR stipulates that individuals whose rights as set forth in that Convention are violated shall have an effective remedy before a national authority.¹⁴⁴ Unfortunately, the right to effective remedy is not included in African convention or Article 25 of ACHR only in terms of judicial remedy. One explanation is that the possible sources of the right to remedy could be general international law. The right of victims to a remedy is regarded as the antithesis of the responsibility of states to provide one, if we can show that such responsibility actually exists, or, alternatively, and more promisingly, under international human rights law.¹⁴⁵

¹⁴³ ICCPR: Article 2(3) Each State Party to the present Covenant undertakes:

- (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
- (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
- (c) To ensure that the competent authorities shall enforce such remedies when granted.

¹⁴⁴ Article 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms (Right to an effective remedy):" Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

¹⁴⁵ Mcdonald, 1999, p. 148.

A remedy could consist of a broad variety of possibilities including judicial or non-judicial remedy. According to General Comment No. 31 of the Human Rights Committee, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.¹⁴⁶ Among these compensation ways, “public memorials”, “access to justice” as well as “informed of concern information” are all closely linked with the right to the truth.

3.2.2 The Right to Justice

The idea of justice is at the very heart of a democratic society. It means that laws apply equally to everyone, and that we all have a chance to a fair trial. Right to justice plays an important role in the protection of injured individuals when violations of human rights and different kinds of damages occur. Based on its fundamental significance, it is regarded as rule of law while it is still likely to become an empty ideal. The origin of right to justice as a human right can be traced to Article 8 of the Universal Declaration of Human Rights: “Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” In addition, Article 25 of the ACHR¹⁴⁷ also make a clear

¹⁴⁶ Human Rights Committee, General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, 26 May 2004, paragraph 16.

¹⁴⁷ Article 25 of American Convention on Human Rights (Right to Judicial Protection):”1. Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.

2. The States Parties undertake:

a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state;

stipulation to this right and place particular emphasis on state's relevant obligation in paragraph 2. Akin to the right to effective remedy, access to justice to be human right faces a number of challenges in international law as well as European and African conventions. Some argue that the right to justice is related to the right to the truth. If the presence of factual or legal impediments to the facts and circumstances of the violation of a fundamental right impedes access to domestic remedies for the judicial protection of the fundamental rights, it constitutes a clear violation of the right to justice.¹⁴⁸ This argument gets supported from IACHR and IACtHR in decisions or judgments of related cases.

3.2.3 The Right to Fair Trials

The right to fair trials is the best method of finding out truth and separating the guilty from the innocent; safeguard and remedy for individuals whose human rights has been violated; essential guarantee to the effective functioning of justice. Set forth by the Universal Declaration of Human Rights in 1948, the right to fair trial has since been further elaborated and is recognized in numerous international and regional instruments, which include Article 14 of the ICCPR, Article 8 of the ACHR, Article 6 of the ECHR and Article 7 of the African charter on Human and People's Rights. Despite diversity in wording and placement of the constituent elements of fair trial rights, international human rights instruments define the right to a fair trial in broadly identical terms.¹⁴⁹ It should be noted that right to fair trials is such an extensive human right that some fundamental elements have been placed in separate positions, but not restricted to articles mentioned above. However, in this section we only need to focus on "the right

b. to develop the possibilities of judicial remedy; and c. to ensure that the competent authorities shall enforce such remedies when granted.

¹⁴⁸ IACHR, *Monsenor Oscar Arnulfo Romero and Galdamez v. El Salvador*, para.145.

¹⁴⁹ Alfredsson & Eide, 1999, p. 225.

to a fair and public hearing by a competent, independent and impartial tribunal established by law”¹⁵⁰. Everyone should be entitled to fair trials and the states are obliged to provide effective judicial recourses that must be substantiated in accordance with the rules of due process of law. Thus, the right to a fair trial is not merely a right to protect people from being unfairly accused but a right to guarantee the disclosure of the real truth through a due process. As a precondition for the realization of the right to the truth, the right to a fair trial with the right to justice ensures the right of the alleged victims or their next of kin for every necessary measure to be taken to know the truth about what happened and to sanction those who are eventually found to be responsible. As The Human Rights Committee illustrated, “the right to fair trials aims at ensuring the proper administration of justice, and to this end guarantees a series of specific rights.”¹⁵¹ It seems the right to the truth is likely to become the one that is protected under the right to fair trial.

3.2.4 The Freedom of Expression

The right to freedom of expression is laid down in Article 19 of the Universal Declaration of Human Rights as well as in Article 19 of the ICCPR. Article 10 of the ECHR, Article 13 of the ACHR and Article 9 of the African Charter on Human and People’s Rights have all carried on the stipulation to freedom of expression. Although there are some differences in the articles of the three instruments, they all empower individuals with “the right to access information”, namely “freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers and through any media”. In other words, the right to access information is an integral part of the fundamental right of freedom of expression. Of course, it embraces a right of access to

¹⁵⁰ Article 14 (1) of ICCPR; Article 8 (1) of ACHR.

¹⁵¹ Human Rights Committee, General Comment No. 32, CCPR/C/GC/32, 9 to 27 July 2007.

information held by public bodies just as Human Rights Committee indicating in its General comment No. 34. So the next question is why such importance placed on the freedom of expression? On the one hand, it is regarded as the inseparable element of a democratic society. Someone says “its practical application underpins two distinctive principles of a democratic republican system of government: the publicity of acts and the transparency of public administration.”¹⁵² It means the freedom of expression can help individuals control over the state authorities and maintain the self-controlled society. On the other hand, freedom of expression also underpins several other rights and allows them to flourish.¹⁵³ The EU also admits its essential role in fulfillment and enjoyment of a wide range of other human rights, including freedom of association and assembly... participation in public affairs.¹⁵⁴ So the next question we should consider is whether the right to the truth is a form of freedom of expression in particular situation or an independent right, whose realization is based on the freedom of expression?

3.2.5 The Relationship among the Rights

In order to analyze strengths and weakness of outlining the right to the truth under right to effective remedy, right to justice, right to a fair trial, as well as right to access information, it is necessary to clarify the relationship between them first. The 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 sheds light on the relationship between the right to the truth and the right to remedy by conferring victims of gross violations of human rights

¹⁵² Curtis, 2000, p. 227.

¹⁵³ What is the role of freedom of speech in a democratic society and where are its limits? Available at <http://www.youthmedia.eu/media/117024-what-is-the-role-of-freedom-of-speech-in-a-democratic-society-and-where-are-its-limits-> (consulted on 5 July 2015).

¹⁵⁴ Council of the European Union, EU Human Rights Guidelines on Freedom of Expression Online and Offline, FOREIGNAFFAIRS Council meeting Brussels, 12 May 2014.

“right to remedy” and chances to “access to justice”, “access to relevant information concerning violations and reparation mechanisms”. According to *Basic Principles and Guidelines*, Victims’ right to remedies include the victim’s right to the following as provided for under international law¹⁵⁵:“

- (a) Equal and effective access to justice;
- (b) Adequate, effective and prompt reparation for harm suffered;
- (c) Access to relevant information concerning violations and reparation mechanisms.”

Apparently, the content of the right to remedy is far more than at least some remedies, such as access to administrative and other bodies, mechanisms, modalities and proceedings conducted in accordance with domestic law. This is not significant in order to advance my argument, because the most important three points are listed here and correspond to “access to justice”, “access to remedy” and “access to information” separately. Firstly, I think “access to justice” here includes the contents of both right to justice and right to a fair trial, because they are the requirements of justice in different contexts. Right to justice is like an admission ticket to ensure that individuals promote recourse to a competent court or tribunal, while right to a fair trial is the guarantee of due process. Further, the relationship between right to remedy and access to justice is that of involving or involved, if we use broadened definition of the former right. Access to justice is defined as the ability of people to seek and obtain a remedy through formal or informal institutions of justice for grievances in compliance with human rights standards.¹⁵⁶ Thus, “access to justice” can be deemed as a certain form of remedy, which is listed as an independent right for its special significance. Secondly, in addition to promoting due legal process towards violations of human rights, the right to effective remedy also provides reparation for victims. As we outlined above, reparations is a

¹⁵⁵ A/RES/60/147, 21 March 2006, para. 11.

¹⁵⁶ United Nations Development Programme, *Programming for Justice: Access for All: A Practitioner’s Guide to Human Rights-Based Approach to Access to Justice* (Bangkok: UNDP, 2005). Hereafter: UNDP, *Programming for Justice*, 2005.

generic term that covers all of the various ways a State can redress the international responsibility it has incurred including material and moral damage. The moral damages have close connection with the right to the truth. In the *Castillo Páez Case*, the IACtHR asserted that the moral damage inflicted was, first of all, the pain and suffering that relatives of a victim experienced with his disappearance and the second moral damage inflicted was the suffering caused to the victim by the violent circumstances under which the events occurred.¹⁵⁷ In this regards, the right to the truth can be considered as the best reparation to moral damages of victim and his next of kin, because access to related information can eliminate anguish and uncertainty caused by that the disappearance and lack of information about the victim. Thirdly, “access to information”, as an integral part of freedom of expression, is an important tool to promote the realization of the right to the truth. As a matter of fact, the role of right to access information is to ensure channels of information release are unimpeded. In other words, only when information is available can we have chances to obtain real “truth”.

In a conclusion, “access to justice” and “access to information” are two extremely valuable tools for achieving the right to the truth. As discussed above, judicial trial is an indispensable part of “truth-seeking process”, which constitutes one of the two phases of realization of the right to the truth. The independent and impartial administration of justice represents one of means of seeking the truth¹⁵⁸ and is one of the most reliable ways to ensure the authenticity of “truth” by the action of the judicial authority, responsible for investigating, evaluating evidence and bringing those responsible to trial¹⁵⁹. However, the judicial process is not the only safeguard for truth seeking, because at least we still need a right leading to state’s positive obligation of investment and a right ensuring availability of related information. “Access to information” removes the obstacles on the way to obtaining truth and guarantees the second phase of

¹⁵⁷ Inter-Am.Ct.H.R, *Castillo Páez Case*, 3 November 1997, para. 79.

¹⁵⁸ A/HRC/5/7, 7 June 2007, para. 27.

¹⁵⁹ E/CN.4/2006/52, 23 January 2006, para. 17.

realization of the right to the truth. Furthermore, both “access to justice” and “access to information” can be assumed within the implication of right to effective remedy since they themselves are forms of effective reparation for moral damages suffered (see (b) above). The right to justice means the possibility of claiming rights before an impartial and independent tribunal established by law, whilst ensuring that perpetrators are tried and punished in the course of a fair trial, and it entails fair compensation for victims.¹⁶⁰ It means in theory, the right to remedy seems more appropriate than other three rights to realize the right to the truth.

3.3 CASE LAWS ON RELATED RIGHTS AND OBLIGATIONS

As Dermot Groome claims in his paper, “The right to the truth can find its legal basis primarily from two underlying categories of protections found in international conventions:

- (1) A state’s failure to adequately investigate and prosecute crimes committed against a person in its custody constitutes a violation of family’s right of access to justice;
- (2) A state’s failure to provide concerned information of victim, especially the one in custody, constitutes inhuman treatment to the next of kin, because of its continuing violation of applicable protections against such treatment.”¹⁶¹

In my opinion, the first protection depends on a state’s obligation to protect victims and their next of kin’s right to access justice through a due judicial process. Therefore, the right to the truth deriving from the first foundation can obtain protection as outlined under four interconnected human rights we analyzed in section 3.3. In terms of the second foundation, it offers a more direct way to realize the right to the truth. As a widely accepted way in jurisprudence of courts, this approach cares more about family’s

¹⁶⁰ *Ibidem*.

¹⁶¹ Groome, 2011, p. 177.

feeling and at the same time puts forward higher demand of state's obligation. In addition, there exists another way to circumvent complex relationship between rights: by turning to obligations of state under particular articles. The common way in judicial practice is to rest upon some rights that are of great significance in democratic society, such as right to life and right to humane treatment, in conjunction with article prescribing general obligation of state to require performance of corresponding obligation.

3.3.1 The Right to the Truth under the Right to effective remedy

The ECtHR has alleged in several cases that the lack of effective and practical remedies capable of leading to the identification and punishment of those responsible and to an award of compensation constitute a violation of Article 13 of the ECHR. On 13 December 2012, a judgment of the ECtHR in the case *El-Masri v The Former Yugoslav Republic of Macedonia* cautiously endorsed a new paradigm of the protection of “the right to the truth”—namely outlining it under the scope of Article 13 of the ECHR, so as to provide a new sight into the settlement of the right to the truth. The case is about an extraordinary rendition regarding torture of an individual wrongly suspected of being involved in terrorism activities. The applicant alleged, in particular, that he had been subjected to a secret rendition operation, namely that agents of the respondent State had arrested him, held him incommunicado, questioned and ill-treated him, and handed him over at Skopje Airport to agents of the US Central Intelligence Agency (CIA) who had transferred him, on a special CIA-operated flight, to a CIA-run secret detention facility in Afghanistan. He further claims that he had been ill-treated for over four months at this location. The alleged ordeal lasted between 31 December 2003 and 29 May 2004, when the applicant returned to Germany.¹⁶² Furthermore, in his

¹⁶² ECHR, *El-masri v. The Former Yugoslav Republic Of Macedonia*, 13 December 2012, para. 3.

allegation of violation of Article 3 of the ECHR, the applicant complained that the investigation before the Macedonian authorities had not been effective within the meaning of this Article.¹⁶³ In addition, except asking for an effective remedy under Article 13, the applicant relied on Article 10 of the Convention, arguing that he had a right to be informed of the truth regarding the circumstances that had led to the alleged violations of his Convention rights.¹⁶⁴ Now we can turn to the attitude of the ECtHR and further elaborate the potential problems step by step. The decision of the ECtHR firstly denied the applicant's complaint under Article 10 of the Convention that he "had a right to be informed of the truth regarding the circumstances that had led to the alleged violations". The court believed there is no appearance of a violation of the applicant's rights and freedoms set out in Article 10. The rationale from the court is that "the issue raised under this article overlaps with the merits of the applicant's complaints under Article 3 and has already been addressed in relation to those complaints. The present case does not raise any particular issue that should be analyzed under Article 10 alone, which does not apply to the facts complained of."¹⁶⁵

In terms of the problem of Article 3 and Article 13, the ECtHR was heavily divided on this question. This is made clear by two separate opinions attached to the ruling.¹⁶⁶ According to joint concurrence opinion of Judges Tulkens, Spielmann, Sicilianos and Keller, the right to the truth would be more appropriately situated in the context of Article 13 of the Convention, which includes a right of access to relevant information about alleged violations, both for the persons concerned and for the general public.¹⁶⁷ Four judges mainly criticize judgment's over-cautiousness and timid allusion to the right to the truth in the context of Article 3 and the lack of an explicit

¹⁶³ *Ibidem*, para. 168.

¹⁶⁴ *Ibidem*, para. 263.

¹⁶⁵ *Ibidem*, para. 192.

¹⁶⁶ Fabbrini, 2014, p. 100.

¹⁶⁷ *Ibidem*, Joint Concurrence Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller, p. 82, Para. 4.

acknowledgment of this right in relation to Article 13 of the Convention.¹⁶⁸ In my opinion, they use two specific reasons to support their point of view. Although the judges admit the right to the truth in present case is linked to the procedural obligations under Article 3, the requirements of Article 13 are broader than a Contracting State's obligation under Article 3 to conduct an effective investigation into the disappearance of a person who has been shown to be under their control and for whose welfare they are accordingly responsible.¹⁶⁹ In addition, they think the court simply noted that the right to the truth has a place in the context of Article 3, but failed to give more explanation. Secondly, they highlight the social dimension of the right to the truth by stating "the desire to ascertain the truth plays a part in strengthening confidence in public institutions and hence the rule of law".¹⁷⁰ In other words, a right to the truth under Article 13 of the ECHR ought to encompass both an individual dimension and a societal one, while Article 3 more focus on individual one.

According to joint concurrence opinion of Judges Casadevall and Lopez Guerra, the case law of the ECtHR makes it clear that contracting parties have an obligation under Article 3 of the ECHR to carry out investigations with the aim to establish the facts of the case and the identity of the persons responsible for the injuries.¹⁷¹ Therefore, it seems redundant to conduct a separate analysis of the right to the truth, since required activity amounts to finding out the truth of the matter, irrespective of the relevance or importance of the particular case for the general public.¹⁷² Then these two judges further explain the problem concerning the subject of the right to the truth. In their opinion, the right to a serious investigation, equivalent to the right to the truth derives

¹⁶⁸ *Ibidem*, Joint Concurrence Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller, p. 83, Para. 10.

¹⁶⁹ *Ibidem*, para. 256.

¹⁷⁰ *Ibidem*, Joint Concurrence Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller, p. 83, Para. 6.

¹⁷¹ *Ibidem*, p. 102.

¹⁷² *Ibidem*, Joint Concurrence Opinion of Judges Casadevall and Lopez Guerra, p. 85.

from the protection of individuals under Article 3 of convention.¹⁷³ However, in fact, the obligation of investment “applies equally in cases which have attracted wide public coverage and in other cases which have not been subject to the same degree of public attention”.¹⁷⁴ In a conclusion drawn from Court’s case law, it is the victim, and not the general public, who is entitled to the right to the truth as resulting from Article 3 of the Convention.

The ECtHR adopts a compromise solution in present case. It fails to fully embrace a new paradigm of the right to the truth under Article 13 of the ECHR, but opens the possibility that the duty to investigate gross human rights abuses lies under Article 3 of the ECHR.¹⁷⁵ Nevertheless, this does not mean that the European approach towards the right to the truth is without any problems. Nor does it mean the ECtHR will not make progress or experience significant change in the near future. Outlining the right to the truth under Article 2 or 3 and reading in conjunction with the State’s general duty under Article 1 of the Convention actually gives tacit consent to the right to the truth is individuals’ rights, which conflicts with established theory on its double right nature. The different concurrence opinion of judges in the ECtHR reveals a new trend of sorts.

Some areas like Inter-American are still in lack of provision of right to effective remedy, but this does not absolve the states of a duty provide remedy and reparation. The IACtHR precedents also provide extensive opportunities for victims and family members to be actively engaged in both the clarification of facts and the subsequent criminal process as an important way to receive their due reparation. Thus, the “effective remedy” in the Inter-American system even surpasses government investigation and prosecution after gross human rights abuse, but only appears in another form. Article 25 of ACHR is considered as a kind of judicial remedy. In the *case of El Salvador*, the IACHR considered that any existence of obstacles to access to

¹⁷³ *Ibidem*, Joint Concurrence Opinion of Judges Casadevall and Lopez Guerra, p. 85.

¹⁷⁴ *Ibidem*, Joint Concurrence Opinion of Judges Casadevall and Lopez Guerra, p. 85.

¹⁷⁵ Fabbrini, 2014, p. 102.

information relating to the facts and circumstances surrounding the violation of a fundamental right negates remedies available under domestic jurisdiction for the judicial protection of the fundamental rights and constitutes violation of Article 25 of ACHR.¹⁷⁶

3.3.2 *The Right to the Truth under the Right to Justice and Right to a Fair Trial*

Right to effective remedy as a human right remains problematic in international law, so that some courts are by virtue of the right to fair trial or the right to justice, realizing the right to the truth. These two rights play a similar role in the protection of the right to the truth and always appear together in the judicial judgments. That is the reason why they are placed in one heading of this section. Inter-American human rights system is an example of one that fails to expressly contain the right to remedy in its legal instruments. According to the opinion of the IACtHR, the right to the truth is a fundamental element of the rights to judicial guarantee and judicial protection, as opposed to a right standing alone.¹⁷⁷ Consequently, the IACtHR implicitly outlined corresponding obligations of state under Article 8 and 25 of the American Convention and other forms of reparation to substitute for right to effective remedy. That interpretation first appeared in a 2000 judgment in the *Case of Bámaca Velásquez v. Guatemala*, where the Court expressly recognized that the right to the truth is subsumed in the right of the victim or his next of kin to obtain from the competent State organs a clarification of the facts relating to the violations and the corresponding responsibilities, through the investigation and prosecution that are a function of the rights to judicial

¹⁷⁶ IACHR, IGNACIO ELLACURÍA, S.J.; SEGUNDO MONTES, S.J.; ARMANDO LÓPEZ, S.J.; IGNACIO MARTIN-BARÓ, S.J.; JOAQUIN LÓPEZ Y LÓPEZ, S.J.; JUAN RAMÓN MORENO, S.J.; JULIA ELBA RAMOS; AND CELINA MARICETH RAMOS V. EL SALVADOR, Case 10.488, 22 December 1999, para. 225.

¹⁷⁷ Inter-Am.Ct.H.R., *the Pueblo Bello Massacre v. Colombia*, 31 January 2006, para. 219.

guarantees and judicial protection recognized in Articles 8 and 25 of the Convention.¹⁷⁸ The States Parties are liable to provide effective judicial recourses to the victims and their family according to Article 25 and recourses that must be proven in accordance with due process of Article 8, always in keeping with the general obligation of the States prescribed in Article 1 to ensure the free and full exercise of the rights recognized by the Convention.¹⁷⁹

The first phase of realization of the right to the truth, namely the “fact-seeking process”, usually consists of two phases: one is related to the state’s routine “fact-finding” exercise; the other is the process of “judicial judgment” even after crimes and their perpetrators are already well known. The division of these two phases can be interpreted from the difference between “acknowledging” and “finding” the truth.¹⁸⁰ The right to justice and the right to a fair trial being combined has become a complete process (the second phase) aiming to official acknowledge crimes, which can be deemed as a form of compensation for victims and their family. In other words, these two rights can help to achieve parts of goals of the right to the truth. With regards to the other phase, the triggering of mandates of the entities lacking judicial powers, such as the truth commission can be based solely on general obligation of the state because of the right to justice and the right to a fair trial’s failure to contain it. In return, the right to the truth can be regarded as an effective tool to promote right to justice and right to a fair trial. For example, Argentina regards the right to the truth as an instrument to make it possible to reconcile amnesty with the right to judicial protection.¹⁸¹ However, they still have to seek a reasonable basis for the right to the truth as it is undefined and is absent from Argentinian law.

¹⁷⁸ Inter-Am. Ct. H.R., *Bámaca Velásquez v. Guatemala*, 25 November 2000, para. 201.

¹⁷⁹ Inter-Am.Ct.H.R, *Case of the Moiwana Community*, 15 June, 2005, para. 142.

¹⁸⁰ Hamber, B. & Kibble, S., *From Truth to Transformation: The Truth and Reconciliation Commission in South Africa*, Catholic Institute for International Relations Report, February 1999. <http://www.csvr.org.za/index.php/publications/1714-from-truth-to-transformation-the-truth-and-reconciliation-commission-in-south-africa.html> (consulted on 9 July 2015)

¹⁸¹ Garibian, 2015, p. 522.

3.3.3 *The Right to the Truth under the Freedom of Expression*

The right to the truth is considered to be integral to the enjoyment of freedom of expression by some legal systems.¹⁸² For example, in *Monsenor Oscar Arnulfo Romero and Galdamez v. El Salvador* and a group of similar cases, the IACtHR acknowledged that the obligation of the state to satisfy individuals' and society's requests for the truth arises from the provisions of Article 13 of the American Convention, which protects the right of access to information. In other words, the failure to perform a serious and complete investigation of the facts makes the State internationally responsible for any violation of the right to freedom of expression of victims and citizens in general to receive information to learn the truth about acts that have occurred.¹⁸³ However, there is no consensus towards this issue. According to the analysis of *El-Masri v The Former Yugoslav Republic of Macedonia* above, we could see that the ECtHR think it is not necessary to establish a violation under freedom of expression, since the issue can be addressed by claiming the procedural obligation of state, which derives from particular articles like right to life.

Is the establishment of liability under violation of freedom of expression a good way to realize the right to the truth? In my opinion, the elements of two rights overlap partially. Both show up as requiring obligation entities to provide concerned information. However, there are significant differences in the origin, nature of rights as well as scope of application. For example, in the case *Toktakunov V. Kyrgyzstan*, the UNHRC also recognized admissible the Article 19 complaint as the ICCPR recognizes the right of individuals and the media to receive state-held information without requiring a demonstration of direct interest or personal involvement.¹⁸⁴ This case

¹⁸² E/CN.4/RES/2005/66, preamble.

¹⁸³ IACHR, Report No. 130/99, CASE. 11.740, VÍCTOR MANUEL OROPEZA MEXICO, 19 November 1999, para. 61.

¹⁸⁴ Human Rights Committee, Communication No. 1470/2006, CCPR/C/101/D/1470/2006, para. 6.3.

involves a Kyrgyz public association, not victim's family, which requested the Ministry of Justice (MOJ) Corrections Unit to provide the number of individuals sentenced to death in a certain period. It seems that public's right to access to information about the death penalty is quite similar to societies the right to the truth, but I suppose they are definitely two separate rights.

For one thing, the focus of the present case is around the possibility for public to access to state-held information, but not solve the problem of authenticity of information. On the contrary, the process of materialization of the right to the truth is actually a truth-seeking journey. In addition to ensuring victim and public's access to information, it is more important to find the out truth through the state's adequate investment and due judicial process. For another, the right to the truth is non-derogable right, which is usually acclaimed in gross human rights violations, while freedom of expression can be limited in certain circumstance. It means there is no need to discuss whether restrictions are justified under article in any case concerning the right to the truth. This is why the right to the truth is the best weapon against amnesty law. In addition, some judicial authorities, such as the ECtHR, reject the idea that the state is under positive obligation to actively inform citizens.¹⁸⁵ Apparently, the right to the truth requires the state to engage in an investigation to secure the victims and the next to kin's right to access related information. Therefore, the right to the truth can be regarded as a kind of existence form of "freedom of expression" in a particular historical period, but cannot be replaced completely by it.

3.3.4 The Right to the Truth under the Right to Humane Treatment

According to the legal practice of the ECtHR, IACtHR and UNHRC, the state's failure to uncover the "truth" concerning violations and victims' well being also can

¹⁸⁵ ECHR, *Case of Guerra and Others v. Italy* (116/1996/735/932), 19 February 1998, para. 53.

constitute inhuman treatment to family members. *Blake v. Guatemala* relates to a family of a victim (Nicholas Blake) that investigates the disappearance of Blake on their own efforts when the Guatemala government failed to disclose Blake's situation and obstructed the family to ascertain the truth. In the case presented, the IACtHR established the state's liability for its undue investigation and provided compensation to Blake's family by judging a violation of Article 5 of the ACHR. The first step is to ascertain whether Blake's disappearance indeed brings serious influence on the lives of the entire family. As a matter of fact, Mr. Samuel Blake, the brother of victim, suffers serious depression and had spent significant money on psychiatric consultations and medication.¹⁸⁶ It is not difficult to imagine the Blake's family members may feel a sense of insecurity, frustration, impotence, suffering and anguish for a considerable time.¹⁸⁷ Once the court thinks this level of mental suffering meets the legal binding standard, then we move to the second step- calculating whether the violation of relatives' mental and moral integrity is a direct consequence of his forced disappearance. As such, the court usually only examines victim's next of kin, because they are most likely affected by the truth of disappearance and authority's incompetence. As all the conditions are fulfilled, the IACtHR considered the state's inaction to constitute a violation of Article 5 of the American Convention on Human Rights in relation to its Article 1(1).

The ECHR took a similar view towards this issue. In the case *Janowiec And Others V. Russia*, the applicant acclaimed a violation of Article 3 of European Convention on Human Rights for three reasons: Russian authorities' prolonged denial of information about victim; Russian authorities' dismissive and contradictory replies in react to relatives' request for truth; Russian courts' insistence of the version of "disappearance" in disregard of the established historic facts.¹⁸⁸ The court made a series

¹⁸⁶ Inter-Am. Ct. H.R., *Blake Case*, 24 January 1998, para. 113.

¹⁸⁷ *Ibidem*, para. 114.

¹⁸⁸ ECtHR, *Janowiec and Others v. Russia*, 16 April 2012, p.40, para. 150.

of critical comments when judging the present case. Firstly, the establishment of such a violation is not only attributed to the responsible state for the disappearance and death, but also the authority that failed to respond to relatives' request for information or hindered the truth seeking process. As for the reason, the court notes that "the essence of the issue under Article 3 is not that there had been a serious human rights violation concerning the missing person; it lies in the authorities' reactions and attitudes to the situation when it had been brought to their attention."¹⁸⁹ Secondly, inhumane treatment is not any specific manifestation of the authorities' attitudes, isolated incidents or procedural acts, but a negative consequence from the long-term acts of authority.¹⁹⁰ Thus, the court expressed its determination to "give a global and continuous assessment" towards authority's attitude to victim's family. The period of assessment is the longer the better, but should be within a reasonable time. Thirdly, the ECtHR took a stricter line to evaluate the proximity of the family ties between applicants and victims. The common rule is that the court must determine whether there exists close relationship, such as the propinquity, between them. However, other factors are still considered by the ECtHR, including the particular circumstances of the relationship, the extent to which the family member witnessed the events in question and the involvement of the family member in the attempts to obtain information about the disappeared person.¹⁹¹ In the present case, the court gave negative answers to five applications after considering the particular relationship between these five applicants and victims. Two of applicants (Ms Wołk-Jeziarska and Ms Krzyszkowiak) are the children of the same victim (Katyn), but they never met their father and had no personal contact. The remaining three applicants (Ms Rodowicz, Mr Trybowski and Mr Romanowski) either had never known their respective grandfather and uncle or only had one chance to meet her grandfather. Therefore, the ECtHR concluded that the mental anguish which five applications

¹⁸⁹ *Ibidem*, para. 151.

¹⁹⁰ *Ibidem*, para. 152-153.

¹⁹¹ *Ibidem*, para. 151.

experienced dis not fall within the scope of Article 3 of the Convention. In my opinion, the ECtHR's standard is not always the same. If these five applicants took all possible measures to seek the truth and hence suffered a loss, the ECtHR may change its mind.

3.3.5 Relying on States' Obligation under Specific Articles

In addition to outlining the right to the truth under the scope of rights above, the judicial authority has a second option—relying on states' obligations under specific articles to achieve the right to the truth protection goal. Both the ECtHR and IACtHR established case laws that read specific articles, such as right to life and right to humane treatment, along with a general article on the states' obligation to arrive at a request for a complete investigation into gross violations of human rights.

In the case of *McCann and Others v. the United Kingdom*, the ECtHR first set out positive obligations on states under Article 2 of European Convention on Human Rights. The case concerns the death of three IRA members (McCann, Savage, Farrell), suspected of a bombing mission in Gibraltar, who were killed by Special Air Service soldiers finally. As a result, the court held by ten votes to nine that there had been a violation of Article 2 of the Convention because it was not strictly proportionate to the objectives to be achieved.¹⁹² In the present case, the court noted that as Article 2 and 3 of Convention enshrines the basic values of the democratic societies making up the Council of Europe, these two articles should not only safeguard the rights but set out the circumstances when the deprivation may be justified.¹⁹³ The Court reiterated many times in different cases that the obligation under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the]

¹⁹² ECtHR, *Case of Mccann and others v. the United Kingdom*, 27 September 1995, p. 40.

¹⁹³ *Ibidem*, p. 37, para. 147.

Convention”, requires that there should be some form of effective official investigation when individuals have been killed as a result of the use of force”.¹⁹⁴ However, the obligations under Article 3 and under Article 2 differed in substance as well as in its temporal outreach.¹⁹⁵ The procedural obligation under Article 2 required the authorities to take specific legal actions capable of leading to identification and punishment of those responsible, while obligation derived from Article 3 required the state react to the situation of the family member of the dead or disappeared victim in a humane and compassionate way¹⁹⁶ and assist the relatives in obtaining information and uncovering relevant facts¹⁹⁷. Unfortunately, the judgment of this case failed to answer the question as to whether a right of access to court to bring civil proceedings in connection with deprivation of life can be inferred from Article 2, since it seems more appropriate to consider it under Article 6 (Right to a fair trial) and 13 (Right to an effective remedy).¹⁹⁸ Nor does the judgment answers “what form such an investigation should take and under what conditions it should be conducted”.¹⁹⁹ In addition, it should also be noted that the guarantees under Article 13 are significantly broader than a State’s procedural obligation under Articles 2 and 3, which is explained in case *Kaya v. Turkey*.²⁰⁰ Therefore, we can conclude that the states’ obligations under Article 2 and 3 are merely used to ensure minimum investigation towards infringement caused by force when the applicants have not invoked Articles 6 and 13. In this regards, the UNHRC takes a similar attitude as the ECHR. It concedes that the states’ obligations derived from Article 6 of the ICCPR (right to life) that “States parties should take specific and effective measures to prevent the disappearance of individuals and establish effective

¹⁹⁴ ECtHR, *mutatis mutandis*, the *McCann and Others v. the United Kingdom*, 27 September 1995, p. 49;, *Kaya v. Turkey*, 19 February 1998, p. 329.

¹⁹⁵ ECtHR, *Janowiec And Others v. Russia*, 16 April 2012, p.40, para. 152.

¹⁹⁶ *Ibidem*.

¹⁹⁷ *Ibidem*, para. 163.

¹⁹⁸ *ibidem*, para. 160.

¹⁹⁹ *Ibidem*, para. 162.

²⁰⁰ *Ibidem*, para. 107.

facilities and procedures to investigate thoroughly, by an appropriate and impartial body”.²⁰¹ However, the UNHRC goes further than the ECHR’s interpretation of general state duty article (Article 2.3 of the ICCPR, Article 1 of the ECHR).²⁰² In the case of *Basilio Laureano Atachahua v. Peru*, the UNHRC also considered, under Article 2.3 of the ICCPR, the state to process a duty to bring to justice those responsible for her disappearance, notwithstanding any domestic amnesty legislation to the contrary²⁰³, while the ECHR failed to clearly involve judicial review in state’s general obligation.

Compared with the ECHR, the IACtHR places a heavy burden of obligations on states by asserting: “whenever there has been a human rights violation, the State has a duty to investigate the facts and punish those responsible, [...] and this obligation must be complied with seriously and not as a mere formality.”²⁰⁴ In the *Castillo Paez* case and other cases relating to the generic obligations of states, the Inter-American Court provides an interpretation of Article 1 (1) of the American Convention on Human Rights as that “the right to know the truth” arises as a basic and indispensable consequence for every state party to that instrument.²⁰⁵ That is to say any state’s ignorance of facts and insufficient investigation of related human rights violation may constitute violation of Article 1 (1) of the Convention. Furthermore, an investigation should not be triggered by victim or his family or upon offer of proof, but rather assumed on the state’s own initiative.²⁰⁶ This illustrates that the state undertook a positive obligation in response to the victim and his family’s right to the truth. However, according to the related judgments of the IACtHR, Article 1 never appears individually

²⁰¹ *Basilio Laureano Atachahua v. Peru*, Communication No. 540/1993, U.N. Doc. CCPR/C/56/D/540/1993 (1996), para. 8.3.

²⁰² Antkowiak, 1991, p. 988.

²⁰³ Human Rights Committee, *Basilio Laureano Atachahua v. Peru*, Communication No. 540/1993, CCPR/C/56/D/540/1993, 25 March 1996, para. 10.

²⁰⁴ Inter-Am.Ct.H.R., *Trujillo Oroza Case*, para. 100; *Cantoral Benavides Case*, para. 69; *Cesti Hurtado Case*, para. 62.

²⁰⁵ Inter-Am.Ct.H.R., *El Salvador, Ignacio Ellacuría*, 22 December 1999, para. 223.

²⁰⁶ Inter-Am.Ct.H.R., *Velasquez Rodriguez Case*, 29 July 1988.

or read in conjunction with right to life or right to human treatment as the ECHR does, predominantly aligning with Article 8 or/and Article 25 to serve as origins of right to the truth.

In a conclusion, both the ECHR and the UNHRC consider that the state's obligations under "right to life" or "right to human treatment" can be used to protect "right to the truth" independently of "right to remedy", "right to fair trial" and "right to justice". Having said that, the focus on the obligations that states take under "right to life" and "right to humane treatment" are different. Apparently, the UNHRC goes further by imposing a heavier obligation on state. In the Inter-American system, the state's obligation to conduct investigation is consistently derived from Article 1 (1) as well as Article 8 or/and Article 25 of the American Convention on Human Rights. At the present stage, it is hard to determine the superiority of one method over another. Furthermore, attention is needed to cover the ECHR's practice. Without a proper interpretation on a concrete form of investigation and the conditions in which it should be conducted, right to the truth is simply an ideal concept.

CONCLUSION

The core objective of this thesis has been to assess and compare the various ways in which human rights instruments and treaty bodies deal with the right to the truth. Following this, the dissertation analyzes two feasible approaches to realize the right to the truth: regarding it as an independent right or outlining it under other rights or obligations. As for the first approach, there are three possible ways for the right to the truth to become an independent legal source in international law system. To be contained in the international or regional treaties is the most direct and realistic option for the right to the truth. It has been emphasized that although a possibility for the right to the truth to become customary law or general principle of law still exists, there are too many uncertainties as it moves towards such destinations. Part of challenges lie in the theoretical problem; no theory can exactly answer to what extent a rule can constitute international custom or general principle of law. In addition, the disunity of states' acts is a further daunting challenge that cannot be circumvented in these studies. Therefore, it seems that leaving a position in treaty law for the right to the truth is the most viable solution.

The thesis then outlines the requirements for the realization of the right to the truth, which must be fulfilled if it is an independent legal right. These requirements are the core of the right to the truth and also the key criteria to compare two approaches. They reflected in two phases of the right realization. The first phase is so-called "truth-seeking process", which is usually guaranteed by actions of non-judicial mechanism and a compulsory judicial process. It is a phase focused on "truth", while the second phase is related to the individual and society's qualification to "access to the truth". The thesis further summarizes benefits that different subjects should obtain from the complete realization process of the right to the truth. That is to say, as an independent legal right, the right to the truth implies an intact process above and ensures that the individual as well as society receive anticipated profits from this process. Thus,

the initial question is transformed to “ whether outlining the right to the truth under other human rights or obligations can achieve a similar effect as the former theoretical assumption does”.

In regards to the second approach, this is primarily concerned with the relationship among these different rights. As summarized in Chapter 3, the scope of the right to effective remedy can cover the remaining three rights—the right to justice, the right to a fair trial, the freedom of expression. Actually, these four rights face the same problem; each only plays a role in fragments of the realization process of the right to the truth. The right to the justice and the right to fair trial guarantee an official judicial decision, while the freedom of expression ensures subjects access to related information. In this way, outlining the right to the truth under the right to effective remedy or under combination of remaining three rights, just as the ECtHR and the IAHR do, may be the best solution so far. However, they cannot be immune to expose to problems too. All of these four rights are derogable rights and also can be limited under certain legal conditions. Nevertheless, the right to the truth is considered as non-derogable and under no circumstance should it be restricted. In other words, although the right to effective remedy brings sufficient reparation to victims and their families as well as society, it is still unable to function like the right to the truth to conflict against amnesty laws. As for the legal practice that failure to do investigation can constitute inhuman treatment to individuals, I think it is although necessary and reasonable, this does not represent a substitute for the right to the truth. At last, let us turn our attention to state obligations. According to the assumption, the states should undertake corresponding positive obligations to conduct investigation, even if they are not responsible states.

So can the right to the truth get complete protection resting on state obligations under specific articles, such as right to life and right to humane treatment? I think the answer is negative. The only way to achieve the goal is to develop a detailed and definite interpretation towards obligations under specific articles by competent

authorities. If so, why not directly create a new legal right and clarify the contents of corresponding obligations?

In a conclusion, the right to the truth has a solid foundation of legal philosophy as well as its own value as an independent legal right. The best way to protect it is to promote legislation and give it an independent status in the international law system. If it is impossible to include it into treaties in the short term, efforts shifting to place it under the right to effective remedy may be a trade-off in current situation.

BIBLIOGRAPHY

BOOKS AND ARTICLES

- Alfreðsson, Guðmundur S., Eide, Asbjørn, *The Universal Declaration of Human Rights: A Common Standard of Achievement*, Martinus Nijhoff Publishers.
- Algan, Bulent, 'Rethinking Third Generation Human Rights', pp. 125 in *Ankar Law Review*, Vol.1, No.1, Summer 2004.
- American Law Institute, *Restatement of the Law, Third, the Foreign Relations Law of the United States*, St. Paul, Minn.: American Law Institute Publishers, 1987.
- Antkowiak, Thomas M., 'Truth as right and remedy in international human rights experience', pp. 977-1013 in *Michigan Journal of International Law*, Vol. 23, 1977.
- Borelli, Silvia, 'A Review of the International Centre for the Legal Protection of Human Rights', *INTERRIGHTS Bulletin*, ISSN 0268-3709, Vol. 15 No. 3, 2006.
- Brierly, J. L., *The Law of Nations: An Introduction to the International Law of Peace*, 6th ed., New York: Oxford University Press, 1963.
- Brown, Stuart M., Jr., 'Inalienable Rights', pp. 192-211 in *The Philosophical Review*, Vol. 64, No. 2 April, 1955.
- Condä, H. Victor, *A Handbook of International Human Rights Terminology*, University of Nebraska Press, 2004.
- Courtis, Victor Abramovich y Christian, 'El Acceso a la Información como Derecho', pp. 197-203 in *en Anuario de Derecho a la Comunicación*, Año 1 Vol.1, 2000.
- Fabbrini, Federico, 'The European Court of Human Rights, Extraordinary Renditions and the Right to the Truth: Ensuring Accountability for Gross Human Rights Violations Committed in the Fight Against Terrorism', p. 100 in *Human Rights Law Review*, Vol. 14, Iss. 1, 2014.
- Garibian, Sévane, 'Ghosts Also Die. Resisting Disappearance through the 'Right to the Truth' and the Juicios por la Verdad in Argentina', pp. 515-538 in *Journal of International Criminal Justice*, volume 12, Issue 3, 2015.
- Geneva Academy of International Humanitarian Law and Human Rights, *What amounts to ' a serious violation of international human rights law'? - An analysis of practice and expert opinion for the purpose of the 2013 Arms Trade Treaty*, Academy Briefing No. 6, August 2014.
- Groome, Dermot, 'The Right to Truth in the Fight against Impunity', pp. 175-199 in *Berkeley Journal of International Law*, Vol. 29, Iss. 1, 2011.
- ICRC, *Rule 117: Customary International Humanitarian Law, Volume I, Rules*, Cambridge Press University, 2005.

- Kammerhoffer, 'Uncertainty in the Formal Sources of International Law: Customary International Law and Some of Its Problems', pp. 523-553 in *European Journal of International Law*, Vol. 15, Iss. 3, 2004.
- Karel Vasak, *Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of law to the Universal Declaration of Human Rights*, UNESCO Courier, Nov. 1977.
- Macdonald, J., 'Derogations under art 15 of the European Convention on Human Rights', p. in *Columbia Journal of Transnational Law*, Colum 36, L. 225, 1997.
- Mcdonald, Avril, 'A Right to truth, justice and a remedy for African victims of serious violations of international humanitarian law', pp. 109-248 in *Law, Democracy & Development*, Vol. 3 (2), 1999.
- Marcon, Glafira A., 'Does Brazil Have the Right to Truth?', *The Macalester Review*: Vol. 3: Iss. 2, 2013.
- Natalija Kukoska M.Sc, 'The Right to the ruth and Truth Commissions', *Iustinianus Primus Law Review*, Vol. 5:2.
- Parlevlie, Michelle, 'Considering Truth. Dealing with a Legacy of Gross Human Rights Violations', pp. 141-174 in *Netherlands Quarterly of Human Rights*, Vol. 16/2, 1998.
- Schabas, William A. & Specialis, Lex, 'Belt and Suspenders - The Parallel Operation of Human Rights Law and the Law of Armed Conflict, and the Conundrum of Jus Ad Bellum', pp. 592-613 in *Israel Law Review*, Vol. 40, No. 2, 2007.
- Shaw, Malcolm, 2008, *International Law* (Sixth Edition). New York: Cambridge University Press.
- Steiner, Henry J., Alston, Philip, & Goodman, Ryan, *International Human Rights in Context: Law, Politics, Morals: Text and Materials*, Oxford University Press, 2008.
- Tardu, M. E., 'United Nations response to Gross Violations of Human Rights: The 1503 Procedure', pp. 559-601 in *Santa Clara Law Review*, Vol. 20, 1980.
- United Nations Development Programme, *Programming for Justice: Access for All: A Practitioner's Guide to Human Rights-Based Approach to Access to Justice* (Bangkok: UNDP, 2005), 2005.
- United Nations, *Rule-Of-Law Tools For Post-Conflict States-Amnesties*, United Nations Publication Sales No. E. 09. XIV. 1, 2009.
- Waldock, Humphrey, *General Course on Principles of Public International Law*, Hague Academy of International Law, 1962.
- Yasmin Naqvi, 'The Right to Truth in International Law: Fact or Fiction', pp. 245-273 in *International Review of the Red Cross*, Vol. 88, No. 862, June 2006.

CASES

- Basilio Laureano Atachahua v. Peru, Communication No. 540/1993, U.N. Doc. CCPR/C/56/D/540/1993 (1996).

Constitutional Court of South Africa, *The Citizen 1978 (Pty) Ltd and others v. McBride*. No: CCT 23/10, judgment of 8 April, 2011.

Constitutional Court of Colombia. *Gustavo Gallón Giraldo y Otros v. Colombia*, Sentencia No. C-370/2006, May 18, 2006.

Constitutional Tribunal of Peru. Genaro Villegas Namuche. Case No. 2488-2002-HC/TC, March 18, 2004.

ECtHR, *Guerra and Others v. Italy*, applications No. 116/1996/735/932, judgment of 19 February 1998.

ECtHR, *Mccann and others v. the United Kingdom*, application No. 18984/91, judgment of 27 September 1995.

ECtHR, *Janowiec And Others v. Russia*, applications No. 55508/07 and 29520/09, judgment of 16 April 2012.

ECtHR, *El-masri v. The Former Yugoslav Republic Of Macedonia*, application no. 39630/09, judgment of 13 December 2012.

ECtHR, *McCann and Others v. the United Kingdom*, application no. 18984/91, judgment of 27 September 1995.

ECtHR, *Kaya v. Turkey*, application no.158/1996/777/978, judgment of 19 February 1998.

Inter-Am. Ct. H.R., *Castillo-Páez v. Peru* (Ser. C), no. 34, judgment of 3 November 1997.

Inter-Am. Ct. H.R., *Bámaca Velásquez v. Guatemala* (series C) No. 70, judgment of 25 November 2000.

Inter-Am. Ct. H.R., *Pueblo Bello Massacre v. Colombia*, (Ser. C) No. 140, judgment of 31 January 2006.

Inter-Am. Ct. H.R., *Blake Case*, (Ser. C) No. 36, judgment of 24 January 1998.

Inter-Am. Ct. H.R., *Moiwana Village V. Suriname*, (Ser. C) No. 124, judgment of 15 June 2005.

Inter-Am. Ct. H.R., *Barrios Altos Case*, (Ser. C) No. 75, judgment of 14 May 2001.

Inter-Am. Ct. H.R., *Myrna Mack Chang*, (Ser. C) No. 101, judgment of November 25, 2003.

Inter-Am. Ct. H.R., *Velasquez Rodriguez Case*, (Ser. C) No. 4 (1988), judgment of 29 July 1988.

Inter-Am. Ct. H.R., *Gómez-Paquiyaauri brothers v. Peru*, (Ser. C) No. 110 (2004), judgment of July 8 2004.

Inter-American Commission on Human Rights, *Alicia Consuelo Herrera et al. v. Argentina*, cases 10.147, 10.181, 10.240, 10.262, 10.309, 10.311, Report No. 28/92, 2 October 1992.

Inter-American Commission on Human Rights, *Lucio Parada Cea, Héctor Joaquín Miranda Marroquín, Fausto García Funes, Andrés Hernández Carpio, Jose Catalino Meléndez y Carlos Antonio Martínez V. El Salvador*, Case 10.480, Report No 1/99, 27 January 1999.

- Inter-American Commission on Human Rights, *Monseñor Oscar Arnulfo Romero y Galdámez V. El Salvador*, Case 11.481, Report No. 37/00, April 13 2000.
- United Nations, Human Rights Committee, *Communication No. 1470/2006*, CCPR/C/101/D/1470/2006, 21 April 2011.
- United Nations, Human Rights Committee, *Communication No. 322/1988*, CCPR/C/51/D/322/1988, 23 July 1988.

REPORTS AND DOCUMENTS

- Amnesty International, *amicus curiae brief submitted to the Inter-American Court of Human Rights in the Case of Benavides Cevallos, Ecuador*, December 18 1997.
- IACHR, *Annual Report of the Inter-American Commission on Human Rights 1977*, OEA/Ser.L/V/II.43, Doc. 21 corr. 1, 20 April 1977.
- IACHR, *Report No. 130/99, CASE. 11.740, VÍCTOR MANUEL OROPEZA MEXICO*, 19 November 1999.
- IACHR, *The Right to Truth in the Americas*, OEA/Ser.L/V/II.152 Doc. 2, 13 August 2014.
- ICJ, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 8 July 1996.
- OACHR, *Report No 25/98*, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.595, 11.657, 11.705., Chile, Alfonso René Chanfeau Orayce, 7 April 1998.
- UNCHR, *Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher*, E/CN.4/2005/102/Add.1, 8 February 2005.
- UNCHR, *Report of the working group on enforced or involuntary disappearances*, E/CN.4/1435, 22 January 1981.
- UNCHR, *Report of the SG on the United Nations Voluntary Fund for Victims of Torture*, E/CN.4/1998/39/Add.1, 10 March 1998.
- UNHRC, *Report of the Office of the United Nations High Commissioner for Human Rights on the seminar on experiences of archives as a means to guarantee the right to the truth*, A/HRC/17/21, 14 April 2011.
- UNHRC, *Report of the United Nations High Commissioner for Human Rights on the Right to the truth*, A/HRC/15/33, 28 July 2010.
- UNHRC, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff*, A/HRC/7/3/Add.3, 1 October 2007.
- UNHRC, *Report of the Office of the High Commissioner for Human Rights: Right to the truth*, A/HRC/12/19, 21 August 2009.
- UNHRC, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Frank La Rue*, A/HRC/14/23, 20 April 2010.

- UNHRC, *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/16/48, 26 January 2011.
- UNHRC, *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, A/HRC/24/42, 28 August 2013.
- UNHRC, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Ben Emmerson, Framework Principles for securing the accountability of public officials for gross or systematic human rights violations committed in the context of State counter-terrorism initiatives*, A/HRC/22/52, 1 March 2013.
- UNHRC, *Right to the Truth*, Decision 2/105, 27 November 2006.
- United Nations, Economic and Social Council, *Report of Special Rapporteur on the independence of judges and lawyers, Leandro Despouy*, E/CN.4/2006/52, 23 January 2006.
- United Nations, Economic and Social Council, *Report of Working Group on Enforced or Involuntary Disappearances, Civil and Political Rights, Including the Questions of: Disappearances and Summary Execution*, E/CN.4/1999/62, 28 December 1998.
- United Nations, Economic and Social Council, *Report of Independent Expert to Update the Set of Principles to Combat Impunity Diane Orentlicher*, E/CN.4/2005/102/Add.1, 8 February 2005.
- United Nations, Human Rights Committee, *General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant*, CCPR/C/21/Rev.1/Add.13, 26 May 2004.
- United Nations, Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, CCPR/C/GC/32, 9 to 27 July 2007.
- United Nations, Human Rights Committee, *General Comment 29, States of Emergency (article 4)*, CCPR/C/21/Rev.1/Add.11, 31 August 2001.
- United Nations, Human Rights Committee, *General Comment 18, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, HRI/GEN/1/Rev.1, 29 July 1994.
- United Nations, Human Rights Committee, *Concluding Observations of the Human Rights Committee: Guatemala, Commissioner for Human Rights: Right to the truth*, A/HRC/5/7, 7 June 2007.
- United Nations, Human Rights Committee, *Concluding Observations of the Human Rights Committee: Guatemala, Consideration of Reports Submitted by States Parties under Article 40 of the Covenant*, CCPR/C/79/Add.63, 3 April 1996.
- United Nations, Committee against Torture, *Consideration of reports submitted by States parties under article 19 of the Convention: Colombia*, CAT/C/COL/CO/4, 4 May 2010.
- United Nations, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The administration of justice and the human rights of detainees*,

Question of the impunity of perpetrators of human rights violations, E/CN.4/Sub.2/1997/20, 26 June 1997.

United Nations, Security Council, Report of the Commission on the Truth for El Salvador, S/25500, 1 April 1993.

WEBSITES

Dr. Walid Abdulrahim, 'Sources of public international law', at https://sites.google.com/site/walidabdulrahim/home/my-studies-in-english/2-sources-of-public-international-law#_ftn3.

Diamond, L., What is Democracy, Lecture at Hilla University for Humanistic Studies, 21 January 2004, at <https://web.stanford.edu/~ldiamond/iraq/WhatIsDemocracy012004.htm>.

Hamber, B. & Kibble, S., 'From Truth to Transformation: The Truth and Reconciliation Commission in South Africa, Catholic Institute for International Relations Report', February 1999, available at <http://www.csvr.org.za/index.php/publications/1714-from-truth-to-transformation-the-truth-and-reconciliation-commission-in-south-africa.html>.

Human Rights Advocacy and the History of Human Rights Standards, Enforced Disappearances, at <http://humanrightshistory.umich.edu/problems/disappearances/>.

ICTJ, Drafting a Truth Commission Mandate, June 2013, at https://www.ictj.org/sites/default/files/ICTJ-Report-DraftingMandate-Truth-Commission-2013_0.pdf.

ICRC, Commentary on the Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949, Article 33-Missing persons, at ICRC website: <https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=B9AC1957F13CFC98C12563CD0051DA78> (consulted on 14 May 2015).

International Law Association, Formation of Customary (General) International Law (1984 - 2000), Conference London Report 2000, at <http://www.ila-hq.org/en/committees/index.cfm/cid/30>.

International Legal Research Tutorial, General Principles of Law, at https://law.duke.edu/ilrt/cust_law_10.htm.

Jain, Neha, General Principles of Law as Gap-fillers, Conference Filling the Gaps: The Study of Judicial Creativity and Equity in Mixed Jurisdictions and Beyond, at http://www.iilj.org/courses/documents/NehaJain_GeneralPrinciplesasGapFillersJan2014.pdf.

The International Center for Transitional Justice, Truth Seeking: Elements of Creating an Effective Truth Commission, published at 3/18/2013, at <https://www.ictj.org/sites/default/files/ICTJ-Book-Truth-Seeking-Chapter1-2013-English.pdf>.

Una duda histórica, ‘no se sabe cuántos son los desaparecidos’, at
<http://edant.clarin.com/diario/2003/10/06/p-00801.htm>.

UN, Archbishop Oscar Arnulfo Romero’s biography, at
<http://www.un.org/en/events/righttotruthday/romero.shtml>.

LEGAL DOCUMENTS

ACHPR, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, DOC/OS (XXX) 247.

ACHPR, Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence, Resolution 111.

Additional Protocol I to the Geneva Conventions.

African Charter on Human and Peoples’ Rights.

American Convention on Human Rights.

American Declaration of the Rights and Duties of Man.

Argentina Law 25.779, 2 September 2003.

International Covenant on Civil and Political Rights.

Council of the European Union, *EU Human Rights Guidelines on Freedom of Expression Online and Offline*, FOREIGNAFFAIRS Council meeting Brussels.

Justice and Peace Law of Colombia (Law 975 of 2005).

Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women.

Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

Optional Protocol to the 1966 International Covenant on Economic, Social and Cultural Rights.

Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.

Rome Statute of the International Criminal Court.

UNHRC, Right to the truth, Resolution 9/11, A/HRC/RES/9/11, 18 September 2008.

UNHRC, Right to the truth, Resolution 12/12, A/HRC/RES/12/12, 12 October 2009.

UNHRC, Right to the truth, Resolution 18/7, A/HRC/RES/18/7, 13 October 2011.

United Nations, General Assembly, Declaration on the Protection of All Persons from Enforced Disappearance, A/RES/47/133, 18 December 1992.

United Nations, General Assembly, 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, A/RES/60/147, 21 March 2006.

United Nations, General Assembly, Proclamation of 24 March as the International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims, A/RES/65/196, 21 December 2010.

United Nations, Economic and Social Council, Resolution 1503 (XLVIII), 48
U.N. ESCOR (No. 1A) at 8, E/4832/Add.1, 27 May 1970.
Vienna Declaration and Programme of Action.