Amicus Curiae Submission in the Case of ***Gomes Lund and Others v. Brazil***

A Submission to the Inter-American Court of Human Rights from the Open Society Justice Initiative, the Commonwealth Human Rights Initiative, the Open Democracy Advice Centre, and the South African History Archive

June 2010

Case No. 11.552

Julia Gomes Lund and Others v. The Federal Republic of Brazil

(*Guerrilha do Araguaia Case*)

***AMICUS CURIAE* BRIEF OF**

THE OPEN SOCIETY JUSTICE INITIATIVE
THE COMMONWEALTH HUMAN RIGHTS INITIATIVE
THE OPEN DEMOCRACY ADVICE CENTER
THE SOUTH AFRICAN HISTORY ARCHIVE

Pursuant to Articles 2(3) and 41 of the Rules of Procedure applicable to this case, the Open Society Justice Initiative (the "Justice Initiative"), the Commonwealth Human Rights Initiative (India), the Open Democracy Advice Center (South Africa), and the South African History Archive hereby submit an *amicus curiae* brief on the development of the right to the truth in international human rights law, and the application of the relevant principles to the right to the truth issues presented by this case.

INTRODUCTION AND STATEMENTS OF INTEREST

1. The Open Society Justice Initiative uses law to protect and empower people around the world. Through litigation, advocacy, research, and technical assistance, the Justice Initiative promotes human rights and builds legal capacity for open societies. We foster accountability for international crimes, combat racial discrimination and statelessness, support criminal justice reform, address abuses related to national security and counterterrorism, expand freedom of information and expression, and stem corruption linked to the exploitation of natural resources. Our staff are based in Abuja, Almaty, Amsterdam, Brussels, Budapest, Freetown, The Hague, London, Mexico City, New York, Paris, Phnom Penh, and Washington, D.C.

2. The Justice Initiative has extensive experience in promoting the adoption and implementation of freedom of information laws in Latin America, Eastern Europe and elsewhere, and has contributed to international standard-setting and monitoring of government transparency around the world. In the field of freedom of expression and information, the Justice Initiative has provided *pro bono* representation before, or made *amicus curiae* submissions to, all three regional human rights systems and the UN Human Rights Committee. In particular, the Justice Initiative made *amicus curiae* submissions to both this Court and the Inter-American Commission on Human Rights (the "Inter-American Commission") in the landmark case of *Claude*

Reyes et al v. Chile.[1] It has also made *amicus curiae* submissions to the Constitutional Tribunal of Chile, in a 2007 case that resulted in the recognition of a constitutional right of access in that country;[2] to the Constitutional Tribunal of Peru in a case that expanded public access to the assets declarations of Peruvian government officials;[3] and to the Supreme Court of Paraguay in a case currently pending before that Court on whether the national Constitution guarantees a right of access to state-held information.[4]

3. The Commonwealth Human Rights Initiative (CHRI) is an independent, non-partisan and non-governmental organization headquartered in New Delhi, India. Established in 1987 by several Commonwealth associations, CHRI works for the practical realization of human rights in the countries of the Commonwealth. Promoting people's access to justice and access to information are CHRI's core areas of work. CHRI has contributed extensively to the efforts to adopt right to information laws in Commonwealth countries, in South Asia and Africa in particular. CHRI also advocates for democratic and accountable policing and respect for the human rights of people in conflict with the law through its police reforms and prison reforms program.

4. The Cape Town-based Open Democracy Advice Centre (ODAC) was established in the belief that, in a constitutional democracy, the right of access to information is not only essential for the exercise and protection of all other rights entrenched in the South African Bill of Rights, but is also necessary for promoting and enhancing an open and accountable administration in all spheres of government. ODAC's primary mission is to promote transparent democracy and to foster a culture of corporate and government accountability. It seeks to achieve its objectives through supporting the effective implementation and protection of the rights and laws which enable access to, and disclosure of, information. Since its inception ODAC has carried on multiple projects, including training both holders of information and requesters or users, such as community-based organizations, NGOs and rural-based organizations, on how to access information. ODAC has experience with the development of access to information jurisprudence, particularly in regards to South Africa's Promotion of Access to Information Act (2000), and the development of access to information jurisprudence throughout Africa. ODAC has previously intervened as *amicus curiae* in a number of cases, including *CCII Systems v. Fakie and Others*;[5] *Trustees, Biowatch Trust v. Registrar: Genetic Resources and Others*;[6] and *Van Wyk v. Unitas Hospital and another*.[7]

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[1] Judgment of September 19, 2006.
[2] In the Matter of Constitutionality of Article 13 of the Constitutional Organic Law on the General Bases of State Administration (No. 18.575) (*Casas Cordero* case), Judgment of August 9, 2007.
[3] *Casas Chardon v. Ministerio de Transportes y Comunicaciones y Otro*, Judgment of September 28, 2009.
[4] Case No. 1054/2008 In the Matter of Constitutionality of the Court of Appeal Judgment in *Defensoria del Pueblo v. Municipalidad de San Lorenzo* (undecided).
[5] NNO 2003 (2) SA 325 (T).
[6] 2005 (4) SA 111 (T).
[7] 2008 (2) SA 472 (CC).

5. The South African History Archive (SAHA) is an independent human rights archive dedicated to documenting and providing access to archival holdings that relate to past and contemporary struggles for justice in South Africa. SAHA is committed to collecting materials from organizations and individuals across a broad socio-political spectrum and making archives accessible to as many South Africans as possible. SAHA's central mission is to recapture lost and neglected histories and to record aspects of South African history in the making. Through its Freedom of Information Program, SAHA has been involved first-hand in utilizing access to information laws to help facilitate transitional justice, particularly through accessing records of the South African Truth and Reconciliation Commission.[8] The South African experience has shown that the right to the truth is underscored by the inherent right to human dignity and is enhanced by other fundamental rights, such as the right to freedom of expression, the right of access to justice, and the right to public participation. In addition, the right of access to information held by public authorities stands in the national Bill of Rights as an autonomous right.

6. By way of context, the current case involves a 28-year-long effort by relatives of the disappeared members of the so-called *Guerrilha do Araguaia*, active during Brazil's military dictatorship in the mid-1970s, to find out the truth and obtain justice for what happened to their relatives. The applicants' and Commission's central claims relate to Brazil's failure to investigate and punish those responsible for the arbitrary detention, torture, and forced disappearance of some 70 persons, including members of the Brazil Communist Party and residents of the region, as a result of operations carried out by the Brazilian Army, between 1972 and 1975, to destroy the guerrilla. A central element of the case is the 1979 Amnesty Law, enacted by Brazil's military government and still in force, which has precluded the prosecution and punishment of those responsible for the forced disappearances and the extrajudicial execution of Maria Lucia Petit da Silva, whose remains were found and identified on May 14, 1996.

7. Through various civil and administrative actions initiated since 1982, family members of the disappeared and certain public authorities have sought – largely unsuccessfully – to obtain information in the possession of, and a truthful accounting from, the Brazilian government, that would help determine the circumstances of the disappearances, including the possible burial site(s) and remains of the victims. The federal Government of Brazil filed multiple appeals against court decisions in favor of the applicants, until the Supreme Court issued a final judgment, also favorable to the applicants, in October 2007. However, the Government maintained throughout the process that a search of public records, including Army and National Archives records, has yielded limited documentation that sheds light only on the general circumstances of the relevant operations, but nothing pertaining specifically to the disappearances and the extrajudicial execution

[8] See P. Pigou, "Accessing the Records of the Truth and Reconciliation Commission," in K. Allan (Ed.), *Paper Wars: Access to Information in South Africa* (2009, Wits University Press: Johannesburg); and *The South African History Archive Trust v. the Minister of Justice and Constitutional Development and David Porogo NO*, Case No. 33394/2002, Transvaal Provincial Division.

of Maria Lucia Petit da Silva. Government agents have also indicated that key archives (may) have been destroyed.

8. In March 2009, the Inter-American Commission referred the case to this Court, claiming that Brazil has violated, inter alia, the applicants' (i) right not to be denied information, under Article 13 (freedom of expression and information) of the Convention; and (ii) the right not to be denied justice, truth and information under Article 5 (personal integrity), in conjunction with Article 1.1 (obligation to respect and secure rights) of the Convention.[9]

9. The current submission discusses first the status of the right to the truth in international and comparative law, including its scope and its relationship to the right of access to information held by public authorities ("right of access" or "right to information"). The second part of the brief applies the general principles to the facts of the current case, and suggests appropriate ways to remedy the violations of the applicants' rights.

I. THE RIGHT TO THE TRUTH IN INTERNATIONAL LAW

10. This section discusses (A) the current recognition and scope of the right to the truth in international law, including in its collective and non-judicial aspects, and (B) the relationship between the right to truth and the right to information held by public authorities.

A. Recognition and Scope of the Right

11. Multiple international tribunals and human rights mechanisms, including this Court, have defined and confirmed the central contours of the right to the truth, either as an autonomous entitlement or one emerging from a combination of other rights. In a recent resolution, the U.N. Human Rights Council recognized "the importance of respecting and ensuring the right to truth so as to contribute to ending impunity and to promote and respect human rights."[10] The right applies to situations involving missing persons and forced disappearances, as well as serious or gross human rights violations. In addition, there is a public or collective element to the right to truth which requires proper consideration of non-judicial remedies.

1. Missing persons and forced disappearances

12. The right to the truth about gross human rights violations has been established most firmly in relation to missing persons and forced disappearances. Its origins have been traced to Additional Protocol I to the Geneva Conventions, which recognizes the right of families to know the fate of their relatives and requires parties to an armed conflict to search for persons reported missing.[11] The International

[9] Application of March 26, 2009.
[10] Human Rights Council, Resolution 9/11, para. 1.
[11] Articles 32-33.

Committee of the Red Cross considers these state obligations to be norms of customary international law.[12]

13. Similarly, in the last several decades, both this Court[13] and the Inter-American Commission on Human Rights[14], as well as the U.N. Human Rights Committee,[15] the U.N. Working Group on Enforced or Involuntary Disappearances,[16] the OAS General Assembly,[17] and the Parliamentary Assembly of the Council of Europe,[18] among others, have recognized the right of victims and their relatives to the truth about the fate and whereabouts of missing or disappeared persons.

14. As early as 1983, the Human Rights Committee addressed, in the *Almeida de Quinteros* case, the plight of the mother of a victim of enforced disappearance, noting that

> "…[it] understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter, in particular, of article 7."[19]

As it has made clear in subsequent jurisprudence, the Committee views the right to the truth as essential to ending or preventing the mental suffering of the relatives of victims of enforced disappearances or secret executions.[20]

15. Although the Inter-American Commission similarly found a separate right to the truth under the American Convention,[21] this Court seemed, at first, not prepared to endorse those rulings. In the early cases, the Court limited itself to holding that the right to the truth was simply "subsumed" within the rights guaranteed by Article 8 (right to a fair trial) and Article 25 (right to judicial protection) of the treaty.[22] More

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[12] ICRC, *Customary International Humanitarian Law, Volume I, Rules* (Cambridge University Press, 2005), Rule 117, p. 421.

[13] See, among others, *Velasquez Rodriguez v Honduras,* Judgment of 29 July 1988, para.181; *Castillo Paez v Peru,* Judgment of 24 January 1998; and *Bamaca Velasquez v. Guatemala*, Judgment of November 25, 2000.

[14] See, among others, Annual Reports 1985-86, p. 205; *Manuel Bolanos v. Ecuador*, Report of 12 September 1995; and *Bamaca Velasquez v. Guatemala*, Report of 7 March 1996.

[15] *Almeida de Quinteros v. Uruguay*, Comm. 107/1981, Views of 21 July 1983.

[16] First Report of the U.N. Working Group on Enforced or Involuntary Disappearances, U.N. Doc. E/CN.4/1435, para. 187.

[17] See, among others resolutions, *OAS General Assembly Resolution AG/Res. 2509 (XXXIX-O/09) on the Right to the Truth*, June 4, 2009. This resolution tasked the Inter-American Commission with preparing a report "on the evolution of the right to the truth in the Hemisphere," in anticipation of a Permanent Council meeting dedicated to the issue. Ibid, para. 7.

[18] See Resolutions 1056(1987); 1414(2004), para. 3; and 1463(2005), para. 10(2).

[19] *Almeida de Quinteros v. Uruguay*, Comm. 107/1981, Views of 21 July 1983, para. 14 (emphasis added).

[20] See *Sarma v. Sri Lanka*, Views of 16 July 2003, para. 9.5; and *Lyashkevich v. Belarus*, Views of 3 April 2003, para. 9.2, respectively.

[21] See note 14 above.

[22] See *Bamaca Velasquez v. Guatemala*, Judgment of November 25, 2000; and the *Barrios Altos* Case (v. Peru), Judgment of 14 March 2001.

recently, however, the Court has construed the right in more extensive terms. Thus, in the case of *Moiwana Community v. Suriname*, which involved a massacre by army forces, the Court held that

> "… all persons, including the family members of victims of serious human rights violations, have the right to the truth. In consequence, the family members of victims and society as a whole must be informed regarding the circumstances of such violations. This right to the truth, once recognized, constitutes an important means of reparation. Therefore, in the instant case, the right to the truth creates an expectation that the State must fulfill to the benefit of the victims."[23]

While the Court has unambiguously recognized the collective aspect of the right to the truth, it is not entirely clear from the case law whether the general public's right to the truth also derives (exclusively) from Articles 8 and 25 of the Convention. Similarly, it appears unsettled whether the right to the truth may apply outside the context of judicial proceedings, and if so, under what circumstances.[24]

16. The Inter-American Commission has emphasized the particular importance of state compliance with the right to the truth in those cases in which legal or historical developments, such as extensive amnesties, have made difficult or impossible the prosecution, or even identification, of the intellectual and material perpetrators of grave human rights abuses.[25] By the same token, the case for exposing the truth is particularly compelling in this case in view of Brazil's failure to prosecute those responsible for the torture and disappearances as a result of the operation of amnesty laws. In such cases, truth and official apologies may well be the only significant forms of reparation available.

17. As a matter of state practice and acceptance, perhaps the most explicit recognition of the right to the truth of victims of disappearance appears in the recent *International Convention for the Protection of All Persons from Enforced Disappearances*, adopted by the U.N. Commission on Human Rights in September 2005.[26] Article 24(2) of the Convention specifically provides that "[e]ach victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person." Brazil was one of the first signatories to the Convention as of 6 February 2007.

18. The Human Rights Chamber for Bosnia and Herzegovina, which was at the time an international-majority tribunal, has interpreted the European Convention on Human

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[23] *Moiwana Community v. Suriname,* Judgment of 15 June 2005, para. 204 (emphasis added).

[24] See part 3 of this section of the brief for a more extensive discussion of the evolution of these aspects of the right to the truth in international and regional law and practice.

[25] See, among others, *Parada Cea and Others v. El Salvador*, Report of 27 January 1999; and *Ignacio Ellacuria v. El Salvador*, Report of 22 December 1999.

[26] As of early May 2010, 83 countries have signed and 18 countries (including ten OAS members) have ratified the Convention. Twenty ratifications are required for its entry into force (Article 39). See: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-16&chapter=4&lang=en.

Rights as guaranteeing the right of victims and their relatives to the truth about the fate and whereabouts of missing or disappeared persons.[27]

2. Serious or gross human rights violations

19. Multiple specialized bodies and authorities – including this Court,[28] the U.N. Human Rights Committee,[29] the U.N. Human Rights Council,[30] and the Office of the U.N. High Commissioner for Human Rights (OHCHR)[31] – have further extended the scope of the right to the truth to include a state obligation to shed light on all serious or gross human rights violations, such as torture or extrajudicial executions, to the point that the principle is now widely accepted.

20. The European Court of Human Rights has yet to explicitly recognize that victims of gross human rights violations, including disappearances, have a right to the truth. However, the European Court has made clear that states' obligation to investigate allegations of serious violations of Articles 2 (right to life), 3 (torture) and 5 (arbitrary detention) of the European Convention includes a requirement of public transparency. In *Kelly and Others v. the United Kingdom*, an Article 2 case involving the use of lethal force by police agents against suspected terrorists and bystanders, the Court considered the effects of the government's decision not to release the prosecutorial report finding that no criminal prosecutions were warranted. The Court found that this was a situation that "crie[d] out for explanation …. There was no reasoned decision available to reassure a concerned public that the rule of law had been respected."[32] In the similar context of *Ramsahai v. Netherlands*, the Grand Chamber of the Court found that "[w]hat is at stake here is nothing less than public confidence in the state's monopoly on the use of force."[33]

21. A 2006 study by the Office of the United Nations High Commissioner for Human Rights concluded, after an extensive review of international law and practice, that

> "[t]he right to the truth about gross human rights violations and serious violations of humanitarian law is an inalienable and autonomous right, recognized in several international treaties and instruments as well as by national, regional and international jurisprudence and numerous resolutions of intergovernmental bodies at the universal and regional levels."[34]

22. The right applies not only to cases of massive or repeated violations, but also to singular cases of sufficient gravity. Many of the judgments and opinions cited

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[27] See *Palic v. Republika Srpska*, Judgment of 11 January 2001; and the *Srebrenica Cases*, Judgment of 7 March 2003, para. 220(4).
[28] See *Moiwana Community v. Suriname,* Judgment of 15 June 2005.
[29] See, inter alia, Concluding Observations on Guatemala, 3 April 1996, CCPR/C/79/add.63, para. 25.
[30] See Human Rights Council, Resolution 9/11.
[31] Office of the United Nations High Commissioner for Human Rights, *Study on the Right to the Truth*, 8 February 2006.
[32] ECHR, Judgment of 4 May 2001, para. 118.
[33] ECHR (GC), Judgment of 15 May 2007, para. 325.
[34] OHCHR, *Study on the Right to the Truth*, para. 55.

above involve cases of individual abuse, albeit often in a context of a general breakdown of the rule of law and respect for human rights.

3. Collective and non-judicial remedies

23. Many authorities have construed the right to the truth to include a public component, above and beyond the right to know of the direct victims and their families. Thus, this Court has held that "society as a whole must be informed of everything that has happened in connection" with severe violations, such as extrajudicial executions.[35] The 2005 Updated Principles on Impunity adopted by the U.N. Commission on Human Rights declare that

> "[e]very people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances that led, through massive or systematic violations, to the perpetration of those crimes."[36]

24. Similarly, the U.N.'s 2005 Basic Principles on Reparations provide that one of the modalities of reparation for gross human rights violations is the "[v]erification of the facts and full and public disclosure of the truth."[37] The highest courts of Argentina, Colombia and Peru, as well as the Bosnian Human Rights Chamber in the Srebrenica cases, have reached similar conclusions in respect of the public's right to the truth.[38]

25. Furthermore, it is clear that the right to the truth requires more than the judicial clarification of facts in the course of criminal investigations and prosecutions aimed at holding the perpetrators accountable. According to the Updated U.N. Principles on Impunity, the rights of victims, their families and the general public to the truth apply "irrespective of any legal proceedings."[39]

26. Judicial investigations constitute, without doubt, a paramount duty of accountability and are often a major contributor to the truth about serious human rights abuses. At the same time, judicial findings are neither sufficient, nor necessarily designed to provide the kind of comprehensive reckoning with past abuses that the public and future generations are entitled to.[40] Such a reckoning would require putting together the broadest possible account of not just the immediate circumstances of the violations, but also the general context, their causes, and the institutional failures that made them possible. States enjoy a certain discretion in determining how to reconstruct the historical truth – whether through independent enquiries,

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[35] *Mack Chang v. Guatemala*, Judgment of 25 November 2003, para. 274 (emphasis added).
[36] Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, Commission Resolution 2005/81, Principle 2.
[37] 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, adopted by U.N. General Assembly Resolution 60/147 of 16 December 2005, Principle 22(b).
[38] Office of the United Nations High Commissioner for Human Rights, *Study on the Right to the Truth*, 8 February 2006, para. 36.
[39] Principle 4.
[40] See paras 23-24 above.

truth commissions, or other credible means – but it is evident that any truth process must go beyond criminal prosecutions.

27. The OAS Resolutions on the right to the truth have specifically "welcome[d] the establishment … of non-judicial or ad hoc mechanisms, such as truth and reconciliation commissions, that complement the justice system."[41] The widespread use of truth commissions and similar processes in transitional societies, including in the Americas, suggests that they are increasingly viewed as an essential means of reparation for the victims, as well as collective closure.[42]

28. The South African Constitutional Court has eloquently described the importance of non-judicial truth processes in countries emerging from decades of state repression:

> "Secrecy and authoritarianism have concealed the truth in little crevices of obscurity in our history. Records are not easily accessible, witnesses are often unknown, dead, unavailable or unwilling. … The Act [establishing the Truth and Reconciliation Commission] seeks to address this massive problem by encouraging these survivors and the dependants of the [victims] to unburden their grief publicly, to receive the collective recognition of a new nation that they were wronged, and crucially, to help them to discover what did in truth happen to their loved ones, where and under what circumstances it did happen, and who was responsible."[43]

29. Hence, the non-judicial aspects of the right to the truth are essential to recognizing the suffering and providing redress for the victims and their relatives. A public and comprehensive reconstruction of the relevant events lays the ground, among other things, for adequate apologies and other forms of symbolic reparation. The International Center for Transitional Justice (ICTJ), one of the world's leading centers of expertise on the topic, argues that a holistic approach is essential following a period of widespread human rights violations:

> "Without any truth-telling or reparation efforts, for example, punishing a small number of perpetrators can be viewed as a form of political revenge. Truth-telling, in isolation from efforts to punish abusers and to make institutional reforms, can be viewed as nothing more than words. Reparations that are not linked to prosecutions or truth-telling may be perceived as 'blood money'…. Experience suggests that to be effective transitional justice should include

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[41] See, for example, the 2009 Resolution, note 13 above, para. 2.

[42] Since the 1983 establishment of Argentina's National Commission for Disappeared Persons (CONADEP), at least ten countries in the Americas have set up official or unofficial truth commissions to shed light on the human rights abuses committed during the military dictatorships and related violations. These include: Argentina (1983), Chile (1990), El Salvador (1992), Ecuador (1996, 2007), Guatemala (1997), Uruguay (2000), Peru (2001), Panama (2001), Paraguay (2003), and Nicaragua (2007). See http://memoryinlatinamerica.blogspot.com/2009/05/latin-america-truth-commission.html.

[43] *Azanian Peoples' Organization (Azapo) and Others v. President of the Republic of South Africa and Others*, 1996 (8) BCLR 1015 (CC), para. 17.

several measures that complement one another. For no single measure is as effective on its own as when combined with the others."[44]

30. The objective reconstruction of the truth about past abuses is also essential to enabling nations to learn from their history and take measures to prevent future atrocities. Prof. Diane Orentlicher, the former Independent Expert tasked with updating the Impunity Principles, has highlighted the strong link between the "collective 'right to know'," the societal right to historical memory and the prevention of future abuses:

> "one of the core ideas [behind the Principles] … is that the public needs to have access to knowledge about the underlying conditions that led to past abuses in order effectively to ensure, as informed and responsible citizens in a democratic society, that those conditions do not recur."[45]

31. The truth, in other words, empowers the body politic to educate itself, reform institutions and promote policies that seek to prevent recurrence of past violations. We are constantly reminded that the struggle for truth is not just a matter of historical memory – or an endemic affliction of young democracies – but an imperative concern for current and future generations everywhere. Thus, after the terrorist attacks of September 2001, and the abusive and disproportionate response of the U.S.-led "war on terror," victims and civil society groups have insisted that the American public "has a right to know what violations were committed in the name of defending its 'national security.'"[46]

Conclusion

32. The precise content and constitutive elements of the right to the truth differ somewhat from one jurisdiction to the other and are, in some respects, in progressive evolution. The OHCHR study cited above concluded, however, that the core content of the right has crystallized sufficiently to imply

> "knowing the full and complete truth about events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them."[47]

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[44] ICTY Fact Sheet, "What is Transitional Justice," 2009; at http://www.ictj.org/static/2009/english/factsheets/what-is-transitional-justice.html.

[45] Remarks made at the International Conference for the Prevention of Torture and Other Ill-Treatment, American University Washington College of Law, February 23, 2009; at http://www.wcl.american.edu/hrbrief/16/4orentlicher.pdf?rd=1.

[46] See, among others, Center for Human Rights and Global Justice, New York University School of Law, "The Right to Truth and Justice: Accountability for U.S. Abuses in Its 'War on Terror'", at www.chrgj.org.

[47] *Study on the Right to the Truth*, note 34 above, para. 59. The Constitutional Court of Colombia, among others, has defined the scope of the right to know in similar terms. See Judgment T-821/07 of October 5, 2007, para. 47 ("…la víctima y los perjudicados por crímenes atroces o internacionales tienen el derecho inalienable a saber la verdad de lo ocurrido. Este derecho apareja el derecho a conocer la autoría del crimen; los motivos y las circunstancias de tiempo, modo y lugar en que ocurrieron los hechos delictivos; y, finalmente, el patrón criminal que marca la comisión de los hechos criminales. … Finalmente, los

In cases of enforced disappearances and related abuses, the right to the truth has also the special dimension of knowing the fate and whereabouts of the direct victim.[48]

B. Relationship between the Right to the Truth and the Right to Information Held by Public Authorities

33. This part of the brief discusses (1) the scope of the right to information in international law, and (2) its relationship to the right to the truth, including (3) with respect to information held by public authorities about human rights abuses, and (4) access to historical archives.

1. Recognition and scope of the right to information

34. According to the jurisprudence of this Court, Article 13 of the Convention guarantees everyone's right "to seek and receive" information held by public authorities – making the Inter-American system a global leader in this area of law.

35. The Court acknowledged early on that the rights of listeners and receivers of information and ideas are on the same footing as the rights of the speaker: "For the average citizen it is at least as important to know the opinion of others or to have access to information generally as is the very right to impart his own opinion."[49] In 2000, the Inter-American Commission on Human Rights expressly recognized that "access to information held by the state is a fundamental right of every individual."[50]

36. In the September 2006 case of *Claude Reyes v. Chile*, the Court confirmed and expanded upon the Commission's position in the following terms:

> "… by expressly stipulating the right to "seek" and "receive" "information," Article 13 of the Convention protects the right of all individuals to request access to State-held information, with the exceptions permitted by the restrictions established in the Convention. Consequently, this article protects the right of the individual to receive such information and the positive obligation of the State to provide it, so that the individual may have access to such information or receive an answer that includes a justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case. … The delivery of information to an individual can, in turn, permit it to circulate in society, so that the latter can become acquainted with it, have access to it, and assess it…."[51]

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familiares de las personas desaparecidas tienen derecho a conocer el destino de los desaparecidos y el estado y resultado de las investigaciones oficiales").

[48] *Ibid.*

[49] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85, November 13, 1985, para. 32.

[50] *Inter-American Declaration of Principles on Freedom of Expression*, adopted at the Commission's 108th regular session, October 19, 2000, para. 4.

[51] *Claude Reyes v. Chile,* note 1 supra, para. 77.

The above holding makes clear that, like the freedom to impart information and ideas, the right of access to state-held information has both an individual and a collective dimension.

37. The recognition of a fundamental right of access by this Court is reflected in state practice and national jurisprudence, including extensively in the Americas. Some ninety countries and major territories around the world have adopted freedom of information laws (statutes) that provide for access to state-held information.[52] Currently, more than 4.5 billion people worldwide live in countries that provide in their domestic law for an enforceable right to obtain information from their governments.[53] In the Americas, at least seventeen countries have nationwide access laws.[54]

38. Furthermore, several countries – including Colombia, Costa Rica, Mexico, Panama, Peru, and Venezuela[55] – have expressly incorporated the right of access to public information into their constitutional bills of rights, formally recognizing its essential role in the proper functioning of a democratic system. Even in the absence of explicit constitutional or statutory authorization, courts in at least three additional countries – Argentina,[56] Chile[57] and Costa Rica[58] – have upheld a fundamental right of access to information as a corollary of freedom of expression and participation rights.

39. Other countries seeking to overcome the legacies of repressive regimes have followed similar paths. The newly democratic South Africa, for example, moved in the late 1990s to entrench the principle of open government within the wider framework of principles designed to distinguish the new government from the

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[52] Roger Vleugels, *Overview of 90 FOIA Countries and Territories*, September 2009, at: http://right2info.org/resources/publications/Fringe%20Special%20-%2090%20FOIAs%20-%20sep%207%202009.pdf.

[53] See population figures provided by Wikipedia for the 90 countries and territories in Roger Vleugels' overview, supra. Wikipedia, *List of Countries by Population,* http://en.wikipedia.org/wiki/List_of_countries_by_population.

[54] These are: Antigua and Barbuda, Belize, Canada, Chile, Colombia, the Dominican Republic, Ecuador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, Trinidad and Tobago, the United States of America, and Uruguay. Argentina and Bolivia have access decrees that apply to the national executive branch, while several other countries, including Brazil, are currently considering proposals to enact national freedom of information laws.

[55] For links to each of these constitutional provisions, see: http://right2info.org/constitutional-protections-of-the-right-to.

[56] Acordada de la Corte Suprema de Justicia de la Nación No. 1/2004, Exp. 315/2004 Adm. Gral. The Supreme Court of Justice held that Article 1 of the national Constitution, which establishes a republican form of government, gives rise to an obligation of transparency because a republic requires that government actions be available to the public.

[57] *Casas Cordero* case (Constitutional Tribunal of Chile), note 2 above. The Tribunal held that the right of access was protected by the Chilean constitution as an integral part of the broader right to freedom of expression and the constitutional principle of a democratic republic.

[58] *Navarro Gutiérrez v. Lizano Fait*, Judgment of April 2, 2002 (Constitutional Court), *as translated in* the 2003 Report of the OAS Special Rapporteur for Freedom of Expression, p. 161. The Costa Rican Court found that access to government information facilitates "the formation and existence of a free public opinion, which is the very pillar of a free and democratic society." *Ibid.*, para. VI.

previous apartheid regime, which was characterized by autocracy and an "obsession with official secrecy."[59] The right of access to information held by public authorities is guaranteed by the Constitution as a separate basic right.[60] Furthermore, the legislature has prescribed that courts must prefer interpretations that advance the objective of moving from a society based on secrecy and authority to a more open democracy.[61]

40. As regards the scope of the right, this Court has underscored the "indispensable" presumption in a democratic society that "all information is accessible," subject only to restrictions that can be imposed, under paragraph 2 of Article 13, on a case-by-case basis.[62] That means that all information held by public authorities is, in principle, subject to the right of access—including historical archives and classified information.

41. A recently finalized draft Inter-American Model Law on Access to Information guarantees access "to any type of data [record] in custody or control of a public authority … regardless of its form, source, date of creation, or official status, whether or not it was created by the public authority that holds it, and whether or not it is classified."[63]

42. Under the draft Model Law, information requesters are entitled, subject to enumerated restrictions,

> "to be informed whether or not the public authority in question holds a record containing that information or from which that information may be derived; [and] if the public authority does hold such a record, to have that information communicated to the requester in a timely manner."[64]

43. In addition, many leading freedom of information regimes, in the Americas and beyond, require public authorities to proactively collect, generate and publish information on a number of issues that are considered important to democratic accountability. Thus, the draft Model Law requires authorities to proactively publish and regularly update some 16 different categories of information, which relate to their respective internal policies, services and operations, financial management, senior officials, and record-keeping systems.[65]

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[59] *Bill of Rights Handbook*, pp. 642, 684-85.
[60] Jonathan Klaaren and Glenn Penfold, "Access to Information," in *Constitutional Law of South Africa,* (2nd ed.), Eds. Woolman, Roux, Klaaren, Stein, and Chaskalon. Vol. I, p. 62.
[61] Promotion of Access to Information Act (2000), section 2(1).
[62] *Claude Reyes,* para. 92. Article 13.2 of the American Convention allows restrictions to the right of freedom of expression "to the extent necessary to ensure: a. respect for the rights or reputations of others; or b. the protection of national security, public order, or public health or morals."
[63] OAS Doc. CP/CAJP-2840/10, Article 1(a), (c) (emphasis added). The draft Model Law was elaborated by the Group of Experts on Access to Information (coordinated by the Department of International Law of the Secretariat for Legal Affairs), pursuant to OAS General Assembly Resolution AG/RES. 2514 (XXXIX-O/09). It was presented to the Committee on Juridical and Political Affairs of the OAS Permanent Council on April 28, 2010.
[64] Ibid., Article 5(a), (b).
[65] Ibid., Article 12.

44. In certain contexts, related to information that is either required by law or considered basic to good governance, public authorities are further required to collect and generate information for public access. Under the draft Model Law,

> "[w]hen a public authority is unable to locate information responsive to a request, and records containing that information should have been maintained, it is required to make reasonable efforts to gather the missing information and provide it to the requester."[66]

45. Courts in various countries have similarly recognized state obligations to generate information under such circumstances. Thus, an Argentine court ordered the City of Buenos Aires, upon application by an information requester, to comply with a separate law that required it to "develop a diagnostic map of the food and nutritional situation" in the city with a view to identifying malnutrition in disadvantaged communities. The City had failed to comply for more than ten years.[67]

46. Under the Indian Right to Information Act, if public authorities have not collected and maintained information that they are authorized to collect from a private body under any law, citizens may request such information and the public authority will have to collect that information and make it available to the requestor.[68]

47. In 2006, the Constitutional Court of Hungary ruled that the government is under a general obligation to maintain records, because failure to do so would directly and seriously restrict the public's right of access to information and, accordingly, instructed the legislature to pass a law requiring records to be kept of cabinet sessions.[69] The legislature duly passed such a law which, among other things, amended the regulations on preparation of minutes of cabinet meetings.[70]

2. Relationship between the right to information and the right to the truth

48. Like freedom of expression and information generally, the right to access state-held information is an eminently instrumental right. In the words of the Chilean Constitutional Tribunal, the right of access is "an essential mechanism for ensuring the full effectiveness of the democratic regime," which promotes, in turn, "the adequate exercise and protection of other fundamental rights."[71]

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[66] Ibid., Article 34.

[67] *Asociación Civil por la Igualdad y la Justicia v. City of Buenos Aires*, Judgment of November 7, 2008 (Juez de Primera Instancia en lo Contencioso Administrativo y Tributario de la Ciudad de Buenos Aires), Amparo No. 27599.

[68] The Right to Information Act (No. 22 of 2005), adopted on June 15, 2005, section 2(f); available at http://righttoinformation.gov.in/webactrti.htm.

[69] Decision of July 13, 2006, *Magyar Közlöny* (Official Gazette) 2006/84. An English summary is available at: http://codices.coe.int/NXT/gateway.dll/CODICES/precis/eng/eur/hun/hun-2006-2-003?f=templates$fn=document-frame.htm$3.0.

[70] E-mail communication from Adam Foldes, Transparency International-Hungary, October 27, 2009 (on file with the Justice Initiative).

[71] *Casas Cordero* case, note 2 above.

49. In the most immediate sense, access to records held by public authorities – and in particular archival information directly or indirectly related to abuses committed by state agents – is essential to any process that seeks to reconstruct the truth about past atrocities and other serious violations. The right to information – which includes the right of access to information held by the state about the requester herself or missing family members (known as habeas data) – gives both victims and the society at large an essential tool for getting at the truth and securing justice.

50. The Inter-American Commission has recognized that

> "recourse to the action of habeas data has become a fundamental instrument for investigation into human rights violations committed during past military dictatorships in the Hemisphere. Family members of disappeared persons have used habeas data actions to obtain information concerning government conduct, to learn the fate of disappeared persons, and to exact accountability. Thus, these actions constitute an important means to guaranteeing the 'right to the truth'."[72]

51. In relation to the broader right to government information, the Constitutional Court of Colombia has noted that "the right of access to public information is a tool that is crucial for the satisfaction of the right to the truth of victims of arbitrary actions, as well as society's right to historical memory."[73]

52. In addition to being an essential tool, the right of access guaranteed by Article 13 of the Convention also provides an important foundation of principle for the right to the truth, and especially the collective or societal component of the right. In a common, key dimension, both the right to a transparent government and the right to the truth are essentially vehicles for securing state accountability – and the overall protection of human rights and public interests.

53. As such, they also have important implications for participatory democracy and sound policy-development, including with respect to the fight against impunity.[74] Comparative doctrine has established, for example, that the right to information is a precondition for the exercise of the basic rights of political participation and representation—guaranteed inter alia by Article 23 of the American Convention, which secures the right of every citizen "to take part in the conduct of public affairs, directly or through freely chosen representatives." This Court noted in *Claude Reyes* that "access to information held by the State may permit participation in public governance by virtue of the social oversight that can be exercised through such access."[75]

54. As the three specialized mandates on freedom of expression have noted, "[i]mplicit in the freedom of expression is the public's right to open access to information and

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[72] *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, para. 290.
[73] Judgment C-491/07 of June 27, 2007, p. 1.
[74] Orentlicher remarks, para. 30 above; see also the preamble to the 2009 OAS *Resolution on the Right to the Truth*.
[75] *Claude Reyes*, note 1 above, para. 86.

to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented."[76] Both truth and the right to know are essential to the promise of "never again."

3. Presumed public nature of information on human rights violations

55. Under Article 13 and this Court's jurisprudence, any restrictions of the right to information must be expressly established by law, serve a legitimate aim, and be necessary in a democratic society.[77] Since no democratic society can conceivably benefit from the cover-up of human rights abuses, any information held by public authorities that sheds light on such violations must be made public. Withholding any part of such information, if at all permissible, needs to be justified by the weightiest of considerations—comparable, for example, to the right of the victims not to disclose particularly painful or sensitive personal information about their ordeals.

56. The presumption of openness in this context is firmly established in the laws of the Americas and – as the next section on historical archives will show – to a great extent, in the practice of the region. Brazil's own Access to Information Bill, which is currently under consideration by the national Senate, provides, in the opening provision on restrictions, that "[i]nformation or documents that concern conduct involving violations of human rights, committed by public officials or at the behest of public officials, may not be subject to access restrictions."[78]

57. The access to information laws of Guatemala,[79] Mexico,[80] Peru,[81] and Uruguay,[82] among others, include similar provisions. So does the draft Inter-American Model

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[76] Joint Declaration of the UN Special Rapporteur on Freedom of Opinion and Expression, the OAS Special Rapporteur on Freedom of Expression and the OSCE Representative on Freedom of the Media, November 26, 1999. *See also* the 2004 Joint Declaration of the three mechanisms, adopted on December 6, 2004, which affirms that "[t]he right to access information held by public authorities is a fundamental human right which should be given effect at the national level through comprehensive legislation…."

[77] *Claude Reyes*, paras 89-91.

[78] Bill PLC 41/2010, adopted by the Chamber (lower house of the Brazilian Congress) on April 13, 2010, Article 21. In original: "As informações ou documentos que versem sobre condutas que impliquem violação dos direitos humanos praticada por agentes públicos ou a mando de autoridades públicas não poderão ser objeto de restrição de acesso."

[79] Law on Access to Public Information (2008), adopted by Congressional Decree No. 57-2008, Article 24: "In no case can information related to the investigation of violations of fundamental human rights or crimes against humanity be classified or reserved [restricted]." (In original: "En ningún caso podrá clasificarse como confidencial o reservada la información relativa a investigaciones de violaciones a los derechos humanos fundamentales o a delitos de lesa humanidad.") Available at http://www.scspr.gob.gt/docs/infpublic.pdf.

[80] Federal Law on Transparency and Access to Public Information (2002), Article 14: "[Information related to] the investigation of grave violations of fundamental rights or crimes against humanity cannot be considered restricted [classified]." (In original: "No podra invocarse el caracter de reservado cuando se trate de la investigacion de violaciones graves de derechos fundamentales o delitos de lesa humanidad.")

[81] Transparency and Access to Public Information Act No. 27806, Article 15: "Information related to violations of human rights or the Geneva Conventions of 1949, committed under any circumstances, by any person, shall not be considered classified." ("No se considerará como información clasificada, la

Law, which stipulates that the exceptions to the right of access provided for in the law "do not apply in cases of serious violations of human rights or crimes against humanity."[83]

58. Disclosing information on human rights violations, both proactively and upon request, is not only required by a compelling public interest;[84] it is also a corollary of the general state duty, under Article 1 of the Convention, to respect and ensure the exercise of the Convention rights and freedoms, including by taking measures to prevent their violation. Serious abuses, such as torture, enforced disappearances or extrajudicial executions, trigger the even more onerous obligation to actively and comprehensively investigate the facts, and identify and punish the perpetrators. As the Inter-American Commission observes,[85] initial disclosures are often instrumental in helping victims and others pull the first threads that end up unraveling the veil of secrecy and indifference about past abuses.

4. Access to historical archives and classified information

59. As submitted, archival records held by public authorities, including national archive institutions, are fully subject to the right to information: citizens and others have no lesser rights to information their governments hold about the past than about current affairs. Access to archival records is often essential to the success of both truth processes and judicial proceedings seeking to hold the perpetrators accountable.

60. The Orentlicher Principles on Impunity recognize that states have a duty to preserve memory, including by maintaining and securing archives:

> "A people's knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State's duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations."[86]

61. In addition, the Principles devote a separate section to the preservation of and access to archives. Principle 15 provides as follows:

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relacionada a la violación de derechos humanos o de las Convenciones de Ginebra de 1949 realizada en cualquier circunstancia, por cualquier persona.")

[82] Right of Access to Public Information Act No. 18.381 (2008), Article 12: "Non-application in cases of human rights violations. – The entities subject to this law shall not invoke any of the exceptions [to access] provided for in the preceding articles when the requested information refers to human rights violations or is relevant to the investigation or prevention of such violations." ("(Inoponibilidad en casos de violaciones a los derechos humanos).- Los sujetos obligados por esta ley no podrán invocar ninguna de las reservas mencionadas en los artículos que anteceden cuando la información solicitada se refiera a violaciones de derechos humanos o sea relevante para investigar, prevenir o evitar violaciones de los mismos.") (Emphasis added.)

[83] Article 45.

[84] Under Article 44 of the draft Model Law, a public authority "may not refuse to indicate whether or not it holds a record, or refuse to disclose that record, … unless the harm to the interest protected by the relevant exception outweighs the general public interest in disclosure."

[85] See *Report on Terrorism and Human Rights,* note 72 above.

[86] Principle 3.

> "Access to archives shall be facilitated in order to enable victims and their relatives to claim their rights. Access shall be facilitated, as necessary, for persons implicated, who request it for their defence. Access to archives should also be facilitated in the interest of historical research, subject to reasonable restrictions aimed at safeguarding the privacy and security of victims and other individuals. Formal requirements governing access may not be used for purposes of censorship."

62. As a necessary condition for guaranteeing public access to archives – and especially those containing information on human rights abuses – states must ensure their preservation, including by taking active measures to prevent their destruction. Destruction of archives is per se a violation of the right to the truth, and widely prohibited by freedom of information and preservation of memory laws.[87] Thus, the draft Model Law makes it "a criminal offense to willfully destroy or alter records after they have been the subject of a request for information."[88] Destroying records without authorization ought to be an administrative offense.[89]

63. The laws and practices of several nations in the Americas that are seeking to address and shed light on past abuses highlight the key importance of access to archives.

64. In Mexico, former President Fox announced in June 2002 the opening of tens of thousands of formerly secret documents about state-sponsored terror from the 1960s to the 1980s. Amounting to millions of pages, the records are now available to the public at Mexico's National Archives.[90]

65. Mexico's Federal Access to Information Institute (IFAI) has ruled, in its adjudicating capacity, that the public is also entitled to have meaningful access to the criminal investigation files related to cases of gross human rights violations, as well as information on the progress of the investigations. In a 2004 case, the Institute ordered the prosecution to grant a requestor access to a "public version" of the genocide file involving former President Echeverria, among others.[91]

66. In Guatemala, prompted by the July 2005 chance discovery of a police archive containing information on operations against former political dissidents, President Colom indicated that his government would declassify all military files revealing information on past abuses, as well as set up a Peace Archives. Despite ongoing resistance from the Armed Forces to the disclosures, the Peace Archives maintain that "information related to the internal armed conflict is an historical topic about

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[87] See inter alia OAS Resolution AG/RES. 2267 (XXXVII-O/07) on the Right to the Truth, adopted on June 5, 2007.
[88] Article 65.
[89] Article 66(f). It is also an administrative offense to "fail to create a record either in breach of applicable regulations and policies or with the intent to impede access to information." Article 66(e).
[90] Kate Doyle, "Mexico Opens the Files," *The Nation*, August 5, 2002.
[91] Resolution 1005/04 of December 7, 2004. IFAI ruled that the prosecution could exclude any data affecting the privacy of third parties from the public version, but should indicate generally which parts of the file were not disclosed. Ibid., p. 19.

which the Guatemalan society has a right to know."[92] The rescue and analysis of the millions of documents from the recovered police archive have already contributed to the re-opening of a number of trials for crimes against humanity that had been frozen for many years. In February 2009, the human rights prosecutor overseeing the police archive passed a regulation that guarantees public access to the archival records.[93] As noted, the documents are subject to the "human rights violations" clause of Guatemala's newly adopted access to information law.

67. In Argentina, President Fernandez de Kirchner decreed in January 2010 the lifting of classification of all military records related to the activities of the armed forces between 1976 and 1983. The decree was prompted by thousands of requests for access filed with the Ministry of Defense by hundreds of judges investigating crimes committed during the military dictatorship.[94]

68. States have made important disclosures not only about abuses of the past, but also of recent history. Thus, in August 2009, the United States Government released the bulk of a 150-page 2004 report by the Central Intelligence Agency's Inspector General on the abusive interrogation techniques used by the CIA on terrorist suspects (known as "the torture report"). The release was prompted by deadlines set by a federal judge in a freedom of information case brought by rights groups, as well as policy changes by the Obama Administration. Further disclosures by the U.S. government in response to the freedom of information request resulted in the publication of some 100,000 documents on interrogation policies and practices. It is also noteworthy that de-classified U.S. government documents on operations of Latin American dictatorships have been used as evidence in human rights prosecutions in Argentina, Chile, Guatemala, Mexico, Peru and Uruguay, among other countries.[95]

De-classification issues

69. It is presumed that the public interest in disclosure of archival information—including (formerly) classified records—becomes progressively stronger as the records grow older. For this reason, most democratic countries have adopted regimes for the periodic or automatic de-classification of secret archives and other reserved information.

70. In this respect, the draft Model Law provides as follows:

> "The exceptions [provided for the protection of a public interest] do not apply to a record that is more than [12] years old. Where a public authority wishes to

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[92] Freedominfo.org, "Active Duty Chief of Police Arrested for 25-Year-Old Political Disappearance of Labor Activist," March 20, 2009.
[93] Ibid.
[94] Freedominfo.org, "Argentina: Declassification of Military Records on Human Rights," January 14, 2010.
[95] Jesse Franzblau and Emilene Martinez-Morales, "US Torture Files and Access to Human Rights Information," Freedominfo.org, August 25, 2009.

reserve the information from disclosure, this period can be extended for another [12] years only by approval by the Information Commission."[96]

71. By the same token, excessively long classification periods, including for national security-related records, undermine the very essence of the Article 13 right to information. If, in addition, those records include information relevant to gross human rights violations, there should be – for the reasons outlined in the preceding section of this brief – a very strong presumption that they should be declassified without delay. Pursuant to Article 25 of the Convention, the ultimate decision on whether to disclose or withhold the information cannot be left to the discretion of the executive authorities; it should be subject to independent review by "a competent court or tribunal."

72. Both the case law of this Court and national standards suggest that there is an absolute presumption that records related to gross violations of human rights must become public. In *Mack Chang v. Guatemala*, the Court held that,

> "in cases of human rights violations, the State authorities cannot resort to mechanisms such as official secrets or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or proceeding."[97]

73. Despite other specificities of an official investigation, the same considerations in favor of disclosure should apply to requests for access presented by victims or their families, human rights protectors, and even the general public. The human rights "super-access" clauses in the national laws described above, as well as the relevant provision of the draft Model Law, do not seem to allow for exceptions to disclosure either. Experience from various transitional justice processes has also shown that, in hindsight, classification of old archives serves little or no genuine national security interest, and is often invoked only to shield perpetrators from truth and justice.

74. The Impunity Principles also appear to leave little scope for exceptions to the right of access to archival information:

> "Access [to archives by courts and non-judicial enquiries] may not be denied on grounds of national security unless, in exceptional circumstances, the restriction has been prescribed by law; the Government has demonstrated that the restriction is necessary in a democratic society to protect a legitimate national security interest; and the denial is subject to independent judicial review."[98]

75. As the latter Principle implies, the state should carry the heavy burden of proving to an independent court, in relation to each category of relevant records, that the public interest in secrecy is stronger than the public interest in providing redress for

[96] Article 43. The draft suggests that most categories of reserved or classified information should be made public after a period of 12 years; for the most sensitive records, the initial classification could be extended by another 12 years, subject to the approval of an independent information authority.
[97] Judgment of 25 November 2003, para. 180.
[98] Principle 16 (emphasis added).

serious rights abuses. In this respect, the draft Model Law details the state's evidentiary obligations as follows:

> "The burden of proof shall lie with the public authority to establish that the information requested is subject to one of the exceptions contained in [the Model Law]. In particular, the public authority must establish:
>
> (a) that the exception is legitimate and strictly necessary in a democratic society based on the standards and jurisprudence of the Inter-American system;
>
> (b) that disclosure will cause substantial harm to an interest protected by this Law; and
>
> (c) that the likelihood and gravity of that harm outweighs the public interest in disclosure of the information."[99]

76. The European Court of Human Rights has also recognized in a series of cases that individuals have a right to access, challenge and correct information the state holds about them—including in (formerly) classified files of the totalitarian secret services. Thus, in *Rotaru v. Romania*, the Court held that Romania had violated Article 8 (right to privacy) of the European Convention by failing to properly regulate the use of and access to information in the archives it inherited from *Securitate*, dictator Nicolae Causcescu's infamous secret service.[100] In particular, the Court found that the current intelligence service retained unacceptably broad discretion in choosing how to use the *Securitate* files.

77. In *Turek v. Slovakia*, the Court found that "it cannot be assumed that there remains a continuing and actual public interest in imposing limitations on access to materials classified as confidential under former regimes," especially when such records are "not directly linked to the current functions and operations of the security services."[101]

II. SUBMISSIONS ON THE CURRENT CASE

78. In light of the principles discussed in the first part of the brief, we submit that the Respondent State is responsible for the following violations of the applicants' and the public's right to the truth.

A. Delayed and ineffective state response amounts to inhuman or degrading treatment

[99] Article 53(1) (emphasis added).
[100] Judgment of May 4, 2000, Application No. 28341/95.
[101] Judgment of February 14, 2006, Application No. 57986/00, para. 115 (involving lustration proceedings against the applicant). See also *Petrenco v. Moldova*, Judgment of March 30, 2010, Application No. 20928/05, Joint Concurring Opinion of Judges Garlicki, Sikuta and Poalelungi (arguing that "an arbitrary bar on any reasonable access" to former secret service archives would constitute a violation of both Article 8 (privacy) and Article 10 (freedom of information) of the Convention).

79. The applicants in the current case have spent some 28 years in an effort to find out – through judicial proceedings and other means – the fate of their disappeared and extra-judicially executed relatives. They have sought, among other sources of truth, access to military, police and intelligence records that could shed light on the whereabouts of their loved ones or their remains, the circumstances that led to their disappearance or execution, as well as the broader context in which these most serious violations of human rights and customary international law took place. In the absence of any criminal accountability—due to the operation of the amnesty laws still in force in Brazil—they have pursued truth as their central concern and form of available redress.

80. After more than three decades, the applicants have received very little by way of truth or other reparation. For the first seven years following their August 1982 civil action, the Brazilian legal system simply ignored them. Between 1989 and October 2007—when the national Supreme Court issued a final judgment favorable to the complainants that is yet to be complied with—the federal Government appears to have used any possible form of appeal available to delay the proceedings,[102] in what can only be characterized as a deliberate effort to deny the victims' right to the truth.

81. It is often said that information is a "perishable commodity."[103] Recognizing the need for prompt processing of requests for information, this Court held, in *Claude Reyes*, that states should adopt effective and appropriate procedures "for processing and deciding requests for information, which establish time limits for taking a decision and providing information."[104] Since timeliness tends to be essential to the proper fulfillment of the right to information, access that is excessively delayed is, in practice, access denied.

82. The Respondent State claims that it has recently made available to the domestic court overseeing execution of the Supreme Court judgment some 16,000 pages of documents related to the *Guerrilha do Araguaia*.[105] The applicants contend, however, that these records contain little new information, and no data on the actual circumstances of the disappearances or the victims' whereabouts. They also appear to contain no or very few records from the Armed Forces' archives. The Army operations against the *Guerrilha* continue to remain shrouded in great secrecy.

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[102] Commission's Application of March 26, 2009, paras 132-138. Between 1993 and October 2007, the federal Government pursued no fewer than seven appeals against court decisions, at multiple levels, that were favorable to the applicants. Ibid.

[103] European Court of Human Rights, *The Sunday Times v. U.K. (No. 2)*, Judgment of November 26, 1991, p. 29.

[104] Para. 163. See also para. 137: "When State-held information is refused, the State must guarantee that there is a simple, prompt and effective recourse that permits determining whether there has been a violation of the right of the person requesting information and, if applicable, that the corresponding body is ordered to disclose the information. In this context, the recourse must be simple and prompt, bearing in mind that, in this regard, promptness in the disclosure of the information is essential."

[105] State Response to the Commission's Application, dated October 31, 2009.

83. This is, by any reasonable standard, an ineffective State response to the applicants' search for the truth over almost three decades. The Respondent State's obstructive attitude continued even after this Court's explicit finding, in September 2006, that Article 13 of the Convention guarantees a fundamental right of access to state-held information.

84. Under the jurisprudence of this Court, the next of kin of victims of enforced disappearances may suffer violations of their own Article 5 right not to be subjected to inhuman or degrading treatment as a result of state actions and omissions. Thus, the Court has found such violations in cases where state authorities failed to search for the disappeared or their remains, harassed or threatened their families, delayed investigations for intolerable periods and/or failed to inform the relatives of their progress, or otherwise treated them in humiliating ways.[106]

85. In particular, inhuman or degrading treatment may result from the anguish experienced by the victims' relatives due to the extended uncertainty, and lack of reliable information, about the fate of the disappeared, the location of their remains, the circumstances of their treatment, and the identities of their tormentors.[107] In the case of the *19 Tradesmen*, the Court considered a delay of ten years in issuing the first criminal verdicts against the perpetrators to be a significant contributor to the violation of the relatives' rights under Article 5 of the Convention.[108]

86. In view of the seriousness of the underlying violations in the current case, and the inevitable suffering and humiliation that the prolonged denial of truth must have caused to the families of the disappeared, it is submitted that the respective State actions and omissions amount to inhuman or degrading treatment of the relatives of the direct victims within the meaning of Article 5(2) of the Convention. They also amount to a wholesale violation of the Brazilian public's right to the truth, under Article 13 of the Convention, about the *Guerrilha do Araguaia* case.

B. Failure to preserve records

87. In the course of the civil proceedings initiated by the applicants, the Brazilian Government and/or representatives of its Armed Forces have made, at various times, statements to the effect that archival records related to the *Guerrilha do Araguaia* have been destroyed. The Armed Forces have made similar representations to other non-judicial bodies, such as the Special Commission on Political Killings and Disappearances (CEMDP).[109]

88. It is, however, difficult to assess the credibility of these claims given the authorities' failure to clarify – including for the purposes of these Inter-American proceedings –

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[106] See *Humberto Sanchez v. Honduras*, Judgment of June 7, 2007, paras 101-103; and the *Case of 19 Tradesmen v. Colombia*, Judgment of July 5, 2004, paras 210-216.
[107] Ibid.
[108] Para. 215. Article 5 § 1 guarantees the right of every person "to have his physical, mental, and moral integrity respected"; Article 5 § 2 protects the right not to be "subjected to torture or to cruel, inhuman, or degrading punishment or treatment."
[109] Applicants' Motion of July 18, 2009.

the circumstances of such supposed destruction of records, including the time(s) and place(s) of destruction, the precise content of the destroyed records, the officials who authorized the destruction, and the laws and regulations they relied upon, if any. No contemporaneous documentary account of the destruction of records has been provided.

89. As submitted, the deliberate destruction of records containing information on human rights abuses, and especially gross abuses such as enforced disappearances, is *per se* a flagrant violation of the right to the truth and a nation's right to its historical memory. The violation is even more serious if the destruction of records is found to have occurred after the victims' relatives, other state agencies or members of the public requested access to such records—in this case, after August 1982. The Court should order the Respondent State to conduct a comprehensive investigation into the alleged destruction of *Guerrilha do Araguaia* records, make its findings fully public, and punish those found responsible for any destruction.

C. Failure to collect privately-held records and conduct adequate searches of state archives

90. In spite of the allegations that the Brazilian Armed Forces' archives relevant to the case have been destroyed, media outlets and/or former Army personnel involved in the *Guerrilha do Araguaia* operations have made public in recent years a considerable amount of privately-held documentary evidence related to those operations. The published records disclosed information on specific Armed Forces and intelligence operations against the *Guerrilha do Araguaia*, including names of commanding officers, names and photographs of detainees, the circumstances of the disappearance and/or execution of certain detainees, and the possible location of mass graves. It was these disclosures that made possible the location and identification of the remains of Maria Lucia Petit da Silva, one of the victims in this case.[110] In addition, independent researchers have published several books on the case of the *Guerrilha do Araguaia*, relying to a great extent on interviews with, and documents provided by, former Army personnel with direct knowledge of the operations.

91. These private disclosures cast serious doubt on the claim that all relevant Army archives have been destroyed and/or are not recoverable. The Respondent State indicates that it has made public calls for the voluntary hand-over of privately-held documentation on the abuses of the military dictatorship.[111] Considering, however, that most of the privately disclosed documents to date are copies of original government records, the Government should have undertaken a much more systematic effort for their recovery, using, if necessary, the coercive force of the law.

92. In addition, the private disclosures and other developments suggest that the archival searches conducted by the authorities, and in particular the Armed Forces, have

[110] Ibid, p. 75.
[111] Respondent's Motion of October 31, 2009.

been inadequate. Thus, it appears that after the Supreme Court judgment in this case, the Armed Forces have produced a small amount of new records, whose existence they had earlier denied.

93. Under the draft Model Law, "the public authority in receipt of the request [for information] must undertake a reasonable search for records which respond to the request."[112] The authority also carries the burden of proving that the searches conducted were adequate.[113] Since the State, unlike the requester, has exclusive and privileged access to the information on the availability of records, the Court must subject the claims on the adequacy of the searches to strict scrutiny.

94. In the current case, the State should be required to provide the applicants and the Court with a detailed account of the documentary searches its various agencies have performed to date, including their means and methods, an index of the physical or digital archives that have been searched and those that have not been, as well as the challenges the authorities have faced in identifying and locating the relevant records, and how they have addressed them. In addition, given the consistently obstructive attitude the Brazilian Armed Forces have adopted toward this case, the State should be required to conduct fresh and comprehensive physical searches of the Armed Forces' archives, using investigators and archival specialists independent of the Armed Forces, who should be granted the fullest possible access and, if necessary, proper security clearance.

D. Failure to establish independent truth-seeking mechanisms

95. We have argued that judicial clarification of the facts is often an insufficient means of compliance with the victims' and the public's right to the truth about massive or gross human rights violations. This is particularly true in contexts, such as Brazil's, where genuine criminal accountability has not been legally or practically possible. Other nations in the Americas and elsewhere have successfully used independent truth-seeking mechanisms, such as truth and reconciliation commissions, to this effect.

96. A comprehensive review of the activities of Brazil's Special Commission on Political Killings and Disappearances (CEMDP) is beyond the scope of this submission. There is little question, however, that CEMDP's mandate and output were not those of a proper truth commission. Among other weaknesses, the Commission's work was greatly hampered by its lack of effective access to the archives—not to mention the active cooperation—of the Armed Forces and intelligence agencies.

97. The shortcomings of the CEMDP process were implicit in President Lula da Silva's December 2009 announcement that his Government would propose the establishment of a proper truth and reconciliation commission (TRC) in the near future. While this is an encouraging development, the reaction of the chief of the

[112] Article 32.
[113] Ibid, Article 53(2).

armed forces and the minister of defense, who reportedly threatened to resign,[114] is a reminder that the TRC process is likely to fail if no measures are taken to ensure the full cooperation of the Brazilian military.

E. Structural obstacles to access: overbroad and discretionary classification laws

98. One major challenge the TRC process will face is Brazil's current classification laws, which restrict public access to a very broad range of state-held information that is classified or reserved in the name of national security interests or individual personality rights—including, arguably, the privacy and reputational interests of military and intelligence personnel who were involved in political repression operations during the dictatorship. The State claims that the classification laws have not been applied in the current case. That claim is difficult to assess, however, in the absence of a comprehensive account by the State as to what records were searched, what records were found relevant to the applicants' request for information, and what parts of these were classified. Furthermore, the country's overbroad classification laws stem from and, at the same time, promote a culture of excessive secrecy and non-accountability within the military, which has inevitably harmed any genuine quest for the truth the Brazilian authorities may have undertaken in the current case. By the same token, they are bound to undermine any TRC process of the future.

99. We understand the Inter-American Commission is submitting two comprehensive expert reports on the compatibility of Brazilian classification laws with the Convention and this Court's right to information jurisprudence. We shall therefore limit ourselves to a brief discussion of the most problematic aspects of these laws and regulations.

100. Current Brazilian legislation grants the Executive branch broad discretion to classify national security-related records for up to 60 years, and records affecting personal honor and privacy for up to a hundred years.[115] In addition, a 2005 statute authorizes a commission composed exclusively of executive officials to extend for indefinite periods of time, and without limit, the classification of any records whose disclosure "would threaten the sovereignty, territorial integrity, and international relations" of the country.[116] Key notions such as the definition of "national security," "international relations," and other protected interests, as well as what would constitute harm to such interests sufficient to trigger different levels of classification, are left to the complete discretion of the Executive. The domestic laws and regulations do not seem to provide for the regular and/or automatic de-classification of records whose withholding is no longer justified—a major feature

[114] Ansalatina.com, "Brazil Ddhh: Comision De Verdad Limpiara Imagen Militar, Gobierno" ("Human Rights in Brazil: Truth Commission Will Cleanse Image of Military, Government"), April 21, 2010.
[115] See Law on National Policies on Public and Private Archives (No. 8.159 of January 8, 1991), art. 23(2)-(3), in conjunction with Law 11.111 of May 5, 2005, arts 6-7.
[116] Law 11.111, Article 6(2).

of classification regimes in established democracies. There is, also, no exception made for information related to gross human rights violations, either past or present.

101. These structural limitations of the right of access under Brazilian law raise serious questions of compatibility with Article 13 of the Convention: including as to whether they are sufficiently precise; whether they serve a legitimate aim; and, most importantly, whether they are necessary in a democratic society. They are particularly vulnerable to the test of Article 13 in two respects: (1) they do not provide for balancing of secrecy interests with other compelling public interests, such as the right to the truth and accountability for human rights abuses;[117] and (2) they do not recognize that secrecy considerations tend to become progressively weaker with the passing of time. For example, protection of the reputational rights of Army personnel for one hundred years—assuming they have any right to privacy while participating in military operations—is manifestly disproportionate. More generally, it is difficult to imagine that the disclosure of the (great majority of) military records relevant to the *Guerrilha do Araguaia* or other dictatorship abuses would currently pose any discernible harm to Brazil's national security.

102. The Brazilian Government should follow the example of its neighboring countries, which share a history of past atrocities, and order the comprehensive declassification of all archives and information related to the human rights abuses committed during the military dictatorship. This will be an indispensable prerequisite for the success of any TRC process.

103. In conclusion, the Respondent State has failed to comply with the October 2007 judgment of its Supreme Court on the current case. It has similarly failed to respect the applicants' and the Brazilian public's right to the truth under the Convention.

CONCLUSION

104. We have argued that victims, their relatives, and the general public have a fundamental right to the truth about gross violations of human rights and international humanitarian law. This right includes, as a minimum, the right to know the full and complete truth about the events that transpired, and their specific circumstances and participants, including the circumstances in which the violations took place and the reasons therefore. We respectfully urge the Court to expressly recognize the right to the truth as an autonomous right, stemming from Articles 1, 8, 13 and 25 of the Convention, which is separate from, if related to, the right to judicial accountability. In particular, grounding the right to the truth on Article 13 would grant both victims and the general public an unambiguous basis for claiming a judicially enforceable right of access to relevant information held by the state, including classified records. We also urge the Court to expressly recognize the non-judical component of the right to the truth, which is essential to constructing not only a comprehensive account of past abuses, but also effective policies and

[117] See Section I.B.3 above on the nearly absolute presumption of publicity of such records.

processes aimed at preventing their recurrence. Such findings would help strengthen and elucidate not only this Court's right to the truth jurisprudence, but also the general development of international human rights law on the matter.

105. On the merits of the current case, we have submitted that the Respondent State is responsible for multiple violations of the applicants' and the public's right to the truth. After more than three decades, the families of the *Guerrilha do Araguaia* victims have yet to receive a proper account of the fate and whereabouts of their loved ones, or an acknowledgment of state responsibility for these crimes. The silence and neglect to which they have been, and continue to be, subjected by the state authorities must have caused the applicants significant pain and suffering amounting to inhuman or degrading treatment, under Article 5(2) of the Convention.

106. More specifically, the State has violated their right to the truth by failing to (i) grant them access to relevant information in its possession in a timely and effective fashion, including by failing to undertake a systematic de-classification of relevant records; (ii) prevent and/or investigate the possible destruction of relevant military and intelligence records; (iii) take adequate measures to collect privately-held information and conduct adequate searches of state archives; (iv) establish independent and effective truth-seeking mechanisms; and (v) adopt laws and regulations designed to respect and ensure the full exercise of the right to the truth about gross human rights violations.

107. Should the Court find a violation of the right to the truth in this case, we respectfully submit it should order the Respondent State to provide, in timely fashion, a full account of the facts of the enforced disappearances and extrajudicial executions related to the *Guerrilha do Araguaia*; the reasons and processes that led to such state actions; the reasons for the related failures of any preventive mechanisms; the responsibilities of officials and agencies at all levels of government; and, where appropriate, the identification of those responsible for the multiple Convention violations.

108. The Respondent State should choose the most effective means of compliance with its obligations per the above paragraph. These should include, however, the following specific remedies:

    a) conducting a comprehensive investigation into the alleged destruction of *Guerrilha do Araguaia* records, making its findings fully public, and punishing those found responsible for any unlawful destruction of records;

    b) taking measures for the systematic recovery of privately-held state records of relevance to this case;

    c) providing the applicants and the Court with a detailed account of the documentary searches its various agencies have performed to date, including a description of the search means and methods, and an index of the archives that have been searched to date;

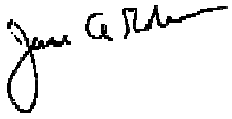
d) conducting fresh and comprehensive physical searches of the Armed Forces' archives, using investigators and archival specialists independent of the Armed Forces, who should be granted the fullest possible access and, if necessary, proper security clearance;

e) establishing an independent and effective truth mechanism empowered and properly equipped to fully investigate the human rights abuses committed—ideally within a broader context—in relation to the *Guerrilha do Araguaia*; and

f) undertaking a comprehensive review of its classification laws and regulations with a view to bringing them into full compliance with the right to the truth and Article 13 of the Convention generally.

June 1, 2010

For the Open Society Justice Initiative



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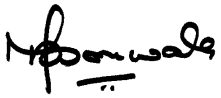

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