Inter-American Commission on Human Rights:

Thematic Hearing on Access to Information in the Investigation of Cases of Grave Violations of Human Rights in Peru

Annex to Submission of La Asociación Pro-Derechos Humanos (APRODEH) by the Open Society Justice Initiative

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March 26, 2012

INTRODUCTION

1. The Open Society Justice Initiative provides this annex to the submission of *La Asociación Pro-Derechos Humanos* (APRODEH) to the Inter-American Commission on Human Rights for its March 2012 thematic hearing. The hearing concerns access to information in the investigation of cases of grave violations of human rights in Peru.[1] This annex provides international and comparative law pertaining to the right of victims, investigators and the public to information concerning violations of human rights, and the corresponding duties of the State.

2. Victims, their relatives, those involved in investigation and prosecution, as well as the public have a fundamental right to the truth about gross violations of human rights and international humanitarian law. This right includes, at 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.

3. There is an unambiguous basis for claiming a judicially enforceable right of access to relevant information held by the state, including classified records. This right of access extends even where the State asserts that the records do not, or no longer, exist. The right to access records related to serious human rights violations committed by State actors exists always, but especially in periods of transition to democracy or following a period of conflict and State-sanctioned repression.

4. Where there is a credible basis for believing that the State holds, or should hold, records related to gross human rights abuses, the State must disclose them. Where the State asserts that relevant requested documents either do not exist or have been destroyed, the State

[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. The Justice Initiative has extensive experience in promoting the adoption and implementation of freedom of information laws, and has contributed to international standard-setting and monitoring of government transparency around the world. The Justice Initiative has made *amicus curiae* submissions to all three regional human rights systems and the UN Human Rights Committee, including in the Inter-American system in the landmark cases of *Claude Reyes et al. v. Chile*, Judgment of 19 September 2006, and *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, Judgment of 24 November 2010. A significant amount of this submission is adapted from the a*micus curiae* 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 in the *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, June 2010.

should conduct a comprehensive investigation into any alleged destruction of records, making its findings public, and punishing those responsible for any unlawful destruction of records; take measures for the systematic recovery of privately-held state records of relevance; provide a detailed account of the searches performed; conduct fresh and comprehensive physical searches of the relevant archives, using independent investigators and archival specialists, who should be granted the fullest possible access and, if necessary, proper security clearance; and establish an independent and effective truth mechanism empowered and properly equipped to fully investigate the human rights abuses committed — ideally within a broader context.

I. Right to Access Government-Held Information

5. The right "to seek and receive" information held by public authorities is guaranteed by Article 13 of the American Convention on Human Rights and broadly recognized in the Americas and around the world. It provides an important, though not the only, foundation of the right to the truth. The Inter-American Commission and the Inter-American Court of Human Rights have affirmed the right to access information as fundamental and entrenched. [2]

6. The recognition of a fundamental right of access to information is reflected in state practice and national jurisprudence. More than ninety countries and major territories around the world have adopted freedom of information laws (statutes) that provide for access to state-held information.[3] As of May 2012, when Brazil's law will enter into force, more than 5.5 billion people worldwide will live in countries that provide in their domestic law for an enforceable right to obtain information from their governments.[4] In the Americas, at least twenty countries have nationwide access laws.[5] Further, the General Assembly of the Organization of American States (OAS) adopted a Model Inter-American Law on Access to Information in June 2010. The Model Law "establishes a broad right of access to information, in possession, custody or control of any public authority, based on the principle of maximum disclosure, so that all information held by public bodies is complete, timely and accessible, subject to a clear and narrow regime of exceptions set out in law that are legitimate and strictly necessary in a democracy society."[6]

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[2] Inter-American Declaration of Principles on Freedom of Expression, adopted at the Commission's 108th regular session, October 19, 2000, para. 4. *Claude Reyes v. Chile*, IACtHR, Judgment of 19 September 2006, Series C No. 151, para. 77.

[3] Overview of Access to Information Laws, at http://right2info.org/access-to-information-laws/access-to-information-laws .

[4] See population figures provided by Wikipedia for the 90 countries and territories. Wikipedia, List of Countries by Population, http://en.wikipedia.org/wiki/List_of_countries_by_population.

[5] These are: Antigua and Barbuda, Belize, Brazil, Canada, Chile, Colombia, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, St. Vincent & Grenadines, 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 are currently considering proposals to enact national laws. Furthermore, several countries – including Colombia, Costa Rica, Mexico, Panama, Peru, and Venezuela – 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. See: http://www.right2info.org/constitutional-protections-of-the-right-to. Courts in additional countries – including Argentina, Chile and Costa Rica – have upheld a fundamental right of access to information as a corollary of freedom of expression and participation rights.

[6] The 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). Available at http://www.oas.org/dil/access_to_information.htm. See also Article 5(a), (b).

7. The Inter-American 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: "[F]reedom of expression is a means for the interchange of ideas and information among human beings and for mass communication…For the average citizen it is just as important to know the opinions of others or to have access to information generally as is the very right to impart his own opinion."[7]

8. In *Claude Reyes v. Chile*, the Inter-American Court affirmed the right of access to State-held information, its individual and collective dimensions, and the corresponding duties imposed on the State: "[Article 13] protects the right of the individual to receive [State-held] information and the positive obligation of the State to provide it. … 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…."[8]

9. As the three specialized mandate holders on freedom of expression have noted, "[i]mplicit in the freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented."[9]

II. The Right to Truth Regarding Human Rights Violations

10. The right to truth recognizes the obligation to disclose information involving serious or gross human rights violations. The core content of the right to truth implies "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."[10] In the Inter-American system, the right to the truth is emerging as an autonomous right, stemming from Article 13, as well as Articles 1, 8, and 25 of the American Convention on Human Rights. It is separate from, if related to, the right to judicial accountability contained in Article 25 of the Convention.

11. International tribunals and human rights mechanisms in the Americas and internationally have accepted the contours of the right to truth. The UN 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."[11] The International Committee of the Red Cross considers these State obligations to be norms of customary international law.[12]

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[7] Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Advisory Opinion OC-5/85, November 13, 1985, para. 32.
[8] *Claude Reyes v. Chile*, IACtHR, Judgment of 19 September 2006, Series C No. 151, para. 77.
[9] 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.
[10] Office of the UN High Commissioner for Human Rights, Study on the Right to the Truth, 8 February 2006, 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 familiares de las personas desaparecidas tienen derecho a conocer el destino de los desaparecidos y el estado y resultado de las investigaciones oficiales"). See also OAS, Office of the Special Rapporteur for Freedom of Expression, The Right to Access to Information on Human Rights Violations, 2011, Section V (on file).
[11] Human Rights Council, Resolution 9/11, para. 1.
[12] ICRC, Customary International Humanitarian Law, Volume I, Rules (Cambridge University Press, 2005), Rule 117, p. 421.

The Inter-American Commission[13] and the Inter-American Court[14] similarly found a separate right to the truth under the American Convention.

12. The right to truth is most widely recognized in cases of enforced disappearance. The UN Human Rights 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.[15] The Inter-American Court[16] and the Inter-American Commission[17], as well as the UN Human Rights Committee,[18] the UN Working Group on Enforced or Involuntary Disappearances,[19] the OAS General Assembly,[20] and the Parliamentary Assembly of the Council of Europe,[21] among others, have recognized the right of victims and their relatives to the truth about the fate and whereabouts of missing or disappeared persons. Article 24(2) of the International Convention for the Protection of All Persons from Enforced Disappearances explicitly recognizes the right to the truth "regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person."[22]

13. It is now widely accepted that the scope of the right to truth includes a State obligation to shed light on all serious or gross human rights violations, including torture and extrajudicial executions. This principle has been recognized by various specialized bodies and authorities – including the Inter-American Court,[23] the UN Human Rights Committee,[24] the UN Human Rights Council,[25] and the Office of the UN High Commissioner for Human Rights (OHCHR).[26] A 2006 OHCHR study concluded, after an extensive review of international law and practice, that "[t]he right to the truth about gross human rights

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[13] 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.
[14] *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, IACtHR, Judgment of 24 November 2010, Series C No. 219.
[15] See *Almeida de Quinteros v. Uruguay*, UNHRC, Comm. 107/1981, Views of 21 July 1983, para. 14; *Sarma v. Sri Lanka*, UNHRC, Views of 16 July 2003, para. 9.5; and *Lyashkevich v. Belarus*, UNHRC, Views of 3 April 2003, para. 9.2. Indeed, the origins of the right to truth have been traced to Additional Protocol I to the Geneva Conventions, recognizing the right of families to know the fate of their relatives and requires parties to an armed conflict to search for persons reported missing. Articles 32-33.
[16] See, among others, *Velasquez Rodriguez v Honduras*, IACtHR, Judgment of 29 July 1988, para.181; *Castillo Paez v Peru*, IACtHR, Judgment of 24 January 1998; and *Bamaca Velasquez v. Guatemala*, IACtHR, Judgment of 25 November 2000.
[17] 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.
[18] *Almeida de Quinteros v. Uruguay*, UNHRC, Comm. 107/1981, Views of 21 July 1983.
[19] First Report of the U.N. Working Group on Enforced or Involuntary Disappearances, U.N. Doc. E/CN.4/1435, para. 187.
[20] 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.
[21] See Resolutions 1056(1987); 1414(2004), para. 3; and 1463(2005), para. 10(2).
[22] The Convention was adopted by the UN Commission on Human Rights in September 2005. As of early March 2012, 91 countries have signed and 31 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.
[23] See *Moiwana Community v. Suriname*, IACtHR, Judgment of 15 June 2005.
[24] See, *inter alia*, Concluding Observations on Guatemala, 3 April 1996, CCPR/C/79/add.63, para. 25.
[25] See Human Rights Council, Resolution 9/11.
[26] OHCHR, Study on the Right to the Truth, *supra*.

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."[27]

14. In the Inter-American Court's landmark decision in *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil* ("*Araguaia"*), the Court recognized that victims of grave human rights violations, their relatives, and the broader public have the right to "be informed of everything that has happened in connection with" past atrocities.[28] The *Araguaia* applicants spent 28 years in an effort to find out the fate of their disappeared and extra-judicially executed relatives. In *Araguaia*, the Court grounded the right to truth in Article 13, but also in Articles 8 (right to a fair trial) and 25 (right to judicial protection) of the Convention.[29]

15. In *Association 21 December 1989 v. Romania*, the European Court of Human Rights for the first time in 2011 explicitly recognized that victims of gross human rights violations, and their family members, have a right to the truth. The case related to the prolonged failure of the Romanian authorities to investigate killings by State agents during the 1989 revolution. Relying on Article 2 (right to life), the Court found the "right of the victims and of their families and dependents to ascertain the truth about the circumstances of events involving a large-scale violation" of fundamental rights.[30] The Court emphasized "the importance for Romanian society" of resolving these cases and uncovering past abuses, and recognized the "right of many victims to know what happened, implicating the right to an effective judicial investigation and the eventual right to reparations."[31] In prior cases, 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.[32]

16. The right to truth incorporates the rights of (A) the victims and their families, (B) investigators, prosecutors and tribunals, and (C) the public.

A. Victims and Their Families

17. The right to truth is fundamental for victims and their family. As stated above, various bodies have re-affirmed that the "denial of the truth about the fate of a disappeared person is a form of cruel, inhuman and degrading treatment" for the family, impermissible under international law.[33] Further, as the Inter-American Commission observes, 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, undermining a culture of

[27] OHCHR, Study on the Right to the Truth, para. 55, *supra*.
[28] *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, *supra*, para. 200.
[29] In earlier cases, the Court had limited itself to holding that the right to the truth was simply "subsumed" within other rights guaranteed by the treaty. See *Bamaca Velasquez v. Guatemala*, IACtHR, Judgment of 25 November 2000; *Barrios Altos Case v. Peru*, IACtHR, Judgment of 14 March 2001.
[30] *Association 21 December 1989 and others v. Romania*, ECtHR, Judgment of 24 May 2011, at para. 144.
[31] *Ibid*., at para. 143 (unofficial translation).
[32] *Kelly and Others v. the United Kingdom*, ECtHR, Judgment of 4 May 2001, para. 118; *Ramsahai v. Netherlands*, ECtHR (GC), Judgment of 15 May 2007, para. 325.
[33] *Trujillo Oroza v. Bolivia*. *Reparations and Costs.* IACtHR, Judgment of 27 February 2002. para. 114. See also *Anzualdo Castro v. Peru*, IACtHR, Judgment of 22 September 2009. para. 113; *La Cantuta v. Peru*, IACtHR, Judgment of 29 November 2006, para. 125; *Velásquez Rodríguez*, IACtHR, Judgment of 29 July 1988. See also *Report on Terrorism and Human Rights*, IACommHR, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, para. 290 (access to habeas data, or information held by the State about the requester or missing family members, has been an important means to "guaranteeing the 'right to the truth' for the family of the disappeared").

impunity.[34] Disclosing information on human rights violations to victims and family members is thus a corollary of the general State duty, under Article 1, to respect and ensure the exercise of the American Convention rights and freedoms, including by taking measures to prevent their violation.

B. Investigators, Prosecutors, and Tribunals

18. The right to truth protects the right of access to information concerning gross human rights violations for judges, prosecutors and investigators. This arises partly out of the duty to investigate violations of human rights and to combat impunity.[35] Serious abuses, such as torture, enforced disappearances or extrajudicial executions, trigger the obligation to actively and comprehensively investigate the facts, and identify and punish the perpetrators. In *Myrna Mack Chang v. Guatemala*, the Ministry of National Defense had refused to provide information to the judges and public prosecutor, citing exemptions or asserting that the information had been incinerated. The Inter-American 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."[36]

C. The Public

19. The right to truth has a public component. The UN Human Rights Commission 2005 Updated Principles on Impunity ("the Orentlicher Principles on Impunity") 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."[37] Similarly, the UN'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."[38]

20. In *Myrna Mack Chang*, the Inter-American Court held that "society as a whole must be informed of everything that has happened in connection" with severe violations.[39] And in *Moiwana Community v. Suriname*, involving a massacre by army forces, the Court held that the right to the truth belongs to "all persons," and required that the State inform "the family members of victims and society as a whole … regarding the circumstances of such violations … [as] an important means of reparation."[40] 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.[41]

21. If State-held records include information relevant to serious or gross human rights violations, there should be a corresponding presumption that they should be made available

[34] See *Report on Terrorism and Human Rights,* supra.
[35] See, e.g., *Association 21 December 1989 and others v. Romania*, Judgment of 24 May 2011, at para. 144, citing *Ould Dah c. France* (déc), Judgment of 17 March 2009.
[36] *Myrna Mack Chang v. Guatemala*, Judgment of 25 November 2003, Series C No. 101, para. 180.
[37] Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, Commission Resolution 2005/81, Principle 2.
[38] 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).
[39] *Myrna Mack Chang v. Guatemala*, *supra*, para. 274.
[40] *Moiwana Community v. Suriname*, *supra*, para. 204.
[41] OHCHR, Study on the Right to the Truth, 8 February 2006, para. 36.

without delay, including through declassification if necessary. The Inter-American Court has suggested that there is an absolute presumption that records related to serious or gross violations of human rights must become public, regardless of assertions of "official secrets or confidentiality of the information, or reasons of public interest or national security."[42] Experience from various transitional justice processes has also shown that, in hindsight, classification of old archives served little or no genuine national security interest, and was often invoked only to shield perpetrators from truth and justice.[43]

22. The presumption of openness of information concerning human rights violations is established in the laws of the Americas and, to a certain extent, in the practice of the region. Brazil's Access to Information Law, set to take effect in May 2012, provides that "[i]nformation or documents about activities involving violations of human rights, committed by public agents or at the behest of public authorities, shall not have their access restricted."[44] The access to information laws of Mexico,[45] Peru,[46] Guatemala,[47] and Uruguay,[48] among others, include similar provisions. So does the Model Inter-American 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."[49]

III. State Duties Related to Right to Truth

23. The right to truth imposes corresponding State duties, including the duties to preserve and archive; to not destroy records; to conduct an adequate search for, and to try to reconstruct, records; to gather and generate information; to disclose information about serious or gross human rights violations even if part of a criminal investigation; to declassify as soon as

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[42] *Myrna Mack Chang v. Guatemala*, *supra*, para. 180.

[43] *See, e.g.*, Dale McKinley, "The State of Access to Information in South Africa," prepared for the Center for the Study of Violence and Reconciliation, p. 23.

[44] Law No. 12.527 of Nov. 18, 2011, 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." At http://www.planalto.gov.br/CCIVIL_03/_Ato2011-2014/2011/Lei/L12527.htm.

[45] 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.")

[46] Transparency and Access to Public Information Act No. 27806 (2002), 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 relacionada a la violación de derechos humanos o de las Convenciones de Ginebra de 1949 realizada en cualquier circunstancia, por cualquier persona.")

[47] Law on Access to Public Information (2008), adopted by Congressional Decree No. 57-2008 (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

[48] 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.")

[49] Article 45.

need for classification passes; and to prove any need for secrecy before an independent court or tribunal.

A. Duties to Preserve and Archive

24. The State has a duty to preserve and archive certain records, including records related to serious or gross human rights violations. The State has a corollary duty to allow presumptive public access to these records, unless a narrowly drawn exemption applies.

25. Access to 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 of human rights. The Orentlicher Principles on Impunity recognize that states have a duty to preserve memory, including by maintaining and securing archives.[50] 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. This includes the establishment or archives, or disclosures of large quantities of formerly secret documents concerning human rights violations, in Mexico,[51] Guatemala[52] and Argentina.[53]

26. 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 perpetrators accountable. Principle 15 of the Orentlicher Principles on Impunity provides that the archives should be accessible to victims, family members, the accused and the public for research.[54]

27. The European Court of Human Rights has also recognized that prosecutors and individuals have a right to access archival information necessary for an investigation into serious human rights abuses, including in classified files of totalitarian secret services. Thus, in *Association 21 December 1989*, the Court in 2011 held that Romania violated the European Convention by failing to properly regulate the use of and access to information in the archives it inherited from the *Securitate*, dictator Nicolae Ceauşescu's infamous secret service. The classification of files by the Romanian Government contributed to the violation of the duty to investigate and give meaningful access to victims.[55]

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[50] Principle 3.

[51] In Mexico in 2002, former President Fox opened and transferred to the National Archives millions of pages of formerly secret documents about state-sponsored terror from the 1960s to the 1980s. Kate Doyle, "Mexico Opens the Files," *The Nation*, August 5, 2002.

[52] In Guatemala, President Colom indicated that his government would declassify all military files revealing information on past abuses, as well as set up a Peace Archives. Freedominfo.org, "Active Duty Chief of Police Arrested for 25-Year-Old Political Disappearance of Labor Activist," March 20, 2009.

[53] In Argentina, prompted by thousands of requests for access filed with the Ministry of Defense by hundreds of judges investigating crimes committed during the military dictatorship, President 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. Freedominfo.org, "Argentina: Declassification of Military Records on Human Rights," 14 January 2010.

[54] "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."

[55] *Association 21 December 1989 v. Romania*, *supra*, at para. 139 (affirming that the classification of information necessary for an investigation as "top secret" or "secret" compromises the work of

B. Duty to Not Destroy Records

28. 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.

29. 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.[56] In addition, the Model Inter-American Law makes it "a criminal offense to willfully destroy or alter records after they have been the subject of a request for information,"[57] and an administrative offense to destroy records without authorization.[58]

C. Duty to Conduct an Adequate Search and to Try to Reconstruct Records

30. A government's assertion that records that might throw light on human rights violations do not exist, or that a prior administration destroyed them, does not discharge a government's responsibility to search for requested documents. Both *Myrna Mack Chang* and *Araguaia* concerned the State's refusal to disclose records that it had asserted did not exist, and were in some cases incinerated. In both cases, the Inter-American Court nonetheless ordered disclosure.

31. The Brazilian Government had asserted, at various times and in various fora, that archival records related to the *Guerrilha do Araguaia* had been destroyed even though media outlets and former military personnel had made public a considerable amount of privately-held documentary evidence related to those operations.[59] The Inter-American Court did not accept the State's bald assertion that the records requested did not exist but instead required the State to "demonstrate[e] that it has adopted all the measures within its reach to prove that the information requested indeed did not exist. It is essential, in order to guarantee the right to information, that the public authorities act in good faith and diligently carry out the actions necessary to ensure the effectiveness of this right, especially when it is a question of knowing the truth of what happened in cases of serious human rights violations…"[60] The Court required the State to identify the steps it had taken to attempt to recover or restrict the information it asserted did not exist.[61]

32. As set forth in the Model Inter-American Law, "the public authority in receipt of the request [for information] must undertake a reasonable search for records which respond to the request."[62] The authority also carries the burden of proving that the searches conducted were adequate.[63] Since the State, unlike the requester, has exclusive and privileged access

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investigators; and that access to archives can only be refused to investigators on national security grounds in exceptional circumstances and subject to independent judicial review, a burden not met by Romania).

[56] See, *inter alia*, OAS Resolution AG/RES. 2267 (XXXVII-O/07) on the Right to the Truth, adopted on June 5, 2007.

[57] Model Inter-American Law on Access to Information, Article 66.

[58] *Ibid*., Article 67(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 67(e).

[59] *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, Applicants' Motion of 18 July 2009.

[60] *Ibid.*, para. 211.

[61] *Ibid.*, paras. 202, 211.

[62] Article 32.

[63] Article 53(2).

to the information on the availability of records, the Court should subject the claims on the adequacy of the searches to strict scrutiny.[64]

33. Where there are credible doubts as to the veracity of State assertions that records are unavailable or destroyed, and where the State is obligated to conserve or produce the information, 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, 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. If the State asserts that documents have been incinerated, the authorities should clarify the circumstances of such supposed destruction of records, including the time(s) and place(s) of destruction, the precise content of the destroyed records, any contemporaneous documentary accounts, the officials who authorized the destruction, and the laws and regulations they relied upon, if any.[65]

34. In some cases, a renewed and independent search may be warranted or required. The OAS Special Rapporteur for Freedom of Expression, in her 2010 report on *The Right to Access Information on Human Rights Violations*, identified various instances in which courts or international bodies ordered such independent investigation following a State assertion that requested records did not exist.[66] For instance, in *Tasca v. SIS* (the State Intelligence Service), the Supreme Court of Moldova ruled that authorities must provide an inventory of the archive and permit personal access to the archive, after the authorities insisted that the documents requested did not exist.[67] The UN High Commissioner for Human Rights urged the Colombian Attorney General to investigate, and publicly report on, the "precision and objectivity of the information contained in military intelligence archives on human rights defenders." In response to this call and other concerns, Colombian President Samper confirmed that the Attorney General would "examine military intelligence files."[68]

35. Where records pertaining to human rights violations are actually or purportedly destroyed, the State should expend effort to attempt to reconstruct the missing information – physically or through investigations.[69] A potent example of a State's physical reconstruction of human rights related information was the reconstruction by the German Birthler Commission – established after the fall of the Berlin Wall to implement the Stasi Records Act – of over 400 of 6,500 recovered bags of documents pertaining to the notorious East German intelligence services. The records had been shredded but were deemed salvageable. [70]

36. As stated by the OAS Special Rapporteur for Freedom of Expression: "The Commission has considered that States should make significant efforts to find information that was supposedly destroyed; if it was possible in Germany to reconstruct documents that were

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[64] *See, e.g., Velasquez Rodriguez v Honduras, supra*, para.181 (ruling that where a person is last seen in custody of State agents, the burden is on the Government to establish what happened to him given that the State is in control of that information).
[65] *See Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, para. 211.
[66] Office of the Special Rapporteur for Freedom of Expression, Annual Report of the Inter-American Commission on Human Rights to the Organization of American States, 2010 (hereinafter "OAS Special Rapporteur 2010 Report"), Chapter III, pp. 311-24.
[67] *Ibid*., p. 314, Ch. III, note 11.
[68] *Ibid.*, Ch. III, para. 18 and note 25.
[69] *Ibid.*, Ch. III, paras. 19-21.
[70] *Ibid*, Ch. III, para. 19, citing Jefferson Adams, *Probing the East German State Security Archives*, 13 International Journal of Intelligence and Counterintelligence 21 (2000).

literally in pieces, States in our region should carry out serious, committed and effective investigations to find copies of the information that has supposedly been lost." [71] According to the Special Rapporteur, this includes opening archives, repeating and expanding searches, permitting and capacitating independent investigations.[72]

D. Duty to Gather and Generate Information

37. Further, in certain contexts, public authorities are required to collect and generate information for public access. This includes information that is either required by law or considered basic to good governance. For instance, under the Model Inter-American 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."[73] Various domestic courts – including in Argentina,[74] India[75] and Hungary[76] – have similarly recognized State obligations to generate information under certain circumstances.

E. Duty to Disclose Information even if part of a criminal investigation

38. Various domestic bodies have recognized the duty of the State to permit access to information related to human rights abuses, even if part of a criminal investigation. In the *Rosendo Radilla Pacheco* case, the family of Rosendo Radilla, disappeared by the military in 1974 during Mexico's state-sanctioned terror, sought access, among other remedies, to the case file compiled by the Attorney General. He refused to disclose the file and in an important 2011 judgment, the Mexican Supreme Court ordered him to do so.[77] The Court made clear that (1) violations of human rights affect not just the victims, but all of society; and (2) the "human rights override" applies to allow for public access to information despite the Attorney General's assertion of a reservation given that the information concerns a human rights violation.[78] Mexico's Federal Access to Information Institute (IFAI) has similarly ruled in several cases that the public is entitled to have meaningful access to criminal investigation files related to cases of gross human rights violations, as

[71] *Ibid.*
[72] *Ibid.*, Ch. III, para. 21.
[73] Article 34.
[74] 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. *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.
[75] 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. 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
[76] 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, which the legislature did. Decision of July 13, 2006, *Magyar Közlöny* (Official Gazette) 2006/84. 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
[77] Amparo 168/2011, Judgment of November 30, 2011.
[78] Amparo 168/2011, Judgment of November 30, 2011, pp. VIII, XIII.

well as information on the progress of the investigations.[79] In Guatemala, the human rights prosecutor overseeing the police archive passed a 2009 regulation that guarantees public access to the archival records. In addition, the documents are subject to disclosure pursuant to the "human rights violations" clause of Guatemala's access to information law.[80]

F. Duty to Declassify Records as Soon as the Need for Initial Classification has Passed

39. Any legitimate justifications for the non-disclosure of records become progressively weaker over time. In *Turek v. Slovakia*, the European Court of Human Rights 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."[81]

40. Excessively long classification periods, including for national security-related records, undermine the very essence of the Article 13 right to information. For these reasons, most democratic countries have adopted regimes for the periodic or automatic de-classification of reserved information. In this respect, the Model Inter-American Law provides that exceptions to disclosure "do not apply to a record that is more than [12] years old," unless extended "by approval by the Information Commission."[82]

G. Duty to Prove Need for Secrecy before an Independent Court or Tribunal

41. The ultimate decision on whether to disclose or withhold information relevant to gross human rights violations cannot be left to the discretion of the executive authorities; it should be subject to independent review by "a competent court or tribunal." As the Inter-American Court recognized in *Myrna Mack Chang*, "when a punishable act is being investigated, the decision to define the information as secret and to refuse to submit it can never depend exclusively on a State body whose members are deemed responsible for committing the illegal act."[83] The Orentlicher Principles on Impunity also suggest that the state should carry the heavy burden of proving, before "independent judicial review," that any public interest in secrecy is stronger than the public interest in providing redress for serious rights abuses.[84] The Model Inter-American Law also details the state's evidentiary burden to establish the application of any exemption to the principle of maximum disclosure.[85]

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[79] 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. Resolution 1005/04 of December 7, 2004. See also Conversation with IFAI, Feb. 22, 2012, notes on file.

[80] Law on Access to Public Information (2008), adopted by Congressional Decree No. 57-2008 (2008), Article 24; *see* note 46, *supra*.

[81] *Turek v. Slovakia*, ECtHR, Judgment of 14 February 2006, para. 115 (involving lustration proceedings against the applicant). See also *Petrenco v. Moldova*, ECtHR, Judgment of 30 March 2010, 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).

[82] Article 43. 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.

[83] *Myrna Mack Chang v. Guatemala*, *supra*, para. 181.

[84] Principle 16.

[85] Article 54(1).

IV. Right to Truth in Periods of Transition, or for Information Related to a Period of Conflict

42. The objective reconstruction of the truth about past abuses is essential to enable nations to learn from their history and take measures to prevent future atrocities. This is true generally, but especially in periods of political transition, and following a period of armed conflict. For this reason, the Inter-American Commission identified the structural importance of freedom of information in periods of transition: "under any circumstances, but especially in processes of transition to democracy, victims and their relatives have the right to know with regard to information on serious violations of human rights in the archives of the State"[86]

43. The significance of uncovering the truth of human rights abuses has been seen around the world following periods of transition and conflict. 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.[87]

44. The establishment of prominent and expanded archives has similarly proved a critical component of transition from repressive regimes. Following the German reunification, Germany established a Commission (the Birthler Commission) to collect and preserve information obtained by the notorious East German Stasi, and ensure historical review of the Stasi activities. More than 2.6 million people consulted the Commission archives in the twenty years since its creation in 1991.[88] New governments in Hungary, the Czech Republic, Romania, Moldova and Bulgaria established similar procedures and protections to ensure the preservation, and public access, to records from former repressive regimes.[89] In its 2011 decision of *Association 21 December 1989 v. Romania*, the European Court of Human Rights recognized this, in acknowledging the right of the victims to uncover the truth of massive abuses of fundamental rights that occurred throughout Romania at the time of the transition twenty years ago.[90]

45. Diane Orentlicher, the former Independent Expert tasked with updating the Principles on Impunity, has highlighted the strong link between the "collective 'right to know'," the societal right to historical memory and the prevention of future abuses. She identified 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

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[86] Inter-American Commission on Human Rights, Petition before the Inter-American Court of Human Rights, in *Narciso González Medina v. Dominican Republic*, May 2, 2010, para. 159. See also OAS Special Rapporteur 2010 Report, Ch. III, para. 1..

[87] 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

[88] OAS Special Rapporteur 2010 Report, Ch. III.

[89] *Ibid.*, para. 19 and note 29, citing the German Law on Stasi Records (Stasi Records Act) of 1990; Law No. III of 2003 of Hungary (the Disclosure Act); Law No. 140 of 1996 of the Czech Republic (the STB Files Access Act); Law No. 187 of 1999 of Romania (the Access to Personal Files Law); the Law of Rehabilitation of Victims of Political Persecution of Moldova; and the Law for Access and Disclosure of Documents of Bulgaria of 2006.

[90] *Association 21 December 1989 and others v. Romania*, *supra*, para. 142

democratic society, that those conditions do not recur."[91] 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. Both truth and the right to know are essential to the promise of "never again."

[91] 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