Amicus Curiae Submission in the Case of

Gudiel Álvarez y Otros ("Diario Militar") v. Guatemala

A Submission to the Inter-American Court of Human Rights from The Open Society Justice Initiative, La Asociación Pro-Derechos Humanos, and La Comisión Mexicana de Defensa y Promoción de los Derechos Humanos, A.C.

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OPEN SOCIETY
JUSTICE INITIATIVE

Case No. 12.590
Caso Gudiel Álvarez y Otros v. Guatemala
("Diario Militar" Case)

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Pursuant to Articles 2(3) and 41 of the Rules of Procedure applicable to this case, the Open Society Justice Initiative (the Justice Initiative), La Asociación Pro-Derechos Humanos (APRODEH, Peru), and La Comisión Mexicana de Defensa y Promoción de los Derechos Humanos (CMDPDH, Mexico) hereby submit an *amicus curiae* brief on the development of the right to truth and corresponding duties of the State in international human rights law, and the application of the relevant principles to the issues presented by this case.[1]

I. INTRODUCTION

1. This case concerns the efforts of the families of 27 victims of forced disappearance to uncover the truth and obtain justice for what happened to their relatives.[2] Their relatives are victims of forced disappearances between 1983 and 1985, among the most violent years of Guatemala's 34-year internal armed conflict during which an estimated 200,000 people died due to political violence, with 93% of the violations at the hands of the State and paramilitary forces.[3] Both during the war and in the years since, the actions of the State security forces in perpetrating an overwhelming quantity of gross human rights violations have remained largely secret, due to a cover-up institutionalized at the highest levels.[4]

2. For nearly 30 years, the family members of the victims have sought to determine the circumstances of their disappearances. Immediately after the events, they searched the morgues, hospitals and cemeteries, reported the incidents to the police, requested meetings with the President, and lodged various *habeas corpus* actions with the courts, seeking information about the reasons for arrest, identity of captors and location of victims. The military police and civilian authorities denied repeatedly all requests for information and refused to acknowledge the illegal arrests.[5] Even after the end of the armed conflict, the government continued to systematically withhold and deny the existence of relevant information, and did not engage in thorough investigations or other mechanisms designed to uncover the truth of what happened.[6]

3. All 27 victims were listed in the *Diario Militar,* a 74-page detailed intelligence record of information on 183 political opponents abducted, forcibly disappeared and/or executed by State agents during the political violence and repression of the 1983-86 military government of President

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[1] *See* Annex 1 for statements of interest of the *amici*.
[2] Applicant Wendy Santizo Méndez was abducted as a child and tortured, but subsequently released; her parents were disappeared. Rudy Gustavo Figueroa Muñoz was a victim of forced disappearance and extrajudicial execution.
[3] The Commission for Historical Clarification (Comisión de Esclarecimiento Histórico, or CEH) found that the military committed "acts of genocide." Commission for Historical Clarification, *Guatemala Memory of Silence (Tz'inil Na'tab'al): Report of the Commission for Historical Clarification*, 2000 ("CEH Report"), Conclusions, para. 122. I/A Comm. H.R., *Gudiel Álvarez and Others ("Diario Militar") v. Guatemala*, Report No. 116/10, Case 12.590, October 22, 2010 ("I/A Comm. H.R. Article 50 Report"), paras. 69, 79.
[4] CEH Report, Conclusions, paras. 56-57.
[5] I/A Comm. H.R. Article 50 Report, para. 475.
[6] *See* Section IV.A.2, *infra*.

Oscar Mejía Víctores. The *Diario Militar* was leaked in 1999 to the National Security Archive, a non-governmental organization, and the State has acknowledged its authenticity.[7]

4. During the search by the family members, the *Diario Militar*, as well as key military plans and the entirety of the National Historical Police Archives (Police Archives), remained hidden in state facilities. They are presently available only as a result of unauthorized disclosures from military personnel to non-governmental entities, or accidental discovery. Access to military and intelligence archives remains severely restricted—for family members, investigators and prosecutors, and the general public. Thirty years after their deaths, there remain no significant advances by government authorities in any State investigations or prosecutions related to the human rights abuses suffered by the victims—a violation of the right of the victims to an effective investigation capable of bringing about the investigation and prosecution of the material and intellectual perpetrators of the atrocities, but also a violation of the victims and Guatemalan society to truth.[8] In addition, the State has denied information concerning State-sanctioned human rights violations to a UN-supported truth commission, established after the internal armed conflict, and to the Constitutional Court.[9]

5. In early proceedings before the Inter-American Commission on Human Rights ("Inter-American Commission"), the State acknowledged that it violated the right to truth of the victims.[10] The State no longer does. The State accepts total responsibility for violations of Articles 3 (juridical personality), 4 (life), 5 (humane treatment), 7 (liberty), 8 (fair trial), 17 (family), 19 (child), and 25 (judicial protection), in connection with the forced disappearances of the victims, the exile of their families and the failures to investigate and clarify the facts regarding the disappearances, and accepts partial responsibility for the violation of Article 13 (thought and expression) for the denial of information to Guatemalan society, including the families of the victims.[11] The State also accepts that there must be an effective investigation into these atrocities. Yet the State rejects the existence of a right to truth actionable before this Court. It recognizes that the families of the victims do not know the truth of what happened to their family members, and it further acknowledges the recognition of the right to truth in international law and its importance in ending impunity and promoting human rights. The State nonetheless "totally opposes" the existence of a free-standing right to truth arising out of the State's obligations under the American Convention, as recognized by this Court in *Gomes Lund v. Brazil*.[12]

6. This submission addresses the following three points:

   - *A. The Right to Truth.* The right to truth is a free-standing right, as this Court has previously decided. It exists alongside but independent of other rights, and does not depend on the request of victims for information or the existence of an ongoing investigation. The right to truth exists as a right for victims and the broader society. In cases of gross violations of human rights or serious breaches of international humanitarian law, the right to truth includes, at a minimum,

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[7] Peace Secretariat, *La autenticidad del Diario Militar a la luz de los documentos del Archivo Histórico de la Policía Nacional* (2009). The Archive, Presidential General Staff, *"El Diario Militar,"* at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB15/dossier-color.pdf.

[8] *See* Section IV.A.1&2, *infra*.

[9] *See* Section IV.A.1, *infra*.

[10] I/A Comm. H.R. Article 50 Report, paras. 44, 47, 54. Ibid, para. 477, *citing* Address by Ruth del Valle, President of the Presidential Human Rights Commission (Comisión Presidencial de Derechos Humanos, COPREDEH), I/A Comm. H.R. Public Hearing, October 22, 2008, on *Gudiel Álvarez (Diario Militar) v. Guatemala*, Case 12.590 ("With reference to the topic of mechanisms and procedures for access to information, Guatemala has in fact lacked procedures for access to information … we indeed recognize this weakness of the State of Guatemala as regards the right to truth and the right to information of the victims.").

[11] State of Guatemala, Submission to I/A Court H.R. in *Gudiel Álvarez (Diario Militar) v. Guatemala*, Case 12.590, October 18, 2011 ("2011 State Submission"), Sec. VI(1)a.

[12] 2011 State Submission, Sec. VI(2)(a).

the right to know the full and complete truth about the events that transpired, and their specific circumstances and participants. While right to truth exists in all such situations, it carries a special importance during a democratic transition or following state-sanctioned repression.

- *B. State Duties under the Right to Truth.* The State has a duty to record, preserve and archive relevant information, prevent its destruction, and permit meaningful access to archives. The right to truth also imposes a duty to search for records, and in certain circumstances, to proactively generate or reconstruct certain information that may not be readily available. The duty to ensure the integrity and proper oversight of such records will in some cases require independent control of the search for or management of records. The State must limit restrictions on disclosure, and ensure judicial oversight over assertions that secrecy is warranted in relation to gross human rights violations. The requisite State obligations must be met within a reasonable time.
- *C. The Diario Militar.* Guatemala has violated the right to truth of the applicants, the investigators and prosecutors, and Guatemalan society, through its failure to disclose evidence concerning the gross violations of human rights suffered by the applicants. The State has failed to record and preserve information required for the meaningful implementation of the right to truth. The State has failed to conduct adequate searches and recover information not readily available. The State has also failed to apply restrictions to disclosure narrowly, and in a manner consistent with its obligations pursuant to the right to truth and this Court's Article 13 jurisprudence. The systematic obstruction of the right to truth of the applicants and Guatemalan society by the State, and especially its military and intelligence bodies, demands independent oversight of its archives related to the operations of the internal armed conflict.

II. THE RIGHT TO TRUTH IN INTERNATIONAL LAW

A. The Right to Truth Regarding Gross Human Rights Violations or Serious Violations of International Law

7. This section discusses the right to truth and (1) its current recognition and evolution; (2) its scope and content; (3) its links with other rights, including in particular the right to information and rights related to judicial accountability; (4) the attachment of the right independent of judicial processes; and (5) its individual and collective components.

1. Recognition and Origins of the Right to Truth

8. Multiple international tribunals and human rights mechanisms have helped define the contours of the right to truth, either as an autonomous entitlement or one emerging from a combination of other rights. The Inter-American Court of Human Rights ("IACtHR") and the Inter-American Commission have repeatedly found a separate right to truth under the American Convention.[13] A 2006 Office of the U.N. High Commissioner of Human Rights study ("OHCHR Right to Truth Study") concluded, after an extensive review of international law and practice, that "[t]he right to 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."[14]

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[13] *See, e.g.*, *Case of Gomes Lund (Guerrilha do Araguaia) v. Brazil.* Objections, Merits, Reparations and Costs. Judgment of November 24, 2010. Series C No. 219, paras. 200-01; *Case of Gelman v. Uruguay*. Merits and Reparations. Judgment of February 24, 2011, paras. 118, 192, 243. In the I/A Comm. H.R.: *See*, *e.g.*, I/A Comm. H.R. Article 50 Report, para. 456.

[14] Office of the United Nations High Commissioner for Human Rights, Study on the Right to Truth, February 8, 2006 ("OHCHR Study on the Right to Truth"), para. 55. *See also* OAS Resolution AG/Res. 2267 (XXXVII-O/07)

9. With this Court's decision in *Gomes Lund* and two recent decisions in the European Court of Human Rights ("ECHR"), the right to truth is rapidly evolving. In the Inter-American system, the right to truth is emerging as an autonomous right. This Court's landmark decision in *Gomes Lund v. Brazil* grounded the right to truth in Articles 8, 13 and 25, in conjunction with Article 1, of the American Convention.[15] In its earlier cases, the Court had generally limited itself to holding that the right to truth was simply "subsumed" within other rights guaranteed by the Convention.[16]

10. In two recent cases, the ECHR explicitly recognized that victims of gross human rights violations, as well as society, have a right to truth. In *Association 21 December 1989 v. Romania*, 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.[17] 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."[18] The ECHR here relied on Article 2 (right to life) of the European Convention on Human Rights.[19] In *Janowiec v. Russia*, the ECHR similarly acknowledged a right to truth, here emerging from Article 3 (right to humane treatment). Family members of victims of the extrajudicial killing of more than 21,000 people by the Soviet secret police in the 1940s sought relief from the Court after the Russian government discontinued an investigation, and refused to provide information. Here, the Court acknowledged a "double trauma: not only had their relatives perished in the war but they were not allowed, for political reasons, to learn the truth about what had happened and forced to accept the distortion of historical fact by the Soviet and Polish Communist authorities for more than fifty years."[20] In prior cases, the European Court implied a right to truth in affirming a State's obligation to investigate and make transparent allegations of serious violations of Articles 2, 3 and 5 (arbitrary detention).[21]

11. 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."[22] The Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity Updated Principles on Impunity ("Updated Principles on Impunity"), adopted by the U.N. Commission on Human Rights in 2005, similarly affirms that the "[f]ull and effective exercise of the right to truth provides a vital safeguard against the recurrence of violations."[23]

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on the Right to the Truth, adopted on June 5, 2007; OAS General Assembly Resolution AG/Res. 2509 (XXXIX-O/09) on the Right to the Truth, June 4, 2009.

[15] *Gomes Lund v. Brazil*, para. 201.

[16] *See Case of Bámaca Velásquez v. Guatemala.* Merits. Judgment of November 25, 2000. Series C No. 70. *Case of Barrios Altos v. Peru.* Merits. Judgment of March 14, 2001. Series C No. 75.

[17] E.C.H.R., *Case of Association 21 December 1989 v. Romania*, Application No. 33810/07, Judgment of May 24, 2011, para. 143 (unofficial translation). The case concerns the prolonged failure of the Romanian authorities to investigate killings by State agents during the 1989 revolution.

[18] Ibid, paras. 143, 194 (unofficial translation).

[19] Ibid.

[20] E.C.H.R., *Case of Janowiec v. Russia*, Application Nos. 55508/07, 29520/09, Judgment of April 16, 2012, para.156.

[21] *See, e.g.*, E.C.H.R., *Case of Kelly v. United Kingdom*, Application No. 30054/96, Judgment of May 4, 2001, paras. 118, 325. E.C.H.R., *Case of Ramsahai and Others v. Netherlands*, Application No. 52391/99, Judgment of May 15, 2007, para. 325 ("What is at stake here is nothing less than public confidence in the state's monopoly on the use of force.").

[22] Human Rights Council, Resolution 9/11, p. 3, para. 1.

[23] U.N. Commission on H.R. Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity, Resolution 2005/81, 2005 ("Updated Principles on Impunity"), Principle 2. *See also* Ibid, Principle 4.

2. Scope and Content of the Right to Truth

12. The right to truth is established firmly in relation to **missing persons and forced disappearances**, arising from the right of families to know the fate of their relatives and requiring State parties to an armed conflict to search for persons reported missing, an obligation of customary international law.[24] Numerous regional and international bodies—including this Court,[25] the Inter-American Commission,[26] the UN Human Rights Committee,[27] the UN Working Group on Enforced or Involuntary Disappearances,[28] the General Assembly of the Organization of American States ("OAS"),[29] and the Parliamentary Assembly of the Council of Europe[30]—have recognized the right of victims and their relatives to the truth about the fate and whereabouts of missing or disappeared persons. The International Convention for the Protection of All Persons from Enforced Disappearances, to which Guatemala is a signatory, explicitly recognizes the right to truth in the context of forced disappearances.[31]

13. Under this Court's jurisprudence, relatives of victims of forced 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.[32] 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 remains, the circumstances of treatment, and the identities of tormentors.[33] 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 progress.[34]

14. It is now widely accepted that the scope of the right to truth extends beyond forced disappearances and includes a State obligation to shed light on **all gross human rights violations or serious violations of international humanitarian law**, including torture and extrajudicial executions. This

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[24] ICRC, *Customary International Humanitarian Law, Vol. I, Rules* (Cambridge University Press, 2005), Rule 117, page 421. Additional Protocol to the Geneva Conventions (Protocol I), Arts. 32-33. The origins of the right have been traced to Additional Protocol I to the Geneva Conventions, recognizing the right to know the fate of relatives and requiring parties to an armed conflict to search for missing persons.

[25] *See*, *e.g.*, *Case of Velásquez Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988. Series C No. 4, para.181. *Gelman v. Uruguay*, paras. 118, 192.

[26] *See*, *e.g.*, I/A Comm. H.R.. Annual Reports 1985-86, OEA/Ser.L/V/II.68 Doc. 8 rev. 1, of September 26, 1986, p. 205; I/A Comm. H.R. Report. *Bámaca Velásquez v. Guatemala*, of March 7, 1996.

[27] U.N. Human Rights Committee, *Almeida de Quinteros v. Uruguay,* Comm. 107/1981, Views of July 21, 1983.

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

[29] *See, e.g.*, OAS AG/Res. 2509 (XXXIX-O/09) on the Right to the Truth, June 4, 2009.

[30] *See* Parliamentary Council of the Council of Europe, Resolutions 1056(1987); 1414(2004), para. 3; and 1463(2005), para. 10(2).

[31] International Convention for the Protection of All Persons from Enforced Disappearances, Art. 24(2) (recognizing right to truth "regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person"). The Convention was adopted by the UN Commission on Human Rights in September 2005. As of April 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). Guatemala signed the Convention February 6, 2007.

[32] *See, e.g.*, *Case of Trujillo Oroza v Bolivia*. Reparations and Costs. Judgment of February 27, 2002. Series C No. 92, paras. 114-115. *See also* U.N. Human Rights Committee, *Almeida de Quinteros v. Uruguay*, para. 14 (recognizing the right to truth as essential to ending or preventing the mental suffering of the relatives of victims of forced disappearances or secret executions).

[33] *See, e.g.*, *Case of Nineteen Merchants v. Colombia.* Merits. Judgment of July 5, 2004. Series C No. 109, paras 210-216.

[34] Ibid.

principle has been recognized by various specialized bodies and authorities—including this Court,[35] the UN Human Rights Committee,[36] the UN Human Rights Council,[37] and the OHCHR.[38] The right attaches not only to cases of massive or repeated violations, but also to singular cases of sufficient gravity. Many of the judgments and opinions cited herein involve cases of individual abuse, albeit often in a context of a breakdown of the rule of law and respect for human rights.

15. When the right to truth attaches, **the content of information subject to disclosure is broad**, including "everything" related to the violation.[39] This Court elaborated the principle of "maximum disclosure, which establishes the presumption that all information [held by public authorities] is accessible, subject to a limited system of exceptions."[40] In the context of the right to truth, this principle directs the State to disclose all information concerning gross human rights violations and serious breaches of international humanitarian law except where strictly limited and compelling exemptions apply to justify withholding of some part of the information. The restrictions *cannot* include classification on the ground of national security.[41] Specifically, 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," and the scope of the violations.[42] In cases of forced disappearances and related abuses, the right to truth includes the special dimension of knowing the fate and whereabouts of the direct victim.[43]

3. Relationship with the Right to Information and Other Rights

16. While the right to truth is emerging as an inalienable and autonomous right, the right is linked to other rights, specifically the rights to information, an effective investigation, and a judicial remedy codified in Articles 1, 8, 13 and 25 of the American Convention. The European Court of Human Rights appears to follow a slightly different approach by treating the right to truth as a separate component of other fundamental substantive rights, such as the right to life, or the right not to be

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[35] *See, e.g.*, *Case of Moiwana Community v. Suriname*. Merits, Reparations and Costs. Judgment of June 15, 2005. Series C No. 124, para. 204.

[36] *See*, *inter alia*, U.N. Human Rights Committee, Concluding Observations on Guatemala, April 3, 1996, CCPR/C/79/add.63, para. 25.

[37] *See* Human Rights Council, Resolution 9/11.

[38] OHCHR Study on the Right to Truth.

[39] *Gomes Lund v. Brazil*, para. 200 (right to "be informed of everything that has happened in connection with" past atrocities). *See also Moiwana Community v. Suriname*, para. 204. The European Court of Human Rights recognized that a State obligation to account for the death of a family member "is significantly larger than an acknowledgement of the fact of death," and includes an obligation "to assist the relatives in obtaining information and uncovering relevant facts," including at a minimum an account of the circumstances of the death and the location of the grave. E.C.H.R., *Janowiec v. Russia*, para. 163.

[40] *Case of Claude Reyes v. Chile*. Merits, Reparations and Costs. Judgment of September 19, 2006. Series C No. 151, para. 92.

[41] *Case of Mack Chang v. Guatemala*. Merits, Reparations and Costs. Judgment of November 25, 2003. Series C No. 101, para. 180. *See also* Section III.B, *infra*.

[42] OHCHR Study on the Right to Truth, para. 59. The Constitutional Court of Colombia, among others, has defined the scope of the right to know in similar terms: "[T]he victims and those injured by atrocities or crimes against humanity have the inalienable right to know the truth of what happened. This right carries with it the right to know the perpetrators, the motives and circumstances of time, manner and place of the circumstances that occurred; and finally, the criminal pattern that characterizes the criminal acts…Families of missing persons have the right to know the fate of their disappeared relatives and the state and results of the official investigations." Judgment T-821/07, Constitutional Court of Colombia, October 5, 2007, para. 47 (unofficial translation). *See also* Updated Principles on Impunity, Principle 2.

[43] *See, e.g.*, *Mack Chang v. Guatemala*, para. 274.

subjected to torture or inhuman or degrading treatment.[44] Both courts, however, impose clear right to truth duties on States.

Right to Information (Article 13)

17. The right to information provides an important, though not the only, foundation of the right to truth. The right "to seek and receive" information held by public authorities is guaranteed by Article 13 of the American Convention and broadly recognized in the Americas and around the world. This Court and the Inter-American Commission have affirmed the right to access information as fundamental and entrenched.[45] 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.[46] 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."[47]

18. 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, including at least twenty in the Americas, have adopted freedom of information laws that provide for access to state-held information.[48] 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.[49] Further, the OAS General Assembly adopted a Model Inter-American Law on Access to Information ("Model Inter-American Law") in 2010 "establish[ing] a broad right of access to information, in possession, custody or control of any public authority, based on the principle of maximum disclosure" with limited exceptions.[50]

19. 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 human rights violations. The right to information – which includes the right of access to information held by the State about the requester 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. Further, the right of access guaranteed by Article 13 of the Convention provides an important foundation of principle for the right to truth, and especially the collective or societal component of the right. Both the right to a transparent government and the right to truth are essentially vehicles for securing state accountability – and the overall protection of human rights and public interests.

Right to a judicial remedy and effective investigation (Articles 8 & 25), and State obligations to guarantee human rights (Article 1)

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[44] *See* para. 10, *supra*.
[45] *Claude Reyes v. Chile*, para. 77; *Gomes Lund v. Brazil*, para. 197; Inter-American Declaration of Principles on Freedom of Expression, adopted at the Commission's 108th regular session, October 19, 2000, para. 4.
[46] *Claude Reyes v. Chile*, para. 77.
[47] 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.
[48] Overview of Access to Information Laws, at http://right2info.org/access-to-information-laws/access-to-information-laws.
[49] 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.
[50] OAS General Assembly Resolution 2607. Organization of American States, Model Inter-American Law on Access to Public Information of 2010 ("Model Inter-American Law"), Art. 2. 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 2514.

20. The right to truth is also linked to the rights to an effective judicial remedy and an effective investigation,[51] and to the obligations of states to respect and guarantee human rights, including the rights to life, liberty and humane treatment.[52] Serious human rights abuses trigger the positive obligation to actively and comprehensively investigate the facts, identify and punish the perpetrators, seek the reestablishment of the right of the victim or "reparation of the harm."[53] The State must undertake an effective search for the truth, it must work to punish the physical perpetrators and masterminds, and the investigation must be carried out "in a serious manner and not as a mere formality preordained to be ineffective.'"[54] Consequently, the investigation should be independent as well as effective.[55] In order to uphold the obligation of an effective investigation, the State cannot apply any form of amnesty to gross violations of human rights, and cannot obstruct the investigative process.[56] As this Court has held, impunity for perpetrators and failure of restoration of the victim's rights would mean the lack of free and full exercise of the rights of the victim.[57] And in the jurisprudence of the European Court of Human Rights, investigations are essential in order for the right to life to be guaranteed and, when applicable, for the State to be held accountable.[58]

21. The rights to a judicial remedy and investigation help elucidate the contours of the content of the right to truth. One of the aims of a criminal investigation is to clarify the facts.[59] An effective investigation requires a thorough analysis of the facts and comprehensive evidence-gathering. The State must ensure that "the authorities in charge of the investigation have within their reach and uses all the means necessary to promptly carry out all those actions and inquiries essential to clarifying the fate of the victims and identifying those responsible."[60] They must be adequately resourced and have the authority and means to access the relevant information to investigate the facts and secure evidence.[61] An effective investigation requires that the judicial authorities consider the factual complexity, context and relevant patterns of violations. It must not neglect evidence-gathering and the pursuit of logical avenues for investigation, particularly where complex structures are implicated.[62]

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[51] American Convention, Arts. 8 & 25. *See, e.g.*, *Gomes Lund v. Brazil*, para. 201. *See also* OHCHR Study on the Right to Truth, paras. 24-32.
[52] American Convention, Art. 1(1). *See, e.g.*, *Velásquez Rodríguez v. Honduras*, para. 166; *Case of Tibi v. Ecuador*. Merits, Reparations and Costs. Judgment of September 7, 2004. Series C No. 114, para. 257; E.C.H.R., *Janowiec v. Russia*, paras. 14-16, 35-42, 59-63.
[53] *See, e.g.*, *Case of González Medina v. Dominican Republic.* Preliminary Objections, Merits, Reparations and Costs. Judgment of February 27, 2012. Series C No. 240, para. 204; E.C.H.R., *Case of Nachova and Others v. Bulgaria*, Application Nos. 43577/98, 43579/98, Judgment of July 6, 2005, paras. 110-111; E.C.H.R., *Janowiec v. Russia*, para. 130.
[54] *Velásquez Rodriguez v. Honduras*, para. 177. *See also Tibi v. Ecuador*, para. 159.
[55] *See, e.g.*, *Case of Pueblo Bello Massacre v. Colombia*. Merits, Reparations and Costs. Judgment of January 31, 2006. Series C No. 140, para. 143; E.C.H.R.,*Case of Güleç v. Turkey*, Application No. 21593/93, Judgment of July 27, 1998, paras. 81-82.
[56] *See, e.g.*, *Gomes Lund v. Brazil*, para. 170-171; *Barrios Altos v. Peru*, para. 41.
[57] *See, e*.g., *Case of González et al. ('Cotton Field') v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 16, 2009. Series C No. 205, para. 288; *Gomes Lund v. Brazil*, para. 140.
[58] E.C.H.R., *Case of Anguelova v. Bulgaria*, Application No. 38361/97, Judgment of 13 September 2002, para. 137; E.C.H.R., *Nachova v. Bulgaria*, para. 110.
[59] *Gomes Lund v. Brazil*, para. 256.
[60] *Case of Tíu Tojín v. Guatemala*. Merits, Reparations and Costs. Judgment of November 26, 2008. Series C No. 190, para. 77.
[61] Ibid.
[62] *See, e.g.*, *Case of Rochela Massacre v. Colombia.* Merits, Reparations and Costs. Judgment of May 11, 2007. Series C No. 163, para. 158; E.C.H.R., *Kelly and Others v. U.K.*, paras. 96-97.

22. The right to truth in cases of serious human rights violations "implicat[es] the right to an effective judicial investigation and the eventual right to reparations."[63] Where the right to truth attaches, a failure to investigate will normally also identify a violation of the right to truth.[64] The Inter-American Commission holds that an investigation may be necessary for the obligations of the right to be met.[65]

23. Yet the State's obligations to ensure an effective investigation are not overlapping entirely with the State's obligations to guarantee the right to truth.[66] First, the right to truth is a substantive right, and the right to an investigation is a procedural remedy for a substantive right (such as the right to life or not to be disappeared). Second, the right to truth has a strong collective dimension and is, as such, held by victims and the broader society, whereas the right to an investigation is held primarily by the victims and their next of kin. Third, while a criminal investigation can be a fundamental part of the realization of the right to truth, the right to truth applies also outside of a judicial context. It is not directed towards the resolution and assignation of responsibility for crimes and imposing sanctions, but it constitutes a different and essential form of reparation for victims and society; truth provides a form of relief that cannot be equated with the outcome of a criminal investigation.[67] On the other hand, the right to an effective investigation requires, by definition, that a formal legal proceeding takes place.[68] While truth is never a substitute for justice, the requirements of the right to truth go beyond the punishment of individual perpetrators.

4. The Right to Truth as a Free-Standing Right

24. The right to truth is a free-standing right, linked to other rights, but applicable even in the absence of judicial processes or formal requests for information. The Updated Principles on Impunity emphasize that the right applies "irrespective of any legal proceedings."[69] 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 to which the public and future generations are entitled. 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.

25. In its right to truth jurisprudence, this Court has distinguished the investigative duties of the State from its prosecutorial ones. Thus, the State's duty to provide the truth for both victims and society is a core component of the right to justice, whether or not there are attendant prosecutorial obligations or options.[70] The Inter-American Commission has emphasized the particular importance

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[63] *See, e.g.*, E.C.H.R., *Association 21 December 1989 v. Romania*, para. 143 (unofficial translation).
[64] *Gomes Lund v. Brazil*, para. 201; *Nineteen Merchants v. Colombia*, para. 188 ("The right of access to justice is not exhausted by the processing of domestic proceedings, but it also ensures the right of the victim or his next of kin to learn the truth about what happened, and for those responsible to be punished, in a reasonable time.").
[65] I/A Comm. H.R.. Report No. 25/98. Cases 11.505, et al. *Alfonso René Chanfeau Orayce, et al. v. Chile*, of April 7, 1998, para. 92 (right to truth "presupposes … the establishment of investigating committees … or the provision of the necessary resources so that the judiciary itself may undertake whatever investigation may be necessary").
[66] *See Gomes Lund v. Brazil*, para. 219.
[67] *See Case of Anzualdo Castro v. Peru*. Preliminary Objections, Merits, Reparations and Costs. Judgment of September 22, 2009. Series C No. 202, para. 119.
[68] *Gomes Lund v. Brazil*, para. 256.
[69] Updated Principles on Impunity, Principle 4.
[70] *Velásquez Rodriguez v. Honduras*, para. 181 ("[e]ven in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains"). *But see Barrios Altos v. Peru*, paras. 41-44 (incompatibility of amnesty laws with the Convention).

of state compliance with the right to truth in those cases in which legal or historical developments have made difficult or impossible the prosecution, or even identification, of the intellectual and material perpetrators of grave human rights abuses.[71] In such cases, truth and official apologies may be some of the few significant forms of reparation available.

26. The ECHR has recognized the need for there to be recognition of the rights of families to know the truth, independent of the cause of action itself. In *Janowiec v. Russia*, the Court found a violation of Article 3 (inhuman treatment) of the European Convention for failure to disclose information to the family members of the deceased, even where the Court found it lacked jurisdiction to consider a violation of Article 2 (right to life) itself: "[T]he Court may assess the authorities' compliance with [Article 3] even in cases where the original taking of life escapes its scrutiny because of a procedural bar such as, for instance, the scope of its temporal jurisdiction." In *Association 21 December 1989 v. Romania*, the European Court similarly recognized that a right to truth attached even if prosecutions of the perpetrators were to become impossible due to a time bar then written into law.[72]

27. 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, irrespective of the existence or non-existence of concomitant measures to hold perpetrators accountable with civil or criminal sanctions.[73] The OAS Resolutions on the right to 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."[74]

28. Further, the attachment of the right to truth may not have as essential prerequisites formalities that may be customary in a right to information framework. Thus, this Court has clarified that the right to truth does not depend on a prior request for information.[75] Disclosing information on human rights violations, both proactively and upon request, is a corollary of the general state duty, under Article 1, to respect and ensure the exercise of the Convention rights and freedoms, including by taking measures to prevent their violation.

5. Individual and Collective Components of the Right to Truth

29. The right to truth has an individual and collective component.[76] As the Inter-American Commission has espoused that the right to truth is "a collective right which allows a society to gain access to information essential to the development of democratic systems, and also an individual right for the relatives of the victims, allowing for a form of reparation."[77] The right to truth thus incorporates the rights of (i) victims and their families, (ii) tribunals, prosecutors and investigators, and (iii) the public.

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[71] *See*, *e.g.*, I/A Comm. H.R. *Lucio Parada Cea, et al. v. El Salvador*. Report No. 1/99, Case 10.480. January 27, 1999.
[72] E.C.H.R., *Association 21 December 1989 v. Romania*. Subsequent to the judgment, Romania legislatively removed the statutory time bar preventing such prosecutions.
[73] *See Anzualdo Castro v. Peru*, paras. 119, 180. At least ten countries in the Americas have established truth commissions, including Argentina (1983), Chile (1990), El Salvador (1992), Ecuador (1996, 2007), Guatemala (1997), Uruguay (2000), Peru (2001), Panama (2001), Paraguay (2003), and Nicaragua (2007).
[74] *See, e.g.*, OAS General Assembly Resolution AG/Res. 2509 (XXXIX-O/09) on the Right to the Truth, June 4, 2009, para. 2.
[75] *See Case of Carpio Nicolle et al. v. Guatemala*. Merits, Reparations and Costs. Judgment of November 22, 2004. Series C No. 117, para. 128; *Case of Gómez Paquiyauri Brothers v. Peru*. Merits, Reparations and Costs. Judgment of July 8, 2004. Series C. No 110, para. 230.
[76] *Gomes Lund v. Brazil*, para. 197.
[77] *See, e.g.*, I/A Comm. H.R. *Lucio Parada Cea, et al. v. El Salvador*, para. 151.

30. *First,* the right to truth is fundamental for **victims and their family members**.[78] Disclosing information on human rights violations to victims is a corollary of the general State duty, under Article 1, to respect and ensure the exercise of the Convention rights and freedoms. States must thus disclose information regarding gross human rights violations or serious breaches of international humanitarian law to the victims and family members even in the face of competing interests in secrecy.[79] 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 impunity.[80]

31. *Second,* the right to truth protects the right of access to information for **tribunals, prosecutors and investigators**. This arises partly out of the duties to investigate violations of human rights and combat impunity. In *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. This 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."[81]

32. The European Court of Human Rights has likewise recognized the absolute right of courts to review information the court itself deems necessary for an investigation into allegations of human rights abuses. Regarding its own right to review a classified submission in its judicial examination of a case concerning a decades-old massacre, the ECHR held that Russia violated its duty to the court when it refused to provide a classified document the court requested. "It is a fundamental requirement that the requested material must be submitted in its entirety, if the Court so requested, and any missing elements must be properly accounted for."[82]

33. *Finally,* the right to truth has a **public component**. This Court has held that "society as a whole must be informed of everything that has happened in connection" with severe violations.[83] 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 truth.[84] The Updated Principles on Impunity declare that the right to the truth is inalienable for "[e]very people" and the UN's 2005 Basic Principles on Reparations provide that one of the modalities of reparation

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[78] *See, e.g.*, *Trujillo Oroza v. Bolivia*, para. 114; *Anzualdo Castro v. Peru*, para. 113.

[79] *See, e.g.*, *Case of Radilla Pacheco v. Mexico*. Preliminary Objections, Merits, Reparations and Costs. Judgment of November 23, 2009. Series C No. 209, para. 258 (requiring that the State disclose the full case file to the family members of victims of forced disappearance as part of a fulfillment of the State's obligations to guarantee the right to truth – and despite the State's assertions that complete disclosure would limit the effectiveness of an ongoing investigation).

[80] *See* I/A Comm. H.R. Report on Terrorism and Human Rights, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., of October 22, 2002.

[81] *Mack Chang v. Guatemala*, para. 180. *See also González Medina v. Dominican Republic*, paras. 248-49 (Inter-American Court finds it inadequate that the State provided only portions of a case file after the Court expressly requested the file in its entirety).

[82] E.C.H.R., *Janowiec v. Russia*, paras. 100-01 (finding a violation of Article 38 of the European Convention which requires Parties to "furnish all necessary facilities" to allow for the Court's examination and "if need be, undertak[ing] of an investigation" and affirming that the Court "has complete freedom in policing the conduct of its own proceedings, assessing the admissibility and relevance of evidence as well as its probative value").

[83] *Mack Chang v. Guatemala*, para. 274. *See also Moiwana Community v. Suriname*, para. 204.

[84] OHCHR Study on the Right to Truth, para. 36.

for gross human rights violations is the "[v]erification of the facts and full and public disclosure of the truth."[85]

34. The collective dimension of the right to truth, and its existence as a free-standing right not dependent on judicial processes or other rights, do not necessarily translate to universal standing. Standing is a different if related concept, subject to additional considerations of principle and customary law. As with other rights with a collective dimension, such as the right to freedom of expression and media freedom, standing is considered on a case-by-case basis. Thus, the public is also entitled to the truth about gross human rights violations, but a person or group of persons must still satisfy the requirements for standing in order to raise a claim. The Court may clarify such standing requirements if and when the specific circumstances of a case so require.

35. The presumption of openness of information concerning human rights violations, specifically, is established in the laws of the Americas and, to a certain extent, in the practice of the region.[86] Guatemala's access to information law,[87] as well as the access to information laws of Brazil, [88] Mexico,[89] Peru,[90] and Uruguay,[91] among others, include provisions preventing the classification, and requiring the disclosure, of information concerning human rights violations. 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."[92]

B. Right to Truth Post-Conflict or in Periods of Transition

36. 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, where the right to truth has a structural importance.[93] The concealment and denial of historic abuses invites and reinforces a continued culture of impunity. As then U.N. High Commissioner of Human Rights Louise Arbour said on a 2006 diplomatic mission to Guatemala: "where impunity is the rule for

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[85] Updated Principles on Impunity, Principle 2. 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).

[86] *See Claude Reyes v. Chile*, paras. 78. 82.

[87] Law on Access to Public Information, adopted by Congressional Decree 57-2008 (Guatemala) of 2008, Art. 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].").

[88] Law No. 12.527 (Brazil) of 2011, Art. 21 ("[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").

[89] Federal Law on Transparency and Access to Public Information (Mexico) of 2002, Art. 14 ("[Information related to] the investigation of grave violations of fundamental rights or crimes against humanity cannot be considered restricted [classified].")

[90] Transparency and Access to Public Information Act No. 27806 (Peru) of 2002, Art. 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.").

[91] Right of Access to Public Information Act No. 18.381 (Uruguay) of 2008, Art. 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.").

[92] Model Inter-American Law, Art. 44.

[93] *See* 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 ("OAS Special Rapporteur 2010 Report"), Ch. III, para. 1.

past violations, it is not surprising that it will also prevail for current crimes."[94] On the other hand, the realization of the collective right to truth concerning prior abuses in periods of transition, or following periods of conflict, empowers the body politic to educate itself, reform institutions and promote policies that seek to prevent recurrence of past violations.

37. Uncovering the truth of prior human rights abuses following periods of transition and conflict helps establish a break from the legacies of the repressive regimes. Thus, the newly democratic South Africa moved to entrench the principle of open government within the wider framework of principles designed to distinguish the new government from the previous apartheid regime, which was characterized by autocracy and an "obsession with official secrecy."[95] The widespread use of truth commissions and similar processes in transitional societies, and the establishment of accessible archives of formerly repressive state security entities, suggests that the collective processes of disclosure of historic abuses is increasingly viewed as a means of reparation for the victims, and part of the process of reaching collective closure.[96] Both truth and the right to know are essential to the promise of "never again."[97]

38. Despite its more obvious inherent value to a society in transition, the right to truth cannot be limited to such contexts. Any society reckoning with egregious abuses of human rights, even in a "mature" democracy, must acknowledge the abuses in order to avoid reinforcing a culture of impunity and repeating the same errors. 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.'"[98]

III. STATE DUTIES RELATED TO THE RIGHT TO TRUTH

39. The right to truth imposes corresponding State duties arising out of Articles 8, 13, and 25, in conjunction with Articles 1 and 2 of the Convention. Article 1(1) imposes a general obligation on States "to guarantee the free and full exercise of the rights recognized by the Convention for any person under its jurisdiction."[99] Article 2 "entails the elimination of any type of norm or practice that results in a violation of the guarantees established in the Convention, as well as the issue of norms and the implementation of practices leading to the effective observance of these guarantees."[100] In accordance with these obligations, State duties corresponding to the right to truth include the duties (a) to archive, prevent the destruction of, and permit access to records; (b) to limit restrictions on disclosure, and prove the need for secrecy before an independent court or tribunal; (c) to search for records, and in some circumstances, to gather, generate and reconstruct unavailable information; (d) to ensure effective and untainted oversight of records; and (e) to fulfill obligations within a reasonable time.

40. These duties also inform the reparations due. This Court has not yet established clearly and fully the reparations that follow from a violation of the right to truth. This Court has, however, identified the fundamental tenet in international law that violations of international obligations attributed to the

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[94] BBC Mundo, *Guatemala: 'Sigue la impunidad,'* May 28, 2006.
[95] Bill of Rights Handbook (South Africa), pp. 642, 684-85.
[96] *See* note 73, *supra*.
[97] *See, e.g.*, E.C.H.R., *Association 21 December 1989 v. Romania*, para. 142 (unofficial translation) (requisite disclosure of information concerning abuses of fundamental rights that occurred at the time of a democratic transition "in order to prevent any appearance that certain acts enjoy impunity").
[98] *See, e.g.*, Center for Human Rights and Global Justice, NYU School of Law, *The Right to Truth and Justice: Accountability for U.S. Abuses in Its 'War on Terror'* (2006).
[99] *Case of the "Las Dos Erres" Massacre v. Guatemala*. Preliminary Objection, Merits, Reparations and Costs. Judgment of November 24, 2009. Series C No. 211, para. 104.
[100] *Claude Reyes v. Chile*, para. 64.

State resulting in damage give rise to the obligation to enact adequate remedies pursuant to Article 63(1) of the American Convention.[101] Reparations include "any positive measures that the State must adopt to ensure that the harmful acts, such as those that occurred in this case, are not repeated."[102] The State cannot invoke domestic law or regulations to avoid or limit its compliance with its international law obligations to provide reparations.[103]

A. Duties to Archive Relevant Information and Ensure Access

41. For the right to truth to have meaning, the State must preserve information related to gross violations of human rights and serious breaches of international humanitarian law, and also guarantee access to it. Corollary obligations implicit in the duties to preserve and ensure access are the duties to produce such information, and protect records from destruction.

42. *First*, the State has a duty to **preserve and archive** certain records to maintain memory concerning human rights abuses.[104] As delineated in the Updated Principles on Impunity:

> "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."[105]

In resolutions concerning the right to truth, the OAS has agreed that, while States have some flexibility within their domestic law and practice, they "should preserve records and other evidence concerning gross violations of human rights and serious violations of international humanitarian law, in order to facilitate knowledge of such violations, investigate allegations, and provide victims with access to an effective remedy in accordance with international law, in order to prevent these violations from occurring again in the future, among other reasons."[106] The Special Mandate Holders on freedom of expression and access to information have similarly recognized that "[p]ublic authorities should be required to meet minimum record management standards" and "[s]ystems should be put in place to promote higher standards over time."[107]

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[101] *Nineteen Merchants v. Colombia*, paras. 219-20, 222. American Convention, Art. 63(1): "If the Court finds that there has been a violation of a right or freedom protected by this Convention, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party."

[102] Ibid, para. 222. *See Case of Blake v. Guatemala*. Reparations and Costs. Judgment of January 22, 1999. Series C No. 48, para. 33.

[103] *Carpio Nicolle v. Guatemala*, paras. 87-88.

[104] *See, e.g.*, I/A Comm. H.R., The Inter-American Legal Framework Regarding the Right to Access to Information, OEA/Ser.L/V/II, CIDH/RELE/INF. 1/09 (2010) ("Inter-American Legal Framework on ATI"), paras. 83-87 (duty to create archives to collect and organize information on serious human rights violations to "preserve the collective memory of what happened"); Antonio González Quintana, *Archival Policies in the Protection of Human Rights* (1995 orig., 2009 2d ed.) ("UNESCO/ICA 2009 Report"), p. 50 ("[d]ocuments which bear witness to the violation of human rights should be preserved").

[105] Updated Principles on Impunity, Principle 3. *See also* Ibid, Principle 14. The Updated Principles on Impunity define archives, for the purposes of the Principles as "collections of documents concerned with violations of human rights and humanitarian law."

[106] OAS AG/RES. 2406; OAS AG/RES. 2595. *See also* Human Rights Council, Resolution 9/11 ("States should preserve archives and other evidence concerning gross violations of human rights and serious violations of international humanitarian law to facilitate knowledge of such violations, to investigate allegations and to provide victims with access to an effective remedy in accordance with international law").

[107] Joint Declaration by the Rapporteurs on Freedom of Expression from the UN, the OAS and the OSCE, December 6, 2004.

43. *Second*, implicit within the duty to preserve records to implement the right to truth is the **duty to produce such records and prevent their destruction**.[108] Given the scope and content of the right to truth, it can only be realized if the State fulfills its obligation to maintain records concerning the actions and events constituting gross human rights violations and serious breaches of international humanitarian law in which the State is complicit, and their circumstances, perpetrators, scope and asserted justification. We submit that this should include the existence and locations of security and intelligence authorities, the laws and regulations applicable to these authorities, and the chain of command; and the names of victims, the names of State actors implicated in the violations, the dates and circumstances of the violations, and where applicable, the location of remains.[109]

44. Further, as a necessary condition for preserving records containing information on human rights abuses, and guaranteeing eventual access, States must take active measures to prevent their destruction. The Updated Principles on Impunity provide that protective measures should be taken "to prevent any removal, destruction, concealment or falsification of archives, especially for the purpose of ensuring the impunity of perpetrators of violations of human rights and/or humanitarian law."[110] Destruction of archives is *per se* a violation of the right to truth, and widely prohibited by freedom of information and preservation of memory laws.[111] 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,"[112] and an administrative offense to destroy records without authorization.[113]

45. The actual destruction, or the inability to locate, archives of security sector and/or intelligence entities during repressive regimes violates or limits the realization of the right to truth, and deprives rights holders of information concerning the circumstances of the violations.[114] States should prohibit the destruction of archives by law and policy.[115] Particularly in a time of transition, a temporal "moratorium should be imposed on the destruction of public documents, including in cases where this is legally regulated."[116]

46. *Third*, **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.[117] "Documents which bear witness to violations of human rights should be available for the exercise of rights in a democracy," including the collective rights to memory, truth, justice, knowledge of those responsible for crimes against human rights; and individual rights to know whereabouts of disappeared families and reparation.[118] The Updated

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[108] *Magyar Közlöny*, Constitutional Court of Hungary, Decision of July 13, 2006, 2006/84 (ruling 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).
[109] *See* Section II.A.2, *supra*. *See also* Updated Principles on Impunity, Principle 18(b).
[110] Updated Principles on Impunity, Principle 14.
[111] See, *inter alia*, OAS Resolution AG/RES. 2267.
[112] Model Inter-American Law, Article 66.
[113] 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).
[114] The inability to locate State documentary support prevented Chilean society from learning the final resting place of victims of forced disappearance or the names of many of the perpetrators of egregious human rights abuses. In the closing years of apartheid South Africa, the apartheid state engaged in a "policy of wide-scale cleansing of the sources of memory with the aim of putting any information which might have been used against it or its principal members, far out of the reach of any future democratic government." UNESCO/ICA 2009 Report, pp. 51, 58.
[115] UNESCO/ICA 2009 Report, p. 84.
[116] The UNESCO/ICA 2009 Report presents as an example judicial orders applicable to the Argentinean Ministry of Defense which prevent any changes to records. UNESCO/ICA 2009 Report, p. 56.
[117] *See Anzualdo Castro v. Peru*, para. 135. *See also* OHCHR Study on Right to Truth, para. 52.
[118] UNESCO/ICA 2009 Report, pp. 57-66.

Principles on Impunity provide that "[a]ccess to archives shall be facilitated in order to enable victims and their relatives to claim their rights" as well as "for persons implicated, who request it for their defence" and "in the interest of historical research, subject to reasonable restrictions aimed at safeguarding the privacy and security of victims and other individuals." Further, "[f]ormal requirements governing access may not be used for purposes of censorship."[119]

47. Archival records held by public authorities, including national archive institutions, are fully subject to the right to information: individuals 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. To that end, the Inter-American Commission has recommended that States "adopt legislative and such other measures as may be necessary to effectuate the right of free access to information in files and documents in the power of the State, particularly in cases of investigations to establish criminal responsibility for international crimes and serious violations of human rights."[120] Laws or regulations governing archives should guarantee "everyone will have the right to access the files of the agents of the repression, with guarantees of their security."[121]

48. The establishment of archival institutions consolidating, preserving and disclosing information concerning the actions of the intelligence and security forces of prior repressive regimes has proved an important component of democratic transition. Following the German reunification, Germany established a Federal Commissioner for the Records of the State Security Service of the former German Democratic Republic to collect and preserve information obtained by the notorious East German Stasi, and ensure historical review of the Stasi activities. German laws, enacted immediately after unification to govern the state security archives, recognize the right of access for family members killed or subject to disappearance, as well as those affected and third parties.[122] More than 2.6 million people consulted the Commission archives in the twenty years since its creation in 1991.[123] In Russia, pursuant to a 1991 presidential decree, victims have the right to consult the files of the former Soviet intelligence entity, the KGB, now managed by the Central Archives of the Federal Security Service (the TsA FSB Rosii).[124] Russia also created a Centre for Archival Information and for the Rehabilitation of the Victims of Political Repression, placed within the pre-existing Central Archive of the Ministry of the Interior, as a repository of information for victims.[125] Almost all Central and Eastern European countries in transition enacted laws governing the management of the archives of the prior repressive regime, with procedures and protections to ensure the preservation, and public access, to records.[126]

49. Examples abound in the Americas as well. Colombia's 2005 Law on Justice and Peace (Law 975) provides, in a section on the preservation of archives: "The right to truth implies that archives are preserved. The judicial bodies which have charge of these, such as the General State Prosecutor, should adopt means to impede theft, destruction or falsification of archives which might seek to impede impunity…" A subsequent provision advises that "access to archives ought to be facilitated in the interests of victims and their families to ensure their rights."[127] In 2002 in Mexico, after a

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[119] Updated Principles on Impunity, Principle 15.
[120] I/A Comm. H.R. Press release 21/98 at the Conclusion of the 101st Special Session, para. 8.
[121] UNESCO/ICA 2009 Report, p. 81.
[122] Act Regarding the Records of the State Security Service of the Former German Democratic Republic 1991 (Stasi Records Act) (Germany), Arts. 14-15, *cited in* UNESCO/ICA 2009 Report, pp. 63-64.
[123] I/A Comm. H.R. Special Rapporteur 2010 Report, Ch. III.
[124] UNESCO/ICA 2009 Report, pp. 83-84.
[125] Ibid, p. 77.
[126] *See* Annex 2. *See also* UNESCO/ICA 2009 Report, pp. 26, 85, 86.
[127] 2005 Law on Justice and Peace (Law 975) (Colombia), Chapter X on Conservation of Archives, Article 58, *cited in* UNESCO/ICA 2009 Report, p. 94.

leadership transition and the end of one-party rule in Mexico, the Government announced the opening of tens of thousands of formerly secret documents about state-sponsored terror from the 1960s to 1980s. Amounting to millions of pages, the records are now available to the public at Mexico's National Archives.[128] The National Archives of the Dominican Republic is modernizing the archives of the security apparatus of the Trujillo dictatorship. And Guatemala's own Police Archives, preserved and reorganized with significant international assistance despite challenges imposed by the Government, are known as one of the largest and most effectively preserved archives of political terror.[129] 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.[130]

50. 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"). Disclosures by the U.S. government in response to an underlying 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.[131]

B. Duty to Limit Restrictions on Disclosure and Prove the Need for Secrecy Before an Independent Tribunal

51. Under Article 13 and the jurisprudence of this Court, any restrictions of the right of access to information held by public authorities must be expressly established by law, serve a legitimate aim, and be necessary in a democratic society; they must satisfy a compelling public interest, and be the least restrictive of the protected right.[132] The State must provide an explanation for non-disclosure that provides specific reasons for denial of access to information, to demonstrate clearly that the withholding decision was neither discretionary nor arbitrary.[133] The burden of proof to justify any decision refusing to provide information "lies with the body from which the information was requested."[134] Under the Model Inter-American 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."[135]

52. With regard to the right to truth issues at stake here, the jurisprudence of this Court has expressly recognized the limited restrictions permissible for asserting that information concerning human

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[128] Kate Doyle, *Mexico Opens the Files*, The Nation, August 5, 2002.
[129] UNESCO/ICA 2009 Report, pp. 25-26.
[130] *Argentina: Declassification of Military Records on Human Rights*, Freedominfo.org, January 14, 2010. Danilo Valladares, *The Best-Kept Secrets – the Military's*, IPS, February 2, 2010.
[131] Jesse Franzblau and Emilene Martinez-Morales, *US Torture Files and Access to Human Rights Information*, Freedominfo.org, August 25, 2009.
[132] *Claude Reyes v. Chile*, paras 89-91. *See also* 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, 2011 ("OAS Special Rapporteur 2011 Report"), Ch. III, paras. 342-43, 347.
[133] *Claude Reyes v. Chile*, paras. 58, 77.
[134] Inter-American Juridical Committee, Resolution 147 of the 73rd regular period of sessions. "Principles on the Right of Access to Information," August 7, 2008, Principle 7.
[135] Model Inter-American Law, Art. 43.

rights violations should remain secret.[136] This is particularly true for human rights violations from a prior authoritarian regime. 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.[137] 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. The presumption of openness in this context is firmly established in the laws of the Americas and to a great extent, in the practice of the region.[138]

53. Any legitimate justifications for the non-disclosure of records become progressively weaker over time. If State-held records include information relevant to gross human rights violations, there should be a corresponding presumption that they should be made available without delay, including through declassification if necessary. Exceptions to disclosure must be time-limited – and "once that period has expired, the information must be made available to the public."[139]

54. This Court has established a presumption that records related to 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."[140] The ECHR has similarly challenged an assumption "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."[141] Relatedly, the European Court upheld the right of victims and prosecutors to access archival information necessary for an investigation into serious human rights abuses, including in the classified files of totalitarian secret services.[142] 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.[143]

55. 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."[144] The domestic laws of virtually all countries in the region contemplate maximum

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[136] *Mack Chang v. Guatemala,* para. 180; *Gomes Lund v. Brazil*, para. 202.
[137] *See, e.g.*, *Gomes Lund v. Brazil*, para. 202.
[138] Ibid. *See also* notes 87-92, *supra*.
[139] I/A Comm. H.R. 2011 Report, Ch. III, para. 348 ("[M]aterial may be kept confidential only while there is a certain and objective risk that, were the information revealed, one of the interests that Article 13.2 of the American Convention orders protected would be disproportionately affected.").
[140] *Mack Chang v. Guatemala*, para. 180.
[141] E.C.H.R., *Case of Turek v. Slovakia*, Application No. 57986/00, Judgment of February14, 2006, para. 115 (involving lustration proceedings against the applicant).
[142] *See also* E.C.H.R., *Janowiec v. Russia*, paras. 94, 104, 109 (rejecting "that a public and transparent investigation into the crimes of the previous totalitarian regime could have compromised the national security interests of the contemporary democratic" state).
[143] *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.
[144] Model Inter-American Law, Art. 42. 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.

periods for maintaining classified information secret.[145] Mass declassification of records from repressive state institutions following a democratic transition is possible, and should be a model. For instance, in Argentina, 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. The decree rejecting classification of these records stated that "such information cannot continue to be kept inaccessible under the argument that it would threaten national security."[146]

56. Even in cases in which this Court has recognized other legitimate interests at stake – such as national security or the investigation or prosecution of crime – the Court has recognized the narrow window for legitimate secrecy of information concerning human rights violations.[147] This Court thus held that Guatemala violated Article 8 of the Convention when the Ministry of Defense, relying on a constitutional state secrecy provision, refused to provide information related to the operation and structure of the Presidential General Staff requested for an investigation into an extrajudicial execution despite repeated requests from the prosecutors and judiciary.[148] This Court has also similarly recognized the right of victims of human rights violations to obtain their investigative and prosecutorial case files, despite legislative provisions justifying non-disclosure of such information, where the information sought "refers to the investigation of crimes that constitute grave violations to human rights," such as a forced disappearance.[149]

57. 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, but must be subject to independent review by "a competent court or tribunal." Indeed, "[s]afeguarding the individual from the arbitrary exercise of public authority is the main purpose of the international protection of human rights."[150] As this Court has held, "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."[151] The Updated 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.[152]

C. Duty to Search for Records, and in Some Circumstances, to Proactively Generate or Reconstruct Information

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[145] I/A Comm. H.R. 2011 Report, Ch. III, para. 357. Brazil's new right to information law eliminates perpetual secrecy, limiting the maximum time period for confidentiality for "top secret" documents to 25 years with a single extension possible, and establishing lesser terms of 15 years for "classified" information and 5 years for "confidential" information. Law No. 12.527 (Brazil) of November 18, 2011, Art. 24. The laws of Ecuador, Nicaragua, Panama, Uruguay, Peru, Chile, Mexico, Dominican Republic, and Guatemala establish maximum initial periods for keeping information secret. Nicaragua (Arts. 28-29), Panama (Art. 7), Colombia (Art. 13) and Guatemala (Art. 28) also provide maximum periods for extension. Only Argentina's law does not address the issue of time periods, and only Chile's permits an indefinite period for classifying national defense and foreign affairs matters. Chile (Art. 22).

[146] *Argentina: Declassification of Military Records on Human Rights*, Freedominfo.org, January 14, 2010.

[147] *See also* Updated Principles on Impunity, Principle 16.

[148] *Mack Chang v. Guatemala*, para. 180.

[149] *Radilla Pacheco v. Mexico*, para. 258. The Mexican Supreme Court subsequently ordered the disclosure of the *Radilla Pacheco* case file concerning an investigation into a forced disappearance during Mexico's so-called "Dirty War." The Court made clear that violations of human rights affect not just the victims, but all of society; and given that the information concerns a human rights violation, the human rights override applies to allow for public access to information despite the Attorney General's asserted classification. *Radilla Pacheco v. Attorney General*, Amparo 168/2011, Supreme Court of Mexico, Judgment of November 30, 2011, pp. VIII, XIII.

[150] *Claude Reyes v. Chile*, para. 129.

[151] *Mack Chang v. Guatemala*, para. 181.

[152] Updated Principles on Impunity, Principle 16. *See* Model Inter-American Law, Art. 54(1).

58. The State has a duty to conduct an adequate search for records. Embedded within this duty is the corollary duty to organize and index records in a manner which facilitates an adequate search. Certain circumstances compel the State to also collect, generate or reconstruct information that is not immediately available.

59. *First*, the State has a duty to **conduct an adequate search**.[153] The authority carries the burden of proving that searches were adequate.[154] Since the State has exclusive and privileged access to the information on the availability of records, the Court should subject the claims on the adequacy of the searches to strict scrutiny.[155]

60. 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 *Mack Chang v. Guatemala* and *Gomes Lund v. Brazil* concerned the State's refusal to disclose records that it had asserted did not exist, and were in some cases incinerated. The Inter-American Court has recognized this as insufficient.[156] 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.[157] This Court did not accept the State's assertion that the records requested did not exist but instead required the State to "demonstrate 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."[158]

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.[159]

61. The assertion that records do not exist or were destroyed is not uncommon. Yet, the discovery of archives of repression in Haiti, Cambodia, Paraguay, Brazil, and Argentina, and the occasional appearance of official records marshaled for the legal defense of security defendants, including in Uruguay and Peru, "has confirmed the hope that [purportedly missing] documents exist, in spite of their presumed destruction."[160]

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[153] Model Inter-American Law, Art. 32.
[154] *Gomes Lund v. Brazil*, para. 202; Inter-American Model Law, Arts. 32, 54(2).
[155] *See, e.g.*, *Velásquez Rodriguez v Honduras*, para.181 (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); *Bámaca-Velásquez v. Guatemala*, paras. 152-53; *Case of Cantoral-Benavides v. Peru*. Merits. Judgment of August 18, 2000. Series C No. 69, para. 55.
[156] *Gomes Lund v. Brazil*, para. 211.
[157] *Gomes Lund v. Brazil*, Brief of Pleadings, Motions and Evidence (Grupo Tortura Nunca Más de Rio de Janeiro, Comisión de Familiares de Muertos y Desaparecidos Políticos del Instituto de Estudios de la Violencia del Estado, and Center for Justice and International Law), July 18, 2009.
[158] *Gomes Lund v. Brazil*, para. 211.
[159] Ibid, paras. 202, 211.
[160] UNESCO/ICA 2009 Report, p. 89. For instance, Uruguayan Colonel Manuel Cordero, introduced documents from the political police in his defense though these records are otherwise unavailable. *See also* Gloria Cano, Testimony before I/A Comm. H.R., "Access to Information in the Investigation of Cases of Grave Violations of Human Rights in Peru," March 26, 2012.

62. *Second*, the duty to search implies a duty to **store relevant records in a manner that is organized and searchable**, including with an **index of records** available.[161] A joint report of UNESCO and the International Council on Archives (ICA) concerning the management of archives of state security services of former repressive regimes ("UNESCO/ICA 2009 Report") recommends that documents of former repressive government entities be enumerated and indexed as soon as possible after a democratic transition.[162] According to the Human Rights Commissioner of the Council of Europe: "there must be strict rules for government agencies on how to register their documents and on obligations to help citizens find what they are looking for."[163] Mexico's right to information law explicitly requires that covered government entities must develop public indices of information classified as secret.[164]

63. *Finally*, 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.[165] The duty to gather or collect information – proactively or in response to a request – is most developed in the context of information of concern for public oversight and to ensure the responsibility of public officials.[166] In *Claude Reyes v. Chile*, the State asserted that it "did not have some of the information, and that it was not obliged to have it or to acquire it"[167] but this Court nevertheless held that the "State, through the corresponding entity, should provide the information requested by the victims, if appropriate, or adopt a justified decision in this regard."[168] Various domestic courts – including in Argentina,[169] India[170] and Hungary[171] – have similarly recognized State obligations to generate information under certain circumstances.

64. It is submitted that in a period in which a country is transitioning from an authoritarian repressive state to a democratic one, information that will facilitate the public accounting of violations of the

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[161] *See, e.g.*, Inter-American Legal Framework on ATI, para. 82.
[162] UNESCO/ICA 2009 Report, p. 70.
[163] Thomas Hammerberg, Council of Europe Commissioner for Human Rights, *Access to Official Documents: Foreword*, Issue Discussion Paper (Feb. 2012), CommDH(2012)7.
[164] Federal Law on Transparency and Access to Public Information (Mexico) of 2002, Art. 17.
[165] *See Claude Reyes v. Chile*, para. 81; *Moiwana Community v. Suriname*, para. 146; Model Inter-American Law, Art. 34 ("[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).
[166] *See Claude Reyes v. Chile*, para. 86; Joint Declaration by the Rapporteurs on Freedom of Expression from the UN, the OAS and the OSCE, December 6, 2004 ("Public authorities should be required to publish pro-actively, even in the absence of a request, a range of information of public interest."); Inter-American Juridical Committee, Resolution 147 of the 73rd regular period of sessions. Principles on the Right of Access to Information, August 7, 2008, Principle 4; Model Inter-American Law, Arts. 9 & 12 (detailing progressive obligations of proactive disclosure).
[167] *Claude Reyes v. Chile*, para. 97.
[168] Ibid, para. 158.
[169] An Argentine court ordered the City of Buenos Aires, upon an information request, 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*, Juez de Primera Instancia en lo Contencioso Administrativo y Tributario de la Ciudad de Buenos Aires, Amparo No. 27599, Judgment of November 7, 2008.
[170] Under the Indian Right to Information Act, if public authorities have not collected information they are authorized to collect from a private body under any law, citizens may request such information and the public authority must collect it and make it available. The Right to Information Act (India), No. 22 of 2005, Sec. 2(f).
[171] The Constitutional Court of Hungary instructed the legislature to pass a law requiring records to be kept of cabinet sessions upon ruling that the government is under an obligation to maintain records as failure to do so would directly and seriously restrict the public's right to information. *Magyar Közlöny*, Constitutional Court of Hungary, Judgment of July 13, 2006, 2006/84.

past regime, and the holding of perpetrators responsible for serious abuses, meets the standard of information necessary for public oversight and ensuring official responsibility. The Inter-American Commission recognizes this proactive duty to gather information concerning human rights violations in which the State itself is implicated:

> "The State has an obligation to launch an investigation to corroborate the facts, whether or not they are found in official documents, with the goal of clearing up the truth of what happened and informing families of the victims as well as the public in general. This is a positive and proactive obligation that depends on obtaining and processing information that allows for full understanding of the facts that are not today duly documented."[172]

65. The Inter-American Commission also extrapolates the duty to proactively produce information, including statistics related to gross violations of human rights, from the duty to access both raw and processed data, or data in the form requested.[173] Depending on the circumstances and the information requested, the State may also have duties to **expend effort to attempt to reconstruct the missing information** related to gross violations of human rights – physically or through investigations.[174] In one potent example of a State's physical reconstruction of human rights related information, the German Commission established after the fall of the Berlin Wall to implement the Stasi Records Act reconstructed 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.[175] As stated by the OAS Office of the Special Rapporteur for Freedom of Expression: "if it was possible in Germany to reconstruct documents that were 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."[176] Chile did just that, following the work of its Corporation for Reparation and Reconciliation in the 1990s. In 2003, the Chilean government created the National Commission on Political Prisons and Torture with 45 offices throughout the country and a mandate to gather information on victims of repression and propose reparations.[177]

66. 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.[178] When there is obligation to gather and the State believes records no

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[172] Inter-American Legal Framework on ATI, para. 88.
[173] Ibid, para. 81.
[174] *See Anzualdo Castro v. Peru*, para. 135 (considering State duties to conduct an effective investigation, and holding that the passage of time limits access to information that could "shed light on the facts," but the lack of access to such resources "does not exonerate state authorities from making the necessary efforts to comply with this obligation"). *See also* OAS Special Rapporteur 2011 Report, Ch. III, paras. 19-21. I/A Comm. H.R. Article 50 Report, para. 447 ("the State is obliged to seek out the information requested and to reconstruct it in the event that it has been destroyed").
[175] OAS Special Rapporteur 2010 Report, Ch. III, para. 19, citing Jefferson Adams, *Probing the East German State Security Archives*, 13 International Journal of Intelligence and Counterintelligence 21 (2000).
[176] OAS Special Rapporteur 2010 Report, Ch. III, para. 19.
[177] UNESCO/ICA 2009 Report, p. 39.
[178] *See Gomes Lund v. Brazil*, para. 211.

longer exist or cannot be retrieved, the State must take steps to try to recover or reconstruct information lost or illegally removed, including through opening archives, repeating and expanding searches, permitting and capacitating independent investigations, and it must explain the steps taken.[179]

D. Duty to Ensure Integrity of Records, in Some Circumstances Through Independent Searches or Management of Archives

67. The State has a duty to guarantee that the integrity of the oversight of human rights related information is maintained—in both actuality and perception. An **independent investigation, or renewed independent search**, may be warranted when there is a credible reason to believe that information exists, and public authorities have denied the existence of information critical to investigations into gross violations of human rights or serious breaches of international humanitarian law.[180] This can be due to inconsistent statements from the State, or the assertion that documents do not exist despite their disclosure in other contexts.

68. There are various examples of courts or international bodies ordering independent searches of military or intelligence archives following concerns about the veracity of assertions of state institutions regarding the availability and integrity of certain records.[181] In one example, Brazil established a Special Commission in 1995 fully authorized to seek "documents from every public body" in its investigation of the fate of missing people believed to be victims of forced disappearance at the hands of the State. The Commission included representatives from the legislature, the Public Ministry, the Armed Forces, and relatives of the disappeared.[182] Colombian President Ernesto Samper confirmed that the Attorney General would "examine military intelligence files" after 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."[183] The Supreme Court of Moldova ruled that authorities must provide an inventory of the state intelligence service archive, and permit personal access to the archive, after authorities insisted that requested documents did not exist.[184]

69. A growing number of information commissions and related bodies, with the authority to overrule administrative classification or disclosure determinations, serve this independent oversight function as well. They do not conduct physical searches, but they have the authority to order the disclosure of records, in the face of assertions by the entity holding the records that the disclosure is not warranted, and in some cases that the information cannot be found. The oversight functions of information commissions and related bodies generally extend to security or intelligence entities, and remains whether or not a state entity is implicated in egregious human rights violations. For instance, Mexico's Federal Access to Information Institute (IFAI) has a mandate to make final and conclusive determinations regarding all classification or withholding decisions and IFAI has

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[179] *Ibid*, paras. 202, 211. OAS Special Rapporteur 2010 Report, Ch. III, para. 21.
[180] *See Gomes Lund v. Brazil*, para. 202 ("the final decision on the existence of the requested documentation cannot be left to [the] discretion [of a State organ whose members are charged with committing the wrongful acts]"). *See also Anzualdo Castro v. Peru*, para. 135.
[181] *See* Annex 2.
[182] UNESCO/ICA 2009 Report, p. 42, citing Art. 9.1 of Brazil's Law 9140 of 1995 ("Law of the Disappeared").
[183] UNHCHR, Report on the situation of human rights in Colombia, E/CN.4/2006/9, January 20, 2006; I/A Comm. H.R., Third Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.102, February 26, 1999, Ch. VII, paras. 59-60.
[184] OAS Special Rapporteur 2010 Report, Ch. III, note 11, referencing Supreme Court of Moldova, *Case of Tasca v. State Intelligence Service (SIS)*, Judgment of July 20, 2007. *See also* Annex 2; Inter-American Legal Framework on ATI, para. 81 (The right to information "implies the possibility of accessing physical places where the information is held, which makes it possible to learn the categorization criteria of the office in question.").

overruled agency decisions to deny access to information, including security sector information.[185] For instance, IFAI ordered the Mexican state intelligence agency, the Center for Investigation and National Security (CISEN), to disclose sensitive information concerning deaths resulting from organized crime and the actions of the state to counter it.[186] Chile's Council for Transparency has similarly engaged actively in a review of agency withholding decisions.[187] Brazil just established a Mixed Commission on Information Evaluation, including legislative, judicial and executive representatives, to review and judge classification decisions every four years with the mandate to issue final determinations on government decisions to withhold access to information.[188]

70. Similarly, at a higher level of intrusion for the state entity, **independent management of archives of a repressive state institution** may be warranted where the entity has systematically failed to provide information that should be disclosed; or where the institution is too heavily implicated in human rights violations to allow for its unbiased oversight, or to retain the public trust in its oversight. An authority accused of egregious human rights violations should no longer retain the authority to control the release of information concerning these violations or to assert conclusively that such information does not exist.[189] As with truth-seeking mechanisms, the "independence, impartiality, and competence" of archives must be secured where public credibility in their management is lacking.[190]

71. This Court, adopting the position of the Inter-American Commission, noted the "possible conflict of interests" when a State authority is in control of information concerning human rights violations in which it is alleged to have been implicated.

> "Public authorities cannot shield themselves behind the protective cloak of official secret to avoid or obstruct the investigation of illegal acts ascribed to the members of its own bodies. In cases of human rights violations, when the judicial bodies are attempting to elucidate the facts and to try and to punish those responsible for said violations, resorting to official secret with respect to submission of the information required by the judiciary may be considered an attempt to privilege the 'clandestinity of the Executive branch' and to perpetuate impunity. Likewise, when a punishable fact is being investigated, the decision to define the information as secret and to refuse to submit it can never depend exclusively on a State body whose members are deemed responsible for committing the illegal act."[191]

The Court's reasoning applies similarly to the disclosure of information outside of the context of a criminal prosecution. The exposure of gross human rights violations is a mechanism to hold individual and institutional perpetrators accountable, and reform systems in such a way to ensure the non-repetition of the violations. As such a mechanism, the state institution faces an inherent conflict in making determinations of whether or not disclosure is warranted.

72. In Latin America, there are various examples of the voluntary or mandated transfer of records of political repression to independent management to facilitate public access to information

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[185] Federal Law on Transparency and Access to Public Information (Mexico) of 2002, Art. 59.
[186] OAS Special Rapporteur 2011 Report Ch. II, para. 365, *citing* IFAI, Case File 145/11, March 23, 2011, p. 64; cf. *CISEN ordered to report on narco deaths*, El Universal, March 24, 2011. *CISEN must turn over information on deaths caused by organized crime*, Notimex, March 23, 2011.
[187] OAS Special Rapporteur 2011 Report, Ch. III, para. 10.
[188] Ibid, Ch. II, para. 50.
[189] *Gomes Lund v. Brazil*, para. 202. *See also* UNESCO/ICA 2009 Report, pp. 68, 70 ("archives of the former repressive services should remain under the control of the new democratic authorities" and be "subject to democratic legislation").
[190] *See* Updated Principles on Impunity, Principle 7.
[191] *Mack Chang v. Guatemala*, para. 181; *Tíu Tojín v. Guatemala*, para. 77.

concerning historic human rights violations.[192] The Paraguayan "*Archivos de Terror*" are now in the Supreme Court under the control of the Center of Documentation and Archives for the Defense of Human Rights. These archives of the Paraguayan Technical Police, or security services, under the Stroessner dictatorship (1954-89) were discovered accidentally in 2002 by a lawyer seeking information in a police station.[193] "[F]ive tons of reports and photos," 300,000 documents in total, the archives list 50,000 murdered, 30,000 disappeared and 400,000 imprisoned. Prosecutors and judges have marshaled the archives to bring charges against former military officers, including former Chilean dictator Augusto Pinochet.[194]

73. Guatemala's Police Archives are now under the control of the General Archives of Central America to shield them from any undue political influence after their accidental discovery and great pressure domestically and internationally to ensure access and relief from political censorship. A copy of all of the records is housed in a university outside of Guatemala.[195] Other regional examples of the establishment of independently controlled archives for the purpose of broader disclosure and a public reckoning with historic violations include the management of various provincial political police archives in Brazil and Argentina.[196] These archives have contributed to significant prosecutions of gross human rights violations.[197]

74. Outside of the region, various states recovering from periods of brutal and sustained human rights violations have established independent control of their archives with the explicit purpose of ensuring greater security of and access to historical records. Since 1996, the Cambodian Centre for the Documentation of the Programme of Genocide has controlled the archives of the Cambodian political police from the period of the Khmer Rouge. Its mandate is to collect documentation on mass killings in Cambodia.[198] Spain transferred the Franco era files of the political police to the National Historical Archive, by agreement under the supervision of the Minister of Culture rather than the Minister of Interior.[199] Virtually all of the former communist countries of Eastern and Central Europe have transferred control of the archives of their former political police to democratic control.[200] The Czech Republic established an Institute for the Study of Totalitarian Regimes, with oversight of the archives of the political police and other espionage institutions previously under the control of the Ministries of Interior, Defense and Justice. The Institute itself is governed by a Council elected by the Parliament to ensure independence. The act establishing the Institute recognizes "the state's obligation to allow the public maximum possible access" to the records "as an expression of its conviction that unlawful acts of any totalitarian or authoritative regime against citizens must not be protected by secrecy or forgotten." [201]

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[192] *See* Annex 2.
[193] Centro de Documentación y Archivo para la Defensa de los Derechos Humanos, at http://www.aladin0.wrlc.org/gsdl/collect/terror/terror_e.shtml. *See* Annex 2.
[194] Mike Caeser, Paraguay's archive of terror, *BBC News*, Mar. 11, 2002.
[195] UNESCO/ICA 2009 Report, p. 91.
[196] Decree 39.680, August 24, 1989 (Brazil); Decree 40.318, January 2000 (Argentina)
[197] Since the annulment of the laws of *punto final* and *obedencia debida* in Argentina, more than 200 cases have been initiated in Argentina. The archives contributed to various cases. UNESCO/ICA 2009 Report, pp. 42-43, 60, 90. *See also* La Comisión provincial por la memoria, Acerca de la Comisión, at http://www.comisionporlamemoria.org.
[198] UNESCO/ICA 2009 Report, p. 95.
[199] Ibid, pp. 53-54.
[200] Ibid, p. 95. *See* Annex 2.
[201] Act No. 181/2007 Coll. on the Institute for the Study of Totalitarian Regimes and the Archive of Security Forces, Czech Republic (2007), Preamble, Arts. 4(c), 4(d), 7(1), 12(4), 13(1), 13(2), 19. The Security Services Archive must be managed by a specialized archivist of "incorruptib[le]" character—defined explicitly to exclude the possibility of management by military or intelligence personnel.

E. Duty to Fulfill Obligations within a Reasonable Time

75. It is often said that information is a "perishable commodity."[202] The right to truth imposes on States a duty to provide appropriate and effective remedies within a limited time period.[203] The "reasonable time" limitation arises out of Articles 8, 13 and 25.

76. Article 13 "establishes a positive obligation for the State to provide the requested information in a timely, complete, and accessible manner," or "the State must offer, within a reasonable time period, its legitimate reasons for impeding access."[204] 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."[205] 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.

77. Articles 8 and 25 require also that the State assures a remedy "within a reasonable time."[206] In *Gomes Lund v. Brazil*, the Inter-American Court found that the State violated the right to truth of the relatives in failing to provide information during their 28-year effort to uncover the circumstances of forced disappearances. As the Court recognized, victims of human rights violations have the right to access, directly and timeously, an investigation uncovering information regarding human rights violations.[207] This Court has defined "reasonable time" in this context to require a consideration of (i) the complexity of the issue; (ii) efforts of the affected party; (iii) actions of the judicial authorities; and (iv) impact generated in the status of the person involved in the process.[208] This Court has reiterated the State's duty "to investigate the facts while there is uncertainty about the fate of the person who has disappeared, and the need to provide a simple and prompt recourse in the case, with due guarantees."[209]

IV. SUBMISSIONS ON THE CURRENT CASE

78. In light of the principles described above and in the international and comparative law on the right to truth, we submit that the State is responsible for the following violations of the applicants' and the public's right to truth. The applicants in the current case have spent decades without knowing, and endeavoring to find out, the fate and whereabouts of their disappeared or extra-judicially executed relatives, and the circumstances and broader context of related human rights violations. They have sought, among other sources of truth, access to government records or independent investigations or prosecutions. Unauthorized disclosures of military and intelligence records have confirmed details about their final moments in State custody; police records discovered by chance in some cases have provided added details. But few direct actions taken by the State have helped to clarify the truth, or to hold perpetrators accountable or provide reparations. On the contrary, the

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[202] E.C.H.R., *Case of Sunday Times v. U.K. (No. 2)*, Application No. 13166/87, Judgment of November 26, 1991, p. 29.
[203] *Gomes Lund v. Brazil*, paras. 219-25.
[204] OAS Special Rapporteur 2011 Report, Ch. III, para. 172.
[205] *Claude Reyes v. Chile*, para. 163. *See also* Ibid, para. 137 ("When State-held information is refused, the State must guarantee that there is a simple, prompt and effective recourse…[P]romptness in the disclosure of the information is essential.").
[206] *González Medina v. Dominican Republic*, para. 255; *Case of Miguel Castro-Castro Prison v. Peru*. Merits, Reparations and Costs. Judgment of November 25, 2006. Series C No. 160, para. 436.
[207] *Gomes Lund v. Brazil*, para. 256. *See also González Medina v. Dominican Republic*, para. 255.
[208] *See, e.g.*, *González Medina v. Dominican Republic*, para. 262; *Case of Bulacio v. Argentina*. Friendly Settlement, Merits, Reparations and Costs. Judgment of September 18, 2003. Series C No. 100, para. 114.
[209] *Bámaca-Velásquez v. Guatemala,* para. 197.

response from the Respondent State can only be characterized as a deliberate effort to deny the right to truth and a pattern of systematic denial and cover-up.

79. In view of the seriousness of the underlying violations, and the inevitable suffering the prolonged denial of truth has caused the families of the disappeared and the Guatemalan society, 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 violation of the public's right to truth, under Articles 1, 8, 13 and 25 of the Convention. This section provides details regarding the pattern of denial of the right to truth to victims, tribunals and prosecutors, and the broader public. It subsequently outlines the derogation of the Respondent State's duties to uphold the right to truth.

A. Pattern of Denial of Truth to All Holders of the Right

80. The Government's refusal to allow access to military and intelligence records of its involvement in forced disappearances, extrajudicial executions, and other gross human rights abuses has been systematic. Yet significant relevant information must be presumed to exist based on numerous disclosures and discoveries in recent years.

1. Denial of Information to Family, Tribunals and Prosecutors, and the Public

81. The Government has denied the applicants access to information regarding the fate or whereabouts of the victims immediately after their disappearances, for the decade before the Peace Accords. At that time, the State even refused to acknowledge its role in the violations. The discovery of the *Diario Militar* confirmed State involvement in their disappearances and, in some cases, their extrajudicial executions. Yet the Government has not transformed its response to family members after the Peace Accords and the disclosure of the *Diario Militar*.[210] The State acknowledged the violations, but provided little more.

82. Further, while the State initiated investigations into the violations, investigations have been belated and inadequate, and remain in their initial stages. After the Peace Accords, the Government dispersed case files pertaining to the victims described in the *Diario Militar* among 38 prosecution offices. It was only in 2005 – 23 years after the disappearances and seven years after the disclosure of the *Diario Militar* – that the State consolidated the cases in the Special Cases and Human Rights Violations Unit (*Unidad de Casos Especiales y Violaciones a los Derechos Humanos*). The Public Prosecutor has sought extensive information on the victims but little on the perpetrators, conducting no interviews with the Armed Forces and only one with the police.[211] The Ministry of Defense and the Ministry of Interior spurned requests for information from the Public Ministry for records needed pursuant to prosecutorial investigations, on procedural or national security grounds.[212] There have been no judgments or sanctions in any of the cases of victims listed in the *Diario*

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[210] I/A Comm. H.R. Art. 50 Report, paras. 35, 60-61.

[211] Testimony of Manuel Giovanni Vásquez Vicente before I/A Court H.R. hearing in *Gudiel Álvarez (Diario Militar) v. Guatemala*, Case 12.590, April 25, 2012 ("Vásquez Vicente Testimony").

[212] I/A Comm. H.R. Art. 50 Report, paras. 48, 50, 431-32, 486, fn 712, referencing Case File MP001/2006/12836. *See* State Submission, received October 13, 2008, including Criminal Case File in the case of Lesbia Lucrecia García Escobar, Communication MP 6168-99 OAP from Public Prosecution Service to Ministry of Defense, June 2, 1999 (seeking information on military chain of command); Communication from Minister of Defense to Public Prosecution Service, June 15, 1999 (denying request on ground that application "did not meet the requirements set out in Article 245 of the Code of Criminal Procedure"). Article 245 of the Guatemala Code of Criminal Procedure, Decree 51-92, provides that: "The courts and the Public Prosecution Service may request reports on data held in records kept in accordance with the law" by providing particular information.

Militar, and investigators and prosecutors cite the Government's refusal to disclose information as a significant limiting factor.[213]

83. More broadly, Guatemalan defense and intelligence entities have denied or provided insufficient or incomplete responses to most requests for documents from military or intelligence archives, including from tribunals and investigators. In March 2008, Guatemala's Constitutional Court ordered the disclosure of four military plans; one was provided to the Court in full and one in part. The military asserted that the other two were restricted by law, unavailable or non-existent, and unrelated to human rights investigations and thus not subject to disclosure under Article 24 of the Law of Access to Public Information.[214] The military has been allowed to act, in effect, as the final arbiter on questions of access to information it holds.

84. The denial of information to the Commission for Historical Clarification (*Comisión de Esclarecimiento Histórico*, or CEH) is a denial of collective access to the truth about the atrocities committed during the internal armed conflict as the CEH was a principal mechanism designed to reconstruct history and provide recommendations for moving forward after the 1994 Oslo Accord.[215] The CEH was tasked to clarify the human rights violations committed in connection with the armed conflict in a comprehensive investigation and report.[216] Article 10 of the National Reconciliation Law of 1996 required that all State entities "provide the Commission the support it requires."[217] Yet, the State repeatedly denied the CEH information from State archives, particularly the files of the military and intelligence services, based on the claim that documents were protected by military or national security exemptions to disclosure in Article 30 of the Constitution,[218] or that requested information never or no longer existed on account of the irregular nature of the armed conflict.[219] Thus, the CEH did not have access to the Police Archives, the *Diario Militar*, or the operational *Plan Sofia* – all in government custody at the time of the CEH's work but released publicly only subsequent to the CEH's report and through unofficial channels.[220]

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[213] Vásquez Vicente Testimony. I/A Comm. H.R. Article 50 Report, para. 35. Overall, few of the 626 documented massacres have resulted in convictions. Also, investigators trying to uncover the truth concerning gross human rights violations continue to face repercussions. Recently, staff members of the Guatemalan Forensic Anthropology Foundation (FAFG) received explicit death threats subsequent to the February 2011 conviction of four military personnel in the Dos Erres massacre. Amnesty International, Guatemala: Submission to the U.N. Human Rights Committee, For the 104th session of the Human Rights Committee (12-30 Mar. 2012) (2012), pp. 4, 9-10. FAFG provides forensic expertise into investigations of massacres and other human rights violations.

[214] The Constitutional Court ordered the disclosure of *Plan Victoria 82*, *Firmeza 83*, *Operación Ixil* and *Plan Sofia*, rejecting the assertions that the decades-old documents could not be provided due to national security risks and their classification as "state secrets." The military provided only *Plan Victoria 82* and eight pages of the more than 200-page operational plan for *Firmeza 83*. Letter to Major General Abraham Valenzuela González, Minister of Defense, Guatemala, from Human Rights First *et al.*, February 3, 2009, p. 2. *See* Amparo 26-2007 of. 1, La Sala Primera de la Corte de Apelaciones del Ramo Penal, Judgment of July 19, 2007. The Constitutional Court decision affirmed the decision of the appellate court..

[215] National Reconciliation Law, Decree 145-96 (1996), Art. 10.

[216] Agreement on the Establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer, June 23, 1994.

[217] National Reconciliation Law, Decree 145-96 (1996), Art. 10.

[218] Constitution, Art. 30. Article 30 provides for public access to information "except when military or diplomatic matters relating to national security or information supplied by individuals under the pledge of confidence is involved."

[219] Letter from Minister of National Defense, Héctor Mario Barrios Celada, to Chairman of CEH, Christian Tomuschat, January 5, 1998. CEH Report, Vol. XII, Annex III, Title 2, pp. 102-107.

[220] Letter from CEH to Álvaro Arzú Irigoyen, President of Guatemala, October 28, 1997, in CEH Report, Vol. XII, Annex III, Title 2, p. 70; CEH Report, Vol. I, Ch. III, pp. 49, 50 ("the collaboration provided by the National Army [was] precarious and unsatisfactory" and "nor was the CEH able to review any official documents related to the Presidential General Staff"). Among other limitations, the CEH was disappointed that "with regard to the forced

85. A decade later, President Colom's 2008 call for declassification of military records was met with similar obstruction. It resulted in an inadequate search and incomplete declassification by a conflicted Commission, and a secret report available only to the President.[221] President Colom announced the declassification of "all" military archives in February 2008 and establishment of the Peace Archives for the purpose of housing declassified military documents.[222] Yet the military resisted independent review and management of military records, relying on the confidentiality exemption for "military subjects" or "national security" in Article 30 of the Constitution.[223] Presidential Decree 64-2009, signed in March 2009, created the Declassification Commission to review records from 1954 to 1996, in response to the military's resistance to declassification review by the Peace Archives.[224] Four of seven Commissioners were members of the military, and classification decisions were made by majority vote.[225] The Commission only had access to documents provided by the military as classified, and was denied access to the archives of the Presidential General Staff. The Minister of Defense provided a written statement to the Commission asserting that the only documents the military holds from the period under consideration are those held by the Office of the Army Adjutant General.[226]

86. At its conclusion in June 2011, the Commission reported it had identified 12,342 relevant documents, out of which it declared 640 partially secret, and 55 classified, but without clear guidelines about the standards for classification. The Commission identified only 740 documents from the 1980s, or six percent of the total documents reviewed.[227] The interim and final reports, as well as the criteria, remain secret, only available to the President; not even the Commissioners have

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disappearances … the CEH was unable to fully identify the decision-making center that issued the orders for the bloodiest actions and operations," partly due to the failure of the government to ensure full access to records. CEH Report, Vol. II, Ch. 2, Title I, p. 14 & Title XI, p. 459.

[221] Humberto Galvan, A Conversation with Guatemala's Presidential Commission on the Declassification of Military Archives (July 21, 2011), at http://www.thedialogue.org/page.cfm?pageID=32&pubID=2709 ("Declassification Commission Conversation").

[222] *Guatemala: Álvaro Colom Ofrece Abrir Archivos Militares*, Prensa Libre, February 26, 2008 (President Colom: "We had promised this in the campaign, but now we know where they are - it was not specified - and we have the information, I can assure you that we are going to make all the Army archives public... [I will do] whatever is necessary to uncover the truth."). Current President Otto Pérez Molina, also former Director of Military Intelligence, said at the time that records of intentional massacres or the killing of civilians would not be found in military archives. Ibid (Pérez Molina: "In the archives you will not find [documents] with orders or blueprints of an operation to kill innocent people during the period of armed conflict, this is not going to be in any archive; what you may find is that an operation was organized to control insurgent groups who were carrying weapons and who were killing and threatening people.").

[223] Statement of Marco Tulio Álvarez, former Director of Peace Archives and former Commissioner on the Presidential Commission on the Declassification of Military Archives, before I/A Court H.R. in *Gúdiel Álvarez v. Guatemala*, Case 12.590, April 17, 2012 ("Tulio Álvarez Statement"), p. 9 (the military "refused to carry out the order delivered verbally").

[224] Declassification Commission Conversation; Presidential Decree 64-2009.

[225] Tulio Álvarez Statement, p. 12-14 ("in reality, in my view, the process was more or less in the hands of the armed forces").

[226] Ibid, p. 4 (Minister of Defense stated: "There are no documents from the period 1954-1996 in the archives of the different agencies of the Guatemalan Army, and those that do exist are under the control of the General Adjutant Service of the Army.") Ibid, p. 13 ("we had access to the documents the Army presented as having been classified"; "the archives that were not identified in this category were not inspected … Nor was the archive of the Presidential General Staff inspected because it was said that this archive had been shut down by the Public Ministry.")

[227] Declassification Commission Conversation (min. 9:00, 29:20-32:40, 1:00:00-1:07:00). In response to questions concerning the initial lack of documents from 1980-1985, the Commissioners reiterated that there is great desire to find documents from this period, and that initial concerns regarding the complete lack of documents from this period led to the extended term of the Commission and eventual recovery of 740 documents. *See also Archivos militares de los años no aparecen*, El Periódico, December 14, 2010.

copies.[228] Moreover, when the military released the approximately 12,200 newly declassified documents in June 2011, it made access to the records complicated and cumbersome: access is provided through a reading room on the military installation of the Army General Staff and petition for copies requires a letter hand-delivered to the Ministry of Defense at another location.[229] Many of the archives are not yet digitized, and the collection is not indexed or systematically organized.[230] The Respondent State's obstructions to truth thus continued even after this Court's explicit finding in 2006 that Article 13 of the Convention guarantees a fundamental right of access to state-held information, and after Guatemala passed its own Law on Access to Public Information in 2009 requiring the disclosure of human rights related information.[231]

2. Evidence Suggesting the Existence of Undisclosed Records Concerning Human Rights Violations

87. There is strong evidence to suggest that the State has or should have access to more records related to the human rights violations at issue here than it has disclosed. *First*, private disclosures and the accidental discovery of the Police Archives strongly suggest that the searches conducted by the authorities, and in particular the military and intelligence entities, have been inadequate. The unofficial disclosures of *Diario Militar* and the operational *Plan Sofia* demonstrate that the State produced records of significant value for shedding light on gross human rights violations, that at least some of these records continue to exist, and that the State is not disclosing them voluntarily or even under court order.

88. The *Diario Militar* is a military document produced by *El Archivo*, the President's Intelligence Unit. *El Archivo*, and its military intelligence counterpart, known as the G-2, acted "without limits" according to the CEH.[232] The *Diario Militar* is public due to an unauthorized disclosure to the 1999 National Security Archive, a foreign non-governmental organization. The 359-page operational *Plan Sofia* includes documents related to operations in July and August 1982 directed at "exterminating subversive elements in the area" of Ixil, in northwestern Quiché. Documents include reports of results, directives, maps, names of personnel, and communications between units and up the chain of command to then President Ríos Montt.[233] The documents describe actions resulting in deaths and detention of civilians, and the destruction of villages, and also the context in which known massacres occurred.[234]Among other things, the operational plan demonstrates that the military made and kept extensive records of their actions during the 1980s, and that there was a clear chain of command, including the President, that controlled a defined and intentional counter-insurgency strategy that resulted in widespread massacres. *Plan Sofia* was released as a result of an unauthorized disclosure after the military refused to produce it despite a Constitutional Court order. Lawyers pursuing genocide charges against Ríos Montt requested the operational records related to *Plan Sofia*, but the Minister of Defense asserted in court that these records either did not exist or could not be located.[235] It was disclosed unofficially in December 2009 and has been introduced in legal challenges to human rights violations in Guatemala and Spain. [236]

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[228] Tulio Álvarez Statement, pp. 14-15.
[229] *Abren en Guatemala Centro de Archivos Desclasificados Sobre Guerra Interna*, Terra Noticias, June 20, 2011.
[230] Tulio Álvarez Statement, p. 15.
[231] Law on Access to Public Information (Guatemala), Decree 57-2008 (2009), Art. 24.
[232] CEH Report, Vol. 2, Ch. 2, Title III: Intelligence, p. 93.
[233] Ibid.
[234] Kate Doyle, "Operación Sofia": Report for the Spanish Genocide Case, submitted to the Spanish National Court, December 2, 2009, at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB297/index.htm.
[235] Kate Doyle, *Operation Sofia: Documenting Genocide in Guatemala*, National Security Archive Electronic Briefing Book No. 297, December 2, 2009.
[236] In Guatemala, former dictator General Ríos Montt and three other former generals are facing charges of genocide and crimes against humanity in connection with military operations *Victoria 82*, *Firmeza 83*, and *Plan Sofia*

89. Despite its failures to disclose military and intelligence records, the Respondent State highlights the Police Archives, and related publications and resources, as evidence of its commitment to the right to truth.[237] The eighty million pages that now comprise the Police Archives were discovered by accident in 2005, after the Human Rights Ombudsman sent inspectors to examine assertions of improper ammunition storage. The Police Archives were made public in their entirety through a strong collaboration with the Human Rights Ombudsman, civil society organizations, and international entities, and in the face of efforts by the executive and state security entities to limit access.[238] They had been concealed by the government even after the Peace Accords; a thorough search for government security records would have uncovered the massive archival records hidden in plain view.[239] A judicial order ensured public access, and the control of the Police Archives initially by the Human Rights Ombudsman, and subsequently by the General Archives of Central America.[240] Yet even now, the Government has not secured institutionally the Police Archives; there is no guaranteed budget, physical infrastructure, regulatory framework, or updated governing Archives Law.[241]

90. *Second,* an estimated 2,500 documents discovered in the Police Archives have a connection to *Diario Militar*, including documents referencing military documentation, military operational plans, and documents concerning military involvement in forced disappearances, house raids, and seizures of allegedly subversive property.[242] Records uncovered within the Police Archives depict the militarization of the police and its subordination to, and linkage with, the operations of the Armed Forces during the internal armed conflict.[243] Further, documents within the Police Archives show there are copies of orders demonstrating that the victims were under the control of security forces before their disappearances and that various state entities collaborated in their disappearances.[244]

91. *Third*, the 2011 identification of the remains of applicants Sergio Linares and Amancio Villatoro, and the 2012 identification of the remains of three other victims, on a former military base outside of Guatemala City by the non-governmental Guatemalan Forensic Anthropology Foundation (FAFG) further identifies the State military and intelligence entities as presumptively controlling more information than they have thus far released. These five victims of state terror are identified in the *Diario Militar*. Although the men were kidnapped on distinct dates under different circumstances, a handwritten "300" under each of their names identifies all five as victims of execution on the same day subsequent to their forced disappearances, with the complicity if not direct responsibility of *El Archivo*.[245] Their exhumation and identification points to the military's

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intended to "exterminate subversive elements." Emily Willard, *National Security Archive: Genocide Trial against Ríos Montt: Declassified Documents Provide Key Evidence*, February 2, 2012. In Spain, Ríos Montt and four other former generals, are facing charges of torture, genocide, illegal detention and state-sponsored terrorism. Amnesty International, Guatemala: Submission to the U.N. Human Rights Committee, for the 104th session of the Human Rights Committee (12-30 Mar. 2012), 2012, p. 5.

[237] 2011 State Submission.

[238] Kate Doyle, *The Atrocity Files*, Harper's Magazine, December 2007, p. 52.

[239] *See* I/A Comm. H.R. Article 50 Report, para. 476.

[240] Tulio Álvarez Statement, p. 6.

[241] Ibid.

[242] Kate Doyle, National Security Archive, Statement before I/A Court H.R. in *Gúdiel Álvarez v. Guatemala*, Case 12.590, April 25, 2012.

[243] *See, e.g.*, "Información confidencial con remisión manuscrita al COCP 1981," October 28, 1981, in Archivo Histórica de la Policía Nacional, From Silence to Memory, 2009 ("AHPN Report"), p. 90 (record sent by or through Joint Operations Center of the National Police – Centro de Operaciones Conjuntas de la Policía, or COCP – to *El Archivo*, identifying "delinquent subversives," and their locations and forms of protection).

[244] See I/A Comm. H.R. Art. 50 Report, para. 45.

[245] National Security Archive, *Remains of two of Guatemala's death squad diary victims found in mass grave*, National Security Archive Electronic Briefing Book No. 363, November 22, 2011. Fundación de Antropología Forense de Guatemala, *FAFG confirms two victims of internal armed conflict identified*, November 25, 2011.

role in the human rights violations at issue here, and the State's likely control of greater information than has thus far been disclosed. In a situation such as this, where the final resting place of victims of forced disappearance is a military base, the presumption holds that the State retains information it is obligated to provide, and that all efforts must be made to prevent discretionary or arbitrary restrictions on disclosure.[246]

92. *Finally*, there is evidence of Respondent State's conspiracy to cover up its involvement in gross human rights violations. Prior to the establishment of the CEH, members of the Armed Forces plotted to deny the existence of relevant records.[247]

3. State Assertions

93. In the hearings before the Inter-American Commission, or in its October 2011 submission to this Court, the State highlighted as advances towards fulfillment of the State right to truth obligation, or its obligations to investigate and disclose information, (i) the enactment of the Law on Access to Public Information; (ii) meaningful access to the Police Archives, including with the publication by the Human Rights Ombudsman of *Derecho a Saber* (The Right to Know), a report analyzing the released documents, and the establishment of the Reference Center on Human Rights Violations with digitized access to the records for victims and relatives; (iii) the progress made in opening the Military Archives under the Presidential Commission on the Declassification of Military Archives ("Declassification Commission"); (iv) the work of the Archives of Peace under the Secretary of Peace (SEPAZ), including in validating the authenticity of the *Diario Militar* and publishing analyses concerning evidence in the Police Archives concerning the events related in the *Diario Militar*; and (v) ongoing criminal investigations, and structural reform of different prosecutorial institutions, including the establishment of the Special Cases and Human Rights Violations Unit in the office of the Attorney General for Human Rights in the Public Ministry.[248]

94. Some of these developments – including the enactment of the right to information law and the disclosure of the Police Archives – are significant advances. But the impact and openness of the Police Archives is largely due to the engagement of civil society, the financial support of international actors, and the oversight of the Human Rights Ombudsman following a court order.[249] Meanwhile, it seems clear that the Declassification Commission was not established with the intention of promoting independent review. Its effectiveness has been limited; and the State continues to resist a thorough and effective search of military and intelligence records, disclosure of all records related to human rights violations, and independent oversight of the archives.[250] The Archives of Peace was established for the express purpose of housing declassified military documents, but the military rejected the presidential mandate and the documents remain under military control. The work of the Archives of Peace has thus been limited as a result of the military's refusal to recognize its authority.[251] The structural reforms related to human rights

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National Security Archive, *Notes from the Evidence Project: Remains of Three Death Squad Diary Victims Identified*, National Security Archive Electronic Briefing Book No. 363, March 22, 2012.

[246] *See Claude Reyes v. Chile*, para. 98.

[247] Defense Intelligence Agency (U.S.), secret message, "*The Rising Impact of the Bámaca Case on the Guatemalan Military Establishment*," November 24, 1994 (shows that Army high command ordered the destruction of documents in anticipation of CEH and that Army had already destroyed installations on a key military base used in 1980s for secret detention and torture of guerrillas), at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB32/vol2.html (Document 45; see also Documents 42, 47). *See Mack Chang v. Guatemala*, para. 172 ("hiding and manipulating the official account … demonstrates that there was an attempt to cover-up those responsible").

[248] I/A Comm. H.R. Article 50 Report, paras. 50-54. 2011 State Submission.

[249] *See, e.g.*, Tulio Álvarez Statement, p. 6.

[250] *See* Sections IV.B.3&4, *infra*.

[251] Tulio Álvarez Statement, p. 6.

prosecutions have not produced a meaningful and effective investigation into the violations, or a disclosure of the results. In sum, the State has not satisfied its right to truth obligations.

B. Derogation of State Duties to Uphold the Right to Truth

95. The Respondent State has engaged in a pattern of the denial of truth institutionalized at the highest levels. The State's violations extend from the date of the initial violations nearly thirty years ago and continue to the present. *First*, the State did not record appropriately information concerning human rights violations, and preserve and archive all relevant records. Nevertheless significant records do exist, yet the State has systematically denied access to them. *Second*, the State has not ensured only narrowly-drawn restrictions to access, without excessive discretion and with meaningful oversight over classification decisions, consistent with both the Law on Access to Public Information and this Court's Article 13 jurisprudence. *Third*, the State has neither conducted adequate searches, nor made any effort to locate or reconstruct records asserted to be unavailable, lost or destroyed. *Finally*, the State's systematic obstruction of the right to truth merits an independent, thorough and effective search of the military and intelligence records, and the transfer of control over all historical records to an independent entity capable of meaningful oversight and facilitating access, and with an aim of ensuring the archives can be preserved and useful for uncovering the truth of the human rights violations widespread during the internal armed conflict.

1. The State failed to regularly record, effectively preserve and archive, and prevent the destruction of relevant information concerning State-sanctioned gross violations of human rights.

96. The State has violated its duty to record, preserve and archive information related to gross human rights violations and serious breaches of international humanitarian law, and to prevent the destruction of records. To the extent that it has failed to record and preserve records, and has destroyed certain records, the State appears to have done so deliberately to retain deniability, avoid accountability and guarantee impunity. Yet evidence makes clear that the State has also misrepresented the extent to which the lack of records, or the failure to preserve records, explains their failure to satisfy State obligations to uphold the right to truth.

Failure to record

97. The Respondent State has asserted as justification for the unavailability of information essential for uncovering gross human rights violations during the period of the internal armed conflict that the irregular nature of the conflict meant that records were not produced, or were not preserved, that otherwise would have been.[252] This is a violation of the obligation corresponding to the right to truth that relevant records be both produced and preserved. It is also a violation under Guatemalan law which, pursuant to Decree 1768 of 1968, recognized the State obligation to record, preserve and systematize records – including military records – as part of the national heritage.[253]

98. The existence of a domestic law requiring the recording and preservation of relevant records in accessible archives, and the existence of identified records which shed light on government practice, suggest that the failure to record and preserve certain records was due to a deliberate decision to avoid the creation of records that would implicate the state military and intelligence apparatus in human rights violations and crimes against humanity and guarantee impunity for perpetrators. Indeed, evidence from the uncovered Police Archives supports the depiction of a policy of cover-up instituted from the highest levels. A record from the Police Archives describes a "verbal order" of April 2, 1982 from the head of the Joint Operations Center mandating that "all complaints from the public should be recorded as described, except when they are made against

[252] Declassification Commission Conversation (min. 1:04:00).

[253] Decree 1768 of June 25, 1968, Preamble, Arts. 9, 10, 12(1), 16(2), 17 (recognizing the obligation to systematize records, prepare indices, catalogs and registers, and take measures to prevent their destruction). There are current efforts to update the national archives law.

elements of the security forces, in which case they should not be mentioned in any document." Another record includes a command from a police official to a subordinate to never identity state actors in descriptions of state actions: "Never personify—the third person must always be used."[254] On the eve of a transition from military to civilian government in 1985, the Armed Forces ordered *El Archivo*, the intelligence unit of the Presidential General Staff, to transfer its records from presidential control to the military's Intelligence Directorate (D-2).[255] The selective recording and preservation of information intended to further impunity and "maintain deniability" is a violation of the right to truth.[256]

99. However, the State has also exaggerated its failure to record, preserve or archive records. It is not credible that, for a decades-long military counter-insurgency campaign, information regarding military plans, personnel involved in operations and the circumstances of these operations did not at one time exist; or that they were all destroyed. Indeed, the unauthorized disclosures of some relevant information subsequent to assertions that the information did not exist, as well as the continued classification of certain records, challenges these assertions.[257]

Failure to prevent destruction of records

100. The Respondent State and/or representatives of its Armed Forces have made, at various times, statements to the effect that archival records have been destroyed. Marco Tulio Álvarez, a Commissioner on the Declassification Commission, and also the former Director of the Peace Archives, reported receiving and verifying complaints about the military's destruction of "important information" in 2003, while he was at the Office of the Human Rights Ombudsman. Despite the Ombudsman's official complaints, the Public Ministry never brought formal charges.[258] In 2008, after the announcement of the declassification of military documents, Tulio Álvarez again heard of the destruction of military documents.[259]

101. In response to the Ombudsman's investigation, the Ministry of Defense asserted that archival purification regulations justified the destruction.[260] As justification for the Commission's failure to review and disclose more records from the 1980s, another Commissioner referenced an archival purification law (*ley de depuración de archivos*) in existence since 1979 which, according to the Commissioner, established an annual procedure to purify archives more than ten years old.[261] The likely Ministry of Defense regulation referenced provides "Norms for the Purification of Military Archives." Yet even this regulation limits permissible destruction to documents without historical, legal or other value.[262]

102. The deliberate destruction of records containing information on human rights abuses, and especially gross abuses such as forced disappearances, is *per se* a flagrant violation of the right to 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

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[254] Kate Doyle, *The Atrocity Files*, Harper's Magazine, December 2007, p. 61.
[255] Kate Doyle and Jesse Franzblau, *Historical Archives Lead to Arrest of Police Officers in Guatemalan Disappearance,* National Security Archive Electronic Briefing Book No. 273, March 17, 2009.
[256] *Anzualdo Castro v. Peru*, para. 179.
[257] *See* Section IV.A.2, *supra*.
[258] Tulio Álvarez Statement, p. 5 (complaints of destruction of Presidential General Staff archives and documents from inactive military bases led to an investigation by the Human Rights Ombudsman in which a delegation "verified that there were papers which had been burned and others which had been shredded," and confirmed that "important information" was destroyed).
[259] Ibid.
[260] Ibid.
[261] Declassification Commission Conversation (min. 1:04:00).
[262] Ministry of Defense Regulation, SAGE-001-79, August 22, 1979 ("Normas Para Depurar los Archivos del Ejército"), Norms II & V.

public requested access to such records – in this case, after the period of the disappearances in 1983 to 1985. The destruction of records of historical significance is also inconsistent with the existence national archives law, the referenced purification regulation, and, after its enactment, the Law on Access to Public Information.[263]

103. It is, however, difficult to assess the credibility of the claim that there was a regular and constant purge of military records, or the claims that there was a more irregular destruction of records, given the authorities' failure to clarify – including for the purposes of these proceedings – 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. The Court should order the Respondent State, through the Public Ministry, to conduct a comprehensive investigation into the alleged destruction of the records, make its findings fully public, and punish those found responsible for any destruction.[264]

Failure to Provide Access

104. The executive, including the military and intelligence entities, of the Respondent State has systematically refused to provide access to information and cooperate in investigations of human rights violations relating to the period of the internal armed conflict. The Government has not declassified and made available archives of records, conducted adequate searches, or provided usable indices of records to facilitate access. The Government has rejected requests for information, or legal obligations to disclose information, on the ground that the information does not exist even where such an assertion is not credible and has been incrementally disproven. Virtually all releases of military or intelligence records related to gross human rights violations have been either by accident or through unofficial disclosures. Explicit requests for relevant information – including from the CEH, courts, prosecutors, and family members – have been repudiated.

2. The State has not ensured only narrowly-drawn restrictions to access, without excessive discretion and with meaningful oversight over classification decisions.

105. The Government has affirmatively refused to provide access to acknowledged military or intelligence records relying on broad assertions of national security, or a wholesale exemption for military records. Neither assertion is consistent with the right to truth, or Article 13 of the American Convention. Further we submit that neither is consistent with Guatemala's Law on Access to Public Information.

Restrictions to Access Inconsistent with International Law

106. The Government's assertions that certain records of the state security services from the period of the internal armed conflict should remain fully or partly classified cannot be maintained. As an initial matter, these assertions are insufficiently substantiated. The assertions that classification on the ground of national security is warranted is difficult to assess in the absence of a comprehensive

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[263] Decree 1768 explicitly recognizes military documents as historic records that should be preserved and not destroyed. It provides for limited destruction of records only where the information is considered without historic or administrative value, and only under the supervision of the General Archives of Central America with the consent of a Consultative Council and prior authorization of the Ministry of Public Education, responsible for oversight of the archives. Decree 1768 of June 25, 1968, Art. 16(8).

[264] *See* Letter from CEH to President Alvaro Arzú Irigoyen, May 24, 1998 ("It is difficult to accept that the information does not exist in Government archives. If that were true, then every time we perceived a serious irregularity indicating the State's responsibility in human rights violations, we would consider it necessary to receive assurances of the investigative measures adopted to determine the precise causes of the loss of historic documents of an official nature.").

account by the State as to what records or parts of records are classified and a clearer account of the standard used.

107. Moreover, the structural limitations of the right of access, implemented in the military-controlled classification and declassification processes, raise serious questions of compatibility with Article 13 of the Convention, including whether they are sufficiently precise and supported by restrictions established in Guatemala's domestic law; whether they serve a legitimate aim; and whether they are necessary in a democratic society.[265] The current use of national security classification authority by the President and the military is insufficiently precise and gives undue discretion to public officials on exemptions that are insufficiently clear and specific. The agreement establishing the Declassification Commission authorized President Colom to continue the classification of documents "that qualify as pertaining to national security in the president's judgment," in a textbook example of unfettered executive discretion.[266] The Commission provided no clear guidelines about the standards for classification it used to judge the records it reviewed, and appeared to use its discretion to adopt its own, undefined, use of the term "national security," as well as what would constitute harm to national security sufficient to trigger different levels of classification.[267] The Commission also chose to arbitrarily exclude entire categories of documents from public scrutiny, with no consideration of their specific relevance to the violations at stake.[268]

108. The classification decisions of the Declassification Commission also do not pursue, to a large extent, any legitimate aim. The Commission and the State generally have failed to show how disclosure of 30-year-old archival records could undermine the country's current national security or other legitimate interests; the only thing they would be likely to unravel is impunity for past abuses. Furthermore, the limitations in practice – though not in domestic law – are particularly vulnerable to the test of Article 13 in that they do not provide for balancing of secrecy interests with other compelling public interests, such as the right to truth and accountability for human rights abuses.[269] The harm to the right to truth and the right to information is severe when the pretext of national security is used to justify non-disclosure of information related to violations of fundamental human rights that the State is obliged to investigate.[270]

109. The continued classification of military and intelligence records from the period of the internal armed conflict is also not necessary in a democratic society. No national security interests are warranted here where the classified documents concern human rights abuses committed by a prior regime, and acknowledged by the successive democratic government.[271] The Government cannot justifiably assert that the disclosure of the great majority of decades-old military records from a

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[265] *Claude Reyes v. Chile*, paras. 89-91.
[266] Presidential Decree 64-2009, Art. 6.
[267] In a short public oral accounting of their results, the Commissioners stated only that their decisions were based on "universal requirements" for classification, and joined political and constitutional concepts of national security to determine criteria for classification. Declassification Commission Conversation (Statement of Eduardo Morales Álvarez, min. 9:00).
[268] Tulio Álvarez Statement, p. 14 ("the Commission voted to approve what types of documents should remain totally classified. … The decision of the Commission was made about each document type, but not each and every document").
[269] *See* Section III.B., *infra*.
[270] *See* I/A Comm. H.R. Art. 50 Report, para. 449.
[271] Documents with continued classification include military campaign operational plans and general military orders from the period of the internal armed conflict. Tulio Álvarez Statement, p. 10. Marco Tulio Álvarez reported in his submission to this Court, on behalf of the State, that the majority of the Commission favored a broad interpretation of the constitutional exemptions to disclosure under Article 30, though his view was that the Constitution, Article 24 of the Law on Access to Public Information, and international law required complete declassification. Ibid, pp. 8-13.

prior repressive regime will pose any discernible harm to national security.[272] Such an argument runs counter to this Court's judgments regarding the disclosure of information concerning gross human rights violations.[273] Even if Article 30 of the Constitution did justify nondisclosure here, domestic provisions authorizing the non-disclosure of information concerning human rights violations are irrelevant to State obligations under international law.[274] Moreover, Guatemala's own Constitutional Court overruled the interpretation of the Armed Forces that Article 30 of the Constitution authorizes continued classification as it ordered the disclosure of four operational plans in the face of similar assertions.[275]

110. Relatedly, the Government's continued classification of military and intelligence documents from the internal armed conflict appears to also be inconsistent with Guatemalan law. Article 13 requires that restrictions on freedom of information are "established by law to ensure that they are not at the discretion of public authorities."[276] The restrictions invoked here appear to fall outside of those pursuant to Guatemalan law for at least three reasons. *First*, the continued classification violates the Article 24 requirement that the State disclose the information related to human rights violations regardless of the national security interests asserted. *Second*, the Government is maintaining continued classification of national security records after the maximum twelve-year classification period permissible.[277] *Third*, the military has not satisfied the harm test of Article 26, requiring a demonstration that disclosure would threaten a legitimate interest, and that the harm is greater than the public interest in disclosure.

111. The President and the Armed Forces have suggested the need for a significant expansion of the authority of the Armed Forces to classify information and remove it from the public domain indefinitely.[278] Though this is reportedly no longer immediately a threat, such a reform would be in violation of Article 13 of the Convention and the principle of maximum disclosure. The State should follow international best practices of countries recovering from repressive regimes and order the comprehensive declassification of all archives and information related to the human rights abuses committed during the internal armed conflict, and reject any efforts to reform the Law on Access to Public Information to authorize greater secrecy. Also of concern is that the law governing the state's archival responsibilities, Decree 1768, is outdated and inconsistent with Article 13 as well as the American Convention and Guatemala's Law on Access to Public Information. Decree 1768 exempts records originating with the Ministry of Defense from public access without express prior written authorization from the Ministry.[279] In February 2009, the Human Rights Ombudsman overseeing the Police Archives passed a regulation that guarantees public access to the archival records. The records from the Police Archives have demonstrated the importance of state security

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[272] On the other hand, it is apparent that the disclosure of the truth of the abuses committed during the armed conflict is not just legally required but also beneficial for the reconstruction of the nation. *See, e.g.*, AHPN Report, pp. 38-39 ("The internal armed conflict and repressive practices characterized a recent historic period in Guatemala that affected and continues to affect society enormously… This should be understood in its fullest dimension, so that no one has the right to hide information that comes from the actions by the State and its officials.").
[273] *Mack Chang v. Guatemala,* para. 180; *Gomes Lund v. Brazil*, para. 202.
[274] *Cantoral-Benavides v. Peru*, paras. 53-54, 176. E.C.H.R., *Janowiec v. Russia*, paras. 105-107.
[275] *See* Amparo 26-2007 of. 1, La Sala Primera de la Corte de Apelaciones del Ramo Penal, Judgment of July 19, 2007. The Constitutional Court decision affirmed the decision of the appellate court.
[276] *Claude Reyes v. Chile*, para. 89.
[277] Law on Access to Public Information, Arts. 23(1), 27, 28.
[278] Declassification Commission Conversation (Statement of Aníbal Samayoa Salazar, min. 19:00, 34:50).
[279] Decree 1768 of June 25, 1968, Art. 17 ("The Director of the Archive shall not permit public access to the document collection ... from the Ministry of National Defense unless the interested party has obtained written and sealed from the relevant Ministry.").

service records in uncovering the truth of what happened and facilitating investigations and re-opening prosecutions concerning human rights violations.[280]

3. The State has not conducted adequate searches, and has failed to reconstruct, gather or generate records that it has been unable or unwilling to locate in its known archives.

112. In spite of the allegations that missing records either never existed or no longer exist, unofficial public disclosures and other developments disprove the State's assertions that it has effectively exhausted its search. The numerous unofficial disclosures, accidental discoveries, and evidence of the military's direct engagement in atrocities and other violations cast serious doubt on the claim that all relevant information not yet disclosed from the military and intelligence archives has been destroyed and/or is irrecoverable. Considering that most of the unofficially disclosed documents are copies of original government records, the Government should have undertaken a systematic effort for their recovery or reconstruction, using, if necessary, the coercive force of the law.

113. The Respondent State has failed to conduct adequate searches of state archives and privately-held records, and has not satisfied the related obligation to collect, gather and reconstruct certain information related to gross human rights violations and serious breaches of international humanitarian law in which the State is implicated. While there is a higher threshold required to prompt the State duty to generate or uncover records that are not readily available, the circumstances here oblige the State to act given the severity of the allegations alleged, the strong evidence implicating the Government, especially the military and intelligence entities, and the degree to which the military has been discredited in its actions during the internal armed conflict and subsequently, in its systematic cover-up of its involvement.

4. The State's systematic obstruction of the right to truth merits independent and effective oversight of the implementation of the right.

114. A thorough and effective search for information by independent investigators and archival specialists is warranted in this case because there is a credible basis for believing that the State holds, or should hold, records related to the gross human rights abuses at issue. Furthermore, the State asserts that relevant requested documents either do not exist or have been destroyed, and the State's involvement in the human rights violations in a period of repression is notorious. The Declassification Commissioners themselves emphasized, at the end of their mandate, that they had great expectation of encountering a significant quantity of records from the 1980s and did not, and that they cannot say at the end of their mandate which records currently exist and which never did or no longer do.[281] Independent experts should be granted the fullest possible access and, if necessary, proper security clearance to engage in a renewed search and investigation. Such a search should include measures to search for and identify victims of forced disappearance.

115. Despite that the military is the party recognized as responsible for the overwhelming majority of the gross human rights abuses during the internal armed conflict, the Declassification Commission did not satisfy the requirements of an independent auditor. It was not independent of the military – with at least half of the Commissioners senior military officers and with the Armed Forces coordinating the process.[282] The Commission also only had limited direct access to military archives and

[280] Human Rights Watch, *World Report 2012: Guatemala* (2012) (Jorge Alberto Gómez, former head of a unit responsible for the coordination of police and military counterinsurgency efforts, was arrested in April 2011; two former police agents were convicted in October 2011 for the 1984 forced disappearance of Edgar Fernando García, and two more trials ongoing trials connected to Fernando García's disappearance).

[281] Declassification Commission Conversation, (min. 1:04:00) (Commissioner: "I cannot assure you that they do not exist, or if they are missing, because I am not really certain what might be missing and what may exist. It is simply uncertain...").

[282] Presidential Decree 64-2009 establishes that the Commission consists of three military members, three representatives of the Presidency, and a single representative of COPREDEH, the President's Human Rights

facilities.[283] Its manner of operation and eventual results are not publicly available. The newly declassified records from the military archives remain definitively under the control of the Ministry of Defense.[284] They are housed on a military site and the military has ultimate decision-making power over their preservation and accessibility.[285]

116. The President purportedly established the Peace Archives, under the Secretary of Peace (SEPAZ), to manage Government records of the period of the internal armed conflict, with independence from the security forces, yet the military prohibited the Peace Archives from serving that role. In addition to a thorough independent search of records, the State should appoint an independent, effective and properly resourced entity to manage the archives of the State security entities from the period of the internal armed conflict. This is necessary in order to preserve, organize and ensure access to the records into the future, to prevent repetition of past abuses, and to ensure public trust that the records remain untainted and their management is in the national interest.

117. Asked whether and how the military can use the declassified records to reform internal processes to avoid future human rights violations, one of the Declassification Commissioners stated that there have been no reported human rights violations concerning the military since the Peace Accords, and that the military, an entirely different institution from the one that existed during the internal armed conflict, "will not fall in the same hole twice."[286] The failure of the military to recognize the opportunity and necessity to learn from the errors of the past highlights the need for a strong independent audit and ongoing democratic control over this period of Guatemala's history. In the period of transition, it is of heightened importance that the security institutions disclose information regarding abuses of the past, acknowledge the truth and the errors committed, and thereby begin to ensure redress of wrongs committed and ensure their non-repetition.

V. CONCLUSION

118. Victims, their relatives, and the general public have a fundamental right to truth about gross violations of human rights and serious breaches of 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. In cases of forced disappearance, it includes the right to know about the fate and location of the disappeared. We argue that that right extends independent of any prosecution or explicit request for information, and that it carries added importance in periods of transition from authoritarian regimes.

119. We have submitted that the Respondent State is responsible for multiple violations of the right to truth of the applicants and of Guatemalan society. The State's systematic denial of information concerning the circumstances of egregious human rights violations, and refusal to conduct an effective and timely investigation into the violations, is a violation of Articles 1, 8, 13 and 25. Further, the State has relegated the applicants to perpetual uncertainty regarding the fate of their family members, causing significant pain and suffering amounting to inhuman or degrading treatment, in violation of Article 5(2) of the Convention.

120. We respectfully urge this Court to expressly recognize the right to 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. Grounding the right to truth on Article 13 grants both victims and

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Commission. One of the representatives of the Presidency was also a military officer, and one of the civilian members resigned prior to the Commission's termination. Tulio Álvarez Statement, pp. 12-14.

[283] Tulio Álvarez Statement, pp. 4, 13.

[284] Declassification Commission Conversation (min. 59:20).

[285] *Abren en Guatemala Centro de Archivos Desclasificados Sobre Guerra Interna*, Terra Noticias, June 20, 2011.

[286] Declassification Commission Conversation (min. 52:00).

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-judicial component of the right to truth, which is essential to constructing not only a comprehensive account of past abuses, but also effective policies and processes aimed at preventing their recurrence. Such findings would help strengthen and elucidate not only this Court's right to truth jurisprudence, but also the general development of international human rights law on the matter.

121. Should the Court find a violation of the right to truth in this case, we respectfully submit it should delineate the duties corresponding to the right to truth, to clarify the reparations due pursuant to Article 63(1). We respectfully submit the Court should order the Respondent State to provide, in a timely fashion, a full account of the facts of the forced disappearances and extrajudicial executions related to the *Diario Militar*; 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. The State has a particular obligation to uncover and disclose the fate and whereabouts of the disappeared. Further, the State should remedy the violation of the right to truth of Guatemalan society by providing meaningful and sustained access to the facts and circumstances of the human rights violations during the internal armed conflict, and enacting systemic reforms to avoid the repetition of the violation of the right to truth and the underlying gross human rights violations.

122. The State should choose the most effective means of compliance with its obligations outlined above. These should include, however, the following specific remedies:

    a) **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 physical or digital archives that have been searched to date and that are known to exist, the challenges the authorities have faced in identifying and locating the relevant records, and how they have addressed them;

    b) **providing the applicants and the Court with information to allow an analysis of the independence and effectiveness of the Declassification Commission's review** of the military archives, including the interim and final reports, the identities and present and historical positions of Commissioners, work done by the Commission to directly access and search military archives, challenges identified by the Commission in accessing and searching military archives, criteria used for continuing classification on national security grounds, criteria used for determining whether information concerns human rights and should be subject to disclosure under Article 24 of the Law on Access to Public Information, and an index delineating the information withheld in whole or in part subsequent to the final report of the Declassification Commission;

    c) **conducting fresh and comprehensive physical searches of the military and intelligence archives**, using investigators and archival specialists independent of the military and intelligence entities, who should be granted the fullest possible access and, if necessary, proper security clearance;

    d) **conducting a search for and identification of victims of forced disappearance;**

    e) **disclosing all military and intelligence records related to the period of the internal armed conflict** – including the complete records of the *El Archivo*, the Directorate of Intelligence (D-2), the Center of Joint Operations (*Centro de Operaciones Conjuntas*, or COC), bases and temporary military installations located in the conflict zones of the country, and other military entities engaged in counterinsurgency operations during the internal armed conflict, and

especially all records from the period 1980 to 1985 – to the long-term oversight of archival specialists independent of the military and intelligence entities and not housed in military facilities;

f) **ensuring immediate and unrestricted public access to all information related to gross human rights violations and serious breaches of international humanitarian law;**

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

h) **taking measures for the systematic recovery of privately-held State records** of relevance to this case, and otherwise using all available legal means to gather and/or reconstruct records that have been destroyed or are irretrievable within existing archives, including through interviews with military personnel who served in operations at the time;

i) **empowering and properly equipping the full investigation of the human rights abuses committed**—within a broader context; with one aim to uncover the facts of the violations and the fate of the disappeared; and with disclosure of the details of the investigation to the family members of the victims and to the public;

j) **granting and ensuring judicial, prosecutorial or investigative authorities unrestricted access** to all requested information, or any other information concerning serious human rights violations committed during the internal armed conflict;

k) **undertaking a comprehensive review of its right to information, archives, and classification laws and regulations, and their implementation**, with a view to bringing the laws and their implementation into full compliance with the right to truth and Article 13 of the Convention generally;

l) **ensuring a full and progressive implementation of the 2008 Law on Access to Public Information**, including the implementation of Article 24, and rejecting regressive modifications of the law that would restrict access to information; and

m) **enacting an archival preservation law** which complies with the State right to truth obligations, including requiring the recording and preservation of records of public and historical importance, preventing the destruction of records, and ensuring processes for public access to archives, and a manner of indexing and organization that enables searchability.

ANNEX 1: 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. The Justice Initiative fosters accountability for international crimes, combats racial discrimination and statelessness, supports criminal justice reform, addresses abuses related to national security and counterterrorism, expands freedom of information and expression, and stems corruption linked to the exploitation of natural resources. The Justice Initiative has staff based in Abuja, Almaty, Amsterdam, Brussels, Budapest, Freetown, The Hague, London, Mexico City, New York, Paris, Phnom Penh, and Washington, D.C. 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 U.N. Human Rights Committee. Among others, 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[287] and to the Court in Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil.[288]

2. La Asociación Pro Derechos Humanos (The Human Rights Association, or APRODEH; Peru) is a non-profit civil society organization committed to fighting for the respect of human rights in Peru. APRODEH was founded in 1983 as an initiative to support parliamentary efforts to respond to the increasing human rights violations as a result of political violence in Peru. APRODEH defends victims in national and international tribunals and develops systematic campaigns to respond to the most serious cases or most salient policies concerning human rights violations. APRODEH incorporates in its work the defense and promotion of economic, social, and cultural rights, with the understanding that they are indivisible from civil and political rights, and places a special emphasis on the rights of indigenous communities and those with disabilities. APRODEH has advanced litigation seeking accountability for gross human rights violations in which the denial of State-held information has been a primary barrier for justice.

3. La Comisión Mexicana de Defensa y Promoción de los Derechos Humanos (The Mexican Commission for the Defense and Promotion of Human Rights, or CMDPDH; Mexico) is an autonomous and independent civil society organization. It was established according to Mexican law and founded in 1989. Its mission is to foster a culture of respect for and guarantees of human rights and to contribute to building the rule of law and social justice, based on the full enjoyment of these, through strategic litigation and the dissemination of paradigmatic cases of human rights violations. CMDPDH's strategic litigation has focused as much in domestic bodies, promoting judicial criteria protective of human rights, as on international bodies, particularly through the presentation of cases before the Inter-American Human Rights System. CMDPDH has specialized in the areas of access to justice and reparations for grave violations of human rights, such as enforced disappearances that occurred in the context of the Mexican government's fighting against the guerrillas in the 1960s and 1970s. As part of these activities, CMDPDH has litigated in Mexico and before the Inter-American System a paradigmatic case concerning the enforced disappearance of Rosendo Radilla Pacheco. A decision before the Inter-American Court in Radilla Pacheco v. Mexico provoked changes in Mexico related to the elimination of military jurisdiction in cases of human rights violations, the classification of the crime of enforced disappearance consistent with international standards, and the obligation to make public information.

[287] *Claude Reyes v. Chile*.
[288] *Gomes Lund v. Brazil*.

ANNEX 2: INDEPENDENT OVERSIGHT OF RECORDS OF STATE SECURITY SERVICES IMPLICATED IN HUMAN RIGHTS ABUSES, EXAMPLES

COUNTRY & NAME OF ARCHIVE	**INDEPENDENT ENTITY RESPONSIBLE** (i.e., for control of archives, implementing search, or ordering disclosure)	**GOVERNING LAW OR DECISION** (legislation, decree, policy, court judgment)	**GOVERNMENT ENTITY ORIGINATOR OF RECORDS (YEARS OF RECORDS) & DOCUMENTS INCLUDED** (i.e., quantity, type of documents)	**ACCESS TO INFORMATION** (i.e., open, closed, partially open – to investigators, victims, families, etc.)	**IMPACT OF ARCHIVES** (prosecutions, convictions, public consultations, etc.) & **GENERAL NOTES**
Argentina Archive of the Department of Intelligence of the Buenos Aires Police (DIPPBA)[1]	Commission of Memory of Buenos Aires Province.	Provincial legislation (1999). Archival material discovered in 1998.	Intelligence Division of Buenos Aires Police (DIPPBA).	Publicly accessible since 2003.	The archival material made an important contribution to proof in significant cases such as Etchecolatz, Von Wernich, Hospital Posadas, Comisaria Quinta and CNU Mar del Plata.
Argentina General Provincial Archive of Santa Fe[2]			Santa Fe Police. Archival records of Santa Fe Police.		Recovery of documents has allowed light to be thrown on at least 19 cases of people who disappeared.
Brazil National Archives[3]	Reference Center for Political Struggles in Brazil / O Centro de Referência das Lutas Politicas no Brasil. Body reports to the House of the Presidency of the Republic.	Presidential Decree 5584 (2005) - regulates transfer of records to National Archives.	Security services during dictatorship (1964-1985). National Security Council, General Committee of Investigation and National Information Service, Brazilian Intelligence Agency.	"Memories Revealed" (*Memorias Reveladas*) website, launched in 2009, makes archives publicly accessible. Thirteen states and the Federal District of Brazil have contributed their public archives, which have been digitized and become part of the "Memories Revealed" portal. The records comprise approximately 200 million pages of textual documents of the period, plus books and audiovisual documents.	The "Memories Revealed" initiative, implemented the federal policy aimed at rebuilding the national memory of the military dictatorship, further enabled compliance with the constitutional requirement of access to information.

Brazil[4]	Special Commission (Río Grande do Sul).	Decree 39.680 (1989) - created commission to organize collection concerning fight for democracy, and to denounce human rights violations. Decree 40.318 (2000) - declassified records of political police in Río Grande do Sul.	Political police during dictatorship (1964-1985). Documents, books, files, periodical publications donated by private individuals or non-governmental organizations, audiovisual documents, published documents relating to bodies of the state administration and personal recorded testimonies.	Declassified and accessible.	
Bulgaria[5]	Committee for Disclosure of Documents and Announcement of Affiliation of Bulgarian Citizens to the State Security and Intelligence Services of the Bulgarian National Army (COMDOS).	Law for Access and Disclosure of Documents (2006).	State security and intelligence services of Bulgarian National Army (1944-1991).	Access available, through application, to citizens and close relatives for information concerning an individual; and to researchers and investigators. Access includes direct examination, copies, and disclosure of names of informants.	Committee prepares and receives documents of the State Security and intelligence services of the Bulgarian National Army, so that centralized archive mandated by the 2006 law could be established. Committee also determines and announces the affiliation of citizens to security and intelligence services.
Cambodia DC-Cam Archives[6]	Sleuk Rith Institute (A Permanent Documentation Center of Cambodia).	Cambodian Genocide Justice Act (US 1994) - established Office of Cambodian Genocide Investigations in US State Department. Yale University's Cambodian Genocide Program (a grantee of the Office) founded DC-Cam in 2005.	Cambodian political police during Khmer Rouge regime. World's largest archive on the Khmer Rouge period with over 155,000 pages of documents and 6,000 photographs.	DC-Cam formulated procedures for managing access to archives both before and during prospective trials of former Khmer Rouge leaders. They cover authorization for those seeking access to documents, photocopying, viewing originals and document custody, care and return. A set of regulations have also been developed for those wishing to view documents in a Public Information Room.	DC-Cam's objectives are to record and preserve the history of the Khmer Rouge regime for future generations and to compile and organize information that can serve as potential evidence in a legal accounting for the crimes of the Khmer Rouge. The DC-Cam Archives has resulted in the publication of many books, a national genocide education initiative, and support services for victims and survivors of the Khmer Rouge regime.

Czech Republic Security Services Archive[7]	Institute for the Study of Totalitarian Regimes: controlled by Council, comprised of seven members elected and recalled by the Senate; archive is administrative office controlled by Institute. Security Services Archive must be managed by a specialized archivist of "incorruptib[le]" character—defined to exclude military or intelligence personnel (Arts. 12(4), 19).	181/2007 Coll. Act of 8 June 2007 on the Institute for the Study of Totalitarian Regimes and the Security Services Archive. Also Law No. 140 of 1996 (STB Files Access Act).	Ministries of Interior, Defense and Justice and dossiers of the former security services (including State Security Service, Intelligence Service of the General Staff of the People's Army, Internal Protection of the Corrective Education Corps of Ministry of Justice (1938 – 1945) (1948 – 1989).	Most archival material is accessible under act on archives (Act No. 499/2004 Coll.), and previously under acts on disclosure of documents created in the course of State Security Service activities (Act No. 140/1996 Coll., Act No. 107/2002 Coll.). Available to researchers in digital form, with some data less than 30 years old anonymized; unredacted after 30 years. Investigation files of former Public Security Service (Veřejná bezpečnost – VB) are located in archive collections of the Ministry of the Interior of the Czech Socialist Republic, and are accessed through communication with archives.	The mandate of the Institute includes securing, digitizing, and making accessible to the public information concerning human rights abuses of the past. The 2007 Czech law establishing the Institute begins: "Those who do not know their past are doomed to repeat it." It calls for the investigation, remembrance and education of historic injustices to avoid their repetition. The Act recognizes "the state's obligation to allow the public maximum possible access to the secret activity of the totalitarian and authoritative regimes security services, as an expression of its conviction that unlawful acts of any totalitarian or authoritative regime against citizens must not be protected by secrecy or forgotten." (Preamble.) In the 2007 law, the Institute replaced the Office for the Investigation and Documentation of the Crimes of Communism, established in 2005 and linked to the police, with a mandate to investigate and collect information and the authority to subpoena records.
Estonia National Archive[8]	Administrative Office of National Archive (Haldusbüroo); reports to State Archive, which is part of National Archive.	Archives Act (2012).	Documents of state security services.	Access to National Archives unrestricted for victims, and access to others permissible with restrictions established by Public Information Act, Personal Data Protection Act, State Secrets and Classified Information of Foreign States Act or another act apply (sec. 10(1)).	The 2012 Act provides for "appraisal of records, acquisition and preservation of archival records, grant of access thereto, organization of use thereof, and liability for rendering records and archival records unusable and destruction thereof, establishment of the bases for records management of agencies and persons performing public duties and the bases for the activities of the National Archives and local government archives" (sec. 1(1)). Predecessor 1994 law governing former secret services archives prevented the destruction of records.
Germany[9]	Federal Commissioner Preserving the Records of the State Security Service of the former German Democratic Republic (BStU).	German Law on Stasi Records (1990).	East German Stasi. Information obtained by Stasi (preserved and collected).	Right of access for family members killed or subject to disappearance, as well as those affected and third parties (Arts. 14-15). More than 2.6 million people consulted archives since 1991.	Agency is a founding member organization of the Platform of European Memory and Conscience.

Guatemala Guatemala National Police Historical Archive / Archivo Histórico de la Policía Nacional (AHPN)[10]	General Archive of Central America / Archivo General de Centroamérica (AGCA), under Ministry of Culture (2009-). Previously (2005-09): Human Rights Ombuds (Procurador de Derechos Humanos, PDH), constitutionally mandated to investigate rights violations.	Civil Court order authorized PDH to inspect files and documents in 2005 after appeal to secure access for human rights investigation in connection with archive following its accidental discovery.	National Police (1882-1996) (no longer in operation). 80 million pages of administrative police documents, including identification cards, vehicle license plates, photographs, police logs, and loose files on kidnappings, murders and assassinations; arranged by location, offices and document type.	Public in its entirety, digitized and accessible online: https://ahpn.lib.utexas.edu (ten million scanned pages). To facilitate public access, the archive "needed to be removed from the political sphere, because even if the project was directed by the Human Rights [Ombudsman], the responsibility for the documents in the first instance lay with the body which inherited the role of the National Police, i.e., the National Civil Police, and which imposed many constraints and difficulties on its use."[11]	The collection "represents the largest single repository of documents ever made available to human rights investigators." Government and police long denied the existence of the archives, especially during 1990s truth commission investigations. The AHPN has become a "central actor and catalyst in prosecutions of war-time cases of human rights violations and in facilitating Guatemala's historical memory." The Public Ministry, Human Rights Ombudsman's Office, and human rights organizations rely on it. It has been used in at least 124 judicial searches for disappeared persons, 1260 investigations relating to possible human rights violations, and support for 166 specific cases. The AHPN provides documents and professional grief counseling to friends and relatives of disappeared.
Hungary Historical Archives of Hungarian State Security / Állambiztonsági Szolgálatok Történelmi Levéltára (ABTL)[12]	ABTL is "publicly financed organization with independent, complete economic management authority and an independent heading within the budget section of the Parliament" (Art. 8(2)).	Law No. III of 2003 (the Disclosure Act) (on the Disclosure of the Secret Service Activities of the Communist Regime and on the Establishment of the Historical Archives of the Hungarian State Security).	State security actors (1944-1990).	"person under observation, a third party, a professional employee, an operative contact person and a collaborator [or their relatives]" can access personal data (Art. 3(1)); researchers can access with protection of personal data (Arts. 3(2)-(3), 4(1)); public – including non-citizens, can access anonymized documents (Art. 5(1)).	In 2011, Hungarian government proposed legislation to allow victims of spying by former secret police and Ministry of the Interior to remove and/or destroy personally related files. This proposed law raised concerns about the potential loss of irreplaceable archival documents on the history of communist Hungary and its state security agencies. Due to vocal opposition, this never became law.
Latvia National Archives of Latvia[13]		1994 law.	State Security Council. Archives.	Accessible.	Law promulgated specifically to conserve and allow access to collections of former State Security Council, with aim of making available the names of those who collaborated with the KGB.

Lithuania Lithuanian Special Archives[14]	Genocide and Resistance Research Centre of Lithuania.	Decree 452 (1996). Decree 579 (2007).	Former State Security and Intelligence Services, including Lithuanian division of KGB, and archives of the Ministry of Interior of the former Soviet Socialist Republic of Lithuania and Lithuanian Communist Party (1939-1990).	Decree permits access; those not permitted by decree can access documents only with written permission from the Centre (Sec. 7-8); courts, prosecution offices, state security department and other pre-trial institutions can access in accordance with functions.	The Centre investigates all manifestations of genocide and crimes against humanity, the persecution during the Soviet and Nazi occupations, and the armed and peaceful resistance to the occupations. 1996 Decree approved regulation of storage, management, research and use of archival collections of former State Security and Intelligence Services, including conditions governing conservation, access, registers of consultation and replacement of documents consulted (brief maximum loan periods); and explicitly stated motive that collections be used to establish those responsible for genocide and full restoration of civil rights.
Mexico National Archives[15]	National Archives.	Governmental order (Diario Oficial de la Federación), June 18, 2002.	Former Federal Security Department and General Department for Political and Social Investigation; had domestic intelligence and monitoring functions; implicated in "dirty war."	Publicly accessible pursuant to order.	Transition of documents to National Archives from Centre for Investigation and National Security (CISEN).
Paraguay "Archivos de Terror"[16]	Center of Documentation and Archives for the Defense of Human Rights, housed within Asunción Supreme Court.	Archives found in 1992 by human rights activist and judge in a police station in a suburb of Asunción, and later other police stations. Cooperation agreement of Supreme Court of Paraguay, the Catholic University of Asunción and the National Security Archive to preserve and make files public.	Paraguayan Technical Police, under Stroessner dictatorship (1954-89). 300,000 documents listing 50,000 murdered, 30,000 disappeared and 400,000 imprisoned; e.g., interrogation transcripts and recordings, photos, records of regional extrajudicial transfers (Operation Condor).	The database is indexed in Spanish and available for public consultation. To provide maximum access to the holdings that carry multinational interest, the Supreme Court included online 246 document images relating to Operation Condor. Selection was made with the criteria of maximum accessibility, technical limitations of publishing digital documents online and respect for privacy.	Prosecutors and judges have marshaled the archives to bring charges against former military officers, including former dictator Augusto Pinochet. "Archivos de Terror" recount final moments of thousands of extra-judicially kidnapped, detained, tortured and killed persons in the Southern Cone of Latin America. They also detail Operation Condor, effort of security forces in six countries to crush left-wing dissent.

Poland Archives of Institute of National Remembrance (IPN)[17]	Institute of National Remembrance. President of Institute independent of state authorities (Art. 9).	Act on the Institute of National Remembrance (1998). Act on the Disclosure of Information on Documents of State Security in the years 1944 – 1990 (2006).	Organs of state security (1944-1989), documents created and collected (Art. 1(1)), and security of Third Reich and USSR (Art. 1(1)). Records regarding Communist, Nazi and other crimes and repression.	Under 1998 law, Securitate archives accessible to all citizens under law. Previously, only historians and journalists had access to files. 2006 law opened communist-era secret police files, including information on current diplomats, ministers and parliamentarians.	Institute is mandated to investigate Communist and Nazi crimes, war crimes and crimes against humanity and peace. Goals of the Institute are carried out by the Commission for the Prosecution of Crimes against the Polish Nation, created in 1998; Office for Preservation and Dissemination of Archival Records; Public Education Office; Vetting Office. Opening of archives contentious, with fears of disappearance of files, and infiltration with former Securitate.
Romania Securitate Archives[18]	National Council for the Study of the Securitate Archives. Also Institute for National Remembrance.	Law No. 187 of 1999 (the Access to Personal Files Law).	Securitate, the Communist secret service.	Files accessible to citizens; NATO or EU citizens with Securitate files, and close relatives.	The National Council administers the archive and develops educational programs and exhibitions with the aim of preserving the memories of victims of the communist regime. Institute for National Remembrance manages files and allows some access.
Russia Central Archives of the Federal Security Service (the TsA FSB Rosii), in the Central Archive of the Ministry of the Interior[19]	Centre for Archival Information and for the Rehabilitation of the Victims of Political Repression (est. 1992).	Law on the Rehabilitation of Victims of Political Repression (1991).	KGB, the former Soviet intelligence entity, and Ministry of Internal Affairs (1955-1991). Institutional records, statistical materials, dossiers on former officials, criminal files, records of operational activities; central reference card file contains 25 million cards of arrested and/or incarcerated.	General acceptance of the right of victims to consult the files concerning them; otherwise, access left to discretion of those responsible for particular archives and documents awaiting declassification.[20]	Purpose of the Centre is to "organize and implement the rehabilitation of repressed individuals, and to furnish information about victims of repression to institutions, organizations, and individuals."

Slovakia Nation's Memory Institute Archive[21]	Nation's Memory Institute (Ústav pamäti národa – UPN).	Act No. 553/2002 Coll. (on Disclosure of Documents Regarding the Activity of State Security Authorities from 1939 to 1989 and on founding the Nation's Memory Institute).	State security authorities (1939-1989). Nearly 12.5 million pages of documents, including 62,000 agency and investigative files; 70.961 microfiches (equivalent to approximately 2 million pages); 466 films.	Disclosure section tasked with disclosing documents about persecutions, carried out by the Nazi or Communist security agencies, to persecuted individuals, with help of electronic screening, original and archival registers.	Other tasks of the Institute: publicizing information on perpetrators and their activities; prompting criminal prosecution of crimes and criminal offences; providing relevant information to public authorities; and systematically accumulating all types of information, records and documents pertaining to the period of oppression; working with similar institutions (archives, museums, libraries, survivors of the resistance, survivors of concentration and labor camps); presenting public with results of its activities.
Spain National Historical Archive, Salamanca[22]	Minister of Culture.	Agreement signed by Minister of Interior (oversight of Central Police Archive) and Minister of Culture (oversight of National Historical Archive), transferred files in political police archive.	Central Police. All files from the political archive of the Central Police.	Accessible to researchers and citizens.	"An invaluable collection of documents for the study of social opposition movements to the Franco regime for a period of more than forty years has been preserved."[23] The general functions of the Archive are to preserve and protect the documentary historical heritage that it already safeguards and the documents that ought to continue to be deposited; describe the information content of the documents; make the document collections accessible to both researchers and citizens; and promote cultural dissemination of documents.
Ukraine[24]	State Archives Department of the Security Service of Ukraine (DA SBU).	Laws on information, national archives and state secrets (Regulation 206 of April 1, 1994).	State security authorities in the former Ukrainian Soviet Socialist Republic and modern-day Ukrainian security authorities. Over 930,000 documents.	Guaranteed access to tribunals, prosecutors and victims and their families. Documents held by DA SBU have a "special-use" requirement under the Law of Ukraine "On State Secrets."	

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