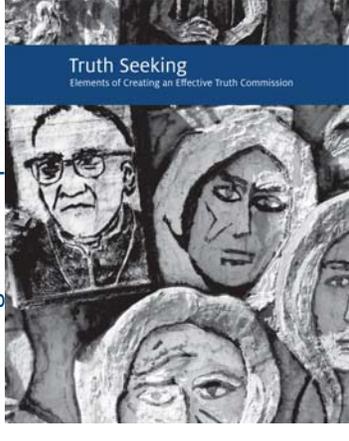


Click image for full publication



Chapter 1

The Right To The Truth

AJK

**“Here in Ayacucho, everybody goes to the cemetery on the Day of the Dead, but I don’t know whether I should go. I don’t know whether I should take flowers somewhere. I don’t know, even now, sometimes I just think . . . .”**

Testimony of Liz Rojas Valdez on the disappearance of her mother,  
Truth and Reconciliation Commission of Peru

## What Is the Right to the Truth?

Victims of gross violations of human rights and serious violations of international humanitarian law, and their families, have the right to an effective remedy. This includes the right to know the truth about the abuses they have suffered, including the identity of perpetrators, the causes that gave rise to the violations, and, if appropriate, the ultimate fate or whereabouts of the forcibly disappeared.

This right has been recognized in legal decisions by courts in several countries as well as by international judicial bodies. While its core elements are well established, the right to the truth continues to evolve and may be characterized differently in various legal systems.

## Aspects of the Right to the Truth

The right to the truth applies to serious violations of human rights, but is most explicitly recognized in regard to enforced disappearances. Certain aspects are increasingly accepted at the international level:

- It is linked to the right to a remedy, including the right to an effective investigation, verification of facts, and public disclosure of the truth; and the right to reparation.
- Victims and their families have the imprescriptible right to know the truth about the circumstances in which human rights violations took place.<sup>1</sup>
- It is connected to the right of relatives and communities to commemorate and mourn human loss in forms that are culturally appropriate and dignified.
- In addition to individual victims and their families, communities and society at large also have the right to know the truth about human rights violations.<sup>2</sup>
- Some legal systems consider the right to the truth to be integral to the enjoyment of freedom of information and freedom of expression.<sup>3</sup>
- Amnesty for perpetrators cannot be invoked to prevent the prosecution of certain international crimes, including crimes against humanity, genocide, and certain war crimes.<sup>4</sup> As such, the prohibition against granting amnesty for such crimes relates to the right to truth insofar as it relates to verification of the facts in question.<sup>5</sup>
- The state has a duty to preserve documentary evidence for commemoration and remembrance, and protecting and ensuring adequate access to archives with information on violations.<sup>6</sup>

## Pursuing the Right to the Truth

The right to the truth should be pursued through both judicial and nonjudicial proceedings. The state should attempt to establish the truth about abuses and violations regardless of whether criminal trials are immediately possible.

Knowing the truth “to the fullest extent possible” includes attempting to establish:

---

<sup>1</sup> UN Commission on Human Rights, Report of the Independent Expert Diane Orentlicher, “Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity,” February 8, 2005, E/CN.4/2005/102/Add.1 [hereinafter *UN Updated Set of Principles*], Principle 4.

<sup>2</sup> *Id.*

<sup>3</sup> United Nations High Commissioner for Human Rights, Human Rights Resolution 2005/66, “Right to the truth,” April 20, 2005, E/CN.4/RES/2005/66. See preamble.

<sup>4</sup> Rome Statute of the International Criminal Court, adopted July 17, 1998; 2187 U.N.T.S. 90, 37 I.L.M. 1002, entered into force July 1, 2002.

<sup>5</sup> United Nations Human Rights Commission, Follow-up Report, “Study on the right to the truth,” June 7, 2007, A.HRC/5/7, ¶10.

<sup>6</sup> *UN Updated Set of Principles*, Principle 3.

---

- The identity of perpetrators
- The causes that led to abuses
- The circumstances and facts of violations
- The ultimate fate and whereabouts of victims in the event of enforced disappearances<sup>7</sup>

### **Limitations of the Judicial Establishment of the Truth**

While courts can certainly be used to establish facts, they may present certain unavoidable limitations:

- The judiciary may be temporarily unable to hold effective trials if a state is failing or enduring civil unrest.
- Trials may be limited to notorious cases or to the most easily identifiable perpetrators, thus neglecting many victims.
- Trials establish the facts using judicial techniques, which may be inadequate to acknowledge the personal, cultural, or psychological experiences of victims.

Nonjudicial measures may be required to satisfy the right to the truth. They include:

- Establishing truth commissions and other non-judicial commissions of inquiry
- Reinforcing the laws protecting the freedom of information and expression
- Forms of remembrance and commemoration, such as memorials and museums

### **Why Does the Truth Matter?**

Establishing the truth about what happened and who is responsible for serious crimes helps communities to understand the causes of past abuse and end it. Without accurate knowledge of past violations, it is difficult for a society to prevent them from happening again. The truth can assist in the healing process after traumatic events; restore personal dignity, often after years of stigmatization; and safeguard against impunity and public denial.

Establishing truth can initiate a process of reconciliation, as denial and silence can increase mistrust and social polarization. A political order based on transparency and accountability is more likely to enjoy the trust and confidence of residents and citizens.

### **Sources of the Right to Truth**

The right to the truth has not yet been the object of a specific international convention. Some argue that the right derives from other well-established rights in international human rights law, such as the right to a remedy, the right to receive and impart information, and the right to due process. Others say it is an autonomous right, independent of or in addition to these other rights. Nevertheless, the core elements of the right are well accepted.

There are explicit treaty references to the right to know certain facts, including in instruments such as the Additional Protocol I to the Geneva Conventions<sup>8</sup> and the International Convention for the Protection of all Persons

---

<sup>7</sup> United Nations Human Rights Commission, Human Rights Resolution 9/11, "Right to the truth," September 24, 2008, A/HRC/RES/9/11. In this connection, an important legal proceeding is the search for the missing and disappeared, including exhumations.

<sup>8</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 UNTS 3, entered into force December 7, 1978.

from Enforced Disappearances (ICCPED),<sup>9</sup> both of which establish the right of relatives of the missing or disappeared to learn the fate and whereabouts of their loved ones.

Most specifically, in an important development, the ICCPED confirms the right to the truth as an enforceable right in itself. The treaty, which entered into force in December 2010, guarantees victims the right to know the truth regarding the circumstances of enforced disappearances, the progress and results of investigations, and the fate of disappeared persons. It also sets out the obligations of state parties, including the duty to provide restitution and guarantees of non-repetition.

Many UN resolutions and reports by independent experts contain explicit statements on the right to the truth. Following resolutions by the Human Rights Council, the UN General Assembly emphasized that the international community should “endeavor to recognize the right of victims of gross violations of human rights, and their families, and society as a whole to know the truth to the fullest extent practicable.”<sup>10</sup>

While there is no specific international convention on the right to the truth (and while UN declarations are not binding agreements), certain regional and national courts have confirmed the enforceability of this right within their jurisdictions.

The Inter-American Commission of Human Rights and the Inter-American Court of Human Rights have confirmed that the right to truth is established by the American Convention on Human Rights,<sup>11</sup> under provisions covering the right to a fair trial, freedom of thought and expression, and the right to judicial protection.

In a series of cases, the Inter-American Court on Human Rights has upheld the right to the truth of victims, their next of kin, and society as a whole. The court has held that:

- The state is obliged to provide victims’ families with the truth about circumstances surrounding crimes.<sup>12</sup>
- The outcome of all proceedings must be divulged to the public for “society to know the truth.”<sup>13</sup>
- Society has the right to know the truth regarding crimes to prevent them in the future.<sup>14</sup>
- Amnesty laws impeding the investigation of the facts about gross human rights violations and the establishment of responsibilities are not permitted under international human rights law.<sup>15</sup>

Some national courts have also affirmed the right to the truth. In Argentina, the Supreme Court held in “Simón” that amnesty laws shielding perpetrators of crimes against humanity were unconstitutional.<sup>16</sup> In Peru, the Constitutional Tribunal in “Villegas Namuche” recognized the right to the truth as a “fundamental right” directly protected by the constitution.<sup>17</sup> In Colombia, the Constitutional Court in the case of “Gustavo Gallón Giraldo y Otros” stated that even the priority of contributing to the demobilization of illegal armed groups did not extinguish the state’s obligation to seek the truth regarding the disappeared.<sup>18</sup> In South Africa, the Constitutional Court in “McBride” upheld the rights of victims, the media, and public to speak the truth about crimes, even

9 International Convention for the Protection of All Persons from Enforced Disappearance, December 20, 2006, E/CN.4/2005/WG.22/WP.1/Rev.4. As of March 3, 2013, 95 states have signed the convention and 37 have ratified or acceded it.

10 *Supra* note 7.

11 American Convention on Human Rights, OAS Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force July 18, 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V/II.82 doc.6 rev.1 at 25 (1992).

12 Velásquez Rodríguez Case, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988).

13 Myrna Mack Chang Case, Inter-Am.Ct.H.R. (Ser. C) No. 101, 274-75 (2003).

14 Bámaca Velásquez Case, Inter-Am.Ct.H.R. (Ser. C) No. 91, 77 (2002).

15 Barrios Altos Case, Inter-Am.Ct.H.R. (Ser. C) No. 75 (2001).

16 Corte Suprema de Justicia de la Nación [National Supreme Court of Justice], 14/6/2005, “Simón, Julio Héctor y otros s/ privación ilegítima de la libertad,” etc. Case S. 17768 (Arg.).

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

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

if they were not the object of an amnesty.<sup>19</sup> In this case, the court held that truth telling was the moral basis of a transition from the injustices of apartheid to democracy and constitutionalism.

Some states, such as Guatemala and Brazil, have justified the establishment of a truth commission by the explicit recognition of their citizens' right to the truth. The Guatemalan peace treaties of 1994 included an "agreement on the establishment of the commission to clarify past human rights violations," recognizing that "the people of Guatemala have a right to know the whole truth concerning these events, clarification of which will help avoid a repetition of these sad and painful events and strengthen the process of democratization in Guatemala."<sup>20</sup>

In Brazil, the production of official truth began with a reparation process through the establishment of the Special Commission on Political Dead and Disappearing (1995) and the Amnesty Commission of the Ministry of Justice (2001). These commissions have the power to recognize violations caused or not prevented by the state, and promote their proper redress. In 2011, the law creating the National Truth Commission indicated that the commission will have the ultimate goal "to honor the right to memory and historical truth and promote national reconciliation."<sup>21</sup>

---

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

20 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, UN Doc. A/48/954-S/1994/751, June 23, 1994.

21 National Truth Commission of Brazil (Comissão Nacional da Verdade) created by Law No. 12.528, November 18, 2011, [www.planalto.gov.br/ccivil\\_03/\\_ato2011-2014/2011/lei/l12528.htm](http://www.planalto.gov.br/ccivil_03/_ato2011-2014/2011/lei/l12528.htm)



**ICTJ** | Justice  
Truth  
Dignity



B R A S I L



**ABC** Agência Brasileira  
de Cooperação

Amnesty  
Commission

Ministry of  
Justice



Eduardo González and Howard Varney, eds., *Truth Seeking: Elements of Creating an Effective Truth Commission*. (Brasília: Amnesty Commission of the Ministry of Justice of Brazil; New York: International Center for Transitional Justice) 2013.

75 pages.

This publication is also available in Arabic, French, Portuguese, and Spanish.