


2012

On Locating the Rights of Lost, 45 J. Marshall L. Rev. 1051 (2012)

Ricardo A. Sunga III

Follow this and additional works at: <http://repository.jmls.edu/lawreview>

 Part of the [Courts Commons](#), [Human Rights Law Commons](#), [International Humanitarian Law Commons](#), [International Law Commons](#), and the [Jurisprudence Commons](#)

Recommended Citation

Ricardo A. Sunga III, On Locating the Rights of Lost, 45 J. Marshall L. Rev. 1051 (2012)

<http://repository.jmls.edu/lawreview/vol45/iss4/3>

This Article is brought to you for free and open access by The John Marshall Institutional Repository. It has been accepted for inclusion in The John Marshall Law Review by an authorized administrator of The John Marshall Institutional Repository.

ON LOCATING THE RIGHTS OF LOST

RICARDO A. SUNGA III*

I. INTRODUCTION

This Article investigates the status and scope of the right to know the truth.¹ It asks the question: What is the nature of the violation that the denial of the truth about disappeared and missing persons constitutes, and how has international law responded to this nature? In the process, the Article explores the need for complete recognition in international human rights law of a distinct right to know the truth and, in this context, critically examines the express guarantee of this right embodied in Article 24(2) of the International Convention for the Protection of All Persons from Enforced Disappearance.² The Article analyzes the specific dimensions of the violation that a denial of the truth about the disappeared and missing constitutes and examines the extent to which international law and jurisprudence adequately reflect its full nature.

Part II of this Article describes and analyzes the nature of the violation that the denial of the truth about disappeared and

* Ricardo A. Sunga III, LLB (University of the Philippines) and LL.M. by Research (University of New South Wales), is a professorial lecturer at the College of Law, University of the Philippines and former Director-Officer-in-Charge of the Institute of Human Rights, University of the Philippines. Thanks to Professors Andrew Byrnes and Jane McAdam of the University of New South Wales for their guidance.

1. The right to know the truth (sometimes called the right to the truth) applies not only to cases of enforced disappearance, but relates to human rights violations in general. This Article is concerned only with the right in the context of the disappeared and missing, however. *See generally* Working Group on Enforced or Involuntary Disappearances, *General Comment on the Right to the Truth in Relation to Enforced Disappearances* (2010), http://www2.ohchr.org/english/issues/disappear/docs/GC-right_to_the_truth.pdf (last visited Aug. 9, 2012).

2. International Convention for the Protection of All Persons from Enforced Disappearance, art. 24(2), *opened for signature* Feb. 6, 2007, G.A. Res. 61/177 (Dec. 20, 2006), U.N. Doc. A/RES/61/177 (2006), 14 I.H.R.R. 582 (2007), *available at* <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/505/05/pdf/N0650505.pdf?OpenElement> [hereinafter *Disappearances Convention*]. *See* Press Release, U.N. Office of the High Comm'r for Human Rights, UN Rights Chief Hails Coming into Force of New Treaty on Disappearances (Nov. 24, 2010), *available at* <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=10557&LangID=E> (last viewed on August 9, 2012).

missing persons constitutes, and its psychological and sociological aspects. It investigates the phenomenon of enforced disappearances and the related phenomenon of missing persons, together with their effects on family members. In particular, it argues that responding to this type of violation involves a range of different interventions such as ensuring rehabilitation, recovery, and access to the truth by those affected. This part sets out the processes and substance of knowing the truth that are important from psychological and sociological perspectives. It explores the social dimension of the right to know the truth and the need for its greater acknowledgement in the law. It considers the harms that a denial of the truth causes, not only to the family members of the disappeared, but also to society itself. It takes into account the establishment of truth commissions in a number of countries as vehicles for implementing the social dimension of the right to know the truth.

Part III considers the extent to which international treaty law prior to the adoption of the Disappearances Convention captures the nature of the violation and adequately responds to it. It also categorizes the relevant treaties. First, it critically examines treaties that specifically provide for a right to know the truth or an equivalent right. The Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts³ is the only treaty in this category, apart from the Disappearances Convention. Part III notes that, by its own terms, this right in Additional Protocol I applies only to the missing in international armed conflicts, including “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.”⁴

Secondly, Part III critically examines the treaties that address situations in which family members are separated from each other as a result of State action. It considers article 26 of Geneva Convention IV⁵ and articles 19(3) and 25(2)(b) of the African Charter on the Rights and Welfare of the Child⁶ as belonging to this category. Thirdly, it critically examines the treaties that define and prohibit enforced disappearance, of which

3. Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of International Armed Conflicts, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I].

4. *Id.* at art. 1.

5. Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 1949, *adopted* Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

6. African Charter on the Rights and Welfare of the Child, *adopted* 1 July 1990, O.A.U. Doc. CAB/LEG/24.9/49 (1990), *available at* http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/a.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf.

the denial of the truth is an element. These treaties are the Rome Statute on the International Criminal Court⁷ and the Inter-American Convention on Forced Disappearance of Persons.⁸ Fourthly, it critically examines general international human rights treaties namely the International Covenant on Civil and Political Rights,⁹ the American Convention on Human Rights,¹⁰ the European Convention on Human Rights,¹¹ and the African Charter on Human and Peoples' Rights,¹² embodying rights that various courts and tribunals have interpreted in a manner that gives effect to the right to know the truth.

Part IV examines how courts and tribunals have dealt with claims involving enforced disappearances and missing persons under existing law, and analyzes the limitations of their jurisprudence. It considers the relevant jurisprudence of the United Nations (U.N.) Human Rights Committee, the Inter-American Court of Human Rights, the European Court of Human Rights and the African Commission on Human and Peoples' Rights, as well as the jurisprudence of the domestic courts and tribunals such as the National Appeals Court for Criminal Cases of Argentina and the Human Rights Chamber for Bosnia and Herzegovina.

7. Rome Statute of the International Criminal Court art. 7(2), *opened for signature* July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute], defines the enforced disappearance as:

the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period.

8. Inter-American Convention on Forced Disappearance of Persons art. II, *adopted* June 9, 1994, O.A.S. Doc. OEA/Ser.P/AG/Doc 3114/94, defines a forced disappearance as:

forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.

9. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

10. American Convention on Human Rights, *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 144 [hereinafter American Convention].

11. Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter European Convention].

12. African Charter on Human and Peoples' Rights, *adopted* June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5 (1981), 1520 U.N.T.S. 216, *reprinted in* 21 I.L.M. 58 (1982) [hereinafter African Charter].

This part acknowledges that, despite the lack of an explicit right to know the truth, courts and tribunals have given meaning to important dimensions of the right to know the truth through their interpretation of the right to an effective remedy, the right not to be subjected to torture or other cruel, degrading or inhuman treatment or punishment, the rights to judicial guarantees and to judicial protection, the right to life, the right to liberty and security of person and the right to private and family life. It concludes, however, that the lack of an explicit guarantee gives a wide discretion to the courts and tribunals to give effect to the right to know the truth, but also *not* to do so.

Part IV also considers whether the reliance on other rights has given rise to case law that lacks coherence and diverges widely from one court or tribunal to the other. It similarly investigates whether that same reliance on other rights has led to remedies that differ greatly in their nature and basis from one court or tribunal to the other. It considers the alternative of invoking a distinct right to know the truth embodied in a treaty that sets out a range of appropriate remedies. It asks whether such an alternative could lead to greater order and predictability in the case law and a greater assurance of the availability of a more comprehensive and appropriate response to the denial of the truth from a victim's perspective.

Part V describes and provides a critique of the explicit guarantee of the right to know the truth in the Disappearances Convention. While the earlier parts established the need for this explicit guarantee, Part V explores the adequacy of the response that the convention provides. This part charts the drafting history of the relevant provisions of the convention. It analyzes the extent to which the convention goes beyond existing international law by affirming in its preamble the "right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end," and by providing in article 24(2) for a "right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person." Part V also takes into account the manner by which the convention supports the right to know the truth in article 24(2) with other provisions.

While Part V appreciates the significant achievement of the express guarantee of the right to know the truth in the Disappearances Convention, it also analyzes why the convention falls short of being an ideal legal response to the nature of the violation that a denial of the truth constitutes.

By way of concluding remarks, this Article argues that despite advances in international law that include the express

guarantee of the right to know the truth in the Disappearances Convention, there remains a need for the law to capture more fully the experiences of the families of the disappeared and missing.

II. NATURE OF THE VIOLATION

This part investigates the nature of the violation that a denial of the truth about the disappeared and missing constitutes. It explores its different dimensions and makes the argument that the law, to be effective, must reflect a comprehensive understanding of these dimensions. In the succeeding parts, this Article proceeds to consider the extent to which international law responds to the nature of this violation.

Section A of this part explores the psychological and sociological literature exposing the unique harms that the families of the disappeared and missing experience as a consequence of the denial of the truth about their relatives. Section B explores the social dimension of the right to know the truth and the need for its greater acknowledgement in the law.

A. Disappeared and Missing

For the response of the law to a human rights violation to be adequate, it must fully comprehend and reflect the nature of the violation. A deeper understanding of the violation consisting of a denial of the truth is important for the families of the disappeared and missing to come to terms with their experiences and to translate this knowledge into legal form.¹³ The law must wholly take into account the suffering that families have endured from not knowing the truth about their disappeared and missing relatives. This part examines the nature of the violation in the context of the enforced disappearance and the related phenomenon of missing persons. It draws on psychological and sociological literature to affirm that the harms experienced by the families of the disappeared and missing are of a depth and complexity unlike that of any other human rights violation.

1. Phenomenon of Enforced Disappearances

The emergence of the right to know the truth is tied to that of the right not to be subjected to enforced disappearance. The denial of the truth is a defining element of an enforced disappearance. The various definitions of the enforced disappearance in the U.N. Declaration on the Protection of All Persons from Enforced Disappearance, the Inter-American Convention on Forced Disappearance of Persons, the Rome Statute and the

13. For a similar analysis applied to a gender-infused theory of harm, see Fionnuala Ní Aoláin, *Exploring a Feminist Theory of Harm in the Context of Conflicted and Post-Conflict Societies*, 35 *QUEEN'S L.J.* 219, 222 (2009).

Disappearances Convention are similar in that they have three common elements:

- (1) involvement of government officials;
- (2) deprivation of liberty; and
- (3) refusal by the government to acknowledge the deprivation of liberty.

The third element pertains to the denial of the truth about the disappeared person. It amounts to a policy of leaving those affected, namely family and friends, with the uncertainty about what has happened to the disappeared person.

The use of enforced disappearance as a state policy is not a recent phenomenon. Finucane cites the Third Reich's Night and Fog program in World War II as representing the earliest use of enforced disappearance as a state policy.¹⁴ He cites its use as a policy of deterrence against suspected members of the resistance who were secretly transported to Germany.¹⁵

The term "enforced disappearance" is, however, a more recent development. Méndez and Vivanco trace the origin of the term to its use in Guatemala in the 1960s to describe opponents of the government who simply vanished.¹⁶ They go on to recount similar disappearances in Chile, Argentina, El Salvador, Honduras, Peru and Colombia from the 1960s through to the 1980s.¹⁷

In those cases, as now, the perpetrators of enforced disappearances are generally agents of the State. Méndez and Vivanco describe them as mostly forming part of specialized units that make up highly secret bodies within the armed or security forces.¹⁸ Méndez and Vivanco believe that they have their own chain of command that directs them, with the ability to avoid any interference from other governmental bodies. These authorities arrest the victims and interrogate and torture them at secret detention centers free from judicial or other intervention. Some victims survive, but most do not. As soon as victims stop providing intelligence, the authorities kill them and dispose of the corpse in a way to ensure continued deniability.¹⁹ Cassese observes that

14. Brian Finucane, *Enforced Disappearance as a Crime under International Law: A Neglected Origin in the Laws of War*, 35 YALE J. INT'L L. 171, 175 (2010).

15. *Id.*

16. Juan Méndez and Jose Miguel Vivanco, *Disappearances and the Inter-American Court, Reflections on a Litigation Experience*, 13 HAMLINE L. REV. 508, 510 (1990). See also Reed Brody and Felipe González, *Nunca Más: An Analysis of International Instruments on "Disappearances"*, 19(2) HUM. RTS. Q. 365, 366 (1997); and Matthew Lippman, *Disappearances: Towards a Declaration on the Prevention of the Crime of Enforced or Involuntary Disappearances*, 4 CONN. J. INT'L L. 121, 121 (1988).

17. *Id.*

18. *Id.* at 511.

19. *Id.*

enforced disappearances are often associated with “the pursuit of power by terror and elimination of political opposition.”²⁰ Brody and González point out that disappeared persons are generally political opponents and members of grass-roots organizations who, as a consequence of the enforced disappearance, become subject to the whim of their captors.²¹

In Resolution No. 33/173 entitled “Disappeared Persons” adopted on 20 December 1978, the UN General Assembly stated that it was “deeply moved by the anguish and sorrow” of “disappeared persons” relatives and “deeply concerned by reports from various parts of the world” of enforced disappearances.²² In characterizing the enforced disappearance, the U.N. Declaration on the Protection of All Persons from Enforced Disappearance states “that enforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms, and that the systematic practice of such acts is of the nature of a crime against humanity.”²³

In a series of cases, starting with *Velásquez Rodríguez v. Honduras*, the Inter-American Court of Human Rights has devoted considerable time to elucidating the gravity and nature of an enforced disappearance:

Disappearances are not new in the history of human rights violations. However, their systematic and repeated nature and their use not only for causing certain individuals to disappear, whether briefly or permanently, but also as a means of creating a general state of anguish, insecurity and fear, is a recent phenomenon. Although this practice exists virtually worldwide, it has occurred with exceptional intensity in Latin America in the last few years.

The phenomenon of disappearance is a complex form of human rights violation that must be confronted in an integral fashion.²⁴

It is the denial of the truth that is the element of the enforced disappearance that accounts for its depth and complexity as a human rights violation. As Rodley puts it, the hallmark of a disappearance is that “the capture and detention of a prisoner

20. Antonio Cassese, *The Statute of the International Criminal Court: Some Preliminary Reflections* 10 EUR. J. INT'L L. 144, 150 (1999).

21. Brody & González, *supra* note 16, at 366.

22. Disappeared Persons, preamble, G. A. Res. 33/173, U.N. Doc. A/RES/33/173 (Dec. 20, 1978).

23. Declaration on the Protection of All Persons from Enforced Disappearance preamble, G.A. Res. 47/133, U.N. Doc. A/RES/47/133 (Dec. 18, 1992).

24. *Velásquez Rodríguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶¶ 149-150 (July 29, 1988); *see also* *Godinez-Cruz v. Honduras*, Inter-Am. Ct. H.R.(ser. C) No. 5, ¶¶ 158 and 63 (Jan. 20, 1989); *and* *Fairen Garbi and Solis Corrales v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 2, ¶ 147 (June 26, 1987).

remains unacknowledged by the official authorities whose agents have been directly or indirectly responsible for it.”²⁵ It is a method of repression that “by its very nature, rests on secrecy and retains its effects as long as the truth remains hidden.”²⁶ These “pernicious effects,” as Zalaquett calls them, are far-reaching.²⁷ Families are left at a loss as to how to regard their disappeared relative. “The disappeared are denied a place among the living and also denied a place among the dead.”²⁸ Cohen cites the acuteness of the special sensitivity of victims of enforced disappearance. He explains that whether the disappeared persons are still alive or already dead, their families desperately want to know what has happened to them.²⁹

The poet Zbigniew Herbert has said, “ignorance about those who disappeared undermines the reality of the world.”³⁰ Indeed, an enforced disappearance causes suffering not only for the disappeared person. In Ní Aoláin’s terminology, an enforced disappearance causes a “community of suffering,”³¹ inflicting harm on those in co-dependent relationships with the disappeared, leading to a “domino effect of rights violation.”³² Rubio lists the parents, partners, spouses, children and siblings among those left emotionally desolate in the wake of an enforced disappearance.³³

An enforced disappearance totally alters the lives of the families of the disappeared. In Sangster’s words, disappearances

25. Nigel Rodley, *United Nations Actions Procedures against “Disappearances”, Summary or Arbitrary Executions, and Torture*, 8(4) HUM. RTS. Q. 700, 703 (1986).

26. Jose Zalaquett, *Confronting Human Rights Violations Committed by Former Governments: Applicable Principles and Political Constraints* 13 HAMLINE L. REV. 623, 629 (1990).

27. *Id.*

28. Shari Eppel, Director, Amani Trust Zimbabwe, *Healing the dead to transform the living: Exhumation and reburial in Zimbabwe*, Regional and Human Rights’ Contexts and DNA, Univ. of Cal., Berkeley, April 26-27, 2001, cited in Margriet Blaauw and Virpee Lahteenmaki, *Denial and Silence or Acknowledgement and Disclosure*, 84 INT’L REV. OF THE RED CROSS 767, 769 (2002), available at http://www.icrc.org/eng/assets/files/other/irrc_848_blaauw_virpi.pdf.

29. Stanley Cohen, *State Crimes of Previous Regimes: Knowledge, Accountability and the Policing of the Past*, 20 LAW & SOC. INQUIRY 7, 19 (1995).

30. Cited in Kirsty Sangster, *Truth Commissions: The Usefulness of Truth-telling*, 5(1) Australian J. of Hum. Rts. 135, 135 (1999), available at <http://corrigan.austlii.edu.au/au/other/ahric/ajhr/ajhrindex.html/1999/5.html>.

31. Fionnuala Ní Aoláin, *Sex-Based Violence and the Holocaust: A Reevaluation of Harms and Rights in International Law*, 12 YALE J.L. & FEMINISM 43, 78 (2000).

32. *Id.*

33. RUTH RUBIO-MARIN, CLARA SANDOVAL & CATALINA DIAZ, THE GENDER OF REPARATIONS: UNSETTLING SEXUAL HIERARCHIES WHILE REDRESSING HUMAN RIGHTS VIOLATIONS 215 (Ruth Rubio-Marin ed., 2009).

“forbid grief; people cannot mourn if they have no knowledge of how and in what circumstances those close to them died.”³⁴ As a result, the grief process is “delayed over an unfixed period. The inability to mourn results in people living in a state of limbo—frozen mourning—from which there can be no release unless it is discovered for certain that those close to them are dead. Only then can mourning begin.”³⁵ It is difficult to disagree with Brody and González who regard the enforced disappearance as the cruelest form of government abuse.³⁶

2. *Phenomenon of Missing Persons*

The phenomenon of enforced disappearances is related to that of missing persons. Many cases involving missing persons can be argued to be cases involving disappeared persons as well. Martin defines “missing persons” as “those persons whose families are without news of them as a result of armed conflict or internal violence.”³⁷ She discusses how the term “missing persons” was originally limited to soldiers, but was later broadened in its scope to cover civilians unaccounted for in the context of an armed conflict.³⁸

The phenomenon of missing persons emerged from the history of conflict. According to Martin, the missing were originally the soldiers, called “cannon-fodder” whose “disappearance or death went mostly unnoticed by their army corps.”³⁹ But during the American Civil War, individual identification of deceased and missing persons started with soldiers receiving identity discs indicating their name, company, regiment, division and army corps. These discs became standard issue after the First World War as a result of decisions taken at the International Red Cross Conference in 1925. Despite these early steps to reduce the phenomenon of soldiers “missing in action,” the phenomenon still exists, especially in recent hostilities in places like Armenia, Azerbaijan, Nagorny Karabakh, Ethiopia and Eritrea, where thousands of families are without news about their relatives.⁴⁰

The phenomenon of missing persons is by no means limited in its scope to soldiers. Martin takes stock of the hundreds of thousands of civilians in camps and the large numbers of women, children and elderly persons missing after heavy air raids during

34. Sangster, *supra* note 30, at 135.

35. *Id.*

36. Brody & González, *supra* note 16, at 366.

37. Sophie Martin, *The Missing*, 84 INT'L REV. OF THE RED CROSS 723, 724 (2002), *available at* http://www.icrc.org/eng/assets/files/other/irrc_848_martin.pdf

38. *Id.*

39. *Id.* at 723.

40. *Id.* at 724.

the Second World War. Their disappearance demonstrates the scope of the problem of missing persons that is more than just the soldiers “missing in action.” Beyond the graves of unknown soldiers are the long lists of other persons missing in political turmoil. As Martin points out, the majority of missing persons are “civilians separated from their families by the effects of war, or who disappeared while in detention or were killed in massacres and thrown into mass graves.”⁴¹

The issue of missing persons similarly entails families searching for their relatives. Martin identifies the main question for the families desperately searching for information as to the whereabouts of relatives, neither knowing whether their relatives are alive or dead nor able to have closure after the violent events that disrupted their lives. According to Martin, the first question raised by the missing persons problem is: is the missing person alive or dead?⁴²

The narratives that define the contours of the problem of missing persons abound. One such narrative is that which Stover and Shigekane share about the families of missing persons in Mala Krusa, Serbia, the site of atrocities during the 1998-1999 war between Serbia and the Kosovo separatist guerillas, in the context of evidence gathering activities for the International Criminal Tribunal for the Former Yugoslavia (ICTY):

For six sweltering weeks, Berry and his team had worked closely with the inhabitants of Mala Krusa locating and exhuming mass graves in the rubble-strewn village. Then one day a rumour spread there that Berry and his team had gathered all the evidence they needed and would be leaving for another village. ‘It was a tense moment’, Berry recalled. ‘We’d received orders that afternoon to move on and somehow the villagers had caught wind of it. They were concerned that we would leave with our work unfinished.’ Faced with a clash between the evidentiary needs of the ICTY for only certain kinds of evidence and the needs of the villagers, Berry opted to stay in Mala Krusa and finish all of the exhumations. ‘The villagers were right’, he said later. ‘They were waiting for their loved ones to be recovered. It would have been disrespectful to leave.’⁴³

Yet another narrative from Stover and Shigekane explains the scrapping of the death certificate program of the International Committee of the Red Cross (I.C.R.C.). Families in search of the truth about their relatives who went missing during the Bosnian

41. *Id.*

42. *Id.*

43. Eric Stover & Rachel Shigekane, *The Missing in the Aftermath of War: When Do the Needs of Victims’ Families and International War Crimes Tribunals Clash?*, 84 INT’L REV. OF THE RED CROSS 845, 845 (2002), available at http://www.icrc.org/eng/assets/files/other/irrc_848_stover.pdf.

war found it hard to accept the deaths of their relatives on paper. Stover and Shigekane write:

Much of the women's rage focused on the I.C.R.C.'s 'death certificate' programme. Since the signing of the Dayton Peace Accords in December 1995, the I.C.R.C., in its humanitarian tradition of trying to reunite families separated by war, had collected information on over 20,000 people who had disappeared on one side or another during the war in Bosnia. For a listing to be accepted, the I.C.R.C. required that a close relative submit the missing person's full name, father's name, date of birth, place of birth, and date and place where the victim was last seen. It then sent this information to the relevant authorities on the other side. Any answers provided were double-checked against the information provided by the wife and/or other witnesses who may have been present when the man disappeared. If the I.C.R.C. delegate was satisfied that the person was deceased, a 'Certificate of Death', signed by an I.C.R.C. delegate, would be delivered to the family. In addition to ending the agonizing uncertainty, these documents were intended to help the next of kin obtain legal benefits such as pensions. But the death certificate programme caused a backlash; many, though not all, families were unwilling and unable to accept a 'paper death'. They claimed that their missing relatives were being written off, that the search for clandestine places of detention was inadequate, and that information was no substitute for bodies. In the autumn of 1997, the I.C.R.C. discontinued its death certificate programme in Bosnia.⁴⁴

Pollack gives another narrative that accounts for the choice of Potocari as the site of a memorial for the missing of Srebrenica. The search for the truth continues for the families of the Bosniak men presumed to have been killed as part of the mass execution of some 7,000 to 8,000 Bosniaks at the hands of the Army of the Republika Srpska during the period of 10–19 July 1995 in and around Srebrenica, a town in the eastern part of the Republika Srpska. Pollack writes:

Potocari represented the site of the initial trauma for the people who were gathered there. While the war began three years before the massacre and many people had been living with terrible deprivations in the Safe Area of Srebrenica for years, it was Potocari where the traumas seemed to crystallize in 'the 'ultimate horror' (Herman, 1997, p. 38). Five years after the moment, one mother pounded her chest, tugged at her hair, and screamed, 'It's very, very difficult for us. My son was with me. I remember everything. My son was hungry and asked if I had anything to eat. I had some bread which I gave him a small piece. The Chetniks [Serbs] at that moment said that they were going to take him away for questioning and I never saw him again.' Memories of families being torn apart

44. *Id.* at 855.

were embedded in the site of Potocari.⁴⁵

These narratives cut across societies and cultures and provide but a glimpse of the harms that the phenomenon of missing persons causes. Missing persons are denied their place in history.

There are, however, differences between missing persons and disappeared persons. First, the concept of the missing is relevant only in the context of an armed conflict, while that of disappeared persons is relevant whether there is a conflict or not. Secondly, a missing person is simply unaccounted for in the context of an armed conflict,⁴⁶ whereas a disappeared person must be deprived of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.⁴⁷

Still, there are plainly similarities between the missing and the disappeared. In many cases, missing persons are at the same time disappeared persons. They suffer the same harms. Their families are robbed not only of their company, but of a way of remembering them. As Szyborska writes, "History counts its skeletons in round numbers. A thousand and one remain a thousand as though the one never existed."⁴⁸

3. *Psychological and Sociological Dimensions*

Other disciplines offer perspectives that enable a deeper understanding of the suffering of the families of the disappeared and missing than a legal perspective alone. To ground this exploration empirically, this Article turns to psychological and sociological literature identifying the unique trauma of the families of the disappeared and missing.

Central to the ordeal of the families of the disappeared and missing is the uncertainty about what has happened to their relative. Fondebrider, a forensic anthropologist, describes the uncertainty over whether a relative is alive or dead as agonizing.⁴⁹ He observes the suffering of the families of disappeared persons as transcending cultural, ideological and religious divides. Regardless of their way of life and political or religious beliefs, he finds that families' experiences can be described in a similar way: a child,

45. Craig Evan Pollack, *Burial at Srebrenica: Linking Place and Trauma*, 56 SOC. SCI. & MED. 793, 796 (2003).

46. See U.N. Office of the High Comm'r for Human Rights, *Study on the Right to the Truth*, U.N. Doc. E/CN.4/2006/91, 16 (Feb. 8, 2006).

47. Disappearances Convention, *supra* note 2, at art. 2.

48. Stover & Shigekane, *supra* note 43, at 845.

49. Luis Fondebrider, *Reflections on the Scientific Documentation of Human Rights Violations*, 84 INT'L REV. OF THE RED CROSS 885, 885 (2002).

spouse or sibling is taken, never to be seen again; without any news, the families are clueless whether their relative is still alive or already dead; the responsible authorities are not of any help; the justice system is just as disappointing; no investigation is conducted; the families cling to the hope that their relative is alive, despite the likelihood that he or she has been executed; the families are unable to hold funeral rites; affliction, fear and disruption take over their homes; they search desperately for the remains of their loved one for closure; with a constant need to do something for their loved one, they even ask to be present at excavations.⁵⁰

As a human rights violation, the denial of the truth has dimensions not found in other violations. According to psychologists Blaauw and Lahteenmaki, the problems that family members of disappeared persons face are complex and can be overwhelming. They narrate how many family members have searched in vain for their relatives, year after year, and even how mothers of disappeared children, after almost 30 years, still hope for their missing child to appear. They regard it as normal for relatives to have difficulties in accepting the death of a disappeared family member.

Blaauw and Lahteenmaki go on to contrast the experience of the families of the disappeared and missing with that of the families of the executed, namely, those known to have been killed. Enforced disappearances and extra-legal executions are two of the most serious forms of human rights violations involving *multiple and continuous* violations of other rights including that of the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Blaauw and Lahteenmaki explain that what sets apart the families of the disappeared and missing is their manner of grieving. First, peculiar to the families of the disappeared and missing is their inability to bury their loved one. Not at all comfortable believing their loved one dead, they even daydream that their relative is still alive somewhere. Secondly, families of the disappeared and missing are unable to mourn properly. Without a proper burial, they cannot start the normal grieving process and run a high risk of complicated grief. Blaauw and Lahteenmaki proceed to explain complicated grief:

It has been found that the family members of missing persons have more anxiety and post-traumatic stress disorders (PTSD) than family members of dead persons. They may suffer from insomnia, preoccupation with thoughts of the deceased, and unpredictable periods of anger, anxiety, survivor guilt, numbing of emotions and withdrawal from other people. These symptoms are typical for both

50. *Id.* at 889.

chronic, unresolved grief and PTSD.⁵¹

Blaauw and Lahteenmaki add that the families of the disappeared and missing even end up feeling guilty and cast varying degrees of blame upon themselves.⁵²

The effects of an enforced disappearance on families include a range of stress-related symptoms that commonly accompany post-traumatic stress disorder among others. Focusing on the Honduran experience, psychologists Quirk and Casco have investigated the effects of an enforced disappearance on families using two control groups: first, families who have lost a relative through accident or illness; second, families in which no member has died in the last ten years. They have found that the stress-related symptoms commonly accompanying disorders like post-traumatic stress disorder occur twice as frequently in the families of the disappeared than in the two other kinds of families. They conclude that families of the disappeared suffer far beyond the levels of normal grief and suggest that fear and isolation cause the extended stress-related disorders long after the disappearance.⁵³

An enforced disappearance affects the families of the disappeared person over an extended period of time. Psychologists Perez-Sales, Duran-Perez and Herzfeld have studied the long-term effects of enforced disappearances and extra-legal executions on Mapuces⁵⁴ and non-Mapuces in Chile. Based on interviews of a random sample of families of the disappeared and executed, they found that more than twenty years after the disappearance or execution of their relatives, a significant number of relatives exhibited clinically identifiable problems with affective disorders and pathological depressive and non-depressive grief as the most common factors.⁵⁵

In their vulnerability, children especially suffer as a result of an enforced disappearance. Focusing on the effects of an enforced

51. Margriet Blaauw & Virpee Lahteenmaki, *supra* note 28, at 770. See also Hussain, et al., *Complicated Grief in Families of Enforced Disappearances*, 25 EUR. PSYCHIATRY 804, 804 (2010).

52. *Id.*

53. Gregory Quirk & Leonel Casco, *Stress Disorders of Families of the Disappeared: A Controlled Study in Honduras*, 39 SOC. SCI. AND MED. 1674, 1674 (1994).

54. Mapuce people have lived, according to historical data, in what is today considered Chile (from Santiago down to the south) and south-centre of Argentina. In the 1992 Chilean census, 928.060 persons considered themselves as Mapuce people. Half of them live in suburban areas of Santiago generally employed as low-paid workers. The rest still live in the Araucania, their original territories in the south of the country.

55. Pau Pérez-Sales, Teresa Durán-Pérez & Roberta Bacic Herzfeld, *Long-Term Psychosocial Consequences in First-Degree Relatives of People Detained - Disappeared or Executed for Political Reasons in Chile. A Study in Mapuce and Non-Mapuce Persons*, 12 PSICOTHEMA 109, 114-15 (2000).

disappearance on children, Munczek and Tuber compare Honduran children of disappeared parents to Honduran children of executed parents. They observe that the children of the disappeared are less able to recover from their loss despite the passage of time. Moreover, children of the disappeared exhibit greater degrees of unconscious emotional disturbance. Munczek and Tuber go on to explain:

The Honduran children and their families have been deeply, irrevocably affected by the loss of their family member, the circumstances surrounding that loss, the hostility, persecution, economic hardship and social isolation they experienced subsequent to the event and the lack of social, political or legal response to and reparations for the injustices they have suffered.⁵⁶

These psychological and sociological dimensions of the harm that families suffer as a result of the denial of the truth about their disappeared and missing relatives mirror a depth and complexity not seen in other human rights violations. Without a firm knowledge of what has happened to their disappeared or missing relative, the families are unable to achieve a resolution of their loss. "One has to remember in order to forget."⁵⁷ But before then, one has to know in order to remember. The truth is essential to moving on. The growing number of truth commissions discussed in Section B of this part is a testament to this fact. As a mother told a priest in Uruguay about the disappearance of her child, "Father, I am ready to forgive but I need to know whom to forgive and for what."⁵⁸ In the context of apologies for wrongs, Celermajer asks a complementary question: "Apology for what?"⁵⁹ Sachs writes of the difficulties of forgiving in the abstract and the power of acknowledging past wrongdoing to enable people to "get on with their lives and enjoy their lives and feel full, free human beings."⁶⁰ The truth is necessary for recovery and rehabilitation. Its denial is a violation so deep and complex that it calls for the articulation of a right deserving of its own name, a right to know the truth.

The denial of the truth is a violation in and of itself. The

56. Deborah Munczek & Steven Tuber, *Political Repression and Its Psychological Effects on Honduran Children*, 47(11) SOC. SCI. & MED. 1699, 1712 (1998).

57. N. Sveaas, *The Psychological Effects of Impunity, in Pain and Survival: Human Rights Violations and Mental Health*, in PAIN AND SURVIVAL: HUMAN RIGHTS VIOLATIONS AND MENTAL HEALTH (Lavik, Nygåard, Sveaas & Fannemel eds., 1994) (cited in Blaauw & Lahteenmaki, *supra* note 51, at 768).

58. Cohen, *supra* note 29, at 41.

59. Danielle Celermajer, *The Apology in Australia: Re-covenanting the National Imaginary in Taking Wrongs Seriously: Apologies and Reconciliation*, in TAKING WRONGS SERIOUSLY: APOLOGIES AND RECONCILIATION 159 (Elazar Barkan & Alexander Karn eds., 2006).

60. Albie Sachs, *Truth and Reconciliation*, 52 SMU L. REV. 1563, 1574-76 (1999).

denial of the truth about the disappeared and missing has elements of other violations. It has elements of torture, non-fulfillment of the duty to investigate, and infringement of family rights, among other violations, as Part IV discusses. But at the same time, the denial of the truth is more than all these other violations combined. When the denial of the truth is the violation, nothing less than ensuring the rehabilitation, recovery and access by those affected to the truth about what has happened suffices for the families of the disappeared and missing to promote their worth as human beings. As Naqvi asserts, the right to know the truth is a measure that offers the families of the disappeared and missing closure and healing in order to restore their dignity.⁶¹

A range of remedies can be applied to give effect to the right to know the truth.⁶² But the truth is a remedy in itself and has a power all its own. As Sangster writes, “there is something in the process by which truth is heard and accepted that has the mysterious potential to repair.”⁶³ It is a power that comes from what Sangster calls the “loudness” of the truth. She explains that “loudness” as “finding out and telling the truth so that the world will know” in the process reversing the silencing effect of the enforced disappearance and phenomenon of missing persons.⁶⁴ Cohen cites how a victim is often told by his or her interrogator, “Scream all you like . . . No one will ever know.”⁶⁵ People must know. A comprehensive response through the full recognition of the right to know the truth, one that employs the very language of the truth, well deserves a place in the legal framework of rights.

B. Social Dimension

The right to know the truth has a social dimension. This social dimension is an important reason behind the establishment of truth commissions around the globe. Among the limitations of the Disappearances Convention is a lack of express acknowledgement of this social dimension, as I suggest in Part V of this Article. It is my argument that capturing in a fuller sense the harms that a denial of the truth causes entails due acknowledgement of this social dimension.

The denial of the truth about disappeared and missing persons affects the individual, his or her family and the community as a whole.⁶⁶ As an I.C.R.C. report details, families and

61. Jasmin Naqvi, *The Right to the Truth in International Law: Fact or Fiction?*, 88 (No. 862) INT'L REV. OF THE RED CROSS 245, 249 (2006).

62. Part IV of this Article discusses the remedies applied in the relevant case law.

63. Sangster, *supra* note 30, at 135.

64. *Id.*

65. Cohen, *supra* note 29, at 18.

66. Blaauw & Lahteenmaki, *supra* note 28, at 767.

communities, not knowing whether their relatives are alive or dead, are unable to obtain closure on the violent events that have disrupted their lives. The I.C.R.C. observes that their anxiety remains with them for years even after the fighting has subsided and peace has returned and they are unable to move on to personal or community rehabilitation and reconciliation. According to the I.C.R.C., the impact extends to future generations who carry with them the resentment caused by the humiliation and injustice suffered by their relatives and other members of the community. These “festering wounds,” as the I.C.R.C. calls them, rot the fabric of society and undermine relations between individuals, groups and nations for decades after the events.⁶⁷

Not only families, but society as a whole has a right to know the truth about its disappeared and missing members. The U.N. Working Group on Enforced or Involuntary Disappearances⁶⁸ states in its General Comment: “The right to the truth is both a collective and an individual right. Each victim has the right to know the truth about violations that affected him or her, but the truth also has to be told at the level of society.”⁶⁹ It is this social dimension of the right to know the truth to which mechanisms such as truth commissions give meaning. The truth enables people to decide how to move on toward national unity and reconciliation. As Zalaquett asserts, because past human rights abuses, including enforced disappearances and related phenomenon of missing persons, affect not only individual victims but society as a whole, it is the people who must decide how to move forward.⁷⁰ Zalaquett explains that the truth must be revealed to them to enable them to make an informed decision.⁷¹ He adds that when the fate of the victims is not known the healing process cannot begin, and deep, festering resentment makes national unity and reconciliation more difficult.⁷²

Minow’s words resonate with Zalaquett’s. She asserts that, in its response to violence, society must overcome communal and

67. I.C.R.C. *Report: The Missing and Their Families, Summary of the Conclusions Arising from Events Held Prior to the International Conference of Governmental and Non-Governmental Experts* 9 (Feb. 19-21, 2003), available at <http://www.icrc.org/eng/resources/documents/publication/p0857.htm>.

68. The former U.N. Commission on Human Rights had established the Working Group on Enforced or Involuntary Disappearances by Resolution 20 (XXXVI), continued in existence by the U.N. Human Rights Council, “to examine questions relevant to enforced or involuntary disappearance”. Annex IV, 1563d meeting on Feb. 29, 1980, U.N. Doc. E/CN.4/2004/59 (2004).

69. Working Group on Enforced or Involuntary Disappearances, *supra* note 1, at 1.

70. Zalaquett, *supra* note 26, at 629.

71. *Id.*

72. *Id.*

official denial of the atrocity and gain public acknowledgement.⁷³ She adds that society must obtain the facts in an account as full as possible in order to meet the victims' need to know, to build a record for history, and to ensure minimal accountability and visibility of perpetrators.⁷⁴ Méndez similarly argues that as a matter of accountability for past abuses, a State is obliged "to disclose to the victims, their families and society all that can be reliably established about those events."⁷⁵

The truth is central to social reconstruction in the aftermath of violence, a process that necessarily entails "converting . . . private knowledge into official and public acknowledgement."⁷⁶ As a matter of moral and legal obligation, Zalaquett asserts that the full disclosure of the truth about the policies of repression and the human rights violations committed in the past is an essential component of the process of moral reconstruction; particularly, the truth concerning the gravest State crimes which the perpetrator regimes have denied or concealed.⁷⁷ He considers public acknowledgement of the truth concerning past crimes by all relevant sectors, as well as public expressions of resolve not to allow the repetition of such horrors, as necessary and salutary steps.⁷⁸

Furthermore, the truth avoids a recurrence of past abuses. As Cohen argues, the truth weakens support for any future repetition of the same abuses.⁷⁹ In this regard, Zalaquett explains that hiding the truth allows those responsible for past abuses to institutionalize their own exculpatory versions of what happened and, thus, escape the judgment of history.⁸⁰ In the process, adherents to the repressive regime, including in some cases institutions as important as the armed forces, will absorb a tradition of concealment.⁸¹ Such failures to fully disclose weaken efforts to buttress the rule of law and prevent the recurrence of human rights abuses.⁸²

In the growing interface between truth and justice, truth is not only a means to justice but, in a manner of speaking, it is

73. MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 88 (1998).

74. *Id.*

75. Juan Méndez, *Accountability for Past Abuses*, 19 HUM. RTS. Q. 255, 261 (1997).

76. Cohen, *supra* note 29, at 18 (citing the philosopher Thomas Nagel).

77. Jose Zalaquett, Inaugural Lecture on Transition to Democracy, at 4-5 (New York University, Nov. 18, 2004), available at http://www.cdh.uchile.cl/conferencias_charlas/zalaquett/NYU_lecture.pdf.

78. *Id.* at 5.

79. Cohen, *supra* note 29, at 1819.

80. Zalaquett, *supra* note 26, at 629.

81. *Id.*

82. *Id.*

justice. Sangster writes not only of “truth into justice” but also of “truth as justice.”⁸³ As Naier acknowledges:

By knowing what happened, a nation is able to debate honestly why and how dreadful crimes came to be committed. To identify those responsible and to show what they did, is to mark them with a public stigma that is a punishment in itself, and to identify the victims, and recall how they were tortured and killed, is a way of acknowledging their dignity.⁸⁴

One possible explanation of the social dimension of the truth is through what Jelin refers to as “collective memory and fear of collective forgetting.”⁸⁵ She asserts that “what a collective memory retains is part of the history that can be integrated into a current value system.”⁸⁶ She calls it “identifying remembrance with the construction of a political culture and identity.”⁸⁷ Savelsberg and King add that collective memory shapes the law.⁸⁸ They observe that the collective memory “influences the creation and behavior of law and legal institutions.”⁸⁹ They add that “memories of past atrocity can also inspire related legal and quasi-legal institutions.”⁹⁰

Truth commissions have served as an important way of implementing the social dimension of the right to know the truth. Truth commissions are “official, temporary bodies established to investigate a pattern of violations over a period of time that conclude with a final report and recommendations for reforms.”⁹¹ Over 40 of them have been established around the world.⁹² Unlike a court or tribunal, a truth commission cannot determine criminal liability, but it can identify patterns of violations, investigate social or political factors, submit policy recommendations and perform a “public acknowledgement” function.⁹³

That society has a right to know the truth is the principal motive for the creation of truth commissions. The language of the

83. Sangster, *supra* note 30, at 135.

84. Cohen, *supra* note 29, at 37 (quoting Neier).

85. Elizabeth Jelin, *The Politics of Memory, the Human Rights Movement and the Construction of Democracy in Argentina*, 21 *LATIN AM. PERSPS.* 38, 49 (1994).

86. *Id.* at 50.

87. *Id.*

88. Joachim Savelsberg & Ryan King, *Law and Collective Memory*, 3 *ANNUAL REV. OF L. AND SOC. SCI.* 189, 200 (2007).

89. *Id.*

90. *Id.*

91. Priscilla Hayner, *Truth Commissions: A Schematic Overview*, 88 *INT'L REV. OF THE RED CROSS* 295, 295 (2006), available at http://www.icrc.org/eng/assets/files/other/irrc_862_hayner.pdf.

92. *Study on the Right to the Truth*, *supra* note 46, at 14.

93. Priscilla Hayner, *Commissioning the Truth: Further Research Questions*, 17 *THIRD WORLD Q.* 19, 21 (1996).

constituent documents of the Guatemalan and Peruvian truth commissions demonstrates this fact. The constituent document of the Guatemalan truth commission states: “Whereas 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 democratisation in Guatemala.”⁹⁴ For its part, the constituent document of the Peruvian truth commission states that “the painful process of violence experienced by the country in the last two decades should be fully clarified, it should not remain forgotten and that the State should guarantee the right of society to the truth.”⁹⁵

Truth commissions seek to uncover the truth about gross human rights violations. For the South African Truth and Reconciliation Commission, the truth meant

establishing as complete a picture as possible of the causes, nature and extent of the gross violations of human rights which were committed during the period from 1 March 1960 to the cut-off date, including the antecedents, circumstances, factors and context of such violations, as well as the perspectives of the victims and the motives and perspectives of the persons responsible for the commission of the violations.⁹⁶

For the Commission for the Reception, Truth and Reconciliation in East Timor, taking up the truth entailed inquiring into

(i) the extent of human rights violations, including violations which were part of a systematic pattern of abuse; (ii) the nature, causes and extent of human rights violations, including the antecedents, circumstances, factors, context, motives and perspectives which led to such violations; (iii) which persons, authorities, institutions and organisations were involved in human rights violations; (iv) whether human rights violations were the result of deliberate planning, policy or authorisation on the part of a state or any of its organs, or of any political organisation, militia group, liberation movement, or other group or individual; (v) the role of both internal and external factors in the conflict; and (vi) accountability, political or otherwise,

94. United States Institute for Peace, Comm'n for Historical Clarification: Charter, *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*, Preamble ¶ 2 (Oslo, Nor., June 23, 1994), available at <http://www.usip.org/files/file/resources/collections/commissions/Guatemala-Charter.pdf>.

95. President of the Republic, *Supreme Decree No. 065-2001-PCM 2001*, Preamble ¶ 4 (Lima, Peru, June 2, 2001), available at <http://www.mississippitrueth.org/documents/PERU.pdf>.

96. Promotion of National Unity and Reconciliation Act 95-34 of 1995, ch. 2, ¶ 3(a) (S. Afr.), available at http://www.fas.org/irp/world/rsa/act95_034.htm.

for human rights violations.⁹⁷

The truth that these commissions seek to draw out is meaningful not only to individuals, but to society as a whole. The denial of the truth harms not only specific people and individuals, but the general community. All must know the true story to heal and move on. As a member of the truth commission for El Salvador, Buergenthal stresses that the manner in which the story is told is not as important as telling the story truthfully.⁹⁸ Healing starts when the story is told and the people acknowledge that the story is real.⁹⁹

The truth may bring closure and healing not only to individuals, but also to society. The constituent document of the Liberian truth commission represents one such acknowledgement of the importance of the truth for the purposes of closure and healing:

Recognizing that introspection, national healing and reconciliation will be greatly enhanced by a process which seeks to establish the truth through a public dialogue which engages the nation about the nature, causes and effects of the civil conflicts and the impact it has had on the Liberian nation in order to make recommendations which will promote peace, justice and reconciliation.¹⁰⁰

However, truth commissions do not need to be established in all cases to implement the social dimension of the right to know the truth. While truth commissions are appropriate in cases involving gross human rights violations, they seem less so in individual cases of human rights violations.

The social dimension of the right to know the truth is different from that of the rights of minorities to “minority protection” toward “cultural autonomy.”¹⁰¹ The right to know the truth about the disappeared and missing simply belongs to society as a whole. This social dimension ought to be duly acknowledged. It is not that every member of society must have standing to initiate an action founded upon a right to know the truth about a

97. U.N. Transnational Admin. in East Timor, UNTAET/REG/2001/10, pt. III, sec. 13.1(a)(i)-(vi) (East Timor, July 13, 2001), *available at* http://www.wcl.american.edu/warcrimes/wcro_docs/collections/spscet/SPSC_East_Timor_-_Other_Docs/UNTAET-Regulations/2001-07-13,_UNTAET-Reg_2001-10.htm.

98. Thomas Buergenthal, *The United Nations Truth Commission for El Salvador*, 27 VAND. J. TRANSNAT'L L. 497, 544 (1994).

99. *Id.*

100. NAT'L TRANSNAT'L LEGISLATIVE ASSEMBLY, *Act to Establish the Truth and Reconciliation Commission of Liberia*, Preamble, ¶ 8 (Monrovia, Liber. May 12, 2005), *available at* <http://www.mississippitruth.org/documents/LIBERIA.pdf>.

101. See Miodrag A. Jovanovich, *Recognizing Minority Identities through Collective Rights*, 27 HUM. RTS. Q. 625, 638 n.66 (2005); Douglas Sanders, *Collective Rights*, 13 HUM. RTS. Q. 368, 375 (1991).

person who has disappeared or is missing. Rather, as some courts and tribunals have shown, should a State be found to have denied such truth, it ought to involve society in the process of rectification.¹⁰² In cases of gross violations of human rights, truth commissions may be appropriate. The State owes as much not only to the families concerned but to society as well.

By way of synthesis, the U.N. Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity¹⁰³ captures the significance of the social dimension of the right to know the truth:

PRINCIPLE 2. THE INALIENABLE RIGHT TO THE TRUTH

Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.

PRINCIPLE 3. THE DUTY TO PRESERVE MEMORY

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. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.¹⁰⁴

As Ní Aoláin reminds us, these are merely “soft” law standards in international law that “make only a small dent” in international treaty law.¹⁰⁵ Still, in Ní Aoláin's words, “they harness something of the potential that the legal form offers to more inclusively name harms and those who suffer them.”¹⁰⁶ When its members disappear or go missing, society likewise suffers the harms of the denial of the truth and should be included among the

102. See Case Law *infra* Part IV discussion (discussing the manner by which courts and tribunals have implemented the social dimension of the right to know the truth through remedial measures involving the public).

103. Comm'n on Human Rights, *Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, Diane Orentlicher, 61st Sess., at 7, U.N. Doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005).

104. *Id.*

105. But see ALAN BOYLE, *SOFT LAW IN INTERNATIONAL LAW-MAKING IN INTERNATIONAL LAW* 141, 156 (Malcolm Evans, ed., 2006) (discussing how soft law facilitates progressive evolution of customary international law, presents alternatives to law-making by treaty in certain circumstances and at other times complements treaties while providing different ways of understanding the legal effect of different kinds of these treaties).

106. Ní Aoláin, *supra* note 13, at 239.

holders of the right to know the truth.

The process that the right to know the truth is undergoing toward full recognition should take into account its social dimension. Society needs to know the truth about its disappeared and missing members to remember what happened, and avoid any repetition of violations. To a greater extent, the law must acknowledge the fact that the right to know the truth belongs not only to individuals but also to society as a whole.

III. TREATY LAW

This part charts the history of the explicit guarantee of the right to know the truth in international human rights law. It critically examines international treaty law prior to the Disappearances Convention and assesses the extent to which it responds to the nature of the violation of the right to know the truth. This historical perspective explains the need for the explicit guarantee of the right to know the truth in article 24(2) of the convention, and reflects the increasing recognition in international human rights law that a denial of the truth does constitute a unique harm.

To respond adequately to the violation that such a denial constitutes, international treaty law must fully reflect an appreciation of its depth and complexity. Four general categories of international treaties currently promote the right to know the truth in varying degrees. First, there are treaties that specifically provide for a right to know the truth or an equivalent right. Apart from the Disappearances Convention,¹⁰⁷ Additional Protocol I¹⁰⁸ is the only other treaty in this category. Secondly, there are treaties that address situations in which family members are separated from each other as a result of State action. Thirdly, there are treaties that define and prohibit the enforced disappearance of which the denial of the truth is an element. Fourthly, there are general international human rights treaties.

A. *Missing Persons*

Outside of the Disappearances Convention, only Additional Protocol I embodies an express guarantee of the right to know the truth, one that applies under specific circumstances. Article 32 of Additional Protocol I provides for the “right of families to know the fate” of their missing relatives.¹⁰⁹ A companion provision, article 33, obliges state parties to “search for the persons who have been reported missing” and “transmit all relevant information

107. Disappearances Convention, *supra* note 2.

108. Additional Protocol I, *supra* note 3.

109. *Id.* at pt. II, sec. III, art. 32.

concerning such persons in order to facilitate such searches.”¹¹⁰

Though the words “right to know the truth” are not used, what is embodied in article 32 of Additional Protocol I is essentially the same right. However, by the express terms of Additional Protocol I, the right applies only to the missing in “armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.”¹¹¹ Other situations fall outside the scope of the right to know the fate of the missing in Additional Protocol I. However, relying on customary international law and not treaty law, the I.C.R.C. interprets this right to cover all types of armed conflicts both international and non-international in character.¹¹²

In its 2005 study, the U.N. Office of the High Commissioner for Human Rights regards the right to know the fate of the missing in article 32 as the historical root of the right to know the truth.¹¹³ However, in light of the limitations of the right conferred by article 32 of Additional Protocol I, and in order to capture more fully the experiences of the families of the missing and of the disappeared themselves, there is a need to go beyond article 32. International treaty law ought to provide for an explicit guarantee of the right to know the truth that is broader in scope, one that applies not only in time of armed conflict, but also in time of peace.

B. Separated Family Members

Without fully recognizing the right to know the truth, some treaties embody elements of this right. Those treaties create duties that open up remedial options for the families of the disappeared and missing.

Among them is Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, which does not provide for the right to know the truth, but to a certain extent, gives effect to it in the context of the protection of civilians in time of an armed conflict.¹¹⁴ It stipulates:

Each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage, in particular, the work of organizations engaged on this task provided they are acceptable to it and conform to its

110. *Id.* at pt. II, sec. III, art. 33, ¶ 1.

111. *Id.* at pt. I, sec. I, art. 1, ¶ 4.

112. See Rule 117 of the *List of Customary Rules of International Humanitarian Law*, INT'L COMM. OF THE RED CROSS,, available at http://www.icrc.org/customary-ihl/eng/docs/v1_rul.

113. *Study on the Right to the Truth*, *supra* note 46, at 5.

114. Geneva Convention IV, *supra* note 5.

security regulations.¹¹⁵

Article 26 addresses the situations in which family members may be dispersed in an armed conflict.¹¹⁶ It creates a duty on state parties to facilitate any enquiries that those family members may make, with the object of renewing contact between them and enabling them to meet.¹¹⁷ It makes it possible for the family members to learn the truth about each other's fate. This duty is among the measures embodied in the Geneva Convention that aim to protect civilian persons in time of war. As Pictet points out, the protective measures of the Geneva Convention are imperative, taking into account "the bitter experiences of the [Second World War] and the horrors of the concentration camps."¹¹⁸

In the regional context, article 19(3) of the African Charter on the Rights and Welfare of the Child¹¹⁹ addresses situations in which a child is separated from a parent as a consequence of state action. It provides:

Where separation results from the action of a State Party, the State Party shall provide the child, or if appropriate, another member of the family with essential information concerning the whereabouts of the absent member or members of the family. States Parties shall also ensure that the submission of such a request shall not entail any adverse consequences for the person or persons in whose respect it is made.¹²⁰

When the States parties are responsible for the separation of parents from their children, article 19(3) imposes an obligation to provide essential information concerning the whereabouts of absent relatives.¹²¹ In the process, it enables the parents and children concerned to learn the truth about each other's fate. This provision goes further by looking after the safety of the parents and children requesting this information. It creates an obligation on state parties to ensure that no submission of any request for information will entail adverse consequences for the parents and children.

Similarly, article 25(2)(b) of the African Charter on the Rights and Welfare of the Child addresses situations in which family members are separated from each other as a result of internal and external displacement.¹²² It requires state parties to "take all necessary measures to trace parents or relatives where separation

115. *Id.* at art. 26.

116. *Id.*

117. *Id.*

118. Jean S. Pictet, *The New Geneva Conventions for the Protection of War Victims*, 45 AM. J. INT'L L. 462, 473 (1951).

119. African Charter on the Rights and Welfare of the Child, *supra* note 6..

120. *Id.* at pt.1, ch. 1, art. 19, ¶ 3.

121. *Id.*

122. *Id.* at pt.1, ch. 1, art 25, ¶ 2(b).

is caused by internal and external displacement arising from armed conflicts.”¹²³ By facilitating the tracing of relatives, article 25(b) enables the truth about the fate of family members separated as a result of internal and external displacement to surface.

The African Charter on the Rights and Welfare of the Child is the first regional treaty to identify children as the possessor of a body of rights and enables children to assert those rights in domestic, judicial or administrative proceedings.¹²⁴ It recognizes that children are independent subjects possessing rights, while stressing the importance of taking into account African cultural values and experiences.¹²⁵ It “puts children’s rights legally and culturally into perspective.”¹²⁶ The duties on states to provide information on the whereabouts of family members absent on account of state action, and to trace parents or relatives separated as a consequence of displacements, are indicative of that nature and of the aims of the African Charter.

To a limited extent, the aforementioned treaties address the harms that accompany a denial of the truth. In the context of the specific situations stated in the aforementioned treaties, the families of the disappeared and missing are entitled to the increased level of treatment from states parties as indicated in the relevant provisions.

C. *Express Inclusion of Enforced Disappearances*

Two treaties prior to the Disappearances Convention define and prohibit enforced disappearances. They do not make any reference to a right to know the truth. However, through their promotion of the right not to be subjected to enforced disappearances, they advance the cause of the right to know the truth.

One of them is the Rome Statute on the International Criminal Court of 1998.¹²⁷ It is an international treaty that includes enforced disappearance as a crime against humanity.¹²⁸ It defines an enforced disappearance as “the arrest, detention or abduction of persons by, or with the authorization, support or

123. *Id.*

124. Danwood Chirwa, *The Merits and Demerits of the African Charter on the Rights and Welfare of the Child*, 10 INT’L J. CHILD. RTS. 157, 157 (2002).

125. Dejo Olowu, *Protecting Children’s Rights in Africa: A Critique of the African Charter on the Rights and Welfare of the Child*, 10 INT’L J. CHILD. RTS. 127, 128 (2002).

126. Amanda Lloyd, *A Theoretical Analysis of the Reality of Children’s Rights in Africa: An Introduction to the African Charter on the Rights and Welfare of the Child*, 2 AFR. HUM. RTS. L. J. 11, 15 (2002).

127. Rome Statute, *supra* note 7.

128. *Id.*

acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period.”¹²⁹

The “refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period” is an element of an enforced disappearance. This element translates to a denial of the truth about the fate of a disappeared person. The Rome Statute is significant for its express inclusion of “enforced disappearance” as a crime against humanity.¹³⁰ Earlier treaties of a similar nature, such as the Charter of the Tribunal of Nuremberg,¹³¹ the Statute of the Tokyo Tribunal¹³² and the Statutes of the Tribunals for the Former Yugoslavia¹³³ and Rwanda,¹³⁴ did not include enforced disappearance as such a crime.¹³⁵ The emergence of the concept of enforced disappearance in the 1960s,¹³⁶ coupled with a gradual increase in the recognition of the importance of the concept, helps to explain the exclusion.

The characterization of the enforced disappearance as a crime against humanity is indicative of the growing recognition of its serious nature. The International Law Commission has explained that the inclusion of “enforced disappearance” in the Rome Statute is on account of “its extreme cruelty and gravity.”¹³⁷ By penalizing the enforced disappearance as a crime against humanity, the Rome Statute adds to the effort to address more fully the harms

129. *Id.* at art. 7(2)(i).

130. Cassese, *supra* note 20, at 150.

131. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, available at <http://www.jus.uio.no/english/services/library/treaties/04/4-06/london-agreement.xml>.

132. Charter of the International Military Tribunal for the Far East at Tokyo, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, Jan. 19, 1946, 4 U.S.T. 27, T.I.A.S. 1589.

133. S.C. Res. 827, U.N. S.C.O.R., 48th sess., 3217th mtg., U.N. Doc. S/Res/827, 32 I.L.M. 1203 (1993).

134. S.C. Res 955, U.N. S.C.O.R., 49th sess., 3453rd mtg., U.N. Doc. S/Res 955 (1994).

135. See TULLIO SCOVAZZI & GABRIEL CITRONI, THE STRUGGLE AGAINST ENFORCED DISAPPEARANCE AND THE 2007 UNITED NATIONS CONVENTION 255 (Martinus Nijhoff, pub., 2007) (citing ANTONIO CASSESE, CRIMES AGAINST HUMANITY, IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 353, 376 (A. Cassese, P. Gaeta, J. R.W.D. Jones, eds., 2002)).

136. Méndez & Vivanco, *supra* note 16, at 510; Brody & González, *supra* note 16, at 366; Lippman, *supra* note 16, at 121.

137. *Report of the International Law Commission on the Work of Its 48th Session*, May 6-July 26, 1996, 51st sess., supp. 10, U.N. Doc. A/51/10, GAOR, Commentary, ch. II, p. 50, ¶ 15 (Oct. 23, 1996).

that families of the disappeared and missing have experienced.

The other treaty that defined and prohibited enforced disappearances prior to the Disappearances Convention is the Inter-American Convention on Forced Disappearance of Persons of 1992.¹³⁸ It refers to enforced disappearances as “forced disappearances.”¹³⁹ It provides:

[F]orced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.¹⁴⁰

The “absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees” is an element of a forced disappearance. It amounts to a denial of the truth about a disappeared person. Though limited in its application to the region, this convention is the first treaty to define and prohibit enforced disappearances. It develops the duty on states to “prevent, investigate and penalize enforced disappearances.”¹⁴¹ Scovazzi and Citroni hail this treaty as “a significant step forward in human rights law.”¹⁴² By defining and prohibiting forced disappearances, the Inter-American Convention increases the level of protection for the families of disappeared and missing persons.

Both the Rome Statute and the Inter-American Convention on Forced Disappearance of Persons address the harms experienced by the families of the disappeared and missing. Though the right to know the truth is distinct from the right not to be subjected to enforced disappearance, these two rights are intimately linked and their development is inextricably intertwined.

D. General Human Rights Treaties

General human rights treaties are able to make their own contribution to the promotion of the right to know the truth. Though they do not explicitly guarantee a right to know the truth,

138. Inter-American Convention on Forced Disappearance of Persons, *supra* note 8.

139. *Id.*

140. *Id.* at art. 2.

141. Brody & González, *supra* note 16, at 382.

142. SCOVAZZI & CITRONI, *supra* note 135, at 253.

they provide for a range of rights that afford some measure of protection to the families of the disappeared and missing. These general human rights treaties include the ICCPR,¹⁴³ the American Convention,¹⁴⁴ the European Convention¹⁴⁵ and the African Charter.¹⁴⁶

These treaties guarantee a body of human rights that can be invoked to give effect to the right to know truth. These rights include the right to an effective remedy in article 2¹⁴⁷ and the right not to be subjected to torture or other cruel, degrading or inhuman treatment or punishment in article 7 of the ICCPR,¹⁴⁸ the free and full exercise of human rights in article 1,¹⁴⁹ the right not to be subjected to torture or to cruel, inhuman, or degrading punishment or treatment in article 5,¹⁵⁰ and the rights to judicial guarantees in article 8¹⁵¹ and judicial protection in article 25¹⁵² of the American Convention; the right to life in article 2 of the European Convention in its procedural aspect,¹⁵³ the right not to be subjected to torture or to inhuman or degrading treatment or punishment in article 3,¹⁵⁴ the right to liberty and security of person in article 5 in its procedural aspect,¹⁵⁵ the right to private and family in article 8,¹⁵⁶ and the right to an effective remedy in article 13¹⁵⁷ of the European Convention; and the right not to be subjected to torture or cruel, inhuman or degrading treatment and punishment in article 5¹⁵⁸ of the African Charter.

The families of disappeared and missing persons have relied on these general human rights treaties in the absence of a specific treaty expressly providing for a right to know the truth. However, the families of the disappeared and missing have had to package the violation of their right to know the truth to fit the framework of rights in these treaties. As Part IV of this Article discusses and evaluates,¹⁵⁹ the case law developed by different courts and tribunals relying on a host of other rights to address the experiences of the families of the disappeared and missing is a

143. ICCPR, *supra* note 9.

144. American Convention, *supra* note 10.

145. European Convention, *supra* note 11.

146. African Charter on the Rights and Welfare of the Child, *supra* note 6.

147. ICCPR, *supra* note 9, at pt. II, art. 2, ¶ 3(a)-(c).

148. *Id.* at pt. III, art. 7.

149. American Convention, *supra* note 10, at pt. I, ch. 1, art. 1, ¶ 1.

150. *Id.* at pt. I, ch. 2, art. 5, ¶ 2.

151. *Id.* at pt. I, ch. 2, art. 8, ¶¶ 1-5.

152. *Id.* at pt. I, ch. 2, art. 25, ¶¶ 1-2.

153. European Convention, *supra* note 11, at sec. I, art. 2, ¶ 1.

154. *Id.* at sec. I, art. 3.

155. *Id.* at sec. I, art. 5, ¶¶ 1-5.

156. *Id.* at sec. I, art. 8.

157. *Id.* at sec. I, art. 13.

158. African Charter, *supra* note 12, at pt. I, ch. I, art. 5.

159. *See* Case Law, *infra* Part IV.

testament to the versatility of these treaties.¹⁶⁰ The lack of consistency and predictability in the case law across the different courts and tribunals establishes the need for an explicit guarantee of the right to know the truth, something which the Disappearances Convention provides.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment is likewise able to provide some protection to the families of the disappeared and missing.¹⁶¹ Though the Committee Against Torture has no relevant case law yet, in its concluding observations on the United States, it declared that the enforced disappearance of which the denial of the truth is an element is a form of violation of the convention against Torture.¹⁶² In its consideration of the initial report of Chad, the Committee Against Torture went further and stated that it regarded any enforced disappearance as a form of torture, not only for the disappeared person, but also for his or her family.¹⁶³

Despite their general terms, these treaties have provided a legal basis for the development of the right to know the truth.

160. Rhona Smith, *Remedying the 'Lost' People in Human Rights Law – Recent Jurisprudence on Involuntary and Enforced Disappearances*, WEB J. CURRENT L. ISSUES, 2009, available at <http://webjcli.ncl.ac.uk/2009/issue1/smith1b.html>.

161. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment art. 20(5), *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention against Torture], available at <http://www2.ohchr.org/english/law/cat.htm>.

162. U.N. Comm. against Torture, Conclusions and Recommendations of the Committee against Torture: United States of America, 36th Sess., May 1-19, 2006, U.N. Doc. CAT/C/USA/CO/2, at ¶ 18 (2006). July 25, 2006), available at [http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/e2d4f5b2dccc0a4cc12571ee00290ce0/\\$FILE/G0643225.pdf](http://www.unhchr.ch/tbs/doc.nsf/898586b1dc7b4043c1256a450044f331/e2d4f5b2dccc0a4cc12571ee00290ce0/$FILE/G0643225.pdf); see also U.N. Comm. against Torture, Concluding Observations of the Committee against Torture: El Salvador, 43rd Sess., Nov. 20, 2009, U.N. Doc. CAT/C/SLV/CO/2, at 4 (Dec. 9, 2009) (providing a similar finding that the enforced disappearance is a violation of the Convention against Torture); Comm. against Torture, Concluding Observations of the Committee against Torture: Syrian Arab Republic, 44th Sess., Apr. 26 - May 14, 2010, U.N. Doc. CAT/C/SYR/CO/1, at 8 (May 25, 2010), available at http://www.un.org/ga/search/view_doc.asp?symbol=CAT%2FC%2FSYR%2FCO%2F1&Submit=Search&Lang=E.

163. Comm. against Torture, Summary Record of the First Part (Public) of the 870th Meeting, 42nd Sess., Apr. 29, 2009, U.N. Doc. CAT/C/SR.870, at p. 8, ¶ 49 (May 4, 2009), available at http://www.un.org/ga/search/view_doc.asp?symbol=CAT%2FC%2FSR.870&Submit=Search&Lang=E; see also Comm. against Torture, Concluding Observations of the Committee against Torture: Chad, 42nd Session, April 27-May 15, 2009, U.N. Doc. CAT/C/TCD/CO/1 (June 4, 2009), available at <http://www.unhcr.org/refworld/country,,,CONCOBSERVATIONS,TCD,,4a645fc02,0.html> (providing the Concluding Observations on torture in Chad).

Substantially and procedurally, they have contributed to the growing recognition of this right, without giving full recognition to it.

By way of summary, prior to the adoption of the Disappearances Convention, international treaty law demonstrated a troubling inability to capture the harms experienced by the families of the disappeared and missing. By using the term capture, this Article is referring to “a normative and theoretical explanation that fully grasps and explains the experience of harm” from the perspective of the families of the disappeared and missing and which “translates that to legal terminology and form.”¹⁶⁴

The tensions between the nature of the violation that a denial of the truth constitutes and the response of international law to that nature are nowhere more pronounced than with respect to international treaty law prior to the adoption of the Disappearances Convention. Outside of the convention, treaty law embodying the right to know the truth has thus far been confined to article 32 of Additional Protocol I, which is limited in its application to situations of armed conflict.¹⁶⁵

Beyond article 32, the relevant treaty law at most embodies *elements* of the right to know the truth. Article 26 of Geneva Convention IV only instructs state parties to *facilitate any enquiries* in situations in which family members are dispersed on account of an armed conflict.¹⁶⁶ Apart from being applicable only within the region, article 19(3) of the African Charter on the Rights and Welfare of the Child merely requires state parties to *provide essential information* concerning the whereabouts of absent relatives in situations in which a child is separated from a parent as a consequence of state action.¹⁶⁷ Similarly, article 25(2)(b) of that treaty merely *instructs* state parties to facilitate the tracing of relatives in cases of separation as a result of internal and external displacement.¹⁶⁸ The American Convention deals more generally with enforced disappearances and is limited in its application to the region.¹⁶⁹ The Rome Statute is similarly concerned only with enforced disappearances in the context of crimes against humanity.¹⁷⁰ As Part IV explores,¹⁷¹ general human rights treaties do not provide for a right to know the truth, but

164. Ní Aoláin, *supra* note 13, at 225.

165. Additional Protocol I, *supra* note 3, at pt. II, sec. III, art. 32.

166. Geneva Convention IV, *supra* note 5, at art. 26.

167. African Charter on the Rights and Welfare of the Child, *supra* note 6, at pt. 1, ch. 1, art. 19, ¶ 3.

168. *Id.* at pt. 1, ch. 1, art. 25, ¶ 2(b).

169. American Convention, *supra* note 10.

170. Rome Statute, *supra* note 7.

171. *See* Case Law, *infra* Part IV.

simply embody a variety of other rights that various courts and tribunals have interpreted in a manner that gives effect to the right to know the truth.

None of the treaties discussed above treat the right to know the truth in a thorough manner. They fail to detail the nature and scope of the right, clarify its individual and social dimensions and provide for measures of protection to address the harms that the families of the disappeared and missing have experienced. Borrowing Bennett's ideas, the existing provisions are scattered and disorganized and are found in a number of unrelated treaties, often buried, without any clear indication of the subject matter.¹⁷² These conditions "hinder[] the establishment of an international consensus and understanding" and indicate the need for a universal treaty provision that can explicitly organize and clarify the right to know the truth.¹⁷³ An express guarantee can capture the harms experienced by the families of the disappeared and missing more fully and, at the same time, raise the status and visibility of the right to know the truth.

The limited capacity of existing treaties to capture the experiences of the families of the disappeared and missing provides a historical perspective that explains why it has been important for the Disappearances Convention to emerge with an express provision universally guaranteeing the right to know the truth. At the same time, in relation to states that do not become parties to the convention, the existing treaties provide some legal options to the families of the disappeared and missing, provided that those states have ratified them.

Given the limitations of the response of international law prior to the adoption of the convention, Méndez characterized the right to know the truth as "emerging,"¹⁷⁴ while Naqvi situated the right "somewhere above a good argument and somewhere below a clear legal rule."¹⁷⁵ Linton talked about the right in the context of "wishful thinking."¹⁷⁶ As such, they all shared the view that the right to know the truth remains a work in progress.

172. Walter Bennett, *A Critique of the Emerging Convention on the Rights of the Child*, 20 CORNELL INT'L L. J. 1, 29-31 (1987).

173. *Id.*

174. JUAN MÉNDEZ, THE RIGHT TO TRUTH, IN REINING IN IMPUNITY FOR INTERNATIONAL CRIMES AND SERIOUS VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS: PROCEEDINGS OF THE SIRACUSA CONFERENCE 17-21 SEPTEMBER 1998 255 (Christopher C. Joyner ed., 1998).

175. Jasmin Naqvi, *The Right to the Truth in International Law: Fact or Fiction?*, 88 INT'L REV. OF THE RED CROSS 245, 273 (2006), available at http://www.icrc.org/eng/assets/files/other/irrc_862_naqvi.pdf.

176. Suzannah Linton, *Post-Conflict Justice in Asia*, at 249, in THE PURSUIT OF INTERNATIONAL CRIMINAL JUSTICE: A WORLD STUDY ON CONFLICTS, VICTIMIZATION, AND POST-CONFLICT JUSTICE 515 (M. Cherif Bassiouni ed., 2009).

The U.N. Working Group on Enforced or Involuntary Disappearances puts things more positively. It stated that “[t]he right to the truth . . . in relation to human rights violations is now widely recognized in international law. This is witnessed by the numerous acknowledgements of its existence as an autonomous right at the international level, and through State practice at the national level.”¹⁷⁷ But it makes this assertion taking into account the explicit guarantee of the right to know the truth in the Disappearances Convention that Part V of this Article discusses.¹⁷⁸ In the context of the international treaty law prior to the convention, the right to know the truth is not yet a fully developed right. But the trend in the treaty law is unmistakable. The movement toward a greater recognition of the right to know the truth cannot be denied.

IV. CASE LAW

This part inquires into the jurisprudence interpreting the law prior to the adoption of the Disappearances Convention. It evaluates the extent to which the international, regional and domestic case law reflects the nature of the violation that a denial of the truth constitutes and the nature of the remedies granted.

The case law interpreting international human rights treaties prior to the adoption of the Disappearances Convention makes significant progress toward affirming that the harm experienced by the families of the disappeared and missing is of a depth and complexity unlike that of any another violation. The courts and tribunals have had little to guide them in the relevant treaties since these do not explicitly guarantee the right to know the truth. Yet, these courts and tribunals have succeeded in giving effect to the right to know the truth through an assortment of other rights. The Working Group on Enforced or Involuntary Disappearances affirms that fact by including jurisprudential precedent as support for its conclusion that the right to know the truth exists.¹⁷⁹

Part of the credit goes to the victims’ counsel for offering novel arguments interpreting those other rights in a way that incorporates important elements of the right to know the truth. The different courts and tribunals deserve just as much credit, if not more, for judiciously accepting those arguments and advancing a few of their own.

Protection of aspects of the right to know the truth through

177. Working Group on Enforced or Involuntary Disappearances, *supra* note 1, at preamble, ¶ 1.

178. See Disappearances Convention *infra* Part V.

179. See *generally* Working Group on Enforced or Involuntary Disappearances, *supra* note 1 (acknowledging precedence in support of its conclusions). The Working Group does not cite the particular jurisprudence and merely makes a general reference to jurisprudential precedent.

interpretation of the prohibition of torture and other cruel, degrading or inhuman treatment or punishment is a recurring theme in the case law. The courts and tribunals have found a strong basis for giving effect to the right to know the truth in the non-derogable right of the families of the disappeared and missing not to be subjected to torture or other cruel, degrading or inhuman treatment or punishment. Mostly, the courts and tribunals have made specific findings of cruel, degrading or inhuman treatment of the families of the disappeared and missing.

The U.N. Human Rights Committee has held that the anguish and stress caused to the remaining family members by a disappearance and by the continuing uncertainty concerning the disappeared person's fate is a violation of article 7 of the ICCPR, which upholds the right not to be subjected to torture or other cruel, degrading or inhuman treatment or punishment.¹⁸⁰ The U.N. Human Rights Committee has not identified the specific aspect of article 7 violated.

By contrast, the Inter-American Court of Human Rights has made a finding of cruel, inhuman or degrading treatment in contravention of article 5 of the American Convention that guarantees the right not to be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.¹⁸¹ According to the Inter-American Court, the continued obstruction of a family member's efforts to learn the truth, the concealment of the corpse, the obstacles put up by the authorities to attempted exhumation procedures and the official refusal to provide relevant information is cruel, inhuman or degrading treatment.¹⁸²

The European Court of Human Rights has similarly made a finding of inhuman treatment contrary to article 3 of the European Convention that upholds the right not to be subjected to torture or to inhuman or degrading treatment or punishment.¹⁸³ Considering the special factors of family ties and the authorities' reactions and attitudes, the European Court has ruled that the silence of the authorities in the face of the real concerns of the families of the missing,¹⁸⁴ and the distress and anguish of the families of the

180. *Quinteros v. Uruguay*, U.N. Human Rights Comm., Comm'n No. 107/1981, U.N. Doc. CCPR/C/19/D/107/1981, ¶ 9.5 (July 21, 1983), *available at* http://www.javier-leon-diaz.com/enforced_disappearances/Quinteros%20v.%20Uruguay.pdf.

181. *Bámaca-Velásquez v. Guatemala*, Merits & Judgment, Inter-Am. Ct. H.R. (ser. C) No. 70, at ¶ 165 (Nov. 25, 2000), *available at* http://www.worldcourts.com/iacthr/eng/decisions/2000.11.25_Bamaca_Velasquez_v_Guatemala.pdf.

182. *Id.* at ¶ 192.

183. *Cyprus v. Turkey*, App. No. 25781/94, III Eur. Ct. of Hum. Rts. 1, ¶ 157 (May 10, 2001), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59454>.

184. *Id.* at ¶ 157.

disappeared as a result of the disappearance of their close relatives, and their inability to find out what has happened to them, amount to inhuman treatment.¹⁸⁵

Likewise, the African Commission on Human and Peoples' Rights has made a particular finding of inhuman treatment contrary to article 5 of the African Charter that guarantees the right not to be subjected to torture or cruel, inhuman or degrading treatment and punishment.¹⁸⁶ It has ruled that holding an individual without permitting him or her to have any contact with his or her family while refusing to inform the family if and where the individual is being held is inhuman treatment of both the detainee and the family concerned.¹⁸⁷

Furthermore, applying article 3 of the European Convention, the Human Rights Chamber for Bosnia and Herzegovina made a finding of inhuman and degrading treatment of the families of the missing.¹⁸⁸ It has held that the failure of a state to clarify in any way the fate of the missing through a meaningful and effective investigation and a full statement of disclosure of all relevant facts to the public is inhuman and degrading treatment in violation of article 3 of the European Convention.¹⁸⁹

Courts and tribunals differ in respect of the particular aspect of the right not to be subjected to torture or other cruel, degrading or inhuman treatment or punishment that is violated. This right can be broken down into its constituent elements, with the differences among them being based on a gradation in the suffering inflicted.¹⁹⁰ The Inter-American Court has found cruel, inhuman or degrading treatment, the Human Rights Chamber has found inhuman and degrading treatment, the European Court and the African Commission have simply found inhuman treatment, while the U.N. Human Rights Committee has made only a general finding of a violation of the right not to be subjected to torture or

185. Dokayev and Others v. Russia, App. No. 16629/05, Eur. Ct. H.R. ¶ 93 (2009), *available at* <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-92119>.

186. Amnesty International v. Sudan, Afr. C.H.P.R., Comm'n. Nos. 48/90, 50/91, 52/91, 89/93, ¶ 54 (1999), *available at* http://www.worldcourts.com/achpr/eng/decisions/1999.11_Amnesty_International_v_Sudan.htm.

187. *Id.*

188. Selimovic v. Republika Srpska, No. CH/01/8365, Human Rights Chamber for Bosnia and Herzegovina, at ¶ 187 (Mar. 17, 2003), *available at* http://www.worldcourts.com/hrcbih/eng/decisions/CH01_8365_Selimovic.pdf.

189. *Id.* at ¶ 174.

190. CLARE OVEY & ROBIN C.A. WHITE, JACOBS AND WHITE: THE EUROPEAN CONVENTION ON HUMAN RIGHTS 75-84 (Oxford Univ. Press, 4th ed. 2006) (relating to the jurisprudence of the European Court); PIETER VAN DIJK & G.J.H. VAN HOOFF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 406-12 (Pieter van Dijk, Fried van Hoof, Arjen van Rijn & Leo Zwaak, eds., 2d ed. 2006).

other cruel, degrading or inhuman treatment or punishment. None of them have made a finding of torture.

The duty of the state under international law to investigate cases of disappeared and missing persons is a similarly recurring theme. This duty arises from various rights that some courts and tribunals have applied in the case law. The U.N. Human Rights Committee has inferred the duty to investigate from the right to an effective remedy in article 2 of the ICCPR.¹⁹¹ The Inter-American Court has held that the duty to investigate arises from the obligation to ensure the free and full exercise of human rights in article 1 of the American Convention,¹⁹² as well as from the rights to judicial guarantees in article 8 and the right to judicial protection in article 25.¹⁹³ The European Court has inferred the duty to investigate from the right to life in article 2 of the European Convention in its procedural aspect,¹⁹⁴ the right to liberty and security of person in article 5 in its procedural aspect,¹⁹⁵ and the right to an effective remedy in article 13.¹⁹⁶

Furthermore, the Human Rights Chamber has creatively recognized the right to know the truth in the context of the right to privacy and family in article 8 of the European Convention. It is a right that “has as its principal element the protection of the integrity of the family.”¹⁹⁷ In upholding “the primacy of family life in terms of the depth of protection,”¹⁹⁸ the European Court has used this right as a vehicle for addressing certain prisoners’ rights.¹⁹⁹ Extending the scope of the application of article 8, the Human Rights Chamber has seen the right of the families of missing persons to access information about their missing relatives as one that falls within the ambit of the right to respect for their private and family life. If information is within a state’s possession or control and the state arbitrarily and without justification refuses to disclose it to the families of the missing upon a proper request, then the state fails to fulfill its positive obligation to secure the families’ right to respect for their private and family lives.²⁰⁰

191. *Sarma v. Sri Lanka*, U.N. Human Rights Comm., Comm., Comm’n No. 950/2000, U.N. Doc. CCPR/C/78/D/950/2000, ¶ 11 (July 31, 2003).

192. *Velásquez Rodríguez v. Honduras*, Inter-Am. Ct. H.R. (ser. C) No. 4, at ¶¶ 181-182.

193. *Bamaca-Velásquez*, Inter-Am. Ct. H.R. (ser. C) No. 70 at ¶), 192.

194. *Cyprus*, Application No. 25781/94, Eur. Ct. H.R. at ¶ 134; *Dokayev*, Application No. 16629/05, Eur. Ct. H.R. at ¶ 93.

195. *Cyprus*, Application No. 25781/94, Eur. Ct. H.R. at ¶ 150.

196. *Dokayev*, Application No. 16629/05, Eur. Ct. H.R. at ¶ 126.

197. *Ovey & White*, *supra* note 190, at 247.

198. *Id.* at 299.

199. *Id.* at 281; *VAN DIJK*, *supra* note 190, at 104-10.

200. *Selimovic*, Case No. CH/01/8365, Human Rights Chamber for Bosn. & Herz. at ¶ 174.

Courts and tribunals have recognized the continuing nature of the denial of truth element of the enforced disappearance. The U.N. Human Rights Committee, the European Court and the Human Rights Chamber have exercised their competence to examine cases of enforced disappearance, even if the events in question started before the entry into force of the pertinent treaties, out of recognition of the continuing nature of the enforced disappearance.²⁰¹ The Inter-American Court has stated that the enforced disappearance is a continuous violation of many rights in the American Convention,²⁰² while the Supreme Court of Chile has cited the continuing nature of the offense of the enforced disappearance as a principal ground for denying an application of an amnesty law and statute of limitation to those responsible for an enforced disappearance.²⁰³

The various courts and tribunals have also elaborated on the circumstances under which individuals can be considered victims who can claim a violation of their right to know the truth. The European Court gives a useful test for determining who qualifies as a victim by identifying “special factors which give the suffering of the person concerned a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human-rights violation.”²⁰⁴ This distinct dimension and character depends on such elements as: “the proximity of the family tie – in that context, a certain weight will attach to the parent-child bond – the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries.”²⁰⁵ The victims in the case law appear to meet this test. They include family members²⁰⁶ like: a

201. *Sarma*, U.N. Human Rights Comm., Commc’n No. 950/2000 at ¶ 6.2; *Varnava and Others v. Turkey*, Application Nos. 16064/90 - 16073/90, Eur. Ct. H.R. (2009), ¶ 148; *Selimovic*, Case No. CH/01/8365, Human Rights Chamber for Bosn. & Herz. at ¶ 169; *but see* *Cifuentes Elgueta v. Chile*, U.N. Human Rights Comm., Commc’n No. 1536/2006, U.N. Doc. CPR/C/96/D/1536/2006, ¶ 8.5 (Sept. 7, 2009); *Acuña Inostroza v. Chile*, U.N. Human Rights Comm., Commc’n No. 717/1996, U.N. Doc. CCPR/C/66/D/717/1996, ¶ 6.4 (July 23, 1999); *Yurich v. Chile*, U.N. Human Rights Comm., Commc’n No. 1078/2002, U.N. Doc. CCPR/C/85/D/1078/2002, ¶ 6.4 (Nov. 2, 2005).

202. *Velásquez Rodríguez*, Inter-Am. Ct. H.R. (ser. C) No. 4 at ¶ 191.

203. *Juan Contreras Sepúlveda y otros (crimen) casación fondo y forma*, Corte Suprema, 517/2004, Resolución 22267 (cited in Fanny Lafontaine, *No Amnesty or Statute of Limitation for Enforced Disappearances*, 3 J. OF INT’L CRIM. JUSTICE 469, 471 (2005).

204. *Cyprus*, Application No. 25781/94, III Eur. Ct. H.R. at ¶ 156.

205. *Id.*

206. *Id.*; *Amnesty Int’l v. Sudan*, Commc’n Nos. 48/90, 50/91, 52/91, & 89/93, African Comm’n on Human and Peoples’ Rights (1999); *Selimovic*, Case No.

parent;²⁰⁷ a child;²⁰⁸ a spouse;²⁰⁹ and a sibling, provided that this sibling adduces proof of actual damage.²¹⁰

But the recognition of the right to know the truth in the case law is not a complete one. In the very strength of the case law lies its weakness. The reliance on other rights to give effect to the right to know the truth is an argument against the existence of the right itself. The use by the courts and tribunals of other rights to give effect to aspects of the right to know the truth puts into question the need for the right to know the truth. The core structure of the case law leaves little room for the possibility of a freestanding right to know the truth.

Though the prohibition of torture and other cruel, degrading or inhuman treatment or punishment forms part of customary international law and has the character of *jus cogens*,²¹¹ not even reliance on this prohibition is sufficient. The use by the courts and tribunals of this prohibition focused on the effects of the violation, and not on the violation itself. It failed to respond adequately to the unique violation that the denial of the truth constitutes.²¹² The applicable right ought to be expressed in the specific and direct language of the truth that is central to the violation, and which, in its unique ability to repair, is essential to promote human dignity. Reliance on anything less would fall short of responding fully to the nature of the violation discussed in Part II.

The absence of a fully recognized right to know the truth embodied in a treaty as an autonomous right gives exceedingly wide discretion to the courts and tribunals to give effect to the right to know the truth, or not. The courts and tribunals wield the authority to decide cases in either direction. Without the guidance that a fully recognized right to know the truth is able to provide, the courts and tribunals are constrained to rely on other rights. But mere reliance on other rights carries with it a lack of assurance that the courts and tribunals will continue to interpret these other rights in a manner that advances the cause of the right to know the truth.

CH/01/8365, Human Rights Chamber for Bosn. & Herz. at ¶ 174.

207. *Quinteros*, U.N. Human Rights Comm., Commc'n No. 107/1981 at ¶ 9.5; *Sarma*, U.N. Human Rights Comm., Commc'n No. 950/2000 at ¶ 6.2.

208. *Bamaca-Velásquez*, Inter-Am. Ct. H.R. (ser. C) No. 70 at ¶ 192.

209. *Velásquez Rodríguez*, Inter-Am. Ct. H.R. (ser. C) No. 4 at ¶ 191.

210. *La Cantuta v. Peru*, Inter-Am. Ct. H.R. (ser. C) No. 63, ¶ 128 (2006).

211. Erika De Wet, *The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law*, 15(1) EUR. J. OF INT'L L. 97, 104 (2004); Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63, 73 (1993).

212. Kirsten Anderson, *How Effective Is the International Convention for the Protection of All Persons from Enforced Disappearance Likely to Be in Holding Individuals Criminally Responsible for Acts of Enforced Disappearance*, 7 MELB. J. OF INT'L L. 245, 265 (2006).

The courts and tribunals do refer to earlier judgments, both their own and those of other courts and tribunals. At the same time, the courts and tribunals show consistency in their judgments. Nonetheless, they remain capable of departing from earlier judgments. The principle of stare decisis does not apply to international courts and tribunals. To these courts and tribunals, earlier judgments serve merely as persuasive authority and not binding authority.²¹³

At the same time, less than full recognition of the right to know the truth has led to a lack of uniformity in the case law. The wide variety of other rights relied on is attributable to the absence of a single, directly applicable right. Across the range of options, the courts and tribunals have ended up citing not just one but a number of other rights interpreted in a variety of ways to give effect to the right to know the truth. The outcome is case law that diverges widely from one court or tribunal to the other in its legal basis. A fully recognized right to know the truth can serve as a unifying thread to bring about a greater sense of order and predictability in the case law.

Apart from the rights relied on to give effect to the right to know the truth, the precise remedies available differ greatly from one court or tribunal to another. Different systems have different approaches and remedies. The absence of an independent right to know the truth widens these differences. An award of damages is obtainable only from the bodies that are able to render binding decisions, namely the Inter-American Court²¹⁴ and the European Court.²¹⁵ Though its decisions are non-binding, the U.N. Human Rights Committee has stated that a state should “pay compensation for the wrongs suffered.”²¹⁶ For its part, the African Commission, a body that similarly renders non-binding decisions, is silent on the matter of compensation and has confined itself to making a general recommendation to “put an end” to the violations.²¹⁷

An order or recommendation to conduct an investigation that can ferret out the truth about the fate of the disappeared and missing is part of the dispositive portion of the decisions of the U.N. Human Rights Committee,²¹⁸ the Inter-American Court²¹⁹

213. George Schwarzenberger, *The Inductive Approach to International Law*, 60(4) HARV. L. REV. 539, 553 (1947).

214. American Convention, *supra* note 10.

215. European Convention, *supra* note 11.

216. *Quinteros*, U.N. Human Rights Comm., Commc’n No. 107/1981 at ¶ 16.

217. *Amnesty Int’l*, Commc’n Nos. 48/90, 50/91, 52/91, 89/93, African Comm’n on Human and Peoples’ Rights at ¶ 54.

218. *Sarma*, U.N. Human Rights Comm., Commc’n No. 950/2000 at ¶ 11.

219. *Bamaca-Velásquez v. Guatemala*, Inter-Am. Ct. H.R. (ser. C) No. 91, ¶ 106 (Feb. 22, 2002).

and the Human Rights Chamber.²²⁰ The African Commission is unable to give such an order or recommendation. The European Court does not expressly order any investigation, but the absence of an effective investigation into the fate of the disappeared and missing has led to its findings of violations of the right to life in its procedural aspect, the right to liberty and security of persons in its procedural aspect, and the right to an effective remedy.²²¹ The Council of Ministers to which the European Court transmits its final judgment supervises its execution.²²²

Some courts and tribunals have given specific instructions depending on whether the disappeared or missing person is still alive or already deceased. In cases involving disappeared or missing persons believed to still be alive, the U.N. Human Rights Committee has recommended the detainee's immediate release,²²³ while the Human Rights Chamber has instructed the state to provide information on the location of the detention and has likewise ordered the detainees' immediate release.²²⁴ In cases involving disappeared or missing persons believed to be already deceased, the Inter-American Court has instructed the state to locate the disappeared person's remains, disinter them in the presence of the family and deliver them.²²⁵ Similarly, the Human Rights Chamber has ordered the state to provide information on the location of the mortal remains as well as of gravesites.²²⁶

Further nuances set each court or tribunal apart from the rest. The U.N. Human Rights Committee is the sole body that has recommended that the authorities bring those responsible to justice,²²⁷ expedite ongoing criminal proceedings,²²⁸ and avoid similar violations.²²⁹ Only the Inter-American Court has gone to the extent of ordering the state to adopt the appropriate legislative and other measures,²³⁰ to adapt its penal laws to international human rights laws dealing with torture and enforced disappearances, to adopt measures to train with regard to human rights principles, and to provide the next of kin of the disappeared

220. *Selimovic*, Case No. CH/01/8365, Human Rights Chamber for Bosn. & Herz. at ¶ 220.

221. *Cyprus*, Application No. 25781/94, Eur. Ct. H.R. at ¶¶ 134, 150; *Dokayev*, Application No. 16629/05, Eur. Ct. H.R. at ¶¶ 93, 126.

222. European Convention, *supra* note 11.

223. *Sarma*, U.N. Human Rights Comm., Commc'n No. 950/2000 at ¶ 11.

224. *Selimovic*, Case No. CH/01/8365, Human Rights Chamber for Bosn. & Herz. at ¶ 220.

225. *Bamaca-Velásquez*, Inter-Am. Ct. H.R. (ser. C) No. 91, at ¶ 106.

226. *Selimovic*, Case No. CH/01/8365, Human Rights Chamber for Bosn. & Herz. at ¶ 220.

227. *Quinteros*, U.N. Human Rights Comm., Commc'n No. 107/1981 at ¶ 16.

228. *Sarma*, U.N. Human Rights Comm., Commc'n No. 950/2000 at ¶ 11.

229. *Quinteros*, U.N. Human Rights Comm., Commc'n No. 107/1981 at ¶ 16.

230. *Bamaca-Velásquez*, Inter-Am. Ct. H.R. (ser. C) No. 91), at ¶ 106.

with appropriate treatment.²³¹ Only the Human Rights Chamber has ordered the state to disclose all available information.²³²

The less than full recognition of the right to know the truth accounts for the variations in the remedies available from one court or tribunal to the other. Remedies are based on rights. The variety of other rights that the courts and tribunals rely on to give effect to the right to know the truth has given rise to an assortment of remedies. A distinct right to know the truth embodied in a treaty that sets out a range of remedies can lead not only to more consistency, but also to greater assurance of the availability of the range of remedies.

Courts and tribunals have likewise differed in the extent to which they surface the individual and social dimensions of the right to know the truth. To a much greater extent, the case law surfaces the individual dimension of the right to know the truth. After all, these are individual complaint procedures. Individual family members have initiated the cases and have caused their prosecution. Consequently, the remedies mostly pertain to them. But some of the courts and tribunals have involved the public to a certain measure and have acknowledged the social dimension of the right to know the truth in the process.

The Inter-American Court has required states to undertake a range of public acts where it has found that they have carried out enforced disappearances. These public acts that implement the social dimension of the right to know the truth include: publication of the relevant parts of the judgment making a finding of an enforced disappearance;²³³ a public act of recognition of responsibility and to make amends;²³⁴ and representation of the disappeared in a memorial and public site.²³⁵ The Human Rights Chamber has also contributed to the implementation of the social dimension of the right to know the truth by ordering the state to publish the entirety of their decisions.²³⁶ In *Selimovic v. Republika Srpska*, the Human Rights Chamber even expressed the hope that a public acknowledgement of responsibility for the Srebrenica events and a public apology to the victims' relatives and the

231. *Goiburú v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 11, ¶¶ 176-179 (Sept. 22, 2006).

232. *Selimovic*, Case No. CH/01/8365, Human Rights Chamber for Bosn. & Herz. at ¶ 220.

233. *Bamaca-Velásquez*, Inter-Am. Ct. H.R. (ser. C) No. 91, at ¶ 3; *Tibi v. Ecuador*, Inter-Am. Ct. H.R. (ser. C) No. 29, ¶ 11 (Sept. 7, 2004); *La Cantuta*, Inter-Am. Ct. H.R. (ser. C) No. 63 at ¶ 13.

234. *Bamaca-Velásquez*, Inter-Am. Ct. H.R. (ser. C) No. 91 at ¶ 3; *Tibi*, Inter-Am. Ct. H.R. (ser. C) No. 29 at ¶ 12; *La Cantuta*, Inter-Am. Ct. H.R. (ser. C) No. 63 at ¶ 11.

235. *La Cantuta*, Inter-Am. Ct. H.R. (ser. C) No. 63 at ¶ 12.

236. *Selimovic*, Case No. CH/01/8365, Human Rights Chamber for Bosn. & Herz. at ¶ 220.

Bosniak community of Bosnia and Herzegovina as a whole would someday be forthcoming from the Republika Srpska on its own initiative.²³⁷ To a lesser extent, the U.N. Human Rights Committee has contributed to the implementation of the social dimension of the right to know the truth by ordering the publication of the entirety of its decision.²³⁸

Not just a few but all of the courts and tribunals should surface both the individual and social dimensions of the right to know the truth. The complete recognition of the right to know the truth is essential for universality in this regard to become a reality. A treaty embodying the right to know the truth can specify the implications of both the individual and social dimensions of the right to know the truth and the extent to which states ought to reflect these dimensions in their actions.

In sum, my argument is that because of limitations in existing jurisprudence, there is a need to give complete recognition to the right to know the truth. The right that the courts and tribunals rely on to give effect to the right to know the truth should be the right to know the truth itself. A distinct right that is directly applicable and reflects the nature of the violation that the denial of the truth constitutes²³⁹ is essential for greater clarity and precision in the legal consequences. A treaty embodying the right to know the truth ought to set out its scope and remedies. Not only can such recognition lead to greater uniformity in the case law, but also to greater assurance that courts and tribunals will decide cases in a manner that gives effect to the right to know the truth, applies the appropriate remedies and reflects the different dimensions of the right to know the truth.

In its limited capacity to capture the experiences of the families of the disappeared and missing, the jurisprudence applying the international treaty law prior to the Disappearances Convention establishes the need for the express provision in the convention that universally guarantees the right to know the truth.²⁴⁰ Furthermore, in relation to states that do not become parties to the convention, the jurisprudence harnesses the potential of existing treaty provisions to provide some legal options to the families of the disappeared and missing, provided these states are parties to the pertinent treaties, as noted in Part III.

237. *Selimovic*, Case No. CH/01/8365, Human Rights Chamber for Bosn. & Herz. at ¶ 219.

238. *Sarma*, U.N. Human Rights Comm., Commc'n No. 950/2000 at ¶ 12; *Madoui v. Algeria*, U.N. Human Rights Comm., Commc'n No. 1495/2006, U.N. Doc. CCPR/C/94/D/1495/2006, ¶ 12 (Dec. 1, 2008); *Sharma v. Nepal*, U.N. Human Rights Comm., Commc'n No. 1469/2006, U.N. Doc. CCPR/C/94/D/1469/2006, ¶ 12 (Nov. 6, 2008).

239. See *supra* Part II (discussing the nature of the violation).

240. See *infra* Part V (describing and critiquing the Disappearances Convention).

With respect to domestic jurisprudence, an international standard to which states can adapt their domestic laws paves the way to greater clarity and precision in the legal consequences at the domestic level. To borrow Nowak's words, the object of a guarantee of a right embodied in a treaty is to make the struggle against the violation more effective by establishing additional state obligations to prevent it, to assist the victims and to punish the perpetrators.²⁴¹ In this regard, the Disappearances Convention that contains an explicit guarantee of the right to know the truth is a promising development.²⁴²

V. DISAPPEARANCES CONVENTION

This part describes and critiques the explicit guarantee of the right to know the truth in the Disappearances Convention. It examines the drafting history of the convention, situates it within the general development of human rights law, and evaluates the extent to which its provisions capture the depth and complexity of the violation that a denial of the truth about the disappeared and missing constitutes.

Section A of this part critically examines the explicit guarantee of the right to know the truth in the convention. Section B analyzes the extent to which other provisions of the convention support the explicit guarantee of the right to know the truth. Section C explores issues in relation to the promotion of the right to know the truth that the convention explicitly guarantees.

A. *Explicit Guarantee*

As Part II discussed, a denial of the truth is a violation of depth and complexity unlike any other. Borrowing Ní Aoláin's words, there is a need for international law to grasp and explain more fully the experience of harm from the perspective of the families of the disappeared and missing and to translate this knowledge into legal form.²⁴³ One way forward in this regard is through an explicit guarantee of the right to know the truth.

1. *Right to Know the Truth*

The convention provides an explicit guarantee of the right to know the truth. Paragraph 7 of the preamble affirms the "right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to

241. MANFRED NOWAK & ELIZABETH MCARTHUR, *THE UNITED NATIONS CONVENTION AGAINST TORTURE* 229 (Oxford Univ. Press 2008).

242. See *infra* Part V (describing and critiquing the Disappearances Convention).

243. Ní Aoláin, *supra* note 13, at 222.

this end.” Furthermore, article 24(2) states that: “Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person.”

Together, these references represent an acknowledgement of the importance of a right on the part of victims to know the truth regarding the circumstances of an enforced disappearance, the progress and results of the investigation and the fate of the disappeared person.²⁴⁴ Scovazzi and Citroni, who were members of the Italian government delegation to the intersessional open-ended Working Group that drafted the convention,²⁴⁵ welcomed the inclusion of the explicit guarantee of the right to know the truth as a “substantial evolution in international human rights law.”²⁴⁶

The explicit guarantee of the right to know the truth in article 24(2) succeeds in giving more specific content to the generalized terms of the ICCPR, the European Convention, the American Convention, and the African Charter that various courts and tribunals have so far relied on to give effect to the right to know the truth, as Part IV discussed. This guarantee has the potential to achieve and preserve consensus on how general standards are to apply in concrete situations and ensure that no room is left for loopholes or disingenuous interpretations of those standards.²⁴⁷ It also has an educative value for raising people’s expectations as to the level of treatment of individuals by governments.²⁴⁸

The right to know the truth in article 24(2) goes beyond other

244. Comm. on Human Rights, 61st sess., *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, 6, U.N. Doc. E/CN.4/2005/66 (Mar. 10, 2005).

245. Resolution 2001/46 of April 23, 2001, Comm. Human Rights, 73rd Mtg. For their drafting sessions, see Comm. on Human Rights, 59th sess., *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, U.N. Doc. E/CN.4/2003/71 (Apr. 25, 2003); Comm. on Human Rights, 60th Sess., *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, U.N. Doc. E/CN.4/2004/59 (Feb. 23, 2004); Comm. on Human Rights, 61st Sess., *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, U.N. Doc. E/CN.4/2005/66 (Mar. 10, 2005); Comm. on Human Rights, 62nd Sess., *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, U.N. Doc. E/CN.4/2006/57 (Feb. 2, 2006).

246. SCOVAZZI & CITRONI, *supra* note 135, at 358.

247. Antonio Cassese, *A New Approach to Human Rights: The European Convention for the Prevention of Torture*, 83(1) AM. J. OF INT’L L. 121, 128-29 (1989).

248. *Id.*

treaty provisions that apply only in times of conflict. Article 32 of the Additional Protocol I, for example, already provides for a “right of families to know the fate of their relatives” in the context of armed conflict and its aftermath, as discussed in Part III. Article 24(2) of the convention provides for a broader right applicable in times of peace as well. It covers the totality of “the circumstances of the enforced disappearance,” whereas article 32 of the Additional Protocol I is limited to “the fate of their relatives” that is a mere element of the circumstances of the enforced disappearance.²⁴⁹ As McCrory asserts, the coverage of the right to know the truth in article 24(2) of the convention is wider than that of the right in article 32 of Additional Protocol I.

2. *Freedom of Information*

Freedom of information in article 18 is a right that is distinct from the right to know the truth in article 24(2). Of the two rights, the right to know the truth is the broader right. The chairperson of the working group that drafted the convention saw freedom of information as but an element of the right to know the truth, albeit a very useful one. Scovazzi and Citroni add that freedom of information is “fundamental for the effective protection of the right to know the truth.”²⁵⁰

The scope of the right to freedom of information in article 18 is confined to the following pieces of information about a detained or disappeared person:

- (a) The authority that ordered the deprivation of liberty;
- (b) The date, time and place where the person was deprived of liberty and admitted to the place of deprivation of liberty;
- (c) The authority responsible for supervising the deprivation of liberty;
- (d) The whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer;
- (e) The date, time and place of release;
- (f) Elements relating to the state of health of the person deprived of liberty;
- (g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains.²⁵¹

By contrast, the right to know the truth in article 24(2)

249. Susan McCrory, *The International Convention for the Protection of All Persons from Enforced Disappearance*, 7(3) HUMAN RIGHTS LAW REVIEW 545, 557 (2007).

250. SCOVAZZI & CITRONI, *supra* note 135, at 329.

251. Disappearances Convention, *supra* note 2, at art. 18.

comprehends the totality of the “circumstances of the enforced disappearance.”²⁵²

Moreover, different groups of people enjoy the two rights. On the one hand, the right to know the truth belongs to every “victim” who is the “disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance” in accordance with article 24(1). On the other hand, freedom of information belongs to “any person with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representatives or their counsel” in accordance with article 18.²⁵³ The drafting process throws little light on how far the terms “victim” and “person with a legitimate interest” go and how exactly these two groups of people compare to each other.²⁵⁴

Furthermore, article 24(2) does not state that the right to know the truth is subject to any restriction.²⁵⁵ By contrast, freedom of information in article 18 is subject to restriction in accordance with article 20 on an exceptional basis and subject to a number of conditions. These conditions are: first, the detainee must be under the protection of the law and the deprivation of liberty must be subject to judicial control; second, the restriction must be strictly necessary and provided for by law; third, the transmission of the information must adversely affect the privacy or safety of the person, hinder a criminal investigation, or for other equivalent reasons; and fourth, the restriction must be in accordance with the law and in conformity with applicable international law and with the objectives of the convention.²⁵⁶

The restriction in article 20 on the guarantee of freedom of

252. *Id.* at art. 24.

253. While the term “victim” is not used on any other occasion in the Convention, the term “legitimate interest” is used on two other occasions. In article 17, a person deprived of liberty or, in the case of a suspected enforced disappearance, since the person deprived of liberty is not able to exercise this right, any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel, shall, in all circumstances, be entitled to take proceedings before a court. In article 30, a request that a disappeared person should be sought and found may be submitted to the Committee, as a matter of urgency, by relatives of the disappeared person or their legal representatives, their counsel or any person authorized by them, as well as by any other person having a legitimate interest. At the fifth drafting session, the Working Group left the definition of the term “persons with a legitimate interest” to national law. Comm. on Human Rights, 62nd sess., *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, U.N. Doc. E/CN.4/2006/57, at ¶ 24 (Feb. 2, 2006).

254. *See infra* Part V.3 (discussing further the scope of the terms “victim” and “person with legitimate interest”).

255. *See infra* Part V.3 (discussing the absolute and non-derogable nature of the right to know the truth).

256. Disappearances Convention, *supra* note 2, at art. 20.

information in article 18 considerably weakens it. Scovazzi and Citroni object to this restriction because they see it as providing an easy excuse for withholding information.²⁵⁷ Scovazzi and Citroni recall the protracted discussions on the exceptions to freedom of information before they found their way to the convention.²⁵⁸

For instance, the protracted discussions, in part, revolved around the withholding of information in order to protect the privacy of an individual in article 20. This exception poses a serious obstacle to obtaining critical information about a detainee's whereabouts. As Scovazzi and Citroni acknowledge, detainees occasionally prefer not to disclose their condition. But they are quick to note that these occasions are rare.²⁵⁹ In addition, according to the working group that drafted the convention, any effort to protect privacy must not enable the authorities to conceal the detention against the wishes of the detainee.²⁶⁰

Privacy must give way to the weightier considerations of a detainee's life, security and integrity. At the second drafting session, participants argued that protecting certain rights at risk in the event of an enforced disappearance such as the right to life, security and physical integrity, was more important than protecting privacy, and efforts to protect the latter should not result in diminished protection from enforced disappearances.²⁶¹

During detention, critical information must be available to foreclose the possibility of an enforced disappearance. The law ought to avoid exceptions that are too broadly formulated, such as privacy. At the third and fourth drafting sessions, despite the support of several delegations for the inclusion of privacy as a restriction on freedom of information, others felt that it opened the door to possible abuses.²⁶²

Just as controversial an exception, the withholding of information to avoid any hindrance to a criminal investigation in article 20 gives another basis for denying information necessary

257. SCOVAZZI & CITRONI, *supra* note 135, at 340.

258. *Id.* at 338.

259. *Id.* at 340.

260. Comm. on Human Rights, 59th Sess., *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance* Comm'n on Human Rights, 59th sess., U.N. Doc. E/CN.4/2003/71, at ¶ 15 (Apr. 25, 2003).

261. Comm. on Human Rights, 60th sess., *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance* Comm'n on Human Rights, 60th sess., U.N. Doc. E/CN.4/2004/59, at ¶ 22 (Feb. 23, 2004).

262. Comm'n on Human Rights, 61st sess., *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, U.N. Doc. E/CN.4/2005/66, ¶ 89 (Mar. 10, 2005).

for the protection of a detainee. At the second drafting session, many delegations complained about the considerable leeway that the authorities had to withhold information at the expense of safeguards meant to minimize the risks of disappearance.²⁶³ They explained that the authorities often invoked the requirements of an investigation when withholding information on persons deprived of liberty.²⁶⁴ At the third and fourth drafting sessions, several participants opposed the withholding of information in order not to obstruct an investigation and remarked that enforced disappearances could never be justified.²⁶⁵

The catchall phrase “other equivalent reasons” in article 20 is particularly objectionable because of its vagueness and susceptibility to a number of interpretations. Scovazzi and Citroni argue that it “has a too generic meaning.”²⁶⁶ At the third and fourth drafting sessions, the wide range of matters that the participants cited as possibly constituting these “other equivalent reasons” included the following: the safety of certain persons such as those who have confessed, national security, and even public security.²⁶⁷ At the same sessions, several participants opposed the addition of exceptions to freedom of information because these exceptions ran contrary to the very spirit of the instrument.²⁶⁸

The possible inference of national security from the phrase “other equivalent reasons” in article 20 demonstrates the increased risk of abuse of such a catchall phrase. According to Scovazzi and Citroni, past experience shows that national security has served as the pretext for most enforced disappearances.²⁶⁹ They find it ironic that a key element of national security is that people should not disappear and any deprivation of liberty should take place in observance of domestic and international safeguards.²⁷⁰

It is easy to understand Scovazzi and Citroni’s description of the inclusion of the phrase “other equivalent reasons” in article 20

263. Comm’n on Human Rights, 60th sess., *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, U.N. Doc. E/CN.4/2004/59, ¶ 124 (Feb. 23, 2004).

264. *Id.*

265. Comm’n on Human Rights, 61st sess., *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, U.N. Doc. E/CN.4/2005/66, ¶ 89 (Mar. 10, 2005).

266. SCOVAZZI & CITRONI, *supra* note 135, at 340.

267. Comm’n on Human Rights, 61st sess., *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, U.N. Doc. E/CN.4/2005/66, ¶ 89 (Mar. 10, 2005).

268. *Id.*

269. SCOVAZZI & CITRONI, *supra* note 135, at 340.

270. *Id.*

for the sake of compromise as “regrettable.”²⁷¹ In their view, article 20 enables domestic legislation to defeat the purpose of the freedom of information in article 18 and, in the process, undermines the prevention of the enforced disappearance contrary to the objectives of the convention.²⁷²

To serve as stronger, more effective support for the right to know the truth, the restriction on freedom of information ought to be minimized. At the fifth drafting session, Italy expressed disappointment at the restriction on freedom of information in article 20.²⁷³ Italy acknowledged that, in any international negotiation, it was inevitable that the final result would be a compromise between different positions. But Italy preferred a specific provision to bind each state party to make available all pertinent information always.²⁷⁴

The conditions in article 20 for the restriction on freedom of information are a source of some consolation. Italy pointed out that an appropriate solution to the issue of restriction on freedom of information was implicit in article 20. Italy welcomed the several conditions that each state party needed to comply with to restrict freedom expression in accordance with article 20. In Italy’s view, these conditions practically foreclosed the possibility of any denial of information that could facilitate a practice of enforced disappearance as well as secret detention.²⁷⁵

The limitations on the restriction in article 20 are rooted in the aim to prevent enforced disappearances. According to the Argentinian delegation, article 20 could on no account be interpreted as meaning that it was permissible to deny or conceal information relating to the crime of enforced disappearance. In particular, it was not permissible to deny or conceal information on the fate of a person deprived of liberty, whether that person was alive or not, the person’s state of physical and mental health or the location.²⁷⁶

Despite the limitations on the use of the restriction in article 20, invoking freedom of information in article 18 remains a challenge. McCrory argues that article 20 restricts the freedom of information in article 18 only if the detained person is under judicial control.²⁷⁷ McCrory clarifies that, in other instances, the

271. *Id.*

272. *Id.*

273. Comm’n on Human Rights, 62nd sess., *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, U.N. Doc. E/CN.4/2006/57, at ¶ 50 (Feb. 2, 2006).

274. *Id.*

275. *Id.* at ¶ 50.

276. *Id.* at ¶ 136.

277. McCrory, *supra* note 249, at 556.

restriction in article 20 does not apply.²⁷⁸ Still, according to McCrory, on the whole, the restriction of freedom of information in article 20 poses difficulties to those seeking to invoke freedom of information in article 18 in a balanced way.²⁷⁹

B. Other Provisions

Beyond the explicit guarantee of the right to know the truth in article 24(2) and freedom of information in article 18, a range of other rights and duties in the convention bear upon the implementation of the right to know the truth.

1. Prohibition of Secret Detention and Requirement of Registers

Likewise forming a part of the convention, the prohibition of secret detention is central to the guarantee of the right to know the truth. Secret detention is the very negation of the right to know the truth. The prohibition of secret detention has also been closely linked to freedom of information.²⁸⁰ Such a prohibition necessarily entails requiring a State party to compile and maintain up-to-date official registers or records of persons deprived of liberty.

a. Secret Detention

Article 17 prohibits secret detention absolutely.²⁸¹ Without prejudice to other international obligations on a state party with regard to a deprivation of liberty, article 17 requires each state party in its legislation to:

- (a) Establish the conditions under which orders of deprivation of liberty may be given;
- (b) Indicate those authorities authorized to order the deprivation of liberty;
- (c) Guarantee that any person deprived of liberty shall be held solely in officially recognized and supervised places of deprivation of liberty;
- (d) Guarantee that any person deprived of liberty shall be authorized to communicate with and be visited by his or her family, counsel or any other person of his or her choice, subject only to the conditions established by law, or, if he or she is a foreigner, to communicate with his or her consular authorities, in accordance with applicable international law;

278. *Id.*

279. *Id.*

280. Comm'n on Human Rights, 61st sess., *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, U.N. Doc. E/CN.4/2005/66, ¶ 92 (Mar. 10, 2005).

281. *Disappearances Convention*, *supra* note 2, at art. 17.

(e) Guarantee access by the competent and legally authorized authorities and institutions to the places where persons are deprived of liberty, if necessary with prior authorization from a judicial authority;

(f) Guarantee that any person deprived of liberty or, in the case of a suspected enforced disappearance, since the person deprived of liberty is not able to exercise this right, any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel, shall, in all circumstances, be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty and order the person's release if such deprivation of liberty is not lawful.²⁸²

The prohibition of secret detention in article 17 is a concrete measure that promotes the right to know the truth. Article 17 is based on article 10 of the Declaration for the Protection of All Persons from Enforced Disappearance²⁸³ on which the U.N. Working Group on Enforced or Involuntary Disappearances has formulated a General Comment.²⁸⁴ Here, the Working Group described the prohibition of secret detention in article 10 as “one of the most practical and valuable tools for ensuring compliance by States with their general commitment not to practice, permit or tolerate enforced disappearances . . . and to take effective legislative, administrative and judicial measures to prevent and terminate such acts”²⁸⁵

It is my argument that article 17 should have gone as far as stating that the prohibition of secret detention is non-derogable. Explaining the same prohibition of secret detention in article 10 of the Declaration for the Protection of All Persons from Enforced Disappearance, the Working Group on Enforced or Involuntary Disappearances has stated that places of detention:

must be official – whether they be police, military or other premises – and in all cases clearly identifiable and recognized as such. Under no circumstances, including states of war or public emergency, can any State interests be invoked to justify or legitimize secret centres or places of detention which, by definition, would violate the

282. *Id.*

283. Declaration on the Protection of All Persons from Enforced Disappearance, GA Res 47/133, 47th sess., U.N. Doc. A/RES/47/133 (Dec. 18, 1992).

284. Comm'n on Human Rights, 61st sess., *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, U.N. Doc. E/CN.4/2005/66, ¶ 76, (2005).

285. Working Group on Enforced or Involuntary Disappearance, *General Comment on Article 10 of the Declaration*, U.N. Doc. E/CN.4/1997/34, ¶ 22 (Dec. 13, 1996).

Declaration, without exception.²⁸⁶

In certain instances, the convention expressly forbids derogation as with the right to a judicial remedy in article 20(2).²⁸⁷ I suggest that it could have also done so with the prohibition of secret detention.

As guaranteed in article 17(d), a detainee has the right to communicate with family, counsel or any other person of his or her choice subject only to limitations established by law.²⁸⁸ At the fifth drafting session, the delegation of Mexico explained its interpretation of article 17(d) that the words “subject only to the conditions established by law” restricting the right to communication of any person deprived of liberty should be subject to some limitation in time, should be reasonable and should be consistent with article 9, paragraph 3, of the ICCPR, in order to avoid secret detention.²⁸⁹

As further guaranteed in article 17(f), a detainee has the right to take proceedings in court to question the legality of his or her detention.²⁹⁰ In accordance with article 17(f), even a person with a legitimate interest is entitled to take proceedings before a court, but only in the case of a suspected enforced disappearance, since the person deprived of liberty is unable to exercise this right personally.²⁹¹

At the fifth drafting session, the United States (US) expressed concern about a conflict between the prohibition of secret detention and its domestic laws.²⁹² The US stated: “We find that article 17 concerning access to places of detention, despite significant improvement, retains the possibility of conflict with constitutional and legal provisions in the laws of some States parties.”²⁹³

It is my suggestion that the US ought to be more open to adapting domestic laws to treaty standards. Taking matters further, Scovazzi and Citroni argue that should the US become a party to the convention, it cannot subject its obligation under the convention to its own domestic laws. Otherwise, it would violate

286. *Id.* at ¶ 24.

287. Disappearance Convention, *supra* note 2, at art. 20(2).

288. *Id.* at art. 17(d).

289. Comm’n on Human Rights, 62nd sess., *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, U.N. Doc. E/CN.4/2006/57, ¶ 130 (2006). Mexico has ratified the Convention. It did not enter this interpretation as a reservation.

290. Disappearances Convention, *supra* note 2, at art. 17(f).

291. Comm. on Human Rights, 61st sess., *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, U.N. Doc. E/CN.4/2005/66, at 21 (2005).

292. U.N. Doc. E/CN.4/2006/57, at 49.

293. *Id.*

article 27 of the Vienna Convention on the Law of Treaties that disallows invoking internal laws as justification for the failure to perform a treaty obligation.²⁹⁴

Just as the right to know the truth in article 24(2) is absolute, the prohibition of secret detention in article 17 is unqualified.²⁹⁵ In requiring states to have legislation prohibiting secret detention, article 17 does not permit any exception to their duty to adapt their domestic laws accordingly.

b. Registers

Article 17 further requires each state party to ensure the compilation and maintenance of up-to-date official registers or records of persons deprived of liberty.²⁹⁶ Each state party must promptly make them available, upon request, to any judicial or other competent authority or institution authorized for that purpose by the law of the state party concerned or any relevant international legal instrument to which the state concerned is a party.²⁹⁷ The information in them must include at the minimum:

- (a) The identity of the person deprived of liberty;
- (b) The date, time and place where the person was deprived of liberty and the identity of the authority that deprived the person of liberty;
- (c) The authority that ordered the deprivation of liberty and the grounds for the deprivation of liberty;
- (d) The authority responsible for supervising the deprivation of liberty;
- (e) The place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of deprivation of liberty;
- (f) Elements relating to the state of health of the person deprived of liberty;
- (g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains;
- (h) The date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.²⁹⁸

The requirement of official registers or records is essential to determine a detainee's fate. Among the basic guarantees that

294. SCOVAZZI & CITRONI, *supra* note 135, at 338.

295. Disappearances Convention, *supra* note 2, at art. 17.

296. *Id.*

297. *Id.*

298. *Id.*

apply to all persons deprived of liberty, the Committee Against Torture has included maintaining an official register of detainees.²⁹⁹ Elaborating on the same requirement in article 10 of the Declaration for the Protection of All Persons from Enforced Disappearance, the Working Group on Enforced or Involuntary Disappearances regards the obligation to compile and maintain up-to-date official registers or records of persons deprived of liberty as a “highly important commitment.”³⁰⁰ The need to update each register or record continuously is essential to ensure that “it covers all persons being held in the relevant centre or place of detention.”³⁰¹ Such a register or record is crucial “in tracing the whereabouts of an individual who may have been deprived of liberty.”³⁰²

2. Other Supporting Provisions

Still other provisions of the convention reinforce the right to know the truth. They provide important tools to combat enforced disappearances and open up the possibility of different remedial options to implement the right to know the truth.

a. Duty to Investigate

Article 12 requires states to conduct a thorough and impartial investigation without delay.³⁰³ Investigations can halt the process of an enforced disappearance.³⁰⁴ The duty to investigate arises even without a formal complaint for as long as there are reasonable grounds for believing that a person has been subjected

299. Committee against Torture, *General Comment No. 2, Implementation of Article 2 by States Parties*, U.N. Doc. CAT/C/GC/2, ¶ 13 (Jan. 24, 2008).

300. Working Group on Enforced or Involuntary Disappearance, *supra* note 285.

301. *Id.*

302. *Id.*

303. Disappearances Convention, *supra* note 2, at Art. 12. Art. 12 of the Disappearances Convention draws on arts. 12 and 13 of the Convention against Torture, that similarly provide for a duty of States to investigate upon a reasonable ground to believe that an act of torture has been committed and a corresponding right of individuals to complain about torture. Convention against Torture, *supra* note 161, at arts. 12, 13. Language on the powers and resources of the investigating authority prompted by article 13 of the Declaration for the Protection of All Persons from Enforced Disappearance was added. Comm’n on Human Rights, 60th sess., *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, U.N. Doc. E/CN.4/2004/59, at 16 (2004).

304. Comm’n on Human Rights, 59th sess., *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, U.N. Doc. E/CN.4/2003/71, at 15 (2003).

to an enforced disappearance.³⁰⁵

b. Protection of Persons With a Legitimate Interest in Information

Article 18 requires states to take appropriate measures to protect persons with a legitimate interest in information and persons participating in an investigation from ill-treatment, intimidation or sanction as a result of the search for information concerning a person deprived of liberty.³⁰⁶ Article 18 lists the relatives of the person deprived of liberty, their representatives or their counsel as examples of persons with a legitimate interest.³⁰⁷

c. Right to a Judicial Remedy

Article 20(2) provides for a right to a prompt and effective judicial remedy as a means of obtaining without delay the information in article 18.³⁰⁸ This right to a remedy is without prejudice to consideration of the lawfulness of the deprivation of a person's liberty.³⁰⁹ Establishing its non-derogable character, article 20(2) expressly forbids any suspension or restriction of the right to a remedy in any circumstances.³¹⁰

d. Reliable Verification of Release

Article 21 requires states to take measures to ensure that persons deprived of liberty are released in a manner permitting reliable verification. Furthermore, article 21 requires states to take the necessary measures to assure the physical integrity of these persons and their ability to exercise their rights fully at the time of release, without prejudice to any obligations to which such persons may be subject under national law.

e. Sanctions

Article 22 requires states to prevent and impose sanctions³¹¹ for: "(a) [d]elaying or obstructing the remedies referred to in article 17 . . . (2) . . . (f), and article 20 . . . (2);³¹² (b) [f]ailure to record the

305. Disappearances Convention, *supra* note 2, at art. 12.

306. *Id.* at art. 18.

307. *Id.*

308. *Id.* at art. 20(2)

309. *Id.*

310. *Id.*

311. *Id.* at art. 22. The Working Group that drafted the Convention appreciated the need to impose sanctions on agents of the State guilty of obstruction. Comm'n on Human Rights, 59th sess., *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, U.N. Doc. E/CN.4/2003/71, ¶ 78, at 16 (2003).

312. Disappearances Convention, *supra* note 2, at art. 22. Article 17(2)(f) guarantees "that any person deprived of liberty or, in the case of a suspected

deprivation of liberty of any person, or the recording of any information which the official responsible for the official register knew or should have known to be inaccurate; and (c) [r]efusal to provide information on the deprivation of liberty of a person, or the provision of inaccurate information, even though the legal requirements for providing such information have been met.”³¹³

f. Duty to Search

Article 24(3) requires states to “take all appropriate measures to search for, locate and release disappeared persons. Furthermore, in the event of the “disappeared persons” death, it creates the duty on the part of States to locate, respect and return their remains.”³¹⁴ Article 24(3) uses the qualifying words “all appropriate measures” to accord states greater latitude.³¹⁵

g. Right to Reparation and Compensation

Article 24(4) provides for the right to obtain reparation and prompt, fair and adequate compensation.³¹⁶ This right belongs to the “victim” who is the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.³¹⁷ In requiring states to ensure this right “in its legal system,” article 24(4) takes into account the diversity of legal systems.³¹⁸

h. Legal Situation of Disappeared and Their Relatives

Article 24(6) requires states to “take appropriate steps with regard to the legal situation of disappeared persons whose fate has

enforced disappearance, since the person deprived of liberty is not able to exercise this right, any persons with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel, shall, in all circumstances, be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty and order the person’s release if such deprivation of liberty is not lawful” while article 20(2) guarantees “the right to a prompt and effective judicial remedy as a means of obtaining without delay the information referred to in article 18, para. 1 relating to freedom of information.” *Id.* at art. 17(2)(f).

313. *Id.* at art. 22.

314. *Id.* at art. 24(3).

315. Comm’n on Human Rights, 62nd sess., *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, U.N. Doc. E/CN.4/2006/57, ¶ 141, at 25 (2006).

316. Disappearances Convention, *supra* note 2, at art. 24(4).

317. *Id.* at art. 24(1).

318. Comm’n on Human Rights, 60th sess., *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, U.N. Doc. E/CN.4/2004/59, ¶ 137, at 24 (2004).

not been clarified and that of their relatives.”³¹⁹ It goes on to list examples of the fields in which their legal situation needs appropriate steps on the part of the states. These fields include “social welfare, financial matters, family law and property rights.”³²⁰

i. Prevention and Punishment of the Wrongful Removal of Children

Article 25 requires states to prevent and punish under its criminal law the wrongful removal of children³²¹ and “the falsification, concealment or destruction of documents attesting to the true identity of . . . children.”³²² In all cases and in all matters relating to article 25, “the best interests of the child shall be a primary consideration and a child capable of forming his or her own views has the right to express those views freely, the views of the child being given due weight in accordance with the age and maturity of the child.” At the fifth drafting session, the Mexican delegation, speaking also on behalf of the Group of Latin American and Caribbean States (GRULAC), welcomed the manner by which the convention tackled the problem of child victims of enforced disappearance as a significant achievement.³²³

In sum, these other provisions of the convention create conditions that make it difficult for the authorities to commit enforced disappearances and to hide the truth about disappeared persons. Freedom of information in article 18 is a useful provision for uncovering the truth about the disappeared. The prohibition of incommunicado detention and the requirement of registers in article 17 promote transparency that helps prevent any concealment.

Some provisions open up remedial options to uncover the truth in situations in which the disappeared persons are still alive. These include the provisions creating the duties on states to investigate in article 12, to protect persons with a legitimate interest in information about the disappeared in article 18, to provide a judicial remedy in article 20(2), to enable reliable verification of release in article 21, to sanction different forms of interference with freedom of information in article 22, to search for

319. Disappearances Convention, *supra* note 2, at art. 24(6).

320. *Id.* Article 24(6) states that this is “[w]ithout prejudice to the obligation to continue the investigation until the fate of the disappeared person has been clarified.” *Id.*

321. *Id.* Article 25(1)(a) enumerates them as “children who are subjected to enforced disappearance, children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance.” *Id.*

322. *Id.*

323. U.N. Office of the High Comm’r for Human Rights, *Study on the Right to the Truth*, U.N. Doc. E/CN.4/2006/91, at 51 (2006).

the disappeared in article 24(3), and to provide reparation and compensation in article 24(4).

Some other provisions open up remedial options to uncover the truth in situations in which the disappeared persons are already deceased. In this regard, article 24(3) obliges states to locate, respect, and return the remains of the disappeared persons who are deceased.³²⁴

The application of yet some other provisions extends to the clarification of the consequences of an enforced disappearance on the legal situation of those affected. In this regard, article 24(6) requires states to take the appropriate steps with regard to the legal situation of disappeared persons whose fate has not been clarified and that of their relatives. Article 25 goes further to protect the best interests of affected children by obliging states to prevent and punish under its criminal law the wrongful removal of children and the falsification, concealment or destruction of documents attesting to the true identity of children.

These other provisions of the convention reinforce the explicit guarantee of the right to know the truth by helping pave the way to tangible results for victims in search of the truth about their disappeared relatives. Seeking not only to prevent an enforced disappearance, these provisions aim to uncover the truth and set straight its consequences on the legal situation of disappeared persons and their relatives.

C. Normative Issues

The explicit guarantee in article 24(2) and the supporting provisions raise a number of questions about the breadth and scope of the right to know the truth.

1. Non-Derogability

The non-derogable character of the right of families to know the truth about the fate of their disappeared relatives deserves express acknowledgement.³²⁵ On the one hand, article 24(2) expresses this right without any exception, limitation or qualification.³²⁶ The absence of any limiting provision establishes

324. Disappearances Convention, *supra* note 2, at art. 23.

325. By non-derogability, this article means the impermissibility of derogation in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed. See ICCPR, *supra* note 9, at art. 4. The U.N. Human Rights Committee has stated that the issue of derogability is independent of the issue of permissibility of restrictions and has cited freedom of religion in article 18 of the ICCPR that permits restrictions but is non-derogable. See U.N. Human Rights Comm., *General Comment No. 29, States of Emergency (Article 4)*, U.N. Doc. ICCPR/C//21/Rev.1/Add.11, ¶ 7 (Aug 31, 2001).

326. Disappearances Convention, *supra* note 2, at art. 24(2).

the absolute character of the right. On the other hand, article 24(2) does not go as far as acknowledging that the right is non-derogable.³²⁷

The silence of the convention on the non-derogable nature of the right to know the truth about the fate of the disappeared has not stopped Scovazzi and Citroni from reading this nature into the convention.³²⁸ They explain that, “As [article 24(2)] does not allow any exception, the right to know the truth must be understood as a non-derogable right.”³²⁹ Still, in spite the absence of any limiting provision, the convention would have established the character of this right more clearly had it made a reference to non-derogability. Just as the convention expressly forbids derogation of the right to a judicial remedy in article 20(2), it could have also done so with the right to know the truth.

It is my argument that the convention should have clarified that the right to know the truth is non-derogable. The right to know the truth is so important that it is not subject to any suspension in time of public emergency. Given the psychological and sociological harms that families suffer as a result of the denial of the truth about their disappeared and missing relatives, as discussed in Part II, families are entitled to know what has happened to their disappeared or missing relative to achieve a resolution of their loss. Furthermore, the truth enables society to decide how to move forward from past abuses and avoid a recurrence of past abuses. As Diane Orentlicher, the independent expert to update the set of principles to combat impunity, has stated, the right to know the truth is inalienable and its full and effective exercise of this right is a “vital safeguard against the recurrence of violations.”³³⁰

Furthermore, the right to know the truth is a cumulation of other non-derogable rights. As Part IV discussed, the case law gives effect to the right to know truth through the non-derogable right not to be subjected to torture or other cruel, degrading or inhuman treatment or punishment among other rights. Furthermore, the right to judicial remedies like the writs of habeas corpus and amparo for uncovering the truth is considered non-derogable as article 20(2) of the convention on the right to a prompt and effective judicial remedy itself acknowledges. In the words of the UN Office of the High Commissioner on Human Rights in its Study on the Right to Know the Truth: “The inalienable character of the right to know the truth together with

327. *Id.*

328. SCOVAZZI & CITRONI, *supra* note 135, at 359.

329. *Id.*

330. Comm’n on Human Rights, 61st sess., *Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, Diane Orentlicher, U.N. Doc. E/CN.4/2005/102/Add.1, at 7 (Feb. 8, 2005).

its material scope militates against derogation in any circumstances.”³³¹ It goes on to link the right to know the truth to the right not to be subjected to torture or other cruel, degrading or inhuman treatment or punishment that is an absolute and non-derogable right.³³² It further argues that “the judicial remedies that protect fundamental rights, such as habeas corpus and amparo, which may also be used as procedural instruments to implement the right to the truth, have now come to be understood as non-derogable.”³³³

While the right to know the truth is absolute and non-derogable, the names of the perpetrators may be withheld in the interest of reconciliation. In this regard, the Working Group on Enforced or Involuntary Disappearances reasons:

State practice indicates that, in some cases, hiding parts of the truth has been chosen to facilitate reconciliation. In particular, the issue whether the names of the perpetrators should be released as a consequence of the right to know the truth is still controversial. It has been argued that it is inappropriate to release the names of the perpetrators in processes such as ‘truth commissions’, when perpetrators do not benefit from the legal guarantees normally granted to persons in criminal processes, in particular the right to be presumed innocent. Regardless, under article 14 of the Declaration, the State has an obligation to bring any person alleged to have perpetrated an enforced disappearance before the competent civil authorities of that State for the purpose of prosecution and trial unless he has been extradited to another State wishing to exercise jurisdiction in accordance with the relevant international agreements in force.³³⁴

The situation to which the Working Group refers is narrowly confined to withholding information about the names of the perpetrators in the interest of a reconciliation process carried out by a truth commission, without prejudice to an appropriate criminal or other action against the perpetrators, duly observing due process requirements. Outside of this situation and in all other respects, the right to know the truth about the disappeared and missing is absolute and non-derogable. The convention could have clarified this matter, but did not do so.

2. *Social Dimension*

The right to know the truth has a social dimension that deserves express recognition in the law. As Part II discussed,

331. U.N. Office of the High Comm’r for Human Rights, *Study on the Right to the Truth*, U.N. Doc. E/CN.4/2006/91, ¶ 44 (Feb. 8, 2006).

332. *Id.*

333. *Id.* at ¶ 45.

334. Working Group on Enforced or Involuntary Disappearances, *supra* note 1.

families and communities are unable to obtain closure not knowing whether their members are alive or dead. Their anxiety can extend to future generations who carry with them the resentment caused by the humiliation and injustice suffered by their relatives and other members of the community. The intensity of their experiences undermines relations between individuals, groups and nations for extended periods after the events.³³⁵ The truth enables the people to decide how to move on toward national unity and reconciliation and avoid a recurrence of violations.

Society must know the truth about its disappeared and missing members in order to remember it and avoid any repetition of violations. Truth commissions through their public proceedings have implemented the social dimension of the right to know the truth.³³⁶ As discussed in Part IV, the Inter-American Court of Human Rights³³⁷ and to a certain degree the Human Rights Chamber of Bosnia and Herzegovina³³⁸ and the U.N. Human Rights Committee³³⁹ have given effect to the social dimension of the right to know the truth through their orders directing States responsible for disappearances and missing persons to publish the entirety or relevant parts of their decisions and, as far as the Inter-American Court is concerned, to acknowledge their responsibility and to perform public acts of apology and remembrance.

But the Disappearances Convention fails to take into account this social dimension of the right to know the truth. The working group that drafted the convention never raised it. The language in which the right to know truth is couched in the convention is highly personal and is confined to individuals. Article 24(2) provides for a right to know the truth that belongs to “every victim” who is the “disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance” without acknowledging that the larger community

335. *I.C.R.C. Report, supra* note 67, at 59.

336. See Comm’n for Historical Clarification Accord, *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*, preamble ¶ 4 (June 23, 1994); and *Promotion of National Unity and Reconciliation Act 1995* (S. Afr.), ¶ 3(1)(a).

337. *Bamaca-Velásquez*, Inter-Am. Ct. H.R. (ser. C) No. 91 at ¶ 3; *Tibi*, Inter-Am. Ct. H.R. (ser. C) No. 29 at ¶ 12; *La Cantuta*, Inter-Am. Ct. H.R. (ser. C) No. 63 at ¶ 11.

338. *Selimovic*, Case No. CH/01/8365, Human Rights Chamber for Bosn. & Herz. at ¶ 49.

339. *Sarma*, U.N. Human Rights Comm., Commc’n No. 950/2000 at ¶ 12; *Sharma v. Nepal*, U.N. Human Rights Comm., Commc’n No. 1469/2006, U.N. Doc. CCPR/C/94/D/1469/2006, ¶ 12 (Nov. 6, 2008); *Madoui v. Algeria*, U.N. Human Rights Comm., Commc’n No. 1495/2006, U.N. Doc. CCPR/C/94/D/1495/2006, ¶ 12 (Dec. 1, 2008).

can be a victim as well.³⁴⁰ The use of the words “individual” and “direct” in the definition give little room to argue that a right to know the truth belongs to the community.

A possible direction toward wider recognition of the right to know the truth is through a greater acknowledgement of its social dimension in the law. According to Scovazzi and Citroni, though the convention does not expressly provide for the social dimension of the right to know the truth, it does not deny it either.³⁴¹ But neither in its substantive nor procedural provisions does the convention give any kind of recognition of this social dimension. There thus remains a need to clarify the legal consequences of the right to know the truth not only with respect to individuals, but also the broader community.

3. *Relation to Freedom of Information*

The only objection thus far to the explicit guarantee of the right to know the truth is that which the US has expressed. The US refuses to recognize the existence of an independent right to know the truth but insists on the sufficiency of freedom of information that article 19 of the ICCPR guarantees. The US prefers to interpret the right to know the truth as the same as freedom of information.³⁴²

The Bush Administration sought to avoid an unqualified right to know the truth.³⁴³ A document detailing proposals by the US

340. Disappearances Convention, *supra* note 2, at art. 24(2).

341. SCOVAZZI & CITRONI, *supra* note 135, at 359.

342. At the fifth session of the working group that drafted the Convention, the US worded its objection in this way:

Preambular paragraph 7 and article 24, paragraph 2, on the right to the truth. This is a notion that the United States views only in the context of the freedom of information, which is enshrined in article 19 of the International Covenant on Civil and Political Rights, consistent with our long-standing position under the Geneva Conventions. We are grateful for the goodwill shown in seeking compromise language in the preamble, but our reservations remain concerning this issue, including with respect to article 24, paragraph 2, which we read in this same light.

Comm’n on Human Rights, 62nd sess., *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, U.N. Doc. E/CN.4/2006/57, at 48 (2006). The US has neither signed nor ratified the convention yet.

343. Nonpaper from the U.S. Delegation to the Chair of the Working Group for the Elaboration of the Treaty to Punish and Prohibit Enforced Disappearance, U.S. DEPT. OF STATE, *available at* http://www.washingtonpost.com/wpsrv/nation/documents/nonpaper_to_french_chair_090309pdf.pdf. The document was released in response to a Freedom of Information Act request by Amnesty International. R. Jeffrey Smith, *US Tried to Soften Treaty on Detainees: Bush White House Sought to Shield Those Running Secret CIA Prisons*, WASH. POST, Sept. 8, 2009, <http://www.washingtonpost.com/wpdyn/content/article/2009/09/07/AR2009090>

during the drafting of the convention stated: “It is critical for the United States to have acceptable text on the “RIGHT TO KNOW”, which recognizes the need of families to have access to the truth without endorsing unacceptably broad “rights”-based language and without requiring provision of information that could impair national security, law enforcement or privacy interests.”³⁴⁴

Other States disagreed with the US.³⁴⁵ As a matter of compromise, paragraph 7 of the preamble, which refers to the right to know the truth, also makes a reference to freedom of information.³⁴⁶ Such a reference to freedom of expression sits oddly in the preamble.³⁴⁷ The chairperson of the working group that drafted the convention clarified that freedom of information is “a supplementary and very useful element of the right to the truth.”³⁴⁸

The many differences between the right to know the truth and freedom of information belie the argument of the US that the two rights are one and the same. Such an argument would only seek to diminish the scope and strength of the right to know the truth: from one that covers the totality of the circumstances of an enforced disappearance as stated in article 24(2) of the convention, to one that is confined to only the particular pieces of information enumerated in article 18; and from one for which no restriction is provided in article 24(2), to one that is subject to the restriction in article 20.

Contrary to the US assertion, the right to know the truth is distinct from freedom of information. The latter is but an instrument to implement the former. As the Working Group on Enforced or Involuntary Disappearances has stated in its General Comment on the Right to the Truth:

The right to the truth in relation to enforced disappearances should be clearly distinguished from the right to information, and in particular the right of the relatives or other persons with a legitimate interest, their representatives or their legal counsel, to obtain information on a person who is deprived of his liberty. The right to information on the person detained, together with the non-

702225.html.

344. *Id.*

345. Comm’n on Human Rights, 62nd sess., *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, U.N. Doc. E/CN.4/2006/57, ¶ 87 (2006).

346. *Id.* Paragraph 7 of the Preamble states: “Affirming the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end.” Disappearance Convention, *supra* note 2, at preamble.

347. *Id.*

348. *Id.*

derogable right of *habeas corpus*, should be considered central tools to prevent the occurrence of enforced disappearances.³⁴⁹

4. Scope of the Term “Victim”

The right to know the truth belongs to every “victim.” Article 24(1) does define a “victim” as the “disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.”³⁵⁰ But as pointed out in Section B of this part, the convention provides hardly any guidance on the scope of the term “victim.” The disappeared person expressly qualifies as a “victim.” However, it remains to be clarified how far the term goes.

The working group that drafted the convention identified family members as being among the victims.³⁵¹ Beyond family members, there is vagueness as to who qualifies as a victim. The intention could well be to give states flexibility to determine who the victims are, as proposed during the third and fourth drafting sessions.³⁵² But states themselves, if they were to make this determination, might do so restrictively, whereas a UN body could be more creative in its interpretation, opening up rather than shutting down different possibilities for victims.

In sum, the explicit guarantee of the right to know the truth raises a few concerns. These include the lack of express recognition of the non-derogable nature of the right to know the truth, as well as its social dimension, and the lack of clarity on its relation to freedom of information, and the scope of the term “victim” to whom this right belongs. The resolution of these issues will contribute greatly to shaping the contour of the right to know the truth and its regime in the context of the convention.

By way of summation, the explicit guarantee of the right to know the truth in the convention is a significant advance in human rights law. As Part II discussed, the denial of the truth about the disappeared and missing is a violation of a depth and complexity unlike any other. Parts III and IV discussed the limited capacity of international treaty law and case law prior to the adoption of the convention to capture the nature of this violation fully and to translate it into legal form. These parts established the need for the express guarantee in article 24(2). The convention

349. Working Group on Enforced or Involuntary Disappearances, *supra* note 1.

350. Disappearances Convention, *supra* note 2, at art. 24(1).

351. Comm’n on Human Rights, 60th sess., *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, U.N. Doc. E/CN.4/2004/59, ¶ 130 (2004).

352. Comm’n on Human Rights, 61st sess., *Report of the Intersessional Open-Ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearance*, U.N. Doc. E/CN.4/2005/66, ¶ 112 (2005).

represents an increasing recognition in international law of the harms caused by a denial of the truth and its development of the means to respond to it.

The convention supports the right to know the truth with the freedom of information in article 18,³⁵³ the prohibition of secret detention in article 17,³⁵⁴ the duty on states to investigate in article 12,³⁵⁵ the duty to protect persons with a legitimate interest in information in article 18,³⁵⁶ the right to a prompt and effective judicial remedy in article 20,³⁵⁷ the duty to ensure reliable verification of the release of detainees in article 21,³⁵⁸ the duty to sanction delaying or obstructing relevant remedies in article 22,³⁵⁹ the duty to search for, locate and release disappeared persons and to locate, respect and return any remains in article 24(3),³⁶⁰ the right to obtain reparation and prompt, fair and adequate compensation in article 24(4),³⁶¹ the duty to take appropriate steps with regard to the legal situation of disappeared persons and their relatives in article 24(6)³⁶² and the duty to prevent and punish the wrongful removal of children in article 25.³⁶³

The explicit guarantee of the right to know the truth in the convention is not a perfect one for a number of reasons. First, despite the absence of any limiting provision, it does not expressly recognize the non-derogable nature of the right. Secondly, it does not acknowledge the social dimension of the right to know the truth. Thirdly, it does not spell out how the right to know the truth interrelates with the freedom of information and, for that matter, the other related rights as well. Fourthly, it does not elucidate the term “victim” so as to make clear who qualifies as an “individual who has suffered harm as the direct result of a disappearance” to whom the right to know the truth belongs. The development of this right will require these issues to be addressed.³⁶⁴

353. Disappearances Convention, *supra* note 2, at art. 18.

354. *Id.* at art. 17.

355. *Id.* at art. 12.

356. *Id.* at art. 18.

357. *Id.* at art. 20.

358. *Id.* at art. 21.

359. *Id.* at art. 22.

360. *Id.* at art. 24(3).

361. *Id.* at art. 24(4).

362. *Id.* at art. 24(6).

363. *Id.* at art. 25.

364. In my view, the monitoring role of the Committee on Enforced Disappearances may provide some of the answers to these normative issues. The reporting procedure in article 29 of the Disappearance Convention that is mandatory for all States parties to the convention is a particularly potent tool for the Committee to clarify normative issues. Disappearance Convention, *supra* note 2, at art. 29. By issuing general comments and concluding observations as part of its reporting procedure, the Committee can develop the right to know the truth. Through its views in its individual communications

Still, the imperfections of the convention do not detract from the achievement that it represents as a fulfillment of the need for an explicit guarantee of the right to know the truth. The references to a right to know the truth in the convention reflect a greater willingness to address the full spectrum of injuries that account for the traumas of the families of the disappeared and missing in the wake of a disappearance. They are important initial steps toward more fully addressing the depth and complexity of the violation that a denial of the truth about the disappeared and missing constitutes.

VI. CONCLUSION

What is the nature of the violation that a denial of the truth constitutes and how has international law responded to this nature? This Article showed that the violation is as deep as it is complex. Though international law has made significant advances in the promotion of the right to know the truth about the disappeared and missing, it stands to improve the extent to which it reflects the nature of the violation and its different dimensions.

The psychological and sociological literature discussed in Part II shows that a denial of the truth about the disappeared and missing complicates the mourning process and causes a higher incidence of affective disorders, pathological depressive and non-depressive grief, anxiety, post-traumatic stress disorder, and greater degrees of unconscious emotional disturbance over an extended period than other forms of human rights violations. Interdisciplinary learning applied to legal analysis deepens our understanding and grounds the challenges to the limitations of the law in a complementary and relevant empirical framework.³⁶⁵

Furthermore, not only do the families of the disappeared and missing experience harms as a consequence of the denial of the truth, but so does society as a whole. When a member of society disappears or goes missing, society itself is greatly affected by the loss. Extended periods of anxiety on the part of the families of disappeared and missing persons turn into deep resentment that considerably strains the relationships between individuals, groups, and nations long after the events themselves.³⁶⁶ When the fate of victims is not known, the healing process cannot begin, and deep, festering resentment makes national unity and reconciliation difficult.³⁶⁷ This social dimension of the right to know the truth about the disappeared and missing has been central to the

procedure in article 31 that requires a separate declaration on the part of States parties, the Committee can build jurisprudence that further clarifies normative issues.

365. Ní Aoláin, *supra* note 13, at 244.

366. See *I.C.R.C. Report*, *supra* note 67, at 9.

367. Zalaquett, *supra* note 26, at 629.

establishment of truth commissions worldwide.³⁶⁸

Prior to the adoption of the Disappearances Convention, international law demonstrated a troubling failure to capture the nature of the violation that the denial of the truth constitutes. As discussed in Part III, outside of the convention, international treaty law guarantees mere elements of the right to know the truth. The existing treaties fail to detail the nature and scope of the right, clarify its individual and social dimensions and provide for measures of protection to address the harms that the families of the disappeared and missing have experienced. The existing provisions are scattered and disorganized and are found in a number of unrelated treaties, often buried, without any clear indication of the subject matter. These conditions hinder the establishment of an international consensus and understanding and indicate the need for a universal treaty provision that can explicitly organize and clarify the right.³⁶⁹ An express guarantee of the right to know the truth can capture the harms experienced by the families of the disappeared and missing more fully and, at the same time, raise the status and visibility of this right.

Part IV showed that prior to the adoption of the convention, different courts and tribunals made creative use of the limited provisions of international treaty law to give effect to the right to know the truth. In spite of the absence of an explicit guarantee of the right to know the truth, these courts and tribunals succeeded in giving effect to the right to know the truth through the interpretation of an assortment of other rights in general human rights treaties.

But less than full recognition of the right to know the truth has led to a lack of uniformity in the case law and has given an exceedingly wide discretion to the courts and tribunals to give meaning to the right to know the truth, or not to do so. A distinct right that is directly applicable and reflects the nature of the violation that a denial of the truth constitutes is necessary for greater clarity and precision in the legal consequences. A treaty embodying the right to know the truth ought to set out its scope, remedies and individual and social dimensions.

In their limited capacity to capture the experiences of the families of the disappeared and missing, the existing treaties and case law provide a historical perspective that explains why it has been important for the Disappearances Convention to emerge with an express provision universally guaranteeing the right to know

368. See Comm. for Historical Clarification Accord, *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*, Oslo, 23 June 1994, preamble, ¶ 2; and *Supreme Decree No. 065-2001-PCM 2001* (Peru) preamble ¶ 4.

369. Bennett, *supra* note 172, at 29-31.

the truth. At the same time, in relation to states that do not become parties to the convention, the treaties and case law provide some legal options to the families of the disappeared and missing, provided these states are parties to the pertinent treaties.

The increasing recognition of the harms that the families of the disappeared and missing have experienced finds more concrete expression in the guarantee of the right to know the truth in the Disappearances Convention. It is a significant advance in human rights law that offers great promise in promoting the right and in influencing the behavior of states in this regard. It affirms in its preamble the “right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end.”³⁷⁰ It goes on to provide in article 24(2) for a “right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person.”³⁷¹ These references to a right to know the truth in the convention reflect a greater willingness to address the full spectrum of injuries that account for the traumas of the families of the disappeared and missing. The references are important initial steps forward toward more fully addressing the depth and complexity of the violation that a denial of the truth about the disappeared and missing constitutes.

The explicit guarantee of the right to know the truth in article 24(2) succeeds in giving more specific content to the generalized terms of existing treaties on which various courts and tribunals have so far relied to give effect to this right. It has the potential to achieve and preserve consensus on how general standards are to apply in concrete situations and ensure that no room is left for loopholes or disingenuous interpretations of these standards.³⁷² It also has educative value for raising the level of people’s expectations as to the manner of their treatment and, to some extent, the level of treatment of individuals by governments.³⁷³

The right to know the truth in article 24(2) of the Disappearances Convention goes beyond article 32 of the Additional Protocol I that applies only in time of conflict. Article 24(2) of the convention provides for a broader right applicable both in time of conflict and of peace. It covers the totality of “the circumstances of the enforced disappearance” whereas article 32 of the Additional Protocol I is limited to “the fate of their relatives” that is a mere element of these circumstances.³⁷⁴

370. Disappearances Convention, *supra* note 2, at preamble.

371. *Id.* at art. 24(2).

372. Cassese, *supra* note 20, at 128-29.

373. *Id.* at 129.

374. McCrory, *supra* note 249, at 557.

Furthermore, the convention supports the right to know the truth in article 24(2) with a number of other provisions that create conditions making it difficult for the authorities to commit enforced disappearances and hide the truth about disappeared persons. Seeking not only to prevent enforced disappearances, these provisions seek to uncover the truth and set straight its consequences on the legal situation of disappeared persons and their relatives.

But there are a number of unresolved normative issues in relation to the explicit guarantee of the right to know the truth in the convention. These normative issues relate to the non-derogable character of this right, its social dimension, its relation to freedom of information and scope of the term “victim.”

Despite its advances, the law needs to do more. The law is only beginning to understand what it means for the state to be the cause of a family member’s inability to know what has happened to a relative. No family should ever have to go through such an ordeal. From the perspective of families of the disappeared and missing and of society, it is imperative for the law to continue to capture more fully their experiences.

