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Genealogy, Variations and Specificity of the Right to Truth

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This essay focuses on the right to truth as a specific guarantee of the human person, characterised by both an individual and collective dimension, especially in the context of transitional justice. The analysis takes as its perimeter of investigation both the normative datum, which highlights its development in three phases (at first exclusively in the sphere of international humanitarian law, then circumscribed to the context of enforced disappearances, and today applicable in any case of serious violation), and the practice of the decisions of international tribunals and human rights control mechanisms. The aim is to highlight how the right to truth, far from constituting an aspiration that is more ethical than juridical or a mere explication of pre-existing rights already established, can, if crystallised, serve the pursuit of its own objectives that would be difficult to achieve without it.

Keywords: *Human rights; Rights to the truth; Transitional justice; Gross violations*

Introduction

On 21 December 2010, the General Assembly of the United Nations (UN) proclaimed 24 March as the *International Day for the Right to Truth about Gross Violations of Human Rights and for the Dignity of Victims*.[1] The anniversary is part of a debate, which has become more accentuated in recent years, both in doctrine[2] and in practice, on the emergence or otherwise of a 'right to truth' understood as an obligation incumbent on States to disclose, both to victims and to the community, every fact and circumstance of which they are aware in

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[1]UN General Assembly (2010). The date was chosen to honour the work of Bishop Oscar Arnulfo Romero of El Salvador, who was assassinated on 24 March 1980 for denouncing violations of the human rights of the most vulnerable population and defending the principles of protection of life, human dignity and opposition to all forms of violence. The purpose of this day is therefore twofold: to honour the memory of the victims of gross and systematic human rights violations and to promote the importance of the right to truth and justice by paying tribute to those who have dedicated and lost their lives in the struggle to reaffirm human rights for all.

[2]Without claiming to be exhaustive, there are four different approaches: a) those who deny a legal autonomy of the right to truth, as Graziani & Rotondo (2020), b) those who, qualify it as a last-generation human right, as Klinkner & Davis (2021), González (2018); and Callejon (2006), c) those who conceive it as a kind of specification of pre-existing rights, as Antkowiak (2002), Aldana-Pindell (2004), and Groome (2011), d) those who speak of it as an emerging principle not yet established as Naqvi (2006).

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relation to serious violations of human rights, mainly in post-dictatorship or post-conflict contexts of transitional justice.[3]

The then UN Secretary General Ban Ki-moon, on the occasion of the first anniversary of this *International Day*, clarified the rationale behind the right to truth:

> "*[…] victims of gross human rights violations and their families are entitled to know the truth about the circumstances surrounding the violations, the reasons they were perpetrated and the identity of the perpetrators. [...] Knowing the truth offers individual victims and their relatives a way to gain closure, restore their dignity and experience at least some remedy for their losses. Exposing the truth also helps entire societies to foster accountability for violations. And since the process of determining the truth often involves fact-finding inquiries and public testimony by victims and perpetrators, it can provide catharsis and help produce a shared history of events that facilitates healing and reconciliation*".[4]

The right to the truth would accrue first and foremost to the victim, i.e. the person directly injured by a criminal act, as well as to persons closely associated with them, first and foremost – but not exclusively – their family members, who have suffered harm as a result of that act, and secondly, but not least, to the community as a whole.[5] From the point of view of the passive side, the right to truth would entail a series of *facere* obligations for States, the hard core of which would be the carrying out of effective investigations,[6] the initiation of prosecutions and the conviction of those found responsible. This triad of basic elements, corollaries of the principle according to which the exercise of *ius dicere* is a monopoly of the State, i.e. it is a right *positum* by the authority in charge of it (having regard, upstream, to its production, downstream, to its application), characteristic of the retributive approach to justice (according to the *suum cuique tribuere* principle, in virtue of which benefits must be equivalent to counter-performances, rewards to merits, penalties to demerits)[7] would be enriched, in the case of the right to truth, with specific forms of reparation, other than the typical modality, i.e. pecuniary reparation. In fact, in order not to reduce legal epistemology to an imitative or reproductive level of the mathematical method, the idea of restorative justice has emerged in recent years, based on a vision that requires a different apparatus of tools, broader and more complex

[3]Stamenkovikj (2021); Mendez & Bariffi (2012); Naftali (2017); Minow (1998); Méndez (1998).
[4]Secretary General (2011). On how international courts try to ascertain the 'procedural' truth, see Wheeler (2019) at 84 and Bhuiyan (2022).
[5]Bassiouni (2006).
[6]According to the Council of Europe, the requirements for an investigation to be 'effective' are: adequacy (the State must do all that is reasonably possible to reach a result); thoroughness (considering every relevant element); impartiality; independence; timeliness; and publicity, without compromising the conduct of the investigation and the fundamental rights of the parties. See Directorate General of Human Rights and Rule of Law (2011).
[7]For Simone Weil, very often the sentence pronounced by the judiciary is nothing but the lowest of revenges: Weil (1957) at 41. This can lead to an aberrant result, namely that the history of the repression of crimes by the State becomes more frightening than the history of the crimes themselves: thus Muller (1995) at 145 ff.

than that which belongs to a merely applicative knowledge, given the crisis of the idea of punishment as affliction, an act that compensates but does not repair.[8] The acme of this tension, at once ethical and juridical, is represented by the Truth and Reconciliation Commissions:[9] the *ratio* behind the work carried out by these Commissions hinges precisely on the right to truth in order to (re)establish a (new) paradigm of values, giving due prominence to the past, through the memorisation of events, in an attempt to avert the recurrence of atrocities and violence.[10] In fact, by making the truth known and avoiding the shortest route, i.e. the *escamotage* of amnesties *tout court*,[11] one restores to a people, an ethnic group, a social community, a stolen heritage, i.e. its memory, avoiding that the concealed and concealed reality defuses and sabotages from the outset any form of reconciliation, an objective that only time can help achieve.[12]

In this change of course, the right to truth seems to take on the role of helmsman, giving the direction and pursuing it, so that in these notes, an attempt will be made, first of all, to reconstruct from a historical-normative point of view the emergence of this new instance in the panoply of those posed to protect the rights of the human person, taking into account practice, in order to highlight, so to speak, 'the state of the art', i.e. whether the right to truth can today be considered a crystallised right or a right *in fieri*, as well as its function, i.e. for what purposes it could usefully be exercised.[13]

The question underlying the investigation of this contribution is therefore, in the first instance, whether the right to truth has now risen to the rank of an autonomous human right endowed with a normative force of its own beyond its rhetorical enunciation as a legitimate aspiration, or, conversely, whether it should (still) be considered a mere specification of other fundamental human rights, consolidated both at the level of convention and at the level of customary law, such as, in particular, the right of States to enact positive measures aimed at preventing and/or repressing serious violations of substantive human rights (*in specie*, the right to life or the prohibition of torture), or procedural rights (such as the right to a fair trial or an effective remedy).

To this end, we shall first of all delimit the content of the right to truth, in the twofold meaning of individual right and collective right, outlining its normative origins and stressing how, in the case of the right to truth, the classic synallagmatic reconstruction of right-duty falls, at least in part, in a bi-univocal *vis-à-vis* declination between the holder of the guarantee and the

[8]Already *illo tempore* Francesco Carnelutti (1951) at 211-212, stated that "il diritto è un fatto essenzialmente spirituale […]. Un contratto, un delitto, un processo sono degli uomini uno di fronte all'altro. Vuol dire che bisogna capire quegli uomini per capire il diritto. Ma questa è materia ribelle […]".

[9]Szoke-Burke (2015); Kukoska (2015).

[10]Baranowska & Glisczczynska-Grabias (2018).

[11]ee Le Moli (2021).

[12]On the practice of truth and reconciliation commissions, let us refer to Latino (2017).

[13]On the broad or narrow interpretation of the notion of truth, see Klamberg (2012) at 611. On the polysemous ambivalence of the concept 'right to truth', (ab)used sometimes in an instrumental manner, see Naftali (2016).

obligor to respect it. In fact, if it is true – and it is true – that the disclosure to the victim of what has happened, functional to his or her specific interest (i.e. reduction of suffering/elaboration of the event), is specularly counterbalanced by the State's duty to investigate the facts relating to serious violations of human rights, nevertheless the State's obligation to ascertain these situations does not end in this key purely related to the victims but also serves other purposes. In fact, the identification and prosecution of the alleged perpetrators and, in general, investigations aimed at tracing the factual picture of what really happened in the case of atrocities, often constitute an indispensable building block to recompose a society fragmented along ethnic, political or religious lines, to enable it to come to terms with its past and to establish policies of equality among its members, reconstructing a national identity and unifying the country through dialogue on a shared history. From a legal point of view, this also has an impact on another profile, that of the active legitimisation of such a right: if the right to truth is to be declined in a way that is (also) independent of the legitimate claims of the victims (albeit not in a contradictory key, but in a supplementary and complementary one), who can invoke it (apart from the victims): their representatives, non-governmental organisations, so-called civil society, etc.?

The right to the truth will therefore be reconstructed in the light of practice in order to verify whether, and with what characteristics, it can today be considered an autonomous case in the international legal panorama, and this, not, as Ignatieff puts it, from the point of view of rights inflation – the tendency to define anything desirable as a right – since this ends up eroding the legitimacy of a defensible core of rights,[14] but on the basis of the fact that there are interests that justify the right to know what actually happened independently of the interests of prosecution, punishment of the offender or (even sometimes) reparation for the wrong suffered by the victim.

The analysis will therefore aim to highlight how the right to truth constitutes a pragmatically and legally indispensable tool in the global perspective of transitional justice, as defined by the UN Secretary General, i.e. «the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof».[15]

[14]Ignatieff (2000). Ignatieff's words can be contrasted with those of Helmons (2000): "la liste des droits de l'homme n'est pas exhaustive. Cette liste se complète au fur et à mesure des besoins de la personne".
[15]Report of the Secretary General (2004).

Legal Prolegomena of the Right to Truth

The emergence of the right to truth in international law is articulated according to a three-phase process: the first, the oldest and most circumscribed, developed in the framework of international humanitarian law; the second, specifically in the context of enforced disappearances; the third, the current, marks a progressive expansion of the operativeness of this guarantee whose legal effects would be released in any scenario in which serious and systematic violations of human rights (*gross violations*) have occurred.

Firstly, in fact, the prodromes of the legal autonomy of the right to truth are to be found in international humanitarian law: the four Geneva Conventions of 1949 prescribe the obligation of belligerents – admittedly, somewhat indefinite – to acquire all the information needed to identify the wounded, sick and dead of the opposing party and to communicate the data collected to the latter.[16] Subsequently, giving normative substance to the UN General Assembly's assertion that the need to be informed of the fate of loved ones – 'civilians as well as combatants' – in a context of war is "a basic human need»",[17] Article 32 of the First Protocol of 1977 to the Geneva Conventions requires that all those who find themselves acting in this sphere – High Contracting Parties, Parties to the conflict and competent international humanitarian organisations – be motivated «mainly by the right of families to know the fate of their relatives».[18] This rule, which details – *ratione materiae* – and specifies – *ratione personae* – what was already generically provided for in the four Geneva Conventions of 1949 for belligerents, was adopted unanimously «after careful reflection, and [...] in full consciousness», thus marking «an important step forward in the field of international efforts to protect human rights»,[19] so that, having now acquired a customary nature, it is also applicable to internal armed conflicts, as clarified by the International Committee of the Red Cross.[20]

[16]Art. 16 of the First Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Countryside; Art. 18-20 of the Second Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea; Art. 120-122 of the Third Convention relative to the Treatment of Prisoners of War; and Art. 129-131 of the Fourth Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

[17]UN General Assembly (1974).

[18]First Additional Protocol. In Section III '*Missing and Deceased Persons'*, which opens with Article 32, the right to truth is not evoked as a mere ethical aspiration but, on the contrary, imposes on the Parties a series of obligations to *facere*: to search for the missing, to facilitate for this purpose the collection of all useful information and to transmit the results of such searches (Art. 33), to respect the remains of the deceased, to care for and mark burial places and to facilitate the return of the remains of the deceased and their personal effects to the State of origin (Art. 34). It should also be remembered that Article 26 of the Fourth Geneva Convention for the Protection of Civilian Persons in Time of War states: «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 organisations engaged on this task provided they are acceptable to it and conform to its security regulations'».

[19]Sanzoz, Swinarski & Zimmermann (1987) at 345-346.

[20]Henckaerts, & Doswald-Beck (2005) in specie *Rule 117* at 421 ff.. See also Henckaerts (2005).

The second phase in the evolution of the right to truth develops in the Latin American context, which is unfortunately characterised by serious and systematic enforced disappearances, a phenomenon that causes the victim's relatives unbearable psychological anguish due to the lack of knowledge about the circumstances of their disappearance and their fate.[21] Since the late 1970s, the United Nations has been sensitive to the issue: first, with Resolution 33/173, in which the General Assembly said it was "deeply moved by the anguish and sorrow", having regard to the difficulty of the relatives of the *disappeared "* in obtaining reliable information from competent authorities as to the circumstances" of the disappearances[22] and, subsequently, with the First Report of the Working Group on Enforced or Involuntary Disappearances, in which, the right to the truth is firmly stated as the prerogative of the relatives of disappeared persons «to learn what happened to their relatives».[23] The normative pinnacle in this context, also thanks to the driving force of the Organisation of American States (OAS),[24] is undoubtedly the International Convention for the protection of All Persons from Enforced Disappearance of 2006.[25] In fact, in that Convention the recognition of a right to truth for victims of enforced disappearance, which represents «one of the most significant developments in international human rights law»,[26] hinges on Art. 24, divided into four paragraphs: the provision, in § 1, provides a broad notion of "victim" that includes, in addition to the disappeared person, all those who have suffered an injury as a direct consequence of enforced disappearance; in § 2, it contemplates the right of victims to know the circumstances of the facts relating to the disappearance of their relatives and to be informed of the developments and results of the relevant investigations in § 3, it enshrines the obligation of States Parties to take all necessary measures aimed at the release of disappeared persons still alive and, in the event of their death, at the recovery of their bodies, and, according to § 4, to provide reparation mechanisms aimed at ensuring prompt, fair and adequate compensation. It is therefore the family members who can exercise their right to know the truth about the circumstances of the enforced disappearance, the developments and results of the investigation and the fate of the missing person. The Committee on Enforced Disappearances, i.e. the Committee composed of ten independent experts with the function of monitoring the implementation of the Convention

[21]Garibian (2014).
[22]UN General Assembly (1978).
[23]Commission on Human Rights (1981) § 192. Note that § 187 expressly refers to Article 32 of the First Additional Protocol.
[24]See the Resolutions of the General Assembly of the OAS inviting the members of the Organisation «in which disappearances of persons have occurred to clarify their situation and inform their families of their fate»: OAS General Assembly (1983) § 5; OAS General Assembly (1984) § 5. See also Resolution of the OAS Permanent Council (2005) urging members of the Organisation to take all necessary measures to prevent enforced disappearances and guarantee the right to truth to relatives of missing persons.
[25]The Convention entered into force on 23 December 2010, in accordance with Article 39(1), which reads as follows: «this Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary General of the United Nations of the twentieth instrument of ratification or accession».
[26]Citroni & Scovazzi (2009) at 102. Earlier, in the same vein, see Taxil (2007).

against Enforced Disappearances by the States that have ratified it, set up pursuant to Article 26 of that Convention, has repeatedly pronounced on the duty of the State to protect the 'right to truth' in domestic law, a right that does not end with the 'traditional' procedural duty of investigation and repression, aimed at avoiding the impunity of the agent.[27] Suffice it to recall that «the family and friends of disappeared persons experience slow mental torture, not knowing whether the victim is still alive and, if so, where he or she is being held, under what conditions, and in what state of health. Aware, furthermore, that they too are threatened; that they may suffer the same fate themselves, and that to search for the truth may expose them to even greater danger».[28] The right to the truth is thus a positive obligation, albeit one of means and not of result, incumbent on the State, which goes hand in hand with the duty to take adequate measures for the prevention of enforced disappearances, and takes the form, in addition to carrying out investigations in the event of their occurrence and punishing the perpetrator, of informing the victim's relatives of 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".[29]

The third phase in the evolution of the right to truth is the one in which this guarantee, which had already exceeded the legal perimeter of international humanitarian law (*lex specialis* of armed conflicts) to develop in the context of enforced disappearances, also overcomes this legal fence and begins to assert itself *tout court* in the case of serious and systematic violations of the rights of the human person. This broadening of the scope in which the right to truth releases its legal effects is "certified" by the Working Group on Enforced or Involuntary Disappearances according to which: "the right to the truth – sometimes called the right to know the truth – [...] is now widely recognised 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. *The right to the truth is applicable not only to enforced disappearances*".[30] The beginnings of the importance of seeking the truth regarding gross violations can be found in the work of the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Louis Joinet, who, in 1997, formulated the *Set of Principles for the protection and promotion of human rights through actions to combat impunity*.[31] Starting from the assumption that «before a new leaf can be turned, the old

[27]*Ex plurimis* see, for example, UN Committee on Enforced Disappearances (2013) §35: "the Committee encourages the State party to continue its efforts to ensure that its legal system guarantees all victims of enforced disappearance the right to obtain reparation, *learn the truth* and receive prompt, fair and adequate compensation [...]" (*emphasis added*).
[28]UN Working Group on Enforced or Involuntary Disappearances (2022).
[29]Last *Affirming* the Preamble of the Convention for the protection of All Persons from Enforced Disappearance.
[30]UN Working Group on Enforced or Involuntary Disappearances (2010) Preamble at 12 (*emphasis added*).
[31]UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (1997).

leaf must be read»,[32] the four pillar-rights of transitional justice are enucleated therein: to know the facts, to justice, to reparation, to guarantees of non-repetition. The bicephalic nature of the right to know emerges from its very definition as it is reiterated that the individual right of each victim relating to his or her right to know what happened (*the right to truth*) is coupled with the «collective right, drawing upon history to prevent violations from recurring in the future».[33] This *Set of Principles* was later developed by Diane Orentlicher in 2005, and became the *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity*, in which Principle 2 states that «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» and, in Principle 4, that «irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims' fate».[34] Again, these Principles, taken up and developed in the reports of the Special Rapporteur of the Sub-Commission, Theo van Boven, and the Special Rapporteur of the Commission on Human Rights, Cherif Bassiouni, formed the basis for the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.[35] In this Resolution, the UN General Assembly reaffirmed that the right to truthfulness falls under the umbrella of reparation and recognised that satisfaction may (also) consist of verification of the facts and full and public disclosure of the truth, accompanied, where appropriate, by an official statement or judicial decision aimed at restoring the dignity and reputation of the victim(s) and those closely associated with them; with a public apology, in which the acknowledgement of the facts and the assumption of responsibility are clearly evident; with commemorations and tributes to the victims; and with the inclusion of an accurate account of violations of international human rights and humanitarian law in training materials at all levels. In 2006, the *Report of the Office of the United Nations High Commissioner for Human Rights*, specifically titled *Study on the right to the truth*, saw the light of day, concluding that «the right to the truth about gross human rights violations and serious violations of human rights law is an inalienable and autonomous right, linked to the duty and obligation of the State to protect and guarantee human rights, to conduct effective investigations and to guarantee effective remedy and reparations. This right is closely linked with other rights and has both an individual and a societal dimension and should be considered as a non-derogable right and not be subject to limitations».[36] All the subsequent *Reports* on the subject are in this

[32]Ibid., § 50.
[33]Ibid., § 17.
[34]UN Commission on Human Rights (2005).
[35]UN General Assembly (2005).
[36]UN Commission on Human Rights (2006).

wake,[37] from whose analysis, in my opinion, it can be affirmed that the legal content of the right to the truth should not be confined to the ethical-deontological sphere circumscribed to the intimate feelings and private reparation of the victim and his family, but may well constitute the effective basis for the recognition of pragmatic and concrete guarantees: think for instance of the need for a death certificate for insurance purposes to safeguard the sustenance of the family of the missing victim.

From a juridical point of view, it seems important to stress how the characteristics of the right to truth enshrined in the most recent instruments, namely inalienability and imprescriptibility, echo the typical profiles of the fundamental rights of the human person, almost suggesting its inalienable nature. Another fundamental aspect concerns the (also) collective dimension of this right: already in 1980 the Inter-American Commission on Human Rights stated that «every society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future».[38] In my opinion, this approach outlines the overcoming of victim-centrism *uti singuli*, so that the – consequent – peculiarities of the right to truth are also reflected on the function of (possible) punishment: the usual and "classic" purposes and canons (general and special prevention, retribution-proportionality) are enriched and sometimes "supplanted" by extraordinary purposes (stigmatisation, reparation, compensation, reconciliation).

To sum up, according to the reconstruction I have tried to outline, it seems therefore that the right to truth was born as a *lex specialis ratione temporis* (norm applicable exclusively in cases of armed conflicts), developed as a *lex generalis* limited *ratione materiae* (*ad hoc* right for the disappeared and their relatives) to rise today to the rank of *lex generalis tout court* in the case of serious and systematic violations of the rights of human persons, especially in the context of transitional justice. In my view, the copious multiplication in recent years of instruments (albeit mainly of soft law) in which the right to truth is recognised testifies to the coagulation of *opinio iuris* as to its legal autonomy,[39] albeit in the awareness, to borrow the words of the United Nations

[37]UN Human Rights Council (2007), Id. (2009), Id. (2011).

[38]Inter-American Commission on Human Rights (1985-1986) at 205: «Moreover, the family members of the victims are entitled to information as to what happened to their relatives. Such access to the truth presupposes freedom of speech, which of course should be exercised responsibly; the establishment of investigating committees whose membership and authority must be determined in accordance with the internal legislation of each country, or the provision of the necessary resources, so that the judiciary itself may undertake whatever investigations may be necessary».

[39]Also in favour of the consolidation of the *opinio iuris* regarding the right to the truth can also be considered the increasing multiplication of Truth and Reconciliation Commissions and other typical mechanisms of transitional justice, all of which are inspired by the right to the truth, insofar as they are prevalently decided and instituted at the State level, which also constitutes evidence in support of a widespread practice. Even the UN High Commissioner for Human Rights (2007, §81) has expressed himself in favour of the crystallisation of the right to truth in the current international legal system, observing that «the right to know the truth about gross human rights violations and serious violations of humanitarian law is recognised in some international treaties and instruments,

High Commissioner for Human Rights, that it is «closely linked with other rights».[40]

The Right to Truth in the Light of Practice

The right to truth is outlined, as just illustrated in the previous paragraph, in many international instruments: it is therefore necessary to verify its resilience in the light of the pronouncements of the human rights treaty monitoring bodies, both international and regional. First of all, an initial reconnaissance shows that, in the face of the almost total absence of *ad hoc* norms on the right to truth in these types of agreements, apart from the aforementioned important exception of the 2006 Convention against Enforced Disappearances, the judicial bodies and international committees in charge of monitoring the correct application of these treaties have usually derived it from other positive provisions and rights expressly provided for.

Indeed, the first explicit reference to the right to truth at the international para-judicial level can be found in the *Considerations* in the case of *María del Carmen Almeida de Quinteros* et al. v. *Uruguay* of 1983 in which the UN Human Rights Committee stated that the anguish caused to a mother by the disappearance of her daughter Elena and the continuing uncertainty as to what may have happened to her and where she (or her remains...) might be, constitutes *in re ipsa* a violation of the 1966 Covenant on Civil and Political Rights, specifically Article 7 on the prohibition of torture and inhuman and degrading treatment, concluding that «the author has the right to know what has happened to her daughter».[41] The South American regional context has recorded numerous complaints, appeals and decisions directly or indirectly related to the right to truth, both by the Inter-American Commission of Human Rights (IACHR),[42] and the Inter-American Court of Human Rights (IACtHR).[43] National courts in Latin America also referred to the right to truth, invoking either their own domestic legislation or the American Convention on Human Rights (ACHR, also known as the San José Pact).[44] Subsequently, albeit to a lesser extent, the European Court of Human Rights (ECtHR) has discussed issues related to the right to truth, although often not explicitly addressing it as such.[45] In the African context, the African Commission on Human and People's Rights (ACHPR) has explicitly referred to the right to truth, arguing that the responsibility rests with the State, in the face of its failure to take all necessary measures in a transparent manner to investigate suspicious deaths and all killings by agents of the State

in the national legislation of several countries, in national, regional and international jurisprudence and by many international and regional intergovernmental organisations».

[40]UN Commission on Human Rights (2006), *Summary*.

[41]UN Human Rights Committee (1983, § 14).

[42]Particularly interesting and rich in practice is the compendium of Inter-American Commission on Human Rights (2014).

[43]Frisso (2018); Ferrer Mac-Gregor (2016).

[44]Marcionni (2017).

[45]Chernishova (2016).

and to identify and hold accountable individuals or groups responsible for violations of the right to life, constitutes in itself a violation of that right by the State, hence a series of measures including, *inter alia,* «making the truth known».[46] Lastly, in the context of international criminal law, the *ad hoc* criminal tribunals (International Criminal Tribunal for the former Yugoslavia-ICTY and International Criminal Tribunal for Rwanda-ICTR) as well as the International Criminal Court (ICJ) have also emphasised in their decisions the importance of the duty to prosecute «the truth about the possible» in the case of war crimes, crimes against humanity and genocide by "establishing an accurate, accessible historical record",[47] since as the Trial Chamber of the ICTY has underlined in its previous rulings « the 'truth' can never be fully established or satisfied».[48] It is also important to highlight that, with regard to the intensity of the suffering that enforced disappearance entails for family members, the refusal of the competent authorities to provide information to family members of disappeared persons has been considered by the ICJ as a cause of psychological suffering falling within the acts identifying genocide, provided for in Article II(b) of the 1948 Convention on the Prevention and Punishment of Genocide, when genocidal intent can be demonstrated.[49]

In fact, a more precise analysis of international practice shows that the right to truth, occasionally described as a right in its own right,[50] in most cases has not been considered by international courts and tribunals as having its own legal autonomy: such instances have sometimes explicitly,[51] sometimes implicitly, rejected this characterisation of the right to truth, so that it has mainly been developed on the basis of human rights already positively regulated. In particular, the primary legal foundations of which the right to truth would constitute a sort of offshoot would mainly be attributable to a triad of guarantees: the right not to be subjected to cruel, inhuman or degrading treatment (the so-called prohibition of torture), the right to life as well as the right to an effective remedy and to a fair trial.

Under the first profile, the prohibition of torture, cruel, inhuman or degrading treatment, undoubtedly a guarantee of *jus cogens*, codified in Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), Art. 7 of the International Covenant on Civil and Political

[46]ACHPR General Comment no.3 (2015) § 17. In doctrine on the subject see Sweeney (2018).
[47]ICTY (2003a, § 60).
[48]ICTY (2003b) at 230.
[49]ICJ (2015, § 160).
[50]Of particular interest is the judgment of the IACtHR (2006, § 150) stating that "the Court considers it relevant to remark that the "historical truth" included in the reports of the above mentioned Commission (ed: the different Chilean Commission in trying to collectively build the truth of the events which occurred between 1973 and 1990) is no substitute for the duty of the State to reach the truth through judicial proceedings".
[51]See e.g. IACtHR (2005, §62): "the Court does not consider the right to know the truth to be a separate right enshrined in Articles 8, 13, 25 and 1(1) of the Convention, as alleged by the representatives, and, accordingly, it cannot find acceptable the State's acknowledgement of responsibility on this point. The right to know the truth is included in the right of the victim or of the victim's next of kin to have the relevant State authorities find out the truth of the facts that constitute the violations and establish the relevant liability through appropriate investigation and prosecution".

Rights, Art. 5 of the American Convention on Human Rights, and Art. 5 of the African Charter on Human Rights and Peoples' Rights, constituted the primordial legal basis on which the first decisions explicitly referring to the right to truth were grafted. In the 1980s, in the wake of the aforementioned *Quinteros* case, there were many pronouncements in which international bodies reiterated that ignoring the whereabouts of the victim (or his remains...),[52] the uncertainty of his fate, the lack of adequate investigations or, moreover, complete inertia on the part of the State authorities, or even state action aimed at preventing the discovery of the truth, are all situations from which psychological suffering for the victims' relatives derives that is so severe as to constitute a substantial violation of the prohibition of torture. Given the breadth of these brief notes, it is obviously not possible to proceed with an exhaustive analysis of the entire practice: but one may recall, by way of example, *ex multis,* the decision of the ACHPR, in the case *Amnesty International and Others* v. *Sudan,* according to which: «there is substantial evidence produced by the complainants to the effect that torture is practised.

All of the alleged acts of physical abuses, if they occurred, constitute violations of Article 5. Additionally, holding an individual without permitting him or her to have any contact with his or her family, and refusing to inform the family if and where the individual is being held, is inhuman treatment of both the detainee and the family concerned».[53] Similarly, the IACtHR, after arguing that the right to truth, although not codified in the San José Pact, nevertheless "it may correspond to a concept that is being developed in doctrine and case law",[54] in the case *'Las Dos Erres' Massacre* v. *Guatemala*, stated that: "the gravity of the facts of the massacre and the lack of a judicial response to clarify them has affected the personal integrity of the 153 alleged victims, next of kin of those deceased in the massacre. The psychological damage and suffering that they have endured due to the impunity that still persists, 15 years after the investigation began, makes the State responsible for the violation of the right recognised in Article 5 of the Convention (...)".[55] It is interesting to note that, within the framework of the ECtHR, in the case *Varnava and others* v. *Turkey,* while equating the psychological suffering of the relatives of the victims with cruel and inhuman treatment («the phenomenon of disappearances imposes a particular burden on the relatives of missing persons who are kept in ignorance of the fate of their loved ones and suffer the anguish of uncertainty. Thus the Court's case-law recognised from very early on that the situation of the relatives may disclose inhuman and degrading treatment contrary to Article 3»), yet it does not consider that it has the power to order the State to proceed operationally in pursuit of the truth (unlike its IACtHR counterpart), limiting itself to awarding compensation to the applicants.[56]

[52] *Ex multis*, see IACtHR (2002, §§ 122-125).
[53] ACHPR (1999, § 54).
[54] IACtHR (1997, § 86).
[55] IACtHR (2009, § 217).
[56] ECtHR (2009, § 200).

A second strand of decisions, mainly by the Strasbourg Court, relates the right to truth to the right to life, inferring that it includes procedural obligations, including the State's duty to initiate and conduct adequate, independent, effective and immediate investigations, so that delaying and, *a fortiori*, obstructing the investigation by the public authorities violates procedural guarantees, while also harming the right of victims, their families and heirs to know the truth about the circumstances of massive human rights violations.[57] A paradigmatic case is *Association '21 December 1989' and others* v. *Romania*, which concerned the brutal repression of anti-government protests in December 1998 that led to the overthrow of Nicolae Ceauşescu's regime.[58] The investigation of the perpetrators was procrastinated and obstructed in various ways so that the Court ruled that, in application of Article 46 ECHR, the defendant State had to put an end to situations similar to the present case, also in light of the importance for Romanian society to know the truth about the events of December 1989.

Finally, under the third aspect, the reconstruction of the link between the right to truth and the right to a fair trial and an effective remedy is more articulated and differently perceived by the different Institutions. In fact, if on the one hand, the ECtHR seems to deny in its practice that the right to truth and the corresponding duties of investigation are ascribable to the right to a fair trial and judicial protection, quite specularly the IACtHR notes that it is precisely the combination of Art. 8 ACHR (right to a fair trial) with Art. 25 ACHR (right to judicial action) provides the main legal basis for the right to the truth in the Inter-American human rights regime, so that, as stated in the leading case of *Bámaca-Velásquez* v. *Guatemala*, "the right to the truth is subsumed in the right of the victim or his next of kin to obtain clarification of the facts relating to the violations and the corresponding responsibilities from the competent State organs, through the investigation and prosecution established in Articles 8 and 25 of the Convention".[59] This approach is shared by the ACHPR: in its *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* of 2003 it states that the right to an effective remedy includes "(...) (iii) the access to the factual information concerning the violations"[60] i.e. precisely one of the typical concretisations of the right to truth.

Concluding Remarks

Having traced the genesis and evolution of the right to truth both in international instruments and in the practice of jurisdictional instances and organs of control of the protection of the rights of the human person, it is now necessary to ascertain whether the findings of these two profiles can be brought together on a, so to speak, pragmatic level. Put another way, what

[57]Panepinto (2017).
[58]ECtHR (2011).
[59]IACHR (2000, § 201).
[60]ACHPR (2003) at 5.

would be the *quid pluris* of the right to truth? In what and for what purposes would it enrich the copious catalogue of human rights? What infungible contribution would it make to the already positively envisaged guarantees? In my opinion, there are at least three levels in which the right to truth would be called upon to play anything but an ancillary or subsidiary role: the right to seek and receive information, the right of access to justice, and the right to reparation in a reconciliatory and not merely retributive key.

Under the first profile, the right to truth would guarantee, both in an individual key and in a collective dimension, that the search for all the elements useful to reconstruct the scenario of what actually happened, for instance through access to archives, cannot suffer exceptions, not even those that usually apply to the more generic right to freedom of information, e.g. public order, national security, protection of morals, privacy.[61] If the pursuit of truth is declined in an inescapable key, those who demand to know cannot be denied knowledge, not even by invoking superior interests. Society as a whole would thus enjoy the right to obtain clarification of the facts relating to gross violations and the relative responsibilities of the State (including the chain of command, the orders given and the instruments knowingly used to ensure secrecy of operations and impunity for those who carried them out). And this, mind you, in order to ascertain the fate of each of the victims individually, one by one, none excluded. Even if one wished to reconstruct the right to truth as an explication of other rights, such as the right not to be subjected to torture, thus denying legal autonomy to this case, however, interpreting the right to truth in a manner instrumental to the vindication of other essential rights would in turn make it incapable of justifying limitations or exceptions to its application. On the contrary, it could even be inferred that States are under an obligation to *facere*: to actively undertake to ensure that all information on the events in question, aimed at clarifying the nature, causes and extent of violations of human rights, as well as the underlying factors, the antecedents and the context that led to such violations, is sought and preserved, and made available to those who request access to it. Thus, the creation and maintenance of State archives, in which all documents relating to gross violations are kept, would be a kind of pre-condition for the effective exercise of human rights in general and the right to truth in particular.

Under the second profile, the right to truth would broaden the category of those entitled to redress: victims, indirect victims, family members – also through a representative of the community in which they live –, the community as a whole. Moreover, it could 'force' the State, in the absence of complainants, to proceed *ex officio*: the liability of the State for failure to respect the right to truth would not only emerge in the case where it did not respect the right to access to justice (commissive tort) but also where it was merely inert (omissive tort), so that the right to truth would imply an obligation to behave proactively. This approach would also have a diriment legal impact of delegitimising the practice of so-called

[61]As an example, consider the contribution made to the right to truth by access to the files of the Unterlagen *des Staatssicherheitsdienstes der ehemaligen Deutschen Demokratischen Republik*, i.e. the archives of the East German secret police.

self-amnesty[62] and criminalising public debate on certain events that a State prohibits from being discussed, gagging the victims, their families and society as a whole.[63]

This aspect is inextricably intertwined with the third profile, i.e. the role of the right to truth in the framework of the consequences of gross violations with regard to the *coté* of reparations. In the prevailing procedural scheme and archetype, of a criminalistic matrix, as underlined in Johan Galtung's *lectio magistralis*, the State, which ascertains the crime and punishes the offender, replaces both the victim, dispossessing him of the right to revenge, and God, exercising the right of retribution.[64] In other words, what prevails is the retributive justice model that, even when it is not intended to be vindictive, but re-educative, as prescribed by the Italian Constitution in Article 27, although it is sadly known that prison separates and de-socialises rather than re-socialises, it combines a crime with a punishment, that is, it responds to evil with evil, so that the violence of the offender on the victim is answered by the violence of the State on the offender. In fact, in the traditional judicial process, the protagonists are the criminal and the judge: the victim is marginalised, almost invited to 'satiate' himself with the punishment inflicted on the condemned man (suffice it to think of the case that I consider paradigmatic: the victim's family members in the United States watch the execution of the death sentence on the guilty party). In this way, the social fracture persists and is exacerbated when it divides an entire community, especially if attempts are made to recompose it with so-called 'blanket amnesties' that do not elaborate but merely remove unpunished violence, on the basis of what is a kind of unspoken (and very wrong) assumption, namely that in certain contexts peace and justice are irreconcilable objectives: put another way, peacemaking would require a 'turning of the page' which, conversely, bringing to light what happened in the pursuit of justice would frustrate, because it would exacerbate the wounds, preventing them from healing.[65] A more effective solution would therefore be to

[62]As leading case in this regard, see IACHR (2001, § 5) which, dealing with Peru's post-dictatorship amnesty laws, found inadmissible all amnesty and statute of limitations provisions as well as the adoption of measures to exclude the liability of those involved because «the so-called self-amnesties are (...) an inadmissible offence against the right to truth». In doctrine see Zanghì (2002) and Laplante & Theidon (2007).

[63]Let us refer, by way of example, to Latino (2018).

[64]Galtung (1998).

[65]Particularly interesting in this regard is the decision of the ECtHR (2014, § 199), concerning the introduction of a Croatian law that had eliminated the effects of the amnesty previously granted for crimes against humanity, in which the Grand Chamber emphasised, in line with what the UN High Commissioner for Human Rights had previously ruled, that «amnesties and other analogous measures contribute to impunity and constitute an obstacle to the right to the truth in that they block an investigation of the facts on the merits and that they are, therefore, incompatible with the obligations incumbent on States given various sources of international law. More so, in regards to the false dilemma between peace and reconciliation, on the one hand, and justice on the other, UN High Commissioner for Human Rights stated that «[t]he amnesties that exempt from criminal sanction those responsible for atrocious crimes in the hope of securing peace have often failed to achieve their aim and have instead emboldened their beneficiaries to commit further crimes. Conversely, peace agreements have been reached without amnesty provisions in some situations where amnesty had been said to be a necessary condition of peace and where many had feared that indictments would prolong the conflict».

reduce, if not replace, 'just violence' or 'violent justice' with restorative justice that tends to mend interpersonal relationships and social cohesion. Well, in my opinion, such a paradigm reversal can only be effectively pursued by pivoting on the right to truth, which is both the starting point and the landing place of the mechanisms proper to transitional justice, particularly, but not exclusively, the Truth and Reconciliation Commissions. In this perspective, the right to truth would constitute an essential and inextricable element for the consolidation of peace and reconciliation, to counter impunity, to avert the risk of similar events occurring in the future, not only at the state level but also at the global level, as seems to be read in the watermark, for example, in some precedents in which the Secretary General has recognised the need for the search for truth in cases in which the United Nations has failed to protect individuals from serious human rights violations (as in the case of the establishment of an independent enquiry into the actions – *rectius*: omissions – of the Organisation in Rwanda in 1994 during the genocide of Tutsis and moderate Hutus[66] or, similarly, when the General Assembly invited the Secretary General to provide a full report on the fall of Srebrenica and the failure of the 'safe area policy'[67]). From this perspective, the fulfilment of the right to truth of the victims and their families and of society as a whole (or rather, to borrow the words of the UN General Assembly, of the 'basic human need' for truth, where the term 'need', in my view, far from mute the legal profile of this guarantee, amplifies it because it makes it equal to a psychological need, if not almost physical, given that the locution 'basic need' in Onusian language is usually used for the needs of human beings relating to their own biological subsistence, such as the right to food, water or health) performs a cathartic function capable of providing relief that goes far beyond mere compensation or monetary reparation.[68]

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[66]UN Security Council (1999). In doctrine on the subject see Anglin (2000/2001).

[67]UN General Assembly (1999, § 7) in which the Secretary General states: «I hope that the confirmation or clarification of those accounts [of the fall of Srebrenica contained in books, journal articles and press reports] contributes to the historical record on this subject».

[68]As also seems to be inferred from reading Principle 22 in the UN General Assembly (2005).

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