A Critical Reflection on the Right to the Truth about Gross Human Rights Violations

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ABSTRACT

The right to the truth about gross human rights violations is gradually becoming more firmly entrenched in international human rights law. However, the content and contours of the right to the truth are not without controversy. Some of the most pressing issues that have arisen are the extent of society’s right to the truth, the scope of the truth that it pursues (fact-finding or broader historical truth) and the relationship between truth seeking and official acknowledgment. This article turns to multidisciplinary research about truth seeking and memory with regard to gross human rights violations, which provides rich insights into the role of truth in the aftermath of mass atrocities that can shed light on the possible implications of the right to the truth. It thus provides a critical reflection on the right to the truth, in order to consider how it could perform a valuable function.

KEYWORDS: transitional justice, memory laws, right to the truth, Articles 2 and 3 European Convention on Human Rights, gross human rights violations

1. INTRODUCTION

The right to the truth about gross human rights violations is becoming more firmly entrenched in international human rights law. In the past decade, the European Court of Human Rights (ECtHR) has also explicitly acknowledged the right to the truth.1 As it has gradually been developed by a diverse set of actors—in treaties, case law, and soft-law documents—the content and contours of the right to the truth are subject to ongoing controversies.2 Discussions so far have mostly focused on questions such

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1 See, amongst other cases, El-Masri v the Former Yugoslav Republic of Macedonia, Application No 39630/09, Merits and Just Satisfaction, 13 December 2012 (Grand Chamber); Al Nashiri v Poland, Application No. 28761/11, Merits and Just Satisfaction, 24 July 2014; Husayn (Abu Zubaydah) v Poland, Application No. 7511/13, Merits and Just Satisfaction, 24 July 2014.

2 Naftali, ‘Crafting a ‘right to truth’ in international law: converging mobilizations, diverging agendas?,’ (2016) Champ penal; Naqvi, ‘The right to truth in international law, fact or fiction?’ (2006) 88 International Review

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as whether it has the status of an autonomous right, to what kinds of atrocities it pertains and what instruments are necessary to guarantee the right to the truth (in particular, whether criminal proceedings are required). This article focuses on a number of issues surrounding the right to the truth that have been less extensively discussed so far. Some of the most pressing questions that have arisen—partly emanating from the discussions within the ECtHR, as well as from the broad interpretation of the right to the truth that can be discerned in many soft-law documents—are the extent of society’s right to the truth, the scope of the truth that it pursues (finding out the facts versus broader historical truth) and the relationship between truth seeking and official acknowledgment. Behind this is the basic question whether truth should invariably prevail in the aftermath of mass atrocity—and thus how absolute the right to the truth should be.

To reflect on these issues, this article turns to multidisciplinary research about truth seeking and memory with regard to gross human rights violations, which provides rich insights into the role of truth in the aftermath of mass atrocities that can help understand the possible implications of the right to the truth. Inspired by such multidisciplinary research, this article provides a critical reflection on the right to the truth, in order to consider how it could perform a valuable function.

Firstly, the article sketches the legal development of the right to the truth in international law, with special attention for the developments in the case law of the ECtHR of the past decade (Part 2). Secondly, it delves into multidisciplinary research about truth seeking and memory with regard to mass atrocity, in order to critically analyse the goals and contours of the right to the truth (Part 3). Part 4 concludes that a too absolute interpretation of the right to the truth—including an entitlement for (all members of) society to historical truth about past atrocities and to have this publicly acknowledged—entails the risk of politicising the process of discussing the past to the detriment of less dominant societal actors. Instead, the right to the truth can play a valuable role as truth seeking, enabling investigations of which the results can eventually shed light on broader questions of interpretive truth.

2. THE RIGHT TO THE TRUTH: DEVELOPMENT AND LEGAL SUBSTANCE

A. Historical Development

The idea of a right to the truth can be traced back to developments in Latin America in the 1970s–1980s. The failure to establish the truth about what happened to a person is exactly what characterises enforced disappearances, which were endemic in the dictatorships that tormented Latin America in that period. Gradually, the idea became accepted that family members have the right to know the truth about the fate of their loved ones. This idea was already raised in a 1983 Human Rights Committee view: *Quinteros v Uruguay* (107/1981), Views, CCPR/C/OP/2 (1990).

*Naftali, supra n 2.*

Panepinto, ‘The right to the truth in international law: the significance of Strasbourg’s contributions’ (2017) 37 Legal Studies 739; Stamenkovikj, *The Truth in Times of Transitional Justice* (PhD thesis, Tilburg University, 2019).

*Stamenkovikj, The Truth in Times of Transitional Justice (PhD thesis, Tilburg University, 2019).*
In the aftermath of these military dictatorships it was not always possible to institute criminal trials to hold those most responsible to account because—amongst other things—the military forces that had committed abuses were still powerful and it was feared that criminal trials could threaten the fragile peace. Alternative ways were found to deal with the past that enabled truth seeking about past atrocities, but that did not seek retribution against perpetrators. Hence, the instrument of truth commissions gained momentum in Latin America, which later spilled over to other parts of the world, the most prominent example being South Africa. The right to the truth came to be seen as a foundation of such truth commissions. Moreover, Argentina in the 1990s adopted the innovative modality of ‘truth trials’ without sanctions: in the presence of amnesties that excluded the possibility to initiate criminal proceedings, such trials enabled official judicial determination of what happened—including through investigations that led to the identification of perpetrators.

By the turn of the 21st century, the idea of societies coming to terms with their past and providing accountability for past abuses had rapidly developed worldwide. The right to the truth became connected to a broader range of gross human rights violations and became more and more institutionalised in United Nations (UN) instruments, also in light of the increased attention for transitional justice processes. As will be shown below, the inter-American human rights system has been particularly important to the development of the right to the truth.

B. Basic Legal Foundations of the Right to the Truth

Whereas certain aspects of the right to the truth could already be found in international humanitarian law, from the end of the 1980s onward the inter-American court of human rights gradually developed what would later become known as the right to the truth in the area of enforced disappearances. In the case of Velásquez Rodríguez v Honduras, the Court judged that when it was not possible to prosecute or punish, the state still had the obligation to investigate—and inform family members about—the

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5 Teitel, ‘Transitional justice genealogy’ (2003) 16 Harvard Human Rights Journal 69.
6 Maculan, ‘Prosecuting international crimes at national level: lessons from the Argentine “Truth-finding trials”,’ (2012) 8 Utrecht Law Review, 106; Garibian, ‘Ghosts also die. Resisting disappearance through the “right to the truth” and the Juicios por la verdad in Argentina’ (2014) 12 Journal of International Criminal Justice 515.
7 Naftali, supra n 2 at I.2.
8 See on the European Court of Human Rights section 2, D below. Furthermore, the African Commission on Human and Peoples’ Rights has recognised the right to access factual information concerning rights violations—as part of the right to an effective remedy—in its Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa (2003). See also General Comment No. 4 on the African Charter on Human and Peoples’ Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5), 21st Extra-Ordinary Session of the ACHPR, 23 February—4 March 2017, which mentions the right to the truth as part of reparations (para 10; 44). See furthermore African Commission on Human and People’s Rights, 245/02, Zimbabwe Human Rights NGO Forum v Zimbabwe, 39th Ordinary Session of the ACHPR, 11—15 May 2006.
9 See on the legal development and conceptualisation of the right to the truth: Stamenkovikj, supra n 2; Naqvi, supra n 2; Panepinto, supra n 2; Szoke-Burke, ‘Searching for the Right to Truth: The Impact of International Human Rights Law on National Transitional Justice Policies’ 33 (2015) Berkeley Journal of International Law 526.
10 In Article 32 of the 1977 First Additional Protocol to the Geneva Conventions, which posits ‘the right of families to know the fate of their relatives’ in the context of international armed conflicts and displacements.
fate of the disappeared.\textsuperscript{11} From the 2000s onwards, the IACtHR explicitly recognised the right to the truth in its case law, although the question whether it is an autonomous right or a right subsumed in other human rights norms is still contested.\textsuperscript{12}

The Inter-American Commission on Human Rights (IACommHR) has explicitly recognised the collective right of society to know the truth.\textsuperscript{13} The Commission has stated that.

societies affected by violence have, as a whole, the unwaivable right to know the truth of what happened as well as the reasons why and circumstances in which the aberrant crimes were committed, so as to prevent such acts from recurring.\textsuperscript{14}

The Inter-American Court has, in more implicit wording, judged that.

every person, including the next of kin of the victims of grave violations of human rights, has the right to the truth. Therefore, the next of kin of the victims and society as a whole must be informed of everything that has happened in connection with said violations.\textsuperscript{15}

In 2006, the right to the truth in the context of enforced disappearance was explicitly laid down in Article 24 (2) of the 2006 International Convention for the Protection of all Persons from Enforced Disappearance, which stipulates 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’.

There is an ongoing controversy in international human rights law about whether there is a right to know who perpetrated the atrocities, which in turn is part of a wider tension in movements supporting the right to the truth, with some focusing on judicial, punitive measures (putting the right to the truth in the context of the right to justice) and others focusing on truth commissions that could grant amnesties, pardons

\textsuperscript{11} IACtHR Series C 4 (1988); see Gloria Park, ‘Truth as justice. Legal and extralegal development of the right to truth’ (2010) 31 Harvard International Review 24.

\textsuperscript{12} See Sweeney, ‘The elusive right to truth in transitional human rights jurisprudence, (2018) 67 International and comparative law quarterly 353; Vermeulen, Enforced Disappearance. Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance (2012) at 336. E.g. Bámaca-Vélásquez v Guatemala, IACtHR Series C 70 (2000); Blanco-Romero et al v Venezuela, IACtHR Series C 138 (2005); Moiwana Community v Suriname, IACtHR Series C 124 (2005); Contreras et al v El Salvador, IACtHR Series C 232 (2011), Myrna Mack Chang v Guatemala, IACtHR Series C 101 (2003), Massacres of El Mozote and nearby places v El Salvador, IACtHR Series C 252 (2012); Guidel Álvarez et al v Guatemala, IACtHR Series C 253 (2012). In Gomes Lund et al (Guerrilha do Araguaia) v Brazil, IACtHR Series C 219 (2010), para 6, the Court seemed to be suggesting a violation of the right to truth as an autonomous right—see Rodríguez Vera et al v Colombia, IACtHR Series C 287 (2014), para 509 and Concurring Opinion of Judge Eduardo Ferrer Mac-Gregor Poisot.

\textsuperscript{13} The right to truth in the Americas, OEA/Ser.L./V/II.152 (2014) at 15, 19; Annual Report of the Inter-American Commission on Human Rights 1985–1986, OEA/Ser.L./V/II.68, Doc. 8 rev. 1 (1986), chapter V.

\textsuperscript{14} Report on the demobilization process in Colombia (2004) at II.A.18.

\textsuperscript{15} Myrna Mack Chang v Guatemala, supra n 12 at 274. See also García and family members v Guatemala, IACtHR Series C 258 (2012), para 176; Moiwana Community v Suriname, supra n 12 at 204; Bámaca-Vélásquez v Guatemala, supra n 12 para 197–198. These findings were sometimes made in the context of the judgment on the merits, sometimes in the context of reparations. See Groome, ‘The Right to Truth in the Fight Against Impunity’ (2011) 29 Berkeley Journal of International Law 175.
or sentence reductions in exchange for confessing to the truth or providing relevant information. As Naftali concludes, this is because the development of the right to the truth has been driven by different rationales without one common vision. Meanwile, the tendency in the IACtHR is clearly to require individualised judicial processes.17

At least it is clear that the right to know the truth exists irrespective of whether criminal proceedings are instituted with the aim of holding individuals accountable. Thus, if judicial accountability is (temporarily) not possible—for instance because of political constraints—states still have an obligation to do everything in their power to let the truth come to light.18 An amnesty law does not relieve the state of its obligations to find out the truth and inform the next of kin of the victims’ fate and the location of the remains.19 The failure by state organs to provide information to a commission of inquiry can also constitute a violation of the right to truth.20

C. Soft-Law Documents

In the 2000s, various soft-law instruments have further developed the concept of the right to the truth,21 in particular the Updated Set of principles for the protection and promotion of human rights through action to combat impunity (2005), as developed by independent expert Orentlicher on request of the UN Commission on Human Rights and updating Joinet's 1997 Principles against Impunity.22 The right of victims to full and public disclosure of the truth about gross human rights violations is also enunciated as part of the right to a remedy and to reparation in the Basic Principles on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights

16 Naftali, supra n 2 at I.3.
17 Naftali, supra n 2 at II.1–2; Contreras et al v El Salvador, supra n 12 at 135. See also Gomes Lund et al. (Guerrilha do Araguaia) v Brazil, supra n 12 at para 297; ‘Las Dos Erres’ Massacre v Guatemala, IACtHR Series C 211 (2009), para 232 (reparations); Massacres of El Mozote and nearby places v El Salvador, supra n 12 at para 316.
18 See in this regard Szoke-Burke, supra n 9 at 529, who furthermore argues that—considering the downsides of criminal trials to reveal structural truths—even when a State is able to carry out a comprehensive suite of prosecutions, it will usually be obliged to look for additional strategies to more comprehensively fulfil its international obligations.'
19 Velásquez Rodríguez v Honduras, supra n 12 at para 181.
20 Gudiel Alvarez et al (‘Diario Militar’) v Guatemala, supra n 12 at para 269. Though in this situation, which was not related to a specific request for information by the victims or their next of kin, the Court chose not to delve into the right to access to information.
21 E.g. Human Rights Council Res 21/7, 24 September 2012, A/HRC/21/L.16; Commission on Human Rights Res 2005/66, 20 April 2005, E/CN.4/RES/2005/66; Working Group on Enforced and Involuntary Disappearances, General Comment on the right to the truth in relation to enforced disappearances, 2010, A/HRC/16/48, para 39. The right to truth has been recognised and elaborated by various UN Special Rapporteurs—in particular, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence: e.g. Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, A/HRC/24/42 (2013); Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, A/68/362 (2013); Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, A/HRC/22/52 (2013); Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Global study on transitional justice, A/HRC/36/50/Add.1 (2017).
22 Orentlicher, Updated Set of Principles for the protection and promotion of human rights through action to combat impunity, adopted by the Commission on Human Rights, E/CN.4/2005/102/Add.1 (2005); Joinet, Principles against Impunity, adopted by the UN Commission on Human Rights, E/CN.4/Sub.2/1997/20 (1997).
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Law and Serious Violations of International Humanitarian Law (2006). Furthermore, the Office of the UN Commissioner on Human Rights (OHCHR) has published a study on the right to the truth in 2006.

These documents generally put forward a broad right to the truth—more so than binding human rights law—including a strong collective dimension and a broad scope of truths covered. As Stamenkovikj concludes,

> While the international community has extensively broadened the scope and application of the right to the truth as an independent concept in international norms and practices over time, it has nonetheless stopped short of codifying this broadly conceived right in sources of hard international law.

Consider for instance Principle 2 of the Updated Principles, which 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.

The OHCHR’s study on the right to the truth also stresses that beyond victims and their family members, society as a whole also has the right to the truth about gross human rights violations, and the Working Group on Enforced Disappearances states (referring to the Updated Principles) that.

> 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 as a ‘vital safeguard against the recurrence of violations’ . . .

More specifically, Principle 3 of the Updated Principles contains a duty for the state 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.

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23 UN GA Res 60/147, 21 March 2006, A/RES/60/147, at 22.
24 OHCHR, *Study on the right to the truth*, 8 February 2006, E/CN.4/2006/91.
25 Stamenkovikj, supra n 2 at 240.
26 Orentlicher, supra n 22, Principle 2.
27 OHCHR, supra n 24.
28 Working Group on Enforced and Involuntary Disappearances, supra n 21.
29 Orentlicher, supra n 22, Principle 3.
International soft-law documents generally posit a broad scope of truths: according to the OHCHR’s study, the right includes:

- knowing the full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them.\(^{30}\)

The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation state that ‘victims and their representatives should be entitled to seek and obtain information on the causes leading to their victimization and on the causes and conditions pertaining to the gross violations of international human rights law.’\(^{31}\) Apart from knowing what happened, this would thus also include knowing why it happened and what the circumstances were—not only with respect to specific individual violations, but also on a more systemic level. According to the IACCommHR, this includes understanding:

- the objective and subjective elements that helped create the conditions and circumstances in which atrocious conduct was perpetrated, and to identify the legal and factual factors that gave rise to the appearance and persistence of impunity.\(^{32}\)

As to the question how absolute the right to the truth is, the OHCHR’s Study takes the view that it ‘should be considered as a non-derogable right and not be subject to limitations.’\(^{33}\) The idea of a right to the truth without limitations is not reflected in other (binding or non-binding) sources, though. For instance, under stringent conditions, restrictions may be mandated by the privacy and security of victims, witnesses, and alleged perpetrators—especially in conflicts that are still ongoing.\(^{34}\) According to the Working Group on Enforced Disappearances, only the right to know the fate and whereabouts of disappeared persons is absolute.\(^{35}\) Other aspects of the right to truth, such as the right to know about the circumstances of a disappearance, the identity of the perpetrators and the progress and results of an investigation, are subject to qualifications.

### D. The European Court of Human Rights and the Right to the Truth

Before the European Court of Human Rights explicitly referred to the right to the truth, the Court already regularly emphasised the importance of investigating the truth about gross human rights violations, in particular enforced disappearance.\(^{36}\) The Court has

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\(^{30}\) OHCHR, supra n 24 at 59.

\(^{31}\) UN GA, supra n 23 at 24.

\(^{32}\) IACCommHR, supra n 14 at II.A.18.

\(^{33}\) OHCHR, supra n 24, Summary; see also par. 60.

\(^{34}\) Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, *Annual report to the UN Human Rights Council*, A/HRC/24/42 (2013), para 107; Orentlicher, supra n 22, at 31.

\(^{35}\) Working group on Enforced and Involuntary Disappearances, supra n 21 at 4; Vermeulen, supra n 12.

\(^{36}\) *Kurt v Turkey* Application No 24276/94, Merits and Just Satisfaction, 25 May 1998; *Çakıcı v Turkey* Application No 23657/94, Merits and Just Satisfaction, 8 July 1999 (Grand Chamber); *Varnava and others v Turkey* Application No 16064/90 (and others), Merits and Just Satisfaction, 18 September 2009 (Grand
formulated a procedural obligation to conduct an effective official investigation capable of leading to the identification and punishment of those responsible for violations of the right to life and the prohibition of torture (Articles 2 and 3 ECHR). Moreover, it has posited a qualified right to access to information under Article 10 ECHR (freedom of expression), which has served—for instance—to allow an historian access to secret service archives from the Communist era.\(^{37}\)

The ECtHR first explicitly formulated the right to know the truth in Association ‘21 December 1989’ v Romania, which dealt with the death of the applicants’ family members during an anti-government demonstration in the context of the Romanian Revolution, just before Ceauşescu was overthrown.\(^{38}\) The Court judged that the delays and inadequacies in the investigation of these deaths—including the lack of information given to the victims’ relatives about the investigation—constituted a violation of the procedural limb of Article 2 ECHR, considering ‘the right of victims and their families and heirs to know the truth about the circumstances surrounding events involving a massive violation of rights as fundamental as that of the right to life . . .’\(^{39}\)

The ECtHR delved further into the right to the truth in a number of cases concerning the role of European states in ‘extraordinary renditions’, secret detention centres and torture by the CIA in the context of counterterrorism, starting with El-Masri v the Former Yugoslav Republic of Macedonia (2012).\(^{40}\) On New Year’s Eve 2003, El-Masri—a German of Lebanese descent—had been arrested in a hotel in Skopje, where he was held incommunicado for three weeks before being brought to Skopje Airport where he was tortured. He was then transferred to Afghanistan to be held in secret detention for more than four months, after which he was given his papers and sent back to Europe and released. He claimed that these atrocities were conducted by the CIA with the assistance of Macedonian officials. The applicant’s claim before the United States’ courts had been dismissed, as the US government successfully asserted its state secrets privilege.\(^{41}\) The ECtHR, confronted with a lack of willingness on the part of the Macedonian authorities to give any information, judged his allegations to be credible and concluded that there had been a violation of the prohibition of torture and inhuman or degrading treatment or punishment (Article 3 ECHR), of the right to liberty and security (Article 5 ECHR),...
the right to respect for private life (Article 8 ECHR) and the right to an effective remedy (Article 13 ECHR). In the context of Article 3 ECHR, one of the issues that arose was the lack of an adequate investigation into the atrocities that would be capable of leading to the identification and punishment of those responsible and of establishing the truth (the procedural limb of Article 3). The Court pointed out that this inadequacy had an impact on the right to the truth regarding the relevant circumstances of the case and stressed ‘the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened’. Not only has the respondent state consistently engaged in outright denial that anything happened to El-Masri; the broader problems of European involvement in CIA-led abductions in the fight against terrorism have been covered up by European states and the US alike, using state secrets laws to impede investigations.

Stressing the importance of the truth for non-recurrence, the Court held that.

an adequate response by the authorities in investigating allegations of serious human rights violations, as in the present case, may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts.

The two concurring opinions show that the right to the truth has led to several discussions within the ECtHR. Concurring judges Tulkens, Spielmann, Sicilianos, and Keller argued that the majority of the Court should have stated even more clearly that, in relation to Article 13 ECHR considering the absence of effective remedies in this case, ‘the applicant was denied the “right to the truth,” that is, the right to an accurate account of the suffering endured and the role of those responsible for that ordeal’. They added, however, that ‘Obviously, this does not mean “truth” in the philosophical or metaphysical sense of the term but the right to ascertain and establish the true facts.

The second group of concurring judges—Casadevall and López Guerra—took an opposite approach to the first group, finding that it was not necessary at all to refer to a right to the truth; after all, the Court’s case law has long recognised States’ duty under Article 3 to investigate the facts and thus find out the truth. They found it particularly problematic that the Court referred to the right of the general public to know what happened: ‘as far as the right to the truth is concerned, it is the victim, and not the general public, who is entitled to this right as resulting from Article 3 of the Convention.’

42 El-Masri v. the Former Yugoslav Republic of Macedonia, supra n 1.
43 See the Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (2013), supra n 21.
44 El-Masri v the Former Yugoslav Republic of Macedonia, supra n 1 at para 192.
45 El-Masri v the Former Yugoslav Republic of Macedonia, supra n 1, Joint Concurring Opinion of Judges Tulkens, Spielmann, Sicilianos and Keller, at para 1–2.
46 El-Masri v the Former Yugoslav Republic of Macedonia, supra n 1, Joint concurring opinion of Judges Casadevall and López Guerra.
In the 2014 judgments *Al Nashiri v Poland* and *Husayn (Abu Zubaydah) v Poland*, the ECtHR further consolidated the collective aspect of the right to the truth. These cases concerned the ‘extraordinary renditions’ of high-level terrorism suspects to (amongst other places) a secret CIA detention centre (‘black site’) in Poland in 2003, where the applicants were held incommunicado and subjected to torture. Eventually they were transferred to Guantanamo Bay where they are still staying (*Al Nashiri’s trial has been subject to procedural delays and is expected to be commencing in February 2022.*)[48] Poland only started to investigate these situations in 2008, years after the manifold public allegations about its involvement in the CIA programme. This investigation dragged on for six years without producing results and without the victims or society being informed about its progress. One of the reasons for this delay—but certainly not the only one—was that the US authorities did not cooperate because of state secrets laws.

Following the argumentation of the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while counteracting terrorism, the Court found that,

> where allegations of serious human rights violations are involved in the investigation, the right to the truth regarding the relevant circumstances of the case does not belong solely to the victim of the crime and his or her family but also to other victims of similar violations and the general public, who have the right to know what has happened.[49]

Notwithstanding the Court’s explicit recognition of the public’s right to know, it should be noted that in the *El-Masri* and *Al Nashiri* cases, the Court declared the Article 10 complaints manifestly ill-founded because they were found to overlap with the Article 3 complaints. Also, as Panepinto makes clear, the ECtHR does not clearly identify rights holders with regard to the collective dimension of the right to the truth; ‘the right to the truth as a collective matter strengthens the right to know held by specific individuals and groups, but the Court is yet to afford a clear, actionable right to the truth to satisfy that dimension.’[50]

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47 *Al Nashiri v Poland*, supra n 1; *Husayn (Abu Zubaydah) v Poland*, supra n 1. In 2018, the ECtHR also published similar rulings against Romania and Lithuania as regards *Al Nashiri’s* and Abu Zubaydah’s incommunicado detention and inhuman treatment at secret CIA sites on their respective territories: *Abu Zubaydah v Lithuania*, Application No. 46454/11, Merits and Just Satisfaction, 31 May 2018, and *Al Nashiri v Romania*, Application No. 33234/12, Merits and Just Satisfaction, 31 May 2018.

48 Rosenberg, ‘Army Judge Proposes 2022 Trial in Guantánamo’s Cole Bombing Case, *The New York Times* 25 February 2020; Ryan, ‘In a setback for Guantánamo, court throws out years of rulings in USS Cole case’ *The Washington Post*, 17 April 2019.

49 *Al Nashiri v Poland*, supra n 1 at para 495; *Husayn (Abu Zubaydah) v Poland*, supra n 1 at para 489. The Special Rapporteur had argued that Article 10 ECHR would be the appropriate provision to deal with society’s right to the truth—Article 3, after all, is really concerned with the rights of victims of torture and not with the rights of society as a whole (par. 483). However, the Court held (similarly to the *El-Masri* judgment) that consideration of Article 10 was not necessary since the relevant issues had already been dealt with under Article 3.

50 Panepinto, supra n 2 at 753.
Connected to this question of society’s right to the truth is the breadth of the concept of truth, with the first group of concurring judges arguing (with respect to Article 13 ECHR) that the right to the truth only includes establishing the true facts. What can be seen from the Court’s case law is that the procedural obligations under Articles 2 and 3 ECHR cannot be satisfied by investigations into broader historical truth, as these provisions require ‘criminal, civil, administrative or disciplinary proceedings, which are capable of leading to the identification and punishment of those responsible or to an award of compensation to the injured party.’\(^{51}\) Nevertheless, as noted above in this paragraph, Article 10 ECHR does provide certain protections in the field of historical truth seeking\(^ {52}\) and more generally, the Court has granted the right to receive information about issues in the public interest to ‘social watchdogs’ such as human rights NGOs.\(^ {53}\) Gallen thus concludes that.

while investigations and the pursuit of truth of longer term historical abuse may not always generate an obligation to investigate with a view towards potential individual accountability or punishment, the Convention continues to insist upon the desirability of enabling investigation and truth seeking of historical wrongdoing as part of the protection of freedom of expression and as being in the public interest of Member States.\(^ {54}\)

The potential implications of a broadly conceived collective right to the truth will be discussed in Part 3.

E. The Way the Right to the Truth Has Been Used in Practice

A range of important aspects of the right to the truth can be discerned in practice. The right has functioned as a catalyst for truth commissions—it has been used as an explicit legal basis for them, such as in Guatemala and Brazil.\(^ {55}\) It has also focused states’ attention on the obligation, independent of the political possibility of instituting criminal trials, to investigate the truth about gross human rights violations. When the state authorities or other parties do not disclose certain materials or give access to archives—be it to victims, their next of kin, witnesses, alleged perpetrators mentioned in the files who may wish to clear themselves, journalists, human rights defenders or other NGOs—the right to the truth can give those actors a tool to press the state authorities to live up to their obligation to disclose (and not destroy) relevant information.\(^ {56}\)

\(^{51}\) Janowiec v Russia, supra n 36, at para 143. See Gallen, supra n 36 at 683.

\(^{52}\) Kenedi v Hungary, supra n 37.

\(^{53}\) Társaság a Szabadággókért v Hungary Application No 37374/05, Merits and Just Satisfaction, 14 April 2009; Magyar Helsinki Bizottság v Hungary, Application No 18030/11, Merits and Just Satisfaction 8 November 2016 (Grand Chamber).

\(^{54}\) Gallen, supra n 36 at 684.

\(^{55}\) Firm and Lasting Peace Accord signed in Guatemala on December 29, 1996; Lei 12,528/2011 (creating the National Truth Commission in Brazil); see for more examples Shelton, Remedies in International Human Rights Law, 3rd edn (2015).

\(^{56}\) See on the important role of archives in guaranteeing the right to truth: Report of the Office of the United Nations High Commissioner for Human Rights on the seminar on experiences of archives as a means to guarantee the right to the truth, A/HRC/17/21 (2011); Report of the UN High Commissioner for Human Rights, Best practices for the implementation of the Right to the truth, A/HRC/12/19 (2009); Report of
right to the truth can counter national authorities’ obstruction of truth initiatives, for example if they fail to provide information.\textsuperscript{57} It can also oblige the authorities to disclose the progress or results of investigations.\textsuperscript{58} In situations where victims, witnesses or perpetrators dare not come forward to speak about what happened because of security concerns and fear of retaliation—and even prosecutors or courts may feel intimidated to engage in investigations—the right to the truth emphasises the responsibility of state authorities to protect them and help them break the silence.\textsuperscript{59}

One particular site where the right to the truth has come into play is in the discussion on the extent of amnesties, pardons, and sentence reductions for perpetrators in exchange for telling the truth. Truth processes may have a negative impact if those involved feel that important parts of the truth are withheld by perpetrators.\textsuperscript{60} Thus, the Colombian Constitutional Court found that Colombia’s Justice and Peace Law (2005) violated the right to the truth, as it provided alternative sentences to members of paramilitary groups in exchange for—amongst other things—telling the truth, while lacking sufficient incentives for the full truth to come to light.\textsuperscript{61} Demobilised combatants who did not disclose the whole truth could be penalised only when this was proven to be intentional—and even then it would only lead to slight sentence increases.\textsuperscript{62} The Court held that, if it was found out that parts of the truth had not been told, the state should take up its own responsibility for a full investigation through the criminal justice system. Indeed, a commitment to truth implies that independent investigation of such statements may be necessary.

As mentioned above, narrowly construed restrictions to the right to the truth can be mandated by the privacy and security of victims, witnesses, but also alleged perpetrators.\textsuperscript{63} This is of particular concern in the digital era, as information may remain available indefinitely.\textsuperscript{64} The idea that other considerations can legitimately overrule truth does not negate that the right to the truth can provide the necessary counterweight when the powers that be are using delaying techniques or misusing access to information exceptions to protect their own interests: indeed, with regard to gross human rights violations there is an overriding public interest to disclose information and the
burden of proof is on the authorities to prove that restrictions based on national security arguments are absolutely necessary. 65

With all this potential come a range of ongoing controversies surrounding the right to the truth, which may intensify as the right is further developed by a more diverse range of legal actors. 66 This analysis focuses on a number of discussions about the right to the truth that partly emanate from the abovementioned ECtHR cases, as well as from the broad interpretation of the right to the truth that can be discerned in many soft-law documents: that is, to what extent the general public should have a right to the truth, how broad the concept of truth should be (fact-finding or also broader interpretive and historical truth) and how it should be related to official acknowledgment of the truth. Multidisciplinary research on truth finding and memory with regard to gross human rights violations provides insights that can help elucidate these issues.

3. A CRITICAL PERSPECTIVE ON THE RIGHT TO THE TRUTH

A. The Value of Truth after Mass Atrocity

Truth is regarded by many as central to come to terms with the past after gross human rights violations. What is considered to be the value of truth seeking after mass atrocity? To start with, such atrocities tend to be accompanied by a stream of euphemisms and lies: proof of what happened is destroyed, during the occurrences and afterwards—for instance, by obstructing the work of investigators and human rights defenders using tactics of violence and intimidation. 67 This is particularly obvious with regard to enforced disappearance, where the authorities—by making the body disappear, destroying identification papers, and refusing to shed any light on the victim’s fate—make it seem as though nothing ever happened. 68 Many survivors are therefore in dire need of bringing the truth to light and communicating their experiences, even though this can be extremely painful: ‘During democratic transitions, people view the facts as the surest antidote to the flatulent rhetoric, glittering slogans, and radiant abstractions of the authoritarian rulers, recently displaced.’ 69 Truth mechanisms should end the ‘state of confusion’ that those in power have previously sought to maintain, in order to bring back people’s standing in the eyes of others, enhance their believability and counter longstanding narratives that presented them as ‘enemies’, as ‘terrorists’ deserving this treatment and so forth. 70

65 See Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (2013), supra note 21 at para 66 (referring to the Global Principles on National Security and the Right to Information (Tshwane Principles) and 106).
66 Stamenkovikj, supra n 2 at 67–70.
67 IACommHR, supra n 14 at II.A.15–9; Cohen, States of denial: knowing about atrocities and suffering (2001) at 225. One may question whether this is now changing with the digital revolution, which enables citizens witnessing events to immediately record and publish them. See Reading, ‘Identity, memory and cosmopolitanism: the otherness of the past and a right to memory?, (2011) 14 European Journal of Cultural Studies 379; Whitty, ‘Soldier Photography of Detainee Abuse in Iraq. Digital Technology, Human Rights and the Death of Baha Mousa’ (2010) 10 Human Rights Law Review 689.
68 Hamber and Wilson, ‘Symbolic closure through memory, reparation and revenge in post-conflict societies’ (2002) 1 Journal of Human Rights 35.
69 Osiel, Mass Atrocity, Collective Memory, and The Law (1997).
70 Shelton, supra n 55 at 112–6.
A Critical Reflection on the Right to the Truth about Gross Human Rights Violations

Many also argue that in order for victims to reclaim their dignity in the eyes of the rest of society, it is necessary for truth mechanisms to make knowledge about what happened evolve into acknowledgment—thus stressing the importance of going beyond fact-finding.\(^{71}\) Even when victims and their next of kin already know what happened, the idea that the truth is finally officially acknowledged after years of lies and denial is thought to be valuable in itself.\(^{72}\)

Besides this intrinsic value of truth as a counterweight to longstanding lies, disbelief, and silence, truth is thought to serve various goals: healing victims’ suffering (through, amongst other things, giving them the opportunity to tell their story and giving them a public voice), reconciliation and preventing future atrocities (‘never again’).\(^{73}\) Whether and how truth seeking can indeed help achieve such goals is a matter of intense debate.\(^{74}\)

Still, the assumption that truth will prevent future atrocities underpins the development of the right to the truth in international law. The idea that ‘full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations’ (as pronounced in the Updated Principles) and that societies should actively engage in remembering their traumatic pasts on order to learn, is a relatively new invention that sounds intuitively right. Nevertheless, for a long time it was thought that leaving the truth for what it was and ‘moving on’ was best for societies to live further in peace.\(^{75}\)

Critics still question whether knowing the precise truth about the past is likely to lead to greater understanding, reconciliation, peacebuilding and prevention of future atrocities—and thus, whether all societies should strive for truth seeking at all times.\(^{76}\) The competing claims about the advantages and disadvantages of truth finding after mass atrocity are impossible to pin down in concrete evidence and to translate into one universal rule applicable to all societies in the same vein. Thus, while accepting the basic premise that there is something important about truth seeking after mass atrocity, it should be noted that there is increasing criticism of the assumption that truth should—as a universal standardised rule—inevitably prevail over other considerations.\(^{77}\) In this light, a broad conceptualisation of the right to the truth raises critical questions.

B. Society’s Right to the Truth

The truth about mass atrocities is clearly of concern to society as a whole. The collective aspect of the right to the truth is directly related to the right to access to information: as the UN Special Rapporteur on freedom of expression concluded,

the right to access information on human rights violations, as enshrined by the right to freedom of expression, should be considered to be part of the right to

\(^{71}\) Cohen, supra n 67.
\(^{72}\) Walker, ‘Truth telling as reparations’ (2010) 41 Metaphilosophy S25. 536–37.
\(^{73}\) Daly, ‘Truth skepticism: an inquiry into the value of truth in times of transition’ (2008) 2 International Journal of Transitional Justice 23.
\(^{74}\) See Karstedt, ‘The emotion dynamics of transitional justice: an emotion sharing perspective’ (2016) 8 Emotion Review 50; Hayner, Unspeakable Truths. Transitional Justice and the Challenge of Truth (2011) at 147–52.
\(^{75}\) Veraart, De passie voor een alledaagse rechtsorde (inaugural lecture VU), 2010, Den Haag: Boom Juridische Uitgevers.
\(^{76}\) Mendeloff, ‘Truth-Seeking, Truth-Telling, and Postconflict Peacebuilding: Curb the Enthusiasm?’ (2004) 6 International Studies Review 355; Daly, supra n 73.
\(^{77}\) David, ‘Against standardization of memory’ (2017) 39 Human Rights Quarterly 296.
truth in all circumstances—whether it relates to past or present situations, is claimed by victims, their relatives or by anyone in the name of public interest, in situations of political transition or not, and irrespective of the existence of legal proceedings, including when judicial action has expired.  

Still, the idea of all members of society having a right to the truth raises difficult questions. The UN Special Rapporteur on human rights and terrorism has suggested that ‘Once it [is] recognised that in cases of gross or systemic violations there [is] a free standing right to truth belonging to society at large, then it would follow that any individual with a legitimate interest in the truth [is] entitled to invoke that right’. The question is then: who has such a ‘legitimate interest’? Such issues have already been dealt with in relation to specific aspects of the right to truth, such as access to archives. However, broader issues arise: after all, in theory a collective right to the truth could be stretched as wide to suggest that every member of the public is entitled to the truth about mass atrocities committed in their society and to claim particular truth initiatives. This would be unattainable in practice, but more importantly, the collective and individual dimensions of truth seeking do not necessarily coincide—they may even strongly conflict. For instance, what if victims or witnesses are not ready to tell their stories—or if subgroups within the victimised community have different ideas about truth seeking, such as ‘complex’ victim groups who have also committed atrocities themselves?

Consider the situation where children of the Argentine Dirty War’s victims were abducted, illegally appropriated, and raised in new families that were often sympathetic to or connected to the dictatorial regime. The Working Group on Enforced Disappearances holds that the right to know the truth also applies to these cases—‘Both the families of the disappeared and the child have an absolute right to know the truth about the child’s whereabouts and the state shall devote its efforts to searching for and identify such children and to reunite them with their families of origin. In Argentina, thanks in large parts to the efforts of the Abuelas (Grandmothers) of the Plaza de Mayo who already—secretly—started their searches during the dictatorship and later successfully lobbied the post-transition government to establish a genetic database and a National Commission on the Right to Identity (amongst other measures), many children of the disappeared were identified and reunited with their biological grandparents. The

78 Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (2013), supra n 21 at para 92.
79 Al Nashiri v Poland, supra n 1 at para 482. See also Panepinto, supra n 2 at 746.
80 E.g. Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, A/HRC/30/42 (2015), Annex: Set of general recommendations for truth commissions and archives.
81 Hamber, ‘Does the truth heal: a psychological perspective on the political strategies for dealing with the legacy of political violence’ in Biggar (ed.), Burying the past: making peace and doing justice after civil conflict (2001) 155; Mendeloff, supra n 76; Fletcher and Weinstein, ‘Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation’ (2002) 24 Human Rights Quarterly 573.
82 See Bouris, Complex political victims (2007); Moffett, ‘Reparations for ‘Guilty Victims’: Navigating Complex Identities of Victim-Perpetrators in Reparation Mechanisms’ (2016) 10 International Journal of Transitional Justice 146.
83 Though there is no absolute obligation to revisit the adoption; here, the best interest of the child also play a part in the balance. Working group on Enforced and Involuntary Disappearances, supra n 21 at 7.
Abuelas’ efforts, backed up by forensic science, also helped to cast a broader light on the nature and extent of the human rights violations committed during the Dirty War (in the absence of other evidence such as the bodies of the disappeared or any documentation, which had largely been destroyed by the military) and led to the prosecution of government officials—thus vindicating the right to the truth. In some cases, however, the uncovering of these truths has raised complex issues—especially since the children have become adults: some of the disappeared children were (initially) not willing to cooperate in the process because of loyalty towards their raising parents, who could face criminal charges. After these controversies were raised in court, a law was passed in 2009 that makes it possible to engage in DNA testing of persons whose raising parents are suspected of having knowingly engaged in illegal adoption of the children of the disappeared, even if these persons themselves refuse to give their biological material, by means of the seizure of personal items. This raises the question whether there is such thing as a right ‘not to know the truth’—or not to cooperate with this process—and how this relates to the biological relatives’ and society’s right to know the truth.86 They might also initially refuse and change their mind later—accepting such a new truth is a personal process that takes some more time than others. One may imagine other types of extremely sensitive conflicts of interests, as Ludwin King indicates: what if, with the aim of holding the perpetrators to account for sexual assault, identifications would take place of children born after mass atrocities in which the use of rape was a common tactic?88 In such cases, one can imagine how shame and stigma would come into play.

The potential conflicts of interest involved in truth seeking and post-conflict justice thus become even more prominent with regard to the collective dimension of the right to the truth and should be duly taken into account. The idea of ‘truth above all else’, coupled with a collective aspect, also raises issues with regard to the timing of truth initiatives. Sometimes it may be too early for truth investigations—as Hayner suggests,

digging into the details of past conflicts . . . may disrupt fragile relationships in local communities recently returned to peace. Truth inquiries usually require the active involvement and emotional investment of victims, as well as significant resources when there are many urgent priorities.89

Truth commissions often have to report within a few years, whereas ‘the most traumatized victims often take the longest to be ready to participate in transitional justice’.90

84 Avery, ‘A Return to Life: The Right to Identity and the Right to Identify Argentina’s Living Disappeared’ (2004) 27 Harvard Women’s Law Journal 235. 251.
85 See Ludwin King, ‘A Conflict of Interests: Privacy, Truth, and Compulsory DNA Testing for Argentina’s Children of the Disappeared’ (2011) 44 Cornell International Law Journal 335; Penchasazadeh, ‘Ethical, legal and social issues in restoring genetic identity after forced disappearance and suppression of identity in Argentina’ (2015) 6 Journal of Community Genetics 207.
86 Ludwin King, ibid. at 561. See also Report of the Office of the United Nations High Commissioner for Human Rights on the right to the truth and on forensic genetics and human rights, A/HRC/15/26 (2010).
87 Penchasazadeh, supra n 85.
88 Ludwin King, supra n 85 at 546–47.
89 Hayner, supra n 74 at 196.
90 Braithwaite and Nickson, ‘Timing truth, reconciliation, and justice after war’ (2012) 27 Ohio State Journal of Dispute Resolution 443.
Also, perpetrators can take years to acquire the confidence that they can confess without fear of revenge. 91 A truth commission without sufficient support, powers and mandate, in a situation where many do not yet feel safe to tell the full truth (especially in ongoing conflicts) 92, could come too early. In transitional environments that are still relatively unstable, the priorities of commissions of inquiry may also be politicised—or truth processes may be used politically to obtain advantages in the peace negotiations. Indeed, different transitional justice contexts (e.g. societies transitioning from authoritarian regimes versus fragile post-conflict societies) may need different types of solutions, also with regard to timing of truth initiatives. 93

On the receiving side there can be a ‘lack of open ears and hearts of people willing to listen’, as Jelin suggests, 94 which harms people telling their story even more when they finally find the courage to do so. Public attention for past wrongs often flares up among later generations, after periods of (partial) amnesia among the generation having experienced the atrocities: ‘… new generations that ask questions and express a willingness to understand, but who are free of the historical burden that weighs upon the common sense of a generation or a social group that has been victimized’. 95 Such changes in perspective may lead to a renewed interest in truth seeking and to revisited transitional justice processes. Indeed, trying to come to a shared understanding of the past is a gradual process taking place over a longer period of time. Truth processes might also be more likely to influence public perception in societies that are already rather stable and where there is ample space for public debate. 96 This could imply that the positive effects of truth initiatives for society are easier to achieve in the long term, when divisions have lessened and new narratives are gradually seeping through public consciousness. 97 As Daly concludes,

If the benefits of truth telling are more likely to be appreciated not in the short term but over time, perhaps transitional governments ought to approach truth not like an infatuation that satisfies an immediate need but rather like a long-term relationship that one nurtures over the course of many years. 98

With regard to broader truth initiatives, the right to the truth could then be conceptualised as a more incremental obligation. 99 This is not to negate that in certain transitional situations, more immediate truth processes and outcomes can be necessary to shed light on government officials allegedly responsible for atrocities, with an eye towards vetting and lustration processes. Without such reforms, after all, chances are

91 Braithwaite, ‘Between proportionality & impunity: confrontation—> truth—> prevention’ (2005) 43 Criminology 283.
92 Vidal-López, ‘Truth-telling and internal displacement in Colombia’ (2012), International Center for Transitional Justice.
93 See Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (2017), supra n 21.
94 Jelin, State Repression and the Labors of Memory (2003) at 66.
95 Ibid.
96 Mendeloff, supra n 76 at 376.
97 Daly, supra n 73 at 39.
98 Daly, supra n 73 at 52.
99 See Collins, ‘Truth-justice-reparations interaction effects in transitional justice practice: the case of the ‘Valech Commission’ in Chile’ (2016) 49 Journal of Latin American Studies 55; see Stoke-Burke, supra note 9, on the advantages and drawbacks of sequencing.
high that the government will continue to hide the truth and will make it extremely difficult to engage in truth initiatives later on.

In many situations victims themselves are in dire need of bringing the truth to light, whereas the powers that be and the dominant groups in society are not (yet) willing to face the past. In such circumstances it is particularly vital that the right to the truth can provide external pressure to support victims, as well as the press and civil society organisations, to oblige the state to investigate and to disclose information. Waiting too long with this process could mean that crucial evidence is gone as victims, witnesses, and perpetrators may no longer be alive. And especially in circumstances where amnesia has been paramount and certain voices have been silenced by society at large, the injustices of the past can be transmitted to later generations——who may become even more active than their predecessors in their strive for acknowledgment of what happened.

C. The Scope of the Right to the Truth

(i) What does the ‘truth’ in the right to the truth entail?

As was shown in Part 2(c), the right to the truth—especially in soft-law instruments—is often considered to go further than the facts of particular cases, pertaining also to the context behind and the more structural reasons for the occurrence of gross human rights violations. The idea of a broad right to the truth is that only establishing what happened in individual cases will not enable society to learn from its past and to actually get to understand the broader context, the systemic nature of the crimes and the role of different actors (including state institutions, bystanders, companies and the broader civil society). Insight into the relations between different events and clarifying the role of various groups and institutions is thus thought to be essential to counter denial and prevent future violations.

In relation to mass atrocity, a broad spectrum of truths can be discerned. Who was victimised and what harms did they suffer? Which individuals and groups did what, who was responsible, which institutions were involved, what were the authority structures? Within which political, societal, institutional context did the atrocities happen, what were the structural reasons behind what happened? What was the motivation of the different actors, what was the role of bystanders, collaborators, informants, and the larger society in the atrocities? Which of the actors is most responsible, what is the legal and moral interpretation of what happened and how are the atrocities represented, compared to other historical occurrences? To what extent were state forces justified in using violence against subversive non-state actors and vice versa? Who should be regarded as a collaborator and who as a hero saving lives? This raises the question what spectrum of truths would be sensible for a right to the truth to cover. In this regard Stanley Cohen’s distinction in literal denial, interpretive denial and implicatory denial is also relevant.101 Whereas initially victims may have a hard time to make sure the dominant stream in society believes what happened to them, when such denial of the facts becomes untenable it tends to be replaced by subtler forms of denial, such as giving

100 Veraart, ‘Redressing the past with an eye to the future: the impact of the passage of time on property rights restitution in post-Apartheid South Africa’ (2009) 27 Netherlands Quarterly of Human Rights 45.
101 Cohen, supra n 67.
the facts a different meaning or isolating the facts as incidents (interpretive denial); moreover, the moral or political implications of the facts may be denied (implicatory denial).

In principle, the right to the truth can play a role with regard to all these types of questions, not only with regard to the ‘bare facts’—indeed, it is not even possible to speak about pure facts that are ‘found’: there is always selection and interpretation involved, already in the act of recovering the traces from the past.\textsuperscript{102} However, giving every member of society the right to know ‘the grand truth’ about past atrocities has far-reaching implications, also in light of the complexities of timing of truth initiatives (as discussed in part B above). Instead of striving for one grand interpretive truth shared and accepted by society as a whole, to be set forth by a time-bound mechanism, truth initiatives could also be conceptualised as long-term, deliberative processes, rather than to pretend laying down a singular truth.\textsuperscript{103} The role of the right to the truth, then, is to aid this discussion, making sure that investigations are enabled or at least not obstructed, which can eventually shed light on a broader interpretive truth. Accepting that the right to the truth can help to elucidate the context, causes and responsibilities with regard to gross human rights violations, is not the same as stating that all members of the public are entitled to historical truth—let alone a right to have this truth officially acknowledged.

\textit{(ii) Official acknowledgment and the ‘duty of memory’}

In a 2011 Argentine truth trial, a descendant of Armenian genocide victims together with Armenian civil society organizations in Argentina started a procedure petitioning clarification of the facts regarding his family members’ fate and remains, as well as access to archives in Turkey and the opening of diplomatic archives of other states.\textsuperscript{104} What the Argentine court eventually did, however, was more than ordering clarification of the facts: the court used all of the evidence gathered to rule by declarative resolution that the events in question could be qualified as genocide—thus providing a legal qualification of the facts adduced to the court.

In order for a symbolic reversal of longstanding silence and for a restoration of victims’ dignity to take hold, it can indeed be powerful to translate what is known into official acknowledgment in a forum that can authoritatively find out and convey what happened, so the result can enter the public sphere. For many people, this means acknowledgment not just of the harm they suffered, but also that they did nothing wrong and were treated unjustly.

The question, however, is whether the right to the truth should impose such official recognitions and thus not only include obligations for truth seeking, but also for its acknowledgment. Most international legal instruments on the right to the truth focus on truth seeking and not explicitly on public acknowledgment. Indeed, the right to the truth is related to, but distinct from the concept of the ‘duty to remember’ (or:

\textsuperscript{102} Ricoeur, Memory, history, forgetting (2004).

\textsuperscript{103} Braithwaite, supra n 91; Riaño Alcalá and Victoria Uribe, ‘Constructing memory amidst war: the historical memory group of Colombia’ (2016) 10 International Journal of Transitional Justice 6.

\textsuperscript{104} Buenos Aires Federal Court No. 5 for Criminal and Correctional Matters, 1 April 2011; see Garibian, supra n 6.
‘duty of memory’): these concepts have different origins, having emerged from different debates.\footnote{See De Baets, ‘The UN Human Rights Committee’s view of the past’ in Belavusau and Gliszczynska-Grabias, Law and Memory. Towards Legal Governance of History (2017) 29. The duty of memory is, in turn, distinct from the ‘right to memory’: see Tirosh, ‘Reconsidering the Right to be Forgotten’—memory rights and the right to memory in the new media era’ (2017) 39 Media, Culture & Society 644; Lee, ‘Towards a right to memory’ (2010) 57 Media Development 3. However, as will be shown below, they have become more and more interrelated within the discourse on transitional justice.\footnote{David, supra n 77.}

The idea of a duty to remember emerged in European states, particularly Germany\footnote{Ibid.} and France,\footnote{Ricoeur, supra n 102; Ledoux, ‘Devoir de mémoire: The post-colonial path of a post-national memory in France’ (2013) 15 National Identities 239; Lalieu, ‘L’invention du ‘devoir de mémoire’, (2001) Vingtième Siècle. Revue d’histoire 83.} in the 1980s and pertained to the way the memory of World War II should be upheld and nourished. The duty to remember was originally conceived as an ethical duty of survivors to testify in the name of others and to speak for those who cannot speak anymore,\footnote{Jelin, supra n 94, referring to the work of Primo Levi.} and for the broader society to keep these voices alive. Ricoeur characterised the duty to remember as a future-oriented duty of justice, the idea of an exemplary memory to learn from the past.\footnote{Ricoeur, supra n 102, at 88. See Report of the Special Rapporteur in the Field of Cultural Rights, Memorialization Processes, UN Human Rights Council, A/HRC/25/49 (2014).} In this view it is a duty owed to others to do justice through memory. Gradually, the duty to remember developed from an ethical human duty to listen to and re-tell other people’s stories to a duty of ‘perpetrator states’ to keep alive the often already dug-up memory of atrocities and to educate the younger generation. In France, this notion particularly came to the forefront when the myth was dispelled that France had been massively resisting the Nazi occupation, at a moment when attention for the Vichy government and France’s own responsibility with regard to the Holocaust increased.\footnote{Löytömäki, ‘The Law and Collective Memory of Colonialism: France and the Case of “Belated” Transitional Justice’ (2013) 7 International Journal of Transitional Justice 205.} Once the duty to remember was well entrenched in French public discourse it was broadened to include other atrocities, in particular the Algerian war and slavery.\footnote{On the Armenian genocide, Loin no 2001–70 du 29 janvier 2001 relative à la reconnaissance du génocide arménien de 1915; on slavery and the slave trade, the ‘loi Taubira’ (Loi no 2001–434 du 21 mai 2001 tendant à la reconnaissance de la traite et de l’esclavage en tant que crime contre l’humanité); the ‘loi Gayssot’ (Loi no 90–615 du 13 juillet 1990 tendant à réprimer tout acte raciste, antisémite ou xénophobe) that prohibits Holocaust denial.}

The duty to remember in France has been the basis for several memory laws (lois mémorielles)\footnote{Ledoux, supra n 108; Lalieu, supra n 108.} which acknowledge past wrongs, such as the Loi Taubira that recognises slavery and slave trade as a crime against humanity. Besides officially acknowledging the past, such legal instruments may also contain provisions on official commemorations and education and sometimes also form the basis for prohibiting the denial, minimization or justification of atrocities. Such efforts to juridicise the duty to remember—moving it from the ethical sphere to the legal sphere—have caused heated debates: many historians view it as state-imposed remembering and a political use of history. They also point out that it has led to dubious counter-initiatives such as the Law on the Recognition of the Nation and National Contribution in Favour of French
Repatriates, which declared that school curricula should recognise the ‘positive role’ of the French colonists in North Africa; this provision was removed after a declaration by the Conseil Constitutionnel.\footnote{Ledoux, supra n 108; Löytömäki, supra n 112.}

Meanwhile, the duty to remember has been increasingly linked to transitional justice debates worldwide. The IACtHR in its reparations sections has laid obligations upon states to engage in public acknowledgment and memory initiatives, such as the dissemination of a documentary and naming streets in honour of victims\footnote{Rodriguez Vera et al v Colombia, supra n 12 at 570 etcetera; Myrna Mack Chang v Guatemala, supra n 12 at 286 etcetera; Miguel Castro-Castro Prison v Peru, IACtHR Series C 160 (2006), para 463. See Sweeney, supra n 12.}, linking the right to the truth explicitly to such reparations.\footnote{Myrna Mack Chang v Guatemala, supra n 12 at 274; Miguel Castro-Castro Prison v Peru, IACtHR Series C 160 (2006), para 440. See also the Basic Principles 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 (2006), UN General Assembly, supra n 23 at 22.} The linkages can also be seen in the 1997 Joinet Principles (the forerunner of Orentlicher’s Updated Set of Principles), which stipulated a duty to remember and linked it to the right to the truth:

\begin{quotation}
The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future. Its corollary is a ‘duty to remember’, which the State must assume, in order to guard against the perversions of history that go under the names of revisionism or negationism; the knowledge of the oppression it has lived through is part of a people’s national heritage and as such must be preserved.\footnote{Joinet, supra n 22 at 17.}
\end{quotation}

The idea of the duty to remember as the corollary of the collective right to the truth does not come back in the updated Principles, which instead stipulate a ‘duty to preserve memory’, specified as ‘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’ (see Part 2(c)).\footnote{Orentlicher, supra n 22, Principle 3.} The UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence has recently identified the ‘duty to carry out memory processes’ (on serious violations of human rights and international humanitarian law) as the ‘fifth pillar of transitional justice’, being ‘both a stand-alone and a cross-cutting pillar’ in relation to the four pillars of truth, justice, reparation and guarantees of non-recurrence, which complements but does not replace mechanisms under these pillars.\footnote{Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Report on Memorialization processes, A/HRC/45/45 (2020).}

\begin{quotation}
\textit{(iii) The drawbacks of a right to official acknowledgment of the truth}
\end{quotation}

It is argued here that the right to the truth should be kept distinct from official acknowledgment of past atrocities, with the right to the truth pertaining only to truth seeking.\footnote{De Baets, supra n 105 at 40, who argues (with regard to the UN Human Rights Committee’s approach) that the right to the truth pertains to ‘history’, not ‘memory’. See about ‘history’ and ‘memory’ Assmann, ‘Transformations between history and memory’ (2008) 75 Social Research 49.}
Bringing legal measures to acknowledge and memorialise past wrongs into the realm of the right to the truth would mean that states always have such a duty towards members of the public, unless there is a strong reason to depart from it. Whereas this may be more easily justified with regard to truth seeking—although even this already raises issues, see para. B above—it is rather far-reaching when it comes to acknowledgment and memorialisation initiatives. These raise more complex questions that deserve even more nuanced approaches than the right to truth seeking.

What if groups seek acknowledgment that they did nothing wrong, or seek official recognition of their heroes, which are regarded as aggressors by others? Consider ‘complex victims’, such as members of armed groups who have themselves become victims of killings or enforced disappearances, or suspected informers who are killed by members of such groups. Conflicting parties will often try to construct a narrative around victimhood to garner popular support, hold the other party responsible and sometimes also to justify their own violent actions. In principle, the right to the truth does not negate this complexity: atrocities have to be investigated, whatever the background and role of the victims. This can be seen clearly in the ECtHR cases about the ‘war on terror’, where the Court has obliged states to investigate human rights abuses committed against terrorist suspects. However, the role of complex victims in memorialisation practices raises more sensitive questions, such as whether and how they are to be represented in monuments, what the right time and place is for acknowledging their suffering and thus how to avoid moral flattening. This does not negate that these groups have the right to know the truth about the atrocities committed against them—but there are good reasons to distinguish this from a duty of memory.

When invoking official mechanisms for acknowledging historical truth, one has to keep in mind that these mechanisms operate within and form part of a broader socio-political context that inevitably influences their functioning. The authorities (or certain factions within the state apparatus) may want to create a vision of the past and of their role that enhances their legitimacy: depending on the nature of the regime after transition (did the former regime stay in power, was it completely replaced or something in between), they may have an interest in silence about past violations or may instead want to do their utmost to acknowledge the crimes of former regime—sometimes to the extent that it amounts to ‘over-acknowledgement’, where past victimization transitions into justifying atrocities committed on one’s own side. In

121 Bouris, supra n 82; Moffett, supra n 82; Riaño Alcalá and Victoria Uribe, supra n 103; Miguel Castro-Castro Prison v Peru, supra n 116.
122 Dudai, ‘Closing the gap. Symbolic reparations and armed groups’ (2011) 93 International Review of the Red Cross 783.
123 Moffett, supra n 82.
124 Report of the Special Rapporteur in the Field of Cultural Rights, supra n 110, at 51; Miguel Castro-Castro Prison v Peru, supra n 116; Hite, Politics and the art of commemoration: memorials to struggle in Latin America and Spain (2012).
125 Although with regard to victims of atrocities committed by non-state groups, the right to truth may be more difficult to enforce, since it is a duty that falls upon the state to investigate.
126 Hunt, ‘Whose truth? Objective truth and a challenge for history’ (2004) 15 Criminal Law Forum 193.
127 Huntington, The Third Wave: Democratization in the Late Twentieth Century (1991); Huyse, ‘Justice after Transition: On the Choices Successor Elites Make in Dealing with the Past’ (1995) 20 Law & Social Inquiry 51.
128 Cohen, supra n 67.
post-conflict situations it is difficult to keep transitional justice mechanisms devoid of political considerations or nation-building memory work.\textsuperscript{129} While the right to the truth should enable resisting such developments—for instance, by enabling contestation of the mandate of official truth investigations, including what abuses are they allowed to document—a far-reaching right to have interpretive truth acknowledged will most likely be unable to prevent already dominant social actors from attempting to have their version of events acknowledged as the version, potentially keeping actual knowledge about the past even further out of sight. The UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence has identified several potential risks of memory processes, specifically in relation to armed conflict between groups: including the risk that they could be abused by those in power constructing narratives to awaken revenge, that they could give rise to competition between victims, and that they could ‘lead to the manipulation of history and the cult of martyrdom, which tends to reopen past wounds, intensify hatred and incite new acts of violence.’\textsuperscript{130} He concludes that ‘[s]hedding light on past events, acknowledging responsibility and bringing the perpetrators to justice are the best antidotes to the manipulation of the past and the glorification of violence’ and that memorialisation is ‘a long-term process to which other tools of transitional justice can contribute.’\textsuperscript{131}

Once official acknowledgment has taken place, it is sometimes used by those in power as a basis for repressing—even criminalizing—other visions of the past.\textsuperscript{132} Although laws criminalising expressions about the past—including those on denial of gross human rights violations—may serve laudable goals (such as protecting victim groups’ human dignity) and although it is vital that public authorities reject and do not nurture manipulative uses of history\textsuperscript{133}, some laws go quite far in restricting discourse about the past.\textsuperscript{134} For instance, criminal trials for justifying or glorifying past atrocities—such as the conviction in France of the retired general Aussaresses, who in his memoirs legitimised torture used in the Algerian war—could have the effect of leading to less perpetrator testimonies and thus less insights about what happened.\textsuperscript{135}

The ECtHR was called on to judge about the book publishers’ convictions in the latter

\textsuperscript{129} Cohen, ‘Unspeakable memories and commensurable laws’ in Karstedt (ed.), \textit{Legal institutions and collective memories} (2009) 27. 36; Loyle and Davenport, ‘Transitional Injustice: Subverting Justice in Transition and Postconflict Societies’ (2016) 15 Journal of Human Rights 126.

\textsuperscript{130} Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (2020), supra n 119 at para 39–40.

\textsuperscript{131} Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (2020), supra n 119 at para 41; 51–8.

\textsuperscript{132} See also Muldoon, ‘The Power of Forgetting: Ressentiment, Guilt, and Transformative Politics’ (2017) 38 Political psychology 669.

\textsuperscript{133} See in this sense the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence (2020), supra n 119 at 103, who devised the ‘principle of non-regression in relation to memory processes’, which ‘places a limit on denialisit or revisionist theories that seek to deny the extent of past violations and the harm caused to victims.’

\textsuperscript{134} Van Noorloos, ‘Memory laws: regulating memory and the policing of acknowledgment and denial’ in Brants and Karstedt (eds), \textit{Transitional Justice and The Public Sphere: Engagement, Legitimacy and Contestation} (2017) 263; Belavusau and Gliszczynska-Grabias, supra n 105; Fronza, \textit{Memory and punishment: historical denialism, free speech and the limits of criminal law} (2018); Moerland, \textit{The Killing of Death: Denying The Genocide Against The Tutsi} (2016); Kahn, \textit{Holocaust Denial and the Law: A Comparative Study} (2004).

\textsuperscript{135} Löytömäki, supra n 112.
case, which it considered to be a violation of Article 10 ECHR: according to the Court, such a testimony is important for public discussion of the past in all its complexity.\footnote{Orban and others v France, Application No 20985/05, Merits and Just Satisfaction, 15 January 2009.} Indeed, the ECtHR, the Human Rights Committee (HRC) and other international organs have become increasingly critical of laws prohibiting expressions about atrocities from the past, in light of the right to freedom of expression and historical debate. In \textit{Perinçek v Switzerland}, the ECtHR held that a criminal conviction for denial of the Armenian genocide (i.e. denying that the atrocities committed amounted to genocide) was a violation of freedom of expression—although in cases concerning Holocaust denial the Court tends to accept infringements of freedom of expression.\footnote{Perinçek v Switzerland, Application No 27510/08, Merits and Just Satisfaction, 15 October 2015 (Grand Chamber); see Van Noorloos, supra n 134.} According to the HRC,\footnote{Human Rights Committee, General Comment No. 34: Freedoms of opinion and expression (art. 19), 12 September 2011, para 49.} 

Laws that penalize the expression of opinions about historical facts are incompatible with the obligations that the Covenant imposes on States parties in relation to the respect for freedom of opinion and expression. The Covenant does not permit general prohibition of expressions of an erroneous opinion or an incorrect interpretation of past events.\footnote{Ricoeur, supra n 102.}

In many cases the permanent struggle for acknowledgment is actually caused by the continuing unwillingness of those in dominant positions to disclose information, blocking access to information that could help victimised groups (and others) to deal with the past. Enabling truth seeking is essential in such circumstances. The right to the truth can come into play when incomplete or inaccurate facts are set forth, for instance when information is kept hidden for political reasons—protecting against ‘definitive forgetting.’\footnote{See also Panepinto, supra n 2 at 741. Further research could shed more light on the influence of digital media technologies on this aspect of the right to the truth: on the one hand one could expect that finding out the truth becomes easier to achieve as the state monopoly on information about conflict situations is increasingly broken, while on the other hand the use of technologies such as deep fake videos will create more challenges for the vindication of the truth. See Whitty, supra n 67. Furthermore, see the discussion on search engines, historical facts and content moderation in relation to the right to the truth in Mulligan and Griffin, ‘Rescripting search to respect the right to truth’ (2018) 2 Georgetown Law Technology Review 557.} When the authorities are repressing the discussion and keeping information out of the public eye, the right to the truth can aid the process towards truth and help less powerful groups to have investigations opened about issues yet unknown to the greater public (or even officially denied).\footnote{140} The right to the truth is thus construed as truth seeking, protecting against enforced erasure of the past. Clarifying what happened can eventually lead to better understanding of the underlying processes and causes of violations; new information may lead to fresh interpretations.

The right to the truth thus conceived is an instrument for opening up dialogues rather than closing them, supporting less dominant groups to have atrocities investigated and thus countering denial and injustice against groups whose suffering has so far
been unacknowledged. The opening of new perspectives can eventually lead to novel conclusions and interpretations (for instance, on the legal classification of events), the content of which in itself cannot be imposed by the right to the truth—if only because the outcome of such discussions about the past is necessarily open ended.

4. CONCLUSION
The way the right to the truth has been gradually developed by a variety of actors—including by the ECtHR in the past decade—has necessitated reflection on its contours, in particular on the extent of society’s right to the truth, the scope of the truth that is sought and the relationship between truth seeking and official acknowledgment. While accepting the basic premise that there is something important about truth seeking after mass atrocity—as a counterweight to longstanding lies, disbelief, and silence—the assumption of ‘truth above all else’ is far from unproblematic, and a broad conceptualisation of the right to the truth raises critical questions.

The potential implications of a broadly interpreted right of all members of society to know the truth are far reaching: there is a myriad of diverging interests involved in the question what aspects of the past should be brought to light, shifting over time. Such conflicts will become even more pressing when members of the public become rights holders with regard to truth about mass atrocities from the past. This should be duly taken into account when interpreting the collective aspect of the right to the truth.

Moreover, a broad spectrum of different truths around mass atrocity can be imagined, including issues of interpretation and historical truth. In this article, it has been argued that, whereas the right to the truth can play a valuable role in enabling investigations (or ensuring that these investigations are not obstructed) of which the results can eventually shed light on broader questions of interpretive truth, it is necessary to consider the potential negative implications of a too absolute right for (all members of) society to historical truth about past atrocities, regardless of timing and context. What is more, if the right to the truth were to entitle members of the public to official acknowledgment and memorialisation of past atrocities (with restrictions of this right strictly construed), this would risk politicising historical discussion even further and could incentivise already dominant social actors from attempting to have their version of events acknowledged as the version, as well as criminalising other views. Questions about the institutional context, about the legal and moral interpretation of what happened, about who is a collaborator and who is a hero, are complex and multifaceted. Trying to come to terms with these issues is a gradual long-term process, sometimes taking place over generations. The right to the truth—conceived as truth seeking—can support this process but should not be utilised to dictate its outcome.

When limited to truth seeking, which is especially vital when powerful actors obstruct those in less dominant positions from finding out what happened, the right to the truth may help to gradually allow society to learn from its past and to broaden the circle of those willing to listen.

141 Wexler, Robbennolt and Murphy, ‘Metoo, Time’s Up, and theories of justice’ (2019) University of Illinois Law Review 45.
142 See on the question whether the right to the truth can extend to atrocities from a long time ago, in view of the temporal limitations in human rights treaties, n 36.