

## CHAPTER III

### ACCESS TO INFORMATION ON HUMAN RIGHTS VIOLATIONS

#### **The right of the victims of human rights violations to access information in State archives on such violations**

1. The thesis advanced by the Inter-American Commission on Human Rights (hereinafter “the IACHR” or “the Commission”) and its Special Rapporteur, and which is set forth in this document – using documents previously drafted by these offices – is that under any circumstances, but especially in processes of transition to democracy, victims and their relatives have the right to know with regard to information on serious violations of human rights in the archives of the State. This is the case even if the archives in question pertain to the security agencies or military or police agencies. Furthermore, the IACHR has maintained that the obligation of access to information in such cases generates a set of affirmative obligations. This chapter explains the reasons that both the IACHR and the Special Rapporteur have in various reports maintained this thesis and lays out the state obligations stemming from it, while discussing the incorporation of this in the most recent verdict of the Inter-American Court on the matter, in the case of *Gomes Lund et al (Guerrilha do Araguaia)*.<sup>1</sup>

2. This document is divided into four parts. First, it sets forth the most important arguments by virtue of which the IACHR has found that it is possible to maintain that the victims of serious violations of human rights and their relatives have the right to know the information on such violations even when it is to be found on military or police premises (i). Second, it describes the special obligations that correspond to the State in order to make this right truly effective (ii). Third, and very briefly, it indicates the characteristics necessary for a legal regime to satisfy the right of access to information in these matters, in accordance with international standards (iii). Finally, it sets forth the way in which the Inter-American Court responded to this doctrine, in the aforementioned verdict in the case *Gomes Lund et al (Guerrilha do Araguaia)*.<sup>2</sup>

#### **1. Do the victims of serious human rights violations or their relatives have the right to access information on such violations when it is in the archives of State security forces?**

3. The right of access to information is a fundamental right protected by Article 13 of the American Convention. The Inter-American Court has established that said article, by expressly stipulating the rights to “seek” and “receive” “information”, protects the right of any person to access information under the control of the State, with the provisos permitted under the strict regime of restrictions established in said instrument.<sup>3</sup> It is a particularly important right for the consolidation, functioning and preservation of democratic systems, and has therefore received a large amount of attention, both from the member States of the OAS<sup>4</sup> and from international doctrine and jurisprudence.

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<sup>1</sup> I/A Court H.R., *Case of Gomes Lund et al (Guerrilha do Araguaia) v. Brazil. Preliminary Exception, Merits, Reparations and Costs*. Judgment of November 24, 2010. Series C No. 219.

<sup>2</sup> I/A Court H.R., *Case of Gomes Lund et al (Guerrilha do Araguaia) v. Brazil. Preliminary Exception, Merits, Reparations and Costs*. Judgment of November 24, 2010. Series C No. 219.

<sup>3</sup> I/A Court H.R., *Case of Claude Reyes et al v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151, paras. 76 and 78.

<sup>4</sup> The General Assembly of the OAS recognizes the right of access to information as “an indispensable requirement for the very functioning of democracy.” In this regard, all the member States of the OAS “have the obligation to respect and ensure respect for access to public information for all persons and promote the adoption of legislative provisions or of

4. However, one of the exceptions to the right of access applies when permitting access to a particular item of information could endanger national defense or security. In some cases, States have resorted to this exception to maintain as classified or secret, even vis-à-vis the judicial authorities of the State itself, information that would make it possible to clarify serious violations of human rights, such as the forced disappearance of persons.

5. It is true that in some cases there is national security information that should remain reserved. However, there are at least three strong arguments according to which the State can, in no case, maintain the secrecy of information on serious human rights violations – especially that related to the forced disappearance of persons – and prevent access to such information by the authorities in charge of investigating said violations, or even by the victims and their relatives.

6. Indeed, the Inter-American Court of Human Rights (hereinafter “the Court”) has held that victims of grave human rights violations and their relatives, as well as society as a whole, have the right to know the truth about atrocities committed in the past. In this respect, the Court has reaffirmed the established case law, according to which, “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.”<sup>5,6</sup> Therefore, and given the fact that the right to know the truth about what happened is established not only in Article 13 but also in Articles 8 and 25 of the Convention,<sup>7</sup> a State agency may never refuse to provide state-held information that might help establish the facts surrounding such violations to the authorities investigating human rights violations. Second, as the Court has stated, denying the relatives of victims of forced disappearance information about the fate of their loved ones contributes to subjecting them to cruel, inhuman or degrading treatment, and therefore is absolutely prohibited under international law. In fact, if the information contained in state records contributes to overcoming such extreme suffering, the government has the obligation to turn it over. Finally, under any circumstance, but especially in processes of transition to democracy, the argument that it is necessary to maintain confidentiality with respect to past atrocities in order to protect present “national security” is inadmissible. No democratic idea of “national security” is compatible with this theory. Each one of the three arguments mentioned will be explained in more detail in the paragraphs below.

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another kind that are necessary to ensure its recognition and effective application.” General Assembly of the OAS. Resolution 1932 (XXXIII-O/03) “Access to Public Information: Strengthening of Democracy.” June 10, 2003. See also resolutions of the General Assembly of the OAS 2057 (XXXIV-O/04), 2121 (XXXV-O/05), 2252 (XXXV-O/06), 2288 (XXXVII-O/07), and 2418 (XXXVIII-O/08).

<sup>5</sup> *Cfr. I/A Court H.R., Case of the 19 Tradesmen v. Colombia. Merits, Reparations and Costs.* Judgment of July 5, 2004. Series C No. 109, para. 261; *Case of Carpio-Nicolle et al. v. Guatemala. Merits, Reparations and Costs.* Judgment of November 22, 2004. Series C No. 117, para. 128; and *Case of Myrna Mack-Chang v. Guatemala. Merits, Reparations and Costs.* Judgment of November 25, 2003. Series C No. 101, para. 274.

<sup>6</sup> *I/A Court H.R., Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Exception, Merits, Reparations and Costs.* Judgment of November 24, 2010. Series C No. 219, para. 200.

<sup>7</sup> On this point, the Court has stated: “The case law of the Inter-American Court has considered the content of the right to know the truth, in particular in cases of forced disappearance. Ever since the *Case of Velásquez Rodríguez*, the Court has affirmed the existence of the “right [of the victim’s relatives] to know what happened to him and, if appropriate, where his remains are located.” The Court has recognized that the right of the relatives of victims of grave human rights violations to know the truth is included within the right of access to justice. The Court has also considered the duty to investigate as a form of reparation, given the need to redress the violation of the right to know the truth in the specific case. Similarly, in this case, the right to know the truth is related to the Ordinary Action filed by the next of kin, which is tied to access to justice and to the right to seek and receive information enshrined in Article 13 of the American Convention.” (citations omitted). *I/A Court H.R., Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Exception, Merits, Reparations and Costs.* Judgment of November 24, 2010. Series C No. 219, para. 201.

**First argument: intelligence agencies cannot reserve from judges and entities in charge of historical clarification, such as Truth Commissions, information that makes it possible to clarify serious human rights violations**

7. According to this first argument, the State cannot deny access to information about to serious human rights violations to judges and autonomous investigation agencies (such as, for example, the public prosecutor or a truth commission).<sup>8</sup> In this regard, in the case *Myrna Mack Chang v. Guatemala*,<sup>9</sup> the Inter-American Court found it proven that the Ministry of National Defense had refused to provide documents related to the functioning and structure of the Presidential Military Staff that were necessary to advance with the investigation on an extrajudicial execution. The Public Prosecutor and the judges repeatedly requested the information, but the Ministry of National Defense denied the delivery by invoking the state secrecy exception governed by Article 30 of the Guatemalan Constitution<sup>10</sup> and the alleged incineration of the corresponding documents.<sup>11</sup> In the view of the Inter-American Court:

“[I]n cases of human rights violations, the State authorities cannot resort to mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or proceeding.”<sup>12</sup>

8. In this regard, the Inter-American Court adopted the considerations of the IACHR, which had alleged before the Tribunal:

“In the framework of a criminal proceeding, especially when it involves the investigation and prosecution of illegal actions attributable to the security forces of the State, there is a possible conflict of interests between the need to protect official secret, on the one hand, and the obligations of the State to protect individual persons from the illegal acts committed by their public agents and to investigate, try, and punish those responsible for said acts, on the other hand. [...]public authorities cannot shield themselves behind the protective cloak of official secret to avoid or obstruct the investigation of illegal acts ascribed to the members of its own

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<sup>8</sup> “Truth commissions” are one of the most-used mechanisms in comparative perspective by the countries that have to face a past with mass human rights violations. According to the International Center for Transitional Justice (ICTJ), “truth commissions” are non-judicial and independent investigation panels established generally for the purpose of establishing the facts and the context of mass violations of human rights or of international humanitarian law committed in the past (definition of ICTJ, available at <http://www.ictj.org>). Among the countries that have used these mechanisms to clarify crimes committed in their past we can mention Argentina, Haiti, Guatemala, South Africa, Peru, East Timor, Ghana and Sierra Leone. See in this respect the entry on “Truth Commissions” in the Encyclopedia of Genocide and Crimes Against Humanity. Available at: <http://www.ictj.org/static/TJApproaches/Truthseeking/macmillan.TC.eng.pdf>

<sup>9</sup> I/A Court H.R., *Case of Myrna Mack Chang v. Guatemala. Merits, Reparations and Costs*. Judgment of November 25, 2003. Series C No. 101, paras. 180 to 182.

<sup>10</sup> I/A Court H.R., *Case of Myrna Mack Chang v. Guatemala. Merits, Reparations and Costs*. Judgment of November 25, 2003. Series C No. 101, para. 175. Article 30 of the Constitution of the Republic of Guatemala establishes: “Article 30. - Publicity of administrative acts. All the acts of the administration are public. Interested parties have the right to obtain, at any time, reports, copies, reproductions and certifications they request and the showing of the files they wish to consult, unless this involves military or diplomatic matters of national security, or data supplied by individuals under the guarantee of confidence.”

<sup>11</sup> I/A Court H.R., *Case of Myrna Mack Chang v. Guatemala. Merits, Reparations and Costs*. Judgment of November 25, 2003. Series C No. 101, para. 176. It should be underscored that the allegation of nonexistence of the documents requested is not an unusual practice among some States. In this regard, the Supreme Court of Moldova decided in the case *Tasca vs. SIS* that the authorities that alleged the supposed nonexistence of certain documents were obliged to: a) turn over to the person requesting the information an inventory of the total archive of the authority summoned and b) they should allow personal access by the applicant to the archives.

<sup>12</sup> I/A Court H.R., *Case of Myrna Mack Chang v. Guatemala. Merits, Reparations and Costs*. Judgment of November 25, 2003. Series C No. 101, para. 180.

bodies. In cases of human rights violations, when the judicial bodies are attempting to elucidate the facts and to try and to punish those responsible for said violations, resorting to official secret with respect to submission of the information required by the judiciary may be considered an attempt to privilege the 'clandestinity of the Executive branch' and to perpetuate impunity. Likewise, when a punishable fact is being investigated, the decision to define the information as secret and to refuse to submit it can never depend exclusively on a State body whose members are deemed responsible for committing the illegal act. [...] Thus, what is incompatible with the Rule of Law and effective judicial protection 'is not that there are secrets, but rather that these secrets are outside legal control, that is to say, that the authority has areas in which it is not responsible because they are not juridically regulated and are therefore outside any control system...'"<sup>13</sup>

9. Following the above reasoning, it can be concluded that failing to grant the organs that investigate human rights violations State information that can facilitate the clarification of such events undermines public order and national security, the foundation of which is respect for human rights and application of the rule of law to public servants. It also compromises the possibility of clarifying the crimes committed and the right of the victims and their relatives to justice. Finally, it undermines the so-called "equality of arms", one of the central principles of due process, for if the agency denying access to information is the same one accused of actions or omissions in relation to the aggressions committed, the victim of such aggressions finds it impossible to prove his or her arguments.

10. In particular, with respect to the importance of Truth Commissions as a mechanism for clarifying the right to know, the Court has stated: "The Court deems that the establishment of a Truth Commission - depending on its object, proceedings, structure and purposes - can help build and safeguard historical memory, clarify events, and determine institutional, social and political responsibilities in certain periods of time for a society."<sup>14</sup>

**Second argument: denying the relatives of victims of forced disappearance information is tantamount to keeping them in a situation of extreme suffering incompatible with international law**

11. The second argument to consider is that the Inter-American Court has stated on numerous occasions that "[t]he continued denial of the truth about the fate of a disappeared person is a form of cruel, inhuman and degrading treatment for the close family."<sup>15</sup> If States take jurisprudence of the Inter-American Court seriously, they must understand that denying the relatives of the victims information, depriving them access to valuable information on the fate of their loved ones, is equivalent to keeping them in a situation that has been equated to torture, which is manifestly contrary to the American Convention and admits no contrary argument. In fact, the prohibition of torture and inhuman or degrading cruel treatment is absolute and admits no exceptions.

<sup>13</sup> I/A Court H.R., *Case of Myrna Mack Chang v. Guatemala. Merits, Reparations and Costs*. Judgment of November 25, 2003. Series C No. 101, para. 181.

<sup>14</sup> I/A Court H.R., *Case of Radilla-Pacheco v. Mexico*. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 23, 2009. Series C No. 209, para. 74. I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Exception, Merits, Reparations and Costs*. Judgment of November 24, 2010. Series C No. 219, para. 297.

<sup>15</sup> I/A Court H.R., *Case of Trujillo Oroza v. Bolivia. Reparations and Costs*. Judgment of February 27, 2002. Series C No. 92, para. 114. See also I/A Court H.R., *Case of Anzualdo Castro v. Peru. Preliminary Exception, Merits, Reparations and Costs*. Judgment of September 22, 2009. Series C No. 202, para. 113; I/A Court H.R., *Case of La Cantuta v. Peru. Merits, Reparations and Costs*. Judgment of November 29, 2006. Series C No. 162, para. 125. In relation to the suffering caused to the relatives of direct victims, see I/A Court H.R., *Case of Bámaca Velásquez v. Guatemala. Merits*. Judgment of November 25, 2000. Series C No. 70, para. 160; I/A Court of H.R., *Case of the "Street Children" (Villagrán Morales and others) v. Guatemala. Merits*. Judgment of November 19, 1999. Series C No. 63, para. 175 and 176; I/A Court H.R., *Case*

**Third argument: under all circumstances, but especially in processes of transition to democracy, the argument that it is necessary to maintain the secrecy of past atrocities to protect “national security” in the present is inadmissible**

12. The third argument that reinforces the thesis according to which information on serious human rights violations that resides in state archives should be turned over to the victims and their relatives refers to the conditions necessary for a true process of transition to democracy to be successful. In any transition, the right of access to information becomes an essential tool to further the clarification of atrocities of the past. That is why the IACHR has pointed out that in contexts of transition to democracy, freedom of expression and access to information acquire a structural importance. Indeed, it is on the basis of these rights that it is possible to reconstruct the past, recognize the errors committed, provide redress to victims and generate a vigorous public debate that contributes to democratic recovery and the reconstruction of the rule of law.<sup>16</sup> In particular, the right of access to information is fundamental in dissolving authoritarian enclaves that seek to survive the democratic transition.<sup>17</sup>

13. In some cases States have argued that publicizing information about the past could nonetheless endanger “national security.” In this regard, it is essential to recall that the concept of “national security” cannot be interpreted at will. This concept should, in all cases, be interpreted from a democratic perspective.<sup>18</sup> It is therefore surprising that the secrecy of serious human rights violations committed by agents of the State during the authoritarian regime from which the State is transitioning should be considered an indispensable condition for maintaining the “national security” of the new order based on the rule of law. Indeed, from a democratic perspective, the concept of “national security” can never include the secrecy of criminal state activities such as torture or the forced disappearance of persons.

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*Blake v. Guatemala. Reparations and Costs.* Judgment of January 22, 1999. Series C No. 48, para. 114 and 116. See also case *Kurt v. Turkey*, ECHR, Judgment of May 25, 1998, Reports of Judgments and Decisions 1998-III para. 133 (in which the court considered the situation of a mother who had suffered the “anguish of knowing that her son had been arrested and that there was a complete lack of official information regarding his fate”. By virtue of that, the European Court considered that the State of Turkey had violated Article 3 of the European Convention on Human Rights). In the same regard, see *Diana Kordon et al. Forced Disappearance: A Particular Form of Torture*, in James M. Jaranson & Michael K. Popkin (editors) *Caring for Victims of Torture* (1998) (in which it is maintained that the “scope of the phenomenon of disappeared persons made it into a paradigm of the repressive policies of the junta. In the light of its characteristics, we can consider that disappearance is a particular form of torture, a torture suffered by those disappeared which is extended to their family and friends. The disappeared person lives in a land without an owner, lives beyond life and death, without legal protection and at the mercy of his captors. The relatives had a high degree of mental suffering and a profound alteration of their daily life.”) Finally, see also Brazil Report: *Nunca Mais*, pp. 65 and 66 (where it is maintained: “More torturous than a sad certainty is the perennial doubt that, every day, renews the pain and augments it. And that pain gains force and color when those tormented by it feel impotent to undo the knot of uncertainty that afflicts them.”)

<sup>16</sup> IACHR, Petition before the Inter-American Court of Human Rights in Case 11.324, *Narciso González Medina v. Dominican Republic*, May 2, 2010, para. 159.

<sup>17</sup> See, in this regard, Federal Commissioner for the Records of the State Security Service of the former German Democratic Republic (“Birthler Commission”), reports on activities of the years 1999, 2001, 2009, describing the contribution of the office of the Federal Commissioner to the convictions of guards and other persons involved in murders committed in the former borders of the German Democratic Republic. This commission has also facilitated the seeking of redress on the part of victims of arbitrary detention, political persecution, labor discrimination, illegal confiscation of property, etc. Between 1991 and 2009 more than 2.6 million persons consulted the archives kept by the Federal Commissioner. Information available at: [www.bstu.bund.de](http://www.bstu.bund.de)

<sup>18</sup> See I/A Court H.R., *Case Molina Theissen v. Guatemala. Merits.* Judgment of May 4, 2004. Series C No. 106, para. 40.2 (in which the I/A Court H.R. recognized that the repression established in Guatemala toward the end of the 70s and beginning of the 80s was based on an interpretation of the concept of national security known as “doctrine of national security”).

14. In this regard, it would be worth asking, as the European Court of Human Rights has done, what damage to the national security of a democratic State can be done by the dissemination of information on crimes of a past authoritarian regime whose legacy a nation seeks to overcome. The European Court of Human Rights had the opportunity to analyze this question in the context of the processes of “lustration” that were begun in Eastern Europe as the central element of the transition processes, after the fall of the Communist regimes in that region. In the case *Turek v. Slovakia*, the Court maintained the following:

“[I]n proceedings related to the operations of state security agencies, there may be legitimate grounds to limit access to certain documents and other materials. However, in respect of lustration proceedings, this consideration loses much of its validity. In the first place, lustration proceedings are, by their very nature, oriented towards the establishment of facts dating back to the communist era and are not directly linked to the current functions and operations of the security services. Thus, unless the contrary is shown on the facts of a specific case, it cannot be assumed that there remains a continuing and actual public interest in imposing limitations on access to materials classified as confidential under former regimes. Secondly, lustration proceedings inevitably depend on the examination of documents relating to the operations of the former communist security agencies. If the party to whom the classified materials relate is denied access to all or most of the materials in question, his or her possibilities to contradict the security agency’s version of the facts would be severely curtailed. Finally, under the relevant laws, it is typically the security agency itself that has the power to decide what materials should remain classified and for how long. Since, it is the legality of the agency’s actions which is in question in lustration proceedings, the existence of this power is not consistent with the fairness of the proceedings, including the principle of equality of arms. Thus, if a State is to adopt lustration measures, it must ensure that the persons affected thereby enjoy all procedural guarantees under the Convention in respect of any proceedings relating to the application of such measures.”<sup>19</sup>

15. Similar reasoning was applied in Brazil by the Federal Regional Court which resolved a remedy of appeal put forward by the State against a verdict that had ordered it to present, confidentially, all the documents containing information on military actions against the *Guerrilha do Araguaia*. In its appeal, the State argued that “by exposing strategic information, basic and indispensable elements for national security are violated (...), and years of services essential to the public interest are immediately destroyed by a decision that is the result of a disproportionate request, at this time of full normality in the country’s democratic life.”<sup>20</sup> The Brazilian court rejected these allegations and denied the remedy of appeal on this point. In the opinion of the Court, “the Union does not deny the existence of said documents, and all the signs indicate that these documents exist, since it is not credible that the Army should have got rid of all the registers of such an important episode in Brazil’s recent history. The *Guerrilha do Araguaia* ended more than 30 years ago, and after so long there can be no possibility that the restricted release of documents about it should violate ‘basic and essential elements of national security.’”<sup>21</sup> Finally, it added: “Although the classification of the documents questioned is in force, Article 24 of Law 8.159 grants the Judicial Branch, in any case, the power to order the production, in a limited manner, of any

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<sup>19</sup> European Court of Human Rights, *Case of Turek v. Slovakia (Application no. 57986/00)*. Judgment of February 14, 2006, para. 115.

<sup>20</sup> Partial Remedy of Appeal of the Federal Union, dated March 24, 2006, against the decision of the 1<sup>st</sup> Federal Court of the Federal District, within the framework of Lawsuit 2001.39.01.000810-5. State Communication of September 4, 2007, Annex 7, para. 26. Free translation. Available at the case file of the case *Julia Gomes Lund et al.* before the Inter-American Commission on Human Rights, No. 11552.

<sup>21</sup> Decision of the Federal Regional Court of August 10, 2006 on the Appeal filed within the framework of Lawsuit 2001.39.01.000810-5. Free translation. Available at the case file of the case *Julia Gomes Lund et al.* before the Inter-American Commission on Human Rights, No. 11552.

classified (secret) document, as long as it is indispensable for the defense of a person's rights or the clarification of the personal situation of the party.<sup>22</sup>

16. Once again, in transitional processes full respect for the right of freedom of expression and access to information contributes, as few other rights do, to guaranteeing the rights of the victims to truth, justice and reparation.<sup>23</sup> In particular, the right to know the truth on what occurred with regard to forced disappearances can only be satisfied if appropriate mechanisms of access to the corresponding information are adopted. Likewise, the right of access to information constitutes an indispensable guarantee to ensure the implementation of measures of non-repetition of the events of the past: knowledge of the atrocities committed is a necessary condition for preventing the abuses committed from being repeated, promoting accountability and transparency in public management, and forestalling corruption and authoritarianism.<sup>24</sup>

## 2. The positive obligations of the State in relation to access to information on mass human rights violations

17. If the victims of human rights violations have the right to access – directly or indirectly – information relative to said violations contained in military or intelligence archives, the next question is how to ensure that such information will not be concealed, removed or disappeared and thus denied to those who have the right to know it.

18. First, as both the IACHR and the Inter-American Court have reiterated, it cannot be left to the institution accused of committing mass human rights violations to decide whether or not the information exists, and whether or not to make it public. In this regard, the States should permit on-site visits to military and intelligence archives by judges, investigators and other independent investigation authorities whenever the existence of information crucial to their investigations has been denied and there are reasons to believe that the information may exist. A measure of this nature is not unprecedented: the United Nations High Commissioner for Human Rights on various occasions urged the Attorney General of Colombia to “verify [...] the precision and objectivity of the information contained in military intelligence archives on human rights defenders and to make public the result of this work.”<sup>25</sup> Similarly, a number of countries of Eastern Europe opened their intelligence archives as a means of confronting the crimes committed in the past.<sup>26</sup>

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<sup>22</sup> Decision of the Federal Regional Court of August 10, 2006 on the Appeal filed within the framework of Lawsuit 2001.39.01.000810-5. Free translation. Available at the case file of the case *Julia Gomes Lund et al.* before the Inter-American Commission on Human Rights, No. 11552.

<sup>23</sup> See in this respect United Nations, Commission on Human Rights, Updated set of principles for the protection and promotion of human rights by means of the fight against impunity, E/CN.4/2005/102/Add.1, February 8, 2005, principle 5.

<sup>24</sup> See IACHR, Report of the Special Rapporteur for Freedom of Expression, 2009. OAS/Ser.L/V/II.Doc.51, December 30, 2009, chap. IV, para. 5.

<sup>25</sup> United Nations High Commissioner for Human Rights, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia, E/CN.4/2003/13, February 24, 2003, para. 161. See also IACHR, *Third Report on the Situation of Human Rights in Colombia*, OAS/Ser.L/V/II.102, February 26, 1999, chap. VII, para. 59-60, indicating that “independent authorities should be in a condition to have access to intelligence information and decide whether it can be kept secret” and describing as of “utmost importance” the announcement by then President of Colombia Ernesto Samper in the sense that “the Attorney General of the Nation would examine military intelligence files.” See also, United Nations High Commissioner for Human Rights, *Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia*, E/CN.4/2006/9, January 20, 2006, recommendation number 6, “The High Commissioner encourages the Government to promote legislation that adequately regulates the use of military intelligence archives, including the applicable procedure for their annual review by the Office of the Attorney General.”

<sup>26</sup> One may cite, by way of example, the German Law on Stasi Records (Stasi Records Act) of 1990 (whose purpose was to facilitate access by individuals to personal data obtained by Stasi, protect the privacy of those individuals and assure a historical, political and juridical reevaluation of Stasi activities, see § 1 (1), para. 1 to 3); law No. III of 2003 of

19. Second, the State cannot release itself from its obligations simply by alleging that the required information on mass human rights violations committed in the past was destroyed. On the contrary, the State has the obligation to search for such information by all possible means. In this regard, the Inter-American Court has stated 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 [or the victims themselves] and society as a whole must be informed of everything that has happened in connection with said violations.”<sup>27</sup> To comply with this obligation, the State should make a substantive effort, in good faith, and contribute all the necessary resources to reconstruct the information that was supposedly destroyed. In Germany, for example, after the fall of the Berlin Wall, thousands of bags containing the remnants of documentation belonging to the intelligence services were discovered. The Birthler Commission, in charge of applying the law on Stasi Archives, determined that the documents of 6,500 bags could be salvaged, and since then the documents in over four hundred of the bags were manually reconstructed.<sup>28</sup> The Commission has considered that States should make significant efforts to find information that was supposedly destroyed; if it was possible in Germany to reconstruct documents that were literally in pieces, States in our region should carry out serious, committed and effective investigations to find copies of the information that has supposedly been lost.

20. Third, should the above efforts prove unsuccessful, the State has in any case the obligation to reconstruct the lost information. With this in mind, it should carry out good faith investigations to make it possible to clarify the events under investigation. In effect, the “Set of principles for the protection and promotion of human rights by means of the fight against impunity” of the United Nations establishes that States have the “duty to preserve archives and other evidence concerning violations of human rights and humanitarian law,” including archives of “(a) national governmental agencies, particularly those that played significant roles in relation to human rights violations; (b) local agencies, such as police stations, that were involved in human rights violations; (c) State agencies, including the office of the prosecutor and the judiciary, that are involved in the protection of human rights; and (d) materials collected by truth commissions and other investigative bodies.”<sup>29</sup> In this regard, the investigations should be oriented toward the persons who could have had access to the information, if it was destroyed, or toward those who participated, at all levels, in the operations or the events under investigation.

21. In short, the obligations mentioned consist of the duty to carry out, in good faith, significant investigative efforts aimed at clarifying the human rights violations being examined. These efforts have to include the opening of archives so that the institutions investigating the event can conduct direct inspections; conducting searches of official installations and making inventories; advancing search operations that include searches of the places where the information could lie; and holding hearings and questioning those who could know where the information is or to those who

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Hungary, known as the Disclosure Act; law No. 140 of 1996 of the Czech Republic, known as the STB Files Access Act; law No. 187 of 1999 of Romania, known as the Access to Personal Files Law; the Law of Rehabilitation of Victims of Political Persecution of Moldova; the Law for Access and Disclosure of Documents of Bulgaria of 2006. These laws establish legal frameworks tending to provide citizens’ access to the archives of repressive and vigilance agencies of previous regimes.

<sup>27</sup> I/A Court H.R., *Case of Myrna Mack Chang v. Guatemala. Merits, Reparations and Costs*. Judgment of November 25, 2003. Series C No. 101, para. 274.

<sup>28</sup> See, in general, Jefferson Adams, *Probing the East German State Security Archives*, 13 *International Journal of Intelligence and Counterintelligence* 21 (2000).

<sup>29</sup> UN Commission on Human Rights. Updated Set of principles for the protection and promotion of human rights through action to combat impunity. E/CN.4/2005/102/Add.1. February 8, 2005. Definitions and Principle 3.



could reconstruct what occurred; among other actions. A public call for those who have documents to turn them in is not sufficient to satisfy the abovementioned obligations.

### 3. The obligation to adapt States' normative framework to international obligations

22. Finally, in order to satisfy the right of victims of human rights violations to access the information in state archives that makes it possible to clarify such crimes, it is necessary to adapt the legal regime to relevant inter-American standards.<sup>30</sup> In this regard, the legal framework regulating the right of access to information should contain at least the following obligations of the State.<sup>31</sup>

23. First, the State has the obligation to define precisely and clearly through a law in the formal and material sense, the grounds for restricting access to certain information.<sup>32</sup> The right of access is governed by the principles of good faith and maximum transparency, and therefore, in principle, the information in the power of the State should be public save the limited exceptions established by law.<sup>33</sup> In any event, exceptions such as "national security", "national defense" or "public order" should be defined and interpreted in accordance with the inter-American juridical framework and, in particular, with the American Convention on Human Rights.<sup>34</sup> In no case can the information on serious human rights violations imputed to the agencies of the State be kept secret and denied to the organs of administration of justice or of historical clarification.<sup>35</sup>

24. Moreover, the State has the obligation to guarantee appropriate and effective proceedings for the processing and resolution of requests for information that establish short timeframes for resolving and providing the information, and that are the responsibility of officials duly trained and subject to legal obligations.<sup>36</sup> This information should be supplied without requiring from the person a direct or personal interest or the reasons for which s/he has requested the information, except when one of the permissible exceptions is involved.<sup>37</sup> The person who has received the information has the right to disseminate and publish it through any means.<sup>38</sup>

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<sup>30</sup> IACHR, Report of the Special Rapporteur for Freedom of Expression, 2009. OAS/Ser.L/V/II.Doc. 51 December 30, 2009, chap. IV, para. 52.

<sup>31</sup> To see more detailed development of each of these principles Cfr. IACHR, Report of the Special Rapporteur for Freedom of Expression, 2009. OAS/Ser.L/V/II.Doc. 51 December 30, 2009, chap. IV

<sup>32</sup> I/A Court H.R., *Case of Claude Reyes and et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151, para. 89. I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Exception, Merits, Reparations and Costs*. Judgment of November 24, 2010. Series C No. 219, para. 197.

<sup>33</sup> I/A Court H.R., *Case of Claude Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151, para. 92. I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Exception, Merits, Reparations and Costs*. Judgment of November 24, 2010. Series C No. 219., para. 199.

<sup>34</sup> IACHR, Report of the Special Rapporteur for Freedom of Expression, 2009. OAS/Ser.L/V/II.Doc. 51 December 30, 2009, chap. IV.

<sup>35</sup> I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Exception, Merits, Reparations and Costs*. Judgment of November 24, 2010. Series C No. 219, paras. 196-202.

<sup>36</sup> *Idem*, para. 163.

<sup>37</sup> I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Exception, Merits, Reparations and Costs*. Judgment of November 24, 2010. Series C No. 219, para. 197.

<sup>38</sup> I/A Court H.R., *Case of Claude Reyes et al. v. Chile. Merits, Reparations and Costs*. Judgment of September 19, 2006. Series C No. 151, para. 77. I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Exception, Merits, Reparations and Costs*. Judgment of November 24, 2010. Series C No. 219, para. 199.

25. In addition, the State should have a simple, rapid and effective judicial remedy which, in the cases in which a public authority denies information, determines whether an infringement of the right to information of the applicant took place and, if so, orders the corresponding institution to deliver the information.<sup>39</sup> The judicial authorities should be able to access the information *in camera* or on visits *in loco* to determine either if the arguments of State agencies are legitimate or to verify whether purportedly nonexistent information is indeed so.

26. Fourth, the State has the obligation to adopt well-founded written decisions in the cases in which the information is denied. Such a decision should make it possible to understand the motives and norms on which the authority based its decision not to deliver the information or part of it and determine whether such a restriction is compatible with the parameters provided for by the Convention.<sup>40</sup>

27. In addition, the State should adopt norms, policies and practices that make it possible to conserve and administer the information appropriately. In this regard, the 2004 Joint Declaration of the rapporteurs for freedom of expression of the UN, OAS and OSCE explains that “public authorities should be required to meet minimum record management standards,” and that “systems should be put in place to promote higher standards over time.”<sup>41</sup>

28. Finally, the State has the obligation to produce, recover, reconstruct or capture the information it needs in order to comply with its duties under international, constitutional or legal norms. In this regard, for example, if information that it should safeguard was destroyed or illegally removed and such information was necessary to clarify human rights violations, the State should, in good faith, make every effort within its reach to recover or reconstruct said information, in the terms already described.<sup>42</sup>

29. In any case, when the response to the applicant is that the information is nonexistent, the State should indicate all the procedures carried out to try to recover it or reconstruct it in such a way that said procedures may be subject to judicial review.<sup>43</sup> In this regard, the Court indicated that in cases in which a punishable act is being investigated, the decision to maintain the confidentiality or deny delivery of information or to establish whether it exists or is nonexistent, cannot depend on the state organ to whose members the commission of the event being investigated is attributed.<sup>44</sup>

30. With regard to violations of human rights, the Court has established 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.”<sup>45</sup>

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<sup>39</sup> *Idem*, para. 137.

<sup>40</sup> *Idem*, para. 122.

<sup>41</sup> Joint Declaration of the Rapporteurs for Freedom of Expression of the UN, OAS and OSCE, (2004). Available at: <http://www.cidh.org/relatoria/showarticle.asp?artID=319&IID=1>.

<sup>42</sup> IACHR, Report of the Special Rapporteur for Freedom of Expression, 2009. OAS/Ser.L/V/II.Doc. 51, December 30, 2009, chap. IV, para. 83.

<sup>43</sup> I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Exception, Merits, Reparations and Costs*. Judgment of November 24, 2010. Series C No. 219, para. 211.

<sup>44</sup> I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Exception, Merits, Reparations and Costs*. Judgment of November 24, 2010. Series C No. 219, para. 202.

<sup>45</sup> I/A Court H.R., *Case of the 19 Tradesmen v. Colombia. Merits, Reparations and Costs*. Judgment of July 5, 2004. Series C No. 109, para. 261; I/A Court H.R., *Case of Carpio Nicolle et al. v. Guatemala. Merits, Reparations and*

31. Particularly in transitional justice processes, States should adopt novel, effective and reinforced measures to allow the victims and their relatives access to information on human rights violations committed in the context of the past regime.

32. Indeed, to offer true guarantees of non-repetition, the transition should break from the culture of authoritarianism in which secrecy in public management predominates, particularly regarding human rights violations.<sup>46</sup> This opacity in State proceedings is fertile ground for the renewed commission of serious human rights violations. Maintaining secret enclaves under the control of institutions accused of committing the violations of the past is of no use to the transitional process and hinders full consolidation of the democratic system by maintaining enclaves of authoritarianism. For this reason, we insist that transitional processes should incorporate special guarantees to protect the right of access to information on human rights violations, as mechanisms to strengthen the establishment of genuine rule of law on the basis of acknowledgment of the atrocities committed in the past and adoption of the necessary measures to prevent them in the future. This is a fundamental debt to all those persons whose unjust suffering we were unable to avoid and whom today we have the duty to protect.

#### 4. The Court's judgment in the case of *Gomes Lund et al (Guerrilha do Araguaia) v. Brazil* and the right of access to information

33. On November 24, 2010, in its verdict in the case of *Gomes Lund et al*, the Inter-American Court declared that the State of Brazil had violated its international obligations as a result of the military operations of the Brazilian army during the years 1973 and 1974, the result of which was the disappearance and death of the alleged members of the resistance group known as *Guerrilha do Araguaia*. The Court also found Brazil responsible for the absence of investigations, sanctions and suitable reparations to the victims of these operations. In its verdict, the Court found, *inter alia*, that the State had violated the right of access to information of the relatives of the victims of the military incursions by failing to provide them the information that existed on these operations in a timely manner.

34. In point of fact, one of the issues the Court had to resolve in the case was whether the State's refusal to turn over all the information available in military archives on the abovementioned military operations had violated the right of access to the information of the relatives of the victims who were disappeared and murdered. In the Commission's application to the Court and during the litigation of the case, the IACHR put forward the arguments set forth in the preceding paragraphs of this document. For the reasons set forth below and based on the standards cited in the paragraph immediately preceding, the Court found that despite the State's most recent efforts to deliver all the available information, the right of access to information of the victims and their relatives, enshrined in Article 13 of the American Convention, had been violated. Consequently, it ordered the State to continue implementing initiatives to search, archive and publish all the information on the *Guerrilha do Araguaia* as well as the information related to human

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*Costs*. Judgment of November 22, 2004. Series C No. 117, para. 128, and, I/A Court H.R., *Case of Myrna Mack Chang v. Guatemala. Merits, Reparations and Costs*. Judgment of November 25, 2003. Series C No. 101, para. 274. I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Exception, Merits, Reparations and Costs*. Judgment of November 24, 2010. Series C No. 219, para. 202.

<sup>46</sup> See IACHR, Report of the Special Rapporteur for Freedom of Expression, 2008. OAS/Ser.L/V/II.134.Doc 5 rev.1, February 25, 2009, chap. IV, para. 3.

rights violations during the military regime.<sup>47</sup> The Court further ordered Brazil to adopt all the legislative, administrative and other measures necessary to strengthen its normative framework on access to information, in accordance with inter-American standards.<sup>48</sup>

35. To support its position, the Court began by clarifying the scope of the right of access to information of the victims of grave human rights violations.<sup>49</sup> As mentioned in the previous paragraph, the Court found that victims have the right to access information on human rights violations in a direct and timely manner. In this respect, and based on the right of access to justice and access to information, the Court reaffirmed the obligation to satisfy the right of victims of grave human rights violations and their relatives, as well as of society as a whole, to know the truth.<sup>50</sup>

36. The Court indicated that the public official to define whether or not the authority delivers the information requested or establishes whether it exists cannot lie with the authority accused of violating human rights.<sup>51</sup> Likewise, the Court recognized that the right of access to information is not fully satisfied with a state response in which it is declared that the information requested is nonexistent.<sup>52</sup> When the State has the obligation to conserve information or to capture it and considers however that it does not exist, it should set forth all the steps it took to try to recover or reconstruct the lost or illegally removed information. Otherwise, the right of access to information is understood to be violated.<sup>53</sup> Finally, the Court understood that the right of access to information should be guaranteed by means of a suitable and effective remedy that is resolved within a reasonable time.<sup>54</sup>

37. The most important facts of the case in point regarding the right of access to information can be summarized in the following manner: on February 21, 1982, the relatives of the victims of forced disappearance of the military operations against the *Guerrilha do Araguaia*, filed a public civil action with the sole objective that all the information on these operations be turned over to them in order to know "the truth of what occurred." On June 30, 2003, 21 years after the action was initiated and after delays and conflicting decisions,<sup>55</sup> the verdict of first instance ordered the State to turn over the respective information to the victims and their relatives within a term of 120 days. The State, however, again filed a series of appeals that delayed the definitive judicial decision until October 9, 2007. Nonetheless, according to the Court, it was only in March 2009 that

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<sup>47</sup> I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Exception, Merits, Reparations and Costs*. Judgment of November 24, 2010. Series C No. 219, para. 292.

<sup>48</sup> I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Exception, Merits, Reparations and Costs*. Judgment of November 24, 2010. Series C No. 219, para. 293.

<sup>49</sup> Corte I.D.H. *Caso Gomes Lund y otros (Guerrilha do Araguaia) v. Brasil*. Excepciones Preliminares, Fondo, Reparaciones y Costas. Sentencia de 24 de noviembre de 2010. Serie C No. 219, párr. 197.

<sup>50</sup> I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Exception, Merits, Reparations and Costs*. Judgment of November 24, 2010. Series C No. 219, para. 200.

<sup>51</sup> I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Exception, Merits, Reparations and Costs*. Judgment of November 24, 2010. Series C No. 219, para. 202.

<sup>52</sup> I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Exception, Merits, Reparations and Costs*. Judgment of November 24, 2010. Series C No. 219, para. 202.

<sup>53</sup> I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Exception, Merits, Reparations and Costs*. Judgment of November 24, 2010. Series C No. 219, para. 211.

<sup>54</sup> I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Exception, Merits, Reparations and Costs*. Judgment of November 24, 2010. Series C No. 219, para. 219-225.

<sup>55</sup> I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Exception, Merits, Reparations and Costs*. Judgment of November 24, 2010. Series C No. 219, para. 222.

compliance with this judgment was actually ordered and the State began to execute acts tending to comply with the decision, which included, *inter alia*, the delivery of around 21,000 documents from the National Archive.

38. In its judgment, the Court recognizes the important advances made by the State of Brazil on this issue, but underscores three important facts. First, it calls attention to the fact that during the entire public access proceeding, the State alleged that the information did not exist and it was therefore impossible to deliver it, while in 2009 it delivered a considerable amount of information related to the issue in question. Second, the Court observes that the State had failed to provide the available information notwithstanding the fact that the first judicial requests were made in 2003. Finally, the Court calls attention to the fact that the definitive judgment and its subsequent execution were delayed unjustifiably for decades. These three facts, and the consideration that the victims had the right to access the information requested and to a remedy that would protect this right within a reasonable time, led the Court to declare the international responsibility of the State for the violation of the right of access to information enshrined in Article 13 of the American Convention.

39. In one of its most important paragraphs, the Court indicates: "The State cannot defend itself by citing the lack of evidence of the existence of the requested documents. Rather, it should justify the failure to provide them by demonstrating that it has adopted all the measures within its reach to prove that the information requested indeed did not exist. It is essential, in order to guarantee the right to information, that the public authorities act in good faith and diligently carry out the actions necessary to ensure the effectiveness of this right, especially when it is a question of knowing the truth of what happened in cases of serious human rights violations such as the forced disappearances and extrajudicial execution in the present case."<sup>56</sup>

40. Consequently, as has been indicated, the Court ordered the State to continue implementing initiatives to search, archive and publish all information on the *Guerrilha do Araguaia* as well as the information relating to human rights violations that occurred during the military regime.<sup>57</sup> It further ordered Brazil to adopt all the legislative, administrative and other measures necessary to strengthen its normative framework on access to information, in accordance with inter-American standards.<sup>58</sup>

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<sup>56</sup> I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Exception, Merits, Reparations and Costs*. Judgment of November 24, 2010. Series C No. 219, para. 211.

<sup>57</sup> I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Exception, Merits, Reparations and Costs*. Judgment of November 24, 2010. Series C No. 219, para. 292.

<sup>58</sup> I/A Court H.R., *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil. Preliminary Exception, Merits, Reparations and Costs*. Judgment of November 24, 2010. Series C No. 219, para. 293.