Legal Studies, 2017
DOI: 10.1111/lest.12172

The right to the truth in international law: The significance of Strasbourg's contributions

Alice M. Panepinto*
Warwick Law School

The concept of a right to the truth is increasingly utilised in different settings to empower victims and societies to find out about past abuses linked to conflict or authoritarianism. Since the last comprehensive study of this topic in 2006, there has been little attempt to draw together the advancements of fragmented practices. Recent developments in European human rights call for a fresh analysis of the right to the truth as a freestanding principle linked to, but separate from, the state duty to investigate. This paper takes stock of the more recent evolutions of the right to the truth and contributes to its independent conceptualisation. The first part investigates whether there is growing consistency between the Inter-American and European human rights systems around the contours of the right to the truth, as linked to survivors' right to know the past and to access justice (make claims) as an individual and collective matter. The second part broadens the discussion to the status of the right to the truth under international law in light of the ECHR jurisprudence, and considers whether the available legal categories are suited to its formalisation.

Alice M. Panepinto, Research Fellow, Centre for Human Rights in Practice, School of Law, Warwick University, Coventry CV4 7AL, UK. Email: a.panepinto@warwick.ac.uk

INTRODUCTION

The right to the truth is on an upward trajectory in international law and it is widely discussed in relation to conflict and authoritarianism.[1] Its modern origins can be found in the jurisprudence of the Inter-American Human Rights system (IACHR) dealing with the legacy of violent regimes in Latin America.[2] In 2010 the UN General Assembly

* The author would like to thank J.A. Sweeney, A. O'Donoghue and colleagues at Warwick for feedback on earlier drafts. I am grateful for comments received at the "The European Court of Human Rights: Promoter or Predator of Democratic Transitions?" workshop co-hosted by PluriCourts (University of Oslo) and the Center for Global Public Law, Koç University in Istanbul in September 2015, and for the helpful feedback of the anonymous reviewers. All errors remain my own.

1. Inter alia, JE Méndez 'Accountability for past abuses' (1997) 19 HRQ 255; PB Hayner *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (London: Routledge, 2nd edn, 2010).

2. Inter alia, M Popkin and N Roht Arriaza 'Truth as justice: investigatory commissions in Latin America' (1995) 20(1) Law & Social Inquiry 79; JM Pasqualucci 'The whole truth and nothing but the truth: truth commissions, impunity and the inter-American human rights system' (1994) 12 BU Int'l LJ 321; JE Méndez and J Mariezcurrena 'Accountability for past human rights violations: contributions of the inter-American organs of protection' (1999) 26 Social Justice 84.

established the international day for the right to the truth,[3] and a UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence has been appointed.[4] More recently the European Court of Human Rights (the Court, ECtHR) has taken steps towards acknowledging the right to the truth (linked to the state obligation to investigate) in relation to authoritarianism and conflict (eg *Aslakhanova v Russia;*[5] *Association 21 December 1989 v Romania;*[6] and *Mocanu v Romania*[7]), as well as in other contexts where state policies limit human rights, for instance as part of counter-terror practices (eg Grand Chamber judgment of *El-Masri v FYRM*[8]).[9] These developments call for a reappraisal of the right to the truth as part of international human rights law (IHRL).

In the aftermath of widespread – and often symbolic – human rights abuses connected to conflict and authoritarianism, individual victims and society at large reckon with the past in many ways to acknowledge harm and identify those responsible. Truth seeking initiatives such as trials and truth commissions contribute to the formation of collective memories, which can then become the object of further debates about the past. But top-down initiatives alone are likely to marginalise some victim accounts and disempower minority or counter-establishment views. The right to the truth offers survivors a tool to instigate truth-seeking processes though an actionable right to hold authorities accountable for effective investigations. This right, however, remains elusive. Building on the last comprehensive study of the right to the truth in 2006 by Yasmin Naqvi,[10] this article takes stock of recent developments of this right and explores what they mean globally.

Specifically, this research presents a fresh analysis of the right to the truth in light of new ECHR case law and examines its impact on its international formulation. The paper evaluates the growing consistency around the contours of the right to the truth and the extent to which it has evolved in public international law (PIL). The first part traces the evolution of the right to the truth in global and regional sources, providing a comparative study of Inter-American and European human rights case law. Two distinct but intertwined themes are analysed: firstly, the connection between the state's duty to investigate and survivors' right to know the past through an actionable right; and secondly, the link between the individual and collective dimensions of the right to the

3. UNGA Res 65/196 'Proclamation of 24 March as the International Day for the Right to the Truth concerning Gross Human Rights Violations and for the Dignity of Victims' (21 December 2010) UN Doc A/RES/65/196.

4. Human Rights Council Resolutions A/HRC/RES/18/7 of 29 September 2011 and A/HRC/RES/27/3 of 25 September 2014 setting out the mandate of the (first) Special Rapporteur, appointed 1 May 2012.

5. *Aslakhanova and others v Russia*, Apps Nos 2944/06 and 8300/07, 50184/07, 332/08, 42509/10 (ECHR, 18 December 2012).

6. *Association 21 Décembre 1989 v Romania*, App Nos 33810/07 and 18817/08 (ECHR, 24 May 2011).

7. *Mocanu and others v Romania*, App Nos 10865/09, 45886/07 and 32431/08 (ECHR, 17 September 2014).

8. *El-Masri v FYRM* [GC], App No 39630/09 (ECHR, 13 December 2012).

9. F Fabbrini 'The European Court of Human Rights, extraordinary renditions and the right to the truth: ensuring accountability for gross human rights violations committed in the fight against terrorism' (2014) 14(1) HRLR 85.

10. Y Naqvi 'The right to truth in international law, fact or fiction?' (2006) 88 IRRC 245. See also the earlier TM Antkowiak 'Truth as right and remedy in international human rights experience' (2001–2) 23 Mich JIL 977.

https://doi.org/10.1111/lest.12172 Published online by Cambridge University Press

truth. The second part discusses what these developments mean in international law, and considers whether existing legal categories (customary international law (CIL) and general principles of law) are suited to the formalisation of the right to the truth. The findings suggest that regardless its formal characterisation, the repeated and varied uses of the right to the truth demonstrate its importance and benefits.

1. THE STATUS AND CONTOURS OF THE RIGHT TO THE TRUTH

The discovery of truth about past harm through formal legal proceedings[11] is inherently permeable to uneven power structures that impact truth seeking initiatives such as trials and truth commissions. Existing laws may (deliberately or not) include and privilege the accounts of some groups and marginalise others.[12] Through the applications of the right to the truth, victims and survivors can attempt to challenge prevailing versions of history and compel authorities to investigate and make public contested accounts of the past. Framing the need to know as a right empowers individuals to instigate truth-seeking processes directly. This, in turn, may help broaden perspectives during truth seeking processes, and ensure greater inclusivity in building collective memories.

The slow recognition of the right to the truth and its uneven application across the world calls for a study of its sources and development in order to understand its contours, normative status and value. Its origins have been traced in International Humanitarian Law (IHL):[13] Art 32 of the Additional Protocol I to the Geneva Conventions refers to the 'right of families to know the fate of their relatives', both with respect to the remains of the deceased (Art 34) and for missing persons (Art 33).[14] But its application is limited to armed conflicts, excluding the full range of situations in which serious violations occur (including authoritarianism). Moreover, IHL lacks easily justiciable rights that individuals may action to uncover the truth about past harm, as well as appropriate tools to deal with non-state actors.

In international criminal law (ICL), the Rome Statute of the International Criminal Court (ICC) provides only a 'limited realisation' of the right to the truth, restricted to the 'context of enforced disappearances (Article 7(1)(i))'.[15] Although, in principle, it could accommodate this right, costly and largely ineffective victim participation

11. The concept of the 'legal truth' is complex and cannot be discussed exhaustively in this article. Here, it is used to describe information about past harm elicited as part of formal (legal) proceedings. On this topic, see inter alia JM Balkin 'The proliferation of legal truth' (2003) 26 Harv J of L & Pub Pol 5; MS Moore 'The plain truth about legal truth' (2003) 26 Harv J of L & Pub Pol 23; RS Summers 'Formal legal truth and substantive truth in judicial fact-finding – their justified divergence in some particular cases' (1999) 18 Law & Philosophy 497.

12. C Campbell and C Turner 'Utopia and the doubters: truth, transition and the law' (2008) 28 Legal Studies 374, 376–377.

13. Naqvi, above n 10, 248.

14. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977) 1125 UNTS 3.

15. H Davis and M Klinkner 'A victim's right to truth and the ICC' (2013), available at http://www.nuffieldfoundation.org/victims-right-truth-and-icc (accessed 3 January 2016), 10; M Klinkner and E Smith 'The right to truth, appropriate forum and the International Criminal Court' in N Szablewska and SD Bachmann (eds), *Current Issues in Transitional Justice: Towards a More Holistic Approach* (New York: Springer, 2015).

https://doi.org/10.1111/lest.12172 Published online by Cambridge University Press

schemes[16] suggest that ICL is not yet ripe for operationalising victims' right to the truth. Moreover, the punitive nature of criminal law exacerbates tensions between justice served, namely, convictions, and justice understood more broadly, in which accountability and punishment for past abuses could be uncoupled.

Today, the right to the truth – as presented in the language of rights – most closely relates to IHRL. It is framed as a right 'in relation to other fundamental human rights by human rights bodies and courts' and referred to as such in truth seeking mechanisms.[17] Since the 1980s and 1990s the UN Human Rights Committee has considered cases about disappearances, death in police custody, prison torture and arbitrary detention in the contexts of authoritarianism and civil conflict in light of the International Covenant on Civil and Political Rights.[18] This right is now being channelled and developed through the work of the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, whose 2013 Report clearly states that the right to the truth is 'enshrined in a number of international instruments'.[19]

Building on existing sources, the 2013 Report by the Special Rapporteur on the promotion of truth frames the current UN understanding of the right to the truth within the scope of human rights. The Report sets out a state requirement to 'establish institutions, mechanisms and procedures that are enabled to lead to the revelation of

16. Ibid, citing C Van den Wyngaert 'Victims before international criminal courts: some views and concerns of an ICC trial judge' (2012) 44 Case Western Reserve J of Int'l L 475.

17. Naqvi, above n 10, 267.

18. Eg Human Rights Committee decisions *Dermit Barbato v Uruguay*, Comm No. 84/1981 (1983); *Muteba v Zaire*, Comm No. 124/1982 (1984); *Laureano v Peru* Comm No. 540/1993 (1996); *Zelaya Blanco v Nicaragua*, Comm No. 328/1988 (1994).

19. UNHRC, Twenty-fourth session 'Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff' (28 August 2013) UN Doc A/HRC/24/42. These are: (1) International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010), 2715 UNTS (CED), Art 24(2) (in September 2013, 93 signatories and 40 ratifications); (2) Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ('Van Boven/Bassiouni Principles'), UNGA Res 60/147 (16 December 2005) UN Doc A/RES/60/147; (3) Human Rights Council Resolutions 9/11 on the Right to the Truth, UNHRC Res 9/11 (24 September 2008) 'Right to the truth', UN Doc A/HRC/9/L.12 para 1, and 12/12, UNHRC Res 12/12 (12 October 2009) UN Doc A/HRC/RES/12/12; (4) UN ECOSOC, Commission on Human Rights, Promotion and Protection of Human Rights 'Study by the Office of the UN High Commissioner for Human Rights on the right to truth' (8 February 2006) UN Doc E/CN.4/2006/91; (5) UN Committee against Torture 'Consideration of reports submitted by States parties under Article 19 of the Convention, Concluding observations: Colombia' (4 May 2010), UN Doc CAT/C/COL/CO/4, para 27; (6) UNHRC 'Report of the Working Group on Enforced or Involuntary Disappearances' (26 Jan 2011) UN Doc A/HRC/16/48: 'The existence of the right to the truth as an autonomous right was acknowledged by the Working Group on Enforced or Involuntary Disappearances (WGEID) in its very first report (E/CN.4/1435, 22 Jan 1981, para 187)'; (7) UNHRC 'Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism' (1 March 2013) UN Doc A/HRC/22/52, para 23; (8) UNHRC 'Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, Mission to Paraguay' (1 October 2007) UN Doc A/HRC/7/3/Add.3, para 82; (9) UNHRC 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression' (20 April 2010) UN Doc A/HRC/14/23, para 34.

https://doi.org/10.1111/lest.12172 Published online by Cambridge University Press

the truth', described as 'a process to seek information and facts about what has actually taken place, to contribute to the fight against impunity, to the reinstatement of the rule of law, and ultimately to reconciliation'.[20] This reflects the language of the 'Van Boven/Bassiouni Principles' adopted by the General Assembly in 2005, affirming that victims have the right to 'access to relevant information concerning violations and reparation mechanisms', and 'should be entitled' to 'learn the truth in regard to (…) violations'.[21]

Among the sources listed in the 2013 Report, the only clear treaty provision enshrining the right to the truth is Art 24(2) of the 2006 International Convention for the Protection of All Persons from Enforced Disappearance (CED):

> 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.

The right to the truth, however, extends beyond the specific instance of disappearance, as evidenced in Human Rights Commission and Human Rights Council resolutions;[22] for example, it may be used to uncover information about confirmed killings and structural violence against certain ethnic or political groups. The 2005 UN Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity (Orentlicher Principles) already acknowledged the broad scope of the right to the truth:

> Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. [23]

Moreover, the 2006 Study on the Right to Truth of the Office of the UN High Commissioner for Human Rights confirmed the 'inalienable right to know the truth vis-à-vis gross human rights violations and serious crimes under the international law'.[24] This indicates its relevance across many instances of abuse, constituting a cross-cutting independent right that spans different contexts and types of harm inflicted during conflict and authoritarianism.

The 2005 Orentlicher Principles also outlined the link between the victims' right to know and the 'general obligations of states to take effective action to combat impunity'.[25] The state obligation to investigate is key to giving the right to the truth a degree of justiciability, notwithstanding the difficulties of operationalising it in political contexts where human rights are abused. In extending the right to the truth to counterterrorism practices, the Special Rapporteur on the promotion and protection

20. Ibid, para 20.

21. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law ('Van Boven/Bassiouni Principles'), Principle X. General Assembly resolution 60/147 of 16 December 2005.

22. See UNCHR Res 2005/66 'Right to the truth' (20 April 2005) UN Doc E/CN.4/RES/2005/66; UNHRC decision 2/105 (27 November 2006); UNHRC Res 9/11 and UNHRC Res 12/12.

23. ECOSOC, Commission on Human Rights, Promotion and Protection of Human Rights 'Report of the independent expert to update the set of principles to combat impunity, Diane Orentlicher' (8 February 2005) UN Doc E/CN.4/2005/102/Add.1, Principle 2.

24. OHCHR 'Study on the right to truth', above n 19.

25. Orentlicher, above n 23, Principles 1 and 4.

https://doi.org/10.1111/lest.12172 Published online by Cambridge University Press

of human rights and fundamental freedoms while countering terrorism has stated that 'the legal right of the victim and of the public to know the truth' is matched by:

> Corresponding obligations on States which can be conveniently gathered together under the rubric of the international law principle of accountability', which extends to 'all three branches of government'.[26]

This is important for holding states to account when truth seeking is obstructed or investigations are known from the start to be ineffective, as some of the regional case law has found (eg ECHR, *Association 21 Décembre v Romania*). So by linking the right to the truth to a corresponding state obligation, regardless of the successor regime's connection to past harms, survivors of abuse may in principle instigate inquiries into historic abuses, which in turn contribute to shaping collective memories.

(a) IACHR contributions to the right to the truth

The Special Rapporteur on the promotion of truth Pablo de Greiff has stated that 'the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights were at the forefront of developing jurisprudence on the right to truth of the victim, his or her next of kin, and the whole of society'.[27] Former President of the Inter-American Court of Human Rights (IACtHR) Antônio Augusto Cançado Trindade echoed this in relation to enforced disappearances.[28] IACtHR jurisprudence considers the truth as a fully justiciable right.[29] Two key intertwined features emerge from that case law: firstly, the centrality of the state's duty to investigate in order to satisfy the applicants' right to the truth. Secondly, the clear link between the individual and collective dimensions of the right to the truth, recognising that society as a whole, in addition to direct victims, has an interest in knowing about the past.

The IACtHR has employed the right to the truth to ensure states are held accountable for past institutional abuse and for refusing to investigate mass violence. And while this right is actionable by direct victims, its effects are relevant more broadly. *Manuel Bolaños* was the first significant Inter-American Commission (the Commission) case involving the right to the truth about enforced disappearances and location of remains.[30] That decision found that the state's failure to 'use all means at its disposal to carry out a serious investigation of violations committed within its jurisdiction to identify those

26. Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (2013), above n 19, paras 23 and 27.
27. Report of the Special Rapporteur on the promotion of truth (2013), above n 19, para 19.
28. AA Cançado Trindade 'Enforced disappearances of persons as a violation of jus cogens: the contribution of the jurisprudence of the Inter-American Court of Human Rights' (2012) 81 Nordic J of Int'l L 507.
29. JE Mendez 'An emerging "right to truth": Latin-American contributions', in S Karstedt (ed) *Legal Institutions and Collective Memories* (Oxford: Hart, 2009) pp 54–55. See also E González and H Varney (eds) *Truth Seeking: Elements of Creating an Effective Truth Commission* (Brasilia, Amnesty Commission of the Ministry of Justice of Brazil; New York, International Center for Transitional Justice 2013) pp 5–6. Notably, the Special Rapporteur for Freedom of Expression of the Organisation of American States (OAS) has placed the right to truth firmly on her agenda; see for instance the section on the right to the truth on the OAS website: http://www.oas.org/en/iachr/expression/showarticle.asp?artID = 156&lID = 1 (accessed 3 January 2016).
30. *Bolaños v Ecuador*, Inter-American Commission on Human Rights (12 September 1995) Case 10.580, Report No 10/95, as discussed by OAS, Right to the Truth, fn [1].

https://doi.org/10.1111/lest.12172 Published online by Cambridge University Press

responsible' was a violation of the Inter-American Convention (IACHR).[31] Specifically, the right to the truth was linked to Art 25 (the Right to Judicial Protection), namely the right of the victim's family to know the fate of disappeared relatives. But as stated on the website of the Organisation of American States, the right to the truth also has a basis 'in Articles 1(1) (Obligation to Respect Rights), 8 (Right to a Fair Trial), and 13 (Freedom of Thought and Expression)'.[32] This suggests that while the right to the truth is not listed in the IACHR, it is more than a procedural corollary to an existing right: it can be actioned in conjunction with an enumerated right but it also carries a special weight of its own as a cross-cutting principle.

To counter attempts to forget about the past and move on, the IACHR system has clarified that Art 13[33] is crucial to 'delivering' the right to the truth to family members and society as a whole, as opposed to amnesties.[34] The IACtHR has stated that amnesty laws pose an obstacle to the right to the truth,[35] because blanket policies to end investigations into past abuses cannot satisfy survivors' right to know the circumstances and responsibilities.

The second aspect to consider is the overlap between individual and collective functions of the right to the truth, understood as serving interests beyond the parties to a case. *Lucio Parada Cea et al v El Salvador* describes the right to the truth as a:

> Collective right which allows a society to gain access to information essential to the development of democratic systems, and also an individual right for the relatives of the victims, allowing for a form of reparation.[36]

The notorious *Villagran-Morales et al. v Guatemala* (street children) case also provides a pertinent example of the importance for society at large to uncover the truth about the state's role in abuse.[37] The inextricable connection between the individual and collective right to know became apparent in the high-profile case of the political assassination of Monsignor Oscar Romero, Archbishop of El Salvador. The Commission found that the state's failure to investigate the circumstances of extra-judicial killing constituted a violation of its duty to reveal the truth to both the victim's family as well as to society at large.[38] It specified that an investigation:

31. Ibid.
32. Ibid.
33. Art 13(1): 'Everyone has the right to freedom of thought and expression. This right includes *freedom to seek, receive, and impart information* and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one's choice' (emphasis added).
34. OAS, Right to the Truth, fn [2]. A violation of Art 13 was found for the first time in *Ignacio Ellacuría v El Salvador*, Inter-American Court of Human Rights (December 22, 1999) Case 10.488, Report No 136/99.
35. *Alfonso René Chanfeau Orayce v Chile*, Inter-American Court of Human Rights (7 April 1998) Cases 11.505 et al, Report No 25/98; in relation to an amnesty law nullifying the recommendations of a truth commission, *Lucio Parada Cea, Héctor Joaquín Miranda Marroquín, et al v El Salvador*, Inter-American Court of Human Rights (27 January 1999) Case 10.480, Report No 1/99.
36. *Lucio Parada Cea et al v El Salvador.*
37. *Villagran-Morales et al. v Guatemala (Merits)* (street children case), Inter-American Court of Human Rights (19 November 1999) Series C No. 63, para 190.
38. *Monsignor Oscar Arnulfo Romero y Galdámez v El Salvador*, Inter-American Court of Human Rights (13 April 2000) Case 11.481, Report No 37/00.

https://doi.org/10.1111/lest.12172 Published online by Cambridge University Press

> Must be undertaken in good faith and must be diligent, exhaustive and impartial and geared to exploring all possible lines of investigation that make it possible to identify the perpetrators of the crime, so that they can be tried and punished.[39]

The IACtHR had already outlined the requirements of investigations in *Velásquez Rodríguez*:

> [investigations] must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government.[40]

This case notably established the state's positive obligation to investigate violations alongside its (preceding) duty to prevent them.[41] The IACtHR upheld this position in the more recent *Contreras*, linking the 'violation of the right to the truth, understood as a violation of the rights contained in Articles 8, 13 and 25 of the Convention' to the state obligation to 'demonstrat[e] that they have taken all the measures at their disposal to prove that the requested information does not exist'.[42] The case also highlighted the importance of the state's positive obligation to investigate in 'democratic societies', in which 'every individual, including the next of kin of the victims of grave human rights violations' has 'the right to know the truth, so that they and society as a whole must be informed on what happened'.[43] *Contreras*, therefore, illustrates how the IACHR has continued, over time, to consider serious investigations in light of the right to the truth, understood as an individual and a collective matter.

So while there is a direct, actionable right to the truth held by individuals affected by the violation, and the corresponding state duty to uncover the past through investigations, trials and other truth seeking mechanisms, the state must also respond to the need for the general public and society at large to know what happened. IACtHR jurisprudence thus establishes that the state obligation to investigate is relevant beyond the parties to individual cases, because truths uncovered contribute to constructing collective memories and inform political debates.

(b) ECHR contributions to the right to the truth

In contrast to the Inter-American system, 'the right to truth has been comparatively slow to develop' in the Council of Europe system.[44] An initial acknowledgement came in 2005 when a series of resolutions of the Parliamentary Assembly of the Council of Europe recognised families of disappeared persons as 'independent victims', to be

39. Ibid para 80.
40. Ibid at para 79, quoting *Velásquez Rodríguez v Honduras*, Inter-American Court of Human Rights (29 July 1988) Series C No 4, para 177.
41. On the significance of the state obligations set out in *Velásquez Rodríguez*, see inter alia N Roht Arriaza 'State responsibility to investigate and prosecute grave human rights violations in international law', (1990) 78 California L R 449, 467–468.
42. *Contreras et al v El Salvador*, Inter-American Court of Human Rights (31 August 2011) Nos 12.494, 12.517 and 12.518, paras 5 and 166.
43. Ibid, 170 and 173, linking the right to the truth to Arts 1(1), 8(1), 25 and, under certain circumstances, Art 13.
44. JA Sweeney *The European Court of Human Rights in the Post-Cold War Era: Universality in Transition* (London: Routledge, 2012) 72. See also Antkowiak, above n 10, 982.

https://doi.org/10.1111/lest.12172 Published online by Cambridge University Press

granted a 'right to be informed of the fate of their disappeared relatives'.[45] However, it was only in the *El-Masri* judgment of December 2012 that the Grand Chamber made its first explicit reference to the right to the truth.[46] This case, which emerged in the context of extraordinary renditions, brought to light the question of the right to the truth in relation to the procedural limb of Art 3 of the ECHR (prohibition of torture), dealing with the enforced disappearance and ill-treatment of the applicant, as well as the subsequent lack of effective state investigations.

The *El-Masri* judgment and concurring opinions 'cautiously expand the function of the state duty to undertake a credible investigation', setting 'a novel standard to secure accountability of human rights violations committed in other national security cases and beyond'.[47] Yet all the judgment says about the right to the truth is that 'inadequate investigations' had an 'impact on the right to the truth'.[48] For the substantive discussion on the right to the truth, the concurring opinions offer valuable insights into the debate between judges about this right in relation to the ECHR and international law more generally. The key issues explored the status of the right to the truth within the scope of the ECHR, whether it constitutes a new right, its relationship to the duty to investigate, and who holds it.

In the separate opinion[49] of Judges Tulkens, Spielmann, Sicilianos and Keller (Tulkens et al), the right to the truth is described as a 'well-established reality' which is 'far from being either innovative or superfluous'.[50] They argue that it is neither 'a novel concept' in the Court's jurisprudence, 'nor is it a new right'. To support their claim, they relied on the Court's case law, global IHRL instruments,[51] IACHR jurisprudence,[52] EU[53] and Council of Europe statements[54] as well as evidence provided by third-party interveners.[55] So by referring to the right to the truth as an established reality, these judges seem to pre-empt opposition to the introduction of unenumerated rights. Moreover, this indicates a conscious contextualisation of the ECHR within broader human rights developments.

45. Parliamentary Assembly of the Council of Europe (PACE) 'Resolution 1463 on Enforced Disappearances' (2005).
46. *El-Masri v FYRM*, para 191.
47. Fabbrini, above n 9, 102.
48. *El-Masri v FYRM*, para 191.
49. On separate opinions, see inter alia R White and I Boussiakou 'Separate opinions in the European Court of Human Rights' (2009) 9 HRLR 37. See also FJ Bruinsma and M de Blots 'Rules of law from Westport to Wladiwostok: separate opinions in the European Court of Human Rights' (1997) 15 NethQHR 175; FJ Bruinsma 'The room at the top: separate opinions in the grand chambers of the ECHR (1998-2006)' (2007) 2 Recht der Werkelijkheid 7.
50. *El-Masri v FYRM*, Joint Concurring Opinion of Judges Tulkens et al.
51. Specifically 'Convention on Enforced Disappearances', Art 24, para 2; 'Updated set of principles for the protection and promotion of human rights'; UNHRC Res 9/11 and UNHRC Res 12/12.
52. *Velásquez Rodríguez v Honduras* and *Contreras v El Salvador*.
53. European Union 'Council framework decision on the standing of victims in criminal proceedings' (15 March 2001) 2001/220/JHA.
54. Council of Europe 'Guidelines of the Committee of Ministers of the Council of Europe on Eradicating Impunity for Serious Human Rights Violations', adopted by the Committee of Ministers (30 March 2011) 1110th meeting of the Ministers' Deputies.
55. Including UNHCHR, Redress, Amnesty International and the International Commission of Jurists; see *El-Masri v FYRM*, paras 175–179.

https://doi.org/10.1111/lest.12172 Published online by Cambridge University Press

But the second concurring opinion in *El-Masri* took the opposite stance. Judges Casadevall and Lopez Guerra asserted that judges have no place in introducing a right 'different from, or additional to' the provisions set out in the ECHR and the Court's case law,[56] dismissing the idea that the right to the truth merits attention either as an extension of Convention provisions or as a novel human right. Contrary to Tulkens et al, Casadevall et al argued that it was not necessary to address the right to the truth 'as something different from, or additional to, the requisites already established in such matters' in previous case law,[57] concluding that 'a separate analysis of the right to the truth becomes redundant'. Yet this reductionist approach seems disconnected from the evolution of the right to the truth elsewhere. A closer analysis of the Court's case law suggests that the substance of the right to the truth, which includes the state duty to investigate and the collective dimension of knowing about past abuse, is nothing new in Strasbourg. However, the ECtHR is yet to formulate a coherent analysis of the right to the truth: its jurisprudence and separate opinions on the issue reveal the Court's interest and ambiguity towards this emerging principle. The two key aspects to consider in assessing the Court's position on the right to the truth are its relationship to the state duty to investigate and its individual and collective dimensions.

(c) The right to the truth and the state duty to investigate

The right to the truth is connected to the 'right to know what happened'.[58] ECtHR jurisprudence has long consolidated the state duty to investigate violations,[59] echoing the substance of the positive obligation to investigate set out in IACHR jurisprudence in relation to the right to the truth. In *El-Masri*, the Grand Chamber traced a link between the lack of an effective investigation and the right to the truth, noting in relation to the procedural limb of Art 3:

> Another aspect of the inadequate character of the investigation in the present case, namely its impact on the right to the truth regarding the relevant circumstances of the case.[60]

This landmark reference to right to the truth requires analysing in conjunction with the state duty to investigate across various contexts considered in recent judgments.

Addressing widespread violence during authoritarian regimes, the Court has considered investigations in light of Arts 2 (and 3). In *Association 21 Décembre 1989* (on the violent repression of anti-government demonstrations in Romania)[61] s3 drew on previous case law to restate that in order to be effective, investigations must

56. *El-Masri v FYRM*, Joint concurring opinion of Judges Casadevall and Lopez Guerra.
57. Ibid.
58. *El-Masri v FYRM*, para 191.
59. Notably *McCann and others v UK*, App No 18984/91 (ECHR, 27 September 1995). With reference to confirmed killings, see in J Chevalier-Watts 'Effective investigations under Article 2 of the European Convention on Human Rights: securing the right to life or an onerous burden on a state?' (2010) 21(3) EJIL 701.
60. *El-Masri v FYRM*, para 191.
61. The context of this case is described as 'dans le cas de l'usage massif de la force meurtrière à l'encontre de la population civile lors de manifestations antigouvernementales précédant la transition d'un régime totalitaire vers un régime plus démocratique', *Association 21 Décembre 1989 v Romania,* para 144 concerning 'la mort ou les blessures par balles et les mauvais traitements et privations de liberté infligés à plusieurs milliers de personnes, dans plusieurs villes du pays', para 9.

https://doi.org/10.1111/lest.12172 Published online by Cambridge University Press

be 'prompt, complete, impartial and thorough' in order to 'identify and punish those responsible'. [62] This is an 'obligation of means and not of results': authorities must demonstrate the adoption of reasonable measures, promptly and with reasonable diligence, to obtain evidence and allow public scrutiny of results, ensuring that investigations are conducted by independent persons not implicated in the events.

The ECtHR has also considered the state obligation to investigate enforced disappearances during conflict. In the unanimous judgment of *Aslakhanova* (pertaining to hostilities between Russia and Chechen groups) s1 listed the regional and international instruments applicable to investigating enforced disappearances, explicitly acknowledging the right to the truth.[63] With reference to Art 2 and in light of the Court's 'settled case-law' (including *Association 21 Décembre 1989*) this judgment listed the guiding principles 'for an investigation to comply with the Convention's requirements', characterised as an obligation of means, and not of results.[64] In order to be effective, investigations must be carried out by persons independent from those implicated in the events, and be 'capable of ascertaining the circumstances' and determining whether the force used was justified, and identifying and punishing those responsible. This requires 'promptness and reasonable expedition', accessibility to family members and some public scrutiny.

With regard to Art 3, investigations into alleged ill-treatment should be thorough and prompt, and 'in principle be capable of leading to the establishment of the facts of the case' and identifying and punishing those responsible.[65] Moreover, there must be 'a sufficient element of public scrutiny of the investigation or its results', suggesting that investigations matter to the parties to the case but also to society at large.

The criteria to assess the effectiveness of investigations were listed again in the recent Grand Chamber judgment, *Mocanu* (on the violent crackdown on anti-government demonstrations in Romania).[66] While the Court did not address the right to the truth explicitly, it built on previous jurisprudence and on Arts 2, 3 and 6(1) to restate the requirements of effective investigations: independence, expedition and adequacy of the investigation, as well as the victim's next of kin participation in the process. This judgment also considered the importance of investigations in the presence of numerous other similar cases:

> The number of violations found in cases similar to the present case is a matter of particular concern and casts serious doubt on the objectivity and impartiality of the investigations.[67]

With regards to the passage of time leading to statutory limitations, the Court noted that high 'political and societal stakes' for Romanian society 'should have led the authorities to deal with the case promptly and without delay in order to avoid any

62. *Association 21 Décembre 1989 v Romania,* paras 133-145.
63. *Aslakhanova v Russia*, paras 60–61, quoting 'PACE Resolution 1463' above n 45; 'Convention on Enforced Disappearances' (CED); also noting that Art 5 CED and Art 7 Rome Statute of the International Criminal Court (17 July 1998, entered into force on 1 July 2002) A/CONF.183/9 both describe widespread or systematic practice of enforced disappearance as a crime against humanity.
64. Ibid, para 121.
65. Ibid, paras 144–145.
66. *Mocanu v Romania*, paras 332–351; upheld in *Bouyid v Belgium* [GC], App No 23380/09 (ECHR, 28 September 2015), para 114; and *Jeronovičs v Latvia* [GC], App No 44898/10 (ECHR, 5 July 2016), para 103.
67. Ibid 334.

https://doi.org/10.1111/lest.12172 Published online by Cambridge University Press

appearance of collusion in or tolerance of unlawful acts'.[68] This echoes IACtHR jurisprudence on the duty to conduct serious investigations especially when violence affects the entire society.

Notwithstanding the attention the Court affords to the state obligation to investigate, its interconnectedness to the right to the truth has not been clearly established. In the first *El-Masri* concurring opinion, Judges Tulkens et al regretted the judgment's 'over-cautiousness' in making a 'somewhat timid allusion to the right to the truth in the context of Article 3 and the lack of an explicit acknowledgment of this right in relation to Article 13' (effective remedy), and to procedural obligations under Arts 3, 5 and 8.[69] Tulkens et al drew on *Association 21 Décembre 1989* to argue that 'in the absence of any effective remedies (…) the applicant was denied the "right to the truth"', explaining that this right encompasses 'an accurate account of the suffering endured and the role of those responsible'. They also suggested that if the right to the truth includes the 'right to ascertain and establish the true facts', it would be better situated in relation to Art 13, given the 'scale and seriousness' of violations and the political context of widespread impunity. As such,

> The search for the truth is the objective purpose of the obligation to carry out an investigation and the *raison d'être* of the related quality requirements (transparency, diligence, independence, access, disclosure of results and scrutiny).

In the contrasting *El-Masri* concurring opinion Judges Casadevall and Lopez Guerra contended that the right to the truth was equivalent to the right to a serious investigation understood procedurally as a 'serious attempt' to 'finding out the truth of the matter'.[70] For them, investigations must establish the facts of the case, the cause of harm suffered, and the identity of those responsible, as a procedural obligation linked to the deprivation of life (Art 2) and torture, inhuman or degrading treatment (Art 3), actionable only by direct victims. So by characterising the right to the truth as equivalent to the procedural limb of Arts 2 and 3 and the state duty to investigate, they argue it does not merit consideration as a separate issue. Yet Casadevall and Lopez Guerra's approach seems unnecessarily cautious in light of the Court's jurisprudence on the state duty to investigate, which indicates recognition of the broader significance of knowing the truth about past abuse. By discounting the development of the right to the truth about widespread violations as a concept that transcends individuality and affects society as a whole, they ignore the ECtHR's own gradual contributions and the established position of the UN and IACHR jurisprudence.

(d) The individual and collective dimensions of the right to the truth

As noted, the right to the truth carries a collective element. Intervening as a third party in *Al Nashiri v Poland* (subsequent to *El-Masri*), the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism clarified the UN understanding of the right to the truth as having 'two dimensions – a private dimension and a public dimension'.[71] Indeed, 'where gross or systematic human rights violations were alleged to have occurred, the right to know the truth was not one that belonged solely to the immediate victim but also to society'.

68. Ibid 338 and 288.
69. *El-Masri v FYRM*, Joint Concurring Opinion of Judges Tulkens *et al*, paras 10–11.
70. Ibid, Joint Concurring Opinion of Judges Casadevall and Lopez Guerra.
71. *Al Nashiri v Poland*, App No 28761/11 (ECHR, 24 July 2014), paras 482–483.

https://doi.org/10.1111/lest.12172 Published online by Cambridge University Press

Importantly, he outlined that recognising a 'free standing right to truth belonging to society at large' gave 'any individual with a legitimate interest in the truth' the entitlement to invoke that right. [72] If, instead:

> the right to truth were to be confined to the individual who had suffered the violation or his representatives, then the exposure of grave and systematic international crimes would necessarily be dependent on the chance occurrence of there being an individual victim or relative who was able and willing to bring proceedings.[73]

The Special Rapporteur's words, reported in the *Al Nashiri* judgment, indicate the Court's awareness of the collective dimension of the right to the truth, in addition its importance for direct victims and relatives. According to the Grand Chamber in *El-Masri*, the 'right to know what happened', as linked to the right to the truth, is relevant to the victim (applicant), whose Convention rights are allegedly violated and who has standing before the Court; his family; 'other victims of similar crimes'; and the 'general public'.[74] The broader understanding of the category of victims echoes established IACHR jurisprudence. Moreover, in *El-Masri*, the ECtHR stated:

> 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.[75]

The importance for the victim's family to know about the past through an enquiry is established in the Court's jurisprudence: there is a continuing violation of Art 3 found when a state persistently fails to account for missing persons.[76] More recently, in *Association 21 Décembre*,[77] the Court found that the ongoing failure of the state to provide families of the victims with adequate and prompt access to an independent judicial enquiry into brutal repression contributed to the violation of Art 2.[78] Thus, relatives directly enjoy independent victim status when state investigations are inadequate, not vicariously through the violation of a loved one's rights. Regarding disappearances, in *Aslakhanova* the Court stated that the 'essence of such a violation

72. Ibid.
73. Ibid.
74. *El-Masri v FYRM*, para 191.
75. Ibid.
76. Eg *Cyprus v Turkey,* App No 25781/94 (ECHR, 10 May 2001); see also D Groome 'Identifying Synergies between the Right to the Truth and International/Domestic Criminal Law in Combating Impunity' (2011) 29 BerkJIL 175, 179–180. However, in older cases, eg *Çakici v Turkey*, App No 23657/94 (ECHR, 8 July 1999), paras 98-99, the Court refused to recognise an automatic 'general principle that a family member of a "disappeared person" is thereby a victim of treatment contrary to Article 3', suggesting that affording victim status to relatives depends on 'special factors' which give 'the suffering of the applicant a dimension and character distinct from the emotional distress', based on the proximity of familial ties, the circumstances of the relationship and whether the harm was directly witnessed.
77. *Association 21 Décembre* also discussed in Sweeney *The European Court of Human Rights in the Post-Cold War Era* 74–75. Also, J Sweeney 'Restorative Justice and Transitional Justice at the ECHR' (2012) 12 ICLR 313, 322.
78. Ibid, paras 142–145; In particular para 143: Or, "l'obligation procédurale découlant de l'article 2 de la Convention peut difficilement être considérée comme accomplie lorsque les familles des victimes ou leurs héritiers n'ont pas pu avoir accès à une procédure devant un tribunal indépendant appelé à connaître des faits".

https://doi.org/10.1111/lest.12172 Published online by Cambridge University Press

does not lie mainly in the fact of the "disappearance" of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention' (linking to Arts 2, 3 and 5).[79] A disappearance is 'a distinct phenomenon, characterised by an ongoing situation of uncertainty and unaccountability in which there is a lack of information or even a deliberate concealment and obfuscation of what has occurred', which 'over time, prolong[s] the torment of the victim's relatives'.[80] So for as long as 'the person is unaccounted for',

> The investigation must be accessible to the victim's family to the extent necessary to safeguard their legitimate interests.[81]

The collective dimension of the right to the truth expands the purpose of the state's obligation to investigate. While it is established that victims and close relatives are entitled to make a legal claim, the general public's interest in knowing the truth about widespread abuse that affects large portions of society contributes an additional, distinct dimension to the right to the truth. This interest can take a variety of forms. In *Association 21 Décembre* the judges considered that 'the public must have a sufficient right to examine (*droit de regard*) the investigation or its findings, in order to challenge (*mise en cause*)' it both in practice and in theory, depending on each case.[82] Moreover, the general public may also want to know what emerged from those investigations through a related 'right to access relevant information about alleged violations', as noted by Tulkens et al in their concurring opinion in *El-Masri.*[83] This connects the right to the truth to the right to access information of public interest also emerging in the Court's jurisprudence.[84]

In essence, when harm has affected society collectively, the right to the truth acquires significance for groups beyond persons directly affected. Since *El-Masri* the Court has reaffirmed that in cases of serious human rights violations:

> 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.[85]

The Court has also found that if authorities fail to conduct serious investigations they may appear tolerant of human rights violations and undermine the rule of law. In *El-Masri* the Grand Chamber stated that an adequate response and investigation is 'essential in maintaining public confidence in their adherence to the rule of law and

79. *Aslakhanova v Russia*, para 131.
80. Ibid 122.
81. Ibid 121.
82. *Association 21 Décembre*, para 133.
83. *El-Masri v FYRM*, Joint Concurring Opinion of Judges Tulkens *et al*, para 4.
84. The emerging right to access information of public interest by members of the general public supports the existence of a collective dimension and social relevance of the right to the truth in relation to the state duty to investigate. The ECtHR has begun to outline its understanding of this in relation to Art 10, most recently in cases involving NGOs seeking information of public interest, like *Youth Initiative for Human Rights v Serbia*, App No 48135/06 (ECHR, 25 June 2013) and very recently in the Grand Chamber decision of *Magyar Helsinki Bizottság v Hungary* [GC], App No 18030/11 (ECHR, 8 November 2016).
85. Also in finding a violation of the procedural limb of Art 3, in *Al Nashiri v Poland*, App No 28761/11 (ECHR, 24 July 2014), para 495, and (verbatim) in *Husayn (Abu Zubaydah) v Poland*, App No 7511/13 (ECHR, 24 July 2014), para 489.

https://doi.org/10.1111/lest.12172 Published online by Cambridge University Press

in preventing any appearance of collusion in or tolerance of unlawful acts'.[86] Subsequent case law upholds this,[87] evidencing the Court's view that failure to conduct serious investigations undermines respect for the rule of law in general. To support this, Tulkens *et al* drew on IACHR cases (*Contreras* and *Velásquez Rodríguez*) to illustrate that victims and relatives, as well as society as a whole, had 'the right to know the truth'. Citing from *Contreras*, they recalled that in democratic societies there must be knowledge 'about the facts of grave human rights violations',[88] which is especially important after conflict or authoritarianism.

But recognising the collective dimension of the right to the truth does not clearly identify rights-holders and, accordingly, subjects entitled to claim its violation. In order for human rights to be given legal effect and rendered justiciable, a degree of certainty around the rights holders is needed. In older cases the Court has accepted applications from family members as indirect victims,[89] and in relation to enforced disappearances this includes spouses,[90] parents,[91] a nephew with close ties to the direct victim and the violation,[92] but not an adult sibling living in a different city.[93] This limited understanding of who may claim a violation clashes with the broad societal significance of the right to the truth articulated recently in *El-Masri* and *Association 21 Décembre*. This discrepancy can be interpreted as part of the Court's gradual recognition of the *significance* of the collective dimension of the right to the truth: in certain instances, knowing the past is clearly relevant to society at large in principle, but in practice only a small number of claimants may be entitled to take legal action. As such, 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 collective dimension.

The second concurring opinion in *El-Masri* adopted this more conservative position, arguing that it is 'the victim, and not the general public' who is entitled to know, regardless of the general public's interest (and curiosity) towards the case.[94] So while not completely dismissing the fact that certain cases are significant beyond the parties to the dispute, Casadevall and Lopez Guerra considered the interest of society at large as irrelevant under the law. But this more conservative approach seems to completely miss the distinctive collective aspect of the right to the truth, especially when the outcome of a case is likely to affect large sections of society. The right to the truth is more that the

86. *El-Masri v FYRM*, para 192, restated in the Joint Concurring Opinion of Judges Tulkens *et al*, para 6: 'The desire to ascertain the truth plays a part in strengthening confidence in public institutions and hence the rule of law'. And previously, *Association 21 Décembre*, paras 134, 144 and 194 with reference to the importance of society to know what happened to victims of violent transition in the context of structural and widespread harm.

87. In particular, *Al Nashiri v Poland*, para 495; *Aslakhanova v Russia*, para 231, noting that addressing 'conditions of guaranteed impunity' for abuses committed by state agents is especially important in establishing of the rule of law and building public confidence.

88. *Contreras v El Salvador* 173; 170. This echoes the Court's own understanding of the ECHR as 'an instrument designed to maintain and promote the ideals and values of a democratic society', as discussed inter alia in *Soering v UK*.

89. 'Where there is a personal and specific link between the direct victim and the applicant', Council of Europe/ECHR 'Practical Guide on Admissibility Criteria' (2014), para 30.

90. *McCann and Others v UK*, App No 18984/91 (ECHR, 27 September 1995).

91. *Kurt v Turkey*, App No 15/1997/799/1002 (ECHR, 25 May 1998), paras 130-134.

92. *Yaşa v Turkey*, App No 63/1997/847/1054 (ECHR, 2 September 1998), para 66.

93. *Çakici v Turkey*, App No 23657/94 (ECHR, 8 July 1999), paras 98-99.

94. *El-Masri v FYRM*, Joint Concurring Opinion of Judges Casadevall and Lopez Guerra.

https://doi.org/10.1111/lest.12172 Published online by Cambridge University Press

state obligation to investigate: in some cases, finding out about past abuses is a public concern, in addition to being a specific entitlement of persons who enjoy victim status.

A narrow legal analysis is unable to appreciate the important extra-legal implications of uncovering the truth about the past, which may carry individual and collective healing functions. Studies in criminology and socio-legal studies have explored the emotional repair of truth finding.[95] Some suggest that 'the restorative nature of truth is as much remedial as it is reparative, as much procedural as substantive, and as much immediate as enduring'.[96] In *El-Masri* Tulkens et al acknowledged the importance of knowing the truth for:

> Establishing the true facts and securing an acknowledgment of serious breaches of human rights and humanitarian law constitute forms of redress that are just as important as compensation, and sometimes even more so.[97]

These considerations give the right to the truth an additional meaning that cannot be understood – or characterised – through law alone. But the Court may not (yet) have the tools to formalise this meaning. And while the ECtHR has reflected on similar issues emerging from IACHR case law, the development of the right to the truth through the ECHR does not match IACHR jurisprudence. Nevertheless, the Court is not oblivious to the potential of the right to the truth.

Since *El-Masri*, and *Association 21 December 1989* before it, the Grand Chamber has faced the question of the collective significance of the right to the truth in relation to widespread past abuses in relation to a number of ECHR provisions (including Arts 38, 7 and 10). In *Janowiec v Russia* (relating to the historic inquiry into the Katyn massacre of Polish prisoners by Soviet forces in 1940) the ECtHR found a failure to comply with the obligations under Art 38 and recognised both:

> the public interest in a transparent investigation into the crimes of the previous totalitarian regime and the private interest of the victims' relatives in uncovering the circumstances of their death.[98]

Taking this further in their separate opinion, Judges Ziemele, De Gaetano, Laffranque and Keller pointed to a 'clear trend towards recognising a right to the truth in cases of gross human rights violations', reiterating that:

> the obligation to investigate and prosecute those responsible for grave human rights and serious humanitarian law violations serves fundamental public interests by allowing a nation to learn from its history and by combating impunity.[99]

Citing from the UN Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, Ziemele et al argued that the right to the truth 'protects the collective memory of the affected people',[100] again indicating a willingness of some judges to acknowledge more directly its collective significance.

95. Eg J Doak 'The therapeutic dimension of transitional justice: emotional repair and victim satisfaction in international trials and truth commissions' (2011) 11 ICLR 263.
96. Antkowiak, above n 10, 101.
97. *El-Masri v FYRM*, Joint Concurring Opinion of Judges Tulkens et al, para 6.
98. *Janowiec and others v Russia*, App Nos 55508/07 and 29520/09 (ECHR, 21 October 2013), para 214.
99. Ibid, joint partly dissenting opinion of Judges Ziemele, De Gaetano, Laffranque and Keller, paras 9 and 24.
100. Ibid.

https://doi.org/10.1111/lest.12172 Published online by Cambridge University Press

Judge Ziemele's separate opinion in *Vasiliauskas v Lithuania* (another historic case on the retroactive conviction for genocide of a former KGB official for killing partisans in the 1950s) also highlights the broader social importance of certain cases:

> the Court is not only dealing yet again with the rights of the applicant, but also finds itself at the centre of a complex social process in a society seeking to establish the truth about the past and its painful events. [101]

Judge Ziemele, again, cited the UN Updated Set of Principles for the Protection and Promotion of Human Rights in arguing that while maintaining the rule of law standards contained in Art 7, the Court is also guided by the 'broader principles regarding the right to truth and prohibition of impunity'.[102] This suggests that some judges have developed an understanding of investigations and accountability within the scope of the Convention that appreciates the collective and social significance of certain cases in addition to the importance for individual claimants. Their position clearly affects the work of the Court, but the fact that the collective significance of investigations is being discussed in separate opinions suggests that the judges are not unanimous on this issue. Consequently, the Court's jurisprudence on the collective dimension of the right to the truth remains fragmented.

The Grand Chamber has also been presented with missed opportunities to consider the collective significance of the right to the truth when fraught histories are debated. For example, in *Perinçek v Switzerland*, the majority found that the criminal prosecution of a Turkish man denying the 1915 Armenian genocide in Switzerland (and not Turkey) constituted a violation of Art 10.[103] Yet seven of the 17 judges dissented, accepting instead the possibility for states 'to make it a criminal offence to insult the memory of a people that has suffered genocide'.[104] Perhaps this case would have been more interesting for the elucidation of the Court's position on the collective significance of the right to the know and debate the past had the respondent state been Turkey, where the Armenian massacre is yet to be politically accounted for and included in institutional memory.

When confronted with 'historically and legally' complex cases,[105] the Court has exercised its discretion to tackle disputes about more general historical truths emerging incidentally from the facts of a specific case. And while the Court is not mandated to settle disputes about the past, in establishing a violation of a Convention right it cannot ignore the wider political context and possible collective significance of a specific case. The jurisprudence illustrates the judges' fragmented approach in engaging the right to the truth incidentally, by attaching it to different substantive articles depending on the facts, the applicant's submissions, the state's responses, and often the persuasiveness of third party interventions, and at times referring to it as an overarching principle not appended to a listed right. Yet the Court's incidental consideration of the right to the truth in relation to historical abuses remains difficult to conceptualise coherently: perhaps its role, as noted by Judge Ziemele, permits only the following:

101. *Vasiliauskas v Lithuania* [GC], App No 35343/05 (ECHR, 20 October 2015), dissenting opinion of Judge Ziemele, para 27.
102. Ibid.
103. *Perinçek v Switzerland* [GC], App No 27510/08 (ECHR, 15 October 2015), paras 213 et seq.
104. *Perinçek v Switzerland*, joint dissenting opinion of Judges Spielmann, Casadevall, Berro, De Gaetano, Sicilianos, Silvis and Kuris, para 2.
105. To borrow from the language used in *Vasiliauskas v Lithuania* [GC], App No 35343/05 (ECHR, 20 October 2015), dissenting opinion of Judge Ziemele, para 27.

https://doi.org/10.1111/lest.12172 Published online by Cambridge University Press

> While maintaining the rule-of-law standard that Article 7 provides, it is particularly important that this Court, at the level of the presentation of facts and the choice of methodology and issues, is guided by these broader principles regarding the right to truth and prohibition of impunity.[106]

How exactly the presentation of facts and methodological choices would operate in practice, however, remains open to further scrutiny.

The differences of opinion around the right to the truth within the Court evidenced in its jurisprudence are reflected in the limited degree of justiciability of the right to the truth. Existing case law does indeed recognise the significance of the collective dimension of the right to the truth, but no tangible legal effect has been given to that recognition, placing the ECtHR behind the pioneering decisions of the IACHR instruments. The explanation for this gap is likely to be informed by the political histories of the two regions and the extent to which dealing with legacies of widespread violence of dictatorships has been a central or peripheral preoccupation for each Court. Yet the EctHR is facing a wider range of contexts in which the right to the truth can be of use to victims and societies as a whole, which include post-authoritarian transitions, counterterror practices, international and non-international armed conflicts as well as illiberal policies of established democracies. This variety may expand the uses of the right to the truth within the scope of the ECHR, as future research may observe.

Nevertheless, in connection to the right to the truth emerging in the ECHR system, victims are able to hold states accountable for conducting inquiries into the circumstances and responsibilities for past abuse and instigate inquiries themselves. This serves the interests of the rule of law and human rights in general, as well as public confidence in state institutions, which affects the whole of society. At the same time, the outcomes of formal truth seeking informs the dynamic process of building, undoing and contesting the formation of collective memories in contexts of competing narratives. As such, identifying the contours of the right to the truth and its status in global IHRL, and making it justiciable, may help empower survivors of abuse and rebuild political communities recovering from violent histories. The ECtHR's gradual process of recognition of the right to the truth seems encouraging for its further consolidation and actionability. Moreover, the position of the European human rights system is significant beyond its jurisdictional boundaries, strengthening the development of the right to the truth internationally.

2. THE STATUS OF THE RIGHT TO THE TRUTH IN PIL

A decade ago Yasmin Naqvi considered whether the right to the truth is emerging as 'something approaching a customary right' (CIL) or a general principle of law,[107] concluding that it stood 'somewhere on the threshold of a legal norm and a narrative device'. Today, these claims can be reassessed in light of new developments in ECHR jurisprudence on the right to the truth. Indeed, since the Strasbourg judges have drawn on UN and IACHR developments and started to explore applications of this principle in Europe, the right to the truth is being used across different jurisdictions, and this is significant for its status in international law more generally. But, in the absence of clear conventional status in PIL, does it reach the threshold of CIL or general principles? Turning to the significance of the recent ECHR jurisprudence in the global debates, this

106. Ibid.
107. Naqvi, above n 10, 267 and 273.

https://doi.org/10.1111/lest.12172 Published online by Cambridge University Press

part will consider how this contributes to the evolution and formalisation of the right to the truth internationally.

(a) The right to the truth and customary international law

In 2006 Naqvi explored the customary status of the right to the truth based on 'repeated inferences' as related 'to other fundamental human rights by human rights bodies and courts' and the proliferation of truth seeking mechanisms.[108] She relied on Meron's seminal work on human rights and custom to discuss how the right to the truth could reflect a CIL norm,[109] concluding that it struggled to meet the requirements. So does the fact that the ECtHR has begun referring to the right to the truth, joining the IACtHR and the UN, demonstrate its emerging customary status?

Establishing the customary status of a norm under PIL remains a notoriously arduous task. The ongoing work of the International Law Commission on CIL and the wealth of (often critical) academic literature on this topic demonstrate the enduring complexity of identifying custom.[110] Defining international custom 'as evidence of a general practice accepted as law', Art 38(1)(b) of the ICJ Statute is understood by the ILC[111] (and scholars) as setting out two constituent elements of CIL: general practice and acceptance as law (*opinio juris*). The 2016 ILC Draft Conclusions indicate that the practice of states, and in some cases international organisations, 'contributes to the formation, or expression, of rules of customary international law' (Draft Conclusion 4) and may take a variety of forms (Draft Conclusion 6). The 2014 International Law Commission 'Report on identification of customary international law' had already reaffirmed that acts of the executive branch in international contexts are to be understood as state practice.[112] With regards to *opinio juris*, 'the practice in question must be undertaken with a sense of legal right or obligation' (Draft Conclusion 9) and may take a variety of forms (Draft Conclusion 10). The 2014 Report stressed that 'accepted as law' is a better term for understanding the 'subjective element' of CIL, acknowledging the paradoxes of *opinio juris* evidenced in academic debates.[113] The

108. Ibid, 267.

109. Ibid, 10, 254, discussing T Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 3rd edn, 1989), and in particular the description of the 'dynamic relationship between custom and treaty', in which the latter may generate 'new rules of customary law and may eventually acquire probative value for establishing the customary character of the new rules', 89–90.

110. The 'Identification of customary international law' is currently being studied by the International Law Commission, which provisionally adopted draft conclusions in summer 2016: International Law Commission, Identification of customary international law, text of the draft conclusions provisionally adopted by the Drafting Committee, Sixty-eighth sessionGeneva, 2 May–10 June and 4 July–12 August 2016 (UN Doc A/CN.4/L.872) (2016 ILC Draft Conclusions). And inter alia: JL Kunz 'The nature of customary international law' (1953) 47 AJIL 662; A D'Amato 'Trashing customary international law' (1987) 81 AJIL 101; JP Kelly 'The twilight of customary international law' (1999–2000) 40 VaJIL 449; A Roberts 'Traditional and modern approaches to customary international law: a reconciliation' (2001) 95 AJIL 757; N Arajarvi 'Between lex lata and lex ferenda? Customary international (criminal) law and the principle of legality' (2011) 15 Tilburg L R: J of Int'l & Eur L 163.

111. International Law Commission, above n 110.

112. ILC 'Second report on identification of customary international law' (66th session, 5th May–6th June 2014), UN Doc A/CN.4/672, para 41.

113. Ibid. para 68.

https://doi.org/10.1111/lest.12172 Published online by Cambridge University Press

Draft Conclusions (16) also envisage rules of particular customary international law at regional, local or other level.

One aspect of the right to the truth – the state obligation to investigate serious human rights violations – has been addressed in the context of the state practice requirement of CIL.[114] Naomi Roht Arriaza acknowledged that 'although state-sponsored grave violations of human rights persist' and states often fail to investigate them, 'other aspects of state practice show that states do recognise these failures as breaches of international norms'.[115] She points to verbal statements of governmental representatives in international organisations as 'recognition of an international obligation to investigate and prosecute'.[116] But this does not directly address the *opinio juris* requirement of CIL, nor consider the collective dimensions of the right to the truth emerging from regional case law.

The recent developments in ECHR jurisprudence adding to IACHR and UN advancements call for an overall reassessment of the right to the truth in relation to CIL through its two constitutive elements. For the purpose of this analysis, and in the absence of state statements against the right to the truth elaborating on *opinio juris*, the role of the ECtHR will be interpreted as relevant to regional CIL and significant for international custom more generally.

With regards to the significance of Strasbourg's jurisprudence in relation to IHRL (and PIL more broadly), the ECHR operates in the context of the rest of IHRL. Consequently, it is permeable to global human rights trends and ECtHR case law feeds back into those developments.[117] The separate opinion of judge Tulkens et al in *El-Masri*, citing UN developments[118] and IACHR case law, evidences the judges' attention to global human rights debates. Established jurisprudence describes the ECHR as a 'living instrument' to be 'interpreted in the light of present-day conditions';[119] while this is primarily understood in relation to the Court's internal hermeneutics,[120] in practice it provides ways for the Court to read global human rights developments into its mandate and through the ECHR. The progressive development of new rights through evolutive interpretation[121] may help the Court respond to new

114. Roht Arriaza, above n 41, 489.
115. Ibid, 492.
116. Ibid, 493.
117. JG Merrills, *The Development of International Law by the European Court of Human Rights* (Manchester: Manchester University Press, 2nd edn, 1993) discussing *Soering v UK,* and *Cruz Varas and others v Sweden,* App No 15576/89 (ECHR, 20 March 1991).
118. Notably, the 'Report of the Working Group on Enforced or Involuntary Disappearances', above n 19, 13.
119. *Tyrer v UK*, App No 5856/72 (ECHR, 25 April 1978), para 31. This should ensure rights that are 'practical and effective', not just 'theoretical or illusory', as notably stated in *Airey v Ireland*, App No 6289/73 (ECHR, 9 October 1979) para 24; *Tyrer v UK*, *Klass v Germany* and *Goodwin v UK*, App No 28957/95 (ECHR, 11 July 2002) discussed in L Wildhaber 'The European Convention on Human Rights and International Law' (2007) 56 ICLQ 217, 221–223. See also A Mowbray 'The creativity of the European Court of Human Rights' (2005) 5 HRLR 57, 60 and I Ziemele 'Customary international law in the case law of the European Court of Human Rights - the method' (2013) 12 Law & Prac Int'l Cts & Tribunals 243.
120. In light of the Vienna Convention on the Law of Treaties (23 May 1969), Art 31(3)(b) on taking into account 'any subsequent practice in the application of the treaty'.
121. Wildhaber, above n 119, 223. For a discussion of evolutive interpretation see also G Letsas *A Theory of Interpretation of the European Convention on Human Rights* (Oxford: Oxford University Press, 2007), 74.

https://doi.org/10.1111/lest.12172 Published online by Cambridge University Press

challenges – looking to other human rights actors and leading to forms of cross-fertilisation across jurisdictions. References to the right to the truth developments through the UN and IACHR, as occurred in *El-Masri* and related judgments, illustrate this.

ECHR jurisprudence carries normative value both within its regional jurisdiction and beyond,[122] and contributes to 'international legal culture' by providing important 'elucidation and development of international law' as well as developing 'principles of general applicability'.[123] Jointly with the IACHR, the ECtHR gives regional effect to general IHRL principles that may otherwise remain non-justiciable for rights-bearers. Thus, dialogue between regional human rights courts informs global human rights developments, including the right to the truth.

References to international law in the Court's jurisprudence denote an interactive, reciprocal correlation. Former President of the Court Luzius Wildhaber highlighted the 'dynamic and evolutive' relationship between the ECHR and PIL, 'checking and building on each other.[124] As 'part of the legal background' of the ECHR (a treaty under PIL[125]), international law is a 'vital reference point' for the Court.[126] By drawing on other international law instruments, the Court in effect develops a reading of the Convention mindful of other areas of IHRL.[127] Thus, the ECHR plays a 'key role' in IHRL and PIL, which is desirable, argues Wildhaber, 'if it contributes to the evolution of international law at large' and furthers human rights.[128]

The Court has relied on international law to determine 'the effect of some substantive provisions of the Convention' and looked at global developments to interpret and apply it.[129] Yet, 'unlike international treaties of the classic kind' it creates 'more than mere reciprocal engagements between contracting States' and establishes obligations that

122. Eg extraterritorially, see *Al-Skeini v UK*, App No 55721/07 (ECHR, 7 July 2011).
123. Merrills, above n 117, pp 252 and 17.
124. Wildhaber, above n 119, 230.
125. Thus, the 1969 Vienna Convention on the Law of Treaties applies to its interpretation, as confirmed in *Loizidou v Turkey*, App No 15318/89 (ECHR, 18 December 1996), para 43, discussing, inter alia, *Golder v the United Kingdom*, para 29.
126. Merrills, above n 117, pp 203–205. The ECHR explicitly mentions international law in Art 7, Art 15, Art 35 and Art 1 Protocol I, and the Court's case law has clarified that 'the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part', as noted in *Al-Adsani v UK* [GC], App No 35763/97 (ECHR, 21 November 2001) para 55, discussed in Wildhaber, above n 117, 220. The same phrase is repeated elsewhere, eg *M and Others v Italy and Bulgaria*, App No 40020/03 (ECHR, 31 July 2012); *Catan and Others v Moldova and Russia*, App Nos 43370/04, 8252/05 and 18454/06 (ECHR, 19 October 2012). The Court routinely considers PIL within the applicable legal framework in deciding cases, under the heading 'Relevant international law' (eg *Sørensen and Rasmussen v Denmark*, App Nos 52562/99 and 52620/99 (ECHR, 11 January 2006)), or jointly under the heading of 'Relevant comparative and international law' (eg *Othman (Abu Qatada) v UK*, App No 8139/09 (ECHR, 17 January 2012)) and references ICJ jurisprudence (eg *Cyprus v Turkey*, 85-86). The ECtHR has also considered customary law provisions as part of applicable PIL eg *Cudak v Lithuania*, App No 15869/02 (ECHR, 23 March 2010) para 66.
127. Merrills, above n 117, pp 203 and 218–226.
128. Wildhaber, above n 119, 220 and 231. See also, broadly, M Forowicz, *The Reception of International Law in the European Court of Human Rights* (Oxford: Oxford University Press, 2010), discussed in S McInerney-Lankford 'Fragmentation of International Law Redux: The Case of Strasbourg' (2012) 32(3) OJLS 609.
129. *Al-Adsani v UK* in Wildhaber, above n 119, 225.

https://doi.org/10.1111/lest.12172 Published online by Cambridge University Press

benefit from 'collective enforcement'.[130] The ECHR's special character as a treaty for the collective enforcement of human rights and fundamental freedoms[131] (and related democratic intent[132]) makes it permeable to global IHRL developments in other treaties, fora, practices and debates. As such, the Court may reflect or give effect to IHRL trends even when these are not squarely set out in the Convention, and thus has been able to recognise the significance of the right to the truth within the scope of the ECHR. At the same time, ECHR judgments feed into global human rights developments and may be constitutive of PIL. ECHR jurisprudence, especially in Grand Chamber formation (like *El-Masri*), contributes to the consolidation of new norms, such as the right to the truth.

Could ECtHR general developments around the right to the truth provide a form of authoritative interpretation in relation to human rights in CIL, [133] similar to UN human rights bodies? Bruno Simma and Philip Alston have examined the notion of authoritative interpretation by the UN in relation to CIL, arguing that UN member states, 'having in good faith undertaken treaty obligations to respect "human rights"' are bound by 'the definition of "human rights" which has evolved over time' through the 'virtually unanimous practice' of UN organs.[134] Yet this reading is far from unanimous.[135] Another indicator for tracing the establishment of CIL norms proposed by Meron is the 'degree to which a statement of a particular right in one human rights instrument, especially a human rights treaty, has been repeated in other human rights instruments', countered by 'the degree to which a particular right is subject to limitations'.[136] Meron (and others[137]) posit that regional human rights courts may also

130. *Ireland v UK*, App No 5310/71 (ECHR, 18 January 1978), para 239.

131. Evidenced in case-law, eg *Mamatkulov and Askarov v Turkey* [GC], App Nos 46827/99 and 46951/99 (ECHR, 4 February 2005) para 100; *Loizidou v Turkey*; *Al-Adsani v UK,* para 55; *Fogarty v UK*; *Cudak v Lithuania*; *Sabeh El Leyl v France*, App No 34869/05 (ECHR, 29 June 2011). The Court has questioned 'the fact that at the heart of any treaty-based agreement there could only be an agreement', as 'the integrity and unity of the Convention system' go 'beyond the consent- and sovereignty-oriented rules of general international law', as noted in Wildhaber, above n 119, 229, discussing *Belilos v Switzerland*, App No 10328/83 (ECHR, 29 April 1988) and *Loizidou v Turkey*.

132. Previous case law has indicated that interpretations must be consistent with 'the general spirit of the Convention, an instrument designed to maintain and promote the ideals and values of a democratic society'. See eg *Mamatkulov and Askarov v Turkey* para 101, citing *Soering v UK,* para 87, and, *mutatis mutandis*, *Klass v Germany,* para 34.

133. In general on CIL and human rights through the UN, see inter alia RB Lillich 'The growing importance of customary international human rights law' (1995) 25 GaJICL 1; IR Gunning 'Modernizing customary international law: the challenge of human rights' (1990) 31 VaJIL 211.

134. B Simma and P Alston 'The sources of human rights: custom, jus cogens and general principles' (1988–1989) 12 AusYBIL 82, 100.

135. Notably, Meron, above n 109, 87, expresses scepticism towards the 'attempt to endow customary law status instantly upon norms approved by consensus or near-consensus at international law conferences' (such as UN human rights conferences); and more recently, warnings against 'a vague and easily manipulable consensus criterion' have been highlighted by JL Goldsmith and EA Posner 'A theory of customary international law' (1998) The Chicago Working Paper Series in Law and Economics (Second Series), available at: http://www.law.uchicago.edu/Lawecon/workingpapers.html (accessed 3 January 2016), 73; And also JL Goldsmith and EA Posner, *The Limits of International Law* (Oxford: Oxford University Press, 2005).

136. Meron, above n 109, 93.

137. Arajarvi, above n 110, 182.

https://doi.org/10.1111/lest.12172 Published online by Cambridge University Press

contribute to the customary formation and interpretation of IHRL, especially through the 'cumulative weight of their case-law' in influencing and consolidating developments of customary human rights law. [138] Moreover, the jurisprudence of regional human rights bodies is 'frequently and increasingly invoked outside the context of their constitutive instruments and cited as authoritative statements of human rights law'; taken cumulatively, this 'has a significant role in generating customary rules'.[139] The notion of the right to the truth has indeed been repeated across different fora, including the ECtHR.

But the extent to which new developments around the right to the truth at ECHR level and the cross-referencing consolidate this right in relation to CIL remains unclear – primarily because the understanding of regional courts' contribution to the formation of CIL remains under-theorised in light of the two constituent elements. As such, and despite recent ECHR developments, qualifying the right to the truth as CIL would be imprecise.

(b) The right to the truth and general principles

Alternatively, the increasing references to right to the truth across different fora could be interpreted as indicating an emerging general principle of law 'as recognised by civilised nations'.[140] Naqvi suggested that jurisprudence of human rights courts may indicate a nascent general principle; more specifically, procedural obligations that address violations of fundamental rights are emerging as 'an expected response by a state to a violation'.[141] Despite its colonial heritage,[142] and contested meaning, [143] general principles of international law may offer 'a means to resolve a variety of issues which neither conventional nor customary international law' are able to address, for example in developing human rights.[144] For Simma and Alston, the notion of general principles admits a situation in which a '[human rights] norm invested with strong inherent authority is widely accepted even though widely violated'.[145] In the absence of treaty provisions, this offers 'a more plausible explanation of how substantive human rights obligations may be established in general international law, than that offered by a strained, or even denatured "new" theory of custom'.[146]

138. Meron, above n 109, 80, 89.
139. Ibid, 100.
140. See Art 38(1)(c) of the ICJ Statute, and inter alia RB Schlesinger 'Research on the general principles of law recognized by civilized nations' (1957) 51 *AJIL* 734; FTF Jalet 'The quest for the general principles of law recognized by civilized nations – a study' (1962) 10 *UCLA L Rev* 1041; W Friedmann 'The uses of "general principles" in the development of international law' (1963) 57 *AJIL* 279; B Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (Cambridge: Cambridge University Press, 1994).
141. Naqvi, above n 10, 268.
142. Credited to Belgian law professor and colonial apologist Descamps at the 1899 Hague Peace Conference, reported in M Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge: Cambridge University Press, 2001), 161.
143. Discussed inter alia in GJH van Hoof, *Rethinking the Sources of International Law* (Deventer, Kluwer Law, 1983), pp 131–151.
144. MC Bassiouni 'A functional approach to "general principles of international law"' (1990) 11 *Mich. J Int'l L* 768, 769.
145. Simma and Alston, above n 134, 102.
146. Ibid, 104, 100–102.

https://doi.org/10.1111/lest.12172 Published online by Cambridge University Press

Considering both national and international sources of general principles, Cherif Bassiouni posited that 'comparative legal technique' offers an 'objective test to measure breadth and depth of recognition and applicability of a given principle in national legal systems'[147] – and by extension, in international (including regional) contexts. Therefore, the more a principle (to a degree of sameness) 'is reiterated in national and international sources, the more it deserves deference'.[148] A comparative analysis of the right to the truth across the UN, IACHR and ECHR mechanisms may thus signal a right under general principles. General principles are mentioned twice in the ECHR text[149] and it has been argued that drafters 'saw the use of general principles as inevitable' as 'part of the fundamental legal fabric'.[150] This indicates 'a process in which the resources of legal culture are constantly being scanned by the judicial mind in a search for new solutions',[151] bolstering Bassiouni's comparative legal technique thesis for identifying general principles.

In *El-Masri* and subsequent cases the Court and individual judges examined ideas piloted by the UN and IACHR mechanisms, and connected them to the ECHR. But while the acknowledgment of the right to the truth by the ECtHR and cross-referencing of IACHR jurisprudence evidences a growing recognition of this right in two regional human rights systems (besides the UN), its generality would have to be evidenced in other jurisdictions too. Moreover, similarly to CIL, regional courts' contribution to the formation of general principles of international law remains unclear. As such, it seems premature to bestow the character of general principle of law to the right to the truth based on the recent developments.

And yet, lack of clarity as to the formal contours of the right to the truth does not detract from the fact that it is being referred to and used to provide an actionable tool for some victims and survivors, with an important function for societies at large. Perhaps in the future, gradual repeated references to the right to the truth will be (borrowing from Koskenniemi) 'formulated in non-controversial language' giving the principle 'good chance' of acceptance 'as part of the discursive stuff out of which international law is made'.[152]

(c) The right to the truth: performing international law

Despite the difficulties of qualifying the right to the truth as a CIL norm or general principle of law, it is far from irrelevant. Some ECHR judges have argued that 'in international law there is a clear trend towards recognising a right to the truth in cases of gross human rights violations'. [153] And in his 2013 annual report, UN Special Rapporteur on the promotion of truth listed *El-Masri* among the regional sources that consolidate the right to the truth globally, alongside the rich IACHR jurisprudence

147. Bassiouni, above n 144, 772–773.
148. Ibid, 811, 813–814.
149. Art 7(2) and in Art 1, Protocol I.
150. Merrills, above n 117, p 177.
151. Ibid, p 200.
152. M Koskenniemi 'General principles: reflexions on constructivist thinking in international law' in M Koskenniemi (ed) *Sources of international law* (Dartmouth, Ashgate, 2000), p 398.
153. Joint partly dissenting opinion of Judges Ziemele, De Gaetano, Laffranque and Keller, *Janowiec and others v Russia* [GC] App Nos 55508/07 and 29520/09 (ECHR, 21 October 2013), para 9; *Husayn (Abu Zubaydah) v Poland*, App No 7511/13 (ECHR, 24 July 2014 – application to the Grand Chamber pending), para 489.

https://doi.org/10.1111/lest.12172 Published online by Cambridge University Press

and the African Commission on Human and Peoples' Rights work.[154] Previously the UN-HRC and the IACHR judges drew on ECHR jurisprudence to elucidate laws applicable within their jurisdictions,[155] suggesting that this could happen again in relation to European developments of the right to the truth. National courts within the ECHR jurisdiction could also take stock of new jurisprudence to support domestic uses of the right to the truth and evidence its global consolidation further. All of this indicates that the new ECHR jurisprudence is not irrelevant to the establishment of the right to the truth in international law.

Since Naqvi's 2006 work, another important advancement in assessing the significance of developments of the right to the truth is the breadth of contexts in which it has been invoked. In addition to the post-authoritarian transitions of Latin America and Central and Eastern Europe considered by the IACHR and ECHR instruments, the ECtHR has also referred to the right to the truth in relation to institutional patterns of human rights abuse in the context of counterterror measures (*El-Masri*, *Al-Nashiri*), historic mass violence (*Janowiec*, *Vasiliauskas*), more recent conflicts (*Aslakhanova*), and current debates about past abuses (*Perinçek*) in relation to a range of ECHR articles. The UN itself, while originally focusing on disappearances, has also broadened the scope of applicability of the right to the truth to a range of contexts.

This evidence points to the fact that while falling short of a formal status under PIL, the right to the truth is being used productively across different international contexts and fora. An innovative way of interpreting these increasing – and cumulative – references could be as 'performative utterances' that do not merely describe an existing legal principle but actually constitute it.[156] In light of J.L. Austin's theory of performativity, the repetition of the expression 'right to the truth' by different actors, at different times, in different contexts indicates a statement that is not true or false (accurate or inaccurate) as such.[157] Instead, this succession of performative utterances is constitutive of the right to the truth in international law, regardless of whether it meets the formal criteria of a CIL norm or a general principle of law.

The turn to an extra-legal theoretical framework to understand the status of the right to the truth in international law can help illustrate its importance in practice, without forcing a premature characterisation through formal sources of PIL. Through Austin's theory of performativity, the right to the truth can be interpreted as being constituted in international law through repeated utterances in different fora, which cumulatively elevate this right's global significance and standing. Furthermore, recognising that the right to the truth is already performed in two regional human rights courts (albeit to differing degrees) and within the UN system might also contribute to the formal processes of formation of general international law. This supports the theses of human

154. Report of the Special Rapporteur on the promotion of truth (2013), above n 19, at 19 and fn [16]. In relation to the African Commission, the right to the truth is an aspect of the right to an effective remedy to a violation of the African Charter.

155. Ibid 18, citing as a sample: UNGA 'Report of the Human Rights Committee', 34th session (1979) Doc A/33/40, paras 246, 345. On the IACHR references to the ECHR jurisprudence: *Velásquez Rodríguez v Honduras,* para 28*; Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory Opinion* (19 January 1984) OC-4/84 (Ser A) No 4, para 56. See also GL Neuman 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (2008) 19(1) EJIL 101, 106-107. Also, Merrills, above n 117, p 20.

156. See JL Austin *How to do things with words* (Oxford: Oxford University Press, 1962)

157. Ibid, p 12

https://doi.org/10.1111/lest.12172 Published online by Cambridge University Press

rights developments through general principles of law put forward by Bassiouni – as evidence of his comparative legal technique – and by Simma and Alston as a new norm invested with strong inherent authority. The ultimate test for the status of the right to the truth in international law, however, is whether it will continue to be used (performed) for practical purposes to allow victims and societies to find out about past violence and ensure accountability of those responsible for harm.

CONCLUSIONS

Since Naqvi's analysis of the status of the right to the truth in international law a decade ago, the ECtHR has joined the conversation previously heralded by the IACHR and the UN. The recent case law, and in particular the *El-Masri* judgment, adds to the growing recognition of the right to the truth, and contributes to how it is understood both regionally and in its global evolution. Taking stock of this development, this article considers the significance of recent ECHR jurisprudence in consolidating the right to the truth regionally and internationally, and reflects on the contours and status of this right in general international law.

A survey of recent Strasbourg case law indicates that much like in the IACHR jurisprudence, the ECtHR has considered the right to the truth through two distinct, yet related, issues: the link between the right to the truth and the state duty to investigate, and the individual and collective dimensions of the right to know about the past in the context of widespread violations that affect society as a whole. The discussion also brings to light the connection between the right to the truth and democracy building after conflict and authoritarianism, as well as in relation to authoritarian practices in established democracies. In that regard, a more clearly defined right to the truth is desirable inasmuch as it helps strengthen the rule of law and promotes confidence in public institutions, as well as contributing to the formation of narratives that feed into wider debates about legacies of violence and abuse at domestic, regional and international levels.

In the quest for a more formal recognition of the right to the truth, it may be tempting to characterise it as a CIL norm or a general principle of law to give it greater authority. Yet despite the significant developments of the past decade that call for a reassessment since Naqvi's study, the right to the truth has still not reached formal standing in PIL based on the sources set out in Art 38 of the ICJ Statute. Nevertheless, this does not detract from the substance and usefulness of the right to the truth: its repeated uses across different fora can be interpreted as performative utterances that contribute to its practical existence in international law. Regardless of its formal status under PIL, its uses indicate its growing significance regionally as well as internationally – with great domestic potential as well. As such, the upward trajectory of the right to the truth should continue to be closely monitored; and, most importantly, there should be no hesitation in actioning this right by those seeking the truth about widespread abuse, in order to hold authorities to account.

https://doi.org/10.1111/lest.12172 Published online by Cambridge University Press