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**State Secrecy and Human Rights**  
**Violations**

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## Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
ACLU	American Civil Liberties Union
ASEAN	Association of Southeast Asian Nations
AZAPO	Azanian Peoples Organization
BIOT	British Indian Ocean Territory
CAT	Committee against Torture
CIA	Central Intelligence Agency
COPASIR	Comitato Parlamentare per la Sicurezza della Repubblica
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
DCAF	Geneva Centre for the Democratic Control of Armed Forces
ECB	European Central Bank
ECOWAS	Economic Community of West African States
ECSC	European Coal and Steel Community
ECtHR	European Court of Human Rights
ETS	European Treaty Series
EURATOM	European Atomic Energy Community
EWHC	England and Wales High Court
EWCA	England and Wales Court of Appeal
FCO	Foreign and Commonwealth Office
FIDH	International Federation for Human Rights
FISA	Foreign Intelligence Surveillance Act
GC	Grand Chamber
GDR	German Democratic Republic
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
IFAI	Instituto Federal de Acceso a la Información y Protección de Datos

ILC	International Law Commission
MLAT	Mutual Legal Assistance Treaty
NATO	North Atlantic Treaty Organization
NGO	Non-Governmental Organization
NSA	National Security Agency
NSWCCA	New South Wales Court of Criminal Appeal
NSWSC	New South Wales Supreme Court
OAS	Organization of American States
OASTS	Organization of American States Treaty Series
OCCAR	Organisation for Joint Armament Cooperation
OFAC	Office of Foreign Assets Control
OJEU	Official Journal of the European Union
OMCT	World Organization against Torture
OMPI	Organisation des Modjahedines du Peuple d'Iran
OSCE	Organization for Security and Co-operation in Europe
QB	Queen's Bench
TFEU	Treaty on the Functioning of the European Union
TIAS	Treaties and other International Acts Series
UK	United Kingdom
UKSC	United Kingdom Supreme Court
UN	United Nations
UNDP	United Nations Development Programme
UNESCO	United Nations Educational Scientific and Cultural Organization
UNMIK	United Nations Interim Administration Mission in Kosovo
UNTS	United Nations Treaty Series
US	United States
USC	United States Code
WTO	World Trade Organization

# INTRODUCTION

*“There are serious reasons to believe that the current state secret protection system is to a large degree an inheritance from the totalitarian regime (...). This situation allows wide manipulations of the concept of state secret”*.<sup>1</sup>

**SUMMARY:** 1. State secrecy *vis-à-vis* violations of fundamental human rights: An emerging legal issue. – 1.1. State secrecy and State sovereignty. – 1.2. State secrecy and human rights violations. – 1.3. State secrecy and the possible limits under international law. – 2. Structure and purpose of the work.

## **1. State secrecy *vis-à-vis* violations of fundamental human rights: An emerging legal issue**

### **1.1. State secrecy and State sovereignty**

The term secret, from the Latin *secretum*, finds its roots in the Indo-European radix *-cern*, the same of the verb *secernere*, which means ‘to separate – to distinguish’.<sup>2</sup> Accordingly, by definition, ‘secret’ is what is known by ‘someone’ and is kept separated from the knowledge of ‘others’.

When applying the above notion to the compound expression ‘State secrecy’, the word ‘someone’ inevitably refers to a number of governmental authorities, whilst ‘others’ refers to foreign States or the rest of society. In fact, regardless of the differences existing between distinct legal systems around the world, State secrecy can be generally defined as the prerogative of a State – based on the assumed need to protect the State as such and, thus, the national

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<sup>1</sup> Parliamentary Assembly of the Council of Europe, *Fair trial issues in criminal cases concerning espionage or divulging State secrets*, Doc. 11031 of 25 September 2006, *Explanatory Memorandum*, reporting the statement of the Board of the Public Chamber of Russia Federation issued in Moscow on 30 June 2006.

<sup>2</sup> A. ERNOUT, A. MEILLET, *Dictionnaire étymologique de la langue latine: histoire de mots*, Paris, 1932, p. 172.

community as a whole – not to disclose all its activities, either by classifying information and/or preventing it from being used in court.<sup>3</sup>

Secrecy and governmental authority have been interlinked since ancient times<sup>4</sup>: secrecy is, indeed, at the heart of political authority from its origins, being an essential feature of any form of government, either authoritarian or democratic.<sup>5</sup>

Regardless of the form of government in place, indeed, secrecy and, more specifically, State secrecy accounts as a kind of *discriminatory* or – better – *ranking element* within the society both with regard to the interests involved (interests that justify concealment *vis-à-vis* interests that are harmed by secrecy) and in relation to the subjects concerned (a number of governmental authorities *vis-à-vis* the rest of the national community). Therefore, the practical articulation of the dialectic relationship between secrecy and publicity impacts on the level of democracy (or, *a contrario*, authoritarianism) of a certain government, State secrecy being a ‘structural’ character of any exercise of political authority: the more information is made public and the more the reasons for secrecy are to be found in the community’s interests, the more the system could be regarded as inherently democratic.<sup>6</sup>

The notion of State secrecy can be traced back to the Ancient Rome, where the expressions *arcana imperii* and *secreta pignori imperii* referred to all those information whose disclosure, especially to foreign enemies, would have threaten the survival of the Roman Empire.<sup>7</sup>

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<sup>3</sup> See B.A. GARNER (ed.), *Black’s Law Dictionary*, St. Paul, 1999, which defines State secret as “the name that it is given to information that concerns the matters of governments that cannot be and should not be revealed even by witnesses in court”.

<sup>4</sup> R. ORESTANO, *Sulla problematica del segreto nel mondo romano*, in AA. VV., *Il segreto nella realtà giuridica italiana*, Padova, 1983, p. 95 ff.

<sup>5</sup> A. MARRONE, *Il nomos del segreto di Stato*, in G. ILLUMINATI (ed.), *Nuovi profili del segreto di Stato e dell’attività d’intelligence*, Torino, 2011, p. 11.

<sup>6</sup> *Ibid.* See also C. BONZANO, *Il segreto di Stato nel processo penale*, 2010, Milano, p. 3. As to the inherent tension between democracy and secrecy see, *inter alia*, E. DUHAMEL, *Secret et démocratie*, in *Matériaux pour l’histoire de notre temps*, vol. 58, 2000, pp. 77-80.

<sup>7</sup> See, *inter alia*, C. MOSCA, G. SCANDONE, S. GAMBACURTA, M. VALENTINI, *I servizi d’informazione e il segreto di Stato: legge 3 agosto 2007, n. 124*, Milano, 2008, p. 459 ff. For a broader overview see *infra* Chapter 1.

The negative role that some information – if revealed to the ‘enemies’ – could have in hindering security was well known also to other ancient civilizations. This is stressed, *inter alia*, by the early origins of intelligence services. Already in the 18<sup>th</sup> century B.C., for instance, Hammurabi relied heavily on secret agents to gather sensitive information that the Babylonians could have then used against their enemies.<sup>8</sup> Similarly, the Greeks resorted to *espionage* to obtain information that could have given them a military advantage over their rivals.<sup>9</sup>

Historical events have also demonstrated, in practice, that the release of sensitive information can undermine security. The story goes that, before declaring war against the Romans, Hannibal had established in Italy a network of spies, who provided to him information of political, economic, military and cultural relevance.<sup>10</sup>

It is from the 16-17th centuries that the ancient notion of *arcana imperii* has been recovered and systematically theorized, impacting on the progressive emergence of modern States.<sup>11</sup> Several theorists of that time, who linked secrecy to governability in the name of national interest (*raison d'état*), endorsed the idea that the decisions that public authorities have to make to protect the national community interest should be kept secret, secrecy being an essential requirement for effective governance.<sup>12</sup> On the ground of this theoretical concept, many States progressively enacted domestic legislation

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<sup>8</sup> *Ibid.*, p. 5.

<sup>9</sup> J.A. RICHMOND, *Spies in Ancient Greece*, in *Greece & Rome*, 1998, p. 1 ff.

<sup>10</sup> C. MOSCA, G. SCANDONE, S. GAMBACURTA, M. VALENTINI, *I servizi d'informazione e il segreto di Stato: legge 3 agosto 2007, n. 124*, *supra* note 7, p. 7. More recently, secrecy has been relied on also with reference to geographical information. In the XVI century, for instance, queen Elizabeth I ordered to keep as a State secret the details of Drake's navigation around the northern coast of the American continent, as the disclosure of similar information could have hindered England's supremacy in the race to trade routes, as well as the security of its vessels. For an overview of this specific episode see, *inter alia*, A. SHOENBERGER, *Loyola Law School, State Secrets, the American Revolution, the War of 1812: The Maritime Connections of the Middle Temple*, in *Journal of Maritime Law & Commerce*, vol. 43, 2012, p. 295.

<sup>11</sup> See, *inter alia*, G. MIGLIO, *Il segreto politico*, in AA. VV., *Il segreto nella realtà giuridica italiana*, *supra* note 4, p. 171 ff.; M. CATANZARITI, *New Arcana Imperii*, in *Journal on European History of Law*, vol. 2, 2012, p. 59 ff.

concerning the protection of State secrets, generally providing for the prohibition to disclose classified information and inevitably limiting to the highest political authorities the competence to decide what accounts for ‘State secret’, even if within the context of the broad parameters set by the law or legal precedents.<sup>13</sup> As a consequence, when involving information classified as State secret, a court case might not be ‘justiciable’, either entirely (as it usually happens when the plaintiff’s case depends totally on classified information) or partially (when classified information only concerns an independent part of the proceedings or can be replaced by other information).

The assumption that State secrecy should exclusively arise from the need to protect the State and, consequently, the national community (generally, on national security grounds) would ‘legitimate’, based on the circumstances of the case at issue, the interference with the plaintiff’s right to act in court, with the accused’s right to defend himself and with the individual and society’s right of access to State-held information.

It comes from the above that the notion of State secrecy is strictly interlinked – by its own nature – to the concept of State sovereignty. As Jürgen Habermas pointed out in his early work on *The Structural Transformation of the Public Sphere*, the protection of ‘secrets of State’ has indeed been historically seen as a means “by which the prince could maintain the *jura imperii, his sovereignty*”.<sup>14</sup>

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<sup>12</sup> See, *inter alia*, G. MIGLIO, *Il segreto politico*, *supra* note 11, p. 172.

<sup>13</sup> For an overview of a few legal systems see D. COLE, F. FABBRINI, A. VEDASCHI (eds), *Secrecy, National Security and the Vindication of Constitutional Law*, Cheltenham, 2013. See also, *inter alia*, A.A. CATOIRA, *El secreto de Estado y los servicios de inteligencia*, in *Cuadernos Const. de la Cátedra Fadrique Furió Ceriol*, n. 38/39, 2002, p. 133 ff.; A. FROST, *The State Secret Privilege and Separation of Powers*, in *Fordham Law Review*, vol. 75, 2007, p. 1931 ff.; G. CARAVALE, *Aspetti della disciplina del segreto di Stato nel Regno Unito: il Justice and Security Bill del 2012*, in *Nomos*, 2012, p. 1 ff.

<sup>14</sup> Emphasis added. J. HABERMAS, *The Structural Transformation of the Public Sphere. An Inquiry into a Category of Bourgeois Society* (1962) (translated by T. Burger), Cambridge, 1991, p. 52.

## 1.2. State secrecy and human rights violations

The recourse to State secrecy – at least when it leads to the dismissal of proceedings because of the impossibility to acquire evidence – can, in practice, grant legal immunity from either criminal or civil consequences. In addition, even when dealing with ‘out of court’ issues, the existence of classified information might cover under a ‘*black veil*’ facts of historical relevance and the responsibilities of those involved.<sup>15</sup>

It is evident that these prerogatives – especially when accompanied by the lack of any *effective* scrutiny on the national authorities’ decision to classify information and the broad parameters under which classification is generally permitted – make the resort to State secrecy an attractive means to hide the truth concerning heinous crimes and serious violations of human rights and to grant impunity to State officials responsible for having committed such violations.

To recall Michael Bakunin’s words: “there is no horror, no cruelty, sacrilege, or perjury, no imposture, no infamous transaction, no cynical robbery, no bold plunder or shabby betrayal that has not been or is not daily

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<sup>15</sup> As this dissertation focuses on State secrecy, it does not take into account other means that might be relied on in order to conceal the truth or change the course of judicial proceedings, such as, for instance, distorted or fake documents. On this topic see, e.g., K. KOUROS, *How Official Documents and Statements can Subtly Subvert the Essence of Protracted International Problems related to Gross Violations of International Law and Human Rights with Special Focus on the Situation in Cyprus*, in K. KOUFA (ed.), *Might and Right in International Relations*, Thessaloniki, 1999, pp. 570-586. The role that destruction of or secrecy about official documents may play in concealing the truth (also concerning human rights violations) is made further evident by the summary of the policy concerning official files and documents followed by the United Kingdom at the moment of the run-up-to independence of former colonies. See UK High Court of Justice, *Ndiki Mutua, Paulo Nzili, Wambugu Wa Nyangi, Jane Muthoni Mara, Susan Ngondi v. The Foreign and Commonwealth Office*, judgment of 5 October 2012, EWHC 2678, para. 113 ff. For instance, according to the aforesaid policy, “there was no objection to the transfer of documents classified as ‘secret’ [to the successor government] (...), provided that they had been suitably scrutinized so as to ensure that no document were passed on which might embarrass Her Majesty’s Government or other governments, (...) members of the police, military forces, public servants (...)”. For a comment on this decision see, *inter alia*, T. SCOVAZZI, *Le forme di riparazione non pecuniaria*

being perpetrated by the representatives of the states, under no other pretext than those elastic words, so convenient and yet so terrible: '*for reasons of state*'".<sup>16</sup>

Past events, as well as recent ones, have shown that State secrecy can indeed undermine the protection of fundamental rights and, in particular, be relied upon to grant, in practice, impunity to government officials for human rights abuses. The resort to State secrecy has in fact been often misused (*rectius* abused) to prevent judicial or parliamentary inquiries aiming at establishing the truth with reference to unlawful acts committed by members of the State's *apparatus*.

Already in the 17<sup>th</sup> century, for instance, the English crown used to justify the lack of any judicial scrutiny over arbitrary detentions on the ground of State secrecy. In the 1627 *Darnell's* case,<sup>17</sup> for example, the Attorney General defended the crown's prerogative to arbitrarily detain its subjects based on the following assumption:

“The King often commits, and shews no cause: if he does express the cause, indeed to beeither for suspicion of felony, coining, or the like, the court might deliver the prisoner, though it was per *speciale mandatum* Domini Regis, because there is no secret in these cases; for with the warrant, he sends the cause of the commitment: but if there was no cause expressed, that court always remanded them. It was intended, there was matter of state, and that it was not ripe, or time for

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*dovute alle vittime di gravi violazioni dei diritti umani*, in *I sentieri della ricerca*, vol. 16, 2013, pp. 93-109.

<sup>16</sup> Emphasis added. See M. BAKUNIN, *Federalism, Socialism, Anti-Theologism*, Geneva, 1867 (Bakunin's speech at the first congress of the League for Peace and Freedom), as reported in S. DOLGOFF (ed.), *The Anarchism of M. Bakunin*, New York, 1971, p. 134.

<sup>17</sup> The case (also known as *Five Knights* case) concerned the forced imprisonment ordered by Charles I in 1627 of five knights who had refused to loan money to the crown to finance the war. The same year the knights filed an appeal for *habeas corpus* before the Court of King's Bench. For an analysis of the case see, *inter alia*, S. WILLMS, *The Five Knights Case and Debates in the Parliament of 1628: Divisions and Suspicion under Charles I*, in *Constructing the Past*, vol. 6, 2006, p. 92 ff.



it to appear. He said, there were *Arcana Imperii*, which subjects were not to pry into. If the King committed a subject, and expressed no cause, it was not to be inferred from thence, there was no cause for his commitment: the course has always been, to say there was no cause expressed, and therefore the matter was not yet ripe; and thereupon the courts of justice have always rested satisfied, and would not search into it. In this case, the King was to be trusted: it was not to be presumed, he would do anything that was not for the good of the kingdom”.<sup>18</sup>

More recently, US authorities have relied on secrecy in order to cover up the existence and operation, during World War II, of a Japanese secret biochemical warfare unit, known as “Unit 731”.<sup>19</sup> The members of the Unit received a superior’s order that the existence of the Unit was a secret to be brought to the “grave”.<sup>20</sup> Furthermore, the US government considered that the strategic importance for national security of information in possession of this Unit outweighed the relevance of “war crimes prosecution”:<sup>21</sup> the disclosure of such information in criminal proceedings could indeed pose a threat to the national security of the United States. As a result, US authorities decided that the documents and information related to the Unit should be kept secret with the consequence that its members escaped prosecution before the International

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<sup>18</sup> Reported in T. SALMON, *A New Abridgement and Critical Review of State Trials*, London, 1737, p. 83.

<sup>19</sup> See P. FONG, *Inter Arma Silent Leges: The Impunity of Japan’s Secret Biological Warfare Unit*, in *New England International and Comparative Law Annual*, vol. 6, 2000, pp. 5-15.

<sup>20</sup> *Ibid.*, p. 9.

<sup>21</sup> *Ibid.*, p. 8.

Military Tribunal for the Far East.<sup>22</sup> Only in 1984, after some documents were disclosed, members of the Unit started confessing their crimes.<sup>23</sup>

The fact that classification might be often used to prevent ‘judicial scrutiny’ over governments’ misconducts is well illustrated also by a memo that the US Atomic Energy Commission issued in 1947 with respect to some experiments undertaken by the government on human beings. The Commission stated: “(...) no document [shall] be released which refers to experiments with humans and may have [an] adverse effect on public opinion or *result in legal suits*. Documents covering such work (...) should be classified ‘secret’”.<sup>24</sup>

More in general, a widespread culture of secrecy might favour human rights abuses and their repetition. It is thus no surprise that the 2000 South Africa Protection of Information Act recognises in its Preamble that the “*secretive culture*” existing during apartheid led to “abuse[s] of power and human rights violations”.<sup>25</sup>

Coming to our days, the question of secrecy *vis-à-vis* protection of fundamental human rights has gained new increasing attention as an emerging legal issue within the context of the post-9/11 global efforts to counter terrorism. The Parliamentary Assembly of the Council of Europe, whilst dealing with the involvement of its Member States in the practice of the so-

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<sup>22</sup> The International Military Tribunal for the Far East (“Tokyo Tribunal”) was established on 19 January 1946 by a special proclamation made by the Supreme Commander for the Allied Powers at Tokyo (TIAS No. 1589). The Charter of the International Military Tribunal for the Far East, annexed to the special proclamation, was later amended on 26 April 1946.

<sup>23</sup> P. FONG, *Inter Arma Silent Leges: The Impunity of Japan’s Secret Biological Warfare Unit*, *supra* note 19, p. 9. Just to make another example, in the aftermath of World War II, a ‘cloak of secrecy’ also surrounded the operation of the Australian War Crimes Court in Hong Kong. On instructions of the government, the court indeed denied any information related to the trials and, in particular, to the sentencing to death of Japanese prisoners. See ‘Sudden Secrecy on War Trials’, in *Morning Bulletin* of 5 October 1948. It is evident that the lack of disclosure of similar information prevented any scrutiny over possible human rights violations in the context of the trial.

<sup>24</sup> Secret Memorandum written by Colonel Haywood and addressed to the attention of Dr. Fidler, dated 17 April 1947. The original text is available at: <https://www.fas.org/sgp/eprint/knowledge.pdf> (last accessed on 24 February 2016).

<sup>25</sup> Act No. 2/2000, adopted on 2 February 2000 and entered into force on 9 March 2001.

called extraordinary renditions,<sup>26</sup> has on several occasions denounced and condemned the increasing attitude to invoke national security and State secrecy “in such a sweeping, systematic fashion as to shield these unlawful operations [extraordinary renditions] from robust parliamentary and judicial scrutiny”.<sup>27</sup>

Similarly, in his 2011 explanatory Report to the Parliamentary Assembly of the Council of Europe Resolution on the *Abuse of State secrecy and national security: obstacles to Parliamentary and judicial scrutiny of human rights violations*,<sup>28</sup> the *Rapporteur* Dick Martin explained that the information gathered during his work for the Council of Europe on extraordinary renditions and secret detentions represented the outcome of private investigations, as official procedures in the different countries involved had generally come up against the argument of State secrecy used by the government to impede the course of justice. Indeed, based on the need to protect international relations, and, especially, intelligence co-operation,<sup>29</sup> State secrecy has been invoked to prevent parliamentary inquiries and judicial

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<sup>26</sup> According to the definition given by the European Court of Human Rights, extraordinary rendition is “an extrajudicial transfer of persons from one jurisdiction or State to another, for the purposes of detention and interrogation outside the normal legal system, where there was a real risk of torture or cruel, inhuman or degrading treatment” (see *Babar Ahmad et al. v. United Kingdom*, joined case App. nos. 24027/05, 11949/08, 36742/08, partial decision on the admissibility, 6 July 2010, para. 113). More recently, the European Court of Human Rights has re-stated the abovementioned definition in its judgments in the cases *Al-Nashiri v. Poland* App No. 28761/11, judgment of 24 July 2014 (para. 454).

<sup>27</sup> See, *inter alia*, Parliamentary Assembly of the Council of Europe, Resolution 1551(2007), adopted on 19 April 2007, on *Fair trial issues in criminal cases concerning espionage or divulging state secrets*, para. 12. See also Parliamentary Assembly of the Council of Europe, Resolution 1838 (2011), adopted on 6 October 2011 on *Abuse of State secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations*, para. 2.

<sup>28</sup> Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, *Abuse of State secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations*, Doc. 12714, 16 September 2011, p. 5 ff.

<sup>29</sup> On the close link between intelligence activities and State secrecy see, *inter alia*, R.D. SCOTT, *Territorially Intrusive Intelligence Collection and International Law*, in *Air Force Law Review*, vol. 46, 1999, p. 222. In this respect, it is also worth mentioning the definition of *espion* in J. SALMON (ed.) *Dictionnaire de droit international public*, Bruxelles, 2001.

scrutiny in relation to the alleged abduction of some suspect terrorists in several countries,<sup>30</sup> such as Italy<sup>31</sup> and the United States.<sup>32</sup>

This practice has been strongly denounced also in the 2012 Report of the High Commissioner for Human Rights on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism,<sup>33</sup> which stressed the growing tension between official secrecy and the right of the victims of severe violations of human rights to an effective remedy in the context of the fight against international terrorism.<sup>34</sup>

Furthermore, parallel to the abovementioned trend towards resorting to State secrecy as a means to hide the truth concerning serious violations of human rights and grant *de facto* impunity to perpetrators, the ‘war on terror’ has paved the way to the increased use of secret intelligence information as evidence in proceedings against suspected terrorists, hindering their right to a fair trial.

As far as this last aspect is concerned, the resort to secret evidence in the ‘war on terror’ has interestingly not constituted a controversial matter only at

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<sup>30</sup> Parliamentary Assembly of the Council of Europe, *Abuse of State secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations*, supra note 28, p. 6 ff. See also, *inter alia*, P. GILL, *Security Intelligence and Human Rights: Illuminating the ‘Heart of Darkness’?*, in *Intelligence and National Security*, vol. 24, 2009, pp. 78-102, who refers more generally to the tension existing between (secret) intelligence activity and the protection of human rights in the United Kingdom after 9/11.

<sup>31</sup> Concerning the alleged extraordinary rendition of the imam Abu Omar in Milan in 2003, the prosecution of Italian intelligence agents was ‘barred’ on the ground of State secrecy, which was invoked by the executive with reference to evidence that could have proved, if disclosed in court, their involvement in the abduction. The case will be examined *infra*.

<sup>32</sup> See, for instance, United States District Court Eastern District of Virginia, *Khaled El-Masri v. Tenet et al.*, judgment of 12 May 2006, 437 F. Supp. 2d 530; and United States District Court for the Northern District of California, *Mohamed et al. v. Jeppesen Dataplan, Inc.*, order of 13 February 2008, 539 F. Supp. 2d 1128. For commentaries, see, D.J. NATALIE, *No Longer Secret: Overcoming the State Secrets Doctrine to Explore Meaningful Remedies for Victims of Extraordinary Rendition*, in *Case Western Reserve Law Review*, vol. 62, 2012, p. 1237 ff. See also D. SILVER, *National Security in the Courts: The Need for Secrecy vs. the Requirement of Transparency*, El Paso, 2010.

<sup>33</sup> UN Doc. A/HRC/22/26, 17 December 2012, para. 38.

<sup>34</sup> Similar observations are contained in the Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, *Assessing Damages, Urging Action*, Geneva, 2009, p. 86 (“(...) the Panel heard that secrecy is growing: legal doctrines such as ‘State secrecy’ and ‘public interest immunity’ are being used to foreclosed remedies to victims. Attempts to

the domestic level. An extensive debate has indeed surrounded the United Nations Security Council's reliance on *secret* intelligence evidence in its listing of suspect terrorists under the regime framed by Resolution 1267 (1999). More specifically, the debate has involved its compatibility with due process rights.<sup>35</sup> In fact, as it has been correctly stressed in legal scholarship:

“The main problem with the designation of individuals for the purpose of the targeted sanctions regime is that the motives and evidence for such designation remain largely confidential. Most of that information stems from national intelligence agencies that have a legitimate interest in not sharing it with potential terrorists. However, keeping large parts of a case secret from the individual concerned interferes with the principle of effective judicial protection”.<sup>36</sup>

The Court of Justice of the European Union<sup>37</sup> and the European Court of Human Rights<sup>38</sup> have both ‘condemned’ this practice as lacking procedural fairness.

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conceal human rights violations on national security grounds are not new, but the current counter-terrorism climate is encouraging yet greater secrecy”).

<sup>35</sup> See *infra*, Chapter 1, at 4.2.2(b).

<sup>36</sup> S. HOLLENBERG, *The Security Council's 1267/1999 Targeted Sanctions Regime and the Use of Confidential Information: A Proposal for Decentralization of Review*, in *Leiden Journal of International Law*, vol. 28, 2015, pp. 51-52.

<sup>37</sup> See Grand Chamber, *Yassin Abdullah Kadi and Al Barakaat Foundation v. Council of the European Union and Commission of the European Communities*, joined cases C-402/05 P and C-415/05 P, decision of 3 September 2008 (*Kadi I*) and *European Commission and United Kingdom v. Yassin Abdullah Kadi*, joined cases C-584/10 P, C-593/10 P and C-595/10 P, judgment of 18 July 2013 (*Kadi II*).

<sup>38</sup> See, recently, European Court of Human Rights, *Al-Dulimi and Montana Management Inc. v. Switzerland*, App. No. 5809/08, judgment of 26 November 2013, paras. 134-135, where the Court found that Switzerland violated Article 6 of the European Convention on Human Rights. According to the Court: “... for as long as there is no effective and independent judicial review, at the level of the United Nations, of the legitimacy of adding individuals and entities to the relevant lists, it is essential that such individuals and entities should be authorised to request the review by the national courts of any measure adopted pursuant to the sanctions regime. Such review was not available to the applicants. It follows that the very essence of their right of access to a court was impaired” (*ibid.*, para. 134).

Although it certainly constitutes the framework in which the issue has had the greatest echo,<sup>39</sup> the recourse to State secrecy has not been confined only to the so-called ‘war on terror’.<sup>40</sup> States – especially in Latin America – have indeed often relied on State secrecy to deny accountability for past crimes and human rights abuses – such as enforced disappearances and tortures – perpetrated during military dictatorships and internal armed conflicts.<sup>41</sup>

To make a further example, in China the treatment of prisoners amounts to a ‘State secret’, thus impeding any ascertainment of possible corporal punishments or other abuses.<sup>42</sup> In particular, information about the use of torture in detention facilities to force confessions is considered classified.<sup>43</sup> Therefore, victims of unlawful misconducts perpetrated by State officials have

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<sup>39</sup> See, *inter alia*, S. CHESTERMAN, *Secrets and Lies: Intelligence Activities and the Rule of Law in Time of Crisis*, in *Michigan Journal of International Law*, vol. 28, 2007, p. 553 ff.; T. SCOVAZZI, *La Repubblica riconosce e garantisce i diritti inviolabili della segretezza delle relazioni tra servizi informativi italiani e stranieri?*, in *Rivista di diritto internazionale*, 2009, p. 960 ff.; L. FISHER, *State Secrets and Democratic Values*, in M.L. VOLCANSEK, J.F. STACK (eds), *Courts and Terrorism. Nine Nations Balancing Rights and Security*, New York, 2010, pp. 50-71; S.D. SCHWINN, *The State Secret Privilege in the Post 9/11 Era*, in *Peace Law Review*, vol. 30, 2010, p. 778 ff.; F. FABBRINI, *Extraordinary Renditions and the State Secret Privilege: Italy and the United States Compared*, in *Italian Journal of Public Law*, 2011, p. 255 ff.; D.A. J. TELMAN, *Intolerable Abuses: Rendition for Torture and the State Secrets Privilege*, in *Alabama Law Review*, 2012, p. 429 ff.; D. J. TELMAN, *On the Conflation of the State Secrets Privilege and the Totten Doctrine*, in *National Security Law Brief*, vol. 3, 2012, pp. 1-8; S. HORTON, *Lords of Secrecy*, New York, 2015.

<sup>40</sup> An interesting overview of the use of secrecy with respect to war more generally (but also focusing on the ‘war on terror’ under an international humanitarian law perspective) is contained in O. BEN-NAFTALI, R. PELED, *How Much Secrecy Does Warfare Need?*, in A. BIANCHI, A. PETERS (eds), *Transparency in International Law*, Cambridge, 2013, pp. 321-364.

<sup>41</sup> Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Framework Principles for Securing the Accountability of Public Officials for Gross or Systematic Human Rights Violations Committed in the Context of States Counter-Terrorism Initiatives, UN Doc. A/HRC/22/52, 1 March 2013, para. 40. See, for instance, the invocation of State secrecy by the Ministry of National Defence of Guatemala in the internal proceedings related to the enforced disappearance and murder of the anthropologist Myrna Mack Chang in September 1990. The Ministry of National Defence refused to turn over to the judiciary documents relating to normal administrative procedures of the Presidential Security Department that might have proved the responsibility of those accused in the case (Inter-American Court of Human Rights, *Myrna Mack Chang v. Guatemala*, judgement of 25 November 2003, Series C No. 101, para. 126).

<sup>42</sup> Human Rights in China, *State Secrets: China’s Legal Labyrinth*, 2007, p. 38, available online at the website: <http://www.hrichina.org/> (last accessed on 24 February 2016).

<sup>43</sup> *Ibid.*, p. 39.

no means of pursuing the punishment of those responsible for torture or other human rights abuses.

In short, States' resort to secrecy has increasingly proven to hinder States compliance with their international legal obligations, especially those protecting fundamental human rights, and, in particular (but not exclusively), the right of the victims of human rights abuses to judicial scrutiny.<sup>44</sup>

### 1.3. State secrecy and the possible limits under international law

In the international sphere, secrecy has characterized for centuries – and still partially characterizes – diplomacy and international relations.<sup>45</sup> Until the beginning of the last century, for instance, the conclusion of secret treaties constituted widespread practice<sup>46</sup> as secrecy surrounded both the *process* and the *result* of international negotiations.<sup>47</sup>

Nowadays, Article 102 of the United Nations Charter<sup>48</sup> requires States to register their international agreements with the Secretariat: those treaties that

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<sup>44</sup> On this topic but pursuant to a domestic perspective see L. LUSTGARDEN, I. LEIGH, *In from the Cold: National Security and Parliamentary Democracy*, Oxford, 1994.

<sup>45</sup> “Secret diplomacy” refers to “intergovernmental negotiations conducted in secret, leading to the conclusion of agreements and treaties that are not make public”. See ‘Secret Diplomacy’ in E. J. OSMANŹYK, *Encyclopedia of the United Nations and International Agreements*, 3<sup>rd</sup> ed., vol. 3, New York, 2003 (edited and revised by A. Mango). For a recent overview see, *inter alia*, S. DE GRAMONT, *The Secret War: The Story of International Espionage since 1945*, London, 1962. See also A. ZIDAR, *Diplomatie contemporaine: entre secret et publicité*, in P. ZEN-RUFFINEN (ed.), *Les secrets et le droit*, Geneva, 2004, pp. 419-443. For a sociological analysis of the use of State secrecy throughout history see instead, e.g., S. LEFEBVRE, *A Brief Genealogy of State Secret*, in *Windsor Yearbook of Access to Justice*, vol. 31, 2013, pp. 95-114.

<sup>46</sup> For a collection of secret treaties see, *inter alia*, E. GROSEK, *Secret Treaties of History*, Philadelphia, 2004. On the topic see also, *inter alia*, P. FOIS (ed.), *Il trattato segreto: profili storico-diplomatici e regime giuridico*, Padova, 1990; P. FOIS, *Il trattato segreto nel sistema degli accordi internazionali*, in *Rivista di diritto internazionale*, vol. 73, 1990, pp. 809-831; V. MAINETTI, *Les traités secrets en droit international*, in P. ZEN-RUFFINEN (ed.), *Les secrets et le droit*, *supra* note 45, pp. 399-417. A similar provision was already contained in the Covenant of the League of Nations (Paris, 29 April 1919).

<sup>47</sup> A. COLSON, *La négociation diplomatique au risque de la transparence: rôle et figures du secret envers des tiers*, in *Négociations*, vol. 11, 2009, at 7.

<sup>48</sup> San Francisco, 16 June 1945. A similar provision was already contained in the Covenant of the League of Nations (Paris, 29 April 1919). Pursuant to Article 18 of the Covenant: “Every treaty or international engagement entered into hereafter by any Member of the League shall

have not been registered cannot be invoked before the organs of the United Nations.

Still, secrecy and transparency characterize international negotiations, being the two opposite poles of a '*tension indécidable*',<sup>49</sup> as the predominance of any of them over the other is inevitably perceived as posing political and strategic risks.<sup>50</sup>

As far as '*State secrecy*' (strictly speaking) is concerned, however, it has to be stressed that States sovereignty has been deeply impacted by the progressive erosion of the so-called principle of domestic jurisdiction (*domaine réservé*), namely that area of internal State authority beyond the reach of international law.<sup>51</sup> The broadening of international law areas of regulation, covering matters which once used to be firmly within the sphere of the *domaine réservé*, has *de facto* reduced the domestic jurisdiction of the State to the point that, nowadays, it could be argued that hardly any matter seems to be 'domestic' any more.<sup>52</sup>

As noted by Ann Florini already in 1998, "(...) for nation-States, the shift is occurring between old ideas of sovereignty, which allow States to keep the

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be forthwith registered with the Secretariat and shall as soon as possible be published by it. No such treaty or international engagement shall be binding until so registered".

<sup>49</sup> A. COLSON, *La négociation diplomatique au risque de la transparence*, *supra* note 47, at 37.

<sup>50</sup> *Ibid.*

<sup>51</sup> For a definition of domestic jurisdiction see A. D'AMATO, *Domestic Jurisdiction* in *Encyclopaedia of Public International Law*, 1992, pp. 1090-1092; K. S. ZIEGLER, *Domaine Réserve*, in R. WOLFRUM (ed.), *Max Planck Encyclopaedia of Public International Law*, 2008, electronic edition, available at: [www.mpepil.com](http://www.mpepil.com) (last accessed on 24 February 2016). On the topic see also H. KELSEN, *Principles of International Law*, New York, 1952, p. 196 ff. and M.S. RAJAN, *United Nations and Domestic Jurisdiction*, Bombay, 1958. The principle of domestic jurisdiction is embodied in Article 2.7 of the United Nations Charter (San Francisco, 26 June 1945) 1 UNTS XVI. On this provision see, *inter alia*, G. NOLTE, Article 2(7), in B. SIMMA (ed.), *The Charter of the United Nations. A Commentary*, II ed., vol. I., Oxford, 2002, pp. 148-171 and B. CONFORTI, C. FOCARELLI (eds), *Le Nazioni Unite*, Padova, 10<sup>th</sup> ed., 2015, p. 183 ff.

<sup>52</sup> As noted by Crawford, "It is not only on the international that the limits of sovereignty are variable and flexible. The apparent clear boundaries between the internal and the international also shift as States enter into new treaties and as new areas of international activity evolve, for example, with respect to human rights". See J. CRAWFORD, *Change, Order, Change: The Course of International Law. General Course on Public International Law*, in *Recueil des Cours*, Leiden, Boston, 2013, p. 74.



world out of their domestic matters, and a new standard that they must explain their actions to the world”.<sup>53</sup>

According to this trend, it may be argued that the very recourse to State secrecy cannot be any longer considered an ‘unchallengeable’ prerogative of the State. Its use (or – often – abuse) must now be tested not only domestically but also in the light of its compatibility with the international legal *régime*.

In this respect, special importance should be given to the gradual phasing-out of the idea that the way a State treats its nationals is exclusively a matter of domestic jurisdiction and, thus, insulated from international legal scrutiny.<sup>54</sup>

As a result of the progressive emergence of treaty-based and customary international human rights rules, as well as the related establishment of *ad hoc* international and regional mechanisms of protection, no State can indeed any longer justify human rights violations – or, *under a procedural dimension*, the lack of effective judicial guarantees against these violations (including the punishment of perpetrators)<sup>55</sup> – merely under the ‘shield’ of domestic jurisdiction.<sup>56</sup> As a consequence, any breach of the State’s international obligations to protect human rights would entail its international

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<sup>53</sup> A. FLORINI, *The End of Secrecy*, in *Foreign Policy*, 1998, p. 50.

<sup>54</sup> See H. V. CONDÉ, *A Handbook of International Human Rights Terminology*, Lincoln, 2004, p. 177. On the topic see also, among others, S.D. KRASNER, *Sovereignty: Organized Hypocrisy*, Princeton, 1999, p. 118 ff. See also again B. CONFORTI, C. FOCARELLI (eds), *Le Nazioni Unite*, *supra* note 51, p. 197 (according to whom, there is no doubt nowadays that anything related to human rights is excluded from the limits inherent to the notion of “domestic jurisdiction”).

<sup>55</sup> Human rights treaties generally provide for the right to an effective remedy. See, *inter alia*, the United Nations International Covenant on Civil and Political Rights (New York, 16 December 1966), 999 UNTS 171, Article 2.3; United Nations Convention against Torture and other Cruel, Inhuman and Degrading Treatment and Punishment (New York, 10 December 1984) 1465 UNTS 85 – hereinafter also ‘Convention against Torture’ – Articles 12, 13, 14; European Convention for the Safeguard of Human Rights and Fundamental Freedoms (Rome, 4 November 1950) 213 UNTS 222 – hereinafter also ‘European Convention on Human Rights’ – Article 13. See also Article 8 of the Universal Declaration of Human Rights, adopted by the United Nations General Assembly on 10 December 1948 with Resolution 217 A (III).

<sup>56</sup> See H. V. CONDÉ, *A Handbook of International Human Rights Terminology*, *supra* note 54, p. 177.

responsibility, unless a specific exception is provided for by another international norm.<sup>57</sup>

Thus, at least in case of a violation of those human rights whose protection cannot be limited or suspended even against national security claims or in time of public emergency<sup>58</sup> or, arguably, in all cases of serious and systematic human rights violations,<sup>59</sup> in *no way* a State could rely on compliance with its domestic norms or internal acts of its organs as a justification for breaching its international legal obligations to protect human rights.<sup>60</sup>

The above statement appears in accordance, *inter alia*, with Article 27 of the Vienna Convention on the Law of Treaties, pursuant to which: “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.<sup>61</sup>

International practice (including international and regional case law) has already firmly pointed towards this direction with regard to domestic rules concerning, among the others, statutes of limitations, jurisdiction by military

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<sup>57</sup> As regards the possible restrictions to human rights due to national security interests and, in particular, State secrecy in the jurisprudence of the European Court of Human Rights see G. ARCONZO, I. PELLIZZONE, *Il segreto di Stato nella giurisprudenza della Corte Costituzionale e della Corte europea dei diritti dell'uomo*, in *Rivista dell'Associazione italiana dei costituzionalisti*, vol. 1, 2012. On the same topic, especially concerning the tension between the invocation of State secrecy and the right of the plaintiff to act in court, see also A. KRYWIN, C. MARCHAND, *Il segreto di Stato e i diritti dell'uomo*, in *Gnosis – Rivista italiana di intelligence*, vol. 16, 2000.

<sup>58</sup> Public emergency derogation clauses are contained in many human rights treaties, as the International Covenant on Civil and Political Rights (Article 4); the European Convention on Human Rights and Fundamental Freedoms (Article 15); the American Convention of Human Rights (Article 27). The topic we will further address *infra*.

<sup>59</sup> See L. F. DAMROSH, *Gross and Systematic Human Rights Violations*, in R. WOLFRUM (ed.), *Max Planck Encyclopaedia of Public International Law*, 2008, electronic edition, available at: [www.mpepil.com](http://www.mpepil.com) (last accessed on 24 February 2016).

<sup>60</sup> See, *inter alia*, A. SEIBERT-FOHR, *The Fight Against Impunity Under the International Covenant on Civil and Political Rights*, in *Max Planck Yearbook of United Nations Law*, 2002, pp. 301-344; INTERNATIONAL COMMISSION OF JURISTS, *Practitioners' Guide Series No. 2: The Right to a Remedy and to Reparation for Gross Human Rights Violations: A Practitioners' Guide*, Geneva, 2006; A. DI STEFANO, *Article 13 – Diritto a un ricorso effettivo*, in S. BARTOLE, P. DE SENA, V. ZAGREBELSKI (eds), *Commentario breve alla Convenzione europea dei diritti dell'uomo e delle libertà fondamentali*, Padova, 2012, p. 495 ff.

<sup>61</sup> Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, entered into force on 27 January 1980, 1155 UNTS 331.

courts, refusal to extradite, and amnesties.<sup>62</sup> This might be held true, in principle, also for those domestic norms relating to State secrecy.<sup>63</sup> Rather, one may argue that this should be *especially* true for those internal norms concerning State secrecy, given its potential role in preventing judicial accountability and granting impunity.

Far from being the subject of a merely theoretical disquisition, the aforesaid dialectic relationship between the domestic recourse to State secrecy and the protection of human rights represents an issue of great practical relevance.

It is indeed undeniable that a State has a *legitimate* need to protect its secrets, especially in relation to diplomatic negotiations, certain intelligence

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<sup>62</sup> See United Nations Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1 of 8 February 2005, Principle 22: “States should adopt and enforce safeguards against any abuse of rules such as those pertaining to prescription, amnesty, right to asylum, refusal to extradite, *non bis in idem*, due obedience, official immunities, repentance, the jurisdiction of military courts and the irremovability of judges that fosters or contributes to impunity”. As to the statute of limitations see also Inter-American Court of Human Rights, *Myrna Mack Chang v. Guatemala*, *supra* note 41, para. 276, and *Almonacid Arellano et al. v. Chile*, judgement of 29 September 2009, Series C No. 154, para. 151. As regards the refusal to extradite see also Inter-American Court of Human Rights, *Goiborù et al. v. Paraguay*, judgment of 22 September 2006, Series C No. 144, para. 132. See also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, judgment, *I.C.J. Report 2012*, p. 422, at 121. With specific reference to amnesties see also Human Rights Committee, *Concluding Observations on Ecuador*, UN Doc. CCPR/C/79/Add.92 of 18 August 1998, para. 7 and *Concluding Observations on Venezuela*, UN Doc. CCPR/C/79/Add.46 of 5 April 1995, para. 153. Similar conclusions can be also found in the case law of the European Court of Human Rights: see, for instance, *Abdulsamet Yaman v. Turkey*, App. No. 32446/96, judgment of 2 November 2004, para. 55, *Okkali v. Turkey*, App. No. 52067/99, judgment of 17 October 2006, para. 76. Furthermore, within this context, the progressive downsizing of the so-called ‘political question doctrine’ (allowing courts to dismiss proceedings at their outset when they relate to political matter, including military and foreign affairs) should also be mentioned. On the topic see, *inter alia*, D. AMOROSO, *A Fresh Look at the Issue of Non-Justiciability of Defence and Foreign Affairs*, in *Leiden Journal of International Law*, vol. 23, 2010, pp. 933-948. See also N.S. WILLIAMS, *Political Question or Judicial Query: An Examination of the Modern Doctrine and the Inapplicability to Human Rights Tort Litigation*, in *Pepperdine Law Review*, vol. 29, 2000-2001, pp. 849-878.

<sup>63</sup> In this respect, the approach undertaken in the present work is in contrast with the view of those arguing that international law, by being inherently anti-democratic and anarchic, would favour despotism and the use of secrecy also at the domestic level. See N. BOBBIO, *Democrazia e segreto*, March 1988, in *Democrazia e segreto* (ed. M. Revelli), Torino, 2011, p. 41: “*non si può combattere il potere invisibile se non con un potere invisibile e contrario, le spie altrui se non con le spie proprie, i servizi segreti degli altri Stati se non con i servizi segreti del proprio Stato*”.

sources and military operations.<sup>64</sup> As noted by Georg Simmel, in fact, “if an objective controlling structure has been built up, beyond the individual interests, but nevertheless to their advantage, such structure may very well, by virtue of its formal independence, have a rightful claim to carry on a certain amount of secret functioning without prejudice to its public character, so far as real consideration of the interest of all is concerned”.<sup>65</sup>

That notwithstanding, this legitimate prerogative may find a “limit” in States’ human rights obligations. As pointed out by the Inter-American Court of Human Rights, indeed, “there is a possible conflict of interests between the need to protect official secret, on the one hand, and the obligations of the State to protect individual persons from the illegal acts committed by their public agents and to investigate, try, and punish those responsible for said acts, on the other”.<sup>66</sup>

Against this background, the *WikiLeaks* phenomenon,<sup>67</sup> as well as the recent revelations by Edward Snowden,<sup>68</sup> can even be read as a ‘reaction’ to the current excessive governments’ secrecy and the lack of accountability

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<sup>64</sup> Interesting examples on the opportunity of a certain degree of political concealment are reported in the Report of the US Commission on Protecting and Reducing Governmental Secrecy, issued on 3 March 1997, p. 6.

<sup>65</sup> G. SIMMEL, *The Sociology of Secrecy and of Secret Societies*, in *American Journal of Sociology*, vol. 11, 1906, p. 469.

<sup>66</sup> Inter-American Court of Human Rights, *Myrna Mack Chang v. Guatemala*, *supra* note 41, para. 181.

<sup>67</sup> WikiLeaks is a non-profit media organization based in Sweden and founded by the Australian citizen Julian Assange. The organization has released and made available to the general public diplomatic cables and other official documents, the most part of which classified as State secrets. See, *inter alia*, P. FRANCESCUTTI, *El secreto diplomático después de Wikileaks: las relaciones internacionales en una era de filtraciones*, in J.M. AZCONA PASTOR, J.F. TORREGROSA CARMONA, M. RE (eds), *Guerra y paz. La sociedad internacional entre el conflicto y la cooperación*, Madrid, 2013, pp. 579-593. On 21 August 2013, Bradley Manning was convicted by a military judge to 35 years of prison for having transmitted hundreds of classified documents to *WikiLeaks*. See ‘Manning Sentenced to 35 Years for a Pivotal Leak of US Files’, in *New York Times*, 21 August 2013, available at: <http://www.nytimes.com> (last accessed on 24 February 2016).

<sup>68</sup> In June 2013 Edward Snowden disclosed US secret documents revealing the existence of an international mass surveillance programme. On the topic and, in particular, on the issues that the mass surveillance system disclosed by Edward Snowden may rise in terms of protection of human rights see, *inter alia*, M. MILANOVIĆ, *Human Rights Treaties and Foreign Surveillance: Privacy in the Digital Era*, in *Harvard International Law Journal*, vol. 56, 2015, pp. 81-146.

resulting thereof.<sup>69</sup> While this current trend towards public disclosure of classified information has led scholars to propose new legal strategies for protecting State secrets, including the resort to copyright law,<sup>70</sup> it contextually emphasises the increasing need for better exploring whether and to what extent the widespread reliance on secrecy might indeed clash with the current international legal framework. Furthermore, it raises new challenging legal issues, such as, for instance, the need for striking the proper balance between the protection of national security, the whistle-blower's right to freedom of expression, and the public interest in the information disclosed.<sup>71</sup>

As Parry pointed out in the *Harvard Law Review* already in 1954:

“[T]he method of non-disclosure may be tolerated so long as it is regarded as applicable only to a restricted department of a nation's affairs or during restricting period of emergency. But the time has gone by when it was possible to regard defence as special, and comparatively unimportant, department, or when it was possible to say that there is a firm line between wartime and peacetime and that the former is an abnormal condition”.<sup>72</sup>

These words, clearly inspired by the beginning of the ‘Cold war’, are still true nowadays as the world has entered an age in which the permanent terrorist

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<sup>69</sup> See L. DIJKMAN, *Do You Want to Know a Secret? Wikileaks. Freedom. Democracy*, in *Amsterdam Law Forum*, vol. 4, 2012, p. 56.

<sup>70</sup> See J. FREEDMAN, *Protecting State Secrets as Intellectual Property: A Strategy for Prosecuting Wikileaks*, in *Stanford Journal of International Law*, vol. 48, 2012, pp. 185-208.

<sup>71</sup> See, e.g., D. KAGIAROS, ‘Protecting ‘National Security’ Whistleblowers in the Council of Europe: An Evaluation of Three Approaches on How to Balance National Security with Freedom of Expression’, in *The International Journal of Human Rights*, vol. 19, 2015, pp. 408-428. See also L. PAQUETTE, *The Whistleblower as Underdog: What Protection Can Human Rights Offer in Massive Secret Surveillance?*, in *The International Journal of Human Rights*, vol. 17, 2013, pp. 796-809; K. HARDY, G. WILLIAMS, *Terrorist, Traitor, or Whistleblower? Offences and Protections in Australia for Disclosing National Security Information*, in *The University of South Wales Law Journal*, vol. 37, 2014, pp. 784-819.

<sup>72</sup> See C. PARRY, *Legislatures and Secrecy*, in *Harvard Law Review*, vol. 67, 1954, p. 740.

threat has brought security and defence at the top of governments' agendas (leading some authors to coin the expression 'national security State').<sup>73</sup>

In the light of the foregoing, the present work aims at testing State secrecy against the international legal framework and, in particular, against international human rights law in order to ascertain whether and to what extent the resort to State secrecy is compatible with it. The growing reliance on the "*loi du secret*" and the consequent multiple violations of human rights that this practice might raise indeed challenging questions. Just to mention a few: does the existing international legal regime set limits to States' reliance on State secrecy? Where these limits are to be found? Where the balance between the legitimate interest of the State to protect national security and the obligation to secure human rights should be struck?

## **2. Structure and purpose of the work**

As it has been observed, "*...la notion de secret en droit international est restée un sujet peu exploré pour ne pas dire vierge ...*".<sup>74</sup> While this statement mainly refers to the role that secrecy plays in the context of international organizations and institutions, the same applies with reference to the issues that States' widespread reliance on secrecy brings up in terms of States' abidance to their international obligations. The present work aims at partly filling in this *lacuna* by analyzing the legal hurdles that the resort to State secrecy on national security grounds might raise in terms of States' compliance with their human rights commitments. Indeed, as a result of States' increasing resort to secrecy, especially in the 'war on terror' context, the time is ripe for systematically examining the issue under a human rights law perspective.

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<sup>73</sup> H. NASU, *State Secrets Law and National Security*, in *International and Comparative Law Quarterly*, vol. 64, 2015, p. 366.

<sup>74</sup> M. ZANI, *La notion de secret à la lumière de la procédure 1503 du Conseil économique et social de l'ONU*, in *L'Observateur des Nations Unies*, vol. 29, 2010, p. 108.

The complexity of the research topic requires some preliminary considerations on the methodology and structure of this work.

First, before ‘testing’ the use (and, more often, abuse) of State secrecy against international law, the notion of ‘secrets of State’ will be defined and contextualized in light of the scope of the present analysis. Accordingly, the first Chapter, titled *State secrecy and human rights protection: framing the issue*, will primary attempt to identify some common traits of the notion of State secrecy in different domestic legal systems, starting from investigating its origins under an historical viewpoint. Far from undertaking a detailed comparative study on how State secrets are regulated and applied in national legal systems, the first part of the work will attempt to establish whether a unitary definition of State secrecy exists at the domestic level – as well as identify the ‘requirements’ for its invocation (chiefly, national security) – to be later assessed in light of the current international legal *régime*.

Therefore, State secrecy regulatory schemes will be analyzed by identifying their recurring practical applications within the parameters set by law or judicial precedents in several countries (that is, classification of sensitive information and denial of access to State archives; State secrecy as procedural blockage to the use of evidence in court, either as obstacle to the right to defence or to the holding of civil and criminal proceedings).

Chapter 1 will then present some practical cases to highlight how and to what extent State secrecy may impact on the protection of human rights, as well as underscore the attitude shown by several States to disregard human rights norms against governments’ secrecy claims. These examples are meant to stress the need for questioning the compatibility of the resort to State secrecy with international law and, more specifically, human rights law.

The following Chapters will be entirely devoted to analyze how and to what extent reliance on State secrecy might conflict with the protection of human rights.

Chapter 2 will focus on the right of access to State-held information and the potential tension existing between the protection of this right and States' legitimate prerogative not to disclose certain sensitive information through classification. Particular attention will be paid to the requirements under which restrictions to the right of access to State-held information are allowed.

Chapter 3 will deal with the possible tensions between the use of State secrecy in the context of judicial proceedings and the protection of several human rights. The first part will thus analyze State secrecy *vis-à-vis* the right to a fair trial, taking into particular account the issues raised by the use of 'secret evidence' against the accused in the context of proceedings. This Chapter will then focus on the potential clash between the resort to State secrecy and other procedural guarantees, such as the right to an effective remedy.<sup>75</sup>

Furthermore, within the context of this Chapter, one question that will be addressed is whether the nature of the substantive right violated, in relation to which redress is sought or criminal proceedings are initiated, might strengthen the 'procedural claim' by vesting the related rights with absolute and non-derogable character.

Chapter 4 will then investigate if and to what extent the reliance on State secrecy might find an obstacle in the States' duty to respect the individual and collective right to know the truth about serious violations of human rights.

The analysis undertaken in these Chapters will allow establishing *whether* (and, in the affirmative, *to what extent*) States' obligations under human rights

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<sup>75</sup> Concerning the impossibility to suspend those judicial guarantees which serve the purpose to protect absolute and non-derogable human rights see, *inter alia*, European Court of Human Rights, *Aksoy v. Turkey*, App. No. 21987/93, judgment of 18 December 1996, para. 98 and Inter-American Court of Human Rights, *Barrios Altos v. Peru*, judgment of 14 March 2001, Series C No. 45, para. 41. See also Human Rights Committee, General Comment No. 29 on derogations during a state of emergency, UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 14: "[even in state of emergency] the State party must comply with the fundamental obligation, under Article 2, paragraph 3, of the Covenant to provide a remedy that is effective".



law may be ‘compromised’ on the ground of national security or other public interests.

Against this background, the last Chapter will attempt to question the overall legitimacy of the invocation of State secrecy against human rights law and define where the balance lies in the inherent tension between secrecy and the protection of fundamental human rights.

Whereas scholarly literature on the topic of State secrecy has so far focused on specific grounds of inconsistency with international law, the present research will in fact attempt to undertake an ‘all-encompassing’ attitude in approaching this complex subject matter from a human rights perspective.

Lastly, specific attention will be paid to some ‘open issues’ such as: the duty of countries others than the ones under whose jurisdiction violations took place to disclose information related to human rights abuses; the possible conflicts of obligations undertaken by States at the international level; and the protection of whistle-blowers for disclosure of national security information.

In conducting the abovementioned analysis, the research will look primarily at existing treaty rules and State practice. The practice of international organizations with respect to secrecy will also be taken into account as far as deemed relevant to highlight current trends in the international scenario and the possible legal hurdles underpinning the growing resort to secrecy also at the regional and international level.

Some aspects have instead been deliberately excluded from the present analysis given that their detailed study would have excessively extended the ‘boundaries’ of the research undertaken. For instance, domestic legal regulations and the related sanctions provided for in case of breach of ‘State secrecy’ norms will not be the object of specific analysis unless otherwise relevant to the scope of the present work. For the same reason, the research will not take into specific account the use of military secrecy in the conduct of hostilities.

Finally, it is worth mentioning from the outset that the use of the expression ‘serious human rights violations’ in the present work bears the meaning that human rights monitoring bodies have generally attributed to it. In this respect, whereas some violations (*e.g.*, torture) are considered intrinsically ‘serious’, others may be regarded as such based on the circumstances at stake in a specific case. In particular, four criteria have been generally identified which may determine the ‘seriousness’ of a certain violation: “the character of the right; the magnitude of the violation; the type of victim; the impact of the violation”.<sup>76</sup>

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<sup>76</sup> See Geneva Academy of International Humanitarian Law and Human Rights, *Academy Briefing No. 6. What Amounts to a Serious Violation of International Human Rights Law? An Analysis of Practice and Expert Opinion for the Purpose of the 2013 Arms Trade Treaty*, August 2014, p. 34. For an overview of the use of the expression ‘serious violations of human rights’ in international practice see also P. SARDARO, *Serious Human Rights Violations and Remedies in International Human Rights Adjudication*, Ph.D. dissertation, University of Leuven (Belgium), 2007, p. 13 ff.

# CHAPTER 1

## STATE SECRECY AND HUMAN RIGHTS PROTECTION: FRAMING THE ISSUE

*“All actions that affect the rights of other human beings, the maxims of which are incompatible with publicity, are unjust”. This principle is to be understood as being not only ethical (as belonging to the doctrine of virtue) but also juridical (as concerning the rights of humans). If I may not utter my maxim explicitly without thereby thwarting my own aim, if it must be kept secret if its is to succeed, if I cannot admit it publicly without thereby inevitably provoking the resistance of all others to my plan, then the necessary and universal and hence a priori understandable opposition to me can be due to nothing other than the injustice with which my maxim threatens everyone”.*

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**SUMMARY:** 1. Introduction. – 2. Defining State secrecy: An historical perspective. 2.1. *Arcana imperii* in the Ancient Rome. – 2.2. State secrecy at the origin of the modern State. – 3. State secrecy: Current perspectives – 3.1. An external or internal threat to national security as a pre-requisite to invoke State secrecy. – 3.2. State secrecy as a ground for classification of documents. – 3.3. State secrecy as exclusionary rule of evidence in criminal or civil proceedings. – 3.4. The protection of State secrets and its constitutional basis. – 4. State secrecy: An international perspective. – 4.1. States’ legitimate prerogative not to disclose sensitive information. – 4.2. Intergovernmental and supranational obligations on the handling of classified information. – 4.2.1. Bilateral agreements and the ‘originator control principle’. – 4.2.2. Participation to intergovernmental organizations. – 4.2.2(a) The United Nations. – 4.2.2(b) The European Union. – 4.2.3. Some conclusive remarks. – 5. State secrecy and the protection of human rights: Some selected examples. – 5.1. The role of State secrecy in the context of the war on terror. – 5.1.1. Restrictive measures against suspected terrorists and secret evidence. – 5.1.2. Classification of information related to counter-terrorism measures. – 5.1.3. State secrecy as an obstacle to judicial scrutiny. – 5.2. State secrecy and human rights violations beyond the war on terror. – 6. Conclusions.

### 1. Introduction

Broadly speaking, since ancient times States have resorted to secrecy as a

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<sup>1</sup> I. KANT, *Toward Perpetual Peace: A Philosophical Sketch*, Königsberg, 1795, reported in P. KLEINGELD (ed.), *Towards Perpetual Peace and Other Writings on Politics, and History*, New Haven and London, 2006, pp. 104-105 (translated by D.L. Colcasure). Emphasis in original.

means to maintain power. Indeed, to have and keep secrets implies having the ‘power’ arising from knowledge; a power whose exercise points in a double direction. From an ‘inner’ perspective, secrecy concurs in maintaining that social order which characterizes the relationship between rulers and ruled and, overall, the public order.<sup>2</sup> From an ‘external perspective’, instead, secrecy amounts to an instrument for maintaining independence, preventing the disclosure to potential enemies of information that could undermine the survival of the State, along the line of the ancient juxtaposition between *amicus* and *hostis*.<sup>3</sup>

It is not a mere coincidence that, even nowadays, in most modern legal systems State secrecy is meant to protect national security either from external or internal threats.

For instance, in Italy, State secrecy covers documents, information, activities and any other matter whose disclosure may jeopardize the integrity and independence of the Italian Republic or harm those institutions lying at the heart of the Constitution.<sup>4</sup>

In the United States, the expression ‘State secret privilege’ refers to that evidentiary rule which blocks the disclosure of those documents or information that might seriously damage national security, being an exclusive prerogative of the President’s authority over diplomatic and military affairs.<sup>5</sup>

In the United Kingdom, the so-called ‘public interest immunity’ represents the ground to refuse the disclosure of information and documents in court any time they would prejudice an important public interest, for instance, by “exposing secret information to enemies of the State” or undermining “the

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<sup>2</sup> A. MARRONE, *Il nomos del segreto di Stato*, *supra* Introduction, note 5, p. 4.

<sup>3</sup> *Ibid.*, p. 13.

<sup>4</sup> See Article 39.1 of Italian Law No. 124/2007.

<sup>5</sup> United States District Court Eastern District of Virginia, *Khaled El-Masri v. Tenet et al.*, decision of 12 May 2006, *supra* Introduction, note 32. For an overview of ‘State secrecy’ in the United States see, *inter alia*, G. LESTER, *When Should State Secrets Stay Secret? Accountability, Democratic Governance, and Intelligence*, New York, 2015.

ability of the security and intelligence agencies to protect the safety of the UK”.<sup>6</sup>

Interestingly, nowadays similar concepts have been transposed also at the supranational level. For instance, Regulation 1049/01/EC, while providing for a specific regime of access to information within the EU, excludes ‘sensitive information’, that is, all classified documents “which protect *essential interests* of the European Union or of one or more of its Member States in (...) areas [such as] public security, defence and military matters”.<sup>7</sup>

Secrecy represents an inherent feature of modern States (and, increasingly, of international organizations), whose utilization is warranted by the need to protect high imperatives, generally falling within the broad concept of internal and external security.

However, both in substantive and procedural terms, secrecy may often come into collision with human rights, as enshrined in both domestic Constitutions and international rules.

A brief look at domestic legal systems shows how State secrecy acts either as classification of sensitive information, limiting the access to the general public,<sup>8</sup> or as evidentiary rule preventing the disclosure of documents or other information in court.<sup>9</sup>

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<sup>6</sup> See The Crown Prosecution Service, *The Disclosure Manual*, Chapter 8, at 8.2 ff. In the UK, also “the willingness of citizens, agencies, commercial institutions, communications service providers etc. to give information to the authorities in circumstances where there may be some legitimate expectation of confidentiality; (...) national (not individual or company) economic interests; (...) the ability of the law enforcement agencies to fight crime by the use of covert human intelligence sources, undercover operations, covert surveillance etc.; the freedom of investigators and prosecutors to exchange views frankly about casework” fall within the notion of public interest. See again *The Disclosure Manual*, at 8.4. On the topic see also M. HANNIBAL, L. MONTFORD, *The Law of Civil and Criminal Evidence: Principles and Practice*, Harlow, 2002, p. 179 ff.

<sup>7</sup> Emphasis added. Regulation EC 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (Official Journal of European Community, L 145/43), Article 9(1). A revision of the Regulation is now under process. See in this respect, Council of the European Union, Proposal for a Regulation of the European Parliament and the Council regarding public access to European Parliament, Council and Commission Documents, file No. 2008/0090 (COD), Brussels, 13 November 2013.

<sup>8</sup> Usually the classification follows a hierarchical scale based on the level of sensitivity of information (restricted, confidential, secret, top secret, etc...). See, for instance, Article 3 ff. of

Depending on the circumstances at stake, the resort to secrecy might therefore compromise, in practice, essential individual rights and liberties such as the right of access to State-held information, the right to an effective remedy, and the right to receive a fair trial.

In addition, whilst few domestic legal systems provide for effective ‘checks and balances’ mechanisms among State powers,<sup>10</sup> which should prevent – at least in theory – any abuse by the executive branch, in other countries scrutiny is relegated to be only ‘on paper’ or, even, non-existent,<sup>11</sup> *de facto* granting to

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Spanish Law No. 9/1968, emended by Law No. 48/78; Article 8.4 of the Ukrainian Law on State Secrets No. 3855/XII of 21 January 1994 (as amended by Law No. 971/IV of 21 June 2003); Articles 4 and 5 of the Belgian Law relating to Classification and to the Authorization of Security of 11 December 1998; Article 5.7 of the Peruvian Ministerial Resolution No. 392-204/DE-SG of 28 April 2011, approving the General Directive 008-2011 MINDEF/SG-UAIP on Procedures for Access, Classification, Reclassification, Declassification, Archiving and Conservation of Defence Information. About classification of information in Italy as regulated by Articles 39-42 of Law No. 124/2007 see, *inter alia*, P. PISA, *Segreto di Stato in evoluzione*, in *Gnosis – Rivista italiana d’intelligence*, 2008.

<sup>9</sup> Concerning State secrecy as evidentiary rule excluding disclosure of information in courts see, for instance, G. PAOLOZZI, *La tutela processuale del segreto di Stato*, Milano, 1983; M. HANNIBAL, L. MONTFORD, *The Law of Civil and Criminal Evidence: Principles and Practice*, *supra* note 6, p. 179 ff.; S. SETTY, *Litigating Secrets: Comparative Perspectives on the State Secret Privilege*, in *Brooklyn Law Review*, 2009, p. 207 ff.

<sup>10</sup> For instance, in Scotland and, more recently, England, when governmental authorities invoke the public interest immunity, courts can undertake a previous exam of the documents in order to establish whether their disclosure would seriously impair the public interest. See, for instance, House of Lords, *Conway v. Rimmer*, 28 February 1968, at 911, which still today represents a main legal precedent. See also *R (Binyam Mohamed) v. Secretary of State and Commonwealth Affairs*, EWHC 2549, 16 October 2009 (at 105). The case of Israel is also worth mentioning. The Israeli Supreme Court has indeed consistently found that the executive’s national security policy is judicially reviewable. As a result, the Court has been frequently involved in the process of balancing national security interests and human rights protection. See, in particular, its decision in Israeli Supreme Court, *Adalah Legal Centre for Arab Minority Rights in Isr. v. Minister of Interior*, case No. 7052/03, 2006, at 692-93. For an overview of domestic legislation related to the use of secrecy evidentiary privilege before Israeli courts see, e.g., A. KOBO, *Privileged Evidence and State Security under the Israeli Law: Are we Doomed to Fail?*, in *Cardozo Public Law, Policy and Ethics Journal*, vol. 5, 2006, pp. 113-125.

<sup>11</sup> In the United States, for instance, judicial scrutiny over State secrecy privilege claims is limited to ascertain whether disclosure would constitute a ‘reasonable danger’ to national security. However, the court must undertake the assessment without having reviewed the concerned documents. For a broader overview see again S. SETTY, *Litigating Secrets: Comparative Perspectives on the State Secret Privilege*, *supra* note 9. On the topic, specifically relating to Spain, it is worth mentioning also E. M. ALONSO, *El control judicial de los secretos de Estado en España. A propósito de les exportaciones de armamento*, in *Revista Opinión Jurídica*, vol. 7, July/December 2008.

the executive absolute discretion in the invocation of State secrecy.<sup>12</sup> Indeed, as it will be better shown *infra*, one of the main issues at stake when considering States' reliance on 'secrets of State' is the absence or practical inefficiency of oversight mechanisms that, even when explicitly provided for by domestic legislation, often lack independence.

As previously mentioned, in the present Chapter particular emphasis will be placed precisely on the attempt to identify the rationale and practical applications of the invocation of State secrecy, as well as its possible impacts in terms of violation of fundamental human rights. The focus will be on selected examples of legislations and case law.

## **2. Defining State secrecy: An historical perspective**

### **2.1. *Arcana imperii* in the Ancient Rome**

In the Ancient Rome, a primitive notion of State secrecy was generally expressed through the terms *arcana imperii* and *secreta imperii* and, at a subsequent stage, following the establishment of the *res publica* in the 6<sup>th</sup> century B.C., with the words *secreta ad rem publicam pertinentia*.<sup>13</sup>

As previously said, the terms *secretum* had its roots in the radix *-cern* of the verb *secernere*, meaning 'to divide-to separate'. Somehow similarly, the word *arcanum* originates from the term *arca*, that indicated the silver case where the State treasure was contained.<sup>14</sup> Accordingly, both these expressions referred to information that should have been kept separated and concealed from the knowledge of most.

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<sup>12</sup> See D. KRAPAC, *Testimonial Evidence in Criminal Trials Excluded for Reasons of National Security, Affairs of State and Public Interest under Croatian Criminal Procedural Law*, in H. ROGGMANN, P. ŠARČEVIĆ (eds), *National Security and International Criminal Justice*, The Hague, London, New York, 2002, p. 40.

<sup>13</sup> C. MOSCA, G. SCANDONE, S. GAMBACURTA, M. VALENTINI, *I servizi d'informazione e il segreto di Stato: legge 3 agosto 2007, n. 124*, *supra* Introduction, note 7, p. 461.

<sup>14</sup> A. ERNOUT, A. MEILLET, *Dictionnaire étymologique de la langue latine: histoire de mots*, *supra* Introduction, note 2, see *arca*, *arceo*, *arx*.

Originally, *arcana imperii* or *secreta imperii* were only those *res* that, whether disclosed, would have impaired the survival of Rome (*pignora imperii*).<sup>15</sup> An example was the ‘*ancilia*’ of Mars whose subtraction by the enemies was believed to determine the end of the Roman Empire.<sup>16</sup>

Parallel to the expansion of Rome and to the extension of its hegemony on the Mediterranean area, the list of *arcana imperii* grew as well, to the point that, even if absent any systematic legal discipline concerning specifically State secrecy, it became possible to identify in practice at least three categories of sensitive information: the *secreta ad bella pertinentia* (military secrets); religious secrets; and those information relating to national security and international relations classified as secrets by the Senate.<sup>17</sup>

As regards the former category, the Digest of Justinian contains two norms dealing with *secreta ad bella pertinentia* and, more specifically, with the prohibition of their disclosure to the enemy.

Both the norms referred to a particular class of militaries – the *exploratores* – who were generally entrusted with the task of acquiring information on the morphological features of the battlefield; therefore, those *milites* who were more likely to get in contact with the enemies.<sup>18</sup>

According to title 6.4. of the 16<sup>th</sup> Section of the 49<sup>th</sup> *Liber* of the Digest: “*exploratores, qui secreta nuntiaverunt hostibus, proditores sunt et capitiiis poenas luunt*” (“the explorers who revealed secrets to the enemies are betrayers and can be sentenced to death”).<sup>19</sup>

Title 3.4. of the same Section of the Digest, instead, provides that: “*is qui explorationem emanet, hostibus insistentibus, aut qui a fossato recedit capite*

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<sup>15</sup> The first use of the expression *arcana imperii* is in P.C. TACITUS, *Historiae*, liber I.4 (“*finis Neronis ut laetus primo gaudentium impetu fuerat, ita varios motus animorum non modo in urbe apud patres aut populum aut urbanum militem, sed omnis legiones ducesque conciverat, evulgato imperii arcano posse principem alibi quam Romae fieri*”).

<sup>16</sup> C. MOSCA, G. SCANDONE, S. GAMBACURTA, M. VALENTINI, *I servizi d'informazione e il segreto di Stato: legge 3 agosto 2007, n. 124, supra* Introduction, note 7, p. 463.

<sup>17</sup> *Ibid.*, p. 465.

<sup>18</sup> On the meaning of *exploratores* see, inter alia, P. PRETO, *Le parole dello spionaggio*, in *Gnosis - Rivista italiana di intelligence*, vol. 6, 1996.

<sup>19</sup> D.49.16.6.4 (unofficial translation), available on line at: <http://amshistorica.unibo.it/176>.



*puniendus est*” (“the explorer who stays far from the camp longer than the time established while the enemies are close and who goes away from the camp should be condemned to death”).<sup>20</sup>

The list of ‘military secrets’ increasingly expanded with time and according to new defensive necessities.

For instance, the Theodosius II’s Code of 438 B.C. expressly envisaged the condemnation to death for those who had revealed to the barbarians the secrets concerning the construction of ships.<sup>21</sup> At that time, the most important cities of the Roman Empire were indeed along the coast and the disclosure of information related to the construction of ships would have strengthened the enemies and put at risk the survival of the Empire.<sup>22</sup>

Besides military secrets, in the Ancient Rome also all those information that were known only by priests, first of all the names of the guardian gods of Rome (known only to the highest pontiff) were considered as secrets (religious secrets).<sup>23</sup>

Indeed, at that time it was believed that a city could have been conquered only by invoking the name of the guardian gods of Rome in a specific order.<sup>24</sup> Accordingly, if disclosed to the enemy, similar information would have impaired the survival of Rome.

Finally, coming to the third category of ‘Roman secrets’, the members of the Senate were not allowed to disclose all those information related to

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<sup>20</sup> D 49.16.3.4 (unofficial translation), available online at: <http://amshistorica.unibo.it/176>.

<sup>21</sup> Theodosius Code, Liber XI, 40.24: “(...) *His, qui conficiendi naves incognitam ante peritiam barbaris tradiderunt propter petitionem viri reverentissimi Asclepiadis Chersonesitanae civitatis episcopi imminenti poena et carcere liberatis capitale tam ipsis quam etiam ceteris supplicium proponi decernimus si quid simile fuerit in posterum perpetratum*”. For translation and commentary of the Theodosian Code see C. PHARR, *The Theodosian Code and Novels and the Sirmodian Constitutions. A Translation with Commentary, Glossary and Bibliography*, Princeton, 1952.

<sup>22</sup> C. MOSCA, G. SCANDONE, S. GAMBACURTA, M. VALENTINI, *I servizi d’informazione e il segreto di Stato: legge 3 agosto 2007, n. 124, supra* Introduction, note 7, p. 467.

<sup>23</sup> See R. ORESTANO, *Sulla problematica del segreto nel mondo romano, supra* Introduction, note 4, p. 113.

<sup>24</sup> *Ibid.*

national security and international policy that the Assembly<sup>25</sup> as a whole had established should have been kept secret.

According to Valerius Maximum, this prohibition was breached only once by the senator Fabius Maximum who accidentally revealed to a Carthaginian the intention of Rome to begin a third war against Carthage.<sup>26</sup>

Although it is unknown whether on that occasion Fabius Maximum was excluded or not from the Senate, it is believed that this was the consequence that normally followed the accidental disclosure of ‘classified’ information’ (whilst the intentional disclosure would have accounted as *crimen proditiōnis* – ‘betrayal’).<sup>27</sup>

The authority to invoke State secrecy, however, was not an exclusive prerogative of the Senate, although, as said, it certainly held a key role at least in establishing those information relating to national security and foreign policy whose disclosure was forbidden.

Indeed, in light of the structure of the Roman system, such authority was shared among the Senate, the priests and the *comitium* (Curiate assembly), each one being competent to establish what amounted to State secret within their respective spheres of influence.<sup>28</sup>

As already mentioned, the disclosure of sensitive information accounted as *crimen proditiōnis*. Although such expression in the Ancient Rome covered all

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<sup>25</sup> The Roman Senate was originally composed by 100 members coming from the patrician families and was subsequently enlarged to include 300 members. The Senate was the holder of the legislative power and, at the same time, the main adviser of the emperor.

<sup>26</sup> VALERIUS MAXIMUS, *Factorum et dictorum memorabilium* (1 century B.C.), Liber II, 2.1: “Adeo autem magna caritate patriae tenebantur, ut arcana consilia patrum conscriptorum multis saeculis nemo senator enuntiauerit. Q. Fabius Maximus tantum modo, et is ipse per imprudentiam, de tertio Punico bello indicendo quod secr<et>o (...)”.

<sup>27</sup> C. MOSCA, G. SCANDONE, S. GAMBACURTA, M. VALENTINI, *I servizi d’informazione e il segreto di Stato: legge 3 agosto 2007, n. 124, supra* Introduction, note 7, p. 469.

<sup>28</sup> *Ibid.* On the notion and functions of the *Comitium* see D. GARGOLA, *Roman Assemblies*, in M. GAGARIN, E. FANTHAM (eds), *The Oxford Encyclopaedia of Ancient Greece and Rome*, Oxford, 2010, p. 282 ff.

those behaviours that amounted to betrayal, it is believed that originally this crime only referred to the disclosure of State secrets.<sup>29</sup>

This seems to be confirmed by the same meaning of the term *proditio*, which means ‘disclosure’.

The monarch and then, in the Republican era, the highest authorities (usually the consuls) were entitled to the repression of the *crimen proditionis* by ascertaining, in public hearings, whether the accused had effectively disclosed sensitive information.<sup>30</sup>

The judicial interest which would have been allegedly offended by disclosure of sensitive information was the *maiestas* of the Roman people,<sup>31</sup> a so high imperative that the act of revealing State secrets was punished with death. The condemnation was originally executed by fall from the Tarpeian Rock<sup>32</sup> and, later on, by decapitation.<sup>33</sup>

It is thus evident that already in the Ancient Rome there was the belief that some information, if made public and accessible also to the enemy, would have been likely to hinder the same survival of the State. This information was of military, religious or political nature and corresponded to that core of knowledge that, *de facto*, allowed the *grandeur* of the Roman Empire. It is thus no surprise that, in legal terms, the disclosure of such information to the enemy would have accounted as a criminal offence against the dignity of the Roman people, punished with the heaviest possible penalty.

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<sup>29</sup> C. MOSCA, G. SCANDONE, S. GAMBACURTA, M. VALENTINI, *I servizi d’informazione e il segreto di Stato: legge 3 agosto 2007, n. 124, supra* Introduction, note 7, p. 471.

<sup>30</sup> *Ibid.*, p. 474.

<sup>31</sup> Iustian Digestum, D. 48.4.1: “*proximum sacrilegio crimen est quod maiestas dicitur. Maiestatis autem crimen illud est, quod adversus populum Romanum vel adversus securitatem eius committitur: quo tenetur is ...quive hostium populi Romani nuntium litterasve miserit*”. See also D.48.4.10.

<sup>32</sup> That had been named over the virgin that Romulus had condemned to the same ‘conviction’ for having disclosed State secrets to the Sabines. See C. MOSCA, G. SCANDONE, S. GAMBACURTA, M. VALENTINI, *I servizi d’informazione e il segreto di Stato: legge 3 agosto 2007, n. 124, supra* Introduction, note 7, p. 473.

## 2.2. State secrecy at the origin of the modern State

Although the importance of concealing sensitive information is something known to all governmental authorities throughout history,<sup>34</sup> as already said, it is from the 16th-17th centuries that the ancient notion of *arcana imperii* has been mostly recovered and extensively theorized.<sup>35</sup>

At that time, many treatises began framing the doctrine of the *raison d'état*, which identifies secrecy and dissimulation as fundamental instruments to ensure governability.

In *La Ragion di Stato* (1589) Giovanni Botero wrote:

“For those who deal with negotiations of the highest importance, concerning either peace or war, secrecy is the most important thing ... the intentions of the Prince, if kept secret, are effective and powerful but, as soon as they are disclosed, lose their value granting advantages to the enemies (...).”<sup>36</sup>

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<sup>33</sup> *Ibid.*

<sup>34</sup> As noted *supra*, the history furnishes many examples of the creation of intelligence services and the attempts by governments to conceal information from foreign enemies. In the XIII century, for instance, Genghis Khan relied on secret agents to obtain relevant information that could support its expansionistic goals and even resorted on dissimulation in order to deceive his rivals. During the Middle Age, the Byzantines' counter-intelligence prevented the enemies to gather information concerning the 'Greek fire', one of the most powerful weapons existing at the time; this gave them huge military advantages on the battlefield. See C. MOSCA, G. SCANDONE, S. GAMBACURTA, M. VALENTINI, *I servizi d'informazione e il segreto di Stato: legge 3 agosto 2007*, *supra* Introduction, note 7, p. 5 ff.

<sup>35</sup> See, *inter alia*, G. MIGLIO, *Il segreto politico*, *supra* Introduction, note 11, p. 171 ff; M. CATANZARITI, *New Arcana Imperii*, *supra* Introduction, note 11, p. 59 ff.

<sup>36</sup> Unofficial translation. G. BOTERO, *La Ragion di Stato*, Venezia, 1589, p. 45. Given the interest of the text, it is worth quoting the original version in its entirety: “*Della Segretezza – Non è parte alcuna più necessaria a chi tratta negozi di importanza, di pace o di guerra, che la segretezza. Questa facilita l'esecuzione de' disegni e 'l maneggio dell'impresche che, scoperte, avrebbero molti e grandi incontri; perché, si come le mine se si fanno occultamente, producono effetti maravigliosi, altramente sono di danno, anziché di profitto, così i consigli de' Principi, mentre stanno segreti, sono pieni di efficacia ed agevolezza, ma non si presto vengono a luce, che perdono ogni vigore e facilità, conciosiaché o i nemici o gli emoli cercano d'impedirli o di attraversarli. Il Gran Duca Cosmo De' Medici, Principe di*

Accordingly, Botero outlines how dissimulating – that is “to pretend not to know or care for what you know and estimate” –<sup>37</sup> is an element of primary importance for the rulers.

Botero’s work also reveals an increasing attention for the ‘internal’ relevance of secrecy.

While, as previously pointed out, the Roman *arcana imperii* mostly referred to those information that, if revealed to foreign enemies, would have hindered the survival of Rome, Botero’s concept of *raison d’état* mainly deals with the importance of secrecy in allowing the Princes to keep the power over their subjects.<sup>38</sup>

Indeed, in the 16th and 17th centuries, political writers focused on secrecy and the clever management of knowledge as a possible source of power,<sup>39</sup> arguing that the rulers should sometimes disregard the law and ethics in order to defend their State or their own sovereignty.<sup>40</sup>

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*grandissimo giudizio stimava che la segretezza fosse un de’capi principali del reggimento degli Stati”.*

<sup>37</sup> *Ibid.*, p. 46. In the original version: “(...) *E dissimulazione si chiama un mostrare di non sapere o di non curare quel che tu sai e stimi (...)*”. Botero also makes an example of the negative consequences that might follow when the ruler does not resort to the *ars dissimulandi*, recalling the rebellions which burst out when Alfonso Duca di Calabria revealed his intention to rearrange the Kingdom of Naples (“*Alfonso Duca Di Calabria, stando egli in Lombardia alla guerra di Ferrara, s’era più volte lasciato uscire di bocca che, ritornato a Napoli, col castigo d’alcuni rassettarebbe le cose del Regno. Queste parole, risaputesi, furono cagione della ribellione dell’Aquila e de’ Baroni; Passerino, signor di Mantova, col minacciar Luigi Gonzaga, fu prevenuto e ammazzato col figliuolo; Francesco d’Orso da Forlì, perché si vedeva minacciare dal Conte Gieronimo Riario, preoccupandolo, l’ammazzò in camera, perché le minacce sono armi del minacciato*”).

<sup>38</sup> According to Botero, secrecy makes the Prince similar to God and raises expectations and dependence in his subjects, who ignore his real intentions. See again G. BOTERO, *La Ragion di Stato*, *supra* note 36, p. 52.

<sup>39</sup> V. KELLER, *Mining Tacitus: Secrets of Empire, Nature and Art in the Reason of State*, in *British Journal of History of Science*, 2012, p. 3.

<sup>40</sup> R. FOXLEY, *Marchamont Nedham and Mystery of State*, in G. MAHLBERG, D. WIEMANN (eds), *European Context for English Republicanism. Politics and Culture in Europe, 1650-1750*, Farnham, 2013, p. 56. It is worth clarifying that, as it appears also from Botero’s words, the political writers of the time analysed not only the role of dissimulation and secrecy in the relationship between the rulers and their subjects, but also with reference to international relations.

In his work, Arnold Clapmar even enlisted among the *arcana imperii* the *simulacra*: the ways in which the rulers could show their adherence to a specific form of government even when, in practice, they followed a different one.<sup>41</sup>

However, at the time there was no unanimous attitude towards ‘political secrecy’. Whilst most of the political literature endorsed the ‘culture of political mystery’ as a fundamental aspect of the reason of State,<sup>42</sup> other authors – among which, John Streater – vehemently supported universal knowledge.<sup>43</sup>

That notwithstanding, in general, the *raison d’état* doctrine, although *in abstracto* linking secrecy to the protection of the *salus rei publicae* and not to the personal power of the ruler, leaved the assessment of what constituted national interest exclusively to the latter, without requiring the establishment of legal parameters or the provision of institutional oversights for his actions.

This theoretical construct is reflected in the practice of that time. In the United Kingdom, for instance, the King could ban the disclosure of sensitive information to protect existing State secrets (the already mentioned *crown privilege*). This faculty amounted to an exclusive power of the King, listed among his royal prerogatives and beyond the reach of the law. Quoting Bacon’s words: “It may be the great Lords thought the Mysteries of State too sacred to be debated before the vulgar, lest they should grow into curiosity”.<sup>44</sup> In the same perspective, in 1620, James I addressed the Parliament as follows:

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<sup>41</sup> P. DONALDSON, *Machiavelli and Mystery of State*, Cambridge, New York, 1988, p. 113.

<sup>42</sup> M. NEDHAM, *Mercurius Politicus*, 1651, p. 1111. In his work Nedham endorsed the division between people and Senate in the Ancient Rome, which, according to the writer, allowed State secrets to be handled by men wise and experienced enough for similar State affairs.

<sup>43</sup> J. STREATER, *A Glympse of that Jewel, Judicial, Just, Preserving Libertie*, London, 1653, p.1.

<sup>44</sup> N. BACON, *An Historical and Political Discourse of the Laws and Government of England, From the First Times to the End of the Reign of Queen Elizabeth*, London, 1739, p. 176.

“We discharge you to meddle with Matters of Government or Mysteries of State”.<sup>45</sup>

Similarly, in France, State secrecy constituted an exclusive prerogative of the Sovran, who was alone entitled to decide if sensitive information could or could not be disclosed.<sup>46</sup>

Against this background, the experience of the Republic of Venice, where, on 20 September 1539, the *Consiglio dei Dieci* established a collegium of three inquisitors, entrusted with the specific task of condemning those who had revealed State secrets, appears somehow peculiar.<sup>47</sup> The competence of the collegium progressively expanded to include all matters of political relevance.<sup>48</sup>

Although this body only held inquisitorial powers, it inevitably contributed to the practical discernment of what constituted sensitive information by ‘adjudicating’ those cases involving the alleged disclosure of State secrets.

Following the transition to liberalism and democracy in most European countries during the 18th-19th centuries, the Prince or King is no longer sovereign and governmental authorities, regardless of the form of government in place, become accountable for their actions. Secrecy becomes the exception – subjected to strict limits – as the public (the people sovereign) should be generally informed about internal and international affairs.

This transformation greatly impacted also on the discipline of State secrecy, especially in its procedural dimension.

However, as it will be better illustrated in the next section, from a substantive point of view, the ancient doctrines of *arcana imperii* and *raison d'état* still partially shape the current regulations on State secrecy, as proven,

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<sup>45</sup> *Proceedings and Debates of the House of Commons in 1620 and 1621*, p. 326. On the topic see, *inter alia*, G. CARVALE, *Aspetti della disciplina del segreto di Stato nel Regno Unito: il Justice and Security Bill del 2012*, *supra* Introduction, note 13, pp. 2-3.

<sup>46</sup> For an overview see L. BÉLY, *Les secrets de Louis XIV: mystères d'Etat et pouvoir absolu*, Paris, 2013.

<sup>47</sup> P. PRETO, *I servizi segreti di Venezia. Spionaggio e controspionaggio ai tempi della Serenissima*, Milano, 2010, p. 59.

<sup>48</sup> *Ibid.*

above all, by the recurring need for an internal or external threat to national security as a pre-requisite for invoking it.

### **3. State secrecy: Current perspectives**

As noted, the resort to State secrecy is usually warranted by the need to protect high imperatives, generally falling within the broad notion of State's national security in its double-fold perspective: external and internal. This is a common trait that has characterized the notion of State secrecy throughout history and still features in current domestic legal systems.

Some examples have already been mentioned, although briefly. The issue, however, deserves a deeper analysis in order to set a more precise framework. To this purpose, national legislation of France, Italy, the People's Republic of China, Peru, the Russian Federation, Spain, the United States and the United Kingdom will be taken into account.<sup>49</sup>

Furthermore, the South African current legal regime<sup>50</sup> and the 2013 South Africa's Protection of State Information Draft Bill – which, when promulgated, will in part reform it – will be also examined. The South African National Assembly adopted the Draft Bill on 12 November 2013. However, since then, the South African President has delayed signing it, likely due to the criticism that this controversial piece of legislation has raised, especially among human rights defenders.<sup>51</sup>

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<sup>49</sup> The relevant legislation and case law of France, Italy, Spain and the United Kingdom has also been the object – together with the legislation and case law of the Netherlands, Sweden and Germany – of a study commissioned by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs. For the outcomes of this study see D. BIGO, S. CARRERA, N. HERNANZ, A. SCHERRER, *National Security and Secret Evidence in Legislation and before the Courts: Exploring the Challenges*, CEPS Paper in Liberty and Security in Europe, No. 78, 2015. States secrets laws in different jurisdictions around the world are analyzed also in H. NASU, *State Secrets Law and National Security*, *supra* Introduction, note 73, p. 368 ff.

<sup>50</sup> See, in particular, the Protection of Information Act of 1982, Act No. 84 of 3 June 1982 (entered into force on 16 June 1982).

<sup>51</sup> In May 2015, however, journalists reported that the South African government initiated drafting implementation regulations in view of the presidential signature of the Protection of State Information Bill. See 'Secrecy Bill Creeps Closer', in *City Press*, 10 May 2015,



At times, domestic legal systems other than those constituting the specific object of the present research will be addressed: these references are mainly meant to provide further support to the conclusions that the analysis of the selected national systems will lead to.

This choice of domestic legal systems aims at providing the reader with a global overview by taking into account – as far as available documents allow so – different geographical areas. Furthermore, it will show that rules protecting State secrets are in place regardless of the different governing systems. Advanced liberal democracies, like authoritarian regimes, do provide for and apply such rules.

Yet, State secrecy laws vary from State to State. As a result, no inference shall be made with regard to States that are not explicitly mentioned.

### **3.1. An external or internal threat to national security as a pre-requisite to invoke State secrecy**

As previously mentioned, Italian secrecy law provides that all the documents, information, activities and any other matter whose disclosure may hinder the *security of the Republic* are covered by State secrecy. The notion “security of the Republic” refers to the integrity and independence of the Italian State and to the defence of institutions as established in the Constitution.<sup>52</sup>

In light of this definition, the executive has identified a list of information susceptible of secret coverage, relating, *inter alia*, to intelligence activities, military plans and infrastructures, economic, financial, scientific,

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available at: <http://www.news24.com/SouthAfrica/News/Secrecy-bill-creeps-closer> (last accessed on 24 February 2016).

<sup>52</sup> See Article 39.1 of Italian Law No. 124/2007. On the subjective nature of these notions see A. MARRONE, *Il nomos del segreto di Stato tra politica e costituzione*, *supra* Introduction, note 5, p. 9. This constitutionally-oriented notion of State secrecy was first conceived and expressed by the Italian Constitutional Court in its decision No. 86 of 24 May 1977. The Court affirmed that secrecy, as general principle of law, is legitimate only if granting protection to the highest constitutional interests, such as military defence and national security (at 5-7).

technological and environmental interests.<sup>53</sup> This last inclusion, however, has raised some doctrinal criticism.<sup>54</sup>

Documents and information concerning terroristic activities or actions aimed at overturning the constitutional order cannot instead be classified.<sup>55</sup>

Somehow similarly to Italian legislation, Article 2 of the Spanish Law No. 9/1968,<sup>56</sup> amended by Law No. 48/78, extends classification to those acts, documents, information, data and objects whose knowledge by non-authorized people could damage or put at risk the *security and defence of the State*. A definition of what amounts to national security is embodied in Article 2 of the Law No. 5/2005, which refers to the protection of the whole society, the Constitution, the constitutional principles and institutions, as well as the preservation of the independence and the territorial integrity of the State.<sup>57</sup>

In France, the protection of secrecy is granted in all fields of activities related to defence (“*secret de la défense*”) and national security (“*sécurité nationale*”).<sup>58</sup> However, no law provides a clear definition of what amounts to *défense* or *sécurité nationale*.<sup>59</sup>

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<sup>53</sup> Decree No. 8 April 2008, *Gazzetta Ufficiale della Repubblica Italiana*, No. 90, 16 April 2008, Annex. Article 39.5 of Law No. 124/2007 entrusts the Prime Minister with the task of establishing the *criteria* for the identification of those documents, acts and information covered by State secrecy.

<sup>54</sup> A. PACE, *L'apposizione del segreto di Stato nei principi costituzionali e nella legge n. 124 del 2007*, in *Giurisprudenza costituzionale*, 2008, pp. 4043-4044.

<sup>55</sup> Law No. 124/2007, Article 39.11.

<sup>56</sup> *Ley sobre secretos oficiales* No. 9 of 6 April 1968.

<sup>57</sup> *Ley orgánica de la defensa nacional* No. 5 of 17 November 2005. It is worth mentioning that, with reference to Law No. 6/1980, then replaced by Law No. 5/2005, an amendment proposal was discussed by the Spanish Parliament to include in the law a clause stating that the defence was aimed at protecting the Nation only against external attacks. The Spanish Parliament eventually rejected the proposed amendment (*Boletín Oficial de las Cortes Generales, Congreso de los Diputados*, I Legislatura, Serie A, No. 72.I.1, 10 October 1979, p. 356).

<sup>58</sup> *Arrêté du 30 novembre 2011 portant approbation de l'instruction générale interministérielle n° 1300 sur la protection du secret de la défense nationale, titre 1er*. See also Ar. 413-9 of the French Criminal Code, pursuant to which: “*Présentent un caractère de secret de la défense nationale au sens de la présente section les procédés, objets, documents, informations, réseaux informatiques, données informatisées ou fichiers intéressant la défense nationale qui ont fait l'objet de mesures de classification destinées à restreindre leur diffusion ou leur accès; Peuvent faire l'objet de telles mesures les procédés, objets, documents, informations, réseaux informatiques, données informatisées ou fichiers dont la divulgation ou auxquels l'accès est de nature à nuire à la défense nationale ou pourrait conduire à la découverte d'un*

In the United Kingdom, the resort to the procedural rule of ‘public interest immunity’ to prevent the use of sensitive information in judicial proceedings apply to those documents or information whose disclosure would expose secret information to the enemies of the State or would undermine the ability of the security and intelligence agencies to protect public safety.<sup>60</sup>

In addition, the 1989 United Kingdom’s Official Secrets Act criminalizes the disclosure of any information concerning *security, intelligence, defence, international relations* and *criminal investigations* by civil servants (primary disclosure) or by any other person under whose possession the information lies (secondary disclosure).<sup>61</sup>

A more general reference to ‘national security’ is instead included in the Freedom of Information Act, which exempts governmental bodies to disclose certain information to the general public on the ground of national security.<sup>62</sup>

The executive has often opted for a broad reading of these ‘national security requirements’. An illustrative case is the Ministry of Defence’s denial, in 2008, to disclose, upon request of the *All Party Parliamentary Group on Extraordinary Renditions*, the *memoranda* of understanding signed by the Afghan, Iraqi, UK and US authorities on detainees transfers, as this may have undermined international bilateral relationships.<sup>63</sup>

The interpretation given by the government is very much questionable and constitutes evidence of its attitude to conceal information even lacking a real

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*secret de la défense nationale; les niveaux de classification des procédés, objets, documents, informations, réseaux informatiques, données informatisées ou fichiers présentant un caractère de secret de la défense nationale et les autorités chargées de définir les modalités selon lesquelles est organisée leur protection sont déterminés par décret en Conseil d'État*”.

<sup>59</sup> In 1957, Jacques Léauté already pointed out: “*définir avec précision les limites du Secret de la Défense nationale est l’aspiration de nombreux juristes français*”. See J. LÉAUTÉ, *Secret militaire et liberté de la presse: étude de droit pénal comparé*, Paris, 1957, p. 1. For an overview of the normative protection of the “*secret de la défense*” in France see, e.g., P. SARTRE, P. FERLET, *Le secret de la défense en France*, in *Études*, vol. 412, 2010, pp. 165-175.

<sup>60</sup> See The Crown Prosecution Service, *The Disclosure Manual*, Chapter 8, *supra* note 6, at 8.2 ff.

<sup>61</sup> Sections 1-6.

<sup>62</sup> The Freedom of Information Act (2000), Part II, section 24.

threat to national security. Indeed, as it has been correctly stressed by the administrative chamber of the UK Upper Tribunal, it is to doubt: “that the terms of a memorandum of understanding or similar agreement that is designed to ensure compliance with human rights and similar legal obligations in respect of people whose detention is transferred to another state could be perceived as confidential in nature”.<sup>64</sup>

In the United States, information controlled by the government can be classified whenever their disclosure may reasonably cause damage to the national security,<sup>65</sup> which is defined as “national defence and foreign relations of the State”.<sup>66</sup> However, classification to conceal violations of laws, inefficiency or administrative errors is prohibited.<sup>67</sup>

These provisions have been interpreted so to ensure the lowest risk possible of damage, thus leading, in practice, to over-classification.<sup>68</sup> The US authorities’ attitude to broadly intend the scope of application of the national security interest is well illustrated by the facts at stake in the case *Center for International Environmental Law v. Office of the United States Trade Representative et al.*<sup>69</sup> There, the plaintiff sought the disclosure of a one-page position paper produced by the US during the negotiations to conclude a free-trade agreement with foreign nations. More specifically, the document contained the government’s understanding of the expression “in like circumstances”, that, in the context of the agreement, would have clarified the type of treatment reserved to foreign investors. The document had been classified by the Office of the Trade Representative on the asserted threat that

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<sup>63</sup> The facts are reported in the judgment of the Upper Tribunal (Administrative Appeal Chamber) in the case *UK All Parliamentary Group on Extraordinary Renditions v. Ministry of Defence et al.*, issued on 18 April 2011.

<sup>64</sup> *Ibid.*, at 59.

<sup>65</sup> Executive order No. 13526 of 2 January 2010, section 1.2(a)(3).

<sup>66</sup> The Classification Information Procedures Act (15 October 1980), section I.

<sup>67</sup> Executive order No. 13526 of 29 December 2009, section 1.7 (a)(1).

<sup>68</sup> S. SCHULHOFER, *Oversight of National Security Secrecy in the United States*, in D. COLE, F. FABBRINI, A. VEDASCHI (eds), *Secrecy, National Security and the Vindication of Constitutional Law*, *supra* Introduction, note 13, p. 25.

its disclosure would have posed to national security, to be intended, in the specific case, as ‘US negotiating capital’.<sup>70</sup>

Also legal advice pertaining to military operations or intelligence activities has been often concealed under the national security veil. An illustrative case is represented by the US Office of Legal Counsel’s denial to disclose those documents examining the legal issues related to the practice of targeted killings.<sup>71</sup>

Under a ‘procedural’ point of view, in a considerable number of instances US courts have also upheld State secrecy privilege claims<sup>72</sup> on the ground of a general interest in protecting *national security*.<sup>73</sup>

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<sup>69</sup> United States District Court, District of Columbia, decision of 29 February 2012, 845 F. Supp. 2d 252.

<sup>70</sup> *Ibid.*, at 15. The Court rejected the Office of the Trade Representative’s arguments as the latter had failed to prove that the disclosure of the position paper would have effectively harmed national security. This decision has been overturned by the Court of Appeals for the District of Columbia Circuit on 7 June 2013 (case No. 12-5136).

<sup>71</sup> The legitimacy of the classification of the legal analysis pertaining to military operations and intelligence activities has been upheld by the New York Southern District Court in its judgment in the case *New York Times Company et al. v. US Department of Justice et al.*, joined cases No. 11 Civ. 6990 (WHP) and 11 Civ. 7562 (WHP), issued on 2 January 2013. This decision, however, has been reformed by the judgment issued on 23 June 2014 by the United States Court of Appeal, Second Circuit, which rejected the government’s secrecy claims and published the legal opinion. See *New York Times Company et al. v. US Department of Justice et al.*, judgment of 23 June 2014, 756 F.3d 100, Annex A. Interestingly, the US government secretive attitude with respect to legal opinions is not a novelty. The 2002 legal opinion on the lawfulness of the use of torture against suspected terrorists drafted by the US Office of the Legal Counsel had been similarly subjected to restricted access until its leaking in 2004. In a 2009 report, the US Department of Justice noted that the limited access to this legal opinion had been obtained by means of an unprecedented restriction of security clearances, whose reasons had never been satisfactorily explained. See United States Department of Justice Office of Professional Responsibility, *Investigation into the Office of the Legal Counsel’s Memoranda concerning Issues relating to the Central Intelligence Agency’s Use of “Enhanced Interrogation Techniques” on Suspected Terrorists*, issued on 29 July 2009, p. 260.

<sup>72</sup> For a better definition of the State secrecy privilege as a procedural rule for preventing the disclosure of sensitive information in court see *infra*, section 3.3.

<sup>73</sup> See, *inter alia*, United States Court of Appeals, District of Columbia Circuit, *Ellsberg et al. v. Mitchell*, decision of 10 May 1983, 709 F. 2d 51, at 59 (“disclosure of the material would damage national security”); United States Court of Appeals, District of Columbia Circuit, *Molerio v. FBI*, decision of 30 November 1984, 749 F. 2d 815, at 821 (“disclosure of that fact would impair national security”); United States Court of Appeals for Ninth Circuit, *Kasza v. Browner*, decision of 8 January 1998, 133 F. 3d 1159, at 1170 (“release of such information would reasonably endanger national security interests”).

The need for protecting national security is recalled also in the Peruvian legal system. Article 2.5 of the Peruvian Constitution<sup>74</sup> recognizes the right of the public to access to information, contextually providing an exception for those information whose disclosure is prohibited by law or by reasons of national security. In addition, Article 16 of the Law on Transparency and Access to Public Information expressly restricts public access in relation to that information whose disclosure could undermine national security by hindering either the democratic institutions of the State or its independence and territorial integrity.<sup>75</sup> Annex B to the General Directive on Procedures for Access, Classification, Reclassification, Declassification, Archiving and Conservation of Defense Information<sup>76</sup> contains a list of all classified information.

Also in the Russian Federation and in the People's Republic of China State secrecy laws refer generally to the protection of security as a constitutive ground to invoke State secrecy. In this respect, they even provide detailed indications as to those matters that may fall into this broad category.

The Russian Law on State secrets,<sup>77</sup> for instance, although not explicitly encompassing a definition of State security, does list categories of information excluded from disclosure for security reasons, among which: military strategic information (*e.g.*, content of strategic and operational plans); certain economic or scientific information (*e.g.*, industrial plan for development of weapons, use of infrastructures for security reasons and, more generally, scientific and technological achievements having large defense and economic significance);

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<sup>74</sup> The Political Constitution of Peru was enacted on 29 December 1993.

<sup>75</sup> Law No. 27806 of 13 July 2002.

<sup>76</sup> General Directive 008-2011 MINDEF/SG-UAIP, *supra* note 8.

<sup>77</sup> Law No. 5485-1 of 21 July 1993, entered into force on 21 September 1993 (and last amended on 6 October 1997). For an overview on State secrets protection in the Soviet era see G.P. VAN DEN BERG, *State Secrets in the USSR: A Note*, in *Review of Socialist Law*, vol. 6, 1980, pp. 199-202.

foreign policy information; information concerning intelligence, counter-intelligence and anti-terroristic activities.<sup>78</sup>

Similarly to the Russian one, the Chinese State secrecy law,<sup>79</sup> whilst generally linking the resort to State secrecy to the concept of ‘state security’ and ‘national interest’,<sup>80</sup> also provides a specific list of ‘State secrets matters’. Article 9 of the *Law on Guarding State Secrets* lists them as follows: major policy decisions on state affairs; national defense and activities of the armed forces; diplomatic activities and activities related to foreign countries; some aspects of national economic and social development, as well as science and technology; activities for safeguarding State security and the investigation of criminal offences; other matters that are classified as State secrets by the State secret-guarding department.

As far as South African legislation is concerned, the 1982 Protection of Information Act currently prohibits the disclosure of information related to the ‘defense of the Republic’, a ‘security matter’, a ‘military matter’ or the

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<sup>78</sup> *Ibid.* Article 5. See also the Russian Presidential edict No. 1203 approving the list of information classified as State secrets, signed by President Yeltsin in Moscow on 30 November 1995. For a general overview on State secrets law in Russia see I. PAVLOV, *Freedom of Information and State Secrets*, in *East European Constitutional Review*, vol. 9, 2000, pp. 102-104.

<sup>79</sup> The State secrets legal framework of the People’s Republic of China is composed of the Law on Guarding State Secrets (enacted on 5 September 1988, amended on 29 April 2010, text available (in Chinese) at: <http://www.gov.cn>; last accessed on 24 February 2016), the Law on Measures for Implementing the Law on Guarding State Secrets (1990), as well as provisions embodied in the State Security Law of the People’s Republic of China (1988), in criminal law and in criminal procedural law. For an overview see Human Rights in China, *States Secrets: China’s Legal Labyrinth*, *supra* Introduction, note 42, p. 10. For an overview on the content of the 1989 Law on Guarding State Secrecy, see T. A. GELATT, *Recent Development: The New Chinese State Secrets Law*, in *Cornell International Law Journal*, 1989, pp. 255-268. As stated, this Law has been slightly amended in 2010.

<sup>80</sup> A legal definition of ‘national security’ can be found in the recently adopted Law on National Security, whose Article 2 states: “National security refers to the relative absence of international or domestic threats to the state’s power to govern, sovereignty, unity and territorial integrity, the welfare of the people, sustainable economic and social development, and other major national interests, and the ability to ensure a continued state of security”. Interestingly, pursuant to Article 7 of the same law, efforts to safeguarding national security interests should take into account the protection of human rights. See Law on National Security of the People’s Republic of China, adopted on 1 July 2015. The unofficial translation of the text in English is available at: [www.chinalawtranslate.com](http://www.chinalawtranslate.com) (last accessed on 24 February 2016).

‘prevention or the combating of terrorism’.<sup>81</sup> The notion of ‘State security’ refers to any matter pertaining to intelligence and the functioning of the intelligence services.<sup>82</sup>

The 2013 South Africa’s Protection of Information Draft Bill, however, is meant to reform the current legislative framework by setting more specific grounds based on which disclosure should not be allowed. According to the Draft Bill, in fact, classification of State information is justifiable when it is necessary to protect ‘national security’,<sup>83</sup> broadly defined as:

“[T]he protection of the people of the Republic and the territorial integrity of the Republic against (a) the threat of use of force or the use of force; (b) the following acts: (i) hostile acts of foreign intervention directed at undermining the constitutional order of the Republic; (ii) terrorism or terrorist related activities; (iii) espionage; (iv) exposure of a state security matter with the intention of undermining the constitutional order of the Republic; (v) exposure of economic, scientific or technological secrets vital to the Republic; (vi) sabotage; and (vii) serious violence directed at overthrowing the constitutional order of the Republic; (c) acts directed at undermining the capacity of the Republic to respond to the use of, or the threat of the use of, force and carrying out of the Republic’s responsibilities to any foreign country and international organisations in relation to any of the matters referred to in this definition, whether directed from, or committed within, the Republic or not, but does not include lawful political activity, advocacy, protest or dissent”.<sup>84</sup>

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<sup>81</sup> South African Protection of Information Act, Article 4.

<sup>82</sup> *Ibid.*, Article 1.

<sup>83</sup> Protection of State Information Draft Bill, text adopted by the South Africa’s National Assembly on 12 November 2013, at 8(2)(a).



Such a broad definition (which includes also economic and technological secrets) makes virtually any information within the scope of classification.

From the analysis undertaken, it appears that considerable variance exists among States. There is indeed notable inconsistency in the terminology itself, with several national laws referring, often interchangeably, to ‘national security’, ‘state security’, ‘national defense’, ‘national interests’ and ‘essential interests’: broad expressions that generally lack any specific legal definition at the domestic level, falling rather in the political *dominium*.<sup>85</sup> The terms used are indeed not defined with sufficient precision to be applied unambiguously. This certainly contributes to make State secrecy susceptible to practical abuses.

Notably, in one case, national security has even been exceptionally framed as to encompass the protection of fundamental human rights.<sup>86</sup>

Regardless of the different wording and the broader or restricted interpretation of the same, there is, however, a sort of *consensus* on those general high security reasons that legitimate restrictions to the disclosure of certain categories of information, *alias* the protection of State’s security, conceived both in terms of conservation of the territorial independence and safeguard of the internal political organization.

One could therefore conclude that, in general, despite the existing differences among countries, mainly depending on their distinct political, social and legal traditions, State secrecy regulations’ legitimate aim consists –

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<sup>84</sup> *Ibid.*, at 1. The same definition of ‘national security’ is also contained in the General Intelligence Law Amendment Act No. 11 of 2013, published in the Government Gazette of the Republic of South Africa, vol. 577, No. 36695, 23 July 2013, at 1(g).

<sup>85</sup> On the vagueness of the notion of ‘national security’ in domestic legal systems see, *inter alia*, T. CHRISTAKIS, *L’État avant le droit? L’exception de ‘sécurité nationale’ en droit international*, in *Revue générale du droit international public*, 2008, pp. 10-12. The term ‘national security’ has been used for the first time in statutory law in the United States National Security Act of 1947. However, already in 1918 the United Kingdom had drafted a statute entitled ‘National Security Bill’, which, in the drafters’ intention, should have established wartime regulations to be applied in combination with the 1911 Official Secrets Act. See I. CAMERON, *National Security and the European Convention on Human Rights*, The Hague, 2000, p. 39.

at least *in abstracto* – in the safeguarding of national security.

This ‘common denominator’ is confirmed also by the Global Principles on National Security and Information (so called ‘Tshwane Principles’), issued on 12 June 2013 by non-governmental organizations and academic institutions. The Tshwane Principles have been endorsed, *inter alia*, by the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression<sup>87</sup> and by the Parliamentary Assembly of the Council of Europe.<sup>88</sup> These Principles set international best practice standards concerning the right to public access to information.<sup>89</sup> In this respect, they list the real and identifiable risk of a *significant* harm to a *legitimate* national security interest as an essential requirement for any restricting measures imposed by States to this right.<sup>90</sup> The Principles, however, do not provide a definition of national security and merely recommend that such notion be precisely defined in domestic law.

Particularly relevant are anyhow the requirements of the significance of the harm and the legitimacy of the national security interest as they provide possible (non-binding) standards against which domestic laws can be tested in the future. That notwithstanding, the vague wording of the related provisions and the lack of a clear definition may divest the abovementioned parameters of any practical relevance. For instance, the principles do not provide any clear criteria for assessing whether the harm is significant. Furthermore, they include a broadly framed definition of what amounts to legitimate national security interest: “(...) an interest the genuine purpose and primary impact of

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<sup>86</sup> See Bulgarian Classified Information Protection Act of 30 April 2002 (as last amended on 24 November 2009), Additional Provisions, para. 13.

<sup>87</sup> Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Frank La Rue, UN Doc. A/68/362, 4 September 2013, para. 65.

<sup>88</sup> Council of Europe, Parliamentary Assembly, Resolution 1954 (2013) on *National Access and Access to Information*, 2 October 2013, para. 7.

<sup>89</sup> See, again, H. NASU, *State Secrets Law and National Security*, *supra* Introduction, note 73, p. 366 (“... the Principles ... have to be seen as best practice standards to be promoted rather than codification of the existing state practice”).

<sup>90</sup> Principle 3.

which is to protect national security, consistent with international and national law”.<sup>91</sup>

Importantly, however, the principles explicitly state that in no case concealment of information about human rights violations or any other violation of law may be considered to respond to a *legitimate* national security interest.<sup>92</sup>

Given their ‘international dimension’, the content of these Principles will be the object of specific analysis in the following Chapters.

### **3.2. State secrecy as a ground for classification of documents**

Pursuant to domestic regulations, State secrecy acts either as classification of sensitive information or as evidentiary rule in the context of judicial proceedings.

As both these scenarios may be relevant under an international law perspective, the two of them need to be briefly dealt with. The main focus will be once again on the legislation of selected countries, namely France, Italy, the People’s Republic of China, Peru, the Russian Federation, Spain, the United States and the United Kingdom. Again, reference will also be made to the 2013 South Africa’s Protection of State Information Draft Bill.

In Italy, the classification of secret documents is regulated by Article 42 of Law No. 124/2007. This provision recognizes four different categories of classified information: ‘*segrete*’ (secret), ‘*segretissime*’ (top secret), ‘*riservate*’ (confidential) and ‘*riservatissime*’ (top confidential).<sup>93</sup> The classification levels, although listed, are not explicitly defined. They are, however, connected to the level of risk that the disclosure of the relevant

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<sup>91</sup> *Ibid.*, Definitions.

<sup>92</sup> *Ibid.*

<sup>93</sup> Law No. 124/2007, Article 42.3. For a complete overview of the Italian normative framework concerning State secrecy and the new aspects of Law No. 124/2007 compared with the pre-existing legislation see, *inter alia*, G. SAPIENZA, *La nuova disciplina del segreto di*

information may pose to national security. In addition, no provision explicitly envisages a bar to classification for selected information with the consequence that all information may be, in practice, prevented from disclosure, provided that they allegedly pose a threat to the security of the Republic.

The classification task rests with the authority that creates the document or records or that first acquires the information, documents or records.<sup>94</sup> Thus, concerning the power to classify documents, no further requirements are envisaged rather than the fact that the classification should be established by that governmental authority which forms or first acquires the document itself.

Secrecy classifications *de facto* limit the knowledge of the relevant information, documents and activities to those persons who have access to them due to their institutional functions.<sup>95</sup> The public authority that applies the secrecy classification also identifies the parts within every record or document that must be classified. In addition, it specifically establishes the level of classification corresponding to each separate part.<sup>96</sup>

After five years from the original classification, the latter is downgraded to the lower level (*e.g.*, from ‘top secret’ to ‘secret’), whilst after further five years the information shall be disclosed unless the duration of the classification is extended.<sup>97</sup>

A peculiar (and particularly high) level of ‘classification’ is set forth by Article 39 of Law No. 127/2007. This norm entrusts the Prime Minister with the exclusive power of classifying sensitive information granting them strict secrecy standards (‘State secrecy privilege’).<sup>98</sup>

After fifteen years from the classification made by the Prime Minister, any person who has an interest can ask access to the undisclosed information. The Prime Minister, however, can extend the duration of the privilege up to the

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*Stato: profili sostanziali*, in G. ILLUMINATI (ed.), *Nuovi profili del segreto di Stato e dell'attività d'intelligence*, *supra* Introduction, note 5, p. 131 ff.

<sup>94</sup> *Ibid.*, Article 42.2.

<sup>95</sup> *Ibid.*, Article 42.1.

<sup>96</sup> *Ibid.*, Article 42.4.

<sup>97</sup> *Ibid.*, Article 42.5.

maximum of thirty years.<sup>99</sup>

Contrary to other classifications, the assertion by the Prime Minister of the State secret privilege is subjected to the oversight of the Parliamentary Committee for the Security of the Republic (COPASIR),<sup>100</sup> which is a political body composed by ten members of the Parliamentary Assembly, chaired by a member of the opposition party.

In addition, as better explained in the next section, if successfully invoked in court, State secrecy privilege may even lead to the dismissal of proceedings.

In Spain, pursuant to Law No. 9/1969,<sup>101</sup> information whose disclosure may hinder national security can be classified either as “secret” or “confidential”. Like in Italy, however, the law does not provide explicit *criteria* on the ground of which this distinction may be drawn. The classification authority – which, pursuant to Article 4 of Law No. 9/1968, is the executive – should thus take into account the seriousness of the damage that certain information, if revealed, could cause to national security.

No legal provision establishes a maximum duration requirement or a compulsory review process applying to classified information. As a consequence of classification, information cannot be generally disclosed to others than those who know them by virtue of their institutional functions.<sup>102</sup>

In France, the *Code de la défense* foresees three different levels of classification of sensitive information: *très secret défense*, *secret défense*, and *confidentiel défense*.<sup>103</sup> The top level of classification is reserved to government priorities in defence and national security, whose divulgation might *very seriously harm* (*nuire très gravement*) national defence. The *Secret Défense* level of classification is instead granted to information whose

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<sup>98</sup> *Ibid.*, Article 39.4.

<sup>99</sup> *Ibid.*, Article 39.7

<sup>100</sup> Article 12 of Law No. 133/2012, Article 1.1.

<sup>101</sup> Law No. 9/169, Article 3.

<sup>102</sup> On the classification of sensitive information in Spain see, *inter alia*, H. WILKINSON MORERA DE LA VALL, *Secretos De Estado y Estado de Derecho: Régimen Jurídico De Los Secretos Oficiales en España*, Barcelona, 2007, p. 237 ff.

<sup>103</sup> Consolidated version of 3 August 2015, Article R-2311-2.

disclosure might *seriously harm* (*'nuire gravement'*) national defence. Finally, the lowest level of classification is reserved to information whose release might *harm* (*'nuire'*) national defence or lead to the disclosure of information classified as 'top secret' or 'secret'.<sup>104</sup> The disclosure of information classified at one of the abovementioned level is sanctioned under French criminal law.<sup>105</sup>

The classification authority rests primarily with the Prime Minister<sup>106</sup> and the General Secretary for Defence and National Security who, pursuant to Article R-1132-3(3) of the *Code de la défense*, "*propose, diffuse, fait appliquer et contrôler les mesures nécessaires à la protection du secret de la défense nationale*". Each Minister is competent for implementing the indications issued by the Prime Minister and for directly classifying as 'secret' or 'confidential' information related to the Ministry he/she is in charge of.<sup>107</sup>

The time length of the classification depends on the degree of sensitivity of the concerned information, which might change over time. The classifying authority is in charge of deciding the proper classification period. However, the classifying authority should undertake a review on the appropriateness of maintaining a document classified at least every ten years.<sup>108</sup>

Classification and declassification are not subject to judicial oversight. A limited control may be exercised by the Parliament: the members of the parliamentary delegation for intelligence can in fact access certain intelligence information.<sup>109</sup> However, State secrets remain generally opposable to the

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<sup>104</sup> *Ibid.*, Article R-2311-3.

<sup>105</sup> Article 413 ff. of the French Criminal Code.

<sup>106</sup> Pursuant to Arts. R 2311-5, R-2311-6 and R-2311-7 of the *Code de la Défense*, the Prime Minister, who is responsible for national defence under Article 21 of the French Constitution, is competent to determine the criteria and the modalities for the protection of top secret information and to define special classifications based on governmental priorities. Furthermore, he is in charge of establishing the conditions under which each Minister shall classify or set criteria for the classification as 'secret' or 'confidential' of information falling within the competence of his Ministry.

<sup>107</sup> *Arrêté du 30 novembre 2011 portant approbation de l'instruction générale interministérielle n° 1300 sur la protection du secret de la défense nationale*, *supra* note 58, Article 11.

<sup>108</sup> *Ibid.*, Article 46.

<sup>109</sup> Created by law No. 2007-1443 of 9 October 2007.

Parliament.<sup>110</sup>

In the United Kingdom, guidelines on classification of sensitive information are contained in the so-called *Security Policy Framework* that envisages four different categories: top secret, secret, confidential and protected.<sup>111</sup> This marking system shall be read in the context of the already recalled Official Secrets Act since such classification – although not required by law – may help identifying those documents whose disclosure is forbidden according to the Act itself.

In the United States there are three different levels of classification of sensitive information: confidential, which applies to information that, if disclosed, would reasonably cause damage to national security; secret, that applies to information that, if disclosed, would reasonably cause a *serious* damage to national security; and top secret, that applies to information that, if disclosed, would reasonably cause a *grave* damage to national security.<sup>112</sup>

The classification authority depends on the related level of ‘confidentiality’. Only the President and the agency heads or officials designated by the President can classify *top secret* information. The authority to classify information as *secrets* may instead be exercised, apart from agency heads and officials designated by the President, by those officials who hold top secret classification authority. Finally, with reference to *confidential* information, apart from the abovementioned authorities, the classification can be made also by those officials holding secret classification authority.<sup>113</sup> Lower governmental authorities may, however, receive a ‘derivative classification’ authority by delegation.

Information shall be kept classified until national security considerations

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<sup>110</sup> See Constitutional Council, decision No. 2001-456 DC of 27 December 2001.

<sup>111</sup> Cabinet Office, *Security Policy Framework*, version 11.0, October 2013 (available at: <https://www.gov.uk>; last accessed on 24 February 2016), at 44.

<sup>112</sup> Executive Order No. 12356 of 2 April 1982, section 1.1. For an overview of the pre-existing regulations see R.G. MUSSO, *Uno sguardo alla tematica dei rapporti tra segreto di Stato e processo nell’esperienza anglo-americana*, in M. CHIAVARIO (ed.), *Segreto di Stato e processo penale*, Bologna, 1978, pp. 126-127.

<sup>113</sup> *Ibid.*, section 1.2.

permit their disclosure.<sup>114</sup>

Peruvian law also codifies the existence of a three-level classification system, pursuant to which sensitive information for national security may be attributed a secret, reserved or confidential status.<sup>115</sup> However, information related to human rights violations or humanitarian law under any circumstance, by any person, should not be considered classified information.<sup>116</sup>

The Ministry for National Defence is competent for classifying sensitive information. The declassification is instead subjected to the assessment of an *ad hoc* ‘*junta de desclasificación de la información*’, which is established and composed by the same authorities that are in possession of the relevant information.<sup>117</sup> If the *junta* decides not to disclose the information, the case can be brought to the attention of the Ministry for National Defence that, after a first review, may submit it to the Council of Ministers. The latter can declassify the information after having informed the ‘*Comisión ordinaria de inteligencia del Congreso de la República*’.<sup>118</sup>

Russian legislation on State secrecy also establishes a classification system. Sensitive information might be classified as secret, top secret or of critical importance depending on the national security interests they relate to.<sup>119</sup> Information about violations of rights and freedoms of individuals and citizens, as well as information on unlawful actions by the State authorities or officials cannot instead be classified as ‘State secrets’.<sup>120</sup>

The authority to classify information belongs to the President, the federal

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<sup>114</sup> *Ibid.*, section 1.6

<sup>115</sup> For a definition of each category and its application see General Directive 008-2011 MINDEF/SG-UAIP on Procedures for Access, Classification, Reclassification, Declassification, Archiving and Conservation of Defense Information, *supra* note 8, at 5.7.

<sup>116</sup> Law on Transparency and Access to Public Information No. 27806/2002, Article 15(c).

<sup>117</sup> General Directive 008-2011 MINDEF/SG-UAIP, *supra* note 8, at 6. Classified information are subjected to review after five years. The competent authority assesses the feasibility of their declassification.

<sup>118</sup> *Ibid.*, at 6.4.1

<sup>119</sup> Law No. 5485-1 of 21 July 1993, Article 7.

<sup>120</sup> *Ibid.*



executive and other governmental bodies. Specific monitoring powers on the protection of State secrets belong to the so-called Federal Service for Technical and Export Control, a governmental agency established in 2004 by presidential decree as part of the Russian Ministry of Defence.<sup>121</sup>

Classification should last maximum thirty years.<sup>122</sup> However, specific extensions may be established by an *ad hoc* body: the Inter-Departmental Commission for State Secrecy Protection.

In the People's Republic of China, Article 10 of the aforementioned Law on Guarding State Secrets sets forth three different levels of classification: top secret, highly secret and secret.

The specific scope and categories of state secrets are defined by the Administration for the Protection of State Secrecy, together with the Ministries of Foreign Affairs and Public Security. However, as regards sensitive information concerning national defence, this task belongs to the Central Military Commission.<sup>123</sup>

The law provides time limits on the classification of sensitive information: thirty years for top secret information; twenty years for highly secret information; and ten years for those documents classified as 'secrets'.<sup>124</sup>

Currently, the South African Minimum Information Standards<sup>125</sup> envisage four levels of classification: 'top secret', 'secret', 'confidential' and 'restricted'.<sup>126</sup> Each level corresponds to a distinct potential harm that the disclosure of the classified information may determine: 'restricted' information are those that might "hamper activities or cause an inconvenience

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<sup>121</sup> See Presidential Decree No. 314/2004 of 9 March 2004.

<sup>122</sup> *Ibid.*, Article 13. On 22 November 2012, the Russian Constitutional Court ruled that the 30-years limit provided for in Article 13 of Law No. 5485-1 applies to information classified as State secrets both before and after the entrance into force of the law itself. This decision overturned the first and second instance judgments, which asserted that documents created before 1993 could stay classified indefinitely. The text of the decision (in Russian) is available at: <https://register.svobodainfo.org> (last accessed on 24 February 2016).

<sup>123</sup> Law on Guarding State Secrecy, Article 11.

<sup>124</sup> *Ibid.*, Article 15.

<sup>125</sup> The Minimum Information Standards is a policy document adopted by the South Africa's Cabinet in 1996.

to an institution or individual”;<sup>127</sup> ‘confidential’ information may “harm the objectives and functions of an individual and/or institution”;<sup>128</sup> ‘secret information’ are those that can “disrupt the objectives and the functions of an institution and/or the State”;<sup>129</sup> ‘top secret’ information might “neutralize the objectives and functions of institutions and/or the State”.<sup>130</sup> The organs of the institutions where the information has been originated is competent for its classification and/or declassification.<sup>131</sup>

The South African Protection of State Information Draft Bill also provides for different levels of classification of sensitive information: pursuant to Article 11, State information might be classified as ‘top secret’, ‘secret’ or ‘confidential’ depending on the degree of harm their disclosure could cause to national security (respectively, “irreparable or exceptionally grave harm”, “serious harm”, “harm”). The Draft Bill excludes that classification may be used under any circumstance to conceal unlawful acts or omissions, incompetence, inefficiency or administrative error, or to limit scrutiny.<sup>132</sup> Any head of a State organ might classify information, directly or by delegating in writing staff members at a sufficient senior level.<sup>133</sup> The classifying authority is also responsible for its declassification.<sup>134</sup> Classifying authorities must undertake a review at least every ten years,<sup>135</sup> but declassification becomes automatic after twenty years, unless the classifying authority certifies that the reasons determining classification still subsist and submits the relevant request to a Classification Review Panel.<sup>136</sup>

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<sup>126</sup> *Ibid.*, Chapter II, at 3.1.

<sup>127</sup> *Ibid.*, at 3.4.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*, Chapter IV, at 1.2.

<sup>132</sup> South African Protection of State Information Draft Bill, Article 8(2)(e).

<sup>133</sup> *Ibid.*, Article 12.

<sup>134</sup> *Ibid.*, Article 14.

<sup>135</sup> *Ibid.*, Article 16.

<sup>136</sup> *Ibid.*, Article 15.

All the analyzed legal systems criminalize the conduct of those disclosing or transmitting classified information without authorization.<sup>137</sup> In addition, all of the countries under consideration admit non-authorized persons to present a formal request of access, leaving, nonetheless, to the classifying authorities broad discretion as to the final decision (although generally requiring a formal motivation for denying access).<sup>138</sup>

Yet, in some instances, the regulation on the procedure to request access to classified information may constitute a classified document itself. In the Russian Federation, for example, the Order governing the access to State archives, which sets forth the procedures for requesting declassification, has been a classified document up to 2011, when it was declassified following the decision of the Kalininsky District Court of St. Petersburg in the case *Zolotonosov v. The Interdepartmental Commission for the Protection of State Secrets under the President of the Russian Federation*.<sup>139</sup>

In most countries, the judiciary formally detains reviewing powers on the executive's classification and denial of access to sensitive information.

In the United States, for instance, under the Freedom of Information Act, federal courts have the mandate to adjudicate administrative claims involving the classification of sensitive information.<sup>140</sup> Similar procedures are in place also in other countries. In Italy, for instance, a case concerning the denied

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<sup>137</sup> See, *inter alia*, Articles 261-262 of the Italian Criminal Code; Arts. 584, 598, 599, 601 and 602 of the Spanish Criminal Code; Title 18, section 793 of the United States Code (USC); Article 283 of the Criminal Code of the Russian Federation.

<sup>138</sup> See again Italian Law No. 124/2007, Article 39.7.

<sup>139</sup> Case No. 2-3224/11, decision issued on 1 June 2011. The Court found that there was no reasonable ground justifying the classification of the regulation and, therefore, ordered its disclosure.

<sup>140</sup> This power arises from the Freedom of Information Act, as amended in 1974 (5 USC. 552). Exemption 1 expressly excludes from the scope of application of the Act those documents, properly classified, that the Executive has established shall be secret in the interest of national defence and foreign policy. The Congress, when amending the Act in 1974, explicitly mandated federal courts to review the executive's decisions to withdraw documents for public access. See also, *inter alia*, United States Court of Appeals for the Second Circuit, *Donovan and others v. FBI*, decision of 24 November 1986, 806 F. 2d 55, at 59; United States Court of Appeals for the Ninth Circuit, *Wiener v. FBI*, decision of 12 July 1991, 943 F. 2d 972, at 980; United States Court of Appeals for the Second Circuit, *Harporn v. FBI*, decision of 22 June 1999, 181 F. 3d 269, at 291.

access to government documents (even on the ground of national security) can be brought before the administrative tribunals as per Article 25 of the Law No. 241/1990.

In the United Kingdom, similar claims may be adjudicated by *ad hoc* administrative courts (so called ‘information tribunals’) under the 2000 Freedom of Information Act.

In Spain, the administrative process governing the access to documents held by public bodies is now regulated by Law No. 19/2013 (*ley de transparencia, acceso a la información pública y buen gobierno*).<sup>141</sup> Article 14 of the said law grants an exemption for those information whose disclosure would hinder, *inter alia*, national security, defense, international relations and public safety. Pursuant to Article 24 of the same law, the *Consejo de Transparencia y Buen Gobierno* – an independent administrative body – is entrusted with reviewing authority over decisions related to the requests of access to State-held information.<sup>142</sup>

Despite the recent adoption of Law No. 19/2013, it has, however, been observed that any open attitude towards transparency and access to information has been counterbalanced by parallel attempts to expand secrecy claims and increase official authorities’ discretionary power.<sup>143</sup> Apart from the long list of exceptions provided for in Article 14 of Law No. 19/2013 (that, as said, includes defense and national security), a number of normative instruments would indeed concur in restricting the scope of application of the

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<sup>141</sup> Enacted on 9 December 2013. For a comment see, e.g., J. L. PIÑAR MAÑAS, *Transparencia y derecho de acceso a la información pública. Algunas reflexiones en torno al derecho de acceso en la Ley 19/2013, de transparencia, acceso a la información y buen gobierno*, in *Revista catalana de dret públic*, vol. 49, 2014, pp. 1-19 and A. MORETÓN TOQUERO, *Los límites del derecho de acceso a la información pública*, in *Revista jurídica de castilla y leon*, vol. 33, 2014, pp. 1-24.

<sup>142</sup> For an analytical overview of all exceptions provided for in Law No. 19/2013 see M.P. COUSIDO GONZÁLEZ, *Secretos de Estado: cambios reales, políticos y legales en la era de la transparencia*, in *Revista jurídica de castilla y leon*, vol. 33, 2014, pp. 1-23.

<sup>143</sup> *Ibid.*, p. 21.

right of access to State-held information,<sup>144</sup> *de facto* limiting the review power of the *Consejo*.

In the Peoples' Republic of China, Order No. 492 (*Provisions on the disclosure of government information*) exempts the administrative organs from disclosing, *inter alia*, State secrets.<sup>145</sup> Nevertheless, pursuant to Article 33 of the same Act, any citizen, legal person or any other organization that believes that an administrative organ, in carrying out government information disclosure work, has infringed upon his/its legal rights and interests, can apply for administrative reconsideration or bring an administrative lawsuit according to the law.<sup>146</sup>

Interestingly, however, Article 77 of the recently adopted Law on National Security binds *all Chinese citizens and organizations* (and thus not only administrative organs) to not disclose State secrets,<sup>147</sup> in accordance with Article 53 of the national Constitution.

The Russian Federation has also enacted a law providing access to information on the activities of State bodies and bodies of local self-government.<sup>148</sup> This law provides specific restrictions in case the information refers to data that, according to federal law, constitute State secrets protected by the law.<sup>149</sup> Even in this case, the government officials' assessment may be

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<sup>144</sup> See, e.g., *Real Decreto No. 1708/2011 sobre Sistema Español de Archivos de la Administración General del Estado y de sus Organismos Públicos y Régimen de Acceso* of 18 December 2011; and *Las Orientaciones para la instrucción de Seguridad del Personal* of 15 December 2009.

<sup>145</sup> The Provisions of the People's Republic of China on the Disclosure of Government Information, adopted on 17 January 2007 and entered into force on 1 May 2008, Article 14.

<sup>146</sup> A similar procedure is also established by Peruvian law. Pursuant to the aforementioned Law No. 27906/2002, Article 11(g), once the ordinary administrative procedure terminates and disclosure has been denied, the requesting person may present his/her claims before the tribunal. In addition, Articles 61-65 of the Peruvian Code of Constitutional Procedure set a peculiar procedure (*habeas data*), which allows filing a complaint before the Constitutional Court (this possibility is recalled also in the aforementioned Article 11(g) of the Law No. 27906/2002).

<sup>147</sup> See Law on National Security of the People's Republic of China, Article 77(6).

<sup>148</sup> Law on Providing Access to Information on the Activities of State Bodies and Bodies of Local Government, signed by the President on 9 February 2009 and entered into force on 1 January 2010 (amended on 11 July 2011).

<sup>149</sup> *Ibid.*, Article 5.

formally subject to judicial control.<sup>150</sup>

In France, the procedure for requesting access to administrative documents is explicitly excluded in relation to any “*secret de la défense nationale*”.<sup>151</sup> However, any refusal of disclosure can be challenged before a *Commission d'accès aux documents administratifs*, which is an independent administrative authority.<sup>152</sup> The Commission’s advisory opinion constitutes a pre-requisite for initiating a lawsuit before French courts.<sup>153</sup>

In South Africa, the procedure for requesting access to State information is currently regulated by the 2000 Promotion of Access to Information Act,<sup>154</sup> pursuant to which a State official may refuse disclosure of information that could be expected to prejudice the defence of the Republic, its security or international relations.<sup>155</sup> The Act envisages a specific procedure of internal appeal against any decision of non-disclosure,<sup>156</sup> following the exhaustion of which a case may be filed in court.<sup>157</sup>

The Protection of State Information Draft Bill similarly admits that an individual can bring a case in court against the governmental authorities’ refusal to disclose classified information. Except for requests of urgent relief, however, this can occur only after the individual has exhausted the internal procedure of appeal provided by the law.<sup>158</sup>

Several national legislations, although envisaging legitimate restrictions to disclosure based on, *inter alia*, national security, do not conceive them as ‘absolute restrictions’. In this case, the classified information is not precluded from disclosure altogether; on the contrary, there may be additional factors – namely, a colliding ‘public interest’ – that the authority must also consider.

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<sup>150</sup> *Ibid.*, Article 23.

<sup>151</sup> Law No. 78-735 of 17 July 1978 (and later amendments), Article 6(2)(b).

<sup>152</sup> *Ibid.*, Article 20.

<sup>153</sup> *Ibid.*

<sup>154</sup> Act No. 2/2000, *supra* Introduction, note 25.

<sup>155</sup> *Ibid.*, Article 41(1)(a).

<sup>156</sup> *Ibid.*, Article 74 ff.

<sup>157</sup> *Ibid.*, Article 78 ff.

<sup>158</sup> South African Protection of State Information Draft Bill, Article 30.

For instance, the already mentioned Chinese Order No. 492 expressly states that no administrative organ may disclose any government information involving State secrets unless the failure to disclose such information could impact on primary *public interests*.<sup>159</sup>

Likewise, the South African Protection of State Information Draft Bill provides that heads of State organs must grant access to classified information, *inter alia*, any time the general interest in disclosure outweighs the harm that could derive from making the information public.<sup>160</sup>

In such instances, the public interest threshold involves a balancing test between ‘colliding’ public interests.

The judiciary’s reviewing authority, however, may often translate in practice into a mere formal check on the existence of the classification itself. With reference to the United States, an interesting example comes from the already mentioned case *Center for International Environmental Law v. Office of the United States Trade Representative*. On 7 June 2013 the Court of Appeals for the District of the Columbia Circuit overturned the first instance decision – rejecting the Trade Representative’s argument that the disclosure of

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<sup>159</sup> The Provisions of the People’s Republic of China on the Disclosure of Government Information, Article 14. Although the legal framework of Israel has not been the object of specific analysis, an interesting example of how colliding public interests may require the disclosure of classified information is represented by the events at stake in the case *Ministry of Defence v. Gisha Legal Center for Freedom of Movement*, decided with judgment of the Supreme Court of Israel on 19 December 2011 (case No. AAA 3300/11). The case focused on the Israel Ministry of Defence’s refusal to disclose information related to the provision of food to the Gaza strip after 2007. The request was aimed at ascertaining the truth about the allegation that Israeli authorities had calculated the number of calories consumed every day by Gaza’s inhabitants and used it to establish a ‘humanitarian minimum’ for the area. The Ministry based its denial of disclosure on the fact that the related information, if disclosed, would have put national security at risk and harm foreign relations. One of the arguments used by the plaintiff to appeal the government’s decision was the fact that the requested documents concerned a health issue of public importance, thus imposing disclosure pursuant to section 17(d) of the Israel Freedom of Information Act (which states that a court may order the disclosure of sensitive information otherwise exempted if there is a public interest in the disclosure that takes precedent over the grounds for rejecting the request). In the specific case, the Supreme Court rejected the plaintiffs’ argument concerning the supremacy of the colliding public interest for health because the requested documentation was never adopted. However, it ordered disclosure given that the government had not sufficiently proved the sensitivity of the information concerned.

<sup>160</sup> South African Protection of State Information Draft Bill, Article 17(2).

a position paper would have hindered the US future negotiating capability – by stating that “whether – or to what extent – this reduced [negotiating] flexibility might affect the ability of the United States to negotiate future trade agreements is not for us to speculate”.<sup>161</sup>

A similar deference to the executive’s assertions *de facto* prevents any *substantive* and *rigorous* judicial reviews of the alleged grounds on the basis of which classification is granted.

In the Russian Federation, non-governmental organizations have also denounced the judiciary’s reluctance to abide by legal provisions, thus often denying Russian citizens access to sensitive information even when this should be granted by the law.<sup>162</sup>

In other countries, legislation on State secrecy provides instead for ‘absolute disclosure thresholds’. ‘Human rights violations’ exemption clauses contained in domestic legal systems<sup>163</sup> are an expression of such a phenomenon (whose dimensions are however broader, encompassing other overriding public interests, such as abuse of authority and environmental risks).<sup>164</sup>

From the above brief analysis, it appears that, regardless of the existing differences, domestic regulations in various countries generally establish a system of classification of sensitive information.

These systems share some common traits such as, for instance, a different level of ‘classification’ based on the potential harm to national security interests and the executive’s classification/declassification authority. In addition, the analysis undertaken shows that national provisions often provide

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<sup>161</sup> Court of Appeals for the District of Columbia Circuit, *Center for International Environmental Law v. Office of the United States Trade Representative*, decision of 7 June 2013, *supra* note 70, p. 9.

<sup>162</sup> See, *inter alia*, Institute for Information Freedom Development, *Annual Report 2010*, published on 31 March 2011, at 2.

<sup>163</sup> See, for instance, the aforementioned Article 7 of the Russian Law No. 5485-1 and Article 15(c) of the Peruvian Law No. 27806/2002.

<sup>164</sup> See again H. NASU, *State Secrets Law and National Security*, *supra* Introduction, note 73, p. 382.



for some kind of oversight mechanisms over classification, either of judicial or political nature. That notwithstanding, as it has already been mentioned and as it will be further shown *infra*, their proper functioning might, in practice, be prevented from lack of independence and deference to the executive.<sup>165</sup>

Finally, while in most countries no explicit provision envisages categories of information that, in any case, should be prevented from disclosure, in few States domestic law sets out exemptions from classification in relation to information related to ‘human rights violations’.

The classification system and related denial of access to sensitive information constitute core aspects of State secrecy legislation, and, as such, they should be borne in mind when assessing State secrecy under an international law perspective.

### **3.3. State secrecy as exclusionary rule of evidence in criminal or civil proceedings**

As already seen, State secrecy can also act as a ground for denying the disclosure of evidence in court, eventually leading to the dismissal of the case.

Under this perspective, States have adopted different regulatory approaches. In Italy,<sup>166</sup> for instance, according to Article 202.1 of the Code of Criminal Procedure, public officials and civil servants are prevented from testifying or submitting any evidence in relation to those matters whose disclosure is banned due to the State secrets privilege. If any of those involved in the proceedings invokes the privilege, in fact, the prosecutor shall ask the

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<sup>165</sup> This phenomenon is well illustrated in A. KAVANAGH, *Judging the Judges under the Human Rights Act: Deference, Disillusionment and the ‘war on terror’*, in *Public Law*, 2009, pp. 287-304 (focusing, *inter alia*, on the deferent attitude of courts to the executive in matters related to national security claims).

<sup>166</sup> For a general overview see, among others, A. VEDASCHI, *Arcana Imperii and Salus Rei Publicae: State Secrets Privilege and the Italian Legal Framework*, in D. COLE, F. FABBRINI, A. VEDASCHI (eds), *Secrecy, National Security and the Vindication of Constitutional Law*, *supra* Introduction, note 13, p. 100 ff.

Prime Minister to confirm that the information is classified.<sup>167</sup> In case the privilege is confirmed, the prosecutor cannot use the information in court.<sup>168</sup> However, if he believes that the evidence covered by the State secrets privilege is not essential to reach the final decision, he can continue investigating. Conversely, if the material protected under the State secrecy privilege is essential to the investigation, the case must be dismissed due to the existence of the privilege itself.<sup>169</sup>

That notwithstanding, if the judiciary believes that the State secrets privilege which impedes the reliance on evidence in the proceedings has been illegitimately invoked by the executive, it can raise a conflict of powers against the latter before the Constitutional Court.<sup>170</sup>

The Constitutional Court's decision may ascertain the illegitimacy of the State secrets privilege and, in such case, proceedings are resumed.<sup>171</sup> Conversely, if the Constitutional Court finds that the State secrets privilege has been legitimately relied upon, the related documents cannot be used as evidence in proceedings.<sup>172</sup>

In a recent highly controversial case, the Constitutional Court has, however, vested State security of a sort of 'unchallengeable supremacy' by stating that "State security is a fundamental public aspect and prevails over any other".<sup>173</sup> By virtue of this reasoning, the Constitutional Court has shown a deference to

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<sup>167</sup> Italian Code of Criminal Procedure, Article 202.2.

<sup>168</sup> *Ibid.*, Article 202.5.

<sup>169</sup> *Ibid.*, Article 202.3.

<sup>170</sup> *Ibid.*, Article 202.7.

<sup>171</sup> *Ibid.*

<sup>172</sup> *Ibid.*

<sup>173</sup> Italian Constitutional Court, judgment No. 106/2009, 11 March 2009 (published 8 April 2009). The Italian Constitutional Court has *de facto* confirmed this approach in its judgment No. 24 of 13 February 2014. For a more detailed comment on the two judgments see *infra* Chapter 1, at 5.1.3. In this respect, it is just worth mentioning how, quite surprisingly, the European Court of Human Rights has recently shown a 'lenient' attitude towards such deferential approach. See European Court of Human Rights, *Nasr and Ghali v. Italy*, App. No. 44883/09, judgment of 23 February 2016 (where the Court, although condemning Italy, *inter alia*, for not having complied with its obligations under Article 3 of the European Convention on Human Rights, in its procedural limb, and Art. 13 of the same instrument, due to the invocation of State secrecy, did not take any clear stance with respect to the aforesaid deferential approach).

the executive that could *de facto* undermine the possibility of future judgments upholding the illegitimacy of the resort to State secrecy.

A different procedure is provided for those documents classified according to Article 42 of Law No. 124/2007, on the condition that the Prime Minister has not invoked the State secrets privilege in relation to them: the judiciary can examine their relevance and decide about the opportunity of using them as evidence in proceedings.<sup>174</sup>

In Spain, the only provisions concerning classified evidence are Article 332 (which establishes the duty of governmental bodies to disclose information in court with the exception of classified information) and Article 371 of the Code of Civil Procedure (concerning public officials' witness statements in civil proceedings and classified evidence), and Article 417 of the Code of Criminal Procedure (pursuant to which the public officials are not allowed as witnesses in court if their statements could risk disclosing official secrets).

The Spanish Supreme Court, however, with its decision in the so-called *CESID* cases,<sup>175</sup> has entrusted itself and, more specifically, its third chamber, with the authority of reviewing the classification of sensitive information made by the government and thus deciding about their disclosure as evidence in court. The Supreme Court can intervene only after the interested party has requested to the government the disclosure of the classified information constituting relevant evidence for the proceedings. If governmental authorities refuse to disclose it, then the party can appeal to the Supreme Court, which decides *in camera*. In case the Supreme Court rules for the declassification of the information, these can be acquired as evidence in the original proceedings.

*In camera* hearings are also allowed by the Russian Code of Criminal Procedure in all those cases in which classified documents constitute relevant evidence in court.<sup>176</sup>

Article 165.2(b) of the Peruvian Code of Criminal Procedure states instead

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<sup>174</sup> Law No. 124/2007, Article 42.8.

<sup>175</sup> Supreme Court, cases nos. 726/1996, 602/1996, 63/1996, decisions of 4 April 1997.

that public officials that are required to give witness statements in court must communicate to the competent authority if their declarations involve State secrets. In this case, the judge will request the executive to confirm the classification and, in the affirmative and if he believes that the information is necessary to adjudicate the case, he will request it in writing.<sup>177</sup>

More in general, Article 15 (c) of the Peruvian Law No. 27806/2002 establishes that the judiciary can request information exempted from public disclosure on national security grounds when this would help the exercise of his jurisdiction in a specific court case.

A peculiar provision is that entrusting the Ombudsman (*Defensor del Pueblo*) with the power of accessing classified information when this is pertinent to his job for the defense of human rights.<sup>178</sup> That notwithstanding, non-governmental organizations have denounced the executive's unwillingness to provide to prosecutors and judges access to information concerning past human rights violations.<sup>179</sup>

In the United Kingdom,<sup>180</sup> courts have traditionally showed high levels of 'submission' to government officials claiming in court the existence of the public interest immunity (a modern *crown privilege*)<sup>181</sup> to prevent the use as evidence of information whose disclosure would undermine national security.

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<sup>176</sup> See Russian Code of Criminal Procedure, Article 241.

<sup>177</sup> Peruvian Code of Criminal Procedure, Article 165.3.

<sup>178</sup> Law No. 27806/2002, Article 15.

<sup>179</sup> See, for instance, Open Society Justice Initiative and Instituto Prensa y Sociedad, *Submission to the UN Human Rights Committee: Review of Peru*, briefing paper, February 2013, p. 6. According to the briefing paper, the obstruction by the executive hindered the progress of judicial cases concerning human rights violations.

<sup>180</sup> For a general overview of the public interest immunity in the United Kingdom and a comparison with the State secrets privilege doctrine in the United States see, e.g., S. D. SCHWINN, *State Secrets, Open Justice, and the Crisis-Crossing Evolution of Privilege in the United States and the United Kingdom*, in *L'Observateur des Nations Unis*, vol. 29, 2012, pp. 171-188.

<sup>181</sup> The public interest immunity can be defined as "a ground for refusing to disclose a document which is relevant and material to the determination of issues involved in civil or criminal proceedings. A claim to public interest immunity can only be justified if the public interest in preserving the confidentiality of the document outweighs the public interest in securing justice" (see House of Lords, *R. v. Chief Constable of West Midlands, ex parte Wiley*, 14 July 1994, p. 1). On the topic see, *inter alia*, C. FORSYTH, *Public Interest Immunity: Recent and Future Developments*, in *The Cambridge Law Journal*, vol. 56, 1997, pp. 51-59.

As noted already in 1981, the United Kingdom has indeed been long characterized by a tendency on the part of the executive to use secrecy as a possible means of concealment, without any meaningful review on the part of the judiciary.<sup>182</sup>

However, at least formally, the final decision on whether the document should or should not be disclosed rests with the judges before which the case is pending.<sup>183</sup> In fact, while early decisions had *de facto* asserted the ‘unnecessary’ character of any judicial review,<sup>184</sup> since the *Conway v. Rimmer* case, UK courts have been entrusted with the task of undertaking a *balancing test* to determine if disclosure should be allowed.<sup>185</sup>

To this purpose, in both civil and criminal cases, courts generally hold an *ad hoc* hearing to review the concerned evidence and thus decide over the public interest claim (*in camera* hearing). If the judge finds that the disclosure may effectively harm national security then neither party can rely on it as evidence in the proceedings.

Recent procedural developments have shown an increasing attention to the balance between national security interests and procedural fairness. For instance, ‘special advocates’ – security-cleared lawyers nominated by the Attorney General to assist and represent the affected party – have started to be appointed in the context of ‘public interest immunity’ cases. In this respect, UK courts’ practice mirrors the evidentiary rules that have developed in other

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<sup>182</sup> M. SUPPERSTONE, *Brownlie’s Law of Public Order and National Security*, II ed., London, 1981, p. 269.

<sup>183</sup> On the topic see, *inter alia*, M. KUMAR, *Protecting State Secrets: Jurisdictional Differences and Current Developments*, in *Mississippi Law Review*, vol. 82, 2013, pp. 853-878 and A. LYNCH, T. TULICH, R. WELSH, *Secrecy and Control Orders: The Role of Vulnerability of Constitutional Values in the United Kingdom and Australia*, in D. COLE, F. FABBRINI, A. VEDASCHI (eds), *Secrecy, National Security and the Vindication of Constitutional Law*, *supra* Introduction, note 13, pp. 154-172.

<sup>184</sup> See, for instance, House of Lords, *Duncan v. Carmell Laird*, 27 April 1942, where the Court stated that a ministerial certificate which contains a document or official secret should be exempted from disclosure and should be accepted without question

<sup>185</sup> House of Lords, decision of 28 February 1968. For a comment to this decision see, *inter alia*, M. CAPPELLETTI, C.J. GOLDEN, *Crown Privilege and Executive Privilege: A British Response to an American Controversy*, in *Stanford Law Review*, vol. 25, 1972, p. 836-844.

countries, such as Canada,<sup>186</sup> Australia,<sup>187</sup> and the United States,<sup>188</sup> where the possible tension between fair trials guarantees and secret information has been accommodated at least formally by allowing closed hearings and the use of security-cleared advocates.

Other novelties point, however, in the opposite direction. Among them, the enactment in 2013 of the UK *Justice and Security Act*,<sup>189</sup> which has introduced a ‘closed’ material procedure applicable to all civil suits. This mechanism allows only to the judge and special advocates to know that sensitive information which, although introduced in the proceedings, if disclosed to the other parties, would hinder national security.<sup>190</sup>

The compatibility of a similar procedure – in which one party is left completely unaware of the evidence acquired in the proceedings – with the right to fair trial is highly questionable.<sup>191</sup> In this respect, these *ex parte* proceedings have even been referred to as a potential ‘Kafkaesque nightmare’

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<sup>186</sup> See the Canadian Immigration and Refugee Protection Act of 2008, Article 85.4.

<sup>187</sup> See Australia’s National Security Information (Criminal and Civil Proceedings) Act, No. 105 of 2004 (as subsequently amended), Article 20 ff. For a comment on this Act see, *inter alia*, S. DONAGHUE, *Reconciling Security and the Right to a Fair Trial: The National Security Information Act in Practice*, in A. LYNCH, E. MACDONALD, G. WILLIAMS (eds), *Law and Liberty in the War on Terror*, Leichhardt, 2007, pp. 87-95.

<sup>188</sup> On the used of security-cleared advocates in UK, Canada and the United States see, *inter alia*, D. COLE, S. I. VLADECK, *Comparative Advantages: Secret Evidence and ‘Cleared Counsels’ in the United States, the United Kingdom and Canada*, in D. COLE, F. FABBRINI, A. VEDASCHI (eds), *Secrecy, National Security and the Vindication of Constitutional Law*, *supra* Introduction, note 13, pp. 173-192.

<sup>189</sup> The Act was approved by the Parliament on 25 April 2013.

<sup>190</sup> The Justice and Security Act, section 6.

<sup>191</sup> See, e.g., J. IP, *Al Rawi, Tariq, and the Future of Closed Material Procedures and Special Advocates*, in *The Modern Law Review*, vol. 75, 2012, pp. 606-654; and J. SULLIVAN, *Closed Material Procedures and the Right to a Fair Trial*, in *Maryland Journal of International Law*, vol. 29, 2014, pp. 269-292, who focuses on the compatibility of the closed material procedures with Article 6 of the European Convention on Human Rights. The growing importance of secrecy in post 9/11 national security cases and the ongoing debate over the suitability of ‘secret justice’ have been recently referred to in T. POOLE, *Reason of State. Law, Prerogative, Empire*, Cambridge, 2015, pp. 274-275. According to other authors, however, the closed material procedure would constitute *per se* a specific “human rights law solution to the State’s need to preserve its interests in the modern human rights era”. See E. NANOPOULOS, *European Human Rights Law and the Normalization of the ‘Closed Material Procedure’: Limit or Source?*, in *Modern Law Review*, vol. 78, 2015, p. 915.

for the party not allowed to hear evidence brought against him.<sup>192</sup>

The shortcomings of the resort to a ‘closed/secret court’ procedure<sup>193</sup> are well explained by Lord Brown in the case *Al Rawi and others v. the Security Services and others*:

“One need not take so extreme a view (...) to recognise the grave inroads into our fundamental principles of open justice and fair trials that are made by closed procedures. Without “A-type disclosure” (...) the claimants may not learn sufficient of the case against them to enable them to give effective instructions to the special advocate to meet it. (...) But beyond all these considerations would be the damage done by a closed procedure to the integrity of the judicial process and the reputation of English justice.”<sup>194</sup>

Also Chinese law establishes a ‘closed material procedure’ system. Indeed, according to Article 152 of the Chinese Code of Criminal Procedure, proceedings involving State secrets shall not be heard in public.

In practice, this provision has not been interpreted as prescribing a restricted access to the trial for the purpose of permitting judges to consider

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<sup>192</sup> J. SULLIVAN, *Closed Material Procedures and the Right to a Fair Trial*, *supra* note 191, p. 269. The same ‘comparison’ has been used by Judge Zann with respect to the UN’s listing of suspected terrorists: “The 1267 Committee regime is (...) a situation for a listed person not unlike that of Josef K in Kafka’s *The Trial*, who awakens one morning and, for reasons never revealed to him or to the reader, is arrested or prosecuted for an unspecified crime”. See Canadian Federal Court, *Abdelrazik v. Canada (Minister of Foreign Affairs)*, decision of 4 June 2009, FCJ No. 656 (QL), para. 53.

<sup>193</sup> In several countries, ‘closed procedures’ are provided for by the law. For instance, in Malaysia, the Security Offences (Special Measures) Act No. 747 of 2012 establishes a closed trial procedure for the use of sensitive information (including information classified as ‘top secret’ or ‘secret’ pursuant to Malaysian law) in criminal proceedings (Part I, Article 3 and Part IV, Articles 8 ff.). The Public Prosecutor can indeed file a request for *ex parte* proceedings any time that a security offence trial involves sensitive information (Article 8(1)). If the seized court upholds the Public Prosecutor’s request, the accused’s lawyer is admitted only to consult a summary statement relating to the content of the classified information (Article 8(7)).

<sup>194</sup> Supreme Court, *Al Rawi and others v. The Security Services and others*, judgment of 13 July 2011, UKSC 34, at 83.

evidence classified as secret, but, rather, as a legal ground allowing ‘secret trials’.<sup>195</sup>

In addition, it has been denounced that:

“based on [the] current understanding of the way that trial closure is justified on the grounds of state secrets in China, it appears that access is restricted for far broader reasons (...). Entire criminal cases may be classified as secret from the police investigation stage onward, based solely on the politically sensitive nature of the alleged criminal activities at issue, and that this classification holds over when the case is tried in court”.<sup>196</sup>

Again, similar mechanisms hardly comply with the right to a fair trial, but rather they seem to reinforce the influence that the executive might exercise over judicial oversight.

In South Africa, governmental authorities might refuse access to certain documents if their disclosure in court would lead to the revelation of State secrets. However, the ultimate authority over disclosure pertains to the judiciary that should guarantee the best balance between the prejudice that disclosure may cause and the protection of the right to a fair trial.<sup>197</sup>

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<sup>195</sup> An example is represented by the ‘closed’ criminal proceedings held before the Intermediate Court of Kashi District in Xinjiang Uygur Autonomous Regions against Alimujiang Yimiti, the manager of a food company, accused of illegally communicating State secrets to a person of foreign nationality. The Court issued its ruling on 6 August 2009, condemning the manager to 15 years of prison. More details of the case can be found in the case note *The Fair Trial and Verdict of Almukiang Yimiti’s Case*, in *Chinese Law and Religion Monitor*, vol. 6, 2010, pp. 55-60. See also M. SÜLYÖK, ‘In All Fairness...’: A Comparative Analysis of the Past, Present and Future of Fair Trial Systems Outside Europe, in A. BADÓ (ed.), *Fair Trial and Judicial Independence. Hungarian Perspectives*, Dordrecht, 2003, p. 133 ff.

<sup>196</sup> See J.D. ROSENZWELG, *Public Access and the Right to a Fair Trial in China*, Universal Period Review Submission: Promoting Increased Transparency in China’s Criminal Justice System, available at: <http://duihua.org> (last accessed on 24 February 2016).

<sup>197</sup> See, e.g., Constitutional Court of South Africa, *Shabalala et al. v. The Attorney General of the Transvaal et al.*, case No. CT/23/94, decision of 19 November 1995, paras. 72(5) and (6). In civil proceedings related to a refusal by the competent authority to disclose classified information, Article 80 of the Promotion of Access to Information Act expressly establishes



Article 49 of the Protection of State Information Draft Bill entrusts the court before which legal proceedings are pending with the task of guaranteeing the proper protection to classified information. In this regard, the court can either order the total or partial disclosure of classified information or decide to hold *in camera* proceedings and limit the disclosure to those cleared to receive such information. In any event, the court should seek oral and written observations by the classifying authority in order to properly balance the principle of open justice and the safeguarding of national security.

In the United States,<sup>198</sup> when in criminal proceedings the defendant wants to rely on classified documents as evidence, the judge may review them in a closed pre-trial hearing to determine their relevance.<sup>199</sup> In case they are necessary, the executive can replace the classified document with a substitutive one, provided that the latter grants to the defendant the same ability of defending himself.

If no substitution can meet the above criterion, the judiciary can request that the classified information is disclosed solely to the defendant under a protective order.<sup>200</sup>

However, if the executive refuses even this option and no alternatives can be found, the judge can only dismiss the case on the ground of secrecy.

In civil proceedings, the State secrecy privilege – the common law doctrine that allows the court to refuse to admit evidence when the executive claims that its disclosure would hinder national security – applies. According to

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that courts, after reviewing the classified material, might decide to hold *in camera* hearings and/or refuse publication of information related to the proceedings.

<sup>198</sup> On the topic see, *inter alia*, D. R. CASSMAN, *Keep it Secret, Keep it Safe: An Empirical Analysis of the State Secrets Doctrine*, in *Stanford Law Review*, vol. 67, 2015, pp. 1173-1217 and S. SCHULHOFER, *Oversight of National Security Secrecy in the United States*, *supra* note 68, p. 29.

<sup>199</sup> Classified Information Procedures Act, section 6. As to the role of this Act in national security litigation see, *e.g.*, I. MACDOUGALL, *CIPA Creep: The Classified Information Procedures Act and its Drift into Civil National Security Litigation*, in *Columbia Human Rights Law Review*, vol. 45, 2014, pp. 668-731.

<sup>200</sup> *Ibid.*

consistent case law since the *United States v. Reynolds* case,<sup>201</sup> the principles to which the application of the State secrets privilege should adhere are the following: the State secrets privilege can be asserted only by the executive; the privilege cannot be lightly invoked; the executive shall comply with precise procedural requirements when asking its application; the judiciary has only limited judicial oversight; once applied, the privilege is absolute.<sup>202</sup>

As to the limited judicial control, while the judiciary retains the power to oversee the application of the State secrecy privilege, when the executive can prove that the disclosure of sensitive information would reasonably cause harm to national security, the court should uphold *tout court* the privilege, without any further examination – not even *in camera* – of the evidence at issue. In other words, if the assertion by the executive complies with procedural requirements and it is reasonable to believe that the disclosure of the information in question might pose a threat to national security, the court would apply the privilege without further examining the documents, impeding the use of the information and, in some instances, even leading to the dismissal of the case.<sup>203</sup> In practice, US courts have even expanded further the scope of the privilege by abdicating any scrutiny on the executive’s allegations over the reasonable harm that would follow the disclosure.<sup>204</sup>

According to the United States Court of Appeals for the Ninth Circuit in the *Mohamed et al. v. Jeppesen Dataplan* case, however, this evidentiary privilege (so-called ‘Reynolds privilege’), that excludes ‘secret’ evidence from the case and *may* result in its dismissal, is not the only possible application of the ‘State secrets privilege’. US contemporary State secrets doctrine would also include a further application of the principle (the so-called ‘Totten bar’),<sup>205</sup> pursuant to

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<sup>201</sup> US Supreme Court, *United States v. Reynolds*, decision of 9 March 1953, 345 US 1.

<sup>202</sup> See J. PERKINS, *The State Secrets Privilege and the Abdication of Oversight*, in *BYU Journal of Public Law*, vol. 21, 2007, p. 243.

<sup>203</sup> *Ibid.*, p. 245.

<sup>204</sup> R. GLASIONOV, *In Furtherance of Transparency and Litigants’ Rights: Reforming the State Secrets Privilege*, in *George Washington Law Review*, vol. 77, 2009, p. 460.

<sup>205</sup> The US Supreme Court in *Totten v. United States* (judgment of 1 October 1875, 92 US 105) found that: “public policy forbids the maintenance of any suit in a court of justice, the

which an action is totally barred any time its very subject matter is itself a State secret.<sup>206</sup> This double-fold ‘reading’ of the privilege has however attracted some criticism.<sup>207</sup>

In any event, even accepting the abovementioned distinction, the two applications may often converge in practice. This occurs anytime that, in the application of the ‘Reynolds principle’, it becomes evident that the case cannot proceed without privileged evidence or that the continuation of proceedings may pose a serious risk of disclosing State secrets.<sup>208</sup>

In France, judges are precluded *tout court* from accessing classified documents. As a result, the concept of ‘secret evidence’ results unknown to the French legal system.<sup>209</sup> The members of the judiciary can only file a request for declassification of certain information when the same appear relevant in the context of pending proceedings. The administrative authority entrusted with the request shall then question the *Commission consultative du secret de la défense nationale* over the opportunity to proceed with declassification. However, the Commission’s opinion does not bind administrative authorities, which remain free to deny declassification even in case of a favourable ‘verdict’.<sup>210</sup>

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trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential (...)” (*ibid.*, para. 107). The Supreme Court therefore declined to enforce a secret espionage contract between the claimant, claiming compensation for rendered services, and the United States government.

<sup>206</sup> United States Court of Appeals for the Ninth Circuit, *Mohamed et al. v. Jeppesen Dataplan, Inc.*, decision of 8 September 2010, 614 F.3d 1070, at 1077. The same reasoning has been later upheld also by the United States District Court, Central District of California (Southern Division) in the case *Fazaga et al. v. Fed. Bureau of Investigation et al.*, order of dismissal of 14 August 2012, 884 F. Supp. 2d 1022, at 1035.

<sup>207</sup> See, *inter alia*, D. J. TELMAN, *On the Conflation of the State Secrets Privilege and the Totten Doctrine*, *supra* Introduction, note 39, p. 5 ff. (according to the Author the Court of Appeals erred in interpreting the Totten decision and to assert that an evidentiary privilege can provide a basis for dismissal before evidence is introduced in the proceedings).

<sup>208</sup> See, *e.g.*, United States District Court for the District of Columbia, *Nasser Al-Aulaqi v. Barack Obama et al.*, memorandum opinion of 7 December 2010, 727 F. Supp. 2d 1, at 53.

<sup>209</sup> D. BIGO, S. CARRERA, N. HERNANZ, A. SCHERRER, *National Security and Secret Evidence in Legislation and before the Courts: Exploring the Challenges*, *supra* note 49, p. 71.

<sup>210</sup> *Arrêté du 30 novembre 2011 portant approbation de l'instruction générale interministérielle n° 1300 sur la protection du secret de la défense nationale*, *supra* note 58, Article 69.

All in all, although the way in which State secrecy may impact on the disclosure of evidence in judicial proceedings differs from State to State,<sup>211</sup> and even within a country as a consequence of distinct applications of the same principle, the exam of the practice has shown that, in most of the countries examined, governmental authorities retain an ‘unchallenged’ discretion in preventing information to be revealed in court. This is true also where a judicial review is formally guaranteed. As noted by Ian Cameron, in fact, “[i]f a governmental minister, or security official, solemnly assures a court that the revealing of an official secret would cause ‘unquantifiable’ damage to national security, the court will find it difficult to disagree even if later transpires that what was meant was ‘unquantifiably small’”.<sup>212</sup>

In addition, even when the judiciary review concludes by ordering the disclosure of sensitive information, it may well happen that the order itself is partially or totally disregarded by governmental authorities.

A suitable example in this respect is represented by the events which followed the 2008 Guatemalan Constitutional Court’s<sup>213</sup> order to disclose military and intelligence documents for the prosecution of a former military leader accused of genocide.<sup>214</sup> Although Guatemalan legal framework on State

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<sup>211</sup> An interesting case is also that of India, where, already in 1975, the Supreme Court set the principle that courts may order the disclosure of governmental documents as evidence in proceedings, even in lack of the authorization required by section 23 of the Indian Evidentiary Act, if the public interest for disclosure overweighs that for secrecy. See Indian Supreme Court, *State of Uttar Pradesh v. Ray Narain*, case No. A.I.R. 1975 S.C. 865, 24 January 1975.

<sup>212</sup> See again I. CAMERON, *National Security and the European Convention on Human Rights*, *supra* note 85, p. 68 (recalling a statement made by a British minister).

<sup>213</sup> In Guatemala cases involving the access to public information are adjudicated by the Constitutional Court, given that Article 30 of the Constitution guarantees the public’s right to access information held by the government unless they concern military or diplomatic matters relating to national security.

<sup>214</sup> Guatemalan Constitutional Court, *The Prosecution in the Trial of Ríos Montt v. Ministry of National Defence*, case No. 2290/2007, judgment of 5 March 2008. It is worth mentioning that the Constitutional Court of Guatemala also rejected the appeal brought by Ríos Montt’s lawyer against the judgment of first instance upholding the consistency of Article 244 of the Guatemalan code of criminal procedure (authorizing the judge to review secret documents *in camera* and eventually order their disclosure in the context of proceedings) with Article 30 of the Constitution (providing for an exception to publicity of administrative acts based on national security grounds). See Guatemalan Constitutional Court, case No. 3478-2010, judgment of 15 December 2010.

secrecy has not been the object of specific analysis, the case is worth quoting given its illustrative nature on this particular aspect. The controversy originated from the request by the prosecutor's office to have access to four military operational plans: *Plan Victoria 82*, *Plan Sofía*, *Firmeza 83*, and *Operación Ixil*. Against the lower court's decision ordering the disclosure, the lawyers of the military leader brought a claim before the Constitutional Court, asserting that those plans amounted to State secrets and did not concern human rights violations (exempted from coverage pursuant to Article 24 of the Guatemalan Law on Access to Public Information).<sup>215</sup>

The Constitutional Court, however, upheld the lower court's decision based on a restrictive interpretation of the military secrets exemptions established by Article 30 of the Guatemalan Constitution. According to the Court, solely that information on State policy whose disclosure would hinder the territorial integrity of the country is entitled to legitimate 'coverage'. Regardless of this decision, the military provided to the prosecutor only *Plan Victoria 82* and eight pages of the *Firmeza 83*.

All these aspects – which can easily lead to 'abuses' by the governments – have to be taken into particular account when testing the resort to State secrecy against international law and, more specifically, human rights law.

### **3.4. The protection of State secrets and its constitutional basis**

A last aspect that deserves preliminary consideration, especially in light of the relevance it may have in terms of incorporation of international law in domestic legal systems, is the constitutional basis of State secrecy protection.

In Italy, for instance, scholars have often upheld the constitutional basis of the State secrets privilege. Some disagreement exists, nonetheless, as to the specific provision in which the privilege would lie. Whilst some commentators claim that the basis of State secrets protection is to be found in Article 52 of

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<sup>215</sup> Decree No. 57/2008, Article 24.

the Italian Constitution (“the sacred duty to defend the homeland”),<sup>216</sup> others believe that is located in Article 54 (“obligation of allegiance to the country”)<sup>217</sup> or in these two provisions jointly considered.<sup>218</sup>

As a matter of fact, however, the Italian Constitution is silent on the point, lacking any express reference to secrecy in its text. This circumstance alone makes any argument meant to entrust State secrecy with constitutional character at least questionable.

In the United States the constitutional basis of the State secrecy privilege has also been the object of some controversy.<sup>219</sup> Since the Supreme Court has never explicitly clarified if the State secrets privilege represents a constitutional authority of the government, lower courts have undertaken different approaches. Thus, while the majority of them have asserted the constitutional basis of the privilege, others have held that it merely amounts to an evidentiary rule originated in common law.

Among the formers there is the US Second Circuit Court, that, in its judgment in the *Arar v. Ashcroft* case,<sup>220</sup> traced back the origins of the State

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<sup>216</sup> See, *inter alia*, A. VEDASCHI, *Arcana Imperii and Salus Rei Publicae: State Secrets Privilege and the Italian Legal Framework*, *supra* note 166, p. 96.

<sup>217</sup> *Ibid.*, p. 97

<sup>218</sup> *Ibid.*

<sup>219</sup> For an overview see L. WINDSOR, *Is the State Secrets Privilege in the Constitution? The Basis of the State Secrets Privilege in Inherent Executive Powers and Why Court-Implemented Safeguards are Constitutional and Prudent*, in *Georgetown Journal of International Law*, vol. 43, 2012, pp. 897-926.

<sup>220</sup> United States Court of Appeals for the Second Circuit, *Maher Arar v. Ashcroft et al.*, decision of 2 November 2009, 585 F.3d 559. The case concerned the tortures and extraordinary rendition allegedly perpetrated by the US government against a Canadian citizen, Maher Arar. The suit was formally filed against the then-Attorney General Ashcroft for the violations of Arar’s Fifth Amendment’s rights. The case will be further analysed *infra*. Following the 9/11 terrorist attacks in New York, the Central Intelligence Agency of the United States, with the complicity of many European States, embarked on a secret program of extraordinary renditions and detentions involving suspect terrorists, who were seized and flown across borders to be interrogated under torture in clandestine sites across the globe. For an overview of the practice of extraordinary renditions and the enhanced interrogations techniques used against suspected terrorists see the Executive Summary of the US Senate Select Committee on Intelligence, ‘Committee Study of the Central Intelligence Agency’s Detention and Interrogation Program’, released on 3 April 2014 and declassified on 3 December 2014. To date (February 2016), the rest of the report is still classified. Among the conspicuous literature on extraordinary renditions see, *inter alia*, P. SANDS, *International Rule of Law: Extraordinary Renditions, Complicity and its Consequences*, in *European Human*

secrets doctrine to the principle of the separation of powers, thus attributing a constitutional dimension to it.<sup>221</sup>

The Fourth Circuit Court also upheld the ‘constitutional significance’ of the State secrets privilege in the *El-Masri v. United States* case,<sup>222</sup> by stating that: “the State secrets privilege has a firm foundation in the Constitution, in addition to its basis in the common law of evidence”.<sup>223</sup> More specifically, the Court linked the constitutional nature of the privilege to its function in allowing the executive to protect sensitive information relevant to the safeguard of its military and foreign affairs.<sup>224</sup>

On the contrary, the Ninth Circuit Court, in the *Mohamed v. Jeppesen Dataplan* case,<sup>225</sup> distanced itself from the majority’s conclusions. The Court,

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*Rights Law Review*, vol. 11, 2006, pp. 408-421; L. N. SADAT, *Ghost Prisoners and Black Sites: Extraordinary Renditions Under International Law*, in *Case Western Reserve Journal of International Law*, 2006, pp. 1-45; A. BERGQUIST, D. WEISSBRODT, *Extraordinary Renditions: A Human Rights Analysis*, in *Harvard Human Rights Journal*, 2006, pp. 123-160; M.N. FORNARI, *La pratica delle consegne straordinarie in altri Stati di individui sospettati di terrorismo e il ricorso alle garanzie diplomatiche*, in I. PAPANICOLOPOLU (ed.), *Atti del V incontro di studio tra giovani cultori delle materie internazionalistiche*, Milan, 2009, pp. 125-171; G. CARELLA, *Nominalismo e lotta al terrorismo internazionale: il caso delle extraordinary renditions*, in G. VENTURINI, S. BARIATTI (eds), *Diritti individuali e giustizia internazionale, Liber Fausto Pocar*, Milan, 2009, pp. 111-123; T. SCOVAZZI, G. CITRONI, *Corso di Diritto Internazionale. La Tutela internazionale dei diritti umani*, Milano, 2013, pp. 417-428; S. BORELLI, *Extraordinary Rendition, Counter-Terrorism and International Law*, in B. SAUL (ed.), *Research Handbook on International Law and Terrorism*, Cheltenham, 2014, pp. 361-378. Furthermore, see Venice Commission (European Commission for Democracy through Law), *Opinion on the International Legal Obligations of Council of Europe Member States in Respect of Secret Detention Facilities and Inter-state Transport of Prisoners* of 18 March 2006 and Council of Europe, Parliamentary Assembly, *Alleged Secret Detentions in Council of Europe Member States – Information Memorandum: II*, doc. AS/jur. (2006) 03 rev. of 22 January 2006 (rapporteur: Dick Marty).

<sup>221</sup> United States Court of Appeals for the Second Circuit, *Maher Arar v. Ashcroft et al.*, decision of 2 November 2009, *supra* note 220, at 581.

<sup>222</sup> United States Court of Appeals for the Fourth Circuit, *Khaled El-Masri v. United States of America et al.*, decision of 2 March 2007, 479 F.3d 296.

<sup>223</sup> *Ibid.*, at 304.

<sup>224</sup> *Ibid.*

<sup>225</sup> United States Court of Appeals for the Ninth Circuit, *Mohamed et al. v. Jeppesen Dataplan, Inc.*, decision of 8 September 2010, *supra* note 206. For a comment of this decision see, *inter alia*, M.Q. CANNON, *Mohamed v. Jeppesen Dataplan, Inc.: The Ninth Circuit Sends the Totten Bar Flying Away on the Jeppesen Airplane*, in *BYU Law Review*, 2012, pp. 407-422. For an overall analysis of the three cases quoted see E. E. LANGLEY, *The Loss of American Values in the Case of Erroneous Irregular Rendition*, in *The Georgetown Law Journal*, vol. 96, 2010, pp. 1441-1479 and B. BERNSTEIN, *Over Before it Even Began:*

in fact, did not find any constitutional basis for the State secrets privilege, focusing merely on its evidentiary character.

In France, the Constitutional Court (*Conseil constitutionnel*) has recently acknowledged that the protection of State secrets responds to the “*exigences constitutionnelles inhérentes à la sauvegarde des intérêts fondamentaux de la Nation*” upheld in Article 34 of the French Constitution.<sup>226</sup>

Similarly, the protection of State secrecy in South Africa might find an implicit constitutional ground in Article 44(2) of the Constitution, pursuant to which: “the Parliament may intervene, by passing legislation (...), when it is necessary to maintain national security (...).”

In most countries, such as the People’s Republic of China, Peru, the Russian Federation and Spain,<sup>227</sup> the Constitution expressly refers to State secrets protection, although generally leaving the task of establishing specific provisions to the legislator.

As previously seen, Article 2.5 of the Peruvian Constitution recognizes the right of the public to access information, contextually providing an exception for those information whose disclosure is prohibited by law or by reasons of national security.

Similarly, Articles 24(2) and 29(4) of the Constitution of the Russian Federation, after asserting everyone’s right to freedom of thought and speech, as well as to seek, get, transfer, produce and disseminate information by any lawful means, mandate federal law to embody a list of information constituting State secrets.

Article 105(b) of the Spanish Constitution also provides a basis to State

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*Mohamed v. Jeppesen Dataplan and the Use of the State Secrets Privilege in Extraordinary Rendition Cases*, in *Fordham International Law Journal*, vol. 34, 2011, pp. 1040-1429.

<sup>226</sup> French Constitutional Court, decision No. 2011-192 QPC of 10 November 2011, paras. 22 and 28. The case concerned the compatibility of the legal discipline related to the “*secret de la défense*” with the right to a fair trial and the principle of separation of powers enshrined in Article 16 of the 1789 Declaration of the rights of man and citizen.

<sup>227</sup> See also, for instance, Article 20(3) of the Constitution of Austria; Article 127(5) of the Constitution of Azerbaijan; Article 74 of the Constitution of Colombia; Article 30 of the Constitution of Costa Rica; Articles 24 and 41 of the Constitution of Georgia; Article 30 of the Constitution of Guatemala.



secrecy protection by establishing that ordinary law shall regulate the access of citizens to administrative files and records, except to the extent that they concern the *security and defense of the State*.

As previously mentioned, somewhat peculiar is instead the provision embodied in Article 53 of the Chinese Constitution, pursuant to which *all citizens* must keep State secrets. According to legal scholarship, this provision – binding all citizens not to disclose sensitive information – undermines in practice the right to receive information and the freedom of the press, formally protected under Article 35 of the same instrument.<sup>228</sup>

From the above analysis, it appears that, generally, in domestic legal systems the protection of State secrets has a constitutional basis, whether implicit or explicit. This aspect helps to better understand the complexity of the tension between secrecy and other constitutional values – including openness, democratic accountability and the protection of human rights – as well as the need for a proper balance between the relevant interests at stake.

In addition, as said earlier, it could even be argued *in abstracto* that the ‘constitutional dimension’ of State secrecy (especially if enlisted among the fundamental provisions of the Constitution) could even affect (international responsibility aside) the incorporation of international law in domestic legal systems, especially in those countries ‘refusing’ an unconditional supremacy of international law above domestic constitutional principles.<sup>229</sup>

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<sup>228</sup> D. M. KLIMAN, *Fateful Transitions: How Democracies Manage Rising Powers, from the Eve of World War I to China's Ascendance*, Philadelphia, 2014, p. 161. This provision reflects the principle of “parity between rights and duties”, that characterizes the Constitution of the People’s Republic of China. As it has been observed, the duty not to disclose State secrets is an expression of the several national duties included in the 1982 Constitution. See R. WEATHERLEY, *Making China Strong. The Role of Nationalism in Chinese Thinking on Democracy and Human Rights*, Basingstoke, 2014, p. 133.

<sup>229</sup> For an overview see, *inter alia*, A. PETERS, *Supremacy Lost: International Law Meets Domestic Constitutional Law*, in *Vienna Journal of Constitutional Law*, vol. 3, 2009, pp. 170-198.

## 4. State secrecy: An international perspective

### 4.1. States' legitimate prerogative not to disclose sensitive information

As already pointed out in the Introduction, States have a *legitimate* prerogative to keep their secrets, especially in relation to diplomatic negotiations, certain intelligence sources and military operations. This prerogative is entrenched in States' sovereignty and, in particular, in the customary international rule protecting the national security of States by prohibiting any external interference with their domestic jurisdiction.

Already in the early '30s of the last century, for example, the United States-Germany Mixed Claims Commission recognized that it "(...) ha[d] not the power to call on (...) government to produce from its confidential files what, *for reason of State*, it considers it would be detrimental to its interests to produce (...)".<sup>230</sup>

States' legitimate interest not to reveal certain information whose disclosure would impair national security has been the object of explicit recognition also in international and regional treaties. In fact, as underlined by Paul Reuter already in 1956: "(...) *il n'est pas douteux que les auteurs de certaines conventions aient eu présente à l'esprit la nécessité de respecter certains secrets politiques ou militaires importants (...)*".<sup>231</sup>

As far as diplomatic documents and inter-States relations are concerned, for instance, Article 24 of the 1961 Vienna Convention on Diplomatic Relations<sup>232</sup> expressly provides that: "the archives and documents of the [diplomatic] mission shall be inviolable at any time and wherever they may

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<sup>230</sup> Emphasis added. The statement of Judge Owen Roberts in the proceedings in the *Sabotage* case (*Lehigh Valley Railroad Company, Agency of Canadian Car and Foundry Company, Limited and Various Underwriters*) is reported in V.D. SANDIFER, *Evidence before International Tribunals*, Chicago, 1939, p. 266.

<sup>231</sup> P. REUTER, *Le droit au secret et les institutions internationales*, in *Annuaire français de droit international*, vol. 2, 1956, p. 48.

be”. Article 27 of the same instrument states, in addition, that: “the official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its function”.

The *ratio* of these provisions is to ensure the efficient performance of diplomatic missions by avoiding any external interference with their activities. Accordingly, the two Articles prevent the receiving (or hosting) State and its courts from penetrating diplomatic documents and correspondence without the consent of the sending State or the State in whose premises the documents are held. Despite the lack of any explicit reference to States’ security interests, these provisions *de facto* grant protection to States’ potentially sensitive information.

As recently made evident by a civil lawsuit filed before UK courts,<sup>233</sup> it is nonetheless controversial whether the expression “inviolability” in Articles 24

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<sup>232</sup> The Vienna Convention on Diplomatic Relations was adopted in Vienna on 18 April 1961 and entered into force on 24 April 1964, 500 UNTS 95.

<sup>233</sup> Court of Appeal (Civil Division), *R. (on the application of Louis Oliver Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs*, judgment of 23 May 2014, EWCA Civ. 708. The proceedings leading to the judgment (also known as *Bancoult No 3*) originated from the challenge brought by Mr. Bancoult, a Chagos islander, against the decision rendered on 1 April 2010 by the UK Secretary of State for Foreign and Commonwealth Affairs to establish, within the British Indian Ocean Territory (BIOT), a ‘no-take’ Marine Protected Area. According to Mr. Bancoult, the ‘no-take’ character of the MPA was unlawful on several grounds, including the improper motive for its establishment. Mr. Bancoult argued that the reason behind the creation of the MPA was, rather than the protection of the environment, the intention to create a long-term mechanism to prevent the resettlement of the Chagossians and their descendants in the area. The claimant based his allegations on a copy of cables sent on 15 May 2009 by the US Embassy in London to the United States Federal Department in Washington and to the US Embassy in Mauritius, that had been made publicly available by *WikiLeaks* and then published in the *Guardian* and the *Telegraph* respectively on 2 December 2010 and 4 February 2011. The text of the cables was said to constitute a record of the meeting held on 12 May 2009 between United States officials, the Director of the Foreign and Commonwealth Office (FCO) and the BIOT Commissioner, during which the creation of a MPA in BIOT was proposed. Pursuant to the text of the cables, the FCO Director and BIOT Commissioner affirmed that, after the establishment of the marine reserve, there would be no “human footprints” or “Man’s Fridays” on the BIOT islands as the creation of a MPA would have prevented resettlement claims of the archipelago’s former inhabitants; therefore, the reserve would have constituted the most effective long-term way to prevent resettlement. On 11 June 2013, the Divisional Court dismissed the case (*R. (on the application of Louis Oliver Bancoult) v. Secretary of State for Foreign and Commonwealth Affairs*, judgment of 11 June 2013, EWHC 1502). As to the improper motive, the Court ruled that the cables were inadmissible given the inviolability of official diplomatic correspondence set by Articles 24 and 27(2) of the 1961 Vienna Convention on Diplomatic Relations. Albeit dismissing the

and 27 of the Vienna Convention on Diplomatic Relations should be interpreted as vesting diplomatic documents with a sort of *absolute immunity*, that is, to exclude their use even when they have already been made publicly available by a third-party.<sup>234</sup> The relevance of this aspect with respect to the content of the present analysis appears evident if one thinks that absolute immunity of diplomatic documents would end up precluding – with no exception – their use as evidence in court, thus potentially barring judicial scrutiny.

Specific international procedures also recognize the risks that the leaks of certain sensitive information might pose to the protection of States' national security. For instance, arms control verification regimes generally provide for a number of safeguards against the possible disclosure of sensitive information that might come to the knowledge of international officers during verification inspections.<sup>235</sup> As a way of example, the Confidentiality Annex to the Chemical Weapons Convention<sup>236</sup> expressly establishes a set of principles aimed at protecting 'confidential information', that is information "(...) (i) designed by the State party from whom the information was obtained and to which the information refers" or information whose "(ii) (...) unauthorized disclosure could reasonably be expected to cause damage to the State party to which it refers (...)".<sup>237</sup> To make a further example, Article 57(b) of the Comprehensive Nuclear Test-Ban Treaty<sup>238</sup> expressly provides that the inspected State shall have "the right to take measures it deems necessary to

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claim and thus upholding the Divisional Court's findings, the Court of Appeal distanced itself from the lower Court by ruling in favour of the admissibility of *WikiLeaks* cables in the proceedings. For a comment to this decision see E. CARPANELLI, *On the Inviolability of Diplomatic Archives and Documents: The 1961 Vienna Convention on Diplomatic Relations to the Test of WikiLeaks*, in *Rivista di diritto internazionale*, vol. XCVIII, 2015, pp. 834-851.

<sup>234</sup> *Ibid.*, para. 64. The thesis of the absolute immunity is supported, e.g., by E. DENZA, *Commentary on the Vienna Convention on Diplomatic Relations*, 3<sup>rd</sup> ed., Oxford/New York, 2008, p. 226.

<sup>235</sup> On this topic see, e.g., E. GRECO, *Protection of Confidential Information and the Chemical Weapons Convention*, in M. BOTHE, N. RONZITTI, A. ROSAS (eds), *The New Chemical Weapons Convention – Implementation and Prospects*, The Hague, London, Boston, 1998.

<sup>236</sup> Geneva, 3 September 1992; entered into force on 29 April 1997, 1974 UNTS 45.

<sup>237</sup> Annex on the Protection of Confidential Information, part A, at 2(a).

protect national security and to prevent disclosure of information not related to the purpose of the inspection”. The same provision, however, excludes that a State party might refuse to disclose information to conceal a violation of its obligation not to carry out nuclear test explosions.<sup>239</sup>

By the same token, although under a different guise, States’ legitimate prerogative not to disclose information that, if publicly available, could hinder State’s national security has been upheld in treaty provisions related to international adjudication.

Article 302 of the United Nations Convention on the Law of the Sea, for instance, expressly provides that: “Without prejudice to the right of a State party to resort to the procedures for the settlement of disputes provided for in this Convention, nothing in [it] shall be deemed to require a State party, in the fulfilment of its obligations under this Convention, to supply *information the disclosure of which is contrary to the essential interests of its security*”.<sup>240</sup>

Similarly, Article 72 of the Rome Statute,<sup>241</sup> drawing on the previous experience of *ad hoc* international criminal tribunals,<sup>242</sup> implicitly recognizes States’ legitimate interest not to publicly disclose certain sensitive information in proceedings before the International Criminal Court by envisaging

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<sup>238</sup> Adopted in New York on 10 September 1996. The treaty has not entered into force yet.

<sup>239</sup> *Ibid.*, Article 57(d).

<sup>240</sup> Emphasis added. Montego Bay, 10 December 1982, entered into force on 16 November 1994, 1833 UNTS 3. During negotiations, the text originally proposed by the United States was amended to expressly recognize that the prerogative of States parties not to disclose sensitive information could not undermine the other parties’ right to resort to dispute settlement procedures.

<sup>241</sup> Statute of the International Criminal Court (Rome, 17 July 1998), entered into force on 1 July 2002, 2187 UNTS 90. On the topic see, *inter alia*, W. A. SHABAS, *National Security Interests and the Rights of the Accused*, in H. ROGGEMANN, P. ŠARČEVIĆ (eds), *National Security and International Criminal Justice*, *supra* note 12, pp. 105-113; O. TRIFFTERER, *Security Interests of the Community of States, Basis and Justification of an International Criminal Jurisdiction versus ‘Protection of National Security Information’, Article 72 of the Rome Statute*, in H. ROGGEMANN, P. ŠARČEVIĆ (eds), *National Security and International Criminal Justice*, *supra* note 12, pp. 53-82; A.G. TACHOU SIPOWO, *La Cour Pénale Internationale et le secret: de l’atténuation de la confidentialité au nom de l’impératif d’effectivité*, Ph.D. dissertation, University of Laval (Canada), 2014, p. 75 ff.

<sup>242</sup> See, for instance, *infra* note 247.

protective mechanisms, such as the holding of *in camera* hearings.<sup>243</sup>

More generally, even in lack of specific treaty provisions, most international and regional tribunals<sup>244</sup> have accommodated the issue of the protection of State secrets by providing special mechanisms (such as, for instance, *in camera* hearings, *ex parte* proceedings or restrictions to disclosure) in their rules of procedure<sup>245</sup> or case law.<sup>246</sup> In this regard, although

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<sup>243</sup> The legitimate interest that States may have in protecting certain information from public disclosure has also been implicitly recognized by the Memorandum of Understanding concluded between the Office of the Prosecutor of the International Criminal Court and Libya. By this agreement, the two parties have indeed “(...) committed to supporting each other’s investigations and prosecutions through the exchange of information, subject to *confidentiality and protection obligations*” (emphasized added). See Statement of the Prosecutor of the International Criminal Court to the United Nations Security Council on the Situation on Libya, pursuant to UN Security Council Resolution 1970 (2011), 14 November 2013.

<sup>244</sup> The International Court of Justice (ICJ), whose rules of procedure do not contain any explicit provision related to sensitive documents, has considered the issue of confidential communications embodying State secrets in two cases: the *Corfu Channel* case (*United Kingdom v. Albania*, judgment of 9 April 1949, ICJ Reports 1949, p. 4) and the *Genocide* case (Case concerning the application of the Convention on the Prevention and Punishment of the Crime of Genocide, *Bosnia and Herzegovina v. Serbia and Montenegro*, judgment of 26 February 2007, ICJ Reports 2007, p. 43). In the *Corfu Channel* case, the UK claimed that a report requested by the Court contained naval secrets and therefore refused to disclose it. In the *Genocide* case, Serbia and Montenegro declined the request made by Bosnia Herzegovina to disclose the minutes of the meetings of the Supreme Defence Council. The respondent State rejected the request based on the fact that these documents had been classified at the domestic level and, moreover, had been the object of a specific protective order issued by the International Criminal Tribunal for the Former Yugoslavia. In both occasions, however, the Court avoided confronting the issue directly and, instead, relied on other available evidence. For a general overview see, *inter alia*, A. RIDDELL, B. PLANT, *Evidence before the International Court of Justice*, London, 2009, p. 206 ff. See also K.J. KEITH, ‘Naval Secrets’, *Public Interest Immunity and Open Justice*, in K. BANNELIER, T. CHRISTAKIS, S. HEATHCOTE (eds), *The ICJ and the Evolution of International Law*, Abingdon, 2012, pp. 125-146.

<sup>245</sup> See, for example, International Criminal Tribunal for the Former Yugoslavia Rules of Procedure and Evidence (Doc IT/32/Rev 49, 22 May 2013), Rule 53(c); International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence (last amended on 13 May 2015), Rule 66(c). Article 33(2) of the rules of procedures of the European Court of Human Rights expressly provides the possibility of classify documents in the Court’s files in the interest of morals, public order, *national security considerations* or anytime that publicity would prejudice the interests of justice.

<sup>246</sup> See, *e.g.*, the recent judgment of the European Court of Human Rights in the *Al-Nashiri v. Poland* case, *supra* Introduction, note 26, para. 365. On the case law of *ad hoc* criminal tribunals see, *inter alia*, H.A. STRYDOM, *The Legal Authority of the International Criminal Tribunal for Ex-Yugoslavia to Order the Disclosure of Evidence*, in *South Africa Yearbook of International Law*, vol. 22, 1997, pp. 76-85; H. ROGGMANN, *National Security and Protection of State in National and International Criminal Procedure: Systematic and Comparative Aspects*, in H. ROGGMANN, P. ŠARČEVIĆ (eds), *National Security and International Criminal Justice*, *supra* note 12, pp. 1-24; L. MORANCHEK, *Protecting National Security Evidence while Prosecuting War Crimes: Problems and Lessons for International*

refraining from granting States a ‘blanket’ right to withhold information based on national security concerns, international adjudicatory bodies have nonetheless upheld States’ legitimate prerogative not to publicly release information that, if disclosed, could hinder their national security.

Just to make an example, in the *Blaškić* case, the Appellate Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) expressly recognized that States have a legitimate interest in protecting their national security by not disclosing certain documents.<sup>247</sup>

In reaching this conclusion, it examined first the national legislation on the use of State secrecy privilege before national courts and concluded that: “th[e] cursory review of municipal law indicates that national security interests may constitute a legitimate limitation on the obligation of States to disclose or produce information before municipal courts of law”.<sup>248</sup> The Chamber further analysed the domestic legislation concerning cooperation with the Tribunal and noted that several States had enacted provisions allowing them not to disclose certain evidence based on national security grounds.<sup>249</sup> The reasoning followed by the Tribunal appears particularly interesting due to the fact that, as noted in academic literature, by reviewing municipal law on the subject, it seemed to conclude – albeit not expressly stating so – that States’ legitimate prerogative not to disclose certain evidence based on national security reasons

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*Justice from the ICTY*, in *Yale Journal of International Law*, vol. 31, 2006, pp. 477-501, and K.A.A. KHAN, G. AZARNIA, *Evidentiary Privileges*, in K.A.A. KHAN, C. BUISMAN, C. GOSNELL (eds), *Principles of Evidence in International Criminal Justice*, Oxford, 2010, pp. 551-597; M. KLAMBERG, *Evidence in International Criminal Trials. Confronting Legal Gaps and the Reconstruction of Disputed Events*, Leiden, Boston, 2013, pp. 255-268.

<sup>247</sup> ICTY, *Prosecutor v. Blaškić*, decision on the objection of the Republic of Croatia to the issuance of *subpoenae duces tecum*, IT-95-14-T, decision of 18 July 1997, para. 67.

<sup>248</sup> *Ibid.*, para. 126.

<sup>249</sup> *Ibid.*, para. 127. As a matter of example, the Chamber referred to the Austrian law on cooperation with the Tribunal, entrusting the Federal Minister of Foreign Affairs with the power of determining if the interest in secrecy would prevail on that of cooperating with the Tribunal.

would amount to a “general principle of law” according to the terms of Article 38(3)(c) of the Statute of the International Court of Justice.<sup>250</sup>

Eventually, however, the Chamber excluded that the protection of such a legitimate interest might be interpreted as granting States a ‘blanket’ right to withhold, for security purposes, documents necessary for trial.<sup>251</sup> Accordingly, the Tribunal found that States’ secrecy claims had to be scrutinized in the context of *in camera*, *ex parte* proceedings.<sup>252</sup>

On top of the above, as it will be further explored in the next Chapters, also international and regional human rights monitoring bodies have often upheld States’ legitimate prerogative not to disclose certain information based on national security concerns. This has occurred mainly – but not only – in relation to the application and interpretation of ‘national security exception clauses’ contained in human rights treaties.<sup>253</sup>

The (non-exhaustive) legal “*puzzle en apparence hétérogène*”<sup>254</sup> that has been depicted in the context of the present section clearly shows that, despite the underlying differences between different treaty regimes, States’ legitimate prerogative to withhold certain information on the ground of national security concerns is well established in international law. However, as it has been partly shown in the present section and as it will be further discussed in the

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<sup>250</sup> See G. HAFNER, *Limits to the Procedural Powers of the International Tribunal for the Former Yugoslavia*, in C. WELLENS (ed.), *International Law: Theory and Practice. Essays in Honour of Eric Suy*, The Hague, 1998, p. 669. Interestingly, some commentators have relied on the same legal category (general principles of law) to conclude that States should justify their refusal to disclose relevant information before international criminal courts based on national security grounds and should recognize the judicial reviewing authority of the court itself. See A. ESER, K. AMBOS, *The Power of National Courts to Compel the Production of Evidence and its Limits. An Amicus Curiae Brief to the International Criminal Tribunal for the Former Yugoslavia*, in *European Journal of Crime, Criminal Law and Criminal Justice*, vol. 6, 1998, p. 19.

<sup>251</sup> *Ibid.*, para. 65.

<sup>252</sup> *Ibid.*, para. 67.

<sup>253</sup> See *infra*, Chapters 2 and 3. For an overview of treaties containing national security exception clauses (including but not limited to human rights treaties) see, e.g., S. ROSE-ACKERMAN, B. BILLA, *Treaties and National Security*, in *New York University Journal of International Law and Policy*, vol. 40, 2008, pp. 437-496.

<sup>254</sup> This expression has been used by Paul Reuter in 1956 to describe the set of norms related to the use of secrecy in international law. See again P. REUTER, *Le droit au secret et les institutions internationales*, *supra* note 231, p. 57.



next Chapters, at least as far as the protection of human rights and the prosecution of heinous crimes are concerned, the acknowledgement of the States' legitimate interest not to disclose certain information has often been accompanied by the provision of specific restrictions and/or oversight mechanisms (either at the international or at the domestic level), *de facto* excluding the existence of a 'blanket right' of States to withhold sensitive information *in all cases*. This trend mirrors and appears as part and parcel of that process of 'gradual erosion' of the realm of States' domestic jurisdiction that has been already pointed out in the Introduction.

## **4.2. Intergovernmental and supranational obligations on the handling of classified information**

### **4.2.1. Bilateral agreements and the 'originator control principle'**

While the protection of State secrets is generally regulated domestically, commitments that States have undertaken at the international level might also require classification and/or non-disclosure of certain information.

Several States, for instance, have entered into bilateral agreements related to the protection of classified information.<sup>255</sup> By concluding these agreements, States have bound themselves to mutually protect and prevent the disclosure of information classified in the other contracting State. As a matter of example, Article 5 of the bilateral agreement between Italy and Spain on the protection of classified information provides that: "*Las Partes no cederán ni divulgarán ni permitirán la cesión ni la divulgación de ningún tipo de Información Clasificada (...) sin la autorización previa de la Parte Originadora*".<sup>256</sup>

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<sup>255</sup> See, for instance, the Agreement between the United States and Italy for the Safeguarding of Classified Information, concluded by notes exchange in Washington on 4 August 1964. The text of some of these treaties is included in Ministerio de Defensa, *Los tratados internacionales sobre protección de la información clasificada*, Madrid, 2009.

<sup>256</sup> *Acuerdo General de Seguridad entre el Reino de España y la República italiana relativo a la protección de la información clasificada intercambiada entre ambos países*, concluded in

Similar provisions are included, *inter alia*, in the bilateral agreements concluded between Spain and France (Madrid, 21 July 2006; Article 4) and between Spain and the United States (Washington, 12 March 1984; Article 4).

More generally, government authorities, especially in common law jurisdictions, have relied on the so-called ‘control principle’ (or ‘State originator control principle’) to refuse the disclosure of sensitive information even when no such treaty provisions were in place or – at least – public. Pursuant to this principle, at the core of multilateral and intelligence co-operation, intelligence information is shared only on the condition that secrecy is ensured also in the ‘receiving country’.<sup>257</sup> In practice, this principle, whether upheld or embodied in domestic legislation,<sup>258</sup> might even end up preventing the disclosure of key information concerning wrongdoings committed by the receiving State officials in proceedings brought before a receiving State court, based on the sole consideration that disclosure would infringe international intelligence cooperation arrangements.

#### 4.2.2. Participation to intergovernmental organizations

The participation of a State to an international organization might also impose obligations with respect to the establishment of specific rules related to classification and non-disclosure. As an example, the admission to the North Atlantic Treaty Organization (‘NATO’) requires candidate States to prove the establishment of “sufficient safeguards and procedures to ensure the security

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Madrid on 19 April 2007, Article 5. The text is included in Ministerio de Defensa, *Los tratados internacionales sobre protección de la información clasificada*, *supra* note 255, p. 98 ff.

<sup>257</sup> *R (Binyam Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs*, EWCA civ. 65, judgment of 10 February 2010, para. 12. This principle has been described as the “(...) most jealously protected national security privilege of all”. See I. LEIGH, *Accountability and Intelligence Cooperation. Framing the Issue*, in H. BORN, I. LEIGH, A. WILLS (eds), *International Intelligence Cooperation and Accountability*, Abingdon, 2011, p. 5.

<sup>258</sup> See, for instance, *Arrêté du 30 novembre 2011 portant approbation de l'instruction générale interministérielle n° 1300 sur la protection du secret de la défense nationale*, *supra* note 58, Article 46 (“*Pour les informations ou supports classifiés étrangers, seule l'autorité étrangère émettrice peut procéder à une déclassification ou à un déclassement*”).

of the most sensitive information as laid down in NATO security policy”.<sup>259</sup> While the text of NATO security policy is itself inaccessible, States wishing to join the Organization, especially in Eastern Europe, have declared to enact new State secrecy laws to abide by this requirement.<sup>260</sup>

Apart from NATO, the participation to other international organizations might also impose specific obligations with regard to classification and secrecy. For the sake of brevity, in the next sections the focus will be on the United Nations and the European Union.

#### **4.2.2(a). The United Nations**

Secrecy issues have also emerged at the United Nations level. Just to make an example, operations rules governing peacekeeping operations are often confidential or secret.<sup>261</sup> Furthermore, as provided, *inter alia*, by the Handbook on United Nations Multidimension Peacekeeping Operations, communications between the missions and the Department of Peacekeeping Operations, if sensitive, may be classified and only distributed to a limited number of people.<sup>262</sup>

More generally, it is noteworthy that the Secretary General of the United Nations has promulgated specific rules dealing with the issue of secure handling (through classification) of information entrusted to or originating

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<sup>259</sup> NATO, Press Release NAC-6(99) 66 of 24 April 1999, ‘Membership Action Plan’, at IV(1).

<sup>260</sup> See A. ROBERTS, *Entangling Alliances: NATO’s Security of Information Policy and the Entrenchment of State Secrecy*, in *Cornell International Law Journal*, vol. 36, 2003-2004, p. 331. Apart from NATO there are other international organizations where security rules are in place. See, for instance, OCCAR Security Agreement between the Government of the French Republic, the Government of the Federal Republic of Germany, the Government of the Kingdom of Belgium, the Government of the Italian Republic and the Government of the United Kingdom (Paris, 24 September 2004).

<sup>261</sup> See also L. PINESCHI, *L’emploi de la force dans les opérations de maintien de la paix des Nations Unies “robustes”: conditions et limites juridiques*, in M. ARCARI, L. BALMOND (eds), *La sécurité collective entre légalité et défis à la légalité*, Milano, 2008, p. 169.

<sup>262</sup> Handbook on United Nations Multidimensional Peacekeeping Operations, 2003, p. 28.

from the United Nations.<sup>263</sup> In particular, the Secretary-General includes among sensitive information which may be classified as “confidential” or “strictly confidential” (based on the gravity of the possible damage) “documents whose disclosure is likely to endanger the security of Member States or prejudice the security or proper conduct of any operation or activity of the United Nations, including any of its peacekeeping operations”.<sup>264</sup>

Another interesting example of the intricacies that States’ commitments undertaken at the international and supranational level might raise, although under a partially different perspective, is represented by the already mentioned debate surrounding the United Nations Security Council’s listing of suspected terrorists and its broad use of ‘secret evidence’.<sup>265</sup> Pursuant to Resolutions 1267 (1999), as subsequently amended, the UN Security Council has established an *ad hoc* Committee whose work is, *inter alia*, that of maintaining

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<sup>263</sup> Secretary General’s Bulletin, Information sensitivity, classification and handling, UN Doc. ST/SGB/2007/6, 12 February 2007.

<sup>264</sup> *Ibid.*, at 1(2)(c).

<sup>265</sup> Among the copious scientific literature on the topic see, *inter alia*, K. ROACH, *Managing Secrecy and its Migration in a Post - 9/11 World*, in D. COLE, F. FABBRINI, A. VEDASCHI (eds), *Secrecy, National Security and the Vindication of Constitutional Law*, *supra* Introduction, note 13, pp. 115-132. See also, *inter alia*, I. BANTEKAS, *The International Law of Terrorism Financing*, in *American Journal of International Law*, vol. 97, 2003, p. 315-322; M. ARCARI, *Sviluppi in tema di diritti di individui iscritti nelle liste dei Comitati delle sanzioni del Consiglio di sicurezza*, in *Rivista di diritto internazionale*, vol. 90, 2007, pp. 657-680; A. CIAMPI, *Sanzioni del Consiglio di Sicurezza e diritti umani*, Milano, 2007; I. COUZIGOU, *La lutte du Conseil de Sécurité contre le terrorisme international et les droits de l’homme*, in *Revue générale du droit international public*, 2008, pp. 49-84; C. MICHAELSEN, *Kadi and Al Barakaat v. Council of the European Union and Commission of the European Communities: The Incompatibility of the United Nations Security Council’s 1267 Sanctions Regime with European Due Process Guarantees*, in *Melbourne Journal of International Law*, 2009, pp. 329-345; C. WEEMA, *Kadi v. Council, Putting the United Nations in its Place*, in *Tulane Journal of International and Comparative Law*, vol. 17, 2009, pp. 571-584; F. SALERNO (ed.), *Sanzioni individuali del Consiglio di sicurezza e garanzie processuali*, Milano, 2010; V. BAEHR-JONES, *Mission Possible: How Intelligence Evidence Rules Can Save UN Terrorist Sanctions*, in *Harvard National Security Journal*, vol. 2, 2011, pp. 447-490; L. PANTALEO, *La protection des droits fondamentaux de la défense dans l’application des mesures ciblées. L’apport des juridictions à la gouvernance des problèmes sécuritaires*, in M. ARCARI, L. BALMOND (eds), *Global Governance and the Challenges to Collective Security*, Napoli, 2012, pp. 149-176; N.J. FORWOOD, *Closed Evidence in Restrictive Measures Cases: A Comparative Perspective*, in K. BRADLEY, N. TRAVERS AND A. WHELAN (eds), *Of Courts and Constitutions. Liber Amicorum in Honour of Nial Fennelly*, Oxford and Portland, 2014, pp. 87-109; S. HOLLENBERG, *The Security Council’s 1267/1999 Targeted Sanctions Regime and the Use of*

a list and overseeing the implementation of financial sanctions against individuals and entities suspected of being tied with the Taliban or Al-Qaida (“Sanctions Committee”).<sup>266</sup> Since 2011, two distinct committees have been established and entrusted to designate those individuals and entities associated with Al-Qaida and the Taliban respectively.<sup>267</sup> In 2015, the first of the two committees has been renamed the “ISIL Da’esh & Al-Qaida Sanctions List”.<sup>268</sup>

Designation on the list is undertaken at the States’ suggestions (chiefly, the United States), without any relevant evidence being disclosed.

As already noted, the secretive nature of the evidence leading to the adoption of restrictive measures affecting individual fundamental rights, as well as the lack of reviewing mechanisms at the UN level, have raised doubts as to the compatibility of this system with due process rights. As a result, on the one hand, States have found themselves “trapped” between the obligation to comply with UN Security Council’s resolutions<sup>269</sup> (and, as far as EU Member States are concerned, EU implementing legislation) and, on the one hand, the duty to abide by their human rights obligations.

Measures implementing the UN sanctions regime, adopted either at the national or supranational level, have indeed been challenged by targeted individuals before domestic and regional courts.

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*Confidential Information: A Proposal for Decentralization of Review*, *supra* Introduction, note 36, pp. 49-71.

<sup>266</sup> UN Security Council Resolution 1267 (1999), adopted on 15 October 1999 (UN Doc. S/RES/1267). The sanction regime has been subsequently modified through resolutions 1333 (2000) of 19 December 2000 (UN Doc. S/RES/1333), 1390 (2002) of 16 January 2000 (UN Doc. S/RES/1390), 1455 (2003) of 17 January 2003 (UN Doc. S/RES/1455), 1526 (2004) of 30 January 2004 (UN Doc. S/RES/1526), 1617 (2005) of 29 July 2005 (UN Doc. S/RES/1617), 1735 (2006) of 22 December 2006 (UN Doc. S/RES/1735), 1822 (2008) of 30 June 2008 (UN Doc. S/RES/1822), 1904 (2009) of 17 December 2009 (UN Doc. S/RES/1904), 1989 (2011) of 17 June 2011 (UN Doc. S/RES/1989), 2083 (2012) of 17 December 2012 (UN Doc. S/RES/2083) and resolution 2161 (2014) of 17 June 2014 (UN Doc. S/RES/2161). See also Resolution 1373 (2001) of 28 September 2001 (UN Doc. S/RES/1373).

<sup>267</sup> See Resolution 1989 of 17 June 2011 (UN Doc. S/RES/1989).

<sup>268</sup> See Resolution 2253 of 17 December 2015 (UN Doc. S/RES/2253).

<sup>269</sup> See United Nations Charter, Article 25.

The judicial decisions to which these challenges have led shed some light on the possible interplay between different obligations and legal systems (especially as far as the dialectic relationship between the ‘use of secret evidence’ and the right to a fair trial is concerned).

In the well known *Kadi I* case, for instance, the Grand Chamber of the Court of Justice of the European Union held that, although Article 103 of the United Nations Charter vests obligations stemming from the Charter with a sort of hierarchical supremacy over any other international obligations,<sup>270</sup> no international agreement may supersede the ‘constitutional’ principles of the EU legal system, including the principle that all acts of the Union (thus including legislation implementing the sanctions regime) should respect fundamental human rights.<sup>271</sup> In this regard, the Court has *de facto* embraced that ‘dualistic approach’ already upheld by several domestic courts.<sup>272</sup>

The Court further excluded that EU acts adopted to implement UN Security Council Resolutions enjoy immunity from jurisdiction and, to the contrary, found that EU courts detain full reviewing authority over their lawfulness.<sup>273</sup> As a result, the Court concluded that the UN sanctions regime, as standing at

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<sup>270</sup> Article 103 of the UN Charter states that: “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail”.

<sup>271</sup> Grand Chamber, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, decision of 3 September 2008, *supra* Introduction, note 37, para. 285. On the *Kadi* ‘saga’ see, *inter alia*, P. PIRRONE, *Attuazione delle risoluzioni del Consiglio di sicurezza contro il terrorismo e tutela giurisdizionale dei diritti fondamentali nell’ordinamento comunitario: la sentenza della Corte di giustizia relativa ai casi Kadi e Al Barakaat*, in *Diritti umani e diritto internazionale*, vol. 3, 2009, pp. 55-83; J. KOKOTT, C. SOBOTTA, *The Kadi Case: Constitutional Core Values and International Law - Finding the Balance?*, in *European Journal of International Law*, vol. 23, 2012, pp. 1015-1024; L. GRADONI, *Raccontare Kadi dopo Kadi II: perché la Corte di giustizia dell’Unione europea non transige sul rispetto dei diritti umani nella lotta al terrorismo*, in *Diritti umani e diritto internazionale*, vol. 7, 2013, pp. 587-561; Z. L. RIKABI, *Kadi II: The Right to Effective Judicial Review Triumphs yet Again*, in *European Human Rights Law Review*, 2013, pp. 631-636.

<sup>272</sup> See, e.g., United Kingdom Supreme Court, *Ahmed and others v. Her Majesty’s Treasury*, decision of 27 January 2010, UKSC 2; and Supreme Court of the Netherlands, *The Netherlands v. A and Others*, judgment of 14 December 2012, LJN: BX8351 (reported in Oxford Report on International Law, ILDC 1959 (NL 2012)).

<sup>273</sup> *Ibid.*, para. 326.

that time, could not be implemented at the EU level as lacking procedural fairness. The Court consequently annulled EU implementing legislation, but decided to maintain its effects with respect to the applicant for three months so to allow the Council to remediate to the breaches found.<sup>274</sup>

In a subsequent decision (*Kadi II*),<sup>275</sup> the Grand Chamber upheld the General Court's decision to annul the applicant's designation at the EU level<sup>276</sup> on the ground that the reasons provided to it to justify such a measure were not substantiated.<sup>277</sup> In doing so, the Court contextually spelled out the standards of review that EU (and domestic) courts should abide by when dealing with cases challenging a listing decision. In particular, with reference to the issue of the use of classified / sensitive information, the Court found that:

“Admittedly, overriding considerations to do with the security of the European Union or of its Member States or with the conduct of their international relations may preclude the disclosure of some information or some evidence to the person concerned. In such circumstances, it is none the less the task of the Courts of the European Union (...) to apply, in the course of the judicial review to be carried out, techniques which accommodate, on the one hand, legitimate security considerations about the nature and sources of

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<sup>274</sup> Council Regulation 881/2002/EC of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaeda network and the Taliban, and repealing Council Regulation 467/2001/EC prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, in so far as it concerns Mr Kadi and the Al Barakaat International Foundation, in OJ L 139/9 of 29 May 2002.

<sup>275</sup> Grand Chamber, *European Commission and Others v. Yassin Abdullah Kadi*, decision of 18 July 2013, *supra* Introduction, note 37.

<sup>276</sup> The General Court annulled Commission Regulation 1190/2008/EC of 28 November 2008 amending for the 101st time Council Regulation 881/2002/EC imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaeda network and the Taliban, in so far as it concerns Mr Yassin Abdullah Kadi, in OJ L 322/25 of 21 December 2008.

information taken into account in the adoption of the act concerned and, on the other, the need sufficiently to guarantee to an individual respect for his procedural rights, such as the right to be heard and the requirement for an adversarial process. To that end, it is for the Courts of the European Union, when carrying out an examination of all the matters of fact or law produced by the competent European Union authority, to determine whether the reasons relied on by that authority as grounds to preclude that disclosure are well founded”.<sup>278</sup>

The European Court of Human Rights has also been requested to address the existing tensions between the States’ duty to implement Security Council’s decisions (based on “secret evidence”) and their human rights obligations.<sup>279</sup> In the *Nada*<sup>280</sup> and *Al-Dulimi*<sup>281</sup> cases, the Court was asked to assess whether domestic measures adopted by Switzerland to implement UN Security Council’s sanction regimes complied with the obligations binding this State under the European Convention on Human Rights. The Court, despite reaching similar conclusions (*i.e.*, Switzerland’s breach of its human rights

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<sup>277</sup> Case T-85/09, *Yassin Abdullah Kadi v. European Commission*, decision of 20 September 2010, para. 195.

<sup>278</sup> *Ibid.*, paras. 125-126.

<sup>279</sup> The issue has been dealt with also by the United Nations Human Rights Committee (although in a partially different perspective) in the *Sayadi and Vinck v. Belgium* case. The Committee found that, although Belgium could not remove the names of the petitioners from the UN sanction list, he was nonetheless responsible for the resulting violations of human rights as it had provided their names for designation. Furthermore, the Committee found that the State had a duty to obtain the delisting, pay compensation and avoid recurrence of similar violations (Communication No. 1472/2006, Views of 22 October 2008, UN Doc. CCPR/C/94/D/1472/2006).

<sup>280</sup> European Court of Human Rights [GC], *Nada v. Switzerland*, App. No. 10593/08, judgment of 12 September 2012.

<sup>281</sup> European Court of Human Rights, *Al-Dulimi and Montana Management Inc. v. Switzerland*, *supra* Introduction, note 38. For a comment of this judgment see, *inter alia*, M. MARCHEGANI, *Le principe de la protection équivalente dans l’articulation des rapports entre ordre juridique des NU et CEDH après l’arrêt Al-Dulimi*, in *QIL* (online journal), available at: <http://www.qil-qdi.org> (last accessed on 24 February 2016). See also A. PETERS, *Targeted Sanctions after Affaire Al Dulimi et Montana Management Inc. c. Suisse: Is there a Way Out of the Catch-22 for UN Members?*, in *EJIL:Talk!*, 4 December 2013, at: <http://www.ejiltalk.org> (last accessed on 24 February 2016).



obligations), has upheld “diverging approaches” in the two cases.<sup>282</sup> Relying on the different degree of discretion of States under distinct UN sanction regimes,<sup>283</sup> the Court has in fact solved the conflict of norms by applying two different principles: the principle of “systemic integration” in the *Nada* case and the principle of “equivalent protection” in the *Al-Dulimi* case.<sup>284</sup>

In the *Nada* case, the Court found, in fact, that the respondent State had failed to show that it “attempted, as far as possible, to harmonise the obligations that [it] regarded as divergent” (namely, the protection of human rights and the duty to implement UN Security Council’s Resolutions).<sup>285</sup> Indeed, according to the Court, Switzerland could have alleviated the sanctions regime in its implementation at the domestic level by taking into account the circumstances of the case at stake and, in particular, the interferences that the sanctions could have with the plaintiff’s enjoyment of his fundamental human rights.<sup>286</sup> Furthermore, the Court found that the respondent State authorities should have ensured an effective mechanism for the review of measures taken at the national level pursuant to UN Security Council’s resolutions and that the lack of similar mechanisms amounted to a violation of the right to an effective remedy.<sup>287</sup>

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<sup>282</sup> See S. HOLLENBERG, *The Diverging Approaches of the European Court of Human Rights in the cases of Nada and Al-Dulimi*, in *International and Comparative Law Quarterly*, vol. 64, 2015, pp. 445-460.

<sup>283</sup> Mr. Al Dulimi’s assets had been frozen under the UN Security Council’s sanction regime concerning members of the former Iraqi government. See UN Resolution 1483 (2003) of 22 May 2003, UN Doc. Res. S/RES/1438, para. 23, and UN Resolution 1518 (2003) of 24 November 2003, UN Doc. S/RES/1518. To the contrary, Switzerland’s implementing sanction measures against Nada had been taken under the UN sanction regime established by UN Security Council Resolution 1267 (1999), as subsequently amended.

<sup>284</sup> Pursuant to this principle, as spelled out by the European Court of Human Rights, States’ actions undertaken to comply with international legal obligations stemming from their participation to an international organization are presumed to be consistent with their obligations under the European Convention on Human Rights if the international organization protects fundamental human rights in a way which is at least equivalent to the one provided for by the European Convention. For a detailed analysis of the two principles and their application in the cases at stake see again S. HOLLENBERG, *The Diverging Approaches of the European Court of Human Rights in the cases of Nada and Al-Dulimi*, *supra* note 282, p. 448.

<sup>285</sup> European Court of Human Rights [GC], *Nada v. Switzerland*, *supra* note 280, para. 197.

<sup>286</sup> *Ibid.*, para. 195.

<sup>287</sup> *Ibid.*, para. 214.

In the *Al-Dulimi* case, instead, the Court held that, due to the absence of any effective and independent review mechanism at the UN level, compliance with the European Convention on Human Rights (and, in particular, with the right to access to court) required that the listed individuals should be authorised at the domestic level to request the review of any implementing sanction measure. Since Switzerland had not ensured any review mechanism, the Court concluded that the rights of the applicant had been violated.<sup>288</sup>

Whilst the European Court of Human Rights' stance has not been exempt from criticism (the examination of which would go much beyond the scope of the present analysis) the two aforementioned judgments, like the ones rendered by the Court of Justice of the European Union, well illustrate some of the complex issues that the use of *secret* evidence, and its tension with due process rights, may increasingly raise at different normative levels. As it has been correctly observed, the tension between national security concerns and the protection of human rights might be exacerbated when a number of different actors comes into play, such as in the case of counter-terrorism measures.<sup>289</sup> *Multiple* actors might, in fact, inevitably increase the likelihood of *multiple* clashes: not only between distinct institutional branches within a certain legal order, but also between different legal systems.<sup>290</sup>

Notwithstanding the attempts undertaken by the Security Council to ameliorate the system, including the establishment of an Ombudsman entrusted with the task of assisting the targeted individuals seeking de-listing,<sup>291</sup> several doubts still exist as to its compatibility with due process rights. Indeed, the Ombudsman can take decisions over de-listing but they become final only if, within sixty days, the Sanction Committee does not decide by consensus to retain the targeted individual on the list. Furthermore,

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<sup>288</sup> See European Court of Human Rights, *Al-Dulimi and Montana Management Inc. v. Switzerland*, *supra* Introduction, note 38, paras. 134-135.

<sup>289</sup> See M. FEINBERG, *International Counter-terrorism, National Security and Human Rights: Conflict of Norms or Check and Balance?*, in *The International Journal of Human Rights*, vol. 19, 2015, p. 391.

<sup>290</sup> *Ibid.*

in lack of consensus, member States can require the Security Council to decide over the issue. Such a step, however, inevitably entails the application of veto rules.

On top of that, the access of the Ombudsman to confidential information depends entirely on the good will of States. In fact, as noted by the European Court of Justice in the *Kadi II* case:

“the evidence which may be disclosed to the person concerned continues to be a matter entirely at the discretion of the State which proposed that he be included on the Sanctions Committee’s list and there is no mechanism to ensure that sufficient information be made available to the person concerned in order to allow him to defend himself effectively (...). For those reasons, the creation of (...) the Office of the Ombudsperson cannot be equated with the provision of an effective judicial procedure for review of decisions of the Sanctions Committee”<sup>292</sup>.

#### **4.2.2(b). The European Union**

The issue of “secrecy” has acquired relevance also at the EU level.<sup>293</sup> Since the adoption of Council decision 2001/264/EC on the security rules for protecting EU classified information, in fact, Member States have been placed under an obligation to implement appropriate national measures to ensure the

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<sup>291</sup> Doc. S/RES/1904, *supra* note 266.

<sup>292</sup> Case T-85/09, *Yassin Abdullah Kadi v European Commission*, decision of 20 September 2010, *supra* note 277, para. 128.

<sup>293</sup> For an overview of secrecy in the EU see, *inter alia*, G. STÄRKLE, *La protection et le traitement des informations classifiées dans le cadre de la politique de sécurité et la défense commune (PSDC) au sein des institutions et agences de l’Union Européenne*, in *Cahiers de droit européen*, vol. 47, 2011, pp. 155-229; D. CURTIN, *Judging EU Secrecy*, in *Cahiers de droit européen*, vol. 48, 2012, pp. 459-490; D. CURTIN, *Overseeing Secrets in the EU: A Democratic Perspective*, in *Journal of Common Market Studies*, vol. 52, 2014, pp. 684-700; D. GALLOWAY, *Classifying Secrets in the EU*, in *Journal of Common Market Studies*, vol. 52, 2014, pp. 668-683.

respect of the rules on the handling of EU classified information within their governments.<sup>294</sup> This obligation has been reiterated by the new set of security rules that the Council has adopted on 31 March 2011<sup>295</sup> and has been subsequently consecrated by the conclusion of a binding agreement between EU Member States.<sup>296</sup> This agreement binds in fact Member States to protect EU classified information provided to them by EU institutions, bodies or agencies; enables them to exchange classified information in the interests of the EU even when no bilateral security agreement is in place; protects classified information provided by a Member State to any EU entity which is subsequently distributed to other Member States, as well as information provided to the EU by a third state or international organization which is subsequently distributed to EU Member States.<sup>297</sup>

The 2011 decision lies down minimum standards and principles for the protection of EU classified information, that is “any information or material designated by an EU security classification, the unauthorized disclosure of which could cause varying degrees of prejudice to the interests of the European Union or to one or more of the Member States”.<sup>298</sup> Pursuant to Article 2(2) of the decision, the EU security classification system encompasses four different levels of classification: ‘EU Top Secret’, ‘EU Secret’, ‘EU Confidential’ and ‘EU Restricted’. Each classification level corresponds to the different negative impact that disclosure might cause to the essential interests of the EU or its Member States (respectively: ‘exceptionally grave prejudice’,

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<sup>294</sup> Council Decision 2001/264/EC of 19 March 2001 adopting Council’s Security Regulations, in OJEU L 101 of 11 April 2001, Article 2. The Decision was adopted in order to bring EU existing classification rules into line with NATO standards. See R. WESSEL, *Good Governance and EU Foreign, Security and Defence Policy*, in D.M. CURTIN, R.A. WESSEL (eds), *Good Governance and the European Union: Reflections on Concepts, Institutions and Substance*, Antwerp, Oxford, New York, 2005, p. 232.

<sup>295</sup> Council Decision 2011/292/EU of 31 March 2011 on the security rules for protecting EU classified information, in OJEU L 141/17 of 27 May 2011, Whereas, at 3.

<sup>296</sup> Agreement between the Member States of the European Union, meeting within the Council, regarding the protection of classified information exchanged in the interest of the European Union (Brussels, 4 May 2011), 2011/C 202/05, in OJEU C202/13 of 8 July 2011.

<sup>297</sup> *Ibid.*, Article 1.

<sup>298</sup> *Ibid.*, Article 2(1).

‘serious harm’, ‘harm’, or mere ‘disadvantage’).<sup>299</sup> Interestingly, this legal instrument gives protection not only to documents classified as secret in one of the EU Member States, but also to documents which have been classified as secret by EU institutions. Furthermore, the decision aims at preventing disclosure of that information whose disclosure would hinder not only EU Member States’ national security but also “the essential interests of the EU”. As such, the decision has transposed the very notion of “State secrecy” at the EU level, *de facto* envisaging a sort of ‘EU secrecy’.

Unlike their predecessors, the new rules establish a classification system whose scope of application extends beyond the Common Security and Defense Policy. In this regard, it has been noted that these security provisions well illustrate the “expanded scope of supranational executive activity in the EU context”.<sup>300</sup>

Council security rules shall be read in conjunction with Regulation 1049/2001/EC, concerning public access to institutional documents, and, in particular, with its Articles 4(1) and 9.<sup>301</sup>

Article 4(1) prevents EU institutions from granting access to documents whose disclosure would undermine public security, defence and military matters and international relations. Article 9 provides a quite broad definition of ‘sensitive documents’ as:

“(...) documents originating from the institutions or the agencies established by them, from Member States, third countries or

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<sup>299</sup> *Ibid.*, Article 2(2). Such a classification system much owes to the 1958 Regulation (EURATOM) No. 3 Implementing Article 24 of the Treaty establishing the European Atomic Energy Community, in OJEC of 6 October 1958, pp. 406-416. This Regulation envisaged four levels of classification: ‘Eura-Top Secret’, ‘Eura-Secret’, ‘Eura Confidential’ and ‘Eura-Restricted’. Each level of classification represented the different harm that information could cause, if disclosed, to the “defence interests of one or more members States” (Article 10).

<sup>300</sup> D. CURTIN, *Secrecy Regulation by the European Union Inside Out*, in D. COLE, F. FABBRINI, A. VEDASCHI (eds), *Secrecy, National Security and the Vindication of Constitutional Law*, *supra* Introduction, note 13, p. 310.

International Organizations, classified ‘TOP SECRET’, ‘SECRET’ or ‘CONFIDENTIAL’ in accordance with the rules of the institution concerned, which protect essential interests of the European Union or of one or more of its Member States in the areas covered by Article 4(1)(a), notably public security, defense and military matters”.

Articles 7 and 8 of the Regulation spell out the procedures for requesting the access to sensitive documents, entrusting those having authority over them with the right to deny their disclosure based on reasonable grounds.

In its judgment related to the case *Joses Maria Sison v. Council of the European Union*, the Court of Justice of the European Union (at the time, Court of Justice of the European Communities) has adopted a broad interpretation of these provisions.<sup>302</sup> The Court has indeed found that documents held by public authorities concerning persons or entities suspected of terrorism and falling within the category of sensitive documents as defined by Article 9 of Regulation 1049/2001/EC must not be disclosed to the public in order to not prejudice the effectiveness of the operational fight against terrorism and thereby undermine the protection of public security.<sup>303</sup> In addition, the Court has observed that the Member State’s originating authority is entitled to require secrecy also with respect to the very existence of a sensitive document and to prevent disclosure of its own identity in the event that the existence of the document should become known.<sup>304</sup>

By means of this judgment, the Court has upheld a sort of ‘absolute presumption’ by means of which documents falling within the category of ‘sensitive documents’ *ex* Article 9 of Regulation 1049/2001/EC should be prevented *tout court* from disclosure. Furthermore, the Court of Justice seems

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<sup>301</sup> Regulation 1049/2001/EC, *supra* note 7, Article 9(1). The content of this Regulation and, more generally, the right of access to information in the EU will be better analyzed in the context of the next Chapter.

<sup>302</sup> Court of Justice of the European Union, *Jose Maria Sison v. Council of the European Union*, case No. C-266/05, judgment issued on 1 February 2007.

<sup>303</sup> *Ibid.*, para. 66.

to have declined its authority to exercise any scrutiny over the appropriateness of classification.<sup>305</sup> No alternative means of access has been envisaged by the Court for the person interested in the disclosure of said information.

On top of that, the intricate web of non-disclosure obligations binding EU Member States is made thicker by the various security agreements that the EU has concluded with third States and international organizations.<sup>306</sup> For instance, pursuant to the 2003 Agreement between the European Union and NATO on the Security of Information,<sup>307</sup> each Party has undertaken: to ensure the protection and safeguard of classified information provided or exchanged by the other party, to ensure that said information keeps the security classification given to it by the originating party, and not to disclose it without the consent of the originator.<sup>308</sup>

The exchange of classified information with third States or international organizations is also envisaged by Council decision 2011/292/EU, whose Article 12 expressly provides that: “security of information agreements or administrative arrangements (...) shall contain provisions to ensure that when third States or international organisations receive [EU classified information], such information is given protection appropriate to its classification level and according to minimum standards which are no less stringent than those laid down in this Decision”.

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<sup>304</sup> *Ibid.*, para. 101.

<sup>305</sup> See, e.g., in S. SETTY, *No Place for Secrets: Balancing National Security Interests and the Need for Transparency of the Law*, in *L'Observateur des Nations Unies*, vol. 29, 2010, p. 156. For a broader overview of the recent jurisprudence of the Court of Justice of the European Union with respect to Regulation 1049/2001/EC see, e.g., P. LEINO, *Just a Little Sunshine in the Rain: The 2010 Case Law of the European Court of Justice on Access to Documents*, in *Common Market Law Review*, vol. 48, 2011, pp. 1215-1252.

<sup>306</sup> For a list of all agreements and other administrative arrangements concluded by the EU under which EU classified documents may be exchanged with third countries and international organizations see, *inter alia*, Doc. 13137/15 (CFSO/PESC 668), 15 October 2015.

<sup>307</sup> Agreement between the European Union and the North Atlantic Treaty Organization on the Security of Information of 26 July 2000 (concluded by exchange of letters), in OJEU L 080 of 27 March 2003, pp. 36-38.

<sup>308</sup> *Ibid.*, Article 4.

These sharing agreements are characterized by the application of the already mentioned ‘originator control’ principle,<sup>309</sup> which, as stressed earlier, expands the scope of secrecy to include classified information originating outside the receiving international organization or State. By requiring the originator’s consent in order to declassify or transfer shared information, this principle excludes any scrutiny over classification on the part of States or international organizations other than the originator itself. Furthermore, apart from States’ non-disclosure obligations that may stem from the application of this principle also at the EU level, the originator control rule might in practice limit any intra-institutional oversight mechanisms in areas such as the negotiations of international agreements.<sup>310</sup> This principle is currently embodied in both Article 12 of decision 2011/292/EU and Article 9(3) of Regulation 1049/2001/EC.

It is thus not surprising that, together with derivative classification (*i.e.*, the act of classifying a certain information on the basis of a classification decision previously made by another authorized authority), the originator control principle has been considered as one of the main ‘mechanisms’ fostering a ‘culture of secrecy’ within the EU.<sup>311</sup> In fact, notwithstanding the progressive recognition of a right of access to information in the name of enhanced transparency and open democracy,<sup>312</sup> the EU appears – almost paradoxically – increasingly permeated by official secrecy.<sup>313</sup> Whilst this trend reflects the

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<sup>309</sup> *Ibid.*

<sup>310</sup> See, *e.g.*, D. CURTIN, *Official Secrets and the Negotiation of International Agreements: Is the EU Executive Unbound?*, in *Common Market Law Review*, vol. 50, 2013, pp. 423-458.

<sup>311</sup> D. CURTIN, *Secrecy Regulation by the European Union Inside Out*, *supra* note 300, p. 313.

<sup>312</sup> See also *infra* Chapter 2, at 2.4.

<sup>313</sup> This is made evident, *inter alia*, by the increasing number of cases brought before the Court of Justice of the European Union, challenging the refusal by EU institutions to disclose certain documents. See, for instance, again *Council of the European Union v. Sophie in’t Veld*, *supra* note 231. The case concerned the refusal by the Council to grant the applicant full access to documents containing the opinion of the Council’s Legal Service related to the opening of negotiations with the United States to conclude an international agreement aimed at making available financial messaging data to the US Treasury Department. The Council had grounded its refusal on the ‘protection of international relations’ exception provided for in Article 4(a) of Regulation 1049/2001/EC. The Court upheld the claim, rejecting the appeal filed by the Council against the first instance decision. According to the Court, in fact, the Council had



affirmation of the EU as a new security actor within the international arena, the general lack of effective ‘check and balance’ mechanisms<sup>314</sup> and the complexities it brings into play (adding a supranational layer of classification to the ones already embodying in domestic legal systems), make the issue of ‘EU secrecy’ a particularly critical one. In this respect, while commentators have started making proposals to contrast the ‘executive unilateralism’<sup>315</sup> that has evolved with respect to EU classification, including the establishment of effective parliamentary oversight,<sup>316</sup> similar developments are still far from being a consolidated reality.

In addition to the above, it is noteworthy that a ‘blacklisting’ mechanism similar to the one created by the UN Security Council exists also at the EU level. Regulation 2580/2001/EC (as subsequently amended) establishes a specific system of designation of suspected individuals and legal entities based on indications coming from Member States’ competent authorities.<sup>317</sup> Like the broader UN ‘blacklisting’ system, also the EU freezing-funds designation mechanism is permeated by the use of ‘secret evidence’.<sup>318</sup>

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been unable to provide evidence to ascertain how the disclosure of the legal opinion could negatively affect ongoing international negotiation

<sup>314</sup> In this regard, and especially as far as the potential tension between secrecy and the protection of human rights is concerned, it might be interesting to see whether and to what extent some consequences could follow in case of accession of the EU to the European Convention on Human Rights. The accession process is currently on halt after the Court of Justice of the European Union ruled that the Draft Accession Agreement of the European Union to the European Convention on Human Rights violates EU law. See Opinion No. 2/13 of 18 December 2014.

<sup>315</sup> See D. CURTIN, *Overseeing Secrets in the EU: A Democratic Perspective*, *supra* note 293, p. 694 ff.

<sup>316</sup> *Ibid.*, p. 695 ff.

<sup>317</sup> Council Regulation 2580/2001/EC of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, in OJ L 344 of 28 December 2001, pp. 70-75. The Regulation has been subsequently amended, *inter alia*, through Regulation 745/2003/EC of 30 April 2003; Regulation 1207/2005/EC of 29 July 2005; Regulation 1957/2006/EC of 4 October 2006 and Regulation 1791/2006/EC of 1 January 2007.

<sup>318</sup> See, *inter alia*, C. ECKES, *Decision Making in the Dark? Autonomous EU Sanctions and National Classification*, in I. CAMERON (ed.), *EU Sanctions: Law and Policy Issues Concerning Restrictive Measures*, Cambridge, 2013, pp. 177-198.

The lawfulness of this designation process has been brought to the attention of the Court of Justice of the European Union. In the *OMPI* case,<sup>319</sup> for instance, the Court of First Instance found that the use of secret evidence in the EU blacklisting process breached the applicant's right to a fair trial and, in particular, the right to be informed of the evidence adduced against it and the right to make known its views on that evidence.<sup>320</sup>

It is noteworthy, however, that, as for the Court's decisions with respect to the UN blacklisting system,<sup>321</sup> little attention has been paid to the possible *treatment* of 'secret evidence' at the basis of designation.<sup>322</sup> While the Court has indeed set high standards of scrutiny by requiring the fullest possible disclosure of evidence, it has *de facto* refrained from explaining how these requirements should be met in practice.

As judicial reviewing mechanisms over listing necessarily entail the examination of the evidence based on which targeted sanctions are adopted, the problem indeed arises as to how 'secret' information should be handled in the context of proceedings, either at the domestic or supranational level.

As previously observed, domestic legal systems generally envisage specific rules related to the use of 'secret' information in court. However, one could

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<sup>319</sup> Court of First Instance, case T-226/02, *Organisation des Modjahedines du Peuple d'Iran v. Council*, decision of 4 December 2008.

<sup>320</sup> *Ibid.*, paras. 76-78.

<sup>321</sup> See case C-402/05, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, *supra* Introduction, note 37, para 344. The Grand Chamber generally recognized that: "It is (...) the task of the Community judicature to apply, in the course of the judicial review it carries out, techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account in the adoption of the act concerned and, on the other, the need to accord the individual a sufficient measure of procedural justice".

<sup>322</sup> Case T-226/02, *Organisation des Modjahedines du peuple d'Iran v. Council*, *supra* note 319, para. 158: "The question whether the applicant and/or its lawyers may be provided with the evidence and information alleged to be confidential, or whether they may be provided only to the Court, in accordance with a procedure which remains to be defined so as to safeguard the public interests at issue whilst affording the party concerned a sufficient degree of judicial protection, is a separate issue on which it is not necessary for the Court to rule in the present action". On this aspect see, *inter alia*, C.C. MURPHY, *Secret Evidence in EU Security Law: Special Advocates before the Court of Justice*, in D. COLE, F. FABBRINI, A. VEDASCHI (eds), *Secrecy, National Security and the Vindication of Constitutional Law*, *supra* Introduction, note 13, p. 269.

legitimately wonder to what extent these rules might find a real application, at least in all cases where the State before whose courts the sanction is challenged is not the one providing the ‘evidence’. In fact, designating authorities generally belong to a State different from the one before whose courts the review claim is brought with the consequence that the former might be reluctant to share sensitive information with the latter. As it has been recently observed, this ‘procedural deficit’ (*i.e.*, the impossibility to access the relevant information) might easily undermine the very existence and practical implementation of domestic mechanisms aimed at balancing procedural fairness and the protection of ‘State secrets’.<sup>323</sup> Furthermore, even admitting that the State whose courts are seized of the matter is the same detaining the ‘secret evidence’, as previously underlined, domestic secrecy rules often raise human rights concerns (including the possible clash with fair trial rights) in their practical application.

The deference that domestic courts may show *vis-à-vis* the secrecy claims of the executive branch also with reference to the listing of suspected terrorists is well illustrated by a number of judicial cases sharing common features with proceedings reviewing assets freezing measures based on the UN (or EU) sanction regimes. For instance, in the case *Holy Land Foundation for Relief and Development v. Ashcroft et al.*, the Plaintiff had challenged before the United States Court of Appeals for the District of Columbia Circuit its designation as terrorist organization and the consequent freezing of its assets operated by the US Office of Foreign Assets Control (OFAC).<sup>324</sup> The Court upheld the listing, contextually rejecting the Plaintiff’s claim that its due process rights had been violated by the ‘secretive’ nature of the evidence

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<sup>323</sup> See again S. HOLLENBERG, *The Security Council’s 1267/1999 Targeted Sanctions Regime and the Use of Confidential Information: A Proposal for Decentralization of Review*, *supra* Introduction, note 36, p. 62.

<sup>324</sup> Such power has been given to the OFAC (a special office within the Department of the Treasury) by President George W. Bush. See Executive Order No. 13224 blocking property and prohibiting transactions with persons who commit, threaten to commit, or support terrorism, of 23 September 2001.

supporting its designation.<sup>325</sup> In reaching these conclusions, the Court stressed the “primacy of the executive in controlling and exercising responsibility over access to classified information, and the executive's ‘compelling interest’ in withholding national security information”.<sup>326</sup> The same Court reiterated its findings in its decision related to the case *Islamic American Relief Agency v. Gonzales et al.*, which similarly concerned a challenge brought against freezing measures adopted by the OFAC. The Court held that, even if “unclassified evidence [wa]s not overwhelming, its review (...) [wa]s extremely deferential”.<sup>327</sup>

The same Court of Appeals has attempted to explain the reason behind this deferential approach in another case related to assets freezing sanctions against suspected terrorists. In the case *People’s Mojahedin Organization of Iran v. Department of State and Colin L. Power*, the Court has indeed recalled legal precedents to conclude that courts are generally ill-suited to determine the sensitivity of classified information and, therefore, due process guarantees only impose “the process due under the circumstances of the case”.<sup>328</sup>

While all these examples refer to US courts’ rulings, given the existence in this country of a listing mechanism similar to the ones established at the UN and EU level, the analysis undertaken in the previous sections in relation to secrecy rules in domestic legal systems allow to conclude that a similar approach might be followed also by domestic courts in other countries.

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<sup>325</sup> Court of Appeals, District of Columbia Circuit, *Holy Land Foundations for Relief and Development v. Ashcroft*, decision of 20 June 2003, 333 F.3d 156, para. 164.

<sup>326</sup> *Ibid.*

<sup>327</sup> Court of Appeals, District of Columbia Circuit, *Islamic American Relief Agency v. Gonzales et al.*, decision of 13 February 2007, 477 F. 3d 728, para. 734.

<sup>328</sup> Court of Appeals, District of Columbia Circuit, *People’s Mojahedin Organization of Iran v. Department of State and Colin L. Power*, decision of 9 May 2003, 327 F. 3d 1238, para. 1242. In contrast to the general deferential trend, however, the District Court of the Northern District of Ohio has recently found that OFAC, by not disclosing the evidence based on which it had adopted assets freezing measures, had breached the plaintiff’s right “to be told on what basis and for what reasons the government deprived it of all access to all its assets and shut down its operations”. See *Kindhearts v. Geithner et al.*, decision of 18 August 2009, 647 F. Supp. 2d 857, para. 906.

At the EU level, the scenario appears even more complex as procedural rules related to handling of secret evidence in proceedings were long absent. This problem was clearly underlined by the French government in the appeal it brought against the decision of the Court of First Instance in the *OMPI* case.<sup>329</sup> As recalled by Advocate General Sharpston in her Opinion:

“The issue raised by this part of the French Republic’s ground of appeal is one of crucial interest. To what extent should it be possible for a party to proceedings before the General Court to insist on information provided to that Court being treated as confidential, with the result that it is not made available to the other party or parties to the proceedings? And, if the information is so treated, may (or should) it nevertheless be taken into consideration by the General Court for the purposes of its judgment?”<sup>330</sup>

In this respect, the General Advocate even recommended that “serious consideration” should be given to the possible amendment of the Court’s Rules of Procedures in order to establish appropriate mechanisms enabling the use of secret documents in court “in a way that it is compatible with [their] character, without doing unacceptable violence to the rights of the other party or parties to the action”.<sup>331</sup> However, neither the Advocate General nor the Court have foreseen any specific mechanism able to ensure the aforementioned balance.

While some commentators have envisaged the possible transposition at the EU level of a special advocate system,<sup>332</sup> the analysis carried out in the

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<sup>329</sup> Grand Chamber, case C-27/09, P *French Republic v. People’s Mojahedin Organization of Iran*, decision of 21 December 2012.

<sup>330</sup> C-27/09 P *French Republic v. People’s Mojahedin Organization of Iran*, Opinion of Advocate General Sharpston, 14 July 2011.

<sup>331</sup> *Ibid.*, para. 186.

<sup>332</sup> See, for instance, the discussion in C.C. MURPHY, *Secret Evidence in EU Security Law: Special Advocates before the Court of Justice*, *supra* note 322, p. 275 ff. (who, however, rejects the feasibility of such transposition).

previous sections has demonstrated that this mechanism is not immune from criticism as to its capability to address due process issues. Furthermore, it has been pointed out that the use of a special advocate system within the EU might amplify the shortcomings that the same has already shown at the domestic level.<sup>333</sup>

The increasing amount of cases involving security issues – and thus sensitive information – has inevitably added pressure to fill in the current *lacuna*. Eventually, as a direct consequence of the smart sanctions litigation and the problems emerged with it, the 2015 amended Rules of Procedure of the General Court of the European Union have provided for a new mechanism concerning the handling of confidential information.<sup>334</sup> According to Article 105 of the new Rules, a party may apply to the General Court for confidential treatment of information whose disclosure would harm the security of the European Union or of one or more of its Member States, explaining the overriding reasons requiring such a treatment. The General Court should assess both the relevance and the need for confidentiality and, in case it found that both conditions are met, it should “weigh the requirements linked to the right to effective judicial protection, particularly the observance of the adversarial principle, against the requirements flowing from the security of the Union or one or more of its Member States or the conduct of their international relations”.<sup>335</sup> Based on the above balancing exercise, the Court should order the adoption of specific procedures capable of accommodating both the aforementioned needs. In this regard, Article 105 even envisages two possible procedural mechanisms: the production of either a summary of the confidential material or of a non-confidential version of the same material.

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<sup>333</sup> *Ibid.*, p. 278.

<sup>334</sup> Rules of Procedure of the General Court, in OJEU L 105 of 23 April 2015. See For an early comment see Editorial, *Confidentiality in Luxemburg: “Something in Motion, Weary but Persisting”*, in *European Law Review*, vol. 40, 2015, pp. 309-310. It is noteworthy that the process of revision of the Court’s rules of procedure has been itself surrounded by secrecy. On this specific point see N. DE BOER, *Secret Evidence and Due Process Rights Under EU Law: ZZ*, in *Common Market Law Review*, vol. 51, 2014, p. 1256.

<sup>335</sup> Rule 105(5).

The said provision is not yet into force, being subjected to the adoption of a decision by the General Court enlisting the security rules applicable to the production of those information deemed to be confidential.<sup>336</sup> As it has been observed, however, this new procedure endows the Court with a wide margin of discretion, which may potentially lead to violations of “fundamental human rights in ways that are not ordinarily accepted in either national or transnational legal orders”.<sup>337</sup>

#### 4.2.3. Some conclusive remarks

Going back to more general considerations, the lack of access to confidential material at the basis of suspect terrorism designation has been regarded, in its multiple facets (with respect to both targeted individuals and courts), as constituting the *core* of the due process issues raised by the sanction regimes: a problem that could only be solved by abandoning the current “*top-down structure*” on which designation procedures rely<sup>338</sup> or by creating a universal common standard of review tailored to those already in place in international criminal tribunals.<sup>339</sup>

The underlined problems with respect to the use of secret evidence in the context of review proceedings on the adoption of targeted sanctions may well foster the tension between different normative levels. Indeed, in the impossibility to acquire ‘secret’ evidence justifying designation, it is likely that EU and domestic courts will strike down the sanctions. However, at least with respect to the UN sanction regime, the annulment of freezing measures implementing the UN list would inevitably bring the EU and its Member

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<sup>336</sup> Rule 105(11).

<sup>337</sup> See again Editorial, *Confidentiality in Luxemburg: “Something in Motion, Weary but Persisting”*, *supra* note 334, p. 310.

<sup>338</sup> See again S. HOLLENBERG, *The Security Council’s 1267/1999 Targeted Sanctions Regime and the Use of Confidential Information: A Proposal for Decentralization of Review*, *supra* Introduction, note 36, p. 51.

<sup>339</sup> V. BAEHR-JONES, *Mission Possible: How Intelligence Evidence Rules Can Save UN Terrorist Sanctions*, *supra* note 265, p. 451.

States in breach of their obligation to abide by UN Security Council's decisions.<sup>340</sup>

More generally, the above developments show that, in an increasingly interconnected world and in front of global threats, States might be required to comply with a web of international commitments restricting the use and distribution of sensitive information, including information that have been classified in other countries or by international organizations *per se*. In this last respect, it is noteworthy that said commitments do not only strengthen the secrecy meant to protect the national security of States members to an international organization, but also envisage an emerging trend towards relying on secrecy as a means to safeguarding the security of the organization itself.

It is evident that this use of secrecy at multiple normative levels poses new complex legal hurdles related to their interaction. These elements should be born in mind when testing the States (or international organizations) reliance on secrecy and confidentiality against human rights norms. In fact, they may raise challenging issues in terms of States' 'conflicting' international commitments (such as, for example, between States' duty to protect classified information, on the one hand, and States' human rights obligations, on the other).

## **5. State secrecy and the protection of human rights: Some selected examples**

### **5.1. The role of State secrecy in the context of the war on terror**

Recent events have increasingly brought under the spotlight how the use (or abuse) of State secrets – acting either as classification of sensitive information

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<sup>340</sup> See F. FABBRINI, *Global Sanctions, State Secrets and Supranational Review: Seeking Due Process in an Interconnected World*, in D. COLE, F. FABBRINI, A. VEDASCHI (eds), *Secrecy, National Security and the Vindication of Constitutional Law*, *supra* Introduction, note 13, p. 292.



or evidentiary rule in proceedings – may collide with the protection of human rights. As highlighted by the US Judge Ben Wizner, indeed, “State secret claims often occur at a nub of the tension between protecting national security and preserving individual rights, particularly where serious government misconduct is alleged”.<sup>341</sup>

A more detailed account of some selected practical cases may help to better contextualize the legal analysis undertaken in the present work.

As stressed earlier, the most illustrative example of the possible clash between State secrets and human rights is probably represented by the role that secrecy has played in the so-called ‘war on terror’ waged after the attacks to the World Trade Center in New York on 11 September 2001.<sup>342</sup>

In the immediate aftermath of the 9/11, several States have begun resorting to secret evidence to issue control orders or detention measures against suspected terrorists. State secrecy has also been increasingly used to retain information concerning counter-terrorism measures, such as, for instance, targeted killings<sup>343</sup> and – probably the most ‘abused’ aspect – as a ground to dismiss legal suits concerning extraordinary renditions claims.<sup>344</sup>

Such a massive recourse to secrecy has led commentators to interpret post-9/11 State secrets as posing a “*dilemma of overclassification*”,<sup>345</sup> as well as “*a different type of legal and political problem*”, more challenging and complex

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<sup>341</sup> ‘State Secrets Privilege and Access to Justice: Which is the Proper Balance? The Philip D. Reed Lecture Series: Panel Discussion’, reported in *Fordham Law Review*, vol. 80, 2011, p. 15.

<sup>342</sup> For a broad overview on the topic see H. DUFFY, *The ‘War on Terror’ and the Framework of International Law*, 2<sup>nd</sup> ed., Cambridge, 2015.

<sup>343</sup> See, e.g., P. ALSTON, *The CIA and Targeted Killings Beyond Borders*, in *Harvard National Security Journal*, vol. 2, 2011, p. 402 ff. According to Alston, any attempts to file a case in court in relation to the CIA’s targeted killings program would be precluded by the State secrecy privilege (*ibid.*, p. 398). See also A. KRISHNAN, *Targeting Individuals: Overcoming the Dilemma of Secrecy*, in *Contemporary Security Policy*, vol. 34, 2013, p. 286 ff.

<sup>344</sup> For an overview in this respect (although limited to the European context) see, *inter alia*, D. BIGO, S. CARRERA, E. GUILD, R. RADESCU, *A Quest for Accountability? EU and Member States Inquiries into the CIA Renditions and Secret Detention Programme*, Study for the Civil Liberties, Justice and Home Affairs Committee, European Parliament, Brussels, September 2015.

<sup>345</sup> This expression is used by S. HORTON, *Lords of Secrecy*, *supra* Introduction, note 39, p. 193.

than in the past.<sup>346</sup>

### 5.1.1. Restrictive measures against suspected terrorists and secret evidence

In the framework of the fight against terrorism, restrictive measures have been often taken against suspected terrorists on the basis of secret evidence. In several countries, for instance, preventive detention and deportation measures have been warranted against individuals suspected of being involved in terrorist activities solely or partially based on information never disclosed to them.<sup>347</sup> Such closed proceedings have indeed become a common feature in cases involving national security.

As a matter of example one could recall the 2001 *UK Anti-Terrorism Crime and Security Act*, envisaging indeterminate detention for non-deportable suspected terrorists, and entrusting the Special Administrative Appeal Court with judicial reviewing authority in proceedings accommodating secret evidence.<sup>348</sup>

After the House of Lords, in the case *A. and others v. Secretary of State for the Home Department*, found the practice of indeterminate detention incompatible with the European Convention on Human Rights,<sup>349</sup> the same was substituted by the so-called ‘control orders’ entailing house detention and

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<sup>346</sup> See K. ROACH, *Managing Secrecy and its Migration in a Post-9/11 World*, *supra* note 265, p. 115.

<sup>347</sup> On preventive detention as a counter-terrorism tool see, *inter alia*, K. ANDERSON, *US Counterterrorism Policy and Superpower Compliance with International Human Rights Norms*, in *Fordham International Law Journal*, vol. 30, 2007, pp. 474-481 and D. MCGOLDRICK, *Security Detention – United Kingdom Practice*, in *Case Western Journal of International Law*, vol. 40, 2009, p. 509. For general considerations over the use of intelligence information as evidence in court see also, *e.g.*, A. SAMBEI, *Intelligence Cooperation versus Evidence Collection and Dissemination*, in L. VAN DEN HERIK, N. SCHRJIVER (eds), *Counter-Terrorism Strategies in a Fragmented International Legal Order*, Cambridge, 2013, pp. 212-239.

<sup>348</sup> The Act was adopted by the UK Parliament on 19 November 2001 and came into force on 14 December 2001.

<sup>349</sup> House of Lords, *A. and others v. Secretary of State for the Home Department*, 2005, para. 239.

other restrictions to freedom. These orders, however, could be likewise adopted on the ground of evidence never disclosed to the defendant, but only to special advocates.

While previous UK courts' decisions had generally paid scarce attention to the controlee's rights to know the reasons for the issuance of the control order against him,<sup>350</sup> the extent to which secret evidence may be relied upon has been somehow 'restricted' by the 2009 judgment of the House of Lords in the case *Secretary of State for the Home Department v. A.F.* The House of Lords found, in fact, that the defendant against whom a control order is issued has the right to receive sufficient information about the allegations against him in order to give instructions to his special advocates.<sup>351</sup>

It is worth stressing, however, that the Court of Justice of the European Union recently 'supported' – or, at least, did not condemn – secret evidence procedures. The Court indeed upheld the necessity to keep secret certain evidence in proceedings against suspected terrorists, although leaving to Member States' courts the task of striking a fair balance between national security and the interest in disclosure.<sup>352</sup>

A mechanism similar to the one envisaged in the 2001 *UK Anti-Terrorism Crime and Security Act* is that embodied in the *Incarceration of Unlawful Combatants Law*, enacted in Israel in 2002. The Act applies to the detention of foreigners suspected of terrorism-related activities. Pursuant to section 5(e) of the Law, a court may admit evidence even in the absence of the prisoner or his

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<sup>350</sup> See, for instance, House of Lords, *Secretary of State for the Home Department v. MB*, 2007.

<sup>351</sup> House of Lords, *Secretary of State for the Home Department v. A.F. and others*, 2009, UKHL 28, para. 65. For a comment on this case see, *inter alia*, A. KAVANAGH, *Special Advocates, Control Orders and the Right to a Fair Trial*, in *The Modern Law Review*, vol. 73, 2010, pp. 824-857.

<sup>352</sup> Court of Justice of the European Union (Gran Chamber), *ZZ v. Secretary of State for the Home Department*, case No. C-300/11, judgment of 4 June 2013, paras. 67-68. The case concerned a dual citizenship holder (Algerian and French citizen), who was denied access in the UK based on suspects about his involvement in terroristic activities. For a comment on this case see, *inter alia*, S. MONTALDO, *Il bilanciamento tra esigenze di pubblica sicurezza e diritti processuali dell'individuo: convergenze e divergenze tra Lussemburgo e Strasburgo*, in *Diritti*

legal representative, or decide not to disclose evidence to him, if its release would harm the State's security.

Whilst Israeli Supreme Court has often interpreted this provision as requiring a careful scrutiny by the judiciary,<sup>353</sup> it has been noted that, in the first-decade of the twenty-first century, of the three hundred twenty two preventive detention cases reviewed by the Supreme Court itself, ninety-five per cent was grounded on secret evidence and not even one led to the release of the detainee.<sup>354</sup>

In Canada, after 9/11 suspected terrorists have increasingly been targeted with security certificates providing for administrative detention under domestic immigration law.<sup>355</sup> Although the issuance of security certificates by the ministers of immigration and public safety are subject to the judicial review of the Federal Court, this court is allowed to examine secret evidence submitted by the government without ever disclosing it to the accused. In this regard, as it has been noted, it appears that the growing reliance on security certificates after 9/11 could be easily explained with that "need for secrecy"<sup>356</sup> which, as previously said, has more generally characterized the 'war on terror'. However, in 2007 the Canadian Supreme Court has found that the lack of any adversarial challenge to secret evidence on the part of the accused

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*umani e diritto internazionale*, 2013, pp. 813-819; and N. DE BOER, *Secret Evidence and Due Process Rights Under EU Law: ZZ*, *supra* note 334, pp. 1235-1262.

<sup>353</sup> See, for instance, Israel Supreme Court, *Barham v. Justice Colonel Shief*, case No. 4400/98 (1998), at 337; Israel Supreme Court, *A. v. State of Israel*, case No. 6659/06 (2008), at 43.

<sup>354</sup> See S. KREBS, *National Security, Secret Evidence and Preventive Detentions: The Israeli Supreme Court as a Case Study*, in D. COLE, F. FABBRINI, A. VEDASCHI (eds), *Secrecy, National Security and the Vindication of Constitutional Law*, *supra* Introduction, note 13, p. 141. On the use of secret evidence in proceedings against suspected terrorists in Israel see also D. BARAK EREZ, M.C. WAXMAN, *Secret Evidence and the Due Process of Terrorist Detentions*, in *Columbia Journal of Transnational Law*, vol. 48, 2009, p. 20 ff.

<sup>355</sup> For a more general overview of the problems related to the use of secret and confidential information and its impact in terms of restriction to the right to access a court in Canada see, e.g., J. KALAJDZIC, *Access to Justice for the Wrongfully Accused in National Security Investigations*, in *Windsor Yearbook of Access to Justice*, vol. 27, 2009, pp. 171-208.

<sup>356</sup> See K. ROACH, *The Law Working Itself Pure? The Canadian Experience with Exceptional Courts and Guantánamo*, in F. NI AOLÁIN, O. GROSS (eds), *Guantánamo and Beyond. Exceptional Courts and Military Commissions in Comparative Perspective*, Cambridge, New York, 2013, p. 201.

violated the right to a fair trial enshrined in the Canadian Charter of Rights and Freedoms and, as a result, was unconstitutional.<sup>357</sup>

In the aftermath of 9/11, also in Australia secret evidence has been widely used in proceedings against suspected terrorists.<sup>358</sup> For instance, secret evidence has been highly resorted to in the criminal case against Faheem Khalid Lodhi, a suspect terrorist accused of preparing a terroristic attack.<sup>359</sup> Against such a restriction to his right to a fair trial, Lodhi challenged the constitutionality of Article 31(8) of the 2004 Australian National Security Information Act, pursuant to which a court should give greatest weight to the risk of prejudice to national security, rather than to the protection of due process guarantees, when deciding in favour or against the disclosure of national security information in the context of a trial. However, the New South Wales Supreme Court and the Court of Criminal Appeal rejected his claim. According to both courts, in fact, while a similar legislative provision undoubtedly affects the balancing task of the judge, it does not alter its inherent discretionary nature.<sup>360</sup>

In addition, Australian courts have sometimes found that, due to their high sensitivity, certain information could not be disclosed even to security-cleared advocates.<sup>361</sup>

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<sup>357</sup> Canadian Supreme Court, *Charakaoui v. Canada* (so-called ‘*Charakaoui I*’), judgement of 23 February 2007. The case concerned the arrest in 2003 of Adil Charkaoui, a Canadian resident, suspected of connections with Al-Qaida. After the ruling of the Supreme Court, the Canadian Parliament enacted in 2008 the Immigration and Refugee Protection Act, which introduced the use of ‘special advocates’ (Article 85.4).

<sup>358</sup> For more details see the contribution by M. CROWLEY, *A Poisoned Apple? The Use of Secret Evidence and Secret Hearings to Combat Terrorism in Australia*, presented at the Australian Counter Terrorism Conference in 2011.

<sup>359</sup> For an overview on this case see, *inter alia*, K. ROACH, *The Eroding Distinction between Intelligence and Evidence in Terrorism Investigations*, in N. MCGARRITY, A. LYNCH, AND G. WILLIAMS (eds), *Counter-Terrorism and Beyond: The Culture of Law and Justice after 9/11*, Abingdon, 2010, p. 61. See again also LYNCH, T. TULICH, R. WELSH, *Secrecy and Control Orders: The Role of Vulnerability of Constitutional Values in the United Kingdom and Australia*, *supra* note 183, pp. 165-166.

<sup>360</sup> See New South Wales Supreme Court, *Regina v. Lodhi*, decision of 7 February 2006, NSWSC 571, para. 108. See also New South Wales Court of Criminal Appeal, *Lodhi v. Regina*, judgment of 20 December 2007, NSWCCA 360, para. 40 ff.

<sup>361</sup> See New South Wales Supreme Court, *R. v. Khazaal*, judgment of 25 October 2006, NSWSC 1061.

Another well-known example of resort to secret evidence is represented by the experience of the military commissions at Guantanamo,<sup>362</sup> where part of the information used for convicting the suspected terrorists has been relied on in the context of trials without the accused being present. Military commissions' prosecutors could indeed withhold evidence on the ground of national security concerns raised in the context of secret hearings, without these assertions being subjected to any judicial review.

In this respect, it is noteworthy that, in its recent 2015 report "Towards the Closure of Guantanamo", the Inter-American Commission on Human Rights even recalled (and thus implicitly upheld) the statement made by a lawyer before the Commission itself, according to which: "A State crime cannot be a State secret"<sup>363</sup> (likely referring to the practical output of the resort of secrecy to preclude evidence in court – *i.e.*, the obstacle to judicial scrutiny over alleged unlawful detentions).

The procedure followed before military commissions in Guantanamo has been brought to the attention of the US Supreme Court in the *Hamdan v. Rumsfeld* case. The Supreme Court concluded that this practice breached Article 3 of the 1949 Geneva Conventions and the Uniform Code of Military Justice.<sup>364</sup> In light of this ruling, the *Military Commission Act* of 2009,<sup>365</sup> although prohibiting the disclosure of State secrets, formally provides the defendant's right to access any information introduced as evidence in the proceedings before military commissions.

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<sup>362</sup>As to the use of secret evidence by military commissions in Guantanamo see, *e.g.*, A. P. JASON, *Wartime Detention Based on Secret Evidence: A Question of Executive Authority and Constitutional Liberty*, in *Vienna Online Journal of International Constitutional Law*, vol. 4, 2010, pp. 326-358. See, in general, also G. SEVRIN, *Les Etats-Unis d'Amérique et l'impunité: Guantánamo, un modèle d'illégalité*, in N. ANDERSSON, D. IAGOLNITZER, V. RIVASSEAU (eds), *Justice internationale et impunité, le cas des États-Unis*, Paris, 2007. See also S. TURNER, S.J. SCHULHOFER, *The Secrecy Problem in Terrorist Trials*, New York, 2005 and G. ROBERTSON, *Fair Trials for Terrorists?*, in R. ASHBY WILSON (ed.), *Human Rights in the 'War on Terror'*, New York, 2005, pp. 169-183.

<sup>363</sup>Inter-American Commission on Human Rights, *Towards the Closure of Guantanamo*, OAS/Ser.L/V/II Doc. 20/15 of 3 June 2015, para. 216.

<sup>364</sup>United States Supreme Court, *Hamdan v. Rumsfeld, Secretary of Defence, et al.*, judgment of 29 June 2006, 548 US 557, at 567.

Human rights NGOs have recently denounced an increasing resort to secret evidence in proceedings related to alleged terrorist offences also in other countries, such as, for instance, Saudi Arabia<sup>366</sup> and Yemen.<sup>367</sup>

Generally-speaking, it is evident that this widespread use of secret evidence in proceedings involving suspected terrorists, especially if concerning preventive restrictive measures, poses potential shortcomings in terms of human rights protection. As well described by the Canadian Supreme Court indeed:

“(…) The judge sees only what the Ministers put before him or her. The judge, knowing nothing else about the case, is not in a position to identify errors, find omissions or assess the credibility and truthfulness of the information in the way the named person would be. Although the judge may ask questions to named person (...) the judge is preventing from asking questions that might disclose the protected information. Likewise, since the named person does not know what has been put against him or her, he or she does not know what the judge needs to hear”.<sup>368</sup>

These issues have not been ‘confined’ to domestic practice. As already underlined, in fact, the use of secret evidence has characterized also the

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<sup>365</sup> Amending the Military Commission Act of 2006.

<sup>366</sup> See, e.g., Amnesty International, *Saudi Arabia: Repression in the Name of Security*, London, 2011, p. 4 (“those who have been charged with security-related offences and brought to trial have faced grossly unfair and in many instance *secret* proceedings”; emphasis added). Saudi Arabia’s authorities promulgated on 31 January 2014 a new Penal Law for Crimes of Terrorism and its Financing, whose Article 12 states that the court may use experts, call and examine witnesses, and receive their testimony without the presence of the accused or of his/her lawyer. The text of the law is available (in Arabic) at: <http://adhrb.org/wp-content/uploads/2015/01/جرائم-من-نظام-الارهاب-وتجوي-له-الارهاب.pdf> (last accessed on 24 February 2016).

<sup>367</sup> See, e.g., Human Rights Watch, *Report on Human Rights in Yemen*, submitted to the Human Rights Committee on occasion of its review of Yemen in March 2012, 1 February 2012, p. 10 (“human rights lawyers ... have repeatedly complained to Human Rights Watch that they are not allowed to see clients’ cases in full...”).

<sup>368</sup> Canadian Supreme Court, *Charakaoui v. Canada*, judgement of 23 February 2007, *supra* note 357, para. 63.

blacklisting of suspected terrorists made by the United Nations Security Council under Resolution 1267 (1999).<sup>369</sup>

As previously explained, indeed, based on the alleged need to protect intelligence sources and national security, suspected terrorists have been blacklisted merely at the States' suggestions, without any solid evidence being required.

In addition, the system, as originally conceived, did not envisage any kind of judicial safeguards or de-listing criteria. As a result, suspected individuals' assets could be frozen even without them knowing the evidence on which the measure was adopted and even if they had never been found guilty in domestic judicial proceedings.<sup>370</sup> In lack of any 'oversight mechanisms', some governments even attempted to introduce political rivals in the list. An example is the case of the Russian government accusing Chechen fighters of connections with Bin Laden.<sup>371</sup>

It is evident that similar consequences may raise doubts as to the compatibility of the listing mechanism with procedural fairness.

As previously stressed, strong criticism has eventually led to a partial reform of the system and to the establishment of an Ombudsman to assist

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<sup>369</sup> UN Doc. S/RES/1267, *supra* note 266.

<sup>370</sup> E. ROSAND, *The Security Council's Efforts to Monitor the Implementation of Al Qaeda Taliban Sanctions*, in *American Journal of International Law*, vol. 98, 2004, p. 748-749.

<sup>371</sup> S. VON SCHORLEMER, *Human Rights: Substantive and Institutional Implications of the War Against Terrorism*, in *European Journal of International Law*, vol. 14, 2003, p. 275. Similar "abuses" of counter-terrorism legal measures have characterized also the implementation of national counter-terrorism legislation by domestic courts. Human rights NGOs have frequently contended that, in several countries, domestic counter-terrorism legislation, and the related lack of fair trial guarantees, has constituted the ground for sentencing to prison human rights defenders or political opponents. See again, *e.g.*, Amnesty International, *Saudi Arabia: Repression in the Name of Security*, *supra* note 366, p. 4. This risk has been well highlighted also by E. POKALOVA, *Legislative Responses to Terrorism: What Drives States to Adopt New Counterterrorism Legislation?*, in *Terrorism and Political Violence*, vol. 27, 2015, p. 492. See also P. T. ZELEZA, *The Causes and Costs of War in Africa. From Liberation Struggles to the 'War on Terror'*, in A. NHEMA, P.T. ZELEZA (eds), *The Roots of the African Conflicts: The Causes and Costs*, Oxford, 2008, p. 14, stressing that "Many African governments have rushed to pass broadly, badly or cynically worded anti-terrorism laws and other draconian procedural measures, and to set up special courts or allow special rules of evidence that violate fair trial rights, which they use to limit civil rights and freedoms and to harass, intimidate and



those suspected terrorists seeking de-listing. However, doubts persist as to the capability of this recently introduced mechanism to guarantee transparency and due process rights. As already mentioned, such doubts have been clearly stressed by the Court of Justice of the European Union in its 2010 judgment in the *Kadi II* case.<sup>372</sup>

However, similar worries have been pointed out also at the domestic level. For instance, in the UK Supreme Court's judgment in the *Ahmed and others v. Her Majesty's Treasury* case, Lord Rodger held that:

“(...) even after the reforms introduced in the last two years, there is little that individuals can do to launch an effective challenge to their listing after it has occurred. The [Sanctions] Committee [of the Security Council of the United Nations] is not obliged to publish more than a narrative summary of reasons for their listing. There is no appeal body outside the Committee to which they can complain. The individuals themselves cannot apply directly to the Committee to have their names removed from the list. Such requests now go to the Ombudsperson. And, if a State applies on their behalf, the name will still not be removed unless all members of the Committee agree. There is an obvious danger that States will use listing as a convenient means of crippling political opponents whose links with, say, Al-Qaida may be tenuous at best”.<sup>373</sup>

Finally, it has to be stressed that the use of secret evidence in court can clash with the right to a fair trial also in civil proceedings filed to seek compensation for damages.

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imprison and crackdown on political opponents. This is helping to strengthen or restore a culture of impunity among the security services in many countries”.

<sup>372</sup> See *Yassin Abdullah Kadi v. European Commission*, decision of 20 September 2010, *supra* note 277.

<sup>373</sup> UK Supreme Court, *Ahmed and others v. Her Majesty's Treasury*, decision of 27 January 2010, *supra* note 272, at 181.

In the already mentioned *Al Rawi and others v. Secretary of State and others* case,<sup>374</sup> for instance, UK State officials countered the compensation claim filed by the applicants in relation to their alleged extraordinary rendition by requesting a ‘closed material procedure’. Governmental bodies, in fact, grounded part of their defense on documents whose disclosure, according to their allegations, would have impaired the public interest. The UK Supreme Court eventually found that, in the absence of *ad hoc* statutory provisions (the judgment was issued before the enactment of the 2013 *Justice and Security Act*), lower courts had no power to order ‘closed material procedures’ as this would determine, in practice, an *abrogation of the right to a fair trial*.<sup>375</sup>

### **5.1.2. Classification of information related to counter-terrorism measures**

In the context of the war on terror, secrecy has been increasingly relied on by States also to prevent the disclosure of information concerning controversial counter-terrorism activities such as targeted killings, extraordinary renditions and unlawful detentions. The cloak of secrecy may indeed aid governments to conceal wrongdoings and prevent scrutiny and accountability.

The attitude to classify as ‘secret’ sensitive information related to governmental counter-terrorism activities is well illustrated by the events at stake in several judicial cases. Although some of them have already been briefly referred to, their ‘emblematic character’ imposes a further assessment in the context of this section.

In the United States, for instance, the *New York Times Company et al. v. US Department of Justice et al.* case<sup>376</sup> arose out of the plaintiffs’ request of disclosure, under the Freedom of Information Act, of information concerning

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<sup>374</sup> Supreme Court, *Al Rawi and others v. The Security Services and others*, judgment of 13 July 2011, *supra* note 194.

<sup>375</sup> *Ibid.*

the practice – largely employed in the war on terror – of killing targeted persons suspected of having ties with terrorism, including US citizens. In particular, the plaintiffs contested the US Department of Defense’s objection to disclose, on the ground of national security concerns, documents addressing the legal status of targeted killings. Similarly, the plaintiffs challenged the US Department of Defense’s refusal to admit the existence of further records concerning the use of drones, based on the assertion that the very existence or non-existence of the requested documents was itself classified. The New York Southern District Court, although eventually upholding the national security exemption invoked by the government, noted that the case at stake implicated serious issues about the limits on the power of the executive under the Constitution and laws of the United States, and “about whether we are indeed a nation of laws, not of men”.<sup>377</sup> According to the Court, in fact, disclosure of the legal reasoning used by the government to justify targeted killings would allow the assessment of a practice that, “like torture before it, remains hotly debated”.<sup>378</sup> Eventually, the Court of Appeals for the Second Circuit overturned the first instance decision by rejecting the government’s secrecy claims and, on 23 June 2014, published a redacted version of the legal opinion.<sup>379</sup>

Another case showing how the reliance on classification may potentially end up barring judicial scrutiny and accountability has directly involved Guantanamo’s detainees.

On 20 July 2014, some media organizations filed a motion before the United States District Court for the District of Columbia to request the unsealing of 28 videotapes related to the force-feeding of Guantanamo’s prisoners. On 23 May 2014, the District Court had indeed ordered the

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<sup>376</sup> New York Southern District Court, *New York Times Company et al. v. US Department of Justice et al.*, judgment of 2 January 2013, *supra* note 71.

<sup>377</sup> *Ibid.*, p. 2.

<sup>378</sup> *Ibid.*

<sup>379</sup> United States Court of Appeals, *New York Times Company et al. v. US Department of Justice et al.*, judgment of 23 June 2014, *supra* note 71, Annex A.

production of the videotapes in a *habeas corpus* case filed by a Guantanamo detainee of Syrian origins, Abu Wa’el Dhiab, despite the US government’s argument that their ‘secret’ character prevented their disclosure and use in court as evidence. However, due to their classification, the videotapes had been kept on seal in the proceedings dockets. On 3 October 2014, the District Court approved the unsealing and public release of the videotapes, even if in a redacted version.<sup>380</sup> On 29 May 2015, the United States Court of Appeals dismissed the appeal of the US government requesting a review of the District Court’s order for lack of jurisdiction.<sup>381</sup>

The arguments the US executive branch has relied on in its pleadings in order to avoid disclosure are worth mentioning as they provide a good example of how national security claims of secrecy are generally (and controversially) framed:

“the videos could reasonably be expected to cause serious damage to national security if disclosed, (...), and, so, are properly classified SECRET (...). In support of this conclusion, (...) several serious harms (...) are likely to occur if the videos are disclosed to the public. First, disclosing the videos poses a risk to military personnel as detainees and other enemies armed with such information can develop countermeasures (...). Second, disclosure of the physical layout of the camp infrastructure would allow an adversary to discover how detainees are housed in response to various acts of misconduct, information that could be provided to detainees to allow them to manipulate the system, disrupt good order and discipline within the camps, and enable them to test, undermine, and threaten physical and personnel security. Third, some detainees would likely respond to

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<sup>380</sup> United States District Court for the Court of Columbia, *Abu Wa’ el (Jihad) Dhiab v. Obama* et al., case No. 05-CV-1457 (GK), judgment of 3 October 2014.

<sup>381</sup> United States Court of Appeals, District of Columbia Circuit, *Abu Wa’ el (Jihad) Dhiab and Shaker Aamer v. Obama* et al., case No. 14-5299, judgment of 29 May 2015.

public release of videos by behaving in such a way as to require more frequent that would be recorded and potentially released to the public, increasing the risk of injury to both detainees and military personnel at Guantanamo. Fourth, the videos could be altered and manipulated to increase anti-American sentiment and inflame Muslim sensitivities overseas, thereby placing the lives of US service members at risk. Fifth, release of the videos would be contrary to the Government's commitment to a firm policy of protecting detainees from public curiosity and could affect the practice of other states in this regard, which would in turn dilute protections afforded US service personnel in ongoing overseas contingency operations and future conflicts. Dilution of these protections could significantly damage national security".<sup>382</sup>

In the UK, the Foreign Office refused to disclose certain information to Binyam Mohamed, an Ethiopian national and UK resident, who had been abducted in the context of the extraordinary rendition program.<sup>383</sup> Mr. Mohamed had indeed requested access to documents that could have been relevant to his defense for charges of terrorism brought against him before US courts (*i.e.* proof that the evidence at the basis of the charges has been obtained by torture). The Foreign Office refused the disclosure based on national security grounds. However, following Mr. Mohamed's request for judicial review, the UK High Court ordered the Foreign Office to disclose to the claimant's security cleared lawyers 42 documents related to his

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<sup>382</sup> United States District Court for the Circuit of Columbia, United States District Court for the Court of Columbia, *Abu Wa' el (Jihad) Dhiab v. Obama et al.*, case No. 05-CV-1457 (GK), Respondents' motion to stay order unsealing videos pending possible appeal and request of administrative stay, filed on 15 October 2014, pp. 4-5.

<sup>383</sup> On this case see, *inter alia*, L. K. MEHALKO, *Hooded: Byniam Mohamed and the State Secrets Privilege*, in *Boston College International & Comparative Law Review*, vol. 34, 2011, pp. 81-94.

rendition.<sup>384</sup> Against the government's claims of public interest immunity, the High Court did not include, however, certain paragraphs (containing a redacted summary of the disclosed documents) in the final version of the judgment. This paved the way to further proceedings. Eventually, the UK Court of Appeal rejected secrecy claims on the ground of national security and granted the full publication of the judgment.<sup>385</sup>

Another explanatory example of the governments' increasingly reliance on State secrecy to hide information concerning counter-terrorism operations is represented by the events brought to the attention of the United Kingdom Upper Tribunal in the case *All Parliamentary Group on Extraordinary Renditions v. Ministry of Defense*. The *All Parliamentary Group on Extraordinary Renditions*, composed of members of the House of Commons and the House of Lords, was created in 2005 to review allegations of the United Kingdom's involvement in the CIA's practice of extraordinary renditions. In 2008, in the exercise of its mandate, the Parliamentary Group filed a request with the Ministry of Defense seeking information about the extra-legal transfer of detainees in cases where there was the risk of torture or other cruel, inhuman or degrading treatment. Among the requested information figured those concerning the diplomatic assurances between the United Kingdom, Iraq, Afghanistan and the United States on the treatment of detainees, as well as the detention practice review and the United Kingdom policy on capture and extra-legal transfers.

The Ministry of Defense, however, refused to release most of the requested information adducing cost-related reasons and disclosure exemptions, such as

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<sup>384</sup> *R (Binyam Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs*, EWHC 2048 (Admin.), judgment of 21 August 2008.

<sup>385</sup> *R (Binyam Mohamed) v. Secretary of State for Foreign and Commonwealth Affairs*, EWCA Civ. 65, judgment of 10 February 2010, *supra* note 257; EWCA civ. 158, judgment of 26 February 2010, [2011] QB 218.

the risk of hindering international relations (with specific reference to diplomatic assurances).<sup>386</sup>

Concerning this last aspect, the conclusions reached by the Upper Tribunal, before which the controversy was brought, appear particularly valuable.<sup>387</sup> As partially recalled *supra*, the Tribunal rejected the government's argument that agreements on diplomatic assurances would have harmed, if disclosed, international relations. According to the Tribunal, in fact, the protection of fundamental human rights is a duty of all States parties to the United Nations and an essential aspect for the promotion of friendly relations among countries.<sup>388</sup> Consequently, any instrument aiming at safeguarding human rights (such as a *memorandum* containing diplomatic assurances for transferred detainees) could not be exempted from disclosure based on the alleged risk that disclosure would hamper international relations.

The Tribunal established a presumption that the disclosure of agreements concerning the protection of human rights would never hinder international relations, unless cogent evidence is adduced.<sup>389</sup> In addition, according to the Tribunal, even when relevant evidence is submitted (and this was not the case), disclosure would not be exempted, as secrecy would be outweighed by the public interest in knowing the terms of a similar agreement.<sup>390</sup>

The governmental reluctance to disclose information concerning the extra-legal transfer of detainees in the context of the war on terror has also characterized the investigative work undertaken by the UK Intelligence and Security Committee on the alleged British involvement in the questioning of prisoners in Afghanistan, Guantanamo and Iraq and, more in general, in the

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<sup>386</sup> Article 27(a) of the Freedom of Information Act exempts the disclosure of governmental information that, if revealed, would prejudice the relations between the United Kingdom and any other State.

<sup>387</sup> Upper Tribunal (Administrative Appeal Chamber) in the case *All Parliamentary Group on Extraordinary Renditions v. Ministry of Defence et al.*, issued on 18 April 2011, *supra* note 63.

<sup>388</sup> *Ibid.*, at 59-60.

<sup>389</sup> *Ibid.*, at 66.

<sup>390</sup> *Ibid.*, at 67.

US rendition program.<sup>391</sup> The executive, in fact, did not provide to the Committee several documents that would have shed more light on the practice, thus proving the weakness of a similar oversight mechanism over intelligence activities.<sup>392</sup>

The veil of secrecy has hampered oversight mechanisms also in other countries.

In its Report on a visit to Lithuania in 2010, for instance, the European Committee on the Prevention of Torture and Inhuman and Degrading Treatment or Punishment noted that, concerning the criminal investigations undertaken on secret prisons for suspected terrorists, the Committee itself had not received the information requested, as the government refused to disclose them adducing that they constituted State secrets.<sup>393</sup>

In Poland, instead, the investigation into public officials' involvement in the extraordinary renditions program, initiated in March 2008, was classified from the beginning as 'top secret'.<sup>394</sup> The outcomes of the inquiry were never released to the public, but rather concealed under the guise of 'secrets of

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<sup>391</sup> Intelligence and Security Committee, *Special Report on Rendition*, July 2007.

<sup>392</sup> See Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, *Abuse of State secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violation*, *supra* Introduction, note 28, p. 17. The members of the UK Intelligence and Security Committee are appointed by the Prime Minister, in consultation with the opposition leader. The reports of the Committee are then presented to the Parliament by the Prime Minister.

<sup>393</sup> Report to the Lithuanian Government on the visit to Lithuania carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 14 to 18 June 2010, Doc. CPT/Inf(2011) 17, 19 May 2011, para. 72. The Committee consequently recommended that "any restrictions on access to information on grounds of State or secret secrecy should be kept to the absolute minimum" (para. 73). With respect to Lithuania's involvement in the extraordinary renditions program, it is noteworthy that the European Court of Human Rights had declared inadmissible the application brought by the Human Rights Monitoring Institute challenging the State's refusal to provide information related to renditions flights grounded on confidentiality claims. The Court dismissed the case on the basis that the Human Rights Monitoring Institute was not directly affected by the violation. See European Court of Human Rights, *HRMI v. Lithuania*, application lodged on 20 December 2012.

<sup>394</sup> A. BODNAR, I. PACHO, *Domestic Investigation into Participation of Polish Officials in the CIA Extraordinary Rendition Program and the State Responsibility under the European Convention on Human Rights*, in *Polish Yearbook of International Law*, vol. XXXI, 2011, p. 237.



State'.<sup>395</sup> Furthermore, governmental authorities highly relied on State secrecy to reject any request of disclosure filed by human rights NGOs on the ground of freedom of information legislation.<sup>396</sup>

In Germany, the parliamentary assembly (*Bundestag*) was likewise denied by the executive information concerning the alleged German participation in the extraordinary renditions program. The parliamentary investigation committee set up to clarify the German government's policy with respect to the transfer of suspected terrorists and secret detentions was, in fact, unable to access relevant information withheld by the executive on the grounds of national security concerns.<sup>397</sup>

Against the executive's refusal to disclose the requested documents, the parliamentary members filed a claim before the Federal Constitutional Court.<sup>398</sup> The Court upheld the need for balancing the legitimate authority of the government not to disclose sensitive information, on the one hand, and the Parliament's interest to be informed, on the other hand. Based on this necessary balance, the executive cannot refuse the disclosure of information solely on the ground of 'State secrecy', but should instead always justify the reasons for withholding it. The fact that disclosure may be inconvenient for the government cannot represent a reasonable ground for denying the release.<sup>399</sup>

According to the above reasoning, the Court found that, in the specific case, the executive had failed to provide the claimants with adequate justifications,

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<sup>395</sup> *Ibid.*

<sup>396</sup> *Ibid.*, p. 238.

<sup>397</sup> See, *inter alia*, Parliamentary Assembly of the Council of Europe, Committee on Legal Affairs and Human Rights, *Abuse of State secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violation*, *supra* Introduction, note 28, pp. 16-17. See also M. VASHAKMADZE, *Secrecy v. Openness: Counter-terrorism and the Role of the German Federal Constitutional Court*, in D. COLE, F. FABBRINI, A. VEDASCHI (eds), *Secrecy, National Security and the Vindication of Constitutional Law*, *supra* Introduction, note 13, pp. 44-49.

<sup>398</sup> German Federal Constitutional Court, judgment of 17 June 2009.

<sup>399</sup> *Ibid.*, at 134.

as it had not managed to demonstrate that the disclosure of intelligence information would have hindered Germany's international relations.<sup>400</sup>

### 5.1.3. State secrecy as an obstacle to judicial scrutiny

In the post-9/11 counter-terrorism era, State secrecy has also been increasingly relied on in the attempt to shield government officers from prosecution for crimes like torture or abduction or to block victims' claims for compensation.

A few examples may help clarifying this practice.

With respect to the use of State secrecy in criminal proceedings, the *Abu Omar* case represents one of the most well known examples.<sup>401</sup>

On 17 February 2003, the imam Hassan Mustafa Osama Nasr, also known as Abu Omar, an Egyptian citizen having the status of political refugee in Italy, was abducted in Milan and forcibly transferred to Egypt. Once in his country of origin, the imam, who was suspected of being involved in terroristic activities, was allegedly held *incommunicado* and subjected to torture and other cruel, inhuman and degrading treatment until his liberation in 2004. After his first release, however, he was imprisoned again and then, since 2007, forced to house detention.

Following the complaint filed by Abu Omar's wife, the Office of the Public Prosecutor of Milan opened a criminal file and, at the end of the preliminary

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<sup>400</sup> *Ibid.*

<sup>401</sup> For an overview of the *Abu Omar* case see, *inter alia*, M. NINO, *The Abu Omar Case in Italy and the Effects of CIA Extraordinary Renditions in Europe on Law Enforcement and Intelligence Activities*, in *Revue Internationale de Droit Pénal*, 2007, p. 113 ff.; F. MESSINEO, *Extraordinary Renditions and State Obligation to Criminalize and Prosecute Torture in the Light of the Abu Omar Case in Italy*, in *Journal of International Criminal Justice*, 2009, p. 1023 ff.; A. PANETTA, *Extraordinary renditions: il mancato bilanciamento tra l'esigenza di tutela dei diritti fondamentali e il segreto di Stato. Riflessioni a margine del caso Abu Omar*, 2009, available online at: <https://diritti-cedu.unipg.it> (last accessed on 24 February 2016); C. MAZZA, *The Abu Omar Case and Extraordinary Renditions*, in *Central European Journal of International and Security Studies*, 2012, p. 142 ff.; S. BUZZELLI, *Diritto alla verità contro Segreto di Stato. Il caso Abu Omar a distanza di dieci anni*, in *Rivista di Scienze Giuridiche*, vol. 61, 2014, pp. 147-161.

investigations, charged twenty-six American citizens – CIA agents and diplomatic representatives – and six Italian citizens – former members of the intelligence services – for having taken part in the abduction and transfer of the imam.

In the trial that followed before the Court of Milan, however, the then-Prime Minister upheld the State secrecy privilege in order to prevent the use as evidence of documents related to the existing relationships between Italian and US intelligence services (although already publicly available).

As a result of the Public Prosecutor's claim over the illegitimate character of the invocation of the State secrecy privilege, proceedings were initiated before the Constitutional Court.

With its controversial decision No. 106/2009,<sup>402</sup> the Constitutional Court found that the government had correctly invoked the State secrecy privilege in the case at stake. By means of this ruling, thus, the Court not only reiterated the implicit constitutional basis for the privilege, but also upheld the supremacy of national security interests over any other constitutional principle, including the protection of fundamental human rights.<sup>403</sup>

Following the Constitutional Court's judgment, the Court of Milan dismissed the case against the former members of the Italian intelligence services, given that, lacking further evidence, their responsibility could not be ascertained.<sup>404</sup> The Milan Court of Appeal upheld the decision of first instance.<sup>405</sup>

On 19 September 2012, however, the Italian Supreme Court overturned the Court of Appeal's judgment in the part in which the judges had allowed the State secrets privilege to hide the facts "behind a black curtain".<sup>406</sup> According to the Supreme Court, in fact, the Court of Appeal had mistaken in interpreting

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<sup>402</sup> Italian Constitutional Court, judgment of 11 March 2009, *supra* note 173.

<sup>403</sup> For an analysis of this decision see, *inter alia*, T. SCOVAZZI, *La Repubblica riconosce e garantisce i diritti inviolabili della segretezza delle relazioni tra servizi informativi italiani e stranieri*, *supra* Introduction, note 39, pp. 960-992.

<sup>404</sup> Criminal Court of Milan, decision No. 12428 of 4 November 2009.

<sup>405</sup> Court of Appeal of Milan, decision No. 3688 of 15 December 2010.

the Constitutional Court's decision as a ground to dismiss the case. Conversely, the judges should have ascertained whether Italian intelligence officials were responsible by resorting to other 'uncovered' evidence. Furthermore, the Supreme Court established that, given that the intelligence agents had not taken part in the extraordinary rendition of Abu Omar in the exercise of their institutional functions, their actions could not be covered by *State secrecy*.<sup>407</sup> Following the Supreme Court's decision, the Court of Appeal convicted the former members of the Italian intelligences services for the abduction of Abu Omar.<sup>408</sup> The then-Prime Minister filed a new claim before the Constitutional Court's against the Supreme Court and the Milan Court of Appeal.

On 13 February 2014, the Italian Constitutional Court annulled, in their relevant parts, both the judgment of the Italian Supreme Court and the subsequent ruling of the Court of Appeal of Milan.<sup>409</sup> The Court found, *inter alia*, that the Prime Minister holds the exclusive prerogative to invoke State secrecy (which cannot be challenged by the judiciary) and that, even if a conflict with other constitutional principles may arise, this conflict should be deemed already solved by those domestic provisions requiring the dismissal of the case (*ex* Article 202.3 of the Code of Criminal Procedure and Article 41 of the Statute on State secrets).<sup>410</sup> According to the Court, indeed, these provisions recognize the primacy of national security on judicial scrutiny. In addition, the Constitutional Court found that the Supreme Court failed in stating that State secrecy could not be invoked in relation to non-official intelligence operations, given that it is not for the Supreme Court to assess the

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<sup>406</sup> Italian Supreme Court, decision No. 46340 of 19 September 2012.

<sup>407</sup> *Ibid.*, p. 122 ff.

<sup>408</sup> Court of Appeal of Milan, decision No. 6709 of 12 February 2013.

<sup>409</sup> Italian Constitutional Court, decision of 13 February 2014, *supra* note 173. For a comment on this decision see, *inter alia*, A. CAPRIO, *L' "ultimo atto" della vicenda Abu Omar: cala il sipario ma qualche dubbio resta sulla scena*, in *Forum di Quaderni Costituzionali*, 29 April 2014, pp. 1-17.

<sup>410</sup> *Ibid.*, para. 5.

content of those information covered by State secrecy.<sup>411</sup>

As a consequence of the judgment of the Constitutional Court, the Italian Supreme Court, with decision No. 20447 of 24 February 2014, annulled the Court of Appeal's ruling that had condemned the Italian officials involved in the abduction of Abu Omar on the ground that judicial action could not continue due to the invocation of State secrecy.

This intricate 'judicial saga' well illustrates the strenuous attempts of the Italian executive to resort to the State secrecy privilege for granting impunity to its own agents.<sup>412</sup> It is worth stressing, however, that Abu Omar and his wife have filed a claim against Italy before the European Court of Human Rights,<sup>413</sup> arguing, *inter alia*, that: “(...) *l'application du secret d'État, ayant de facto empêché la punition des responsables et la réparation du dommage subi, est contraire aux obligations procédurales découlant de [...] la Convention*”.<sup>414</sup>

On 23 February 2016, the European Court of Human Rights has issued its judgment on the case, upholding the applicants' claim. In particular, as it will also be better examined *infra*, the Court relied on the fact that State secrecy had been invoked with respect to documents already in the public domain to conclude that Italy had breached, *inter alia*, Article 3 of the European Convention of Human Rights (prohibition of torture), in its procedural limb. The Court found indeed that: “*en l'espèce, le principe légitime du 'secret d'État' a, de toute évidence, été appliqué afin d'empêcher les responsables de répondre de leurs acts*”.<sup>415</sup> According to the Court, in fact, as a consequence of the invocation of the State secrecy privilege in the course of proceedings, “*l'enquête (...) et le procès (...) n'ont pas abouti à leur issue naturelle qui, en*

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<sup>411</sup> *Ibid.*, para. 6.

<sup>412</sup> In this respect, it is worth stressing that the State secrecy privilege has been invoked by three Prime Ministers belonging to different political parties.

<sup>413</sup> European Court of Human Rights, *Nasr and Ghali v. Italy*, App. No. 44883/09, lodged on 6 August 2009; the text of the application (in French) can be found at: <http://hudoc.echr.coe.int> (last accessed on 24 February 2016).

<sup>414</sup> *Ibid.*, p. 25.

<sup>415</sup> European Court of Human Rights, *Nasr and Ghali v. Italy*, *supra* note 173, para. 272.

*l'espèce, était 'la punition des responsables (...). En fin de compte, il y a donc eu impunité'*.<sup>416</sup>

The Court furthermore concluded that Italy also breached Article 13 of the European Convention on Human Rights (right to an effective remedy), given that, *inter alia*, the resort to State secrecy had prevented any “effective” criminal proceedings and *de facto* deprived the applicants of the possibility to seek compensation through a civil lawsuit.<sup>417</sup>

Interestingly enough (and indicative of the complex dialectic existing between secrecy and human rights protection), Luciano Seno, a former Italian military agent convicted to 2 years and 8 months of prison for aiding and abetting in the abduction of Abu Omar,<sup>418</sup> also filed an application before the European Court of Human Rights, arguing that the Italian government’s reliance on State secrecy in the *Abu Omar* proceedings has hindered his right to a fair trial.<sup>419</sup>

As mentioned, governments have largely resorted to the State secrets privilege also in civil suits filed by victims of the extraordinary renditions program against governmental agencies or contractors.<sup>420</sup>

In the *El-Masri v. Tenet et al.* case,<sup>421</sup> for instance, the US government

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<sup>416</sup> *Ibid.*

<sup>417</sup> *Ibid.*, paras. 335-336. The Court has instead declined to examine whether the resort to State secrecy had also determined a breach of Article 6 of the European Convention on Human Rights (right to a fair trial). The Court found indeed that: “*ce grief se confond avec celui que les requérants tirent du volet procédural de l'article 3 de la Convention, dans la mesure où il ne concerne qu'un aspect spécifique du déroulement d'une procédure qui, pour elle, ne répond pas au critère d'effectivité au sens de la Convention*” (*ibid.*, para. 341).

<sup>418</sup> See again Criminal Court of Milan, decision No. 12428 of 4 November 2009. The conviction was confirmed by the Court of Appeal of Milan with decision No. 3688 of 15 December 2010 and by the Italian Supreme Court with decision No. 46340 of 19 September 2012.

<sup>419</sup> See ‘Abu Omar, la Consulta: ammissibile il conflitto sollevato dal governo Monti’, in *LaStampa.it*, 26 March 2013, available at: <http://www.lastampa.it> (last accessed on 24 February 2016).

<sup>420</sup> For an overview of US case law in this respect see, e.g., P. WALD, *National Security Versus Human Rights: An Uneven Playing Field*, in *Proceedings of the American Society of International Law*, 2010, pp. 458-461.

<sup>421</sup> For more details on the case see, *inter alia*, S. D. SCHWINN, *The State Secrets Privilege in the Post-9/11 Era*, in *Pace Law Review*, vol. 30, 2009-2010, p. 812 ff. For a broader overview see also V. HANSEN, *Extraordinary Renditions and the State Secrets Privilege: Keeping Focus*

sought the dismissal of the complaint based on the fact that the very issue at stake was itself classified. Khalid El-Masri, a German citizen of Lebanese descent erroneously suspected of being connected with terrorist groups, was abducted by the Macedonian police in December 2003 and subsequently handed over to CIA's agents. Until May 2004, he was detained in a secret prison in Afghanistan, where he was subjected to torture and other inhuman treatments.

In the civil suit he filed against the former CIA Director, George Tenet, El-Masri claimed that US government officials and contractors had violated both international law and US constitutional law in conducting his extraordinary rendition. The government intervened arguing that neither the plaintiff nor the respondent could establish their respective positions without resorting to classified information, whose disclosure would have jeopardized national security. In addition, the government asserted the constitutional foundation of the State secrets privilege and, consequently, the limited authority that the judiciary may have in reviewing its application. As a consequence of the invocation of the State secrets privilege, the claim was dismissed in 2006.<sup>422</sup> The decision was appealed the same year. The Court of Appeal of the Fourth Circuit, however, upheld the first-instance judgment.<sup>423</sup>

The US government invoked the State secrecy privilege also in the *Mohamed et al. v. Jeppesen Dataplan, Inc* case.<sup>424</sup> The case arose out of the complaint filed by five victims of renditions – namely, Binyam Mohamed, Abu Elkassim, Ahmed Agiza, Mohamed Farag Amhad Bashmilah and Bisher

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*on the Task at Hand*, in *North Carolina Journal of International Law and Commercial Regulation*, vol. 33, 2007-2008, pp. 629-655.

<sup>422</sup> United States District Court Eastern District of Virginia, *Khaled El-Masri v. Tenet et al.*, judgment of 12 May 2006, *supra* Introduction, note 32.

<sup>423</sup> United States Court of Appeals for the Fourth Circuit, *Khaled El-Masri v. United States of America et al.*, decision of 2 March 2007, *supra* note 222. On 9 October 2007, the Supreme Court refused to review the case.

<sup>424</sup> For an overview see, *inter alia*, G. RAGUAN, *Masquerading Justiciability: The Misapplication of State Secrets Privilege in Mohamed v. Jeppesen – Reflections from a Comparative Perspective*, in *Georgia Journal of International and Comparative Law*, vol. 40, 2012, pp. 423-472.

Al-Rawi – against a subsidiary company of Boeing allegedly implicated in the transfer of suspected terrorists. According to the Plaintiffs, the private company had provided flight planning and logistical support to the aircraft and crew on all flights transporting them to the various locations where they had been detained and tortured. In addition, this assistance was provided with the knowledge of the purposes of the program, including the fact that the victims would have been subjected to torture and other inhuman treatment.<sup>425</sup>

The US government intervened in the trial at its very beginning requesting the dismissal of the case under the State secrets privilege. The District Court for the Circuit of North California upheld the government’s motion finding that the allegations concerned ‘secret’ operations and, therefore, dismissed the case.<sup>426</sup> The Court of Appeals for the Ninth Circuit (composed by a panel of three judges) reversed and remanded the first-instance decision based on the fact that the US government had failed to properly establish a basis for dismissal under the State secrets privilege.<sup>427</sup> The government, however, appealed to the full bench of eleven judges. The Court of Appeals took the case *en banc* “to resolve questions of exceptional importance regarding the scope and application of the State secrets doctrine”.<sup>428</sup> The government re-asserted the State secrets privilege and, eventually, the Court upheld it by concluding that “there is no feasibly way to litigate Jeppesen’s alleged liability without creating an unjustifiable risks for State secrets”.<sup>429</sup>

The US government has raised similar arguments in another case brought before US courts by Mahar Arar, a Canadian citizen of Syrian origin, who had allegedly been abducted and tortured in the context of the extraordinary

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<sup>425</sup> The Plaintiffs acted under the Alien Tort Statue, alleging two main claims: one for “forced disappearance” and the other for “torture or other cruel, inhuman and degrading treatment”.

<sup>426</sup> United States District Court for the Northern District of California, *Mohamed et al. v. Jeppesen Dataplan, Inc.*, order of 13 February 2008, *supra* Introduction, note 32.

<sup>427</sup> United States Court of Appeals for the Ninth Circuit, *Mohamed et al. v. Jeppesen Dataplan, Inc.*, judgment of 28 April 2009, 579 F. 3d 943.

<sup>428</sup> United States Court of Appeals for the Ninth Circuit, *Mohamed et al. v. Jeppesen Dataplan, Inc.*, judgment of 8 September 2010, *supra* note 206, at 1077.

<sup>429</sup> *Ibid.*, p. 1087. On 16 May 2011, the Supreme Court denied to review the case. See *Mohamed et al. v. Jeppesen Dataplan, Inc.*, 131 S. Ct. 2442.



rendition program. Arar filed a complaint against the former Attorney General Ashcroft and other members of the Bush Administration seeking compensation for damages. Although the Court dismissed the case based on different procedural grounds and more specifically, on the inadmissibility of civil remedy for extraordinary renditions allegations, also in this case the government asserted the State secrecy privilege to prevent the continuation of the trial.<sup>430</sup> The Court of Appeals for the Second Circuit upheld the first-instance decision.<sup>431</sup>

In addition to invoking it in civil suits related to extraordinary renditions compensation claims, the US government has relied on the State secrets privilege also to seek the dismissal of an injunction aimed at preventing the targeted killing of Anwar Al-Aulaqi, a dual US-Yemeni citizen suspected of ties with Al-Qaeda. Pursuant to governmental authorities, in fact, litigating such a case would have inevitably lead to the disclosure of information concerning, *inter alia*, whether or not, and to what extent, the US may target a foreign terrorist organization, the criteria for the use of lethal force and the threats posed by terroristic organizations.<sup>432</sup> The United States District Court for the District of Columbia has recognized that the case raised “vital consideration of national security and of military and foreign affairs (and hence, potentially, of State secrets)”.<sup>433</sup> However, the existence of other grounds based on which adjudicating the case (*i.e.*, the lack of standing of the plaintiff, the father of the targeted individual) prevented the Court from addressing the secrecy claim.<sup>434</sup>

The US government has invoked the State secrets privilege also in the context of civil claims related to the placement of individuals suspected of

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<sup>430</sup> United States District Court for Eastern District of New York, *Maher Arar v. Ashcroft et al.*, judgment of 16 February 2006, 414 F. Supp. 2d 250.

<sup>431</sup> United States Court of Appeals for the Second Circuit, *Maher Arar v. Ashcroft et al.*, decision of 2 November 2009, *supra* note 220.

<sup>432</sup> United States District Court for the District of Columbia, *Nasser Al-Aulaqi v. Barack Obama et al.*, memorandum opinion of 7 December 2010, *supra* note 208, at 53.

<sup>433</sup> *Ibid.*, at 8.

<sup>434</sup> *Ibid.*, at 54.

being involved in terrorist activities on the no-fly and terrorist watch lists. For instance, with a declaration dated 14 March 2013, the US Attorney General filed a State secrets privilege claim before the United States District Court for the Northern District of California in order to obtain the dismissal of the injunction for declaratory relief submitted by Rahinah Ibrahim, a Malaysian citizen who had asserted that her inclusion in the list violated her due process and equal protection rights.<sup>435</sup> The District Court, however, after reviewing the classified documents *ex parte* and *in camera*, has dismissed the Attorney General's motion as ungrounded.<sup>436</sup> On 16 July 2015, the District Court for the Eastern District of Virginia has similarly dismissed a State secret privilege claim filed by the US Attorney General in relation to another petition challenging the placement on the US no-fly list without any redress review.<sup>437</sup>

Finally, it is worth mentioning that the US government has also frequently relied on the State secrecy privilege to seek dismissal of civil suits related to the mass surveillance programme undertaken by the National Security Agency as part of the US's counter-terrorism efforts. As it has been observed, the US government "systematically used national security secrecy to prevent multiple accountability mechanisms from scrutinizing its warrantless surveillance programme".<sup>438</sup> This has concerned first and foremost judicial scrutiny.

In several instances, US courts have dismissed compensation claims (concerning the alleged breach of privacy rights) due to the fact that the State secrecy privilege made impossible to establish whether the plaintiff had been subjected to surveillance.<sup>439</sup> In the *ACLU v. NSA* case, for instance, the Court

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<sup>435</sup> United States District Court for the Northern District of California, *Rahinah Ibrahim v. Department of Homeland Security et al.*, Declaration of Eric Holder, Jr., Attorney General of the United States, of 14 March 2013; filed in court on 23 April 2013.

<sup>436</sup> United States District Court for the Northern District of California, *Rahinah Ibrahim v. Department of Homeland Security et al.*, case No. C-06-00545 WHA, decision of 14 January 2014.

<sup>437</sup> See, e.g., United States District Court for the Eastern District of Virginia, *Gulet Mohamed v. Eric H. Holder, Jr.*, et al., case No. 1:11-cv-50 (AJT/MSN), decision of 16 July 2015.

<sup>438</sup> K. CLARK, *The Architecture of Accountability: A Case Study of the Warrantless Surveillance Programme*, in *Brigham Young University Law Review*, 2010, p. 405.

<sup>439</sup> *Ibid.*, pp. 400 ff.

of Appeals for the Sixth Circuit upheld the State secrecy privilege invoked by the defendant and, consequently, dismissed the claim due to the lack of evidence over the alleged surveillance.<sup>440</sup>

## **5.2. State secrecy and human rights violations beyond the war on terror**

While the resort to State secrecy in the context of the war on terror has attracted much doctrinal attention, there are other practical examples that, although less known, similarly show how the use (or abuse) of State secrecy may obstacle the effective protection of fundamental human rights.<sup>441</sup>

Even if a detailed analysis of these cases is not the purpose of the present work, it may again be useful to make some illustrative digressions.

In Kyrgyzstan, for instance, information concerning the number of sentenced to death and prison mortality constitute information classified as ‘State secrets’, as such not available to the public. In addition, the regulation enacted by the government that imposes this classification is itself classified.<sup>442</sup> As this information may be relevant to ascertain possible violations of human rights and fundamental freedoms, the refusal of their disclosure could well hinder their effective safeguard. Furthermore, one could cast doubts as to whether similar information, if disclosed, could actually have a negative impact on Kyrgyzstan’s national security interests or if, conversely, State secrecy amounts to a mere pretext for not releasing ‘inconvenient’ data

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<sup>440</sup> United States Court of Appeals for the Sixth Circuit, *ACLU v. NSA*, 493 F.3d 644, judgment of 6 July 2007.

<sup>441</sup> For an overview of the serious human rights violations that declassification of secret documents have revealed see, *inter alia*, A. ROBERTS, *Transparency in the Security Sector*, in A. FLORINI (ed.), *The Right to Know: Transparency for an Open World*, New York, 2007, p. 309 ff.

<sup>442</sup> This issue was even brought to the attention of the Human Rights Committee by Nurbek Toktakunov, a member of public association dealing with human rights. Toktakunov asserted that the Kyrgyz Ministry of Justice had denied him access to information concerning the number of sentenced to death and that domestic Courts had upheld the Ministry’s decision. See Human Rights Committee, *Toktakunov v. Kyrgyzstan*, Communication No. 1470/2006, Views of 28 March 2011.

and avoiding accountability.<sup>443</sup>

In Latin American countries, State secrecy has been likewise relied on by governments to hide information related to violations of human rights perpetrated by governmental agents and military officials. The events at stake before the Constitutional Court of Guatemala in the already mentioned case *The Prosecution in the Trial of Ríos Montt v. Ministry of National Defense* well illustrate this practice.<sup>444</sup> The Guatemalan Ministry of National Defense, in fact, intervened in the genocide trial against the former military dictator to assert that the documents required by the criminal judges in relation to four military operational plans were ‘State secrets’, thus protected from disclosure.

Similarly, on another occasion, the Guatemalan authorities appealed to State secrecy for refusing the disclosure of documents relating to the operation and structure of the Presidential General Staff in the context of investigations concerning an extra-judicial execution.<sup>445</sup>

In Colombia, the government’s attitude to resort to State secrecy to hide human rights violations has been the object of a claim brought before the Constitutional Court in 2003.<sup>446</sup> Alirio Uribe Muñoz, a Colombian citizen, challenged the constitutionality of Articles 27 and 42 of the Decree No.

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<sup>443</sup> Similarly, in Burkina Faso, the list of all cases of human rights violations dealt with by the Ministry of Human Rights and Civic Promotion is *confidential*. Moreover, documentation centers related to human rights abuses perpetrated in the country, while generally accessible to the public, are subjected to the application of administrative rules (including restrictions on national security grounds). It is evident that a similar framework may easily lead to prevent access to information related to human rights abuses. See Burkina Faso Ministry of Human Rights and Civic Protection, Information on Good Practices in the Establishment and Preservation of National Archives on Human Rights Provided by Burkina Faso to the Office of the United Nations Office of the High Commissioner for Human Rights, May 2013, UN Doc. HRC/NONE/2014/9, at 1, available at: <http://www.ohchr.org> (last accessed on 24 February 2016).

<sup>444</sup> Guatemalan Constitutional Court, *The Prosecution in the Trial of Ríos Montt v. Ministry of National Defence*, *supra* note 214.

<sup>445</sup> See Inter-American Court of Human Rights, *Myrna Mack Chang v. Guatemala*, *supra* Introduction, note 41, at 180-182.

<sup>446</sup> Constitutional Court of Colombia, case C-872/03, decision of 30 December 2003. On the role that the Colombian Constitutional Court plays in enhancing the protection of the rights to truth, justice and reparation see, e.g., H.A. SIERRA PORTO, *La función de la Corte Constitucional en la protección de los derechos de las víctimas a la verdad, la justicia y la*

1799/2000, which restrict the access to military documents. The Plaintiff grounded his complaint, *inter alia*, on the fact that similar provisions facilitated impunity for violations of human rights perpetrated by military officials.<sup>447</sup>

In Colombia, reliance on secrecy has also raised issues with reference to the right to a fair trial. Indeed, the establishment in 1991 of a system of secret courts has shown all possible shortcomings that the use of secrecy in proceedings (including secret evidence) might have in terms of due process rights.<sup>448</sup> The system of secret courts (so-called ‘Courts of Public Order’) – based on the anonymity of judges and the secrecy surrounding the entire procedure – was set up to adjudicate crimes threatening public order, such as drugs trafficking, terrorism and kidnappings.<sup>449</sup> The system had a two-fold purpose: preventing retaliations against the judiciary and increasing the conviction rate. However, pursuant to the rules of procedure, the accused was denied the possibility to confront witnesses.<sup>450</sup> Furthermore, the entire proceedings were concealed from public scrutiny.<sup>451</sup> These circumstances, while undermining due process rights, also paved the way to a ‘political abuse’ of the system, which was eventually used to try political dissidents.<sup>452</sup> The Inter-American Commission on Human Rights also stressed that the secrecy surrounding the Courts of Public Order, although established to face a situation of emergency, did not abide by the minimum guarantees of due

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*reparación en Colombia*, in *Anuario de derecho constitucional latinoamericano*, vol. XV, 2009, pp. 179-188 (and, especially, p. 183).

<sup>447</sup> The Court summarizes the Plaintiff’s complaint as follows: “(...) *Al respecto señala que la reserva que establecen los artículos 27 y 42 del decreto 1799 de 2000 (...) constituye un mecanismo de impunidad, en relación con los crímenes de lesa humanidad (...)*” (*Ibid*, at III).

<sup>448</sup> On the topic see M.R. PAHL, *Concealing Justice or Concealing Injustice? Colombia’s Secret Courts*, in *Denver Journal of International Law and Policy*, vol. 21, 1992-1993, pp. 431-440.

<sup>449</sup> *Ibid.*, p. 434.

<sup>450</sup> *Ibid.*, p. 436.

<sup>451</sup> *Ibid.*

<sup>452</sup> *Ibid.*, p. 438.

process established in international instruments.<sup>453</sup>

In Brazil, the government has relied on State secrecy to impede the disclosure of information concerning the operations conducted by the military in the Araguaia region at the end of the '70s, during which many people were either killed or disappeared. In the context of the judicial proceedings that followed the massacre, the relatives of the victims had indicated the existence of an armed forces report, dated 5 January 1975, which could have helped clarifying the case. Government authorities, however, denied the existence of such a document and declared that, even if it existed, it could not be produced given its secret character.<sup>454</sup>

In Russia, the government has instead classified as State secrets thirty-six of the one-hundred-eighty-three volumes of the criminal file on the 1940 'Katyn massacre', in which thousands of Poles were killed at the hand of the Soviet secret police.<sup>455</sup> Following the invocation of State secrecy with reference to portions of the material related to the massacre the case was dismissed.<sup>456</sup> The Polish prosecuting authorities were similarly denied by the Russian government the disclosure of the relevant documents, based on State secrecy grounds.<sup>457</sup>

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<sup>453</sup> Annual Report of the Inter-American Commission on Human Rights 1992-1993, Doc. OEA/Ser/L/V/II.83 of 12 March 1993, Chapter V.I.

<sup>454</sup> Inter-American Commission on Human Rights, *Gomes Lund et al. (Guerilla de Araguaia) v. Brazil*, case 11.552, Report No. 33/01, OEA/Ser.L/V/II.111, Doc. 20 rev., at 159 (2000), 6 March 2001, paras. 42-43.

<sup>455</sup> See M.B. SZONERT (ed.), *Katyn: State-Sponsored Extermination*, Bloomington, 2012, p. 56.

<sup>456</sup> See European Court of Human Rights [GC], *Janowiec et al. v. Russia*, cases Nos. 55508/07 and 29520/09, judgment of 21 October 2013, paras. 43-46. For a comment on this judgment see Y. KOZHEUROV, *The Case of Janowiec and others v. Russia: Relinquishment of Jurisdiction in Favour of the Court of History*, in *Polish Yearbook of International Law*, vol. 33, 2013, pp. 227-246.

<sup>457</sup> See A. GURYANOV, *Current Status of the Katyn Case in Russia*, in *Case Western Reserve Journal of International Law*, vol. 45, 2013, p. 595. As far as Russia is concerned, it is worth mentioning that, on 28 March 2015, a presidential decree extended the list of State secrets to include military casualties in time of peace. As a result, evidence related to the number of deaths and the whereabouts of military personnel are now 'shielded' from public scrutiny. This measure has raised criticism as it could potentially grant broad coverage to Russia's military operations in Ukraine (including possible human rights abuses). The text of the presidential decree is available (in Russian) at: <http://publication.pravo.gov.ru/Document/View/0001201505280001> (last accessed on 24

Furthermore, several Russian NGOs have recently denounced investigative authorities' widespread reliance on secrecy in order to obstruct access to the investigative material of cases related to serious human rights violations committed in Northern Caucasus.<sup>458</sup> In this respect, they also stressed that classification, by being often based on secret acts in itself, can easily hide abuses, preventing any assessment of the real *status* of investigations.<sup>459</sup> Additionally, they observed that, in many cases, access was eventually denied even in presence of a judgment imposing disclosure.<sup>460</sup> Strikingly, these observations have followed the European Court of Human Rights' findings that the situation in Russia, where victims' relatives were denied access to cases files even when investigations had been stuck for years, was unsatisfactory and should be amended.<sup>461</sup> In this respect, the Court specifically suggested a balancing approach between the resort to State secrecy and the need for public scrutiny over investigations into serious human rights violations.<sup>462</sup>

As far as Ukraine is concerned, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment recently reported that prosecuting authorities had been prevented from gaining access to some relevant information concerning the alleged ill-treatment of detained persons by law enforcement officials during the 'Maidan protests' (between November 2013 and February 2014) as they had been classified as 'State secrets'.<sup>463</sup>

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February 2016).

<sup>458</sup> See Russian Justice Initiative, Asreya, and Human Rights Center "Memorial", *Memorandum to the Committee of Ministers of the Council of Europe, Applicants' Observations Regarding the Execution of the Judgments of the European Court of Human Rights in Cases from the North Caucasus*, 10 January 2014, Doc. DH-DD(2014)154.

<sup>459</sup> *Ibid.*, para. 9.

<sup>460</sup> *Ibid.*, para. 13 ff.

<sup>461</sup> See, e.g., European Court of Human Rights, *Aslakhanova et al. v. Russia*, App. Nos. 2944/06, 8300/07, 50184/07, 332/8, 42509/10, judgment of 18 December 2012, para. 236.

<sup>462</sup> *Ibid.*

<sup>463</sup> See Council of Europe, Report to the Ukrainian Government on the Visit to Ukraine carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading

In the United Kingdom, secrecy (both as a ground to refuse disclosure of information and in terms of ‘closed material procedure’) has been resorted to during investigations and in the context of proceedings related to alleged serious violations of human rights perpetrated by State agents in Northern Ireland.<sup>464</sup>

In Italy, secrecy claims have concerned push-back operations of migrants at seas. In particular, based on security reasons, Italian authorities have concealed under the ‘State secrets shield’ the names and identities of commanders and physicians allegedly involved in the practice of intercepting migrants and sending them back to their departure countries, despite the real risk of being subject to torture or other forms of ill-treatment.<sup>465</sup>

In France, one of the most well known examples of the protection of ‘*secret de la défense*’ is represented by the so-called ‘*Karachi affair*’.<sup>466</sup> Claims of secrecy have indeed prevented any judicial scrutiny and parliamentary inquiry into the circumstances surrounding the 2002 terroristic attack in Karachi, Pakistan, in which eleven French engineers lost their lives.<sup>467</sup> Allegedly, the attack was linked to an arm deal concluded by France and Pakistan during the ‘90s. Despite the fact that the *Commission consultative sur le secret de la défense nationale* has issued several opinions in favour of declassification,<sup>468</sup>

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Treatment of Punishment from 9 September to 16 September 2014, Doc. CPT/Inf(2015) 21 of 29 April 2015, para. B.30.

<sup>464</sup> For an overview of some cases see Committee on the Administration of Justice, *The Apparatus of Impunity? Human Rights Violations and the Northern Ireland Conflict: A Narrative of Official Limitations on Post-Agreement Investigative Mechanisms*, Belfast, January 2015, p. 30 ff. See also J. P. TERCENO III, *Burying the Truth: The Murder of Human Rights Lawyer Patrick Finucane and Britain’s Secret Public Inquiries*, in *Fordham Law Review*, vol. 74, 2005-2006, pp. 3297-3332.

<sup>465</sup> See Council of Europe, Response of the Italian Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on its Visit to Italy from 27 to 31 July 2009, Doc. CPT/Inf(2010) 15, para. A. The facts are well illustrated in T. SCOVAZZI, *Human Rights and Immigration at Sea*, in R. RUBIO-MARÍN (ed.), *Human Rights and Immigration*, Oxford, 2014, p. 255.

<sup>466</sup> The case is reported in detail in D. BIGO, S. CARRERA, N. HERNANZ, A. SCHERRER, *National Security and Secret Evidence in Legislation and Before the Courts: Exploring the Challenges*, *supra* note 49, p. 28.

<sup>467</sup> *Ibid.*

<sup>468</sup> *Ibid.*



French Prime Ministers have always refused to disclose evidence that could have helped clarifying the facts and allowed the victims' families to know what led to the death of their next of kin.<sup>469</sup>

French official authorities have invoked the '*secret de la défense*' also with respect to the negative impacts of the nuclear tests conducted by France in the Sahara and in the atolls of Mururoa and Fangataufa, in French Polynesia, between 1960 and 1996.<sup>470</sup> French authorities have indeed refused for decades to disclose information related to the harmful effects of the nuclear tests to veterans and local inhabitants who alleged that the experiments had caused them severe diseases.<sup>471</sup> Only at the beginning of 2013, following the judicial authorities' order to the Ministry of Defense to seize the *Commission consultative du secret de la défense nationale*<sup>472</sup> and the favourable opinions for their declassification issued by the latter,<sup>473</sup> the French government declassified several documents related to the nuclear experiments, confirming that the tests caused detrimental effects on the environment and public health.<sup>474</sup>

On 4 May 2015, a *Commission d'information auprès des anciens sites d'expérimentations nucléaires du Pacifique* has been instituted in order to increase transparency on the impacts that nuclear experiments had on public

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<sup>469</sup> *Ibid.*

<sup>470</sup> See, e.g., B. DANIELSSON, *Under a Cloud of Secrecy: the French Nuclear Tests in the Southern Pacific*, in *The South Pacific*, vol. 13, 1984, pp. 336-341.

<sup>471</sup> The Law No. 2010-2 of 5 January 2010, as amended by Decree No. 2014-1049 of 14 September 2014, has recognized the right of the victims of nuclear experiments to compensation and, to this purpose, has established a *Comité d'indemnisation des victimes des essais nucléaires*. The members of the Committee have been recently nominated (see *Décret du 24 février 2015 portant désignation des membres du comité d'indemnisation des victimes des essais nucléaires institué par l'article 4 de la loi n° 2010-2 du 5 janvier 2010 relative à la reconnaissance et à l'indemnisation des victimes des essais nucléaires français*).

<sup>472</sup> Administrative Tribunal of Paris, *Association des vétérans des essais nucléaires et Association Moruroa et Tatou*, decision read in public hearing on 7 October 2010 (No. 0807363). The judgment has been confirmed by the *Conseil d'État* with decision of 20 February 2012 (No. 350382).

<sup>473</sup> Opinion No. 2012-20 of 20 December 2012 and opinion No. 2013-07 of 21 March 2013.

<sup>474</sup> '*Les secrets des essais nucléaires français dévoilés*', in *Rfi*, 4 July 2013 (available at <http://www.rfi.fr/france/20130703-secrets-devoiles-essais-nucleaires-francais>, last accessed on 24 February 2016).

health and the environment around the area.<sup>475</sup> Quite ironically, however, the Commission is bound to comply with the same norms related to the protection of State secrets.<sup>476</sup>

Finally, in the United States, both classification on the ground of national security and the State secrecy privilege have been relied on not to disclose information related to private military and security companies (including, possibly, human rights violations perpetrated by the latter). As noted by the UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination: “given [intelligence] agencies’ power to invoke confidentiality in the interest of national security, the public does not have access to information on the company hired, the activities it is contracted to do and its areas of deployment”.<sup>477</sup> The Working Group similarly took note of the role that secrecy may play as evidentiary privilege in court to prevent accountability of private military contractors in respect to breaches of international law.<sup>478</sup>

All the above examples – although far from constituting an exhaustive list – demonstrate that governments have broadly relied on State secrets (and are likely to continue to do so) as a tool to conceal possible human rights abuses even beyond the war on terror.

## 6. Conclusions

While it would be too ambitious to draw solid conclusions from the brief and limited comparative analysis undertaken in this Chapter, with some degree

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<sup>475</sup> *Arrêté du 4 mai 2015 créant une commission d’information auprès des anciens sites d’expérimentations nucléaires du Pacifique*, 4 May 2015, published in the *Journal officiel de la République française* on 20 May 2015, Article 2.

<sup>476</sup> *Ibid.*

<sup>477</sup> Human Rights Council, Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of people to self-determination. Mission to the United States of America (20 July to 3 August 2009), UN Doc. A/HRC/15/25/Add. 3 of 15 June 2010.

<sup>478</sup> *Ibid.*, para. 78.

of approximation it is possible to identify a sort of ‘shared rationale’ underpinning State secrecy rules in different domestic contexts.

Regardless of the variances existing among national legal systems, State secrecy laws, where in place, share indeed several common traits,<sup>479</sup> such as the need that a national security interest is hindered by the disclosure of the concerned information; their constitutional basis (although in some countries this aspect remains controversial); the executive’s exclusive authority to determine what amounts to a ‘State secret’; and the weakness of judicial and parliamentary oversight systems.<sup>480</sup>

In most countries, State secrecy generally acts either as classification of information or evidentiary privilege rule in criminal and civil proceedings.

Pursuant to national classifying systems, governmental authorities withhold classified information and citizens may request their disclosure through *ad hoc* administrative procedures. However, governments usually hold great discretion as to whether allow or not such a disclosure.

In the context of trials, the executive may rely on State secrecy evidentiary privileges to prevent that sensitive information – whether formally classified or not – are disclosed as evidence. As already pointed out, such a claim may even lead, eventually, to the dismissal of a civil or criminal case without any effective judicial review taking place.

Moreover, even when a certain legal system formally allows the judiciary

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<sup>479</sup> As noted by H. Nasu: “Unlike other areas of law, there are significant commonalities, at least on the face of the text, between State secrecy laws in different States, presumably because the law in many States has largely been transplanted, instead of being developed indigenously to meet the peculiar need of each society”. See again H. NASU, *State Secrets Law and National Security*, *supra* Introduction, nota 73, p. 371.

<sup>480</sup> As further evidence of the widespread lack of parliamentary oversight over secrecy claims see, *inter alia*, Parliamentary Oversight of the Security Sector, ECOWAS Parliament-DCAF Guide for West African Parliamentarians, endorsed by the ECOWAS Parliament on 29 September 2010, p. 178 ff. It is worth mentioning that the perspectives under which State secrecy laws have been examined in the present Chapter are not the only ones possible. Nasu, for instance, divides domestic secrecy laws into three categories: (i) source-based (entrusting public authorities with the task of classifying information); (ii) class-based (categorizing State secrets into different classes) and (iii) prejudice-based (protecting certain information only when disclosure would have a prejudicial effect). See again H. NASU, *State Secrets Law and National Security*, *supra* Introduction, note 73, p. 377 ff.

to review State secrecy claims, it might happen that, in practice, courts show deference to the executive's indications.<sup>481</sup>

Apart from this absence of political will to stand up against the executive's directives, however, further obstacles to proper oversight (either judicial or parliamentary) may come from the vague definition of the notion of 'national security' on which the protection of State secrets is generally based, as well as the lack of competence / expertise to intervene.<sup>482</sup>

More generally, to use Philip Alston's words, even when administrative, judicial or parliamentary oversight mechanisms are formally in place, they often resemble a mere "façade of legality to dignify official lawlessness".<sup>483</sup>

Whilst the concept of 'State secrecy' inherently belongs to domestic legal systems, international agreements and institutions have increasingly transposed and relied on the notion of 'secrecy' also at the supranational level. As it has been noted, in fact, "secrecy is also more challenging today because (...) is often a product and a precondition of information sharing relationships between agencies within countries and *between countries*".<sup>484</sup>

In this regard, the web of international and regional commitments undertaken by States adds further intricacies to the legal discourse concerning the difficult relationship between the invocation of secrecy, on the one hand, and the protection of human rights, on the other hand.

As it has been widely demonstrated, the resort to State secrecy, both in its procedural and substantive dimension, can indeed raise questions as to its compatibility with the protection of human rights. The possible tension

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<sup>481</sup> It has to be said, however, that this trend is not unanimously agreed on. Some authors, for instance, have used the expression 'juridification of security disputes' to describe the growing willingness of UK courts to deal with national security claims and show less deference to the executive. See, for instance, C. WALKER, *Living with National Security Disputes in Court Processes in England and Wales*, in M. KUMAR, G. MARTIN, R. SCOTT BRAY (eds), *Secrecy, Law and Society*, Abingdon, 2015, p. 159. As shown in the previous sections, however, it seems that the practice provides ambivalent signals in this respect.

<sup>482</sup> See again I. CAMERON, *National Security and the European Convention on Human Rights*, *supra* note 85, p. 68.

<sup>483</sup> P. ALSTON, *CIA and Target Killing Beyond Borders*, *supra* note 343, p. 293.

between the classification of sensitive information, on the one hand, and the right of access to information, on the other hand, is a well-suited example. By the same token, the use of 'secret evidence' in court proceedings, whether allowed under a 'closed' or '*ex parte*' procedure, may raise doubts about its abidance to due process rights. Furthermore, in its most 'troubling' application, State secrecy may also be relied on to hide the truth concerning severe human rights violations and grant impunity to perpetrators. The recent past has indeed registered an increasingly number of cases in which governments have relied on State secrecy laws to attempt to conceal past abuses and shield their own agents from judicial accountability.

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<sup>484</sup> Emphasis added. See K. ROACH, *Managing Secrecy and its Migration in a Post - 9/11 World*, *supra* note 265, p. 116.



## CHAPTER 2

# DOCUMENTS CLASSIFIED AS STATE SECRET AND THE RIGHT OF ACCESS TO STATE-HELD INFORMATION

*“The tradition of liberal, individualistic democracy maintained an equilibrium of publicity, privacy and secrecy. The equilibrium was enabled to exist as long as the beneficiaries and protagonists of each section of this tripartite system of barriers respected the legitimacy of the other two and were confident that they would not use their power (...) to disrupt the equilibrium”.*<sup>1</sup>

**SUMMARY:** 1. Introduction. – 2. The right of access to information in international law. – 2.1. The right of access to State-held information as a fundamental human right. – 2.1.1. Recognition of the right of access to State-held information at the universal level. – 2.1.2. Recognition of the right of access to State-held information at the regional level. – 2.1.3. The right of access to State-held information with respect to specific issues. – 2.2. Case law of human rights monitoring bodies. – 2.3. State practice (and ‘*opinio juris*’). – 2.4. – The right of access to information in international organizations. – 3. Legitimate restrictions to the right of access to information: the ‘national security’ clause. – 4. State secrecy and the right of access to information concerning human rights violations. – 5. Conclusions.

### 1. Introduction

As underlined in Chapter 1, governments often rely on classification of documents as ‘official secrets’ to withhold information related to human rights abuses.

From an international law perspective, a first aspect that deserves to be carefully considered is if a tension exists between such withholding of information, on the one hand, and the individuals’ right of access to information, on the other. Indeed, as Roy Paled and Yoram Rabin recently observed:

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<sup>1</sup> E.A. SHILS, *The Torment of Secrecy. The Background and Consequences of American Security Policies*, Chicago, 1957 (reprinted in 1996), pp. 26-27.

“European law and Inter-American law suggest an accelerating trend with respect to recognizing freedom of information as a right that flows from the right to freedom of expression. (...) The burgeoning perception in legal circles is that the right to freedom of information has been established as a recognized right in international law and that we can expect further institutionalization in States’ law in coming years”.<sup>2</sup>

Other scholars have stressed that there seems to be an emerging consensus in international law to extend freedom of speech guarantees to access to State-held information.<sup>3</sup>

These statements are strongly supported, *inter alia*, by the recent Report of the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression of 4 September 2013,<sup>4</sup> pursuant to which “the right to seek and receive information is an essential element of the right to freedom of expression (...), a right in and of itself and one of the rights upon which free and democratic societies depend”.<sup>5</sup>

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<sup>2</sup> R. PALED, Y. RABIN, *The Constitutional Right to Information*, in *Columbia Human Rights Law Review*, vol. 42, 2011, p. 393.

<sup>3</sup> See, for instance, N. WENZEL, *Opinion and Expression, Freedom of, International Protection*, in R. WOLFRUM (ed.), *Max Planck Encyclopaedia of Public International Law*, 2008, electronic edition, available at: [www.mpepil.com](http://www.mpepil.com) (last accessed on 24 February 2016), para. 20. See also K. J. KEITH, *Freedom of Information and International Law*, in J. BEATSON, Y. CRIPPS (eds), *Freedom of Expression and Freedom of Information. Essays in Honour of Sir David Williams*, Oxford, New York, 2000, pp. 349-374; J. KLAAREN, *The Human Right to Information and Transparency*, in A. BIANCHI, A. PETERS (eds), *Transparency in International Law*, *supra* Introduction, note 40, pp. 223-238.

<sup>4</sup> The Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has been entrusted with its first mandate by the Commission on Human Rights through Resolution 1993/45 of 5 March 1993 (adopted without a vote). The Human Rights Council extended the Special Rapporteur’s mandate of other three years with Resolution 7/36 of 28 March 2008 (adopted by a vote of 32 to none, with 15 abstentions). Finally, the Special Rapporteur’s mandate has been again extended of other three years by Human Rights Council Resolution 16/4 of 24 March 2011 (adopted without a vote).

<sup>5</sup> UN Doc. A/68/362, *supra* Chapter 1, note 87, para. 18.



Against this background, this Chapter aims at establishing whether a right of access to State-held information has indeed emerged and, in the affirmative, at examining its nature, content and limits. Furthermore, the analysis undertaken will attempt to survey under which circumstances the right of access to State-held information can be limited due to national security reasons, especially in cases in which alleged human rights violations are involved. This research will be carried out with the main purpose of shedding light over the complex balance that shall be stricken between the resort to secrecy on national security grounds, on the one hand, and the protection of human rights, on the other hand.<sup>6</sup>

## **2. The right of access to information in international law**

### **2.1. The right of access to State-held information as a fundamental human right**

#### **2.1.1. Recognition of the right of access to State-held information at the universal level**

At the universal level, the right to freedom of information was made the object of specific attention by the United Nations General Assembly already during its first session, in December 1946.<sup>7</sup> In its Resolution 59(I) of 14 December 1946, the General Assembly, while authorizing the convocation of a conference of all Member States on freedom of information, recognized that “freedom of information is a fundamental human right and is a touchstone of

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<sup>6</sup> As noted already in 1981 by Michael Supperstone in its *Brownlie's Law of Public Order and National Security*, reliance on secrecy for security reasons needs indeed to be balanced with the “legitimate demands for an informed public opinion”. See M. SUPPERSTONE, *Brownlie's Law of Public Order and National Security*, *supra* Chapter 1, note 182, p. 246.

<sup>7</sup> On the right to freedom of information in the United Nations see, *inter alia*, Z. CHAFEE, JR., *Legal Problems of Freedom of Information in the United Nations*, in *Law and Contemporary Problems*, vol. 14, 1949, pp. 545-583.

all the freedoms to which the United Nations is consecrated”.<sup>8</sup> Pursuant to the definition given by the General Assembly itself, freedom of information should be understood as the right to gather, transmit and publish news anywhere and everywhere.<sup>9</sup> Thus, originally, the term referred mainly to the free flow of information in society and across borders rather than to the more specific right to access information held by public authorities.<sup>10</sup>

The conference called by Resolution 59(I) was held in Geneva from 23 March to 21 April 1948 and led to the drafting of three international conventions.<sup>11</sup> The Draft Convention on Freedom of Information, in particular, while recognizing contracting States’ obligation to secure to all their nationals – as well as to the nationals of every other contracting State lawfully within their territory – freedom to impart and receive information, admitted restrictions for “matters which must remain secret in the interest of national safety”.<sup>12</sup> The Draft Convention, however, neither provided a definition of “national safety” nor spelled out the exact limits to such a legitimate exemption.

In 1949 the United Nations General Assembly approved a Draft Convention on the International Transmission of News and the Right of Correction, which consisted of a combination of two of the draft conventions prepared during the aforementioned conference.<sup>13</sup> An amended version of the

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<sup>8</sup> United Nations General Assembly, Resolution 59(I), 65th plenary meeting, 14 December 1946, UN Doc. A/229.

<sup>9</sup> *Ibid.*, Preamble.

<sup>10</sup> T. MENDEL, *Freedom of Information. A Comparative Legal Survey*, UNESCO, Paris, 2008, p. 8.

<sup>11</sup> Draft Convention on the Gathering and International Transmission of News; Draft Convention Concerning the Institution of an International Right of Correction; Draft Convention on Freedom of Information. See United Nations Conference on Freedom of Information, Final Act, UN Doc. E/CONF.6/79, 22 April 1948.

<sup>12</sup> *Ibid.*, p. 15. Draft Convention on Freedom of Information, Article 2. For a critique to the text of the Draft Convention see, *inter alia*, F.E. HOLMAN, *Convention on Freedom of Information: A Threat to Freedom of Speech in America*, in *American Bar Association Journal*, vol. 37, 1951, pp. 567-570.

<sup>13</sup> United Nations General Assembly, Resolution 277 C (III), 211st plenary meeting, 13 May 1949, UN Doc. A/RES/277(III) A-C.

Convention was opened to signature in 1952.<sup>14</sup> No further action was however taken by the General Assembly with respect to the Draft Convention on Freedom of Information.<sup>15</sup>

The delegates at the 1948 conference also made suggestions concerning a draft article to be included in the Universal Declaration of Human Rights. Article 19 of this instrument,<sup>16</sup> which recognises everyone's "right to seek, receive and impart information" as part of the right to freedom of opinion and expression,<sup>17</sup> much owes to the conference outcome.

Although the Declaration is non-binding in nature, it certainly exerted influence over the drafting of subsequent international agreements. Article 19(2) of the 1966 International Covenant on Civil and Political Rights,<sup>18</sup> for instance, is framed in identical terms as Article 19 of the Universal Declaration by stating that "everyone shall have the right to freedom of expression; this right shall include *freedom to seek, receive and impart information* (...)" (emphasis added). Pursuant to Article 19(3) of the Covenant, such right may be subject to certain restrictions provided by the law and necessary either for the respect of rights or reputation of others or for the protection of national security, public order, public health or morals.

The somehow ambiguous wording used in the aforesaid universal instruments well adapts to the numerous facets of the right to freedom of expression and information, which include – to use Professor Weeramantry's words – "the question of national sovereignty and the protection of sensitive

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<sup>14</sup> United Nations General Assembly, Resolution 630(VII), 403rd plenary meeting, 16 December 1952, UN Doc. A/RES/630(VII).

<sup>15</sup> E. H. LAWSON, M. L. BERTUCCI (eds), *Freedom of Information*, in *Encyclopaedia of Human Rights*, 2nd ed., Washington, 1996, p. 537.

<sup>16</sup> United Nations General Assembly, Universal Declaration of Human Rights, UN Doc. A/RES/217(III)A, 10 December 1948.

<sup>17</sup> Article 19 of the Universal Declaration of Human Rights states: "everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinion without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers".

<sup>18</sup> See *supra* Introduction, note 55. To date (24 February 2016), 168 States have ratified the Covenant.

defence and classified information”.<sup>19</sup> Indeed, as already underlined in 1991 by the United Nations Sub-Commission Special Rapporteurs, Mr. Danilo Türk and Mr. Louis Joinet, in their final report on the right to freedom of opinion and expression, the term ‘information’ has several meanings and may also be subject to various restrictions such as those relating to State or military secrets. Therefore, they further observed that:

“In view of the variety of meanings attached to the word ‘information’ considerable caution is called for when the term is used in human rights discussion. The precise meaning of the term should be defined concretely in the context of the relevant circumstances, proceeding from the principle that all types of information should be available to everyone”.<sup>20</sup>

The potential impact of the right to freedom of information on public scrutiny over the conduct of State agents well explains the reluctance of States to expressly acknowledge a right of access to State-held information. As it has been noted in academic doctrine, in fact, States’ concerns about the need to protect information necessary to retain power coming from the control of knowledge has historically led to coin the right to freedom of information as a ‘weak device’ for the disclosure of information held by public bodies.<sup>21</sup> This approach rested on the assumption that governments were allowed to disclose information only if they decided to do so.<sup>22</sup>

That notwithstanding, subsequent practice has progressively and consistently moved to an interpretation of the right to seek and receive information as including an autonomous positive right of access to information

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<sup>19</sup> See C.G. WEERAMANTRY, *Access to Information: A New Human Right. The Right to Know*, in *Asian Yearbook of International Law*, vol. 4, 1994, p. 101.

<sup>20</sup> See UN Doc. E/CN.4/Sub.2/1992/9, 14 July 1992, para. 13.

<sup>21</sup> P. KELLER, *European and International Media Law: Liberal Democracy, Trade and the New Media*, Oxford, 2011, p. 286.

held by public authorities.<sup>23</sup> This trend has been generally regarded as part of the so-called “transparency shift” taking place in the ‘90s.<sup>24</sup>

Already in 1998, the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Abid Hussain, observed that “the right to seek and receive information is not simply a converse of the right to freedom of expression but a freedom on its own”<sup>25</sup> and that the “right to access information held by the government should be the rule rather than the exception”.<sup>26</sup> He also noted that States in every region and with different governmental structures used to classify far more information than could be considered *necessary*,<sup>27</sup> to the detriment of democracy and accountability.

According to the Special Rapporteur, in the context of the right of access to information, ‘*necessity*’ should mean indeed that a serious harm to the States’ interest is unavoidable if information is disclosed, provided that the asserted harm outweighs the harm caused to the rights of expression and information.<sup>28</sup> Therefore, while restrictions to the right of access to information are admissible, the ‘unnecessary’ resort to confidentiality and secrecy would undermine the full realization of the right of access to information.

These statements have been reiterated and further elaborated in subsequent reports submitted by the Special Rapporteur on the Promotion and Protection

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<sup>22</sup> M. RIEKKINEN, M. SUKSI, *Access to Information and Documents as a Human Right*, Turku, Åbo, 2015, p. 27.

<sup>23</sup> On the topic see, *inter alia*, M. CASTELLANETA, *La libertà di stampa nel diritto internazionale ed europeo*, Bari, 2012, p. 24 ff. and C. A. BISHOP, *Access to Information as a Human Right*, El Paso, 2012. This last author has noted, however, that the conceptualization of the right of access to information as linked to the right to freedom of expression is only one of several conceptualizations being used to advance access as a human rights. Indeed, access to information as a human right would be also linked to information privacy, the right to a healthy environment and the right to the truth about serious human rights violations. These possible “conceptualizations” of the right of access to information will be partly addressed *infra (ibid., p. 5)*.

<sup>24</sup> M. RIEKKINEN, M. SUKSI, *Access to Information and Documents as a Human Right*, *supra* note 22, p. 28.

<sup>25</sup> Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, Report of the Special Rapporteur, Mr. Abid Hussain, UN Doc. E/CN.4/1998/40, 28 January 1998, para. 10.

<sup>26</sup> *Ibid.*, para. 11.

<sup>27</sup> *Ibid.*, para. 13.

<sup>28</sup> *Ibid.*

of the Right to Freedom of Opinion and Expression. In 2004, the Special Rapporteur observed that, whereas international instruments only provide for a general right to freedom of information, the right of access to information can be inferred from the expression “to seek and receive information” contained in Article 19(2) of the International Covenant on Civil and Political Rights.<sup>29</sup> This right imposes on public bodies a duty to disclose all information they hold unless prevented from a legitimate exemption.<sup>30</sup>

More recently, the Special Rapporteur reaffirmed that the right to seek and receive information – a right in and of itself – constitutes an essential element of the right to freedom of expression.<sup>31</sup> Pursuant to the Special Rapporteur’s statements, this right has several aspects, encompassing both the right of the society as a whole to have access to information of public interest and the right of individuals to request and receive information either of public interest or concerning themselves.<sup>32</sup>

The Special Rapporteur also noted that the right of access to information often acts as a vehicle to enable the exercise of other fundamental human rights.<sup>33</sup> In light of the foregoing, the Special Rapporteur observed that “a culture of secrecy is acceptable only in very exceptional cases (...)” and that “when access to information can affect the enjoyment by individuals of other rights (...), information can be withheld only in very exceptional

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<sup>29</sup> Civil and Political Rights, including the Question of Freedom of Expression, The Right to Freedom of Opinion and Expression, Report of the Special Rapporteur, Ambeyi Ligabo, UN Doc. E/CN.4/2005/64, 17 December 2004, para. 39.

<sup>30</sup> *Ibid.*

<sup>31</sup> UN Doc. A/68/362, see *supra* Chapter 1, note 87, para. 18.

<sup>32</sup> *Ibid.*, para. 19.

<sup>33</sup> *Ibid.* Academic literature has confirmed such approach. Professor Weeramantry, for instance, already in 1994, explicitly affirmed that a right to information is an ancillary right to a variety of other human rights. According to his three-tiers analysis, at the international level, the right of access to information has proved to be ancillary to the right to peace; at the domestic level, it contributes to the exercise of the right to self-government; at the individual level, finally, the full realization of any recognized fundamental right is dependent on the right of access to information. He observed indeed that: “if there is reality in human rights at any level it must necessarily follow that access to the information appropriate to the exercise of that right becomes a right in itself. To deny this would be to contradict and indeed render nugatory the basic right which is under examination”. See C.G. WEERAMANTRY, *Access to Information: A New Human Right. The Right to Know*, *supra* note 19, p. 101 ff.

circumstances, *if at all*’.<sup>34</sup>

The Special Rapporteur has therefore recognized some peculiar traits of the right of access to State-held information: its two-fold dimension as a self-standing right and as a procedural or ‘instrumental right’; its individual and societal character; its relative nature. Additionally, by envisaging a strict interpretation of allowed restrictions, the Special Rapporteur has upheld a “gradual shifting from a provider-based to a recipient-based approach”<sup>35</sup> (which translates into the presumption of the prevalence of the right of access on the secrecy of State-held information).

The Human Rights Committee, in its General Comment No. 34,<sup>36</sup> has also interpreted Article 19(2) of the International Covenant on Civil and Political Rights to encompass the right of access to information held by public bodies.<sup>37</sup> According to the Human Rights Committee, in fact, Article 19(2) of the Covenant embraces the right of access to State-held information, regardless of the form in which the information is stored, its source and the date of its production.<sup>38</sup> To give effect to this right, States are obliged to disclose information of public interest, as well as set in place procedures to ensure the individuals’ right to gain access to the same.<sup>39</sup>

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<sup>34</sup> Emphasis added. UN Doc. A/68/362, *supra* Chapter 1, note 87, para. 20.

<sup>35</sup> See again M. RIEKKINEN, M. SUKSI, *Access to Information and Documents as a Human Right*, *supra* note 22, p. 29.

<sup>36</sup> See Human Rights Committee, General Comment No. 34, UN Doc. CCPR/C/GC/34 of 12 September 2011. For a comment see, *inter alia*, M. O’FLAHERTY, *Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committee’s General Comment No. 34*, in *Human Rights Law Review*, vol. 12, 2012, pp. 627-654 and A. ZAYAS, M. AUREA, *Freedom of Opinion and Freedom of Expression: Some Reflections on General Comment No. 34 of the UN Human Rights Committee*, in *Netherland International Law Review*, vol. 59, 2012, pp. 425-454.

<sup>37</sup> The fact that such a recognition represents a recent evolution is made evident by the fact that the Human Rights Committee did not address the right of access to State-held information in its 1983 General Comment No. 10 on Article 19 of the International Covenant on Civil and Political Rights. See Human Rights Committee, *General Comment No. 10*, UN Doc. HRI/GEN/1/Rev. 1 of 28 July 1983.

<sup>38</sup> *Ibid.*, para. 18.

<sup>39</sup> *Ibid.*, para. 19. In light of the Human Rights Committee’s observations, it seems that the views of those who argue that Article 19(2) does not impose an obligation to provide information or a right to obtain it is now to reject. In this regard, see, *e.g.*, A. MASON, *The Relationship between Freedom of Expression and Freedom of Information*, in BEATSON, Y.

Notably, the Human Rights Committee also provided a definition of ‘public bodies’ as “all branches of the State (executive, legislative and judicial) and other public or governmental authorities, at whatever level – national, regional or local – [which] are in a position to engage the responsibility of the State party”.<sup>40</sup> Furthermore, the Committee expressly highlighted the ‘proactive’ dimension of the right of access, which therefore imposes on States parties not only to abide by access requests (passive dimension), but also to put in the public domain information of public interest.<sup>41</sup>

Like the UN Special Rapporteur on the Freedom of Opinion and Expression, also the Human Rights Committee upheld a restrictive ‘attitude’ towards admissible restrictions. The Committee, in particular, relied on its general approach to limitation clauses to conclude that, even with respect to Article 19(3) of the International Covenant on Civil and Political Rights: limitations cannot jeopardize the right itself, they must be “provided by law”, comply with a necessity and proportionality test and be based only on one of the grounds expressly mentioned in Article 19(3).<sup>42</sup>

Finally, it is worth mentioning that, at the universal level, the right to access to State-held information has been recognized also through several non-binding instruments. Just to make an example, the 2000 United Nations Millennium Declaration expressly refers to the “right of the public to have access to information”, thus explicitly hinting to the ‘societal dimension’ of this right.<sup>43</sup> More recently, the 2010 UNESCO Declaration on Freedom of Information explicitly called upon States to enact domestic legislation in

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CRIPPS (eds), *Freedom of Expression and Freedom of Information. Essays in Honour of Sir David Williams*, *supra* note 4), p. 227 (who, however, does not exclude that the emergence of a modern information society may lead to the implication in Article 19 of an obligation to make available information not otherwise accessible).

<sup>40</sup> See again UN Doc. CCPR/C/GC/34, *supra* note 36, para. 7.

<sup>41</sup> *Ibid.*, para. 19.

<sup>42</sup> *Ibid.*, paras. 21-22.

<sup>43</sup> See United Nations Millennium Declaration, adopted by General Assembly’s Resolution No. 55/2, UN Doc. A/RES/55/2 of 18 September 2000, para. 24.



abundance by the principle of maximum disclosure of information.<sup>44</sup>

While these instruments do not exert any legally binding force *per se*, they may nonetheless be considered as evidence of the increasing ‘acknowledgment’ that the right of access to State-held information has had at the universal level, contextually providing useful guidelines for the ascertainment of its content.

### **2.1.2. Recognition of the right of access to State-held information at the regional level**

The wording characterizing the recognition of the right to freedom of information in universal instruments has been transposed also at the regional level. Like the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, also Article 13(1) of the American Convention on Human Rights<sup>45</sup> indeed recognizes that everyone has the right to freedom of thought and expression, including the right to seek, receive and impart information and ideas of all kinds, regardless of frontiers. Furthermore, in the same way as the International Covenant on Civil and Political Rights does, Article 13(2) expressly provides for legitimate restrictions to this right, as long as they are established by law and prove necessary to ensure the respect of the rights and reputation of others, or the protection of national security, public order, public health and morals.

Similarly, Article 32(1) of the Arab Charter on Human Rights<sup>46</sup> guarantees the “right to information and to freedom of opinion and expression, as well as the right to seek, receive and impart information and ideas through any medium, regardless of geographical boundaries”. Article 32(2) of the same

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<sup>44</sup> See UNESCO Brisbane Declaration on Freedom of Information: The Right to Know, adopted on 3 May 2010.

<sup>45</sup> Adopted at the Inter-American Specialized Conference on Human Rights, in San José, on 22 November 1969, entered into force on 18 July 1978, OAS Treaty Series No. 36. To date (24 February 2016) 25 States are parties to it.

instrument, moreover, envisages possible restrictions to such right when required either by the need for respecting the rights or reputation of others or by the protection of national security, public order, public health or morals.

The ASEAN Human Rights Declaration, although non-binding, also envisages the right of every person to seek, receive and impart information.<sup>47</sup>

A slightly different phrasing is instead embodied in Article 10 of the European Convention on Human Rights, which provides that: “everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interferences by public authorities and without frontiers (...)”.

In addition, according to this provision, the exercise of this right may be subject to those restrictions prescribed by law that are necessary in a democratic society. The list of the possible legitimate aims allowing limitations is however broader than in other human rights instruments. The European Convention on Human Rights, in fact, expressly enlists national security, territorial integrity, public safety, the prevention of disorder or crime, the protection of public health, morals, the reputation or rights of others, the protection of those information received in confidence and the maintenance of the authority and impartiality of the judiciary as possible grounds for allowing restrictions.<sup>48</sup> As it appears from the *travaux préparatoires* of the Convention, the broad reach of admissible restrictions may be partly ascribed to the United Kingdom’s proposals to modify the original content of the provision,

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<sup>46</sup> Adopted by the Council of the League of Arab States in Tunis on 22 May 2004 and entered into force on 15 March 2008.

<sup>47</sup> Adopted by the Heads of State and Government of the Member States of the Association of Southeast Asian Nations (ASEAN) in Phnom Penh on 18 November 2012, para. 23. Notably, the Declaration contains a general limitation clause, pursuant to which “The exercise of human rights and fundamental freedoms shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition for the human rights and fundamental freedoms of others, and to meet the just requirements of *national security*, public order, public health, public safety, public morality, as well as the general welfare of the peoples in a democratic society” (*ibid.*, para. 8; emphasis added).

<sup>48</sup> For a general overview on the content of Article 10 of the European Convention on Human Rights see, *inter alia*, C. BRANTS, *The Free Flow of Information. A Sovereign Concept in and*

corresponding to Article 19 of the International Covenant on Civil and Political Rights.<sup>49</sup> However, no indication emerges as to the exact meaning to be attributed to any of these possible exceptions.

Article 9(1) of the African Charter on Human and Peoples' Rights<sup>50</sup> also states that: "Every individual shall have the right to receive information". Differently from other human rights treaties, however, the Charter does not contain any express limitation clause.

Compared to other international and regional instruments, the European Convention on Human Rights and the African Charter on Human and Peoples' Rights adopt a more limited definition of freedom of expression by omitting the word "seek". As it will be shown below, however, the lack of a uniform definition has not impeded (eventually) an interpretation of the content of the right in similar – not to say identical – terms.

Apart from the above-reported provisions, the existence of an autonomous right of access to information has been widely 'acknowledged' also in soft-law instruments. The Organisation of American States, for instance, adopted in 2000 a Declaration of Principles on Freedom of Expression, pursuant to which "access to information held by the State is a fundamental right of every individual" and "States have the obligation to guarantee the full exercise of this right".<sup>51</sup>

In 2008, the Inter-American Juridical Committee of the Organisation of American States also published a set of guidelines on the right of access to

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*of itself*, in I. BOEREFIJN, J. GOLDSCHMIDT (eds), *Changing Perceptions of Sovereignty and Human Rights: Essays in Honour of Cees Flinterman*, Antwerp, 2008, pp. 395-416.

<sup>49</sup> Council of Europe, European Commission of Human Rights, Preparatory Work on Article 10 of the European Convention on Human Rights, Doc. DH (56) 15 of 17 August 1956, para. 13.

<sup>50</sup> Adopted in Nairobi on 27 June 1981, entered into force on 21 October 1986. To date (24 February 2016) 53 States have ratified it.

<sup>51</sup> Declaration of Principles on Freedom of Expression, Principle 4. The Declaration was approved by the Inter-American Commission on Human Rights during its 108th regular session. The existence of an autonomous right to freedom of expression has found recognition also in several resolutions by the General Assembly of the Organization of American States. See, for instance, docs. AG/RES. 1932 (XXXIII-O/03), 10 June 2003; AG/RES. 2057

information.<sup>52</sup> The Guidelines stress that access to information constitutes a fundamental human right enabling every individual to obtain information held by public authorities subject only to a limited regime of exceptions, which, in any case, should be proportionate to the interest that justifies them.<sup>53</sup>

Both these documents are grounded and built upon Article 13 of the American Convention on Human Rights, based on the assumption that access to information held by public bodies enhances democracy, accountability and the full realization of other rights, such as, first of all, the right to freedom of expression.

The Inter-American Commission on Human Rights' Special Rapporteur for Freedom of Expression (hereinafter, also 'Inter-American Special Rapporteur') also repeatedly stated that, under the Inter-American system, the right of access to information is a fundamental human right protected under Article 13 of the American Convention on Human Rights. As such, this provision imposes on States a positive obligation to allow access to information under their control.<sup>54</sup>

In 2002, the African Commission on Human and Peoples' Rights has also adopted a Declaration of Principles on Freedom of Expression in Africa.<sup>55</sup> Article IV(1) of the Declaration, titled "Freedom of Information", which openly refers to Article 9 of the African Charter on Human and Peoples' Rights,<sup>56</sup> states that public authorities hold information as "custodians of the public good". This implies that everyone has the right of access to information

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(XXXIV-O/04), 8 June 2004; AG/RES. 2121 (XXXV-O/05), 26 May 2005; AG/RES. 2252 (XXXVI-O/06), 6 June 2006.

<sup>52</sup> The Inter-American Juridical Committee, Principles on the Right of Access to Information, Doc. CJI/RES.147 (LXXIII-O/08), 7 August 2008.

<sup>53</sup> *Ibid.*, Principle 1.

<sup>54</sup> See, e.g., Inter-American Special Rapporteur for Freedom of Expression, *Annual Report 2003*, chapter IV, *Report on the Access to Information in the Hemisphere*, para. B.1.12; *The Right to Access to Information in the Inter-American Legal Framework*, Doc. OEA/Ser. L/V/II, 30 December 2003, para. A.1. For a general overview see S. A. CANTON, *The Role of the OAS Special Rapporteur for Freedom of Expression in Promoting Democracy in the Americas*, in *University of Miami Law Review*, vol. 56, 2001, p. 307 ff.

<sup>55</sup> African Commission on Human and Peoples' Rights, Declaration of Principles on Freedom of Expression in Africa, adopted during its 32nd session, held in Banjul, 17-23 October 2002.

held by public bodies, subject only to clearly defined restrictions established by law.

Ancillary to the recognition of the right of access to information, Article IV(2) of the Declaration invites States to amend national secrecy laws in a way to comply with freedom of information principles. Even without considering further the issue related to the admissible restrictions to the right of access to information – which will be the object of specific analysis *infra* – it is worth noting that this provision makes clear that public authorities’ resort to secrecy and confidentiality cannot be any longer considered separately from those international norms upholding the right of access to information.

In 2007, the African Commission on Human and Peoples’ Rights also expanded the mandate of the Special Rapporteur on Freedom of Expression in Africa<sup>57</sup> to include the monitoring of States’ compliance to access to information standards. Accordingly, the Special Rapporteur has been renamed ‘Special Rapporteur on Freedom of Expression and *Access to Information in Africa*’.<sup>58</sup> The Special Rapporteur has repeatedly called on States parties to carry out comprehensive reforms to guarantee the access to information and ensure both legal and practical compliance of national laws with regional and international standards.<sup>59</sup>

The Organization of American States and the African Commission on Human and Peoples’ Rights have also recently adopted model laws on access to information.<sup>60</sup> Both documents invite States to recognize and give effect to

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<sup>56</sup> *Ibid.*, Preamble.

<sup>57</sup> The Special Rapporteur was created in 2004. See African Commission on Human and Peoples’ Rights, Resolution on the Mandate and Appointment of a Special Rapporteur on Freedom of Expression in Africa, 7 December 2004, Doc. ACHPR/Res. 71 (XXXVI).

<sup>58</sup> Emphasis added. African Commission on Human and Peoples’ Rights, Resolution on the Expansion of the Mandate and Re-appointment of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, 28 November 2007, Doc. ACHPR/Res. 122 (XXXXII).

<sup>59</sup> See, *e.g.*, recently, Activity Report of the Special Rapporteur on Freedom of Expression and Access to Information in Africa, presented during the 55th ordinary session of the African Commission on Human and Peoples’ Rights (28 April-12 May 2014), para. 46.

<sup>60</sup> See Organization of American States, Secretariat for Legal Affairs, Department of International Law, Model Inter-American Law on Access to Public Information and its

the right of access to information held by public authorities and to provide only for limited restrictions to the enjoyment of this right when exceptional circumstances make it unavoidable.<sup>61</sup> The ‘African Model Law’ also clarifies that information cannot be exempted from access, as envisaged in the Model Law itself, merely on the basis of its classification *status*.<sup>62</sup> Thus, classification of information at the national level cannot prevent *tout court* the application of those international principles that impose on public authorities to withhold information from disclosure only in exceptional circumstances and for legitimate interests whose protection is embodied in clearly defined norms.

It is further worth mentioning that, at the European level, the Committee of Ministers of the Council of Europe adopted on 27 November 2008 a Convention on Access to Official Documents, whose Preamble, after recalling, *inter alia*, Article 10 of the European Convention on Human Rights, states that “official documents are in principle public and can be withheld subject only to the protection of other rights and legitimate interests”.<sup>63</sup> Pursuant to the Convention text, “official documents” are all information recorded in any form, drawn up, received or held by public authorities.<sup>64</sup> Each contracting State should guarantee access to documents held by public authorities and could refuse disclosure only in limited cases, provided that restrictions appear necessary in a democratic society and proportionate to the aim of protecting legitimate States’ interests, first and foremost, national security.<sup>65</sup>

To date, however, the Convention remains largely unsigned<sup>66</sup> and, consequently, it has not yet entered into force. That notwithstanding – as it has been correctly observed – the Convention’s very existence represents an

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Implementation Guidelines, 2012. See also Model Law on Access to Information for Africa, adopted by the African Commission on Human and Peoples’ Rights during its extraordinary session held in Banjul on 23-24 February 2013.

<sup>61</sup> Model Inter-American Law, p. 13; Model Law on Access to Information for Africa, p. 17.

<sup>62</sup> Model Law on Access to Information for Africa, p. 34.

<sup>63</sup> Council of Europe Convention on Access to Official Documents, adopted by the Committee of Ministers on 27 November 2008, during its 1042nd meeting (ETS No. 205).

<sup>64</sup> *Ibid.*, Article 1.2(b).

<sup>65</sup> *Ibid.*, Article 3.1(a).

<sup>66</sup> To date (24 February 2016) only seven States have ratified this Convention.

important progress for the recognition of the right of access to information in international law.<sup>67</sup>

Along the same line, it is nonetheless noteworthy that, through Resolution 1954 (2013) on *National security and access to information*, the Parliamentary Assembly of the Council of Europe has recently recalled the importance of the principle of transparency, including access to information held by public bodies.<sup>68</sup> Resolution 1954 (2013) also focuses on important aspects of the right of access to information, which have not found recognition in the conventional text. Whereas Article 3 of the Convention provides for a broad list of generally formulated ‘exemptions’ to the contracting States’ duty to provide general access to information, Resolution 1954 (2013), conversely, aims at clearly delimiting States’ discretion. In particular, as better examined *infra*, the Resolution provides a sort of ‘exception to the exception’, pursuant to which access to information should be granted also in cases normally included among legitimate exceptions where the public interest in its disclosure overrides the authorities’ interest in keeping it secret. This includes those cases in which information to be disclosed concerns human rights violations.<sup>69</sup>

As already stressed, by Resolution 1954 (2013) the Parliamentary

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<sup>67</sup> Council of Europe, Parliamentary Assembly, *National security and access to information*, Doc. 13293, 3 September 2013, Explanatory Memorandum by Rapporteur Mr. Díaz Tejera, para. 19. Some commentators have even observed that, despite the general criticism raised by non-governmental organizations, the Convention constitutes “a breakthrough regarding the status of freedom of information in international law”. See again R. PALED, Y. RABIN, *The Constitutional Right to Information*, *supra* note 2, p. 389. On the topic see also F. EDEL, *La convention du conseil de l'Europe sur l'accès aux documents publics: premier traité consacrant un droit général d'accès aux documents administratifs*, in *Revue française d'administration publique*, 2011, pp. 59-78.

<sup>68</sup> Council of Europe, Parliamentary Assembly, Resolution 1954 (2013), *supra* Chapter 1, note 88. It is noteworthy that, already in 1970, the Parliamentary Assembly of the Council of Europe recommended the Committee of Experts on Human Rights to consider and make recommendations on “the extension of the right of freedom of information provided for in Article 10 of the European Convention on Human Rights, by the conclusion of a protocol or otherwise, so as to include freedom to seek information (...); there should be a corresponding duty on public authorities to make information available on matters of public interest (...)”. See Council of Europe, Parliamentary Assembly, Resolution 582 (1970) *on mass communication media and human rights*, adopted on 23 January 1970, para. 8(i). See also, *inter alia*, Council of Europe, Parliamentary Assembly, Resolution 854 (1979) *on access by the public to governmental records and freedom of information*, adopted on 1<sup>st</sup> February 1979.

Assembly also welcomed the so-called ‘Tshwane Principles’, issued on 12 June 2013 by several non-governmental organizations and academic institutions. These Principles, which are based on international and national law, and good practice standards,<sup>70</sup> while attempting to strike an attainable balance between national security interests and the full realization of the right of access to information held by public authorities, assume as their fundamental premise that access to State-held information is a right of every person, which should be protected by laws drafted with precision and with narrowly drawn exceptions.<sup>71</sup>

These Principles represent the most recent effort by non-governmental organizations and international law experts to codify ‘best practices’ in the field of the right of access to information.

Already in 1995, for instance, a group of international law experts and NGOs adopted the Johannesburg Principles on National Security, Freedom of Expression and Access to information.<sup>72</sup> The Johannesburg Principles attempted to transpose into a set of guidelines international and regional laws and standards related to the protection of human rights, as well as evolving State practice (which will be the object of in-depth analysis *infra*).<sup>73</sup>

Importantly, Principle 11 of the Johannesburg Principles recognises that everyone has the right to obtain information from public authorities, including information relating to national security, unless the government can prove that the restriction is provided by law and is necessary in a democratic society to protect a legitimate national security interest.

Although several of the documents examined in the present section mainly

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<sup>69</sup> *Ibid.*, para. 9.5.

<sup>70</sup> See again *supra* Chapter 1, at 3.1, Introduction.

<sup>71</sup> *Ibid.*, Preamble.

<sup>72</sup> The Johannesburg Principles on National Security, Freedom of Expression and Access to Information, adopted in London on 1 October 1995. For a commentary of the Principles see S. COLIVER, *Commentary on the Johannesburg Principles*, in S. COLIVER, P. HOFFMAN, J. FITZPATRICK, S. BOWEN (eds), *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information*, The Hague, 1999, pp. 11-81.

<sup>73</sup> *Ibid.*, Introduction.



lack binding legal force in themselves, they certainly serve as interpretative tools for those treaty provisions to which they expressly refer, setting international standards from which national legislation should draw on.

### **2.1.3. The right of access to State-held information with respect to specific issues**

For the sake of argument, it is worth mentioning that the right of access to information has been further recognized and developed in international instruments dealing with specific issues,<sup>74</sup> such as the protection of the environment and the fight against corruption.

The 2003 United Convention against Corruption, for instance, has expressly upheld the importance of the right of access to information as an anti-corruption tool.<sup>75</sup> Article 10 of this Convention requires States parties to adopt procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration, as well as on decisions and legal acts concerning members of the public. In addition, Article 13 imposes on contracting States the positive obligation to take appropriate measures to promote public participation in the fight against corruption and, to this end, ensure that the public has effective access to information.<sup>76</sup>

At the regional level, Article 9 of the 2003 African Union's Convention on Preventing and Combating Corruption<sup>77</sup> also requires contracting States to adopt such legislative and other measures to give effect to the right of access

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<sup>74</sup> Accordingly, some commentators have even proposed different conceptualizations of the right of access to information. See, *inter alia*, C. A. BISHOP, *Access to Information as a Human Right*, *supra* note 23, p. 8.

<sup>75</sup> The Convention against Corruption was adopted in New York by the United Nations General Assembly by Resolution 54/8 of 31 October 2003, 2349 UNTS 41. It entered into force on 14 December 2005. To date (24 February 2016), 172 States have ratified it.

<sup>76</sup> *Ibid.*, Article 13.1(b).

<sup>77</sup> Adopted in Maputo on 11 July 2003 and entered into force on 8 May 2006. To date (24 February 2016), 34 States have ratified it.

to information relevant to assist in the fight against corruption and related offences.

In the environmental field, the right of access to information has been recognized as an important element of sustainable development since the adoption of the 1992 Rio Declaration on Environment and Development,<sup>78</sup> whose Article 10 expressly states: “(...) at the national level, each individual shall have appropriate access to information concerning the environment which is held by public authorities, including information on hazardous materials and activities in their community and the opportunity to participate in decision-making processes (...)”.<sup>79</sup>

Since then, several multilateral environmental treaties have expressly included obligations of States parties to grant the public access to State-held information on environmental matters.<sup>80</sup> It is noteworthy, however, that

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<sup>78</sup> UN Doc. A/CONF. 151/26 of 12 August 1992.

<sup>79</sup> See also Agenda 21, para. 23.2, which provides that “(...) individuals, groups and organizations should have access to information relevant to the environment and development held by national authorities, that have or are likely to have a significant impact on the environment and information on environmental protection measures”.

<sup>80</sup> See, e.g., Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), Article 9 (opened for signature in Paris on 22 September 1992; entered into force on 25 March 1998, 2354 UNTS 67); Convention on the Transboundary Effects of Industrial Accidents, Article 9.1 (opened for signature in Helsinki on 17 March 1992 and entered into force on 19 April 2000, 2105 UNTS 457); Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Article 15(2) (opened for signature in Rotterdam on 10 September 1998, entered into force on 24 February 2004, 2244 UNTS 337); Convention on Persistent Organic Pollutants, Article 10.1(b) (opened for signature in Stockholm on 22 May 2001, entered into force on 17 May 2004, 2256 UNTS 119); Cartagena Protocol on Biosafety to the Convention on Biological Diversity, para. 23.1(b) (adopted on 29 January 2000 and entered into force on 11 September 2003, 2266 UNTS 208). At the regional level, the right of access to environmental information constitutes, in particular, one of the three ‘pillars’ on which the Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters (‘Aarhus Convention’) is built on. This Convention was adopted by the United Nations Economic Commission for Europe and opened for signature on 25 June 1998 and entered into force on 30 October 2001, 2161 UNTS 447. Although the Aarhus Convention is a regional instrument, it is opened to participation of all countries. This Convention is generally regarded as the most far-reaching international treaty with minimum standards for access to information on environmental matters. See J. EBBESSON, *Access to Information on Environmental Matters*, in R. WOLFRUM (ed.), *Max Planck Encyclopaedia of Public International Law*, 2008, electronic edition, available at: [www.mpepil.com](http://www.mpepil.com) (last accessed on 24 February 2016). For an overview on the Aarhus Convention see, *inter alia*, S. STEC, S. CASEY-LEFKOWITZ, *The Aarhus Convention: An Implementation Guide*, New York,

environmental treaties often provide for a ‘limitation clause’ with respect to the States’ duty to ensure the right of access to environmental information. For instance, the OSPAR Convention expressly allows States parties to refuse disclosure when it would affect, *inter alia*, international relations, national defence or public security (Article 9(3)). An identical provision is included in Article 4.4 of the Aarhus Convention.

The aforementioned trend towards the recognition of a right of access to information concerning environmental matters has been paired by the development of environmental procedural rights in human rights law, where the right of access to information related to the environment has mainly been inferred from the right to life, privacy or property.<sup>81</sup>

Accordingly, as Sands and Peel observe, “the duty to provide – and the right to obtain – access to information on the environment (...) is now firmly entrenched in international law”.<sup>82</sup>

Since it would go much beyond the scope of the present analysis to further expand upon the content, nature, and limitations<sup>83</sup> of these specific articulations of the right of access to State-held information, it suffices here to acknowledge that, generally speaking and as underlined by the Inter-American Court of Human Rights, similar provisions further support the existence of a

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2000; M. PALLEMAERTS (ed.), *The Aarhus Convention at Ten: Interactions and Tensions between Convention International Law and EU Environmental Law*, Groningen, 2011; C. PITEA, *Diritto internazionale e democrazia ambientale*, Parma, 2013.

<sup>81</sup> See again J. EBBESSON, *Access to Information on Environmental Matters*, *supra* note 80, para. 27. See, *inter alia*, European Court of Human Rights, *Guerra et al. v. Italy*, App. Nos. 116/1996, 735/1996, 932/1996, judgment of 19 February 1998, para. 60; *Taşkin et al. v. Turkey*, App. No. 46117/99, judgment of 10 November 2004, para. 119; *Tătar v. Romania*, App. No. 67021/01, judgment of 27 January 2009, para. 113; African Commission on Human and Peoples’ Rights, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication No. 155/96, decision of 27 October 2001, para. 53.

<sup>82</sup> P. SANDS, J. PEEL (with A. FABRA, R. MACKENZIE), *Principles of International Environmental Law*, 3rd ed., Cambridge, 2012, p. 648. See also, *inter alia*, S. KRAVCHENKO, *Is Access to Environmental Information a Fundamental Human Right?*, in *Oregon Review of International Law*, vol. 11, 2009, pp. 227-265.

<sup>83</sup> On the possible conflicts between the right of access to environmental information and secrecy at the domestic level see also, *inter alia*, L. R. HOURCLÉ, *Military Secrecy and Environmental Compliance*, in *New York University Environmental Law Journal*, vol. 2, 1993, pp. 316-346.

right of access to information held by public authorities.<sup>84</sup>

Moreover, the specific instruments that have been recalled in the present section allow (by means of a ‘combined reading’ with previous findings) reiterating some important features of this right. First of all, the right of access to State-held information has been generally upheld not only as a self-standing right, but also as ‘instrumental right’ vital to the protection and realization of other fundamental rights (the right of access to information related to environmental matters is indeed illustrative in this respect). Secondly, the right of access to State-held information has been generally framed and understood as admitting certain limitations. Whereas different instruments provide for distinct catalogues of possible ‘restrictions’, there are certain recurring grounds that may be detected (*i.e.*, national security).

Even in light of the abovementioned evolutions, less clear is whether the right of access to information shares both an individual and societal dimensions and whether and to what extent the specific public interest character of the ‘critical values’ that disclosure may protect under specific circumstances (*i.e.*, environment, human rights) play a role in the balancing exercise with other public interests claims.<sup>85</sup> As it has emerged from the above and to a larger extent it will be demonstrated *infra*, international practice – despite clearly pending towards affirmative answers in both instances – is not well-consolidated in this respect, making these subjects in need of further clarification.

## **2.2. Case law of human rights monitoring bodies**

The analysis of the case law of human rights monitoring bodies mainly

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<sup>84</sup> Inter-American Court of Human Rights, *Claude Reyes et al. v. Chile*, judgment of 19 September 2006, Series C No. 151, para. 81.

<sup>85</sup> On the notion of ‘public interest’ and its relevance with respect to the right of access to State-held information see, *inter alia*, G. MAKAUSKAITĖ, *Public Interest in the Context of the Right to Access Official Information*, in *Baltic Yearbook of International Law*, vol. 11, 2011, pp. 281-306.

confirms the trend towards the progressive recognition of the right of access to State-held information that has been highlighted in the previous sections.

In its views concerning the already mentioned *Toktakunov v. Kyrgyzstan* case,<sup>86</sup> for instance, the Human Rights Committee affirmed that the right to freedom of thought and expression, enshrined in Article 19 of the International Covenant on Civil and Political Rights, includes the protection of the right of access to State-held information, which embraces both an individual and a social dimension. Contracting States are bound to either provide the requested information or justify any restrictions of the right to receive it. In this last case, however, the legitimacy of refusal has to be tested against the Covenant itself.<sup>87</sup> In addition, given the social dimension of the right, information should be provided without any need to prove a direct interest or personal involvement in order to obtain it.<sup>88</sup>

In this last regard, the Committee clearly departed from its previous findings. In an identical case, which had been brought to its attention two years earlier, the Committee excluded a breach of Article 19 of the Covenant based on the fact that the claimant, a human rights activist, had not proved why he personally needed the requested information.<sup>89</sup> The Committee found that, although the author alleged a general public interest in the disclosure of

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<sup>86</sup> See UN Doc. CCPR/C/101/D/1470/2006, *supra* Chapter 1, note 442.

<sup>87</sup> *Ibid.*, para. 7.4. Whilst the Human Rights Committee had previously underlined the importance to enact freedom of information laws at the national level (see, for instance, *Concluding observations on Azerbaijan*, UN Doc. CCPR/C/79/Add. 38, 3rd August 1994, para. 18; *Concluding observations on Ukraine*, UN Doc. CCPR/C/79/Add. 52 of 26 July 1995, para. 7, where, nevertheless, the Committee expressed its concerns about those legal provisions which allow for the rejection of passport application by holders of State secrets, *ibid.*, para. 16), the Committee has for the first time clearly recognized that the right of access to information is covered by Article 19 of the International Covenant on Civil and Political Rights in its views concerning the *Toktakunov v. Kyrgyzstan* case (see *supra* Chapter 1, note 442).

<sup>88</sup> *Ibid.*

<sup>89</sup> Human Rights Committee, *S.B. v. Kyrgyzstan*, Communication No. 1877/2009, decision on admissibility, UN Doc. CCPR/C/96/D/1877/2009 of 30 July 2009, para. 4.2. For a commentary to this case see, *inter alia*, M. MCDONAGH, *The Right to Information in International Human Rights Law*, in *Human Rights Law Review*, vol. 13, 2013, p. 31 ff.

information related to the number of death sentences executed in Kyrgyzstan, the complaint constituted an *actio popularis* and was therefore inadmissible.<sup>90</sup>

More recently, in its 2013 views concerning the *Castañeda v. Mexico* case, the Committee reiterated that the right of freedom of expression embodied in Article 19 of the International Covenant on Civil and Political Rights encompasses the right of access to State-held information and, accordingly, States parties are under the obligation to make every effort to ensure “easy, prompt, effective and practical access” to information, unless there is ground for a legitimate restriction.<sup>91</sup>

At the regional level, in its 2006 landmark decision in the *Claude Reyes et al. v. Chile* case, the Inter-American Court of Human Rights, *inter alia*, ruled that, by expressly protecting the right to “seek” and “receive” information, Article 13 of the American Convention on Human Rights stipulates the right of all individuals to request access to State-held information, with the only exception of those legitimate restrictions permitted by the Convention itself.<sup>92</sup> According to the Court, the aforementioned provision protects the right of the individual to receive such information and binds the State to provide it or justify its refusal.<sup>93</sup> In addition, the individual requesting State-held information is exempted from proving any direct or personal interest in disclosure.<sup>94</sup> Indeed, like the Human Rights Committee observed in the

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<sup>90</sup> *Ibid.*

<sup>91</sup> Human Rights Committee, *Castañeda v. Mexico*, Communication No. 2202/2012, UN Doc. CCPR/C/108/D/2202/2012 of 29 August 2013, para. 7.4.

<sup>92</sup> Inter-American Court of Human Rights, *Claude Reyes et al. v. Chile*, *supra* note 84, para. 77. For an analysis of the case see, among others, M. BEUKES, *The Recognition of a Right of Access to Government-Held Information by an International Tribunal and the Role of Non-Governmental Organizations in the Occasion: Foreign Judicial Decisions*, in *South African Yearbook of International Law*, vol. 31, 2006, pp. 273-286; S. J. PIOTROWSKI (ed.), *Transparency and Secrecy. A Reader Linking Literature and Contemporary Debate*, Plymouth, 2010, p. 9 ff; J. SCHÖNSTEINER, A. BELTRÁN Y PUGA, D. A. LOVERA, *Reflections on the Human Rights Challenges of Consolidated Democracies: Recent Developments in the Inter-American System of Human Rights*, in *Human Rights Law Review*, vol. 11, 2011, pp. 378-379; L. C. CHAVEZ, *The Claude-Reyes Case of the Inter-American Court of Human Rights – Strengthening Chilean Democracy?*, in *Nordic Journal of Human Rights*, vol. 31, 2013, pp. 513-531.

<sup>93</sup> *Ibid.*

<sup>94</sup> *Ibid.*

*Toktakunov v. Kyrgyzstan* case, the Inter-American Court of Human Rights recognized the two dimensions of the right of access to information, individual and societal, that States are compelled to grant simultaneously.<sup>95</sup>

The claim brought before the Court concerned the alleged refusal by the Chilean Committee on Foreign Investment to disclose commercial information about the company appointed to carry out a deforestation project (known as ‘Rio Cóndor’) in the XII Chilean region. The claimants, three environmental activists, asserted that such information was necessary to undertake monitoring activity on the environmental impact of the exploitation project in the region and assess its possible consequences on indigenous forests. The Court observed that the Chilean government had not been able to prove any legitimate interest which, based on Article 13 of the American Convention on Human Rights, could justify its failure to provide the requested information. It consequently found that the Chilean State had violated the claimants’ right of access to information as enshrined in Article 13 of the Convention.<sup>96</sup>

The Inter-American Court has reiterated this approach also in its subsequent case law. In its 2010 judgment in the *Gomes Lund et al. v. Brazil* case, the Court reaffirmed that Article 13 of the American Convention on Human Rights protects every person’s right to request access to information under State control and the States parties may limit access to it only in specific cases and under one of the reasons allowed by the Convention itself.<sup>97</sup> According to the Court, in a democratic society, it is indispensable that public bodies be governed by a principle of ‘maximum disclosure’, subject only to a restricted system of exceptions.<sup>98</sup> In light of the foregoing, the Court found that a State cannot seek protection by arguing the lack of existence of the requested documents; to the contrary, Article 13 of the American Convention binds the State to establish the reason for denying disclosure, demonstrating

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<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*, para. 99.

<sup>97</sup> Inter-American Court of Human Rights, *Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, judgment of 24 November 2010, Series C No. 219, para. 197.

that “it has adopted all the measures under its power to prove that, in effect, the information sought does not exist”.<sup>99</sup> In this respect, the Court further observed that to argue the lack of evidence of the existence of certain documents, without explaining which procedures have been adopted to confirm the non-existence of the relevant information, allows States to exert discretion in providing said information, thus undermining legal certainty and hindering the full realization of the right of access to information.<sup>100</sup> By means of this reasoning, the Court inferred from Article 13 of the American Convention on Human Rights a general duty for the State to act in good faith and diligently when facing a request for disclosure.<sup>101</sup> The relevance of this statement becomes evident if considering that – as partly demonstrated in the previous Chapter – national laws (if in place) often do not provide for any oversight mechanisms over classification procedures and, in any case, even when they do so, this does not always prevent abuses.

With reference to the Inter-American Court of Human Rights’ case law, it is noteworthy, however, that in a more recent case in which the claimants alleged a violation of the right of access to information based on the Ministry of Defence’s refusal to provide information about the enforced disappearance and death of their next of kin the Court considered not incumbent on it to make an independent analysis grounded on Article 13 of the American Convention on Human Rights. The Court observed that, unlike in previous cases, the alleged violation did not relate to a specific request presented by the victims but concerns the refusal to provide information to judicial and extrajudicial bodies entrusted with the task of clarifying what happened to the claimants’ next of kin. The Court found that the Ministry of Defence’s refusal to provide said information had certainly hindered the investigations and, accordingly, considered it in the context of the alleged violation of the State’s

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<sup>98</sup> *Ibid.*, para. 199.

<sup>99</sup> *Ibid.*, para. 210.

<sup>100</sup> *Ibid.*, para. 211.

<sup>101</sup> *Ibid.*, para. 210.



duty to undertake prompt and effective investigation into human rights violations, stemming from Articles 8(1) and 25(1) of the American Convention on Human Rights.<sup>102</sup>

Contrary to its Inter-American counterpart, the European Court of Human Rights has proved more reluctant in inferring from the right to freedom of expression embodied in Article 10 of the European Convention on Human Rights a State's positive obligation to provide access to information.<sup>103</sup> As noted by an eminent legal author, indeed, the lack of the word "seek" in Article 10 of the European Convention on Human Rights gives rise to two possible interpretations of this provision: a textual interpretation based on the Convention *travaux préparatoires*, which leads to exclude that such a right is enshrined in Article 10, and a more 'permissive' approach, grounded on the principle of effectiveness, pursuant to which the right of access to information is included in Article 10.<sup>104</sup> The European Court of Human Rights' tortuous case law on the right of access to information has developed between these two opposite views. In its 1987 judgment in the *Leander v. Sweden* case, for instance, the Court found that Article 10 of the European Convention on Human Rights does not confer on the individual a right of access to a register containing information on his personal position (such as secret police files), nor does it embody an obligation for the government to impart such information to the individual.<sup>105</sup> In a more recent judgment issued in 2003, the

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<sup>102</sup> See Inter-American Court of Human Rights, *Gudiel Álvarez et al. ('Diario Militar') v. Guatemala*, judgment of 20 November 2012, Series C No. 253, para. 269.

<sup>103</sup> On the topic see, *inter alia*, W. HINS, D. VOORHOOF, *Access to State-Held Information as a Fundamental Right under the European Convention on Human Rights*, in *European Constitutional Law Review*, 2007, pp. 114-126; P. KELLER, *European and International Media Law: Liberal Democracy, Trade and the New Media*, *supra* note 21, p. 295 ff.; A. SHARLAND, *The Influence of the European Convention on Human Rights*, P. COPPEL (ed.), *Information Rights*, 2<sup>nd</sup> ed., Oxford, 2014, p. 92 ff.

<sup>104</sup> G. MALINVERNI, *Freedom of Information in the European Convention on Human Rights and in the International Covenant on Civil and Political Rights*, in *Human Rights Law Journal*, vol. 4, 1983, p. 449.

<sup>105</sup> European Court of Human Rights, *Leander v. Sweden*, App. No. 9248/81, judgment of 26 March 1987, para. 74. As to the previous case law concerning Article 10 of the European Convention on Human Rights see again G. MALINVERNI, *Freedom of Information in the European Convention on Human Rights and in the International Covenant on Civil and*

Court further held that “it is difficult to derive from the Convention a general right to access to administrative data and documents”.<sup>106</sup> The Court reiterated such conclusions in subsequent judgments.<sup>107</sup>

More recently, however, the Court has shifted to a less strict approach.<sup>108</sup> In its 2006 admissibility decision in the *Sdružení Jihočeské Matky v. Czech Republic* case, the Court recognized that the refusal by the Czech government to provide information concerning a nuclear power station to a non-governmental organization interfered with the right to receive information, as embodied in Article 10 of the Convention.<sup>109</sup> The Court, nonetheless, concluded that the claim was ill-founded, given that the government’s denial to provide information had been dictated by the need to protect legitimate interests, such as industrial secrets and national security, which fall within the derogation clause provided by Article 10(2) of the Convention.<sup>110</sup>

This shift in the approach to Article 10 of the European Convention on Human Rights, which, quite unsurprisingly, came right after the Inter-American Court of Human Rights issued its judgment in the *Claude Reyes* case, has been confirmed by the Court also in its 2009 judgment in the case

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*Political Rights*, *supra* note 104, para. 448 ff. It is noteworthy that the judgment of the European Court of Human Rights in the *Leander* case somehow partially overturned Professor Malinverni’s analysis of the Court’s previous case law. According to him, previous decisions seemed to lead to the conclusion that Article 10 of the Convention guarantees the right to seek information, in particular in case it appears of general interest (*ibid.*, p. 450).

<sup>106</sup> European Court of Human Rights, *Loiseau v. France*, App. No. 46809/99, judgment of 18 November 2003, para. 7.

<sup>107</sup> See, *inter alia*, European Court of Human Rights, *Gaskin v. United Kingdom*, App. No. 10454/83, judgment of 7 July 1989 (concerning the lack of disclosure of records made during the period the claimant was in social care), para. 52; *Guerra et al. v. Italy*, *supra* note 81 (concerning access to environmental information), para. 53; *Roche v. United Kingdom*, App. No. 32555/96, judgment of 19 October 2005 (concerning the alleged inadequate access to information concerning tests carried out on the claimant), para. 172.

<sup>108</sup> This evolving trend is well described in C.J.S. KNIGHT, *Article 10 and a Right of Access to Information: Case Comment*, in *Public Law*, 2013, pp. 468-477 (the Authors also takes into account the possible impact that such a less restrictive reading of Article 10 of the European Convention on Human Rights might have at the domestic level, focusing on the United Kingdom). See also F. LEHNE, P. WEISMANN, *The European Court of Human Rights and Access to Information*, in *International Human Rights Law Review*, vol. 3, 2014, pp. 303-315.

<sup>109</sup> European Court of Human Rights, *Sdružení Jihočeské Matky v. Czech Republic*, App. No. 19101/03, judgment of 10 July 2006, para. 1.1: “(...) la Cour admet que le rejet de ladite demande a constitué une ingérence au droit de la requérante de recevoir des informations”.

*Társaság Szabadságjogokért v. Hungary*, where, for the first time, it expressly acknowledged its advancement towards the recognition of a right of access to information and found that the State's failure to provide information may amount to an interference with the full enjoyment of Article 10.<sup>111</sup> In another 2009 judgment, the Court went even further and found that the Respondent State had breached Article 10 of the European Convention on Human Rights in denying to the claimant, an historian, access to classified information related to the State security services.<sup>112</sup> Thus, the Court indirectly admitted that the right of access under Article 10 of the European Convention on Human Rights does not concern only information directly affecting the requesting individual.

No later than in 2013, the European Court of Human Rights confirmed once again its latest interpretative approach to Article 10 of the European Convention on Human Rights. The case originated from a complaint brought before the Court by the Youth Initiative for Human Rights, a non-governmental organization entrusted with the task of monitoring the implementation of transitional laws with a view of ensuring the respect for human rights, democracy and the rule of law. The claimant alleged that the Serbian government had breached Article 10 of the European Convention on Human Rights by refusing to disclose information, collected by the Serbian intelligence agency, related to a number of people who had been subjected to electronic surveillance by the agency itself in 2005. According to the reported facts, the agency firstly denied access to the said information by appealing to the Serbian law on State secrets but, after the Serbian information

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<sup>110</sup> *Ibid.*

<sup>111</sup> European Court of Human Rights, *Társaság Szabadságjogokért v. Hungary*, App. No. 37374/05, judgment of 4 April 2009, para. 36.

<sup>112</sup> European Court of Human Rights, *Kenedi v. Hungary*, App. No. 31475/05, judgment of 26 May 2009, para. 43. See also, lately, European Court of Human Rights [GC], *Gillberg v. Sweden*, App. No. 41723/06, judgment of 3 April 2012, para. 82 ff. (where the Court rejected the applicant's argument that he had a negative right to refuse access to certain information under Article 10 of the European Convention on Human Rights). For a comment concerning this ruling see, *inter alia*, M. SPURRIER, *Gillberg v. Sweden: Towards a Right of Access to Information under Article 10?*, in *European Human Rights Law Review*, 2012, pp. 551-558.

commissioner ordered its disclosure, the agency declared to have never held it. The European Court of Human Rights upheld the claim by recognizing that the notion of “freedom to receive information” embodied in Article 10 of the European Convention on Human Rights embraces a right of access to information.<sup>113</sup> The Court was thus not persuaded by the government’s assertion that Article 10 could not be construed as imposing on contracting States a positive obligation to disseminate information.<sup>114</sup> To the opposite, it observed that the agency’s refusal to provide the non-governmental organization with the requested information interfered with the right to freedom of expression by hindering the legitimate gathering of information of public interest. In the light of the foregoing, the Court found that the government’s conduct had been arbitrary and in breach of Article 10 of the European Convention.<sup>115</sup>

Notably, in reaching its conclusions, the Court highly relied on declarations and statements by other human rights bodies, including the Human Rights Committee’s General Comment No. 34 and the reports of international and regional special procedures on the freedom of expression.<sup>116</sup>

The Court’s reiterated its ‘broad’ approach to Article 10 of the European Convention on Human Rights also in its 2013 judgment in the case *Österreichische Vereinigung Zur Erhaltung, Stärkung Und Schaffung Eines Wirtschaftlich Gesunden Land – Und Forst-Wirtschaftlichen Grundbesitzes v. Austria*.<sup>117</sup> In this specific case, however, the Court seemed to further stretch its previous case law by “finding it strikingly” that State authorities had not

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<sup>113</sup> European Court of Human Rights, *Youth Initiative for Human Rights v. Serbia*, App. No. 48135, judgment of 25 June 2013, para. 20.

<sup>114</sup> *Ibid.*, para. 24.

<sup>115</sup> *Ibid.*, para. 26.

<sup>116</sup> *Ibid.*, paras. 13-15.

<sup>117</sup> See European Court of Human Rights, *Österreichische Vereinigung Zur Erhaltung, Stärkung Und Schaffung Eines Wirtschaftlich Gesunden Land - Und Forst-Wirtschaftlichen Grundbesitzes v. Austria*, App. No. 39534/07, judgment of 28 November 2014, para. 46. For a comment on this ruling see again F. LEHNE, P. WEISMANN, *The European Court of Human Rights and Access to Information*, *supra* note 108, p. 306 ff.

made public some information of considerable public interest.<sup>118</sup> This assertion by the Court has indeed been interpreted as a possible hint – albeit implicit – to an obligation for States to proactively publish information on their own *motus*. Under this reading, the Court’s allusion would mirror the Human Rights Committee’s stance, pursuant to which, as stated before, in order to give effect to the right of access to information, States should proactively put in the public domain governmental information of public interest.<sup>119</sup> Whether or not the European Court’s statement does effectively represent the outset of a further ‘expanded’ interpretative trend will, however, be clarified only by future decisions.

In any event, as it has been noted, “the [European] Court’s recognition of the applicability of the right to freedom of expression and information in matters of access to official documents is undoubtedly an important new development which further expands the scope of application of Article 10 of the [European] Convention”.<sup>120</sup>

In conclusion, with the only exception of the African human rights bodies, which, so far, have never been confronted with the matter, human rights courts and monitoring bodies have shown a converging attitude – although with different ‘nuances’ – towards applying the right to (seek and) receive information to encompass a right of access to State-held information.

It has to be said, however, that, whereas the right of freedom of expression has represented the core provision based on which human rights monitoring bodies have derived the right of access to State-held information, the latter has been upheld also as a corollary to other human rights, such as, for instance, the right to a fair trial and the right to privacy.

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<sup>118</sup> H. DARBISHIRE, *The Challenges for the Right to Information in the Age of Mega-Leaks*, in T. MCGONAGLE, Y. DONDERES (eds), *The United Nations and Freedom of Expression and Information. Critical Perspectives*, Cambridge, 2015, p. 282.

<sup>119</sup> See again Human Rights Committee, General Comment No. 34, *supra* note 36, para. 19.

<sup>120</sup> D. VOORHOOF, *The European Convention on Human Rights: The Right to Freedom of Expression and Information Restricted by Duties and Responsibilities in a Democratic Society*, in *Human Rights*, vol. 7, 2015, p. 37.

In its General Comment No. 34 on Article 19 of the International Covenant on Civil and Political Rights, the Human Rights Committee has indeed recognized that “elements of the right of access to information are also addressed elsewhere in the Covenant”.<sup>121</sup>

This assertion conforms to the Committee’s findings with respect to the right to a fair trial (Article 14),<sup>122</sup> the right to privacy (Article 17),<sup>123</sup> the right to take part in the conduct of public affairs (Article 25)<sup>124</sup> and the right of minorities to enjoy their own culture, to profess and practice their own religion and use their own language (Article 27).<sup>125</sup>

The European Court of Human Rights has similarly found that, at least with reference to personal data, the lack of the government to provide access to information may amount to a breach of Article 8 of the European Convention on Human Rights (“right to respect for private and family life”).<sup>126</sup>

The above summarized ‘double-track path’ followed by human rights monitoring bodies well illustrates (and even ‘accentuates’) the already reported two-fold dimension of the right of access to State-held information, either as an emerging self-standing right and as an ‘instrumental’ right, ensuring the due implementation of other fundamental human rights.

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<sup>121</sup> See again Human Rights Committee, General Comment No. 34, *supra* note 36, para. 18.

<sup>122</sup> Human Rights Committee, General Comment No. 32, UN Doc. CCPR/C/GC/32 of 23 August 2007, para. 31.

<sup>123</sup> See Human Rights Committee, *General Comment No. 16*, UN Doc. HRI/GEN/1/Rev. 1, 8 April 1988 para. 10.

<sup>124</sup> Human Rights Committee, *General Comment No. 25*, UN Doc. CCPR/C/21/Rev.1/Add.7 of 12 July 1996, para. 11.

<sup>125</sup> Human Rights Committee, *General Comment No. 23*, UN Doc. CCPR/C/21/Rev.1/Add.5, 8 April 1994, para. 7.

<sup>126</sup> See, for instance, European Court of Human Rights, *Gaskin v. United Kingdom*, *supra* note 107, *Guerra et al. v. Italy*, *supra* note 81; *Turek v. Slovakia*, App. No. 57986/00, judgment of 14 February 2006. In this last case, the Court found that the denial by the Slovakian government to disclose information classified by the previous communist regime during lustration proceedings did interfere with the right to respect for private and family life embodied in Article 8 of the European Convention on Human Rights (*ibid.*, para. 115).

### 2.3. State practice (and ‘*opinio juris*’)

The emerging consensus on the existence of a human right of access to State-held information seems to be further confirmed by States’ general practice and *opinio juris*.<sup>127</sup>

First of all, under an ‘*opinio juris* perspective’, several States have acknowledged that the right to freedom of expression embodied in international and regional human rights treaties creates an obligation to provide access to governmental information. As a matter of example, in its 2000 periodic report submitted in accordance to Article 40 of the International Covenant on Civil and Political Rights, Trinidad and Tobago outlined that Article 19 of the Covenant had been given legal recognition at the national level by enacting a law seeking to extend the right of the public to have access to information in the possession of public authorities.<sup>128</sup>

Similarly, Israel, in reporting on its compliance to Article 19 of the International Covenant on Civil and Political Rights, has indirectly inferred from it a State’s duty to grant access to information held by public bodies. Indeed, according to Israel, “the absence of legislation imposing a duty of disclosure by public authorities, (...) and perhaps even a certain misplaced understanding of official secrecy deriving from the prevalence of legitimate security concerns in everyday life have led to a common set of habits (...) in which ordinary, proper requests for information relevant to the public or to the applicant are not always granted (...)”.<sup>129</sup>

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<sup>127</sup> According to Article 38(1)(b) of the Statute of the International Court of Justice, customary law requires “evidence of a general practice accepted by law”. This expression has been interpreted as to set two constitutive elements of custom: State practice and *opinio juris sive necessitatis* (which refers to the sense of legal obligation moving the State to undertake a certain conduct).

<sup>128</sup> Human Rights Committee, *Addendum to the third and fourth periodic reports of States parties due in 1990 and 1995 respectively: Trinidad and Tobago*, UN Doc. CCPR/C/TTO/99/3, 22 February 2000, para. 246.

<sup>129</sup> Human Rights Committee, *Addendum to the initial report of State parties due in 1993: Israel*, UN Doc. CCPR/C/81/Add. 13, 2 June 2000, para. 605.

More generally, for decades, States have included in their reports references to the right of access to information when discussing their compliance to Article 19.<sup>130</sup>

On the contrary, only few States have explicitly denied that Article 19 creates an obligation to disclose information.<sup>131</sup>

As to Article 10 of the European Convention on Human Rights, similar contentions may be drawn from States' attempts to justify the lack of disclosure of information under one of the legitimate exceptions provided for by Article 10(2), rather than contesting the application of the provision itself.<sup>132</sup>

In accordance and in addition to the above, a growing number of States have adopted freedom of information legislation encompassing the right of access to State-held information.<sup>133</sup> As of February 2016, more than a hundred countries have enacted such laws.<sup>134</sup>

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<sup>130</sup> On this aspect see C. A. BISHOP, *Access to Information as a Human Rights*, *supra* note 23, p. 48. See, e.g., Human Rights Committee, *Second periodic report of States parties due on 2 August 2000: Georgia*, UN Doc. CCPR/C/GEO/2000/2, 26 February 2001, para. 457; *Consideration of reports submitted by States parties under Article 40 of the Covenant. Second periodic report of States parties: Serbia*, UN Doc. CCPR/C/SRB/2, 28 August 2009, paras. 398-399. Concerning Article 10 of the European Convention on Human Rights, similar contentions may be drawn by States' attempts to justify the lack of disclosure of information under one of the legitimate exceptions provided by Article 10(2).

<sup>131</sup> In its comments concerning the Human Rights Committee's Draft General Comment No. 34, Germany stated, for instance, that no such entitlement could be inferred from Article 19(2) of the International Covenant on Civil and Political Rights. See Germany's comment on Human Rights Committee's General Comment No. 34 on Article 19 of the International Covenant on Civil and Political Rights, available at: <http://home.broadpark.no> (last accessed on 24 February 2016; unofficial source). See also, earlier, Human Rights Committee, *Fourth periodic reports of State parties due in 1994. Addendum: United Kingdom and Northern Ireland*, UN Doc. CCPR/C/95/Add. 3 of 19 December 1994, para. 372: "Article 19 confers the right to hold opinion without interference and the right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas, but it is not primarily concerned with guaranteeing access to information".

<sup>132</sup> In this respect, see, e.g., European Court of Human Rights, *Kenedi v. Hungary*, *supra* note 112, para. 42.

<sup>133</sup> For a description of the phenomenon see, *inter alia*, J.M. ACKERMAN, I.E. SANDOVAL-BALLESTEROS, *The Global Explosion of Freedom of Information Laws*, in *Administrative Law Review*, vol. 58, 2006, pp. 85-130.

<sup>134</sup> The list may be found at the website: <http://www.right2info.org> (last accessed on 24 February 2016). The 100th country to have enacted freedom of information legislation is Paraguay in September 2014 (ley No. 5.282, *De libre acceso a la información pública and y transparencia gubernamental*).



Just to refer to some of the domestic legal systems that have been taken into account in Chapter 1, one could recall the already mentioned United States Freedom of Information Act, which establishes, as a general principle, that all US governmental documents should be publicly available.

In China, legislation has been enacted dealing with open access to governmental information.<sup>135</sup> Unlike in other countries (including the United States), however, such provisions focus on institutional ‘openness’, without expressly upholding an individual right of access to State-held information. This right has indeed been recognized only at the local level through the adoption of the 2003 Guangzhou Rules.<sup>136</sup> That notwithstanding, as it has been noted, “in China, where government secrecy has a strong historical tradition and transparency is still in its early phases, [such a] legislation should be regarded as a kind of milestone of open governance, thus making it possible for advancements in transparency as well as in the balance between transparency and secrecy”.<sup>137</sup>

In the Russian Federation, the law on providing access to information on the activities of governmental bodies and bodies of local self-governments has been enacted by the Duma on 9 February 2009, and entered into force on 1 January 2010.<sup>138</sup> This law, which implemented the right of access to State-held information embodied in Articles 24(2) and 29(4) of the Constitution, has been considered as a driving cultural change for the long-standing culture of secrecy in the country.<sup>139</sup>

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<sup>135</sup> See Regulations on Open Government Information, enacted by the State Council on 17 January 2007.

For an overview see, *inter alia*, L. WENJING, *Approaching Democracy through Transparency: A Comparative Law Study on Chinese Open Government Information*, in *American University International Law Review*, vol. 26, 2011, pp. 983-1007.

<sup>136</sup> Rules on Open Government Information of Guangzhou Municipality, promulgated by Executive Order No. 8 of 6 November 2002, Article 1 (unofficial text available at: <http://www.freedominfo.org>, last accessed on 24 February 2016).

<sup>137</sup> *Ibid.*, p. 1002.

<sup>138</sup> For an overview see, *inter alia*, J. HENDERSON, H. SAYADYAN, *Freedom of Information in the Russian Federation*, in *European Public Law*, vol. 17, 2011, pp. 293-311.

<sup>139</sup> *Ibid.*, p. 301.

In Peru, as in other Latin American countries,<sup>140</sup> freedom of information laws have instead been passed as a key factor in tackling the legacies of past authoritarian regimes and overcoming impunity for serious human rights violations.<sup>141</sup> The already mentioned 2002 Peruvian Law on Transparency and Access to Public Information, which was enacted a few years after the fall of President Alberto Fujimori's government, specifically protects the right of access to State-held information, making – in principle – any governmental information publicly accessible.

As partially noted in the previous Chapter, however, the fact that national legislation providing for the right of access to State-held information is in place does not mean that abuses cannot occur. To the contrary, the same discretion that is often granted to governmental bodies in establishing which information may be withheld from disclosure under legitimate exemptions,<sup>142</sup> as well as the absence of effective oversight mechanisms and the judiciary's deference to the executive, make them somehow likely.

For instance, the Inter-American Special Rapporteur for Freedom of Expression has stressed in its 2001 report that practices contributing to a culture of secrecy with respect to State-held information continue to be followed in most Latin American countries also because, given the vague and general wording used in national provisions, State agents often prefer denying disclosure out of fear of punishment.<sup>143</sup>

With specific reference to Peru, some Authors have also highlighted how

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<sup>140</sup> As for the rationale behind and the features of Latin America freedom of information laws see, *inter alia*, G. MICHENER, *Assessing Freedom of Information in Latin America a Decade Later: Illuminating a Transparency Causal Mechanism*, in *Latin American Politics and Society*, vol. 57, 2015, pp. 77-99.

<sup>141</sup> See J. M. BURT, C. CAGLEY, *Access to Information, Access to Justice: The Challenges to Accountability in Peru*, in *SUR International Journal on Human Rights*, vol. 18, 2013, p. 75.

<sup>142</sup> For instance, as to the worries raised by human rights defenders with regard to the 2013 South Africa's Protection of State Information Bill and its impacts on the Promotion of Access to Information Act see Human Rights Watch, *World Report 2013: South Africa*, available at: <http://www.hrw.org/world-report/2013> (last accessed on 24 February 2016).

<sup>143</sup> See Inter-American Special Rapporteur for Freedom of Expression, *Annual Report 2001*, Chapter III, *Report on Action with Respect to Habeas Data and the Right to Access to Information in the Hemisphere*, para. 164.

the domestic Transparency Law has not been able to prevent in practice many governmental agencies to function under a veil of secrecy.<sup>144</sup> A research published in 2013 has indeed denounced that, “while the development of Peru’s transparency law was impressive on paper, the degree of actual transparency in the country – particularly regarding cases involving human rights abuses – is poor”.<sup>145</sup>

On top of that, this tendency towards maintaining secrecy has been eventually ‘institutionalized’ by means of Legislative Decree No. 1129/2012.<sup>146</sup> Building upon the exceptional clause contained in the 2002 Transparency Law, Article 12 of the Decree indeed denies public access to any information related to national security and defence.<sup>147</sup>

Just to make an additional example, the United States Freedom of Information Act expressly provides for legitimate exemptions to the right of access to State-held information, including, *inter alia*, the protection of information “properly” classified “in the interest of national defence or foreign policy”.<sup>148</sup>

As already partly highlighted in the context of Chapter 1, despite this Act specifically instructs the judiciary with reviewing power over the “appropriateness” of classification (in a much more stringent way than other State secrecy legislation enacted in the country), adjudicatory practice has clearly shown an attitude towards presuming the validity of executive secrecy claims.<sup>149</sup> This trend has characterized the application of the Freedom of

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<sup>144</sup> See again J.M. BURT, C. CAGLEY, *Access to Information, Access to Justice: The Challenges to Accountability in Peru*, *supra* note 141, p. 82 ff.

<sup>145</sup> *Ibid.*, p. 82.

<sup>146</sup> Legislative Decree No. 1129/2012 (*decreto legislativo que regula el sistema de defensa nacional*) enacted by the *Congreso de la República* on 12 December 2012.

<sup>147</sup> Article 12 states: “*Los acuerdos, actas, grabaciones, transcripciones y en general, toda información o documentación que se genere en el ámbito de los asuntos referidos a la Seguridad y Defensa Nacional, y aquellas que contienen las deliberaciones sostenidas en las sesiones del Consejo de Seguridad y Defensa Nacional, son de carácter secreto*”.

<sup>148</sup> Freedom of Information Act, para. 552(1)(A).

<sup>149</sup> For an overview of the related practice see, *inter alia*, *Access to National Security Information under the US Freedom of Information Act*, New York University School of Law,

Information Act since its inception.<sup>150</sup> Furthermore, it has concerned both *in camera* inspection of documents (which, as it has been noted, has often acted as a mere “formality”<sup>151</sup>) and, more generally, the process of *de novo* review of agency classification.<sup>152</sup> Based, *inter alia*, on the so-called ‘mosaic theory’, pursuant to which intelligence data, even if *per se* ‘insignificant’, may acquire relevance when combined with other pieces of information, US judges have indeed often declined to assess the merits of secrecy claims and have instead embraced a more deferent approach towards the executive’s assertions.<sup>153</sup>

In addition to the above, national freedom of information laws are often paired with separate bills on State secrets which might further hinder the effective realization of the right of access to information. To make an example, the Human Rights Committee has recently expressed its concerns with regard to the Act on the Protection of Specially Designated Secrets adopted by Japan in 2013. According to the Committee, the aforementioned Act contains a vague and broad definition of the matters that can be classified as secrets and this may interfere with the full exercise of the right of access to information established in Article 19 of the International Covenant on Civil and Political Rights.<sup>154</sup>

Recently, human rights NGOs have similarly expressed worries with

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Public Law and Legal Theory Research Paper Series, Working Paper No. 15-14, May 2015, pp. 1-15.

<sup>150</sup> See M. SUPPERSTONE, *Brownlie’s Law of Public Order and National Security*, *supra* Chapter 1, note 182, p. 278 ff. See also J. H. SHENEFIELD, *Access to Information*, in J. NORTON MOORE, F. S. TIPSON, R. F. TURNER (eds), *National Security Law*, Durham, 1990, pp. 939-970.

<sup>151</sup> *Ibid.*, p. 4.

<sup>152</sup> *Ibid.* On this specific aspect see also, *inter alia*, M. B. KWOKA, *Deferring to Secrecy*, in *Boston College Law Review*, vol. 54, 2013, pp. 185-242.

<sup>153</sup> For an overview of this doctrine and its use in US courts see, *inter alia*, D. E. POZEN, *Mosaic Theory, National Security, and the Freedom of Information Act*, in *Yale Law Journal*, vol. 115, 2005, pp. 628-679.

<sup>154</sup> Human Rights Committee, *Concluding observations on the sixth periodic report of Japan*, UN Doc. CCPR/C/JPN/CO/6, 20 August 2014, para. 23. For an overview of the new Japanese Secrecy Bill see also L. REPETA, *Raising the Wall of Secrecy in Japan: The State Secrecy Law of 2013*, in *Meiji Law Journal*, vol. 21, 2014, pp. 13-34. For an analysis of the issues that the newly enacted State secrecy law raises in terms of balance with human rights norms see, e.g., M. CORRALES, *Right to Know v. Secrecy Law in Japan. Striking the Right Balance*, in *Zeitschrift für Japanisches Recht (Journal of Japanese Law)*, vol. 19, 2014, pp. 189-200.

respect to Law No. 6532, enacted by the Turkish Parliament on 17 April 2014, and entered into force on 26 April of the same year.<sup>155</sup> The law, which amends previous legislation on State intelligence services and the National Intelligence Agency, has been denounced as paving the way to possible abuses by undermining, *inter alia*, the right of access to information.<sup>156</sup>

Concerns have also surrounded the entrance into force in Honduras of the *Ley para la clasificación de documentos públicos relacionados con la seguridad y la defensa nacional*,<sup>157</sup> due to the wide discretionary authority it empowers the executive with and the possible consequences in terms of restrictions of the right of access to State-held information.<sup>158</sup>

On top of that, the extent to which the right of access to information is granted might vary under different national legal regimes. For instance, whilst some countries have enacted laws that require public authorities to provide only to the requesting individual information they hold, others have included the obligation for governmental bodies to search for information they ought to be in possession of.<sup>159</sup> Similarly, whereas some States' national legislation guarantees the right of access to information to 'everyone',<sup>160</sup> other countries have adopted laws that limit to 'citizens' the exercise of this right.<sup>161</sup>

That notwithstanding, it is undeniable that the enactment of laws which provide for access to State-held information in several countries might be indicative of the States' general understanding that an international obligation exists to guarantee the full enjoyment of this right. Under this perspective, the

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<sup>155</sup> Human Rights Watch, 'Turkey: Spy Agency Law Opens Door to Abuses', 29 April 2014, available at: [www.hrw.org](http://www.hrw.org) (last accessed on 24 February 2016).

<sup>156</sup> *Ibid.*

<sup>157</sup> Decree No. 418-2013 of 20 January 2014 (published in the Official Gazette on 7 March 2014).

<sup>158</sup> Reporters Without Borders, *Secrecy law deals major blow to public's right to be informed*, 16 January 2014, available at: <http://en.rsfb.org> (last accessed on 24 February 2016).

<sup>159</sup> Only few national freedom of information laws do impose on public authorities to seek for information they should hold. Among them, *e.g.*, the Latvia's Freedom of Information Law (Article 5.1) and the India's Right to Information Act (Article 2.f).

<sup>160</sup> See, *e.g.*, the Poland's Act on Access to Public Information, Article 2.1; Montenegro's Law on Free Access to Information, Article 1.

widespread adoption of specific legislation at the national level supports the view of an emerging rule consecrating the right of access to State-held information.

This aspect has been well depicted by the Inter-American Court of Human Rights, which, in inferring a right of access to information from Article 13 of the American Convention on Human Rights, found it “particularly relevant that, at the global level, many countries have adopted laws designed to protect and regulate the right to accede to State-held information”.<sup>162</sup>

In addition, it is noteworthy that, in some instances, national legislation directly recalls international human rights treaties and declarations. The 2010 Liberia’s Freedom of Information Act, for instance, recognizes in its Preamble that the right of access to information is a fundamental right enshrined in both the Universal Declaration of Human Rights and the African Charter of Human and Peoples’ Rights.

As already underlined in the previous Chapter,<sup>163</sup> in some countries the right of access to information has even obtained recognition at the constitutional level. Article 100 of the Norwegian Constitution, for instance,

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<sup>161</sup> See, e.g., Nepal’s 2007 Right to Information Act, Article 3(2) (“every citizen shall have access to information held by public bodies”) (unofficial translation).

<sup>162</sup> See Inter-American Court of Human Rights, *Claude Reyes et al. v. Chile*, *supra* note 84, para. 82. At the same time, it is noteworthy that, for instance, both Chile and Brazil have enacted freedom of information laws right after the Inter-American Court of Human Rights’ judgments in the *Claude Reyes* and *Gomes Lund* cases respectively, in which the Court expressly recognized that Article 13 of the American Convention on Human Rights includes the right of access to information. As regards Chile, the Court itself took note with appreciation that, subsequent to the facts of the *Claude Reyes* case, Chile had made substantive progress in establishing by law the right of access to State-held information, including a constitutional reform. Chile has eventually adopted a law on transparency and access to public information in August 2008 (*Ley n. 20,285 sobre acceso a la informacion publica*). In November 2011, Brazil also adopted a law on access to public information. For a broader overview of State practice in Latin America see, *inter alia*, R. G. MICHENER, *The Surrender of Secrecy: Explaining the Emergence of Strong Access to Information Laws in Latin America*, Ph.D. dissertation, University of Texas (United States), 2010 and S. FUMEGA, F. SCROLLINI, *Primeros aportes para diseños de políticas de datos abiertos en América Latina*, in *Derecho comparado de la información*, vol. 21, 2013, pp. 1-37. For an overview of State practice in Africa see instead, among others, C. DARCH, *The Problem of Access to Information in African Jurisdiction: Constitutionalism, Citizenship and Human Rights Discourse*, in F. DIALLO, R. CALLAND (eds), *Access to Information in Africa: Law, Culture and Practice*, Leiden, Boston, 2013, pp. 27-53.

states that everyone has the right to access to documents held by public bodies and limitations may be set by law only to protect other weighty interests.<sup>164</sup> Similar provisions are contained, *inter alia*, in Article 110 of the Dutch Constitution,<sup>165</sup> Article 12 of the Finnish Constitution,<sup>166</sup> Article 32 of the South African Constitution<sup>167</sup> and Article 30 of the Costa Rica Constitution,<sup>168</sup> just to name a few.<sup>169</sup> As it has been observed, “as far as these (...) constitutions reflect cardinal political changes, the introduction of the right to the publicity of documents (...) testifies to the official repudiation of the principle of secrecy in handling official information, paving the way for a genuine accommodation of the principle of transparency in public administration in national legal systems”.<sup>170</sup>

The recognition of the right of access to State-held information is not limited, however, to *express* constitutional provisions. In several States, high courts have upheld this right based on a broad and systemic interpretation of existing constitutional provisions and general principles of law. In the *Forest*

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<sup>163</sup> See, in particular, Chapter 1, at 3.

<sup>164</sup> The Constitution of Norway was adopted on 18 May 1814. Article 100 of the Constitution has been amended in 2005.

<sup>165</sup> “In the exercise of their duties government bodies shall observe the right of public access to information in accordance with rules to be prescribed by Act of Parliament” (unofficial translation). The Dutch Constitution has been adopted on 17 February 1983.

<sup>166</sup> “Documents and recordings in the possession of the authorities are public, although their publication has for compelling reasons been specifically restricted by an Act. Everyone has the right of access to public documents” (unofficial translation). The Finnish Constitution has been adopted on 11 June 1999).

<sup>167</sup> “Everyone has the right of access to any information held by the State (...)”. The Constitution of South Africa was promulgated on 10 December 1996.

<sup>168</sup> “Free access to (...) information on matters of public interests is guaranteed. State secrets are excluded from this provision” (unofficial translation from Spanish).

<sup>169</sup> See, *e.g.*, Article 68 of the Egyptian Constitution (enacted on 18 January 2014), pursuant to which official documents are the property of the People and their disclosure is a right guaranteed by the State for all citizens. The text (in English) of the Egyptian Constitution is reported in *Rivista della Cooperazione Giuridica Internazionale*, vol. 50, 2015, pp. 147-180. For a complete overview in this respect see again R. PALED, Y. RABIN, *The Constitutional Right to Information*, *supra* note 2, p. 370 ff., who distinguish between veteran and recently-drafted Constitutions. While the formers did not originally contain any reference to the right of access to State-held information and, only in a few cases, specific provisions have been added later, the letters do usually include detailed provisions on freedom of information and right of access (*ibid.*, p. 372).

<sup>170</sup> M. RIEKKINEN, M. SUKSI, *Access to Information and Documents as a Human Right*, *supra* note 22, p. 81.

*survey inspection request* case,<sup>171</sup> for instance, the South Korean Constitutional Court has ruled that the right of access to State-held information constitutes an essential aspect of the right to freedom of speech guaranteed by Article 21 of the State's Constitution.<sup>172</sup> According to the Court, this right, which is directly enforceable, is not absolute but may be subject to restrictions, whose permissible extent must be drawn by balancing the interests protected by the restriction itself and the related interference with the right of access.<sup>173</sup>

Similarly, the Supreme Court of India has upheld that the right of access to information is implicit in free speech and expression rights guaranteed by Article 19 of the Indian Constitution.<sup>174</sup> In reaching this conclusion, the Supreme Court argued that: "disclosure of information (...) must be the rule and secrecy an exception justified only where the strictest requirement of public interest so demands. The approach of the Court must be to attenuate the area of secrecy as much as possible consistently with the requirement of public interest, bearing in mind all the time that disclosure also serves an important aspect of public interest (...)"<sup>175</sup>

The Supreme Court of Japan also recognized the right of the public to access State-held information much before a freedom of information law was enacted at the national level and even in the absence of a specific provision embodied in the Constitution. Already in 1969, the Supreme Court upheld that the right to freedom of expression enshrined in Article 21 of the Japanese Constitution does include the people's right to know (*shiru kenri*), which encompasses both the freedom to receive and gather information.<sup>176</sup>

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<sup>171</sup> *Petitioner v. Supervisor of the County of Ichon*, case No. 1 KCCR 176, 88Hun-Ma22, judgment issued on 4 September 1989. The summary of the case is available at: <http://www.right2info.org>.

<sup>172</sup> *Ibid.*

<sup>173</sup> *Ibid.*

<sup>174</sup> Supreme Court of India, *S.P. Gupta v. President of India*, case No. AIR 1982 SC 149, 30 December 1981, para. 66.

<sup>175</sup> *Ibid.*

<sup>176</sup> Supreme Court of Japan, *Kaneko v. Japan (Hakata Station Film case)*, judgment issued on 26 November 1969. For a comment on this judgment see N. KADOMATSU, *The Right to be*



Commentators have observed that, although the Court did not expressly recognize an autonomous right of access to State-held information, this right is implicitly contained in the same notion of the ‘right to know’.<sup>177</sup> In this respect, the Court’s conclusions were, at the time, considered much advanced when compared to decisions on government secrecy by high courts in other democracies.<sup>178</sup>

The Israeli Supreme Court also grounded its recognition of the right of access to State-held information on the right to freedom of expression, which constitutes one of the basic principles of the Israeli system of law. According to the Court, in order to grant the full exercise of this right, withholding of information may be justifiable only in exceptional cases when the security of State or foreign relations may be impaired or when there is a risk of harming other vital public interests.<sup>179</sup>

In some instances, national courts have expressly referred to international instruments as interpretative guidance.<sup>180</sup> For instance, in a 2003 judgment, the Constitutional Court of Colombia found that the right of access to State-held information is guaranteed both by the Constitution itself and by international law. In this last regard, the Court recalled, *inter alia*, Article 13 of the American Convention on Human Rights, Article 19 of the International Covenant on Civil and Political Rights and Principle 4 of the Inter-American

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*Informed: the Obligation for Providing Information. The Case of Japanese Information Disclosure Law*, in *Journal of Law and Politics*, vol. 69, 2002, p. 441 ff.

<sup>177</sup> *Ibid.*, p. 463.

<sup>178</sup> *Ibid.*, p. 462.

<sup>179</sup> Israeli Supreme Court, *Shalit v. Peres*, case No. 1601/90, 8 May 1990, para. 5.

<sup>180</sup> In this respect, it is noteworthy that national high courts have sometimes denied the same existence of a universal human right of access to information. In its judgment in the *Certification of the Constitution case*, for instance, the Constitutional Court of South Africa found that “freedom of information is not a universally accepted fundamental human rights”. See Constitutional Court of South Africa, *Certification of the Constitution of the Republic of South Africa*, judgment of 6 September 1996, case No. CCT 23/96, para. 85. It is significant, however, that few years later the same Court recognized the importance of the right of access to State-held information in promoting fundamental values such as accountability, responsiveness and openness. See Constitutional Court of South Africa, *Brümmer v. Minister for Social Development and Others*, judgement of 13 August 2009, case No. CCT 25/09, para. 62.

Declaration of Principles on Freedom of Expression.<sup>181</sup>

Likewise, the Paraguay's *Juzgado de liquidación* has observed that the right to receive information granted by Article 28 of the Paraguayan Constitution must be construed in light of Article 13 of the American Convention on Human Rights, as interpreted by the Inter-American Court of Human Rights.<sup>182</sup> As a consequence, “(...) *el derecho a acceder a la información que obra en poder del Estado es un derecho humano de raigambre constitucional que, además, integra el halo de derechos humanos que el Paraguay se ha comprometido a respetar ante la comunidad americana (...)*”.<sup>183</sup>

In this respect, particularly interesting is also the judgment issued by the Supreme Court of Argentina in the *ADC v. Pami* case.<sup>184</sup> The Court relied on international human rights provisions – which according to Article 22 of the Argentinian Constitution have constitutional *status* – to provide a broad recognition to the right of access to State-held information.<sup>185</sup> The Court noted, indeed, that “*el reconocimiento del acceso a la información come derecho humano ha evolucionado progresivamente en el marco del derecho internacional de los derechos humanos*”.<sup>186</sup> Accordingly, the Court cited extensively the Inter-American Court of Human Rights' decision in the *Claude Reyes et al. v. Chile* case, as well as the reports of the Office of the Special Rapporteur on Freedom of Expression of the Inter-American Commission of Human Rights, to delineate the essential features of the right.<sup>187</sup> Among them, the Court highlighted the two-fold dimension of the

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<sup>181</sup> Colombia Constitutional Court, case No. C-872/03, 30 December 2003, *supra* Chapter 1, note 446, para. VII(3).

<sup>182</sup> Judge of liquidation, *Elizabeth Flores Negri v. Rector of the National University of Asunción*, case S.D. No. 40, 31 July 2007, at 294.

<sup>183</sup> *Ibid.*, at 295.

<sup>184</sup> Supreme Court of Argentina, *ADC v. Pami*, case No. A.917.XLVI, 4 December 2012.

<sup>185</sup> *Ibid.*, para. 13.

<sup>186</sup> *Ibid.*, para. 9.

<sup>187</sup> *Ibid.*, para. 10. It is noteworthy that the Court also quoted other international instruments, among which the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

right of access to information, individual and social; the obligation imposed on States to adopt legislative or regulatory measures to guarantee this right and promote a culture of transparency within the State; the exceptional nature of limitations to this right, which are admissible only to satisfy imperative interests of the State; the fact that no specific and direct interest is needed for requesting disclosure.<sup>188</sup>

More recently, with resolution No. SE-001-2015 of 28 July 2015, the *Instituto de acceso a la información pública* of Honduras has required the Parliament to amend the already mentioned *Ley para la clasificación de documentos públicos relacionados con la seguridad y la defensa Nacional*, given its incompatibility with domestic and *international* norms protecting the right of access to State-held information, including, in particular, Article 13 of the American Convention on Human Rights.<sup>189</sup> The *Instituto* also relied on non-binding international instruments, such as the recently endorsed Tshwane Principles.<sup>190</sup>

In this context, it is also worth mentioning that, already in 1999, the Constitutional Court of Latvia ruled that both Article 19 of the Universal Declaration of Human Rights and Article 19 of the International Covenant on Civil and Political Rights appeal States to ensure the right of access to information.<sup>191</sup> As a result, the Court found that the right to freedom of expression upheld in Article 100 of the Latvian Constitution had to be interpreted as covering also the right of access to information and concluded that the confidentiality of government agreements could not be considered in compliance with said provision.<sup>192</sup>

But even lacking similar direct references to international law, the fact that several countries have vested the right of access to information with

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<sup>188</sup> *Ibid.*

<sup>189</sup> Case No. 001-2015, pp. 14-18.

<sup>190</sup> *Ibid.*, p. 12.

<sup>191</sup> Constitutional Court of Latvia, case No. 04-02 (99), decision No. LAT-1999-2-002, 6 July 1999, para. 1. For a brief comment on the decision see M. VERPEAUX, *Freedom of Expression*, Strasbourg, 2010, p. 179.

constitutional rank seems to strengthen the recognition of this right under an international law perspective. Indeed, as correctly pointed out by Mendel, “(...) national interpretations of constitutional guarantees of freedom of expression are of some relevance to understanding the content of their international counterparts”.<sup>193</sup>

In this respect, it is noteworthy that some commentators have even attempted to construe the right of access to State-held information as a “general principle of law recognized by civilized Nations” as per Article 38(1)(c) of the Statute of the International Court of Justice.<sup>194</sup> Hovell, for instance, in 2009 concluded that: “contemporary trends in legal systems across the globe are striking, and there are clear indications pointing towards a gradual evolution of a general principle of international law recognizing a right of access to information”.<sup>195</sup>

Any arguments relying on the nature of the right of access to State-held information either as a general principle of law or as custom is, however, weakened by the *recent* dimension of the phenomenon. As previously said, the growth in the number of freedom of information laws has indeed taken place only in the last decades.

Furthermore, it cannot be denied that, as it has been correctly noted, “in recent years some of the most significant disclosure of information about governmental behaviour (...) have come through massive leaks rather than in response to access to information requests”.<sup>196</sup> The same trend towards ‘increasing’ secrecy that has characterized the ‘war on terror’ is representative

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<sup>192</sup> *Ibid.*, para. 3.

<sup>193</sup> See again T. MENDEL, *Freedom of Information. A Comparative Legal Survey*, *supra* note 10, p. 20.

<sup>194</sup> See D. HOVELL, *The Deliberative Deficit: Transparency, Access to Information and UN Sanctions*, in J. FARRALL, K. RUBENSTEIN (eds), *Sanctions, Accountability and Governance in a Globalised World*, Cambridge, 2009, p. 113.

<sup>195</sup> *Ibid.*

<sup>196</sup> H. DARBISHIRE, *The Challenges for the Right to Information in the Age of Mega-Leaks*, *supra* note 118, p. 271. Just to make an example of States’ reluctance to provide certain information, it suffices to quote the percentages of (un)success of requests related to C.I.A renditions flights. Of the 28 countries where requests were filed, only 7 States have released the requested information. See Reprieve and Access Info Europe (NGOs), *Rendition on*

of an oscillatory – not to say, contradictory – practice. Hence, the progressive recognition of the right of access to State-held information under a theoretical perspective has been partly counterbalanced by practical developments of opposite meaning.

While these considerations do not outshine the above-summarized evolutions towards a growing recognition of the right of access to State-held information, they should nonetheless be taken into account in assessing their exact ‘normative’ significance under an international law perspective.

#### **2.4. The right of access to information in international organizations**

Parallel to the aforementioned developments at the domestic level, the practice of international organizations has also shown a progressive pattern towards enhancing transparency and access to information.

As already previously mentioned, for instance, following the widespread criticism concerning the absence of transparency in the United Nations Security Council’s listing mechanism of suspect terrorists, an Ombudsman has been established in 2009 in order to review individual de-listing requests.<sup>197</sup> Whilst, as already stressed, this newly-adopted procedure still presents some shortcomings in terms of effective respect of listed individuals’ due process guarantees (including their right to be duly informed about the evidence against them), it is certainly indicative of a growing attitude towards accommodating access to information instances.

In recent years, several international organizations have further adopted access to information policies. In fact, whilst, up to the late ‘80s, international organizations’ policies on freedom of information provided access only in

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*Record. Using the Right of Access to Information to Unveil the Paths of Illegal Prisoner Transfer Flights*, Report of 19 December 2011, p. 11.

<sup>197</sup> See *supra* Chapter 1, at 4.2.2(b). For a specific analysis concerning the application of the right of access to information to the United Nations Security Council with specific reference to individual sanctions see again D. HOVELL, *The Deliberative Deficit: Transparency, Access to Information, and UN Sanctions*, *supra* note 194, pp. 92-122.

exceptional circumstances, a new trend towards greater transparency has started developing since the early '90s.<sup>198</sup>

The World Bank has been the first international organization to adopt a transparency-oriented access to information policy in 1993. This change has been driven, to a large extent, by the pressure exercised by non-governmental organizations, willing to access information on the environmental impact of the Bank's projects.<sup>199</sup>

In 2009, the World Bank has released a revised version of its policy, which was further amended in 2013 (so-called 'AI Policy'). According to its own dictate, the policy aims at striking an appropriate balance between confidentiality and transparency, based on five principles: the maximization of access to information; the provision of a clear lists of exceptions; the safeguard of deliberative processes; the setting of clear procedures for making information available; the recognition of the requesters' right to an appeals process.<sup>200</sup> Compared to the previous disclosure policy, the revised version has shifted from an approach that enlisted only information which could be disclosed to one oriented to the principle of maximum disclosure, although accompanied by a set of exceptions (which include, *inter alia*, security and safety information and information provided in confidence by Member countries or third parties).<sup>201</sup>

Following the trend initiated by the World Bank, regional development banks have also adopted access to information policies, which mainly

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<sup>198</sup> A. GRIGORESCU, *International Organizations and their Bureaucratic Oversight Mechanisms. The Democratic Deficit, Accountability and Transparency*, in B. REINALDA (ed.), *Rutledge Handbook of International Organizations*, Abdingdon, 2013, p. 180. For the sake of argument, it should be stressed that this trend towards transparency *vis-à-vis* secrecy has not be limited to the adoption of access to information policies. A general call for enhanced transparency has for instance concerned disputes settlement procedures in the context of the Word Trade Organization. In this respect (and, more generally, on the tension between secrecy and transparency in international trade disputes) see J. NAKAGAWA, D. MACGRAW, *Introduction*, in J. NAKAGAWA (ed), *Transparency in International Trade and Investment Dispute Settlement*, Abington, New York, 2015, pp. 1-14.

<sup>199</sup> *Ibid.*

<sup>200</sup> World Bank Policy on Access to Information, 1st July 2013, available at: <http://www-wds.worldbank.org> (last accessed on 24 February 2016).

reproduce the AI Policy's structure.<sup>202</sup>

NGOs, however, have firmly criticized the extensive lists of exceptions to disclosure that are contained in the aforementioned policies on the assumption that widespread confidentiality and the absence of a strict public interest test might prevent from ascertaining compliance with human rights obligations.<sup>203</sup> Just to make an example, it has been noted that the "secrecy" surrounding the projects financed by the banks represent a possible fostering factor in preventing local citizens' access to information related, *inter alia*, to their environmental impact.<sup>204</sup>

That notwithstanding, these policies represent relevant practice in the increasing recognition of the right of access to information at both the universal and regional level.

In this respect, it is also worth mentioning that, in 1997, the United Nations Development Programme (UNDP) followed the developments banks' example by adopting its own information disclosure policy.<sup>205</sup> The UNDP's policy is grounded on the presumption that any information should be made available to the public. However, it also provides for a series of exceptions aimed at preserving private and public interests (including information whose disclosure is likely to endanger the security of Member States and information

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<sup>201</sup> *Ibid.*, paras. 8-17.

<sup>202</sup> Inter-American Development Bank, *Access to Information Policy*, lastly amended in April 2010, available at: <http://publications.iadb.org>; African Development Bank Group, *Disclosure and Access Policy*, lastly amended in February 2013, available at: <http://www.afdb.org>; Asian Development Bank, *Public Communications Policy*, lastly amended in October 2011, available at: [www.adb.org](http://www.adb.org); European for Reconstruction and Development, *Public Information Policy*, lastly amended May 2014, available at: <http://www.ebrd.com> (last accessed on 24 February 2016).

<sup>203</sup> See, e.g., *European Bank for Reconstruction and Development: Draft Environment and Social Policy Retreats on Human Rights*, Joint Statement by Accountability Counsel, Amnesty International, Article 19, CEE Bankwatch Network, Center for International Environmental Law, Centre for Research on Multinational Corporations, and Human Rights Watch, 5 March 2014, available at <http://www.hrw.org> (last accessed on 24 February 2016).

<sup>204</sup> See, *inter alia*, I.A. BOWLES, C.F. KORMOS, *Environmental Reform at the World Bank: The Role of the US Congress*, in *Virginia Journal of International Law*, vol. 35, 1995, p. 793. On the topic in general see, among others, S. FUJITA, *The World Bank, Asian Development Bank and Human Rights: Developing Standards of Transparency, Participation and Accountability*, Cheltenham, 2013.

<sup>205</sup> Available at: <http://www.undp.org> (last accessed on 24 February 2016).

received by Member States or third parties under an expectation of confidentiality). Against this background, it is noteworthy that the policy makes direct reference to ‘international standards’ as the basis that would legitimize the prescribed exceptions.<sup>206</sup> Similar disclosure policies have been subsequently adopted by other United Nations agencies.<sup>207</sup>

As already underlined in the previous Chapter, the right of access to information has obtained extensive recognition also in the context of the European Union.<sup>208</sup>

Article 42 of the Charter of Fundamental Rights of the European Union<sup>209</sup> expressly states that: “any citizen of the [European] Union, and any natural or legal person residing or having its registered office in a Member State, has a right of access to documents of the institutions, bodies, offices and agencies of the Union, whatever their medium”.

This wording partly mirrors that of Article 225 of the 1997 Amsterdam Treaty, which has now been transposed, with some significant amendments, in Article 15(3) of the Treaty on the Functioning of the European Union

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<sup>206</sup> *Ibid.*, para. 11.

<sup>207</sup> For an overview see again A. GRIGORESCU, *International Organizations and their Bureaucratic Oversight Mechanisms. The Democratic Deficit, Accountability and Transparency*, *supra* note 198, p. 181.

<sup>208</sup> As regards, instead, the secretive practices that surrounded the European Union at its origins see P. BIRKINSHAW, *Freedom of Information. The Law, the Practice and the Ideal*, 4th ed., Cambridge, 2010, p. 381. For a general overview on freedom of information in the context of the European Union see H. KRANENBORG, W. VOERMANS, *Access to Information in the European Union. A Comparative Analysis of EC and Member States Legislation*, Groningen, 2005; L. N. GONZÁLEZ ALONSO, *Artículo 42*, in A. MANGAS MARTÍN (ed.), *Carta de los derechos fundamentales de la Unión Europea. Comentario artículo por artículo*, Bilbao, 2008, p. 679-699. J. MACDONALD, R. CRAIL, C. H. JONES, *The Law of Freedom of Information*, 2nd ed., Oxford, New York, 2009, p. 411 ff. See also, among others, U. ÖBERG, *EU Citizens’ Right to Know: The Improbable Adoption of a European Freedom of Information Act*, in *Cambridge Yearbook of European Legal Studies*, 1999-2000, p. 311 ff., examining whether the right of access to documents constitutes a general principle of European Union law; and D. CURTIN, *Citizens’ Fundamental Right of Access to EU Information: An Evolving Digital Passepartout?*, in *Common Market Law Review*, vol. 37, 2000, p. 7-41, who underlines the pioneering role of the European Union in giving effective implementation to the right of access to information (*ibid.*, p. 9).

<sup>209</sup> Proclaimed by the Council, the Parliament and the Council in Nice on 7 December 2000, OJ C 364, 18 December 2000, p. 6 ff. The Charter was further amended in 2007. Pursuant to Article 6(1) of the Treaty on the European Union: “The Union recognizes the rights, freedoms



(‘TFEU’).<sup>210</sup> In accordance to the text of the Charter of Fundamental Rights of the European Union, as revised in 2007, the recalled amendments have broaden the scope of the right of access to information so as to cover not only the three main EU institutions (Parliament, Commission and Council) but all other bodies, offices and agencies of the European Union.<sup>211</sup> This expanding ‘approach’ clearly suggests the importance that the right of access to information is increasingly assuming within the European Union.

As to secondary legislation, in May 2001, the European Parliament and the Council adopted the already mentioned Regulation 1049/2001/EC on access to European Parliament, Council and Commission documents. The Regulation sets forth the principles, conditions and limits that govern the exercise of the right to access documents in the context of the European Union.<sup>212</sup> In particular, the Regulation provides for a narrow list of exceptions, which are generally subject to a ‘public harm test’.<sup>213</sup>

Some exceptions, however, are exempted from such a test. In fact, every time disclosure would undermine the public interest as regards public security,

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and principles set out in the Charter of Fundamental Rights of the European Union (...), which shall have the same legal value as the Treaties”.

<sup>210</sup> On the right of access to documents see also Declaration No. 17 to the Final Act of the Treaty on the European Union, signed at Maastricht on 7 February 1992.

<sup>211</sup> The full text of Article 15 of the Treaty on the Functioning of the European Union reads as follows: “1. In order to promote good governance and ensure the participation of civil society, the Union institutions, bodies, offices and agencies shall conduct their work as openly as possible. 2. The European Parliament shall meet in public, as shall the Council when considering and voting on a draft legislative act. 3. Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have a right of access to documents of the Union institutions, bodies, offices and agencies, whatever their medium, subject to the principles and the conditions to be defined in accordance with this paragraph. General principles and limits on grounds of public or private interest governing this right of access to documents shall be determined by the European Parliament and the Council, by means of regulations, acting in accordance with the ordinary legislative procedure. Each institution, body, office or agency shall ensure that its proceedings are transparent and shall elaborate in its own Rules of Procedure specific provisions regarding access to its documents, in accordance with the regulations referred to in the second subparagraph. The Court of Justice of the European Union, the European Central Bank and the European Investment Bank shall be subject to this paragraph only when exercising their administrative tasks. The European Parliament and the Council shall ensure publication of the documents relating to the legislative procedures under the terms laid down by the regulations referred to in the second subparagraph”.

<sup>212</sup> Regulation (EC) 1049/2001, *supra* Chapter 1, note 7, Article 1.

defence and military matters, international relations, or the financial, monetary or economic policy of the Union or of a Member State, as well as the privacy and the integrity of individuals, EU requested institutions should refuse access even when an overriding public interest in disclosure has been proven.<sup>214</sup> Furthermore, any time a document originates from a Member State, the same State may require the institution not to disclose it without its prior permission.<sup>215</sup>

Notably, similar assertions reveal an opposite approach compared to the one adopted by the European Court of Human Rights. As it will be reiterated *infra*, in fact, this Court has interpreted the balancing exercise between competing public interests in the sense that the interest in public disclosure of certain information may in certain instances be so strong to override any other interest underpinning the resort to confidentiality and secrecy.<sup>216</sup>

As already underlined in the previous Chapter, Article 9 of the Regulation envisages a specific discipline for sensitive documents. Indeed, according to Regulation 1049/2001/EC, an institution, which refuses access to documents that are classified as top secret, secret, or confidential and that protect essential interests of the European Union or of one of its Member States, shall give the reason for its denial in a manner that does not hinder the underpinning protected interests. The Regulation also provides for an internal review,<sup>217</sup> as well as for the right to initiate court proceedings or bring a complaint to the Ombudsman,<sup>218</sup> in case disclosure is denied.

A proposal for reforming Regulation 1049/2001/EC, aiming at further strengthening the right of access to information, is now under consideration.<sup>219</sup>

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<sup>213</sup> *Ibid.*, Article 4(2).

<sup>214</sup> *Ibid.*, Article 4(3).

<sup>215</sup> *Ibid.*, Article 4(5).

<sup>216</sup> See European Court of Human Rights [GC], *Guja v. Moldova*, App. No. 14277/04, judgment of 12 February 2008, para. 52.

<sup>217</sup> Regulation 1049/2001/EC, *supra* Chapter 1, note 7, Article 7.

<sup>218</sup> *Ibid.*, Article 8.

<sup>219</sup> See European Commission, *Green Paper on Public Access to Documents held by Institutions of the European Community*, 18 April 2007, Doc. COM(2007) 185 final, available at: <http://ec.europa.eu/transparency> (last accessed on 24 February 2016).

In addition, different institutions of the European Union have adopted decisions to regulate public access to documents under their control.<sup>220</sup>

The Court of Justice of the European Union has also contributed, to a significant extent, to shape the right of access to documents within the EU framework. Already in 1996, the Court acknowledged the “progressive affirmation of the individuals’ right of access to documents held by public authorities” both at the national and community level.<sup>221</sup> Accordingly, the Court found that, even lacking specific legislation, the Council should have taken measures to guarantee the full realization of this right.<sup>222</sup> In reaching its conclusion, the Court highly relied on the opinion of the Advocate General Tesauro, according to whom the analysis of international, regional and national practice pointed at a progressive affirmation of the individual's right of access to official information, either as a development of rights earlier recognized as being vested in the individual (*i.e.*, the right to freedom of expression) or as an independent right resulting from a change in perception concerning the relations between the governors and the governed.<sup>223</sup> That notwithstanding, the Court did not find it necessary to rule expressly on the recognition of a specific general principle of EU law granting a general right of access.

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<sup>220</sup> See, for instance, Council decision 93/731/EC on public access to Council documents, 20 December 1993, OJ L 340, 31 December 1993, p. 43 ff.; Commission decision 94/90/ECSC, EC, EURATOM on public access to Commission documents, 8 February 1994, OJ L 46, 18 February 1994, p. 58 ff.; European Parliament decision 97/632/EC, ECSC, EURATOM on public access to European Parliament documents 10 July 1997, OJ L 263, 25 September 1997, p. 27 ff.; decision of the European Central Bank ECB/2011/6 on public access to European Central Bank documents, 9 May 2011, OJ L 158, 16 June 2011, p. 37 ff.

<sup>221</sup> See European Court of Justice, *Netherlands v. Council*, case No. C-58/94, judgment of 30 April 1996, para. 34 ff. On this decisions see, *inter alia*, E. CHITI, *Further Developments of Access to Community Information: Kingdom of the Netherlands v. Council of the European Union*, in *European Public Law*, vol. 2, 1996, p. 563-569.

<sup>222</sup> *Ibid.*, para. 38.

<sup>223</sup> *Opinion of Mr. Advocate General Tesauro*, delivered on 28 November 1995, in *European Court Reports* 1996, p. I-02169, para. 16. The Advocate General also observed the link existing between the right to access to documents in the possession of the public authorities and the right to freedom of expression enshrined in Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 19 of the International Covenant on Civil and Political Rights.

Similarly, in the subsequent *Hautala* case,<sup>224</sup> the Court declined the invitation by the Advocate General Léger to recognize *explicitly* the existence of a fundamental right of access to documents held by Community institutions.<sup>225</sup>

Furthermore, even when taking into account more recent decisions,<sup>226</sup> it appears evident that the Court has generally been reluctant to take clear steps towards the formal recognition of the right of access to documents as a general principle of EU law or as a fundamental human right.<sup>227</sup>

However, the above issue has lost much of its relevance after the right of access to document has been ‘upgraded’ to the level of fundamental human right by Article 42 of the Charter of Fundamental Rights of the European Union, which now shares the same legal values as EU Treaties.

In this respect, it has been noted that Article 42 of the Charter would have added symbolism to the role of access to documents as a fundamental norm of EU law and Members States’ constitutional systems, as made evident, *inter alia*, by the acknowledgment of its role in ensuring openness as per Article 15 of the TFEU.<sup>228</sup>

In addition, it is undeniable that, during the last decade, the Court of Justice of the European Union has played a crucial role in framing some important guiding principles in relation to the right of access to documents within the EU

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<sup>224</sup> *Council v. Hautala*, case No. C-353/99, judgment of 6 December 2001.

<sup>225</sup> *Opinion of Mr. Advocate General Léger*, delivered on 10 July 2001, in *European Court Reports* 2001 I-9565, paras. 86-87.

<sup>226</sup> See also Court of Justice of the European Communities [GC], *Sweden v. Commission*, case No. C-64/05, judgment of 18 December 2007, where the Court did not expressly uphold the Advocate General’s Maduro conclusion that ‘the right of access to documents is a fundamental right’. Opinion of Mr. Advocate General Maduro, delivered on 18 July 2007, in *European Court Reports* 2007 I-1233, para. 55.

<sup>227</sup> See S. PRECHAL, M. E. DE LEEUW, *Transparency: A General Principle of EU Law?*, in U. BERNITZ, J. NERGELIUS, C. CARDNER (eds), *General Principles of EC Law in a Process of Development*, 2008, p. 210. On the issue see also K. LENAERTS, *In the Union we Trust: Trust-Enhancing Principles of Community Law*, in *Common Market Law Review*, vol. 41, 2004, p. 320-321.

<sup>228</sup> D. CURTIN, J. MENDES, *Article 42*, in S PEERS, T. HERVEY, J. KENNER, A. WARD (eds), *The EU Charter of Fundamental Rights. A Commentary*, Oxford and Portland, 2014, p. 1118. The Authors even doubt whether approaching access to information as a fundamental human right may indeed add further value to its recognition as a fundamental EU norm (*ibid.*)

legal system. Among them, in particular, the presumption that all documents should, in principle, be disclosed, whilst exceptions should be interpreted narrowly,<sup>229</sup> and the need for any request to be examined specifically and individually on a case-by-case basis.<sup>230</sup>

Just to make a recent example, in its 2014 decision in the *Council of the European Union v. Sophie in't Veld* case, the Court found that, in light of the strict interpretation that should be given to the exceptions to the right of access to documents, the mere fear of disclosing the existence of divergent opinions within the institutions regarding the appropriate legal basis for adopting a decision authorizing the opening of negotiations on behalf of the European Union is not a sufficient ground to conclude that the public interest in the field of international relations may be undermined.<sup>231</sup>

For the sake of argument, however, it has to be noted that the case law of the Court with respect to access to institutional documents has not been consistent. For instance, it has been denounced that the Court would have given at times “(...) an unnecessary generous interpretation to the scope and meaning of several key exceptions to this right”.<sup>232</sup> In a recent set of cases, the Court has indeed envisaged non-disclosure ‘presumptions’.<sup>233</sup> However, this specific line of jurisprudence has been neither homogeneous nor characterized by *general* reach. Indeed, the Court has so far developed such a presumption mainly with reference to cases concerning procedures for reviewing State

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<sup>229</sup> See, e.g., Court of Justice of the European Communities, *Netherlands and van der Wal v. Commission*, joined cases Nos. C-174/98 and C-189/98, 11 January 2000, para. 27; *Council v. Hautala*, *supra* note 224, para. 25; [GC] *Sweden v. Commission*, *supra* note 226, para. 66.

<sup>230</sup> See, e.g., Court of Justice of the European Communities, *Sweden and Turco v. Council, Denmark, Finland, United Kingdom, and Commission*, joined cases Nos. C-39/05 and C-52/08, judgment of 1 July 2008, para. 35.

<sup>231</sup> Case C-350/12 P, *Council of the European Union v. Sophie in't Veld*, decision of 3 July 2014, para. 48.

<sup>232</sup> See J. HELISKOSKI, P. LEINO, *Darkness at the Break of Noon: The Case Law on Regulation No. 1049/2001 on Access to Documents*, in *Common Market Law Review*, vol. 43, 2006, p. 781.

<sup>233</sup> See, for instance, Court of Justice of the European Union, *Commission v. TGI*, case No. C-139/07 P, decision of 29 June 2010, para. 61. See also, more recently, *LPN and Finland v. Commission*, case No. C-514/11 P, decision of 14 November 2013, paras. 48-49.

aid,<sup>234</sup> infringement procedures,<sup>235</sup> documents exchanged in the context of merger control procedures,<sup>236</sup> and pleadings filed by an institution in proceedings pending before the Court itself.<sup>237</sup>

It follows from the above that, during the last twenty years, several international organizations have changed their policies (or legislation) to allow greater access to their official documents. In addition, even in those international organizations in which specific disclosure policies are still not well defined, such as, for instance, the World Trade Organization, there has been a tendency to narrow secrecy and accommodate participation of social and economic actors.<sup>238</sup>

Whereas this general trend towards the erosion of the ‘culture of secrecy’ in international organizations<sup>239</sup> might be regarded as strengthening the view that the right of access to information is emerging or has emerged as well-established universal human right, some further elements might suggest a more cautious approach.

First, apart from the European Union, no other intergovernmental organization has so far recognized the right of access to information as *binding* upon it (having generally adopted *non-binding* policies). As it has been noted, indeed, quite strikingly, “(...) not one of the intergovernmental bodies that have led the way in promoting the recognition of the right of access to

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<sup>234</sup> Court of Justice of the European Union, *Commission v. TGI*, *supra* note 233, para. 61.

<sup>235</sup> Court of Justice of the European Union, *LPN and Finland v. Commission*, *supra* note 233, paras. 48-49.

<sup>236</sup> Court of Justice of the European Union, *Commission v. Éditions Odile Jacob*, case No. C-404/10 P, 28 June 2012, para. 123.

<sup>237</sup> Court of Justice of the European Union [GC], *Sweden and Others v. API and Commission*, case No. C-514/07 P, decision of 21 September 2010, para. 94.

<sup>238</sup> See S. CHARNOVITZ, *Transparency and Participation in the World Trade Organization*, in *Rutgers Law Review*, vol. 56, 2004, p. 12. For a general overview see also L. M. HINOJOSA MARTÍNEZ, *Transparency in International Financial Institutions*, in A. BIANCHI, A. PETERS, *Transparency in International Law*, *supra* Introduction, note 40, pp. 77-111.

<sup>239</sup> See again A. GRIGORESCU, *International Organizations and their Bureaucratic Oversight Mechanisms. The Democratic Deficit, Accountability and Transparency*, *supra* note 198, p. 181.

information has explicitly applied the right to itself”.<sup>240</sup>

Second, even when they have adopted *ad hoc* policies (which is still not the case for many international organizations), the issue remains as to the absence of formal mechanisms pursuant to which individuals and the general public may request and obtain access to certain documents.

The shortcomings of this lack of ‘access procedures’ has been well illustrated, for instance, by the EUROCONTROL’s refusal to provide human rights defenders with flight logs and other information relating to the CIA’s renditions flights.<sup>241</sup>

Lastly, as partly underscored *supra*, international organizations’ policies still allow a large number of restrictions, which can, in practice, undermine transparency and favour confidentiality.

### **3. Legitimate restrictions to the right of access to information: the ‘national security’ exemption**

As the analysis undertaken so far clearly shows, the right of access to information is not absolute. International, regional and national provisions generally encompass lists of legitimate aims for exceptions, which, although they might partially differ from instrument to instrument, often share common traits.<sup>242</sup>

For instance, Article 19 of the International Covenant on Civil and Political Rights, Article 13 of the American Convention on Human Rights and Article 10 of the European Convention on Human Rights all require that restrictions on the right to (seek), receive and impart information must be established in

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<sup>240</sup> See again H. DARBISHIRE, *The Challenges for the Right to Information in the Age of Mega-Leaks*, *supra* note 118, pp. 289-290.

<sup>241</sup> *Ibid.*, p. 289. See also Reprive and Access Info Europe (NGOs), *Rendition on Record. Using the Right of Access to Information to Unveil the Paths of Illegal Prisoner Transfer Flights*, *supra* note 196, p. 6.

<sup>242</sup> See, *inter alia*, A. P. AMIRI, *Freedom of Information and National Security: A Study of Judicial Review under US Law*, Berlin, 2014, p. 14 ff.

law.<sup>243</sup> The Inter-American Court of Human Rights has well described the rationale and scope of this requirement in the already mentioned *Claude Reyes* case:

“(...) restrictions must be established in law to ensure that they are not at the discretion of public authorities. Such laws should be enacted for reasons of general interest and in accordance with the purpose for which such restrictions have been established”.<sup>244</sup>

In addition, the Court outlined that the term ‘law’ cannot be interpreted as a synonymous for any legal norm, since a similar approach would imply that fundamental human rights might be restricted at the sole discretion of public authorities.<sup>245</sup>

Along the same line of reasoning, the Human Rights Committee excluded that the regulation governing access to information on death sentences in Kyrgyzstan, pursuant to which declassified material can be used exclusively for services purposes, constitutes ‘law’ meeting the criteria set up in Article 19(3) of the International Covenant on Civil and Political Rights.<sup>246</sup>

In the *Kenedi v. Hungary* case, the European Court of Human Rights also clarified that the expression ‘prescribed by law’ embodied in Article 10 of the European Convention on Human Rights involves qualitative elements such as foreseeability and, in general, the absence of arbitrariness.<sup>247</sup> Indeed, according to the Court, even if the responding State justified its refusal to disclosure on the ground that the requested documents were classified as ‘State secrets’, the reluctance by the State to comply with the orders of disclosure

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<sup>243</sup> See also Inter-American Declaration of Principles on Freedom of Expression, *supra* note 51, Principle 4 and Declaration of Principles on Freedom of Expression in Africa, *supra* note 55, Principle IV.

<sup>244</sup> Inter-American Court of Human Rights, *Claude Reyes et al. v. Chile*, *supra* note 84, para. 89.

<sup>245</sup> *Ibid.*

<sup>246</sup> Human Rights Committee, *Toktakunov v. Kyrgyzstan*, *supra* Chapter 1, note 442, para. 7.6.

<sup>247</sup> European Court of Human Rights, *Kenedi v. Hungary*, *supra* note 112, para. 44.



issued by domestic courts could not be regarded as a measure prescribed by the law.<sup>248</sup> To the contrary, such an attitude amounts to a ‘misuse of power’ in breach of Article 10 of the European Convention.<sup>249</sup>

As previously underlined, in addition, the Declaration of Principles on Freedom of Expression in Africa expressly provides that secrecy laws shall be amended as necessary to comply with freedom of information principles;<sup>250</sup> hence, it follows from this provision that secrecy laws that do not abide by international standards cannot fall within the meaning of ‘clearly defined rules established by law’ which legitimate restrictions.

International and regional instruments also demand that exemptions established by law serve a legitimate purpose. While different systems of human rights protection may encompass distinct lists of legitimate aims,<sup>251</sup> it is anyhow possible to detect some consistent requirements.

Generally speaking, in fact, in order for an infringement of the right of access to information to be justified, it must respond to the need to protect national security, public order, public health or morals or to respect the reputation or rights of others.<sup>252</sup>

In addition, for an exemption to be legitimate under international law, it

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<sup>248</sup> *Ibid.*, para. 45.

<sup>249</sup> *Ibid.* Concerning the need for restrictions to be prescribed by law, some interesting indications arise also from the so-called Johannesburg Principles, pursuant to which the law must be accessible, unambiguous, drawn narrowly and with precision so to enable individuals to foresee whether a particular action is unlawful. See again Johannesburg Principles, *supra* note 72, principle 1.1(a). See also Principle 8 of the Lima Principles, according to which: “(...) it will be not possible to maintain secret information under the protection of unpublished legislation (...)”. The Lima Principles were adopted by the Seminar on Information for Democracy in 2000 and subsequently welcomed by the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression in its 2001 annual report (UN Doc. E/CN.4/2001/64, Annex II, 13 February 2001).

<sup>250</sup> See again Declaration of Principles on Freedom of Expression in Africa, *supra* note 55, Principle VI(3).

<sup>251</sup> For instance, as indicated in the previous section, whilst Article 10(2) of the European Convention on Human Rights envisages an extensive list of legitimate grounds for restrictions to the right of receive and impart information, neither the African Charter on Human and Peoples’ Rights nor the Declaration of Principles on Freedom of Expression contain similar provisions.

has to be necessary in a democratic society. Whilst Article 10 of the European Convention on Human Rights expressly spells out this condition, the Inter-American Court of Human Rights has inferred it from an extensive interpretation of Article 13 of the American Convention on Human Rights.<sup>253</sup>

This ‘necessity test’ requires that limitations to the right of access to State-held information should be intended to satisfy a compelling public interest. Indeed, in a democratic society, State authorities should be governed by the so-called ‘principle of maximum disclosure’, which establishes the presumption that all information is accessible, subject to a limited system of exceptions.<sup>254</sup> This also implies that, in case the same objective may be reached through different options, the one leading to the minor restriction of the protected right must be selected.<sup>255</sup> Accordingly, the necessity requirement is paired by a ‘proportionality test’, pursuant to which the restriction should be proportionate to the interest that justifies it and appropriate for ensuring its underpinning legitimate purpose.<sup>256</sup>

It follows from the above that over-broad reliance on State secrecy might constitute an illegitimate interference with the enjoyment of the right of access to information. In its 2001 *Concluding Observations on Uzbekistan*, for instance, the Human Rights Committee invited the State to amend its Law on the Protection of State Secrets in order to better define and considerably reduce the matters defined as ‘State secrets’ so as to bring it in compliance with Article 19 of the International Covenant on Civil and Political Rights.<sup>257</sup>

Governments have the burden of proof to demonstrate that a certain

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<sup>252</sup> See Article 19(3) of the International Covenant on Civil and Political Rights; Article 13(2) of American Convention on Human Rights and Article 10(2) of the European Convention on Human Rights.

<sup>253</sup> See *Claude Reyes et al. v. Chile*, *supra* note 84, para. 91.

<sup>254</sup> *Ibid.*, para. 92. On the principle of maximum disclosure see also, e.g., the Inter-American Special Rapporteur for Freedom of Expression reports on Panama (Doc. OEA/Ser. L/V/II.110, 9 March 2001, para. 30) and Paraguay (Doc. OEA/Ser. L/V/II.117, 3, July 2003, para. 130).

<sup>255</sup> *Ibid.*, para. 91.

<sup>256</sup> *Ibid.*

<sup>257</sup> Human Rights Committee, *Concluding Observations on Uzbekistan*, UN Doc. CCPR/C/71/UZB, 26 April 2001, para. 18.

restriction complies with a permitted purpose and is necessary in a democratic society.<sup>258</sup>

In addition, States must give evidence that the disclosure would cause a ‘substantial harm’ to the legitimate interest protected by the exemption.<sup>259</sup> The ‘substantial harm’ must be greater than the public interest in receiving the requested information. As a result, the protection of the right of access to State-held information includes a positive duty to explicitly balance the substantial harm that may derive from disclosure with the public interest in releasing the information, taking into account both short and long-term consequences.<sup>260</sup>

The exact contours of this balancing exercise are, however, not clearly defined. It is noteworthy, nonetheless, that, as previously mentioned, the European Court of Human Rights has found that “the interest which the public may have in particular information [in the case at stake, the discovery of information related to alleged governmental misconduct] can sometimes be so strong as to override even a legally imposed duty on confidentiality”.<sup>261</sup> In stating so, the Court seems to have adopted a sort of ‘hierarchical approach’ in weighting competing public interests, by relying on the ‘importance’ of the

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<sup>258</sup> *Ibid.*, para. 93. See also Human Rights Committee, General Comment No. 34, *supra* note 36, paras. 27 and 35 (which also adds that States must demonstrate in specific and individualized fashion the precise nature of the threat, and the necessity and proportionality of the specific action taken). Based on this assumption, in the *Toktakunov v. Kyrgyzstan* case, the Human Rights Committee, concluded that, having the State failed to provide any pertinent explanation for the refusal of disclosure, the denial to impart information on the number of death sentences could not be deemed necessary for the protection of a legitimate purpose as per Article 19(3) of the International Covenant on Civil and Political Rights. See again Human Rights Committee, *Toktakunov v. Kyrgyzstan*, *supra* Chapter 1, note 442, para. 7.7.

<sup>259</sup> See United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, *2000 Annual Report*, UN Doc. E/CN.4/2000/63, 18 January 2000, para. 44 (“... a complete list of the legitimate aims which may justify non-disclosure should be provided in law and exceptions should be narrowly drawn so as to avoid including material which does not harm the legitimate interest”).

<sup>260</sup> See Inter-American Rapporteur for Freedom of Expression, *2003 Annual Report*, Chapter IV, paras. 47-48. In this respect, see also Article 4(2) of Regulation (EC) 1049/2001, pursuant to which, for certain exemptions, the refusal to provide information is not allowed if there is an overriding public interest in disclosure.

<sup>261</sup> See European Court of Human Rights [GC], *Guja v. Moldova*, *supra* note 216, para. 52.

information concealed as “ranking element”.<sup>262</sup>

States parties have an obligation to abide by the parameters set in international human rights treaties, as interpreted by human rights monitoring bodies, when restricting the right of access to State-held information. Indeed, as observed by the Inter-American Court of Human Rights, if State authorities establish limitations to this right without respecting applicable international norms, this creates fertile ground for discretionary and arbitrary conduct by the State in classifying information as secret, reserved or confidential, giving rise to legal uncertainty.<sup>263</sup>

Among the aforementioned legitimate purposes for limiting the right of access to information, *national security* is certainly the most common – and, probably, the most controversial – ground based on which States justify the withholding of information. Apart from international and human rights treaties, most national information laws<sup>264</sup> and even international organizations’ policies or legislation expressly provide for ‘national security’ limitation clauses.<sup>265</sup>

As partly already stated, however, no uniform and clear definition of ‘national security’ can be found either at the international or domestic level.

International human rights treaties, although explicitly enlisting the protection of national security among those purposes that might legitimize a limitation to the full enjoyment of human rights, do not contain a specific definition. The *travaux préparatoires* do not help shading further light as to the exact meaning of this expression. Rather, they even reveal how this nebulous concept may be ‘subjectively’ perceived in different national contexts.

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<sup>262</sup> At the domestic level, however, there may be found opposite statements. See, for instance, Supreme Court of Philippines, *Almonte v. Vasquez*, case No. 93567, judgment of 23 May 1995 (“[State secrecy] privilege is based upon public interest of such paramount importance as in and of itself transcending the individual interests of a private citizen, even though, as a consequence thereof, the plaintiff cannot enforce his legal rights”).

<sup>263</sup> See *Claude Reyes et al. v. Chile*, *supra* note 84, para. 98.

<sup>264</sup> See also *supra* Chapter 1, at 3.1.

<sup>265</sup> See *supra* at 2.4.

In the debate leading to the adoption of the International Covenant on Civil and Political Rights, for instance, Lebanon opposed the proposal of the United Kingdom to add in Article 19(3) “the protection of territorial integrity” as an additional legitimate ground for restriction. According to Lebanon, indeed, this notion was already encompassed in the concept of “national security”.<sup>266</sup>

Likewise, none of the international bodies charged with interpreting and applying human rights treaties has, so far, provided an overall definition of national security.<sup>267</sup>

On top of that, the analysis of State practice depicts a fragmented *scenario*, which has been partly outlined in Chapter 1. In most countries, domestic law lacks any definitions of the term ‘national security’. As a result, there is no limit to the executive’s interpretation of this concept, especially if the judiciary is not fully autonomous.<sup>268</sup> As noted by Lord Woolf in the case *Secretary of State for the Home Department v. Rehman*, “what can be regarded as affecting national security can vary according to the danger being considered”.<sup>269</sup>

But even in those States where national laws provide a definition of ‘national security’, this is often vaguely worded and, in any event, considerable variation exists from State to State. For instance, only some States include in the definition of national security the protection of the

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<sup>266</sup> See UN Doc. E/CN.4/SR/320, p. 12, as reported in A.L. SVENSSON-MCCARTHY, *The International Law of Human Rights and States of Exception. With Special Reference to the Travaux Préparatoires and Case-Law of the International Monitoring Organs*, The Hague, Boston, London, 1998, p. 155.

<sup>267</sup> *Ibid.*, p. 147 ff.

<sup>268</sup> This is the case, for instance, of Albania and India. See L. KRABBE, *Freedom of Expression and Access to Information in relation to National Security in Albania*, in S. COLIVER, P. HOFFMAN, J. FITZPATRICK, S. BOWEN (eds), *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information*, *supra* note 72, p. 202 and See K.S. VENKATESWARAN, *India: National Security, Freedom of Expression and Emergency Powers*, in S. COLIVER, P. HOFFMAN, J. FITZPATRICK, S. BOWEN (eds), *Secrecy and Liberty: National Security, Freedom of Expression and Access to Information*, *supra* note 72, p. 329.

<sup>269</sup> *Secretary of State for the Home Department v. Rehman*, 3 All ER 778, judgment of 23 May 2000, para. 39. See also T. EMERSON, *National Security and Civil Liberties*, in *The Yale Journal of World Public Order*, vol. 9, 1982, p. 78 (according to the Author, the concept of national security has for good reasons never been defined).

constitutional order.<sup>270</sup> Similarly, while some countries' laws do encompass international relations in the notion of 'national security', others consider it as being a separate concept.<sup>271</sup> To make a further example, only few countries incorporate national economy within the scope of national security.<sup>272</sup> In addition to the above, as it has been already observed in the previous Chapter,<sup>273</sup> there is inconsistency in the terminology itself, with several national laws referring, often interchangeably, to 'national security', 'state security', 'national defense', 'national interests' and 'essential interests'.

A precious guidance for defining the content of the notion of national security may however be drawn from the *Siracusa Principles on the Limitations and Derogation Provisions in the International Covenant on Civil and Political Right*.<sup>274</sup> According to principle VI, "national security may be invoked to justify measures limiting certain rights only when they are taken to protect *the existence of the nation or its territorial integrity or political independence against force or threat of force*".<sup>275</sup>

The Principles also provide a negative definition of national security by setting clear limits to its invocation as a reason for imposing restrictions to the full enjoyment of human rights. In this respect, the Principles clearly state that national security cannot be invoked to prevent local or relatively isolated threats to law and order.<sup>276</sup> Moreover, it cannot be resorted to in order to impose vague or arbitrary limitations, especially where adequate safeguards

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<sup>270</sup> See, e.g., Hungarian Act 125/1995 on the National Security Services, Article 74, pursuant to which the national security interest is "to secure the sovereignty and protect the constitutional order of the Republic of Hungary (...)" (unofficial translation).

<sup>271</sup> Countries whose legislation does not enlist international relations in the definition of national security are, among others, Belgium, Denmark, The Netherlands, Russia and the United Kingdom.

<sup>272</sup> See, e.g., Moldova Law on Access to Information (2000), para. 7(2).

<sup>273</sup> See *supra* Chapter 1, at 3.1.

<sup>274</sup> UN Doc. E/CN.4/1985/4, 28 September 1984, Annex. The Siracusa Principles were drafted by a group of experts convened by the International Commission of Jurists and other NGOs. The Principles have been subsequently endorsed by the United Nations Sub-Commission Special Rapporteurs, Mr. Danilo Türk and Mr. Louis Joinet, in their final report on the right to freedom of opinion and expression. See UN Doc. E/CN.4/Sub.2/1992/9, *supra* note 20, para. 77.

<sup>275</sup> Emphasis added. *Ibid.*, para. 29.

and effective remedies against abuses are not in place.<sup>277</sup>

A similar definition is also contained in the already recalled Johannesburg Principles.<sup>278</sup> Although these Principles have not binding legal value, they might certainly be regarded as an important standards-setting tool.

As observed in the previous Chapter, however, the fact that the recently adopted Tshwane Principles have not included a definition of national security but, rather, have demanded States to provide it in national legislation<sup>279</sup> may be indicative of the acknowledgement that international law, as it stands at present, does not purport a clear legal definition of the said notion.

That notwithstanding, under the perspective of ‘State practice’, it is noteworthy that the definition embodied in the Siracusa and Johannesburg Principles has recently found some (partial) corroboration at the domestic level.<sup>280</sup> In the already recalled case *The Prosecution in the Trial of Ríos Montt v. Ministry of Defence*, for instance, the Constitutional Court of Guatemala has found that the term ‘national security’ contained in Article 30 of the Guatemalan Constitution (‘right of access to State-held information’) “*se refiere a la capacidad de preservar la integridad física y el honor de la Nación y de su territorio; a proteger los elementos conformantes del Estado sobre cualquier agresión de grupos extranjeros o de nacionales*

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<sup>276</sup> *Ibid.*, para. 30.

<sup>277</sup> *Ibid.*, para. 31.

<sup>278</sup> The full text of Principle 2 of the Johannesburg Principles (see *supra* note 72) reads as follows: “A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country’s existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government (...).”

<sup>279</sup> See again Tshwane Principles, *supra* Chapter 1, at 3.1, Definitions.

<sup>280</sup> It may be questionable, however, whether such ‘national’ definitions may have any value in the interpretation of the ‘limitation clauses’ contained in the human rights treaties. The Human Rights Committee has indeed held, for instance, that: “its interpretation and application of the International Covenant on Civil and Political Rights has to be based on the principle that the terms and concepts Or the Covenant are independent of any particular national system or law and of all dictionary definitions. Although the terms of the Covenant are derived from long traditions within many nations, the Committee must now regard them as having an autonomous meaning”. See Human Rights Committee, *Gordon C. Van Duzen v. Canada*, Communication No. R.12/50, UN Doc. Supp. No. 40 (A/37/40), 7 April 1982, para. 10.2.

*beligerantes*”.<sup>281</sup>

Similarly, the Constitutional Court of Colombia recently asserted that any restriction to the right of access to information on the ground on national security should present “(...) *un vínculo de conexidad material con la protección de la integridad territorial del país* (...)”.<sup>282</sup>

That said, it is undeniable that, although international and regional bodies have not provided a definition of national security, some of them have however offered meaningful guidance in clarifying and even limiting its scope.<sup>283</sup>

For instance, in their 1991 final report on the right to freedom of opinion and expression, United Nations Sub-Commission Special Rapporteurs, Türk and Joinet, observed that, whilst restrictions to protect national security, such as those related to military and State secrets, are necessary to protect States’ legitimate interests, particular attention should be paid to the problems arising from the ambiguity of provisions defining the same concept of ‘secrets’, given that a very broad interpretation of the term might *de facto* bar the exercise of the right to freedom of expression.<sup>284</sup> In this respect, the two Special Rapporteurs upheld the view expressed by Professor Kiss already in 1985, pursuant to which national security “as a ground for limitation of human rights, (...) may justify the protection of military secrets. (...) However, (...) vague or arbitrary limitations are to be avoided and adequate safeguards and effective remedies against abuses are to be provided for”.<sup>285</sup>

More recently, the Human Rights Committee underlined that extreme care must be taken by States parties to ensure that provisions related to national security – whether described as ‘official secrets’ or sedition laws or otherwise

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<sup>281</sup> Guatemalan Constitutional Court, *The Prosecution in the Trial of Ríos Montt v. Ministry of National Defence*, *supra* Chapter 1, note 214, p. 8. See also Guatemalan Constitutional Court, *Opinión consultiva* No. 2819-2004 of 8 March 2005, para. IV.

<sup>282</sup> Constitutional Court of Colombia, case C-872/03, *supra* Chapter 1, note 446, para. VII.

<sup>283</sup> See again S. COLIVER, *Commentary on the Johannesburg Principles*, *supra* note 72, p. 17.

<sup>284</sup> See UN Doc. E/CN.4/Sub.2/1992/9, *supra* note 20, para. 24.

<sup>285</sup> See A. KISS, *Commentary by the Rapporteur on the Limitation Provisions*, in *Human Rights Quarterly*, vol. 7, 1985, p. 21.



– are crafted and applied in a manner that conform to the strict requirements set out in Article 19(3) of the International Covenant on Civil and Political Rights. According to the Committee, for instance, it is incompatible with the aforementioned provision to invoke such laws to suppress or withhold information of legitimate public interest that do not *effectively* harm national security.<sup>286</sup>

The United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression and Inter-American Special Rapporteurs for Freedom of Expression have repeatedly denounced the excessive secrecy and over-classification of information in several countries, requiring a restricted reading of ‘national security’ exception clauses.<sup>287</sup>

In its 2015 report, for instance, the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has expressly underlined that secrecy should be imposed only with respect to information that, if disclosed, would harm a specific interest protected under Article 19(3) of the International Covenant on Civil and Political Rights (including national security), provided that a process is in place to determine whether public interest in disclosure might outweigh the harm.<sup>288</sup> Additionally, two main aspects underscored by the United Nations Special Rapporteur deserve special mention. First, according to the Special Rapporteur, the principle of maximum disclosure should be implemented by means of adoption of “processes that allow for evaluation of classification decisions, within institutions and by the public, including penalties for over-classification”.<sup>289</sup> Second, quite interestingly the Special Rapporteur stressed that law alone is insufficient to eradicate a culture of secrecy and that such an evolution necessarily requires political and bureaucratic willingness to move

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<sup>286</sup> Human Rights Committee, General Comment No. 34, *supra* note 36, para. 30.

<sup>287</sup> See UN Doc. E/CN.4/1998/40, *supra* note 25, para. 13.

<sup>288</sup> Report of the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, UN Doc. A/70/361 of 8 September 2015, para. 12.

<sup>289</sup> *Ibid.*

towards transparency and public access.<sup>290</sup>

The Inter-American Special Rapporteur for Freedom of Expression has further stressed that “the process of evaluation required to adequately justify a denial of access to State-held information takes on particular urgency and importance when the legitimate aim in question is that of protecting national security”.<sup>291</sup> In addition, the justification for classifying information on the basis of national security should no longer be available when the threat to a legitimate interest subsides.<sup>292</sup>

Therefore, while general procedures and requirements on restrictions (*i.e.*, legitimate aim, necessity and proportionality, burden of proof) apply also to those limitations grounded on national security concerns, in this last case a highest degree of scrutiny should apply. In this respect, the Inter-American Special Rapporteur has even demanded that, at the domestic level, classified material should be reviewed by an independent judicial mechanism to ensure that national security interests are appropriately balanced with the public interest in receiving information.<sup>293</sup>

In Europe, the European Court of Human Rights has expressly acknowledged that espionage,<sup>294</sup> terrorism,<sup>295</sup> incitement to/approval of terrorism<sup>296</sup> and subversion<sup>297</sup> constitute threats to national security.

More generally, in its judgment in the *Vereniging Weekblad Bluf! v. Netherlands* case, the European Court of Human Rights has recognized that a certain degree of secrecy is essential – and, hence, justified under Article 10 of the European Convention on Human Rights – in order to protect the State

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<sup>290</sup> *Ibid.*, para. 14.

<sup>291</sup> Inter-American Special Rapporteur for Freedom of Expression, *Annual Report 2003*, Chapter IV, para. 49.

<sup>292</sup> *Ibid.*, para. 46.

<sup>293</sup> See, *e.g.*, Inter-American Rapporteur for Freedom of Expression, *Report on the situation of freedom of thought and expression in Haiti*, 15 July 2003, Doc. OEA/Ser.L/V/II.117, para. 30.

<sup>294</sup> European Court of Human Rights, *Klass et al. v. Germany*, App. No. 5029/71, judgment issued on 6 September 1978, para. 48.

<sup>295</sup> *Ibid.*

<sup>296</sup> European Court of Human Rights [GC], *Zana v. Turkey*, App. No. 18954/91, judgement issued on 25 November 1997, para. 50.

against *activities of individuals and groups attempting to undermine the basic values of a democratic society*.<sup>298</sup> However, in the case at issue – since the information had already been made public and, therefore, could not be protected as State secret anymore –

the Court excluded that a seizure order might have served the legitimate aim of protecting national security.<sup>299</sup> Thus, according to the Court, once the confidentiality of security information is lost, the question whether the information should continue to be withheld on the ground of national security becomes a question of little or no practical meaning.<sup>300</sup>

Interestingly, the aforementioned case law of the European Court of Human Rights has been explicitly recalled by the Italian *Corte di Cassazione* in the *Abu Omar* case. The Court referred indeed to it to support the assertion that, once certain information has become public, any legal protection of it on the ground of State secrecy (including, the resort to the State secrecy privilege in

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<sup>297</sup> European Court of Human Rights, *Leander v. Sweden*, *supra* note 105, para. 59

<sup>298</sup> European Court of Human Rights, *Vereniging Weekblad Bluf! v. Netherlands*, App. No. 16616/90, judgment of 9 February 1995, para. 35. Although the case does not deal with the right of access to information *tout court*, the related conclusions might well apply also to the ‘right of access to information’ cases. The Court of Justice of the European Union has also upheld the essential character of secrecy and confidentiality to protect States’ legitimate national security interests. For instance, in the aforementioned *Jose Maria Sison v. Council of the European Union* case, the Court found that “sensitive documents as defined by Article 9 of Regulation No. 1049/2001 must not be disclosed to the public in order not to prejudice the effectiveness of the operational fight against terrorism and thereby undermine the protection of public security”. See Court of Justice of the European Union, *Jose Maria Sison v. Council of the European Union*, *supra* Chapter 1, note 302, para. 66.

<sup>299</sup> *Ibid.*, para. 33.

<sup>300</sup> D. J. HARRIS, M.O’BOYLE, C. WARBRICK (eds), *Law of the European Convention on Human Rights*, 3rd ed., Oxford, New York, 2014, p. 476. See also European Court of Human Rights, *Observer and Guardian v. United Kingdom*, App. No. 13585/88, judgment of 26 November 1991, para. 69. It has to be stressed, however, that this findings have not always been implemented at the domestic level. The Finnish Supreme Administrative Court, for instance, in its decision KHO 2004:25 of 2 March 2004, has *de facto* excluded that the previous publication of classified documents – at least when occurred without the executive’s consent – could prevent the Ministry of Foreign Affairs from invoking the said classification as a ground for non-disclosure. The Administrative Court reached these conclusions notwithstanding the plaintiff’s reliance on Article 10 of the European Convention on Human Rights (a summary of this decision in English is available at: <http://trip.abo.fi>; last accessed on 24 February 2016).

the context of criminal proceedings) could not be invoked anymore.<sup>301</sup>

Eventually, the European Court of Human Rights has indeed upheld the *Corte di Cassazione*'s stance, although addressing the issue under Article 3 of the European Convention on Human Rights in its procedural limb (rather than under Article 10 of the same instrument). In its aforementioned ruling of 23 June 2016 in the *Nasr and Ghali* case, the European Court has in fact rejected the Government's argument according to which the resort to State secrecy had been legitimate and necessary to protect national security, since those information covered under the veil of "State secrecy" had already been in the public domain. The Court found indeed that, given that those information for which the Italian executive had invoked the State secrecy privilege had already been disseminated in the press and on internet, it "*voit (...) mal comment l'usage du secret d'État une fois les informations litigieuses divulguées pouvait servir le but de préserver la confidentialité des faits*".<sup>302</sup> The Court thus excluded that the State secrecy privilege may legitimately be invoked based on national security reasons when those information whose disclosure would allegedly hinder the country's security are already in the public domain.

While this specific case law has, so far, been limited to the European context, it could nonetheless serve similar practical instances if 'transposed' into other systems of human rights protection. In the United States, for instance, national security law expressly admits '*retroactive classification*', which means that the government may publicly disclose information and classify it later on.<sup>303</sup> However, even in lack of specific decisions on the point,

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<sup>301</sup> See again Italian Supreme Court, decision No. 46340 of 19 September 2012, p. 130. It is noteworthy, however, that the Supreme Court recalled this case law on Article 10 of the European Convention on Human Rights to conclude that the late invocation of State secrecy in respect to documents already in the public domain was inconsistent with Articles 6 (right to a fair trial) and 13 (right to an effective remedy) of the European Convention on Human Rights (*ibid.*, p. 131).

<sup>302</sup> See again European Court of Human Rights, *Nasr and Ghali v. Italy*, *supra* Chapter 1, note 173, para. 268.

<sup>303</sup> On the topic see, e.g., J. ABEL, *Do you Have to Keep Government's Secrets? Retroactively Classified Documents, the First Amendment and the Power to Make Secret out of the Public Record*, in *University of Pennsylvania Law Review*, vol. 163, 2014-2015, pp. 1037-1097.

it might be argued that such legislation would hardly comply with the ‘restrictive interpretation’ of the national security exemption provided for in Article 19(3) of the International Covenant on Civil and Political Rights (to which the United States are parties), as interpreted by the Human Rights Committee.<sup>304</sup>

Finally, the European Court of Human Rights, while recognizing that States enjoy a wide margin of appreciation when relying on national security claims, held that this expression cannot be “stretched beyond its natural meaning”.<sup>305</sup>

Narrower parameters limiting the application of the ‘national security’ exemption have been recently set out also by the Parliamentary Assembly of the Council of Europe. In the abovementioned Resolution 1954 (2013) on National Security and Access to Information, indeed, the Assembly, although acknowledging that national security interests constitute a valid ground for withholding State-held information, also recognized that access to information represents a crucial component of national security in itself, by enabling democratic participation, sound policy formulation and public scrutiny of State action.<sup>306</sup>

As a consequence, the Assembly has stressed the need to place reasonable limits upon the invocation of national security as grounds to restrict access to information. In this respect, the Assembly has highlighted that information

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<sup>304</sup> See, in this respect, also the already mentioned Tshwane Principles (*supra* Chapter 1, at 3.1). Principle 49(b) provides that: “If information has been made generally available to the public, by whatever means, whether or not lawful, any effort to try to stop further publication of the information in the form in which it already is in the public domain is presumptively invalid”. As previously highlighted, it must be stressed however that this instrument is not legally binding.

<sup>305</sup> European Court of Human Rights, *C. G. et al. v. Bulgaria*, App. No. 1365/07, judgment of 24 April 2008, para. 43. On the concept of margin of appreciation see, *inter alia*, S. GREER, *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, Strasbourg, 2000; Y. ARAI-TAKAHASHI, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Oxford, 2002; M. AMBRUS, *The European Court of Human Rights and Standards of Proof. An Evidentiary Approach towards the Margin of Appreciation*, in L. GRUSZCZYNSKI, W. WERNER (eds), *Deference in International Courts and Tribunals. Standard of Review and Margin of Appreciation*, Oxford, 2014, pp. 235-253.

<sup>306</sup> Council of Europe Parliamentary Assembly, Resolution 1954 (2013), *supra* Chapter 1, note 88, para. 3.

may be withheld based on national security reasons for only as long as it proves necessary to protect a legitimate national security interest and that, to this purpose, public archives containing secret information should periodically review whether the legitimacy of secrecy still exists on national security grounds.<sup>307</sup> In addition, according to the Assembly, “as a safeguard against overly broad exceptions, access to information should be granted even in cases normally covered by a legitimate exception, where public interest in the information in question outweighs the authorities’ interest in keeping it secret”.<sup>308</sup> Hence, as already pointed out, the Assembly has envisaged a sort of ‘exception to the exception’, expressly subjecting any denial to provide information to an ‘overriding public interest’ test.

Finally, like the Inter-American Special Rapporteur for Freedom of Expression, the Assembly has outlined the importance that public oversight bodies in charge of monitoring the activities of the security services should be independent from the executive.<sup>309</sup>

To summarize, while national security clearly constitutes a valid ground for States to impose restrictions on the right of access to information, the same legal concept of national security is still a nebulous one. This may easily lead States to over-invocate national security concerns to keep information secret. That notwithstanding, under international human rights law, States’ reliance on national security to withhold information meets specific limits. International and regional human rights monitoring bodies (as well as UN human rights special procedures) have indeed recognized that, in general, restrictions to the right of access to State-held information – whether based on national security concerns or on other legitimate aims – should be established in law, be necessary in a democratic society and proportionate to the interest which justifies the exemption. Moreover, States have an additional burden of demonstrating that disclosure would cause substantial harm to the legitimate

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<sup>307</sup> *Ibid.*, para. 9.4.

<sup>308</sup> *Ibid.*, para. 9.5.

interest whose protection has grounded the restriction itself.

As it has been noted more generally, in fact, “the term national security [as included in human rights treaties] was never intended as empowering governments to restrict the exercise of human rights for reasons of State. This means that government policies based on doctrine, such as the national security doctrine, which exclusively focus on military objectives defined without respect for democratic values, the rule of law and respect for the individual, are squarely incompatible with this important branch of international law”.<sup>310</sup>

On top of that, there is an increasing tendency to raise the ‘legitimacy threshold’ in any case States rely specifically on national security reasons to restrict access to State-held information. Although this trend does not yet amount to a well-established practice – especially considering the cautious approach that, so far, has been taken by those international and regional bodies charged with monitoring the application of relevant human rights treaties – it might still be indicative of an emerging interpretative pattern.

This conclusion seems to find support also in domestic case law. For instance, in a judgment issued on 27 June 2007, the Constitutional Court of Columbia found that: “(...) *para limitar un derecho de la importancia del derecho de acceso a la información pública no basta con apelar a conceptos amplios y de notable nivel de abstracción como el concepto de defensa y seguridad nacional*”.<sup>311</sup> According to the Court, in fact, any restriction to the right of access to information, even when grounded on national security considerations, shall meet the following requirements:

“(...) *i) la restricción está autorizada por la ley o la Constitución; ii) la norma que establece el límite es precisa y clara en sus términos de*

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<sup>309</sup> *Ibid.*, para. 9.9.

<sup>310</sup> See again A.L. SVENSSON-MCCARTHY, *The International Law of Human Rights and States of Exception. With Special Reference to the Travaux Préparatoires and Case-Law of the International Monitoring Organs*, *supra* note 266, p. 189.

*forma tal que no ampare actuaciones arbitrarias o desproporcionadas de los servidores públicos; iii) el servidor público que decide ampararse en la reserva para no suministrar una información motiva por escrito su decisión y la funda en la norma legal o constitucional que lo autoriza; iv) la ley establece un límite temporal a la reserva; v) existen sistemas adecuados de custodia de la información; vi) existen controles administrativos y judiciales de las actuaciones o decisiones reservadas; vii) la reserva opera respecto del contenido de un documento público pero no respecto de su existencia; viii) la reserva obliga a los servidores públicos comprometidos pero no impide que los periodistas que acceden a dicha información puedan publicarla; ix) la reserva se sujeta estrictamente a los principios de razonabilidad y proporcionalidad; x) existen recursos o acciones judiciales para impugnar la decisión de mantener en reserva una determinada información”.*<sup>312</sup>

More recently, the Constitutional Court of Colombia has rejected the provision of the *Draft Law on Transparency and Right to National Public Information* that exempted from disclosure information belonging to vaguely worded categories, such as defence, national security, public order and international relations.<sup>313</sup> The Court found that this provision breached both Colombia’s constitutional law and international law by entrusting national authorities with broad discretion in restricting the right of access to information.<sup>314</sup>

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<sup>311</sup> Decision No. C- 491/07, para. 21.

<sup>312</sup> *Ibid.*, para. 12.

<sup>313</sup> Decision No. C-274/13 of 9 May 2013, at 3.2.5.

<sup>314</sup> *Ibid.* According to the Constitutional Court: “*Este tipo de expresiones genéricas o vagas constituyen una habilitación general a las autoridades para mantener en secreto la información que discrecionalmente consideren adecuado, y es claramente contraria al artículo 74 CP, porque constituyen una negación del derecho, e impiden el control ciudadano sobre las actuaciones de los servidores públicos y de las agencias estatales. También resulta contraria a los tratados internacionales de los cuales Colombia hace parte, y que conforman el bloque de constitucionalidad en sentido estricto*”.



It is interesting to see if similar conclusions will be upheld also by the Peruvian Constitutional Court, before which the Peruvian national Ombudsman has recently challenged the abovementioned Legislative Decree No. 1129/2012, which provides that all information and documents related to security and national defense are by their own nature *secret*.<sup>315</sup>

In this regard, further indications may even be drawn from the abovementioned 2013 Tshwane Global Principles on National Security and the Right to Information. These Principles – that, as already pointed out, aim at providing guidance to those drafting or implementing national legislation on access to State-held information, by codifying international, regional and national standards and good practices – state that no restrictions on the right of information on national security grounds may be imposed unless the government can demonstrate its abidance by the following parameters: (i) the restriction is prescribed by law; (ii) is necessary in a democratic society; (iii) serves the protection of a legitimate national security interest; and (iv) *the law provides for adequate safeguards against abuse, including, prompt, full, accessible and effective scrutiny of the validity of the restriction by an independent oversight authority and full review by the courts*.<sup>316</sup>

While the first three requirements reflect well-established case law from international and regional human rights monitoring bodies, the fourth parameter seems to elaborate further on existing international, regional and national practice in a *de lege ferenda* perspective. This may be held true also for other provisions contained in the Tshwane Principles. Principle 5(b), for instance, expressly provides that States cannot withhold information based on national security grounds simply on the basis that it was generated by, or shared with, a foreign State or inter-governmental body. Principle 6 states that all oversights, ombudsmen and appeal bodies, including courts, should have

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<sup>315</sup> For more indications on this pending case see, *inter alia*, Open Society Foundation, *Written Report concerning Compliance of Peruvian Executive Decree No. 1129 with International Law*, available at: <https://www.opensocietyfoundations.org/> (last accessed on 24 February 2016).

access to national security information, regardless of their classification level. Principle 10 identifies some categories of information which should enjoy a high presumption in favour of disclosure and may be withheld or classified on national security grounds in the most exceptional circumstances and only if there is no other reasonable means by which limiting the harm arising from disclosure. They include information related to violations of human rights and humanitarian law, laws and regulations establishing safeguards for the right to liberty and security of person, the prevention of torture or other ill-treatment and the right to life, the structure and power of government, decision to use military forces or to acquire weapons of mass destruction, surveillance procedures, financial information, accountability concerning constitutional and statutory provisions or other abuses of power, as well as information related to public health, public safety or the environment.

As stated, although most of these principles do not seem, so far, to reflect existing legally binding obligations, they still may be indicative of a new emerging interpretative trend.

#### **4. State secrecy and the right of access to information concerning human rights violations**

A particular dimension of the right of access to State-held information concerns the right to seek and receive information related to human rights violations.

In this respect, Article 6 of the *United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*<sup>317</sup> explicitly states that everyone has the right, individually and in association with others, to know, seek, obtain, receive and hold information

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<sup>316</sup> See again Tshwane Principles, *supra* Chapter 1, at 3.1, Principle 3.

about all human rights and fundamental freedoms, including having access to information concerning how these rights are implemented in the domestic legislative, judicial or administrative system.<sup>318</sup>

This provision includes, *inter alia*, the right of access to information concerning human rights abuses that – as recently stressed by the Special Rapporteur on the Promotion and the Protection of the Right to Freedom of Opinion and Expression – “often determines the level of enjoyment of other rights and [constitutes] (...) a right in itself’.<sup>319</sup>

Although this right is strictly interrelated to the right to the truth,<sup>320</sup> its scope of application is a broader one, since it is not limited to (but still include) grave and systematic human rights abuses.<sup>321</sup> This consideration, together with the different historical paths that have characterized the development of the right to the truth and the right of access to information, as well as the fact that human rights monitoring bodies have been, so far, disinclined to base the recognition of the right to the truth on those provisions enshrining the right to freedom of expression, suggests dealing with these rights separately. In this respect, however, it should be born in mind what the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression recently concluded:

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<sup>317</sup> Adopted by the United Nations General Assembly by Resolution 53/144 of 9 December 1998, UN Doc. A/RES/53/144, 8 March 1999.

<sup>318</sup> On the practical implementation of this provision see, *inter alia*, C. CREAMER, B. A. SIMMONS, *Transparency at Home: How Well do Governments Share Human Rights Information with Citizens?*, in A. BIANCHI, A. PETERS (eds), *Transparency in International Law*, *supra* Introduction, note 40, p. 239-268 (stressing the potential role of national human rights institutions in enhancing transparency related to human rights). The right of access to information on human rights has not found recognition in any of the major human rights treaties. Only the United Nations Convention on the Rights of the Child (New York, 20 November 1989, entered into force on 2 September 1990, 1577 UNTS 3) provides that State parties should undertake to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike (Article 42). Whilst this provision imposes on States parties a clear obligation to disseminate information on the specific human rights guaranteed by the Convention, it does not explicitly envisage an individuals and public right of access to human rights information.

<sup>319</sup> UN Doc. A/68/362, *supra* Chapter 1, note 87, para. 21.

<sup>320</sup> See *infra* Chapter 4.

<sup>321</sup> See again UN Doc. A/68/362, *supra* Chapter 1, note 87, para. 24.

“the right of access to information on human rights violations, as enshrined by the right to freedom of expression, should be considered to be part of the right to truth in all circumstances — whether it relates to past or present situations, is claimed by victims, their relatives or by anyone in the name of public interest, in situations of political transition or not, and irrespective of the existence of legal proceedings, including when judicial action has expired”.<sup>322</sup>

Concerning the right to seek and receive information about human rights abuses, human rights mechanisms and bodies have increasingly affirmed the necessity to place strict limits upon the resort to classification and national security as a ground for restricting access.

In its judgment concerning the already recalled *Gomes Lund et al. v. Brazil* case, for instance, the Inter-American Court of Human Rights has stressed that, based on Article 13 of the American Convention on Human Rights, State authorities cannot resort to mechanisms such as official secret or confidentiality, or reasons of national security, to refuse the disclosure of information required by judicial or administrative authorities in charge of an investigation about human rights violations.<sup>323</sup> In addition, according to the Court, the decision to classify the information or to refuse disclosure cannot be left to the sole discretion of the same State organ whose members are charged with committing the wrongdoing.<sup>324</sup>

The Court’s judgment expanded on the conclusions already reached by the Inter-American Commission on Human Rights in its 1998 Annual Report, where it recommended the Member States of the Organization of American

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<sup>322</sup> *Ibid.*, para. 92.

<sup>323</sup> Inter-American Court of Human Rights, *Gomes Lund et al. v. Brazil*, *supra* note 97, para. 202. See also *Myrna Mack Chang v. Guatemala*, *supra* Introduction, note 41, para. 180 (where, however, the Court based its finding on a combined reading of Articles 8 and 25 of the American Convention on Human Rights).

<sup>324</sup> *Ibid.*

States to adopt such legislative and other measures necessary to enhance the right of access to information contained in government files and documents, particularly in the case of investigations related to international crimes and serious human rights violations.<sup>325</sup> According to the Inter-American Commission, indeed, the right of access to State-held information requires States to remove those legal and administrative obstacles arising from the classification of documents relevant to investigate serious human rights abuses.<sup>326</sup>

In relation to the application of the ‘national security’ limitation clause contained in Article 13 of the American Convention on Human Rights, the Inter-American Special Rapporteur for Freedom of Expression also outlined that States should establish a series of constitutional checks on the classification of ‘official secrets’.<sup>327</sup> The establishment of similar checks is especially relevant any time, as in the case of alleged serious violations of human rights, the admissibility of limitations to the right of access to State-held information on the ground of national security should be subject to particular scrutiny (when not excluded at all).

Article 45 of the Model Inter-American Law on Access to Information also provides that restrictions to the right of access to State-held information on the ground, *inter alia*, of national security should not apply in cases of serious violations of human rights or crimes against humanity.<sup>328</sup> A similar provision, although referring merely to information related to massive repression for political, social or other reasons, is contained in the Model Law on State Secrets adopted by the Inter-parliamentary Assembly of Member States of the

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<sup>325</sup> Inter-American Commission on Human Rights, *Annual Report 1998*, Chapter VII, Doc. OEA/Ser. L/V/II.102, 16 April 1999, para. 20.3.

<sup>326</sup> *Ibid.*, para. 20.2.

<sup>327</sup> Inter-American Special Rapporteur for Freedom of Expression, *Annual Report 2003*, Chapter IV, para. 55.

<sup>328</sup> Model Inter-American Law on Access to Public Information, *supra* note 60.

Commonwealth of Independent States in 2003.<sup>329</sup>

The Parliamentary Assembly of the Council of Europe has repeatedly affirmed that information concerning the responsibility of State agents who have committed human rights violations cannot be shielded under the guise of ‘State secrecy’.<sup>330</sup>

Likewise, the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression has highlighted that, although under international human rights law, national security constitutes a legitimate ground to limit the right of access to State-held information, States should not allege national security concerns to withhold information regarding serious violations of human rights. In addition, when limitations are deemed absolutely necessary, the State has anyway the burden of demonstrating that the exceptions are compatible with international human rights law.

As regards information related to other violations of human rights, the Special Rapporteur stated that similar information should be subject to a high presumption of disclosure and, in any event, may not be withheld on national security grounds in a manner that would prevent accountability.<sup>331</sup>

An identical provision is contained in Principle 10 of the Tshwane Principles on National Security and the Right to Access to Information, that, as already mentioned, have been endorsed by both the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression and the Parliamentary Assembly of the Council of Europe.

According to Principle 10, the aforementioned presumptions should apply

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<sup>329</sup> Decision No. 21-10 of 16 June 2003. See in this respect also Organization for Security and Cooperation in Europe, Comments on Legal Regulations on Access to Information and State secrets in Albania, report drafted by D. Banisar, April 2006, p. 5.

<sup>330</sup> Council of Europe, Parliamentary Assembly, Resolution 1675 (2009) on *State of Human Rights in Europe: The Need to Eradicate Impunity*, 24 June 2009, para. 9.2; Resolution 1838 (2011), *supra* Introduction, note 27, para. 4; Resolution 1954 (2013), *supra* Chapter 1, note 88, para. 6.

<sup>331</sup> UN Doc. A/68/362, *supra* Chapter 1, note 87, para. 106.

to information about past or current violations and regardless of whether the State holding the information is or is not the alleged perpetrator. The same Principle also provides a definition of ‘information concerning human rights violations’ to include:

“(…) (a) a full description of, and any records showing, the acts or omissions, that constitutes the violations, as well as the dates and circumstances in which they occurred and, where applicable, the location of any missing persons or mortal remains; (b) the identities of all victims, so long as consistent with the privacy of the victims, their relatives, and witnesses; and aggregate and otherwise anonymous data concerning their number and characteristics that could be relevant in safeguarding on human rights; (c) the names of the agencies and individuals who perpetrated or where otherwise responsible for the violations (...); (d) information on the causes of the violations and the failure to prevent them”.<sup>332</sup>

As it will be better illustrated *infra*,<sup>333</sup> the individuals and public’s right to receive information on human rights violations also implies that government officials who disclose classified information related to human rights abuses should not be subject to legal or administrative sanctions.<sup>334</sup> The same applies to those individuals who disseminate classified information on the assumption that release would serve the public interest.<sup>335</sup> In this respect, it is noteworthy that the Committee of Ministers of the Council of Europe, recalling Article 10 of the European Convention on Human Rights, recently recommended States to include within the definition of “information of public interest” under

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<sup>332</sup> Tshwane Principles, *supra* Chapter 1, at 3.1, Principle 10(6).

<sup>333</sup> See Chapter 5, at 3.3.

<sup>334</sup> UN Doc. A/68/362, *supra* Chapter 1, note 87, para. 107.

<sup>335</sup> *Ibid.*

domestic law information concerning human rights abuses.<sup>336</sup>

As already partly stressed in Chapter 1, few States have also included ‘human rights exceptions’ in their national freedom of information laws. Article 7 of the Russian law on ‘State secrets’, for instance, provides that information related to violations of rights and freedoms of individuals and citizens, as well as information on unlawful actions by the State authorities or officials, cannot be classified as ‘State secrets’. Article 15(c) of Peruvian Law No. 27806 on Transparency and Access to Public Information similarly prevents public authorities from classifying any information related to violations of human rights and humanitarian law.

But even countries whose legislation has not been the object of specific analysis in the present work have enacted national provisions that explicitly exclude information related to human rights abuses from classification.

To make some further examples, Article 24 of the Guatemalan Decree No. 57/2008 states that: “*En ningún caso podrá clasificarse como confidencial o reservada la información relativa a investigaciones de violaciones a los derechos humanos fundamentales o a delitos de lesa humanidad*”.

Similarly, Brazilian Law No. 12,527 of 18 November 2011 expressly prohibits any restrictions to the right of access to information or documents when they relate to human rights violations perpetrated directly by State agents or under their instructions. Furthermore, the same piece of legislation requires disclosure of information and documents necessary to obtain judicial or administrative protection of fundamental human rights.<sup>337</sup>

Likewise, Article 12 of the Law on access to State-held information of

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<sup>336</sup> Council of Europe, Committee of Ministers, Recommendation CM/Rec(2014)7 on the *Protection of whistle-blowers*, 30 April 2014, para. I.2. See also Parliamentary Assembly of the Council of Europe, Resolution 1729 (2010) on the *Protection of whistle-blowers*, 29 April 2010, para. 6.1.1.

<sup>337</sup> Law No. 12,527 of 18 November 2011, Article 21: “*Não poderá ser negado acesso à informação necessária à tutela judicial ou administrativa de direitos fundamentais. As informações ou documentos que versem sobre condutas que impliquem violação dos direitos humanos praticada por agentes públicos ou a mando de autoridades públicas não poderão ser objeto de restrição de acesso*”.



Uruguay prevents the State authorities from relying on any of the legitimate grounds for restriction provided for by the law itself when the requested information or document concerns human rights violations or appears otherwise relevant to investigate or avoid them.<sup>338</sup>

Similar ‘human rights exceptions clauses’ may be found also in State secrets laws adopted in El Salvador,<sup>339</sup> Georgia,<sup>340</sup> Latvia,<sup>341</sup> Moldova<sup>342</sup> and Tunisia.<sup>343</sup>

Mexico’s Transparency Law also provides that, in case of severe violations of human rights or crimes against humanity, information found during the investigations may not be classified.<sup>344</sup>

The Mexican Federal Institute for Access to Information and Data Protection (IFAI)<sup>345</sup> has further elaborated on this provision. For instance, in a case concerning the request addressed by a petitioner to the public prosecutor to access a public version of a preliminary criminal investigation related to the

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<sup>338</sup> Law No. 2719 of 15 July 2008.

<sup>339</sup> Law No. 534/2011 on Access to Public Information of 3 March 2011, Article 19: “*no podrá invocarse el carácter de reservado cuando se trate de la investigación de violaciones graves de derechos fundamentales o delitos de trascendencia internacional*”.

<sup>340</sup> Law on State Secrets No. 455/1996 of 29 October 1996, Article 8.1: “Defining any such information as a state secret that may prejudice or restrict basic human rights and freedoms or may cause harm to health and safety of population shall be prohibited” (unofficial translation available at: <http://www.right2info.org>; last accessed on 24 February 2016).

<sup>341</sup> Law on Official Secrets, adopted on 17 October 1996, Article 5.3: “It is prohibited to grant the status of an official secret and to restrict access to the following information (...) information regarding violations of human rights” (unofficial translation available at: <http://www.right2info.org>; last accessed on 24 February 2016).

<sup>342</sup> Law on State Secrets No. 106-XIII of 17 May 1994, Article 12.1(a): “It is prohibited to classify the information on violation of human rights and freedoms” (unofficial translation available at: <http://www.right2info.org>; last accessed on 24 February 2016).

<sup>343</sup> Decree No. 2011-41 of 26 May 2011 on Access to Administrative Documents of Public Authorities, Article 18, pursuant to which access to administrative documents cannot be denied when concerns “(...) *documents dont la divulgation est nécessaire en vue d'exposer, d'enquêter ou de poursuivre de graves violations des droits de l'Homme ou crimes de guerre*”.

<sup>344</sup> *Ley federal de transparencia y acceso a la información pública*, enacted on 11 June 2002, Article 14. For an overview on Mexico’s Transparency Law see, *inter alia*, E. HEYNER, *Latin American State Secrecy and Mexico’s Transparency Law*, in *George Washington International Law Review*, vol. 38, 2006, p. 437 ff.

<sup>345</sup> The IFAI is an independent oversight body established by the Mexican Transparency Law and entrusted with the power to decide appeals against public authorities’ refusals to provide State-held information. The commissioners are appointed by the Mexican President and approved by the Mexican Senate.

killing of peaceful protesters by the Mexican military and paramilitary forces on 2 October 1968 in *Plaza de las Tres Culturas* in Tlateloco, the IFAI found that the expression ‘investigation’ in Article 14 of the Transparency Law should be interpreted as to include criminal proceedings.<sup>346</sup> As a result, the IFAI concluded that, since the case at stake engaged alleged violations of fundamental human rights, the investigations records could not be protected by secrecy.<sup>347</sup>

In a landmark decision issued on 20 August 2014, the IFAI, overturning its previous findings, further elaborated on the scope of application of Article 14 by upholding that this exemption should include also those information related to ‘*probable*’ (but not otherwise ascertained) human rights violations.<sup>348</sup> As a consequence, the IFAI ordered the Office of the Public Prosecutor to disclose its files related to the mass killing of migrants occurred in San Fernando in 2011.<sup>349</sup>

In other countries, domestic courts have interpreted national provisions enshrining the right of access to State-held information and applicable international norms so to bar State’s organs from invoking classification to

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<sup>346</sup> IFAI, *Sigríd Arzú Colunga v. Public Prosecutor (Procuraduría general de la República)*, resolution No. 1311/10, 26 May 2010, p. 52. The IFAI has ordered the disclosure of classified documents based on the ‘human rights exemption’ contained in Article 14 of the Mexican Transparency Law also in other cases. See, e.g., *Jacqueline Peschard Mariscal v. Public Prosecutor (Procuraduría general de la República)*, case No. 5110/08, 4 March 2009 (where the IFAI ordered the disclosure of the investigative files related to the enforced disappearance of Rosendo Radilla Pacheco, a school teacher disappeared in 1974); *Ángel Trinidad Zaldivar v. Public Prosecutor (Procuraduría general de la República)*, resolution No. 3804/09, 18 November 2009 (where the IFAI ordered the release of the public version of the investigative files concerning the massacre occurred in 1988 in El Charco, when eleven peoples were killed during a military operation).

<sup>347</sup> *Ibid.*, p. 53.

<sup>348</sup> IFAI, *Areli Cano Guadiana v. Public Prosecutor (Procuraduría general de la República)*, resolution No. 1924/14, 20 August 2014, p. 64. By this ruling, the IFAI found itself competent to determine whether the facts at stake involve human rights violations, even lacking such a finding by another legal authority.

<sup>349</sup> The Office of the Public Prosecutor complied with the request of disclosure in December 2014. However, further developments might eventually come from the decision of the Mexican Supreme Court, before which the Office of the Public Prosecutor has filed a claim asking the reform of the federal judge first instance decision which required the IFAI to assess whether the requested information concerned serious violations of human rights. Information

withhold information related to serious violations of human rights. The Constitutional Court of Colombia, for instance, has upheld that:

*“(...) en una sociedad democrática, la regla general consiste en permitir el acceso a todos los documentos públicos. (...) Aunando a lo anterior, debe existir, en toda entidad oficial, una política pública de conservación y mantenimiento de esta variedad de documentos, muy especialmente aquellos que guarden una relación directa con la comisión masivas y sistematicas de los derechos humanos y del derecho internacional humanitario”.*<sup>350</sup>

It is clear from the above that the scope of application of this ‘human rights exception’ varies from State to State. In addition, it must be underlined once again that only few States have enacted similar provisions (mainly – but not only – in Latin America), whereas most States’ national information laws still do not provide specific exemptions from classification on national security grounds. On top of that, as already observed, even when similar provisions are in place, they might still be disregarded in practice.

That notwithstanding, the abovementioned provisions and judgments which set public interest disclosure thresholds related to serious human rights violations may well be regarded as representative of an *emerging* (not to say – *dawning*) State practice supporting the existence of a specific obligation for States not to withhold from disclosure by means of classification information concerning serious human rights abuses.

## **5. Conclusions**

As the analysis undertaken in this Chapter has shown, international and

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on the pending case is available at: <http://www.fundacionjusticia.org> (last access on 24 February 2016).

regional human rights courts and monitoring bodies have progressively inferred from the right of freedom of expression embodied in human rights treaties an autonomous right of access to State-held information.

Despite some colliding signals, the recognition of this newly established ‘human right’ seems to find further support in State practice and, to a certain extent, in the growing adoption of access to information policies and legislation in the context of international organizations.

In general terms, the right of access to State-held information requires States to comply with requests of access pursuant to the principle of maximum disclosure and even proactively publish *proprio motu* information of public interest.

Human rights monitoring bodies have also repeatedly stressed the ‘instrumental’ character that this right may have in ensuring the full respect of other fundamental human rights such as, but not limited to, the right to a fair trial.

Regardless of the scattered scenario underpinning international, regional and domestic practice (which imposes caution in reaching any conclusive standpoint), the right of access to State-held information has also been generally interpreted as having both a collective and individual dimension. Yet, such recognition inevitably shares the more general debate surrounding the very notion of ‘collective rights’. The progressive collectivisation of individual rights – of which the upholding of a social dimension of the right of access to State-held information may be seen as an additional expression – does indeed raise specific issues, especially related to the practical exercise of such entitlements.<sup>351</sup>

As widely remarked, the right of access to State-held information is not absolute and admits restrictions. However, such exemptions should be interpreted narrowly and comply with strict requirements. In particular,

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<sup>350</sup> Constitutional Court of Columbia, case C-872/03, *supra* Chapter 1, note 446, para. VII.3.

limitations on the right of access to State-held information must be established by law, be necessary in a democratic society, proportionate, and respond to a legitimate aim expressly provided for in international and regional treaties. The burden of demonstrating the abidance by these parameters rests on States.

Among the legitimate aims that allow States to impose restrictions on the right of access to information there is national security. Lacking a clear legal definition at the international level of what this expression stands for, States have however shown a tendency to over-invoke national security concerns to keep information secret and refuse requests of disclosure.

As it has been recently noted in academic literature, this trend raises some inevitable questions, such as: “[d]oes the existing legal regime effectively delimit the scope and extent of State secrets protection on ever expanding national security grounds? Or is the role of freedom of information in the current and future society eviscerated whenever national security is invoked?”<sup>352</sup>

In this respect, the examination undertaken in the previous sections has demonstrated that international and regional human rights monitoring bodies have growingly envisaged the need for applying a higher degree of scrutiny any time States rely on ‘national security’ as the basis for denying disclosure.

States’ resort to classification of information as secret or confidential must comply with well-defined parameters in order not to interfere with the individual and public right of access to State-held information. In particular, while the resort to classification of official secrets is not barred *per se* and, to the contrary, is expressly permitted any time it serves a legitimate aim provided for in international and regional human rights treaties, States refusing disclosure based on it should demonstrate that a similar restriction amounts to a necessary, proportionate and non-arbitrary measure.

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<sup>351</sup> See, e.g., I. BANTEKAS, L. OETTE, *International Human Rights Law and Practice*, Cambridge, 2013, pp. 411-412.

<sup>352</sup> See again H. NASU, *State Secrets Law and National Security*, *supra* Introduction, note 73, p. 367.

In addition, international and regional human rights monitoring bodies, as well as – to a certain extent – domestic courts, have increasingly recognized that States should not allege national security concerns to withhold information concerning serious violations of human rights or crimes against humanity and that, even when other violations of human rights are at stake, classification on national security grounds should not be relied on in a manner that would prevent accountability.

These evolutions are paired by the general recognition that, at times, the interest that the public may have in disclosure is so relevant to override any duty of confidentiality or secrecy. While human rights monitoring bodies have so far refrained from setting clear standards governing the balancing exercise between colliding public interests, and rather, have limited their reasoning to a case-by-case assessment, the very fact that, in circumstances opposing the protection of State secrets, on the one hand, and the interest in accountability for government illegal conducts, on the other hand, the latter has been considered prevailing may strengthen the view that a hierarchy exists between different ‘public interests’.

Hence, in light of developing international, regional and national practice, it seems possible to infer from the right of access to information an *emerging* obligation for States not to resort to classification and secrecy to refuse the disclosure of information related to serious violations of human rights, at least any time such a reliance would prevent accountability.

Indeed, whereas it has been argued that – at the domestic level – the “idea that all human rights are public concerns that can always override national security interests is not *universally* accepted”<sup>353</sup> (as only few countries have expressly provided similar ‘limitation clauses’ in their legislation), the very recent proliferation of similar “provisions” seems nonetheless to confirm the abovementioned conclusion. This ‘national’ trend, whether taken into account together with the developments in international and regional practice, may in

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<sup>353</sup> *Ibid.*, p. 397.

fact further support the view according to which the progressive recognition of the right of access to State-held information and the contextual restrictive reading of 'national security' limitations clauses would impose on States an obligation to disclose information concerning serious human rights violations.





## CHAPTER 3

# STATE SECRECY AS EVIDENTIARY PRIVILEGE AND PROTECTION OF HUMAN RIGHTS

*“(...) Regardless of whether a person in custody is an American citizen or a foreigner, regardless of whether he or she is apprehended, and regardless of the Government’s preconceptions about his or her guilt, that person should be entitled to some reasonable standard of due process. Secrecy and disregard for the rule of law are not the ideals upon which a free and open society is based”<sup>1</sup>.*

1. Introduction. – 2. State Secrecy and the right to a fair trial. – 2.1. The right to a fair trial in international law. – 2.1.1. The right to a fair trial in international binding and non-binding instruments. – 2.1.2. The content of the right to a fair trial. – 2.2. Possible restrictions to fair trial guarantees under international human rights law. – 2.2.1. Restrictions provided for in human rights instruments. – 2.2.2. Restrictions to the right to fair trial in the case law of human rights monitoring bodies. – 2.2.3. State practice. – 2.2.4. State secrecy *vis-à-vis* the right to a fair trial. – 2.3. The right to a fair trial: A non-derogable right? – 3. State secrecy and the right to an effective remedy. 3.1. The right to an effective remedy in international law. – 3.1.1. The right to an effective remedy in universal human rights instruments. – 3.1.2. The right to an effective remedy in regional human rights instruments. – 3.1.3. State practice. – 3.2. Possible restrictions to the right to an effective remedy under human rights law. – 3.3. The right to an effective remedy: A non-derogable right? – 4. State secrecy and the duty to investigate serious human rights violations, and to prosecute and punish perpetrators. – 4.1. The duty to investigate, prosecute and punish in international instruments and in the case law of human rights monitoring bodies. – 4.2. The duty to investigate, prosecute and punish: Assessing its customary status. – 4.3. State secrecy *vis-à-vis* the duty to investigate, prosecute and punish. – 5. ‘State secrecy privilege’ before human rights courts and States’ duty to cooperate with international monitoring bodies. – 6. Conclusions.

### 1. Introduction

As previously stressed, secrecy in legal proceedings stems out of the resort to evidentiary privileges, preventing either the disclosure of evidence to one of the parties to the trial or the use of a piece of evidence *tout court*. In some

instances, as a result of the invocation of secrecy in the context of proceedings, a certain case might even become non-justiciable. In addition, if ‘judicial proceedings’ are to be understood in broad terms, the resort to secrecy might impair prosecutorial investigations into alleged heinous crimes, ineluctably barring the path to court and accountability.

In all these cases, the resort to secrecy privileges – whereas formally dictated by the need to avoid the public harm that the disclosure of certain information can cause – may raise concerns as to the State’s full abidance by its obligations under human rights law.

Furthermore, while the inherent tension between secrecy privileges and the protection of fundamental human rights is widely acknowledged, the very mechanisms sometimes established in order to strike a proper balance between underpinning competing interests (such as, for instance, the already recalled practice of ‘special advocates’) have often attracted criticism for their alleged failure to grant appropriate human rights guarantees. For instance, in 2013, the Committee against Torture expressed its concern about the use of special advocates in UK proceedings, stressing that this practice could breach fair trial guarantees and impact adversely on accountability for State authorities’ alleged involvement in torture or other inhuman or degrading treatments.<sup>2</sup>

As said earlier, the use of secrecy privileges and the legal hurdles linked to it have gained *momentum* in the context of the ‘war on terror’, when a widespread “culture of security has yielded exceptional legal measures and

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<sup>1</sup> Senator Bingaman, Congressional Records, US Senate, 14 July 2003, at S9321.

<sup>2</sup> Committee against Torture, *Concluding Observations on the Fifth Periodic Report of the United Kingdom*, UN Doc. CAT/C/GBR/CO/5 of 24 June 2013, para. 12. See also Keynote Remarks by the Assistant Secretary-General for Human Rights, Ivan Šimonović, at the regional meeting on “Fair trial and due process in the counter-terrorism context”, Brussels, 5 July 2012: “Another challenge is the increased reliance on intelligence information in criminal proceedings. While the use of accurate intelligence is essential to preventing terrorist acts and bringing terrorist suspects to justice, increased reliance on intelligence information, without sufficient consideration for safeguards against abuses, represents a serious challenge to the right to a fair trial. In particular, problems arise when the need for State secrecy is invoked to avoid disclosing information, while also being used as a basis for detention; or when secret information is used as evidence and not shared with the defendant or the defence”. See: <http://www.ohchr.org> (last accessed on 24 February 2016).

increased recourse to secrecy, (...) impact[ing] upon due process and the rule of law (...).<sup>3</sup> Governments have resorted to secrecy claims (or, at times, even to secret trials) either to prevent the disclosure of evidence in proceedings against suspected terrorists or to ‘block’ the normal course of justice in civil and criminal trials initiated against official authorities (or private parties) in relation to counter-terrorism measures.<sup>4</sup>

However, limiting the discourse to the war on terror would be reductive. Just to make a further example, in several countries, such as Finland and the United States, intelligence secret evidence has been repeatedly relied on in the context of administrative immigration procedures even before the events of 9/11.<sup>5</sup> To make a further example, in Australia, invocation of State secrecy to prevent disclosure of certain sensitive information in proceedings has been upheld in legislation related to organized crimes (and thus, with a broader scope of application than the mere terroristic threat).<sup>6</sup>

Against this background, and bearing in mind that the use of State secrecy as evidentiary privilege might raise different human rights concerns depending

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<sup>3</sup> See M. KUMAR, G. MARTIN, R. SCOTT BRAY, *Secrecy, Law and Society*, in M. KUMAR, G. MARTIN, R. SCOTT BRAY (eds), *Secrecy, Law and Society*, *supra* Chapter 1, note 481, p. 65.

<sup>4</sup> See, e.g., Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN Doc. E/CN.4/2005/60 of 20 January 2005, para. 16. On the increasing use of secret evidence in UK courts see, *inter alia*, Justice, *Secret Evidence*, London, June 2009.

<sup>5</sup> In the United States, the Immigration Statute authorizes the Immigration and Naturalization Service to submit in court classified evidence, especially in the context of expulsion proceedings. See, *inter alia*, M.R. HALL, *Procedural Due Process Meets National Security: The Problem of Classified Evidence in Immigration Proceedings*, in *Cornell International Law Journal*, vol. 35, 2001-2002, pp. 515-532. The use of secret evidence in immigration proceedings in the United States dates back to the pre-9/11 ‘era’. See in this respect also the overview of cases in D. COLE, *Secret Trials*, in *Human Rights*, vol. 28, 2001, pp. 8-9. For an overview of the practice in Finland, where intelligence secret evidence has been used in administrative procedures concerning the issuance of residence permits, see, e.g., T. OJANEN, *Administrative Counter-Terrorism Measures – A Strategy to Circumvent Human Rights in the Fight against Terrorism?*, in D. COLE, F. FABBRINI, A. VEDASCHI (eds), *Secrecy, National Security and the Vindication of Constitutional Law*, *supra* Introduction, note 13, p. 259 ff. Clearly, however, the use of secret evidence in immigration proceedings has boomed after 9/11. See also, *inter alia*, J. IP, *The Adoption of the Special Advocate Procedure in New Zealand’s Immigration Bill*, in *New Zealand Law Review*, 2009, pp. 207-237.

<sup>6</sup> For an overview of this legislation and the way in which Australian courts have attempted to strike a balance between procedural fairness and legitimate secrecy claims see, *inter alia*, G. APPLEBY, *Protecting Procedural Fairness and Criminal Intelligence: Is there a Balance to be*

on the specific circumstances at stake, this Chapter will attempt to better explore *if* and to *what extent* the resort to secrecy in the context of a trial or in a way to prevent effective judicial protection actually clashes with the protection afforded to some widely-recognized human rights.

## **2. State secrecy and the right to a fair trial**

### **2.1. The right to a fair trial in international law**

As largely anticipated, the invocation of State secrecy in court might – at different degrees – raise issues as to its compatibility with due process guarantees. In order to better understand the contours and extent of this strain, the first step is thus to turn to briefly examine the legal basis and normative content of the right to a fair trial<sup>7</sup> in international law, clearly focusing on those aspects which appear the most relevant with respect to the issues at stake in the present work.

#### **2.1.1. The right to a fair trial in international binding and non-binding instruments**

As it has been noted in academic literature, “the right to a fair trial is one of the most important safeguards of justice and the rule of law”.<sup>8</sup> This right, which encompasses both substantial and procedural guarantees, is indeed a “key element to human rights protection”.<sup>9</sup>

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*Struck?*, in M. KUMAR, G. MARTIN, R. SCOTT BRAY (eds), *Secrecy, Law and Society*, Chapter 1, note 481, pp. 75-98.

<sup>7</sup> For an interesting historical study on the use of the expression ‘free trial’ and its normative implications see I. LANGFORD, *Fair Trial: The History of An Idea*, in *Journal of Human Rights*, vol. 8, 2009, pp. 37-52.

<sup>8</sup> A. D. BOSTAN, *The Right to a Fair Trial: Balancing Safety and Civil Liberties*, in *Cardozo Journal of International and Comparative Law*, vol. 12, 2004, p. 1.

<sup>9</sup> See Human Rights Committee, General Comment No. 32, *supra* Chapter 2, note 122, para. 2.

Due to its importance, the right to a fair trial is embodied in most human rights instruments. Article 10 of the Universal Declaration of Human Rights, for instance, expressly provides that: “[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him”. Article 11(1) of the same instrument further states that: “Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence”.<sup>10</sup>

These provisions have been transposed and articulated in greater detail in the main human rights binding instruments adopted at the universal<sup>11</sup> and regional level. For instance, Article 14 of the International Covenant on Civil and Political Rights expressly provides that:

“All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all

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<sup>10</sup> As to the right to a fair trial in the Universal Declaration of Human Rights see, *inter alia*, D. WEISSBRODT, M. HALLENDORFF, *Travaux Préparatoires of the Fair Trial Provisions – Article 8 to 11 - of the Universal Declaration of Human Rights*, in *Human Rights Quarterly*, vol. 21, 1999, pp. 1061-1096. See also D. HARRIS, *Right to a Fair Trial in Criminal Proceedings as a Human Right*, in *International & Comparative Law Quarterly*, vol. 16, 1967, pp. 352-378, and D. WEISSBRODT, *The Right to a Fair Trial. Articles 8, 10 and 11 of the Universal Declaration of Human Rights*, The Hague, Boston, London, 2001. Few months before the Declaration was adopted, the right to a fair trial was upheld also in Articles XVIII and XXVI of the American Declaration of Rights and Duties of Man (OAS Resolution No. XXX), adopted in Bogotá by the Ninth Conference of American States on 2 May 1948.

<sup>11</sup> Specific fair trial guarantees have been included in several treaties dealing with specific issues, such as, for instance, Article 16 of the Convention relating to the Status of Refugees (Geneva, 28 July 1951; entered into force on 22 April 1954) 189 UNTS 150; Article 40 of the Convention on the Rights of the Child; Article 5(a) of the International Convention on the Elimination of Racial Discrimination (New York, 21 December 1965), entered into force on 4 January 1969, 660 UNTS 195; Article 15 of the Convention against Torture; Article 13 of the Convention on the Rights of Persons with Disabilities (New York, 13 December 2006), entered into force on 3 May 2008, 2515 UNTS 3.

or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public (...). In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him; (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; (...) (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing (...).<sup>12</sup>

Article 6 of the European Convention on Human Rights,<sup>13</sup> Article 8 of the

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<sup>12</sup> Concerning this provision, as interpreted by the Human Rights Committee, see, e.g., A. CONTE, *The Judicial Process*, in A. CONTE, R. BURCHILL (eds), *Defining Civil and Political Rights. The Jurisprudence of the United Nations Human Rights Committee*, 2nd ed., Farnham, 2009, pp. 156-199. See also P. TAVERNIER, *Le droit à un procès équitable dans la jurisprudence du Comité des droits de l'homme des Nations Unies*, in *Revue trimestrielle des droits de l'homme*, 1996, pp. 3-22.

<sup>13</sup> Article 6 of the European Convention on Human Rights states: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. (...) Everyone charged with a criminal offence has the following minimum rights: a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; b. to have adequate time and facilities for the preparation of his defence; c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require (...)." A detail analysis of this provision, as interpreted by the European Court of Human Rights, is provided in C. GRABENWATER, *European Convention on Human Rights. Commentary*, Munich, Oxford, 2014, p. 98 ff; and B. RAINEY, E. WICKS, C. OVEY (eds), *The European Convention on Human Rights*, 6th ed., Oxford, 2014, pp. 247-278. See also L. G. LOUCAIDES, *Questions of Fair Trial under the European Convention on Human Rights*, in

American Convention on Human Rights,<sup>14</sup> Article 7 of the African Charter on Human and Peoples' Rights<sup>15</sup> and Article 13 of the Arab Charter on Human Rights<sup>16</sup> provide for the same minimum guarantees of procedural fairness. Articles 47 and 48 of the EU Charter of Fundamental Rights also uphold a core of due process entitlements.<sup>17</sup>

Specific aspects of the right to a fair trial are also disciplined in (non-binding) declarations and guiding principles, such as, for instance, the Basic

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*Human Rights Law Review*, vol. 3, 2003, pp. 27-51; S. TRECHSEL, *Human Rights in Criminal Proceedings*, Oxford, 2005; E. BREMS, *Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms*, in *Human Rights Quarterly*, vol. 27, 2005, pp. 294-326.

<sup>14</sup> Article 8 of the American Convention on Human Rights provides that: "Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature. Every person accused of a criminal charge (...) is entitled, with full equality, of the following guarantees: (...) (c) adequate time and means for the preparation of his defence; (d) the right of the accused to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel (...). Criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice". For a comment see, *inter alia*, A. UBEDA DE TORRES, *The Right to Due Process*, in L. BURGORGUE-LARSEN, A. UBEDA DE TORRES (eds), *The Inter-American Court of Human Rights. Case Law and Commentary*, Oxford, 2011, pp. 641-667.

<sup>15</sup> Article 7 of the African Charter on Human and Peoples' Rights expressly provides: "Every individual shall have the right to have his cause heard. This comprises: the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; (...) the right to defence, including the right to be defended by counsel of his choice". On this provision see, *e.g.*, C. HEYNS, *Civil and Political Rights in the African Charter*, in M. EVANS, R. MURRAY (eds), *The African Charter on Human and Peoples' Rights. The System in Practice, 1986-2000*, Cambridge, 2002, pp. 155-163.

<sup>16</sup> Article 13 of the Arab Charter on Human Rights states: "Everyone has the right to a fair trial that affords adequate guarantees before a competent, independent and impartial court that has been constituted by law to hear any criminal charge against him or to decide on his rights or his obligations. (...) Trials shall be public, except in exceptional cases that may be warranted by the interests of justice in a society that respects human freedoms and rights".

<sup>17</sup> Article 47(2) states, for instance, that: "Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented". Article 48(2) also provides that: "Respect of the rights of the defence of anyone who has been charged should be guaranteed". For a comment on these provisions see S. PEERS, T. HERVEY, J. KENNER, A. WARD (eds), *The EU Charter of Fundamental Rights. A Commentary*, *supra* Chapter 2, note 228, pp. 1197-1349.

Principles on the Independence of the Judiciary,<sup>18</sup> the Basic Principles on the Role of Lawyers<sup>19</sup> and, at the regional level, the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.<sup>20</sup>

Finally, it is worth mentioning that, apart from the aforementioned recognition at the international level, the right to a fair trial is upheld also in national Constitutions and legislation within domestic legal systems. In this respect, however, it has to be stressed that, in principle, the requirement of fairness may diverge under certain aspects at the domestic and international level. Accordingly, there might be a breach of human rights international rules even in case municipal law had been formally abide by (and *vice versa*).

As a result of their universal acceptance, the fundamental principles of fair trial are generally considered declarative of international customary law.<sup>21</sup>

### **2.1.2. The content of the right to a fair trial**

The right to a fair trial incorporates several ‘sub-rights’ that apply to both civil and criminal proceedings, although specific additional guarantees are generally provided for in case of criminal charges.<sup>22</sup> They include, *inter alia*,

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<sup>18</sup> United Nations General Assembly Resolution No. 40/32, UN Doc. A/RES/40/32 of 29 November 1985, Annex.

<sup>19</sup> Report of the Eight United Nations Congress on the Prevention of Crime and the Treatment of Offenders, UN Doc. A/CONF.144/28/Rev.1 (1990), Annex (p. 118).

<sup>20</sup> Proclaimed by the African Commission on Human and Peoples’ Rights in 2003, Doc. OS (XXX) 247 (2003). For a general overview of declarations and resolutions adopted by the African Commission on Human and Peoples’ Rights with respect to fair trial guarantees see, *inter alia*, N. J. UDOMBANA, *The African Commission on Human and Peoples’ Rights and the Development of Fair Trial Norms in Africa*, in *Africa Human Rights Law Journal*, vol. 6, 2006, pp. 299-332.

<sup>21</sup> See, e.g., S. SHAH, *Detention and Trial*, in D. MOECKLI, S. SHAH, S. SIVAKUMARAN, D.J. HARRIS (eds), *International Human Rights Law*, 2nd ed., Oxford, 2014, p. 271. As to the customary nature of the right to a fair trial as embodied in international humanitarian law instruments see, e.g., J. M. HENCKAERT, L. DOSWALD-BECK (eds), *Customary International Humanitarian Law*, vol. 1, Cambridge, 2009, p. 352 ff. (Rule 100).

<sup>22</sup> According to human rights courts and monitoring bodies’ case law, however, most proceedings (thus including administrative proceedings) are now deemed to fall within the scope of application of fair trial guarantees. See, e.g., N. MOLE, *Restricted Immigration Procedures in National Security Cases and the Rule of Law: An Uncomfortable Relationship*, in A.M. SALINAS DE FRIAS, K. SAMUEL, N. WHITE (eds), *Counter-Terrorism: International*



the right to have a case adjudicated by a competent, independent and impartial tribunal, the right to a fair hearing, the right to a public hearing, the right to equality and – in the context of criminal proceedings – the right to be informed of the charges and the right to an adequate defence.<sup>23</sup> International human rights courts and *quasi*-judicial monitoring bodies have partly derived – and further elaborated upon – these ‘constituent elements’ through interpretation.

The right to equality before courts and tribunals and the right to a fair hearing, for instance, include both the right of equal access to court and the right of ‘equality of arms’ (*égalité des armes*). The former right requires States to organize their judicial systems so as to grant to all individuals the right of access to court without discrimination.<sup>24</sup> In this respect, the right to *equal* access to court also encompasses the very right of access to court, which human rights monitoring bodies have often inferred from due process guarantees.<sup>25</sup>

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*Law and Practice*, Oxford, 2012, p. 738. Furthermore, as far as due process guarantees in criminal proceedings are concerned, they need to be complied with also in the context of *international* criminal trials. Fair trial guarantees are indeed provided for in the relevant statutes and rules of procedures of international criminal tribunals. For an overview see, *inter alia*, J. SLOAN, *The International Criminal Tribunal for the Former Yugoslavia and Fair Trial Rights: A Closer Look*, in *Leiden Journal of International Law*, vol. 9, 1996, pp. 479-501; S. STAPLETON, *Ensuring a Fair Trial in the International Criminal Court: Statutory Interpretation and Impermissibility of Derogation*, in *New York University Journal of International Law and Politics*, vol. 31, 1999, pp. 535-609; J. K. COGAN, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, in *The Yale Journal of International Law*, vol. 27, 2002, pp. 111-140; M. DAMAŠKA, *Reflection of Fairness in International Criminal Justice*, in *Journal of International Criminal Justice*, vol. 10, 2012, pp. 611-620.

<sup>23</sup> Most of these sub-rights were already mentioned in the 1927 award of the General Claims Commission Mexico-United States in the *Chattin* case: “irregularity of court proceedings is proven with reference to absence of proper investigations, insufficiency of confrontations, withholding from the accused the opportunity to know all of the charges brought against him, undue delay of the proceedings, making an hearing in an open court a mere formality...”. See *B.E. Chattin (United States) v. United Mexican States*, award of 23 July 1927, in *Report of International Arbitral Awards*, vol. IV, pp. 282-312, para. 30.

<sup>24</sup> See, e.g., European Court of Human Rights, *Golder v. The United Kingdom*, App. No. 4451/70, decision of 21 February 1975, para. 36.

<sup>25</sup> See, e.g., Human Rights Committee, *Oló Bahamonde v. Equatorial Guinea*, Communication No. 468/91, Views of 20 October 1993, UN Doc. CCPR/C/49/D/468/1991 of 11 November 1993, para. 9.4. For a general overview see, *inter alia*, F. FRANCONI, *The Right of Access to Justice under Customary International Law*, in F. FRANCONI (ed), *Access to Justice as a Human Rights*, Oxford, 2007, p. 3 ff. It is noteworthy, however, that, unlike the European Convention on Human Rights and the African Charter on Human and Peoples’ Rights, the

The right to equality of arms imposes instead on States to ensure that all parties of proceedings are entitled to the same procedural rights and have equal opportunities to challenge the arguments made by the other party/ies.<sup>26</sup> Accordingly, this right also implies that the parties to a case should, in principle, have access to all the evidence submitted in the context of the trial (principle of ‘adversarial proceedings’).

In criminal proceedings, this right is strictly interconnected to the right to be informed on the charges and the right to an adequate defence, which similarly require that “evidence must in principle be produced in the presence of the accused at a public hearing”.<sup>27</sup> In particular, the expression “adequate facilities for the preparation of defence” contained in several human rights instruments has been interpreted to refer to all material that the public prosecutor is to use in court.<sup>28</sup> The refusal of access to the criminal file or to

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American Convention on Human Rights includes a specific provision on the right of access to justice (Article 25). With specific reference to the interpretation of Article 6 of the European Court of Human Rights as to include the right of access to a court (and its shortcomings) see, e.g., A. NICOL, *Judicial Immunity and Human Rights*, in *European Human Rights Law Review*, vol. 11, 2006, pp. 558-559.

<sup>26</sup> See, e.g., Inter-American Court of Human Rights, *Ivcher Bronstein v. Peru*, Series C No. 74, judgment of 6 February 2001, paras. 107 and 110; and European Court of Human Rights, *Dombo Beheer B.V. v. The Netherlands*, App. No. 14448/88 of 27 October 1993, para. 33; *Edwards and Lewis v. United Kingdom*, App. Nos. 39647/98 and 40461/98, judgment of 27 October 2004, para. 46.

<sup>27</sup> European Court of Human Rights, *Barberà, Messegué and Jabardo v. Spain*, App. No. 10590/83, decision of 6 December 1988, para. 78. See also, *inter alia*, European Court of Human Rights, *Rowe and Davis v. United Kingdom*, App. No. 28901/95, judgment of 16 February 2000, para. 60; [GC], *Salduz v. Turkey*, App. No. 36391/02, decision of 27 November 2011, para. 67. See also, e.g., Human Right Committee, *Peart v. Jamaica*, Communication No. 482/1991, UN Doc. CCPR/C/47/D/482/1991 of 19 March 1993, para. 11.5; *Bee v. Equatorial Guinea*, Communications Nos. 1152/2003 and 1190/2003, UN Doc. CCPR/C/85/D/1152 of 31 October 2005, para. 6.3; African Commission on Human and Peoples’ Rights, *Courson v. Equatorial Guinea*, communication No. 144/95, decision of 11 November 1997, para. 21; Court of Justice of the European Union, *ZZ v. Secretary of State of the Home Department*, *supra* Chapter 1, note 352, para. 55. See also, e.g., W. MALGORZATA, *The Principle of Equality of Arms in Criminal Procedure under Article 6 of the European Convention on Human Rights and its Functions in Criminal Justice of Selected European Countries: A Comparative View*, Leuven, 2000. As to the inherent contrast that *prima facie* arises between the use of secret evidence and the right to adversarial proceedings see, *inter alia*, E. YAROSHEFSKY, *Secret Evidence is Slowly Eroding the Adversary System: CIPA and FISA in the Courts*, in *Hofstra Law Review*, vol. 34, 2006, pp. 1063-1091.

<sup>28</sup> See, e.g., Human Rights Committee, UN Doc. CCPR/C/GC/32, *supra* Chapter 2, note 122, para. 33.

obtain copies of the documents contained therein is thus *prima facie* a breach of fair trial guarantees.<sup>29</sup>

As noted indeed by the European Court of Human Rights:

“It is a fundamental aspect of the right to a fair trial that criminal proceedings (...) should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both the prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. (...) [P]rosecution authorities should disclose to the defense all material evidence in their possession for or against the accused”.<sup>30</sup>

Strictly connected to the right to a fair trial is also the right to a public hearing, which requires, at least in principle, that hearings are conducted orally and publicly. Indeed, as stressed by the Human Rights Committee, the publicity of hearings “enhances the transparency of proceedings and thus provides an important safeguard for the interest of the individual and the society at large”.<sup>31</sup> The right to a public hearing prevents that the administration of justice is handled in secret with no public scrutiny. As noted by the European Court of Human Rights, in fact, “by rendering the

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<sup>29</sup> See, *inter alia*, European Court of Human Rights, *Foucher v. France*, App. No. 22209/93, judgment of 18 March 1997, para. 36. These standards do apply also to immigration administrative procedures. See also, *e.g.*, Human Rights Committee, *Concluding Observations on Canada*, UN Doc. CCPR/C/CAN/CO/5 of 20 April 2006, para. 13; and *Concluding Observations on United Kingdom of Great Britain and Northern Ireland*, UN Doc. CCPR/C/GBR/CO/6 of 30 July 2008, para. 17. See also Committee against Torture, *Concluding Observations on Australia*, UN Doc. CAT/C/AUS/CO/3 of 22 May 2008, para. 10 (requiring the State to bring its national legislation in compliance with fair trial guarantees). See also Working Group on Arbitrary Detention, *Khader Adnan Musa v. Israel*, Opinion No. 3/2012, UN Doc. A/HRC/WGDA/2012/3 of 10 July 2012, para. 22.

<sup>30</sup> See again European Court of Human Rights, *Rowe and Davis v. United Kingdom*, *supra* note 27, para. 60.

<sup>31</sup> Human Rights Committee, UN Doc. CCPR/C/GC/32, *supra* Chapter 2, note 122, para. 28.

administration of justice visible, publicity contributes to the achievement of (...) a fair trial, the guarantee of which is one of the fundamental principles of any democratic society”.<sup>32</sup>

It is clear from the above that the use of secrecy in court – either by means of secret evidence, *in camera* hearings (hearings from which the public is excluded), closed hearings (*in camera* hearings from which also one of the parties is excluded) or as evidentiary bar making the case *de iure* or *de facto* untriable<sup>33</sup> – might *prima facie* be inconsistent with several ‘sub-rights’ falling within the ‘umbrella’ of due process guarantees.

Just to make an example, the UN Working Group on Arbitrary Detentions has denounced how the lack of a sufficiently precise definition of ‘State secrets’ under Chinese law and its consequent extensive interpretation by public authorities in terms of evidentiary privilege might impair the right to a defence in cases involving State security.<sup>34</sup>

## **2.2. Possible restrictions to fair trial guarantees under international human rights law**

### **2.2.1. Restrictions provided for in human rights instruments**

The constituent elements of the right to a fair trial, which have been partly underscored in the previous section, are *generally* not absolute. They may

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<sup>32</sup> See, e.g., European Court of Human Rights, *Pretto et al. v. Italy*, App. No. 7984/77, judgment of 8 December 1983, para. 21.

<sup>33</sup> Apart from the use of State secrecy as evidentiary privilege in the context of proceedings leading to the dismissal of the case, classification of documents may prevent access to court *ab initio*. §In this respect, it is noteworthy that the Human Rights Committee recently observed that, in the United States, the fact that many details related to the CIA’s extraordinary rendition programme remain secret constitutes a barrier to accountability and redress. See Human Rights Committee, *Concluding Observations on the fourth periodic report of the United States of America*, UN Doc. CCPR/C/USA/CO/4 of 23 April 2014, para. 5.

<sup>34</sup> See Report of the Working Group on Arbitrary Detentions, Mission to China, UN Doc. E/CN.4/2005/6/Add.4 of 29 December 2004, para. 36.

indeed be subjected to restrictions by means of balancing them against other common interests.<sup>35</sup>

This non-absolute character is well illustrated by the negotiating history of the Universal Declaration of Human Rights. In the debate leading to the adoption of its final text, delegates stressed that, in the context of both civil and criminal proceedings, the fair trial requirement of publicity embodied in Articles 10 and 11 of the Declaration could be restricted on the basis, *inter alia*, of national security concerns.<sup>36</sup> Whereas no specific indication was introduced in this respect in the text of the two aforesaid provisions, agreement was reached in the sense that this scenario fell within the scope of application of Article 29 of the Declaration, which provides that “in the exercise of his rights and freedoms, everyone should be subject only to those limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just

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<sup>35</sup> Apart from express limitation clauses included in human rights treaties provisions, these international instruments often contain a specific limitation clause of a more general nature. See, for instance, Article 32(2) of the American Convention on Human Rights, pursuant to which: “The rights of each person are limited by the rights of others, by the *security of all*, and by the just demands of the general welfare, in a democratic society” (emphasis added). See also Article 27(2) of the African Charter of Human Rights: “The rights and freedoms of each individual shall be exercised with due regard to the rights of others, *collective security*, morality and *common interest*” (emphasis added). On this last provision (and, more generally, on the so-called ‘claw-back’ clauses in the African Charter) see, *inter alia*, V. O. ORLU NMEHILLE, *The African Human Rights System. Its Laws, Practice and Institutions*, The Hague, London, New York, 2001, p. 161 ff. See also Article 52(1) of the European Union Charter of Fundamental Rights, pursuant to which: “Any limitation on the exercise of the rights and freedoms recognized by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may only be made if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others”. Whereas the European Convention on Human Rights does not encompass a similar provision of general nature, the European Court of Human Rights has derived from the conventional text ‘implicit’ restrictions clauses by means of interpretation. On this point (‘implied’ or ‘inherent’ limitation clauses in the context of the European Convention on Human Rights) see, e.g., S. SOTTIAUX, *Terrorism and the Limitation of Rights: The ECHR and the US Constitution*, Portland, 2008, p. 47.

<sup>36</sup> See again D. WEISSBRODT, *The Right to a Fair Trial. Articles 8,10 and 11 of the Universal Declaration of Human Rights*, *supra* note 10, p. 21.

requirements of morality, public order and the general welfare in a democratic society”.<sup>37</sup>

The possible restrictions to the right to a public hearing have been transposed and explicitly embodied in both the International Covenant on Civil and Political Rights and the European Convention on Human Rights, which provide that the publicity requirement may be limited, *inter alia*, “in the interests of national security in a democratic society”.

Principle 1(f)(2) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa similarly provide that the publicity requirements may be restricted, *inter alia*, for reasons of “national security in an open and democratic society that respects human rights and the rule of law”.<sup>38</sup>

Interests of national security include, among others, the protection of State and military secrets.<sup>39</sup> However, as previously pointed out, the very ‘vagueness’ of the expression national security at both international and domestic level might clearly raise doubts as to what the aforementioned exceptional clauses actually refer to, paving the way to practical ‘abuses’.

### **2.2.2. Restrictions to the right to a fair trial in the case law of human rights monitoring bodies**

International and regional monitoring bodies have also interpreted the principles of equality of arms and of adversarial system and the right of access to court so to admit legitimate restrictions (in both civil and criminal proceedings). The need to protect competing interests, such as national

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<sup>37</sup> *Ibid.*, p. 16 and p. 23.

<sup>38</sup> Even in the absence of an explicit provision in this respect in the American Convention on Human Rights, the Inter-American Commission on Human Rights also held that the right to a public trial might be subjected to limitations for reasons of security. See Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, Doc. OEA/Ser. L/V/II.116 of 22 October 2002, para. 250.

<sup>39</sup> See C. GRABENWATER, *European Convention on Human Rights. Commentary*, *supra* note 13, p. 147.

security, might indeed require in some instances the withholding of certain information from one of the party (*i.e.*, the accused in the context of criminal proceedings).<sup>40</sup> It has to be stated beforehand, however, that the practice of human rights monitoring bodies does not appear fully convergent. While the European Court of Human Rights has repeatedly upheld the relative nature of the principles of equality of arms and adversarial proceedings, as well as of the right of access to court which it infers from Article 6 of the European Convention on Human Rights,<sup>41</sup> as it will clearly emerge *infra*, the Human Rights Committee and the Inter-American Court of Human Rights have been more reluctant to expressly admit a possible restriction on the ground of national security concerns, limiting themselves to a few ‘implicit’ assertions in this respect.

As already stressed in the previous Chapter, any limitation – whether expressly provided for in the conventional text (including reference to a general limitation clause) or upheld by interpretation<sup>42</sup> – is permissible only when strictly necessary and proportionate to the legitimate aim it should protect.<sup>43</sup>

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<sup>40</sup> See, *e.g.*, European Court of Human Rights, [GC] *Rowe and Davis v. The United Kingdom*, *supra* note 27, para. 62 (“... the entitlement to disclosure of evidence *is not an absolute right* ...”, emphasis added); *Fitt v. The United Kingdom*, App. No. 29777/96, judgment of 16 February 2000, para. 45.

<sup>41</sup> Due to the fact that human rights treaties monitoring bodies have often inferred the right of access to court also from the right to an effective remedy, further attention will be paid to it also *infra*. For an analysis of the case law of the European Court of Human Rights with respect to the right to a fair trial in the ‘war on terror’ and its comparison with the case law of the highest courts in the United Kingdom and United States of America see, in particular, H. TIGROUDJA, *L’équité du procès pénal et la lutte internationale contre le terrorisme. Réflexions autour de décisions internes et internationales récentes*, in *Revue trimestrielle des droits de l’homme*, vol. 69, 2007, pp. 3-38.

<sup>42</sup> As previously stated, the lack of a written limiting clause is not conclusive as to the absolute nature of a certain human right. Rights may be subjected to limitations even in lack of written limiting clauses. See, *e.g.*, M. BOROWSKI, *Absolute Rights and Proportionality*, in *German Yearbook of International Law*, vol. 56, 2013, pp. 395-396.

<sup>43</sup> See again *Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights*, UN Doc. E/CN.4/Sub.2/1992/9, *supra* Chapter 2, note 20. More generally on the topic see O. DE SCHUTTER, *International Human Rights Law*, Cambridge, 2010, p. 288 ff.

Human Rights treaties supervisory bodies have accordingly held that any encroachment on fair trial guarantees such as publicity, the right of access to a court or tribunal and the adversarial system should be subject to a necessity and proportionality analysis.<sup>44</sup>

States bear the burden, *inter alia*, to justify the necessity of restrictions to fair trial guarantees. For instance, in the *Estrella v. Uruguay* case, the Human Rights Committee concluded that, due to the State's failure to justify the need for limiting the right to a public hearing, the holding of an *in camera* trial breached Article 14 of the International Covenant on Civil and Political Rights.<sup>45</sup> Similarly, in its judgment in the *Civil Liberties Organization et al. v. Nigeria* case, the African Commission of Human and Peoples' Rights found a violation of the right to a fair trial as a consequence of the respondent State's failure to show that the holding of secret hearings fell within the parameters of exceptional circumstances allowing them.<sup>46</sup> The European Court of Human Rights also excluded the admissibility of *in camera* hearings by default.<sup>47</sup>

The 'proportionality test' further implies that States must establish specific mechanisms able to accommodate legitimate security interests, while ensuring to the greatest extent possible a minimum core of procedural rights. Security considerations cannot in fact legitimate *blanket* restrictions to the principles of publicity and full disclosure of evidence.

Indeed, as noted by the European Court of Human Rights in its judgment in the *Dağtekin et al. v. Turkey* case:

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<sup>44</sup> See, *inter alia*, European Court of Human Rights, *Van Mechelen et al. v. The Netherlands*, App. Nos. 21363/93, 21364/93, 21427/93 and 22056/93, judgment of 23 April 1997, paras. 54 and 58.

<sup>45</sup> See Human Rights Committee, *Estrella v. Uruguay*, Communication No. 74/1980, UN Doc. CCPR/C/18/D/74/1980 of 23 March 1983, para. 10. See also, *e.g.*, Human Rights Committee, *Khoroshenko v. Russian Federation*, Communication No. 1304/04, UN Doc. CCPR/C/101/D/1304/2004 of 29 April 2011, para. 9.11 (the Committee found, in the case at stake, that the State did not prove any of the possible justifications for the restriction of the publicity requirement).

<sup>46</sup> African Commission on Human and Peoples' Rights, *Civil Liberties Organization, Legal Defence Centre and Assistance Project v. Nigeria*, Communication No. 218/98, judgment of 7 May 2001, para. 39.



“The Court is mindful of the security considerations at stake (...). This does not mean, however, that the national authorities can be free from effective control by the domestic courts whenever they choose to assert that national security and terrorism are involved. There are techniques that can be employed which both *accommodate legitimate security concerns* about the nature and sources of intelligence information *and yet accord the individual a substantial measure of procedural justice*”.<sup>48</sup>

To make an example, with respect to the publicity requirement, in the *Castillo Petruzzi et al. v. Peru* case, the Inter-American Court of Human Rights has *de facto* excluded that the ‘proportionality’ requirement (and thus the provision of a minimum core of due process guarantees) can be considered satisfied if trials have been conducted in a off-limit military base, before faceless judges and in complete secrecy.<sup>49</sup> While this case concerned the way in which trials for treason were conducted in Peru, similar doubts as to the full respect of the publicity requirement could be raised, *inter alia*, also with respect to the proceedings – shrouded in secrecy – before the already mentioned military commissions in Guantánamo and before Israeli military courts in the West Bank.<sup>50</sup>

As to the right of access to court, the European Court of Human Rights has also clearly upheld that, while “the protection of national security is a

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<sup>47</sup> See, *e.g.*, European Court of Human Rights, *Bocellari and Rizza v. Italy*, App. No. 399/02, judgment of 13 November 2007, para. 35 ff.

<sup>48</sup> Emphasis added. See, *e.g.*, European Court of Human Rights, *Dağtekin et al. v. Turkey*, App. No. 70516/01, judgment of 13 March 2008, para. 34.

<sup>49</sup> See Inter-American Court of Human Rights, *Castillo Petruzzi et al. v. Peru*, Series C No. 52, judgment of 30 May 1999, para. 172. The Court did not uphold the argument of the State that the secrecy surrounding the trials was justified by the need to protect security.

<sup>50</sup> While formally holding public trials, in practice these courts often operate in secrecy. See, *inter alia*, O. ARONSON, *In/visible Courts: Military Tribunals as Other Spaces*, in D. COLE, F. FABBRINI, A. VEDASCHI (eds), *Secrecy, National Security and the Vindication of Constitutional Law*, *supra* Introduction, note 13, p. 235.

legitimate aim which might entail limitations on the right of access to court, including the withholding of information for the purpose of security (...), it is necessary to consider whether there is a *reasonable relationship of proportionality between the concerns for the protection of national security invoked by the authorities and the impact which the means they employed to this end had on the applicant's right of access to a court or tribunal*".<sup>51</sup> More specifically, the Court found that the "removal of courts' jurisdiction by executive *ipse dixit*",<sup>52</sup> without the applicant having any opportunity to know and judicially challenge the measures taken against him, could not be considered a proportionate – and thus lawful – restriction of the right of access to court under Article 6 of the European Convention on Human Rights.<sup>53</sup>

With specific regard to the adversarial system and equality of arms principles, the European Court of Human Rights has expressly set precise criteria to establish whether a certain restriction is legitimate under Article 6 of the European Convention on Human Rights. According to the Court, in fact, the question of non-disclosure of evidence should be brought to the attention of domestic courts at all levels of jurisdiction and should be approved by way of a balancing exercise between the public interest and due process guarantees.<sup>54</sup>

The Court has indeed found a breach of Article 6 of the European Convention on Human Rights in cases where judges refused or were not allowed to examine confidential information in order to issue a decision on disclosure. For instance, in the *Dowsett v. United Kingdom* case, the Court

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<sup>51</sup> Emphasis added. See European Court of Human Rights, *Devenney v. The United Kingdom*, App. No. 24265/94, judgment of 19 March 2002, para. 26. The case concerned the issuance of a certificate against the applicant by the Secretary of State, which constituted, according to the applicable law, conclusive evidence of the termination of an employment contract for reasons of protecting the public safety and order. See also, earlier, European Court of Human Rights, *Tinnelly & Sons Limited et al. and McElduff et al. v. The United Kingdom*, App. No. 62/1997/845/1052-1053, judgment of 10 July 1998, para. 75 ff.

<sup>52</sup> *Ibid.*, para. 28.

<sup>53</sup> *Ibid.*, para. 29.

<sup>54</sup> See, *inter alia*, D. VITKAUSKAS, G. DIKOV, *Protecting the Right to a Fair Trial under the European Convention on Human Rights*, Strasbourg, 2012, p. 46.

found that the prosecutor's reliance on the public interest immunity, without the domestic court assessing the secrecy claim, violated the right to a fair trial.<sup>55</sup> Similarly, in its 2013 judgment in the *Bucur and Toma v. Romania* case, the Court held that the refusal of the judiciary to assess whether the 'top secret' classification attributed by the executive was legitimate violated the applicant's right to due process guarantees.<sup>56</sup> Likewise, the Inter-American Court of Human Rights, in its judgment in the *Myrna Mack Chang v. Guatemala* case, held that governmental authorities' refusal to disclose relevant evidence on the ground of official secrecy, without the judge in charge of the case being provided with it, violated the right to a fair trial.<sup>57</sup> In particular, the Inter-American Court found that, especially in criminal proceedings related to alleged serious violations of human rights, any invocation of secrecy with respect to relevant evidence should necessarily be subjected to oversight by a branch of State power different from the one asserting the claim.<sup>58</sup>

Hence, effective judicial oversight over non-disclosure of evidence constitutes a necessary pre-condition for any restriction to be consistent with Article 6 of the European Convention on Human Rights or Article 8 of the American Convention on Human Rights. Disclosure of information to the court serves indeed two different goals: it allows the judiciary to assess the lawfulness of the secrecy claim and entrusts it with the task of ensuring procedural fairness.<sup>59</sup>

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<sup>55</sup> See, e.g., European Court of Human Rights, *Dowsett v. United Kingdom*, App. No. 39482/98, judgment of 24 June 2003, para. 44.

<sup>56</sup> See, e.g., European Court of Human Rights, *Bucur and Toma v. Romania*, App. No. 40238/02, judgment of 8 January 2013, para. 131.

<sup>57</sup> See again Inter-American Court of Human Rights, *Myrna Mack Chang v. Guatemala*, *supra* Introduction, note 41, para. 179. It is noteworthy that, in this respect, the Inter-American Court of Human Rights recalls the pertinent case law of its European counterpart.

<sup>58</sup> *Ibid.*, para. 181.

<sup>59</sup> See again S. HOLLENBERG, *The Security Council's 1267/1999 Targeted Sanctions Regime and the Use of Confidential Information: A Proposal for Decentralization of Review*, *supra* Introduction, note 36, p. 58. Similar conclusions have been reached also by the Court of Justice of the European Union. See, e.g., case T-284/08, *Organisation des Modjahedines du Peuple d'Iran v. Council*, *supra* Chapter 1, note 319, para. 75. Interestingly, the fact that

Yet, the involvement of the judiciary does not suffice *per se*. To the contrary, the European Court of Human Rights found that, in case the applicable law limits the judicial oversight mechanism to be a mere formality incapable of any meaningful review, the right to a fair trial is infringed for lack of adequate procedural guarantees.<sup>60</sup> This should therefore be held true also in the case of the judiciary's practical deference to non-disclosure claims. In other words, whether the judiciary – *de facto* or *de iure* – merely takes note of a 'secrecy' claim, without assessing the validity of this assertion and eventually ensuring a proper balance between competing interests, due process guarantees should not be considered fully complied with.

Even when an effective judicial oversight is in place, difficulties related to the non-disclosure should in any case be counterbalanced by the provision of appropriate procedural mechanisms capable of accommodating a core of due process guarantees such as, for instance, the disclosure of a summary of information.<sup>61</sup>

In this last regard, the case law of the European Court of Human Rights mirrors the findings of the Human Rights Committee. In the *Ahani v. Canada* case, for instance, the Committee concluded that the use of summaries of information, instead of full evidence, justified on the ground of national security concerns did not violate Article 14 of the International Covenant on

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judicial review over secrecy claims constitutes a necessary pre-condition for ensuring fair trial rights has been upheld – although, clearly, under different terms – also in the context of international criminal proceedings. In the already recalled decision *Prosecutor v. Blaškić*, for instance, the International Criminal Tribunal for the Former Yugoslavia found that recognizing “a unilateral right of a State to withhold information necessary for the proceedings on national security grounds would prejudice the capacity of the International Tribunal to ensure a fair trial” (emphasis added). See again *Prosecutor v. Blaškić*, decision on the objection of the Republic of Croatia to the issuance of *subpoenae duces tecum*, *supra* Chapter 1, note 247, para. 131. The problem of secrecy claims and fair trial guarantees in international criminal tribunals is well illustrated in J.K. COGAN, *The Problem of Obtaining Evidence for International Criminal Courts*, in *Human Rights Quarterly*, vol. 22, 2000, pp. 404-427.

<sup>60</sup> See, e.g., European Court of Human Rights, *Mirilashvili v. Russia*, App. No. 6293/04, judgment of 11 December 2008, paras. 207-209.

<sup>61</sup> European Court of Human Rights, *Botmeh and Alami v. United Kingdom*, App. No. 15187/03, judgment of 7 June 2007, paras. 43-45.

Civil and Political Rights, as the accused had been able to have access to enough evidence to defend himself.<sup>62</sup>

The Court of Justice of the European Union has also interpreted due process guarantees embodied in the EU Charter of Fundamental Rights to require, at the very least, the disclosure of a summary of information, provided that the same would suffice to challenge adversarial evidence.<sup>63</sup>

More generally, partial disclosure of evidence may also fit among those “procedures” capable of ensuring a minimum core of due process guarantees. Thus, the European Court of Human Rights found a breach of the right to a fair trial in a case in which the domestic court had refused a partial disclosure of evidence, due to the fact that complete non-disclosure had prevented the applicant from challenging the lawfulness of the secret evidence.<sup>64</sup>

In another case, the Court concluded that the classification as “top secret” of an investigative file did not meet fair trial standards to the extent that it prevented the accused from properly reviewing his file and making copies of it.<sup>65</sup> Interestingly, in reaching this conclusion, the Court also reiterated its findings in the *Turek v. Slovakia* case, pursuant to which:

“(…) unless the contrary is shown on the facts of a specific case, it cannot be assumed that there remains a continuing and actual public interest in imposing limitations on access to materials classified as confidential under former regimes. This is because lustration proceedings are, by their very nature, oriented towards the establishment of facts dating back to the communist era and are not directly linked to the current functions and operations of the security services. Lustration proceedings inevitably depend on the examination

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<sup>62</sup> Human Rights Committee, *Ahani v. Canada*, Communication No. 1051/2002, UN Doc. CCPR/C/80/D/1051/2002 of 29 March 2004, para. 10.5.

<sup>63</sup> Court of Justice of the European Union, *European Commission and United Kingdom v. Yassin Abdullah Kadi*, judgment of 18 July 2013, *supra* Introduction, note 37, para. 111.

<sup>64</sup> See European Court of Human Rights, *Mirilashvili v. Russia*, *supra* note 60, para. 205 ff.

of documents relating to the operations of the former communist security agencies. If the party to whom the classified materials relate is denied access to all or most of the materials in question, his or her possibilities of contradicting the security agency's version of the facts will be severely curtailed".<sup>66</sup>

It follows from the above-cited cases that any restriction to fair trial guarantees requires first of all the establishment of procedural mechanisms able to ensure a balancing exercise between competing interests. In this respect, domestic courts should grant, as far as possible, that the party is placed in a position to challenge the evidence and make allegations.<sup>67</sup> In particular, the party should at least be revealed the essence of the case against him (so-called 'gisting' requirement).<sup>68</sup> This applies not only in the context of the trial, but also in case of lengthy and apparently indefinite pre-trial detention (by means of an extensive application of due process guarantees applicable with respect to criminal proceedings).<sup>69</sup> As it has been correctly noted, in this respect, the Court has identified – although under 'imprecise' terms – an 'absolute' core of due process guarantees that cannot be restricted even in view of legitimate security concerns: whatever national security

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<sup>65</sup> European Court of Human Rights, *Matyjek v. Poland*, App. No. 38184/03, judgment of 24 April 2007, para. 63.

<sup>66</sup> *Ibid.*, para. 54. See also European Court of Human Rights, *Turek v. Slovakia*, *supra* Chapter 2, note 126, para. 115.

<sup>67</sup> See European Court of Human Rights [GC], *A. et al. v. United Kingdom*, App. No. 3455/05, judgment of 19 February 2009, para. 218 (in this case, the Court considered the fairness of proceedings under Article 5(4) of the European Convention on Human Rights but applied the same standards developed with respect to Article 6). For a comment on this case see, *inter alia*, S. SHAH, *From Westminster to Strasbourg: A and others v. United Kingdom*, in *Human Rights Law Review*, vol. 9, 2009, pp. 473-488.

<sup>68</sup> See also on this point, for instance, Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/63/223 of 6 August 2008, para. 16 (related to the practice of listing of terrorists). On this specific aspect see, *inter alia*, R. GOSS, *Balancing Away Article 6 in Home Office v. Tariq. Fair Trials Rights in Closed Material Proceedings*, in M. KUMAR, G. MARTIN, R. SCOTT BRAY (eds), *Secrecy, Law and Society*, Chapter 1, note 481, pp. 58-72.

<sup>69</sup> European Court of Human Rights [GC], *A. et al. v. United Kingdom*, *supra* note 67, para. 217. See also Human Rights Committee, General Comment No. 35, UN Doc. CCPR/C/GC/35 of 16 December 2014, para. 15.

interest is to be protected, the subject concerned should always be provided with sufficient information about the essence of the case.<sup>70</sup>

How this requirement should be met in practice is, however, controversial.<sup>71</sup> In this respect, the Grand Chamber of the European Court of Human Rights merely excluded that fair trial guarantees are complied with when the domestic court's decision "is based solely or to a decisive degree on closed material".<sup>72</sup>

In its recent judgment in the *ZZ v. Secretary of State for the Home Department* case, concerning the use of secret evidence in the context of immigration expulsion proceedings (*i.e.*, with respect to those elements on the ground of which the applicant had been denied access to the country for reasons of "public security"), the Court of Justice of the European Union has *de facto* confirmed – to the extent relevant for the case at stake – the approach of the European Court of Human Rights.<sup>73</sup> Contrary to the findings of the Advocate General's Opinion, the Court concluded that Article 47 of the EU Charter on Fundamental Rights requires that the "parties of a case must have the right to examine all the documents or observations submitted to the court for the purpose of influencing its decision, and to comment on them".<sup>74</sup> Restrictions to disclosure based on national security concerns may be exceptionally admitted provided that two conditions are met. First, States should ensure an effective judicial review over the "existence and validity of

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<sup>70</sup> See again S. HOLLENBERG, *The Security Council's 1267/1999 Targeted Sanctions Regime and the Use of Confidential Information: A Proposal for Decentralization of Review*, *supra* Introduction, note 36, p. 56.

<sup>71</sup> R. GOSS, *Balancing Away Article 6 in Home Office v. Tariq. Fair Trials Rights in Closed Material Proceedings*, *supra* note 68, p. 65.

<sup>72</sup> See again European Court of Human Rights [GC], *A. et al. v. United Kingdom*, *supra* note 67, para. 220. It has to be seen whether, in future judgments related to cases currently pending before it, the European Court will further elaborate on this specific point. See, for instance, European Court of Human Rights, *Salajuddin Amin v. The United Kingdom* and *Rangzieb Ahmed v. The United Kingdom*, applications lodged, respectively, on 21 January 2009 and on 21 December 2011 (the applicants complained that the Respondent State violated Article 6 of the European Convention on Human Rights by denying them access to relevant evidence in the criminal proceedings following a grant of public interest immunity).

<sup>73</sup> See again Court of Justice of the European Union (Grand Chamber), *ZZ v. Secretary of State for the Home Department*, *supra* Chapter 1, note 352.

the reasons invoked by the competent national authority”.<sup>75</sup> Second, States should provide mechanisms and rules enabling, in case of non-disclosure, national courts to strike the most appropriate balance between national security concerns and due process guarantees.<sup>76</sup> This implies, in the context of criminal or expulsion proceedings, that the person concerned should be informed at least of the essence of the case against him.<sup>77</sup>

Consistently, both the European Court of Human Rights and the Court of Justice of the European Union have denied that *complete* non-disclosure of evidence not accompanied by the revelation of the substance of the allegations – even when justified on the ground of national security concerns – can ever be considered in compliance with due process guarantees.<sup>78</sup>

In this respect, it is just worth mentioning that, notably, as far as immigration procedures are concerned, the duty of States to establish procedural safeguards capable of accommodating legitimate security concerns (*i.e.*, State secrecy claims) and procedural fairness has been upheld also by the United Nations High Commissioner for Refugees in its Guidelines on Article 1F of the 1951 Convention relating to the Status of Refugees.<sup>79</sup>

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<sup>74</sup> *Ibid.*, para. 55.

<sup>75</sup> *Ibid.*, para. 58.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*, para. 65.

<sup>78</sup> This similarities in the case law of the European Court of Human Rights and the Court of Justice of the European Union have been highlighted, *inter alia*, by J. FORWOOD, *Closed Evidence in Restrictive Measures Cases: A Comparative Perspective*, *supra* Chapter 1, note 265, p. 94.

<sup>79</sup> United Nations High Commissioner for Refugee, *Guidelines on International Protection. Application of the Exclusionary Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, UN Doc. HCR/GIP/03/05, 4 September 2003, para. 36 (“exclusion should not be based on sensitive evidence that cannot be challenged by the individual concerned. (...) Secret evidence or evidence considered in camera should not be relied upon to exclude. Where national security interests are stake, they may be protected by introducing procedural safeguards which also respect the asylum-seeker’s due process rights”. On the specific topic of the use of secret evidence in asylum seeking proceedings and its compatibility with human rights law see, *inter alia*, D. BALDINGER, *Vertical Judicial Dialogues in Asylum Cases: Standards on Judicial Scrutiny and Evidence in International and European Asylum Law*, Leiden, 2015, pp. 47-48. See also J. RAMJI-NOGALES, *A Global Approach to Secret Evidence: How Human Rights Law Can Reform Our Immigration System*, in *Columbia Human Rights Law Review*, vol. 39, 2008, pp. 287-350.



As to the ‘necessity test’, whilst it rests with domestic authorities (and, more specifically, with the judiciary) to evaluate the appropriateness of non-disclosure, the European Court of Human Rights has generally interpreted this requirement to prohibit the use of closed material procedures any time a certain piece of evidence appears ‘essential’ to the outcome of the case.<sup>80</sup>

Furthermore, it can be argued that the invocation of State secrecy in relation to documents or information that are already in the public domain<sup>81</sup> would not meet the ‘necessity’ requirement. While there are no rulings so far dealing explicitly with this specific issue in the context of the right to a fair trial, as already stressed in the previous Chapter, the European Court of Human Rights has generally upheld that the legal protection ensured to certain information by means of State secrecy cannot be deemed “legitimate and necessary” under the European Convention on Human Rights once the information or document has become public.<sup>82</sup>

In this respect, it is regrettable that the European Court of Human Rights did not touch explicitly upon the issue of the consistency of the resort to State secrecy over public information with due process guarantees in its recent judgment in the *Nasr and Ghali* case (regardless of the argument made by the applicants in this regard). It may nonetheless be argued that the very fact that the Court declined to examine whether the facts at stake gave rise to an autonomous breach of Article 6 of the Convention by referring to its finding under Article 3 of the same instrument in its procedural limb<sup>83</sup> – which include, as previously recalled, a denial of the the *legitimate* resort to State

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<sup>80</sup> European Court of Human Rights, *Georgios Papageorgiu v. Greece*, App. No. 59506/00, judgment of 9 May 2003, para. 39.

<sup>81</sup> As to the invocation of State secrecy with respect to information already in the public domain see, as a matter of further example, also the denunciation made by the NGO Justice, according to which, in several cases, the UK government has relied on secrecy with respect to evidence already publicly available. See again Justice, *Secret Evidence*, *supra* note 4, p. 227.

<sup>82</sup> See again, *e.g.*, European Court of Human Rights, *Vereniging Weekblad Bluf! v. Netherlands*, *supra* Chapter 2, note 208, para. 35 and *Observer and Guardian v. The United Kingdom*, *supra* Chapter 2, note 300, para. 69. See also, more recently, *Nasr and Ghali v. Italy*, *supra* Chapter 1, note 173, para. 268.

secrecy with respect to information already in the public domain – may be considered as an ‘implicit’ acknowledgement that claims of secrecy with respect to public documents should be deemed inconsistent also with due process guarantees.<sup>84</sup>

### 2.2.3. State practice

Regardless of the fluctuating trend and widespread deferential attitude towards executive’s secrecy claims that have been illustrated in the context of Chapter 1, it has to be stressed that domestic highest courts have also began upholding, although seldom and often inconsistently, the aforementioned requirements in the application of fair trial principles.<sup>85</sup>

The Israeli Supreme Court, for instance, has repeatedly advocated the judiciary’s reviewing power over claims of secrecy and, in the context of criminal proceedings, the need for the accused to be informed at least of the gist of the case.<sup>86</sup> Furthermore, in a way that mirrors the case law of the European Court of Human Rights on the point, the Supreme Court found that secret evidence should be always disclosed when it appears essential to the case.<sup>87</sup>

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<sup>83</sup> See again European Court of Human Rights, *Nasr and Ghali v. Italy*, *supra* Chapter 1, note 173, para. 341.

<sup>84</sup> Especially considering that, as previously remarked, the Court motivated its decision to not separately examine the alleged breach of Article 6 of the European Convention on Human Rights with the fact that it constituted a specific aspect of certain procedural requirements that the Court found not to have been satisfied in the case at issue (see again European Court of Human Rights, *Nasr and Ghali v. Italy*, *supra* Chapter 1, note 173, para. 341).

<sup>85</sup> As to the important role that domestic courts’ rulings may play in terms of international law see International Law Commission, Third Report on identification of customary international law by Micheal Wood, Special Rapporteur, UN Doc. A/CN.4/682, 27 March 2015, p. 42: “decision of national courts may play a dual role in relation to customary international law: not only as State practice, but also as means for the determination of rules of international customary law”.

<sup>86</sup> See, e.g., M. KREMNITZER, L. SABA-HABESCH, *Executives Measures against the Liberties of Terrorist Suspects*, in G. LENNON, C. WALKER (eds), *Routledge Handbook of Law and Terrorism*, Abingdon, 2015, p. 231.

<sup>87</sup> See again again A. KOBO, *Privileged Evidence and State Security under the Israeli Law: Are we Doomed to Fail?*, *supra* Chapter 1, note 10, p. 117 ff.

To make another example, in a decision issued in 2007, the Supreme Administrative Court of Finland drew on the case law of the European Court of Human Rights to conclude that secrecy claims over sensitive evidence could not be translated into a ‘blanket exemption’ from effective judicial review.<sup>88</sup>

Additionally, in its already mentioned judgment in the *Secretary of State for the Home Department v. A.F.* case, the UK House of Lords has openly relied on the European Court of Human Rights’ case law concerning due process guarantees to hold that, at least in case of control orders, the person concerned should be provided with sufficient evidence enabling him to understand the essence of the case.<sup>89</sup>

Similarly, as previously pointed out, in its judgment in the *Charakaoui* case, the Canadian Supreme Court found that the absence of procedural safeguards ensuring, as far as possible, the adversarial system with respect of undisclosed evidence violated the right to a fair trial protected under Article 7 of the Canadian Charter of Rights and Freedoms.<sup>90</sup>

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<sup>88</sup> See Finnish Supreme Administrative Court, KHO 2007:48, judgment of 12 July 2007 (a summary in English is available at: <http://trip.abo.fi> (last accessed on 24 February 2016)). The case concerned the use of intelligence information in immigration proceedings.

<sup>89</sup> House of Lords, *Secretary of State for the Home Department v. A.F.*, *supra* Chapter 1, note 351, para. 65.

<sup>90</sup> Canadian Supreme Court, *Charakaoui v. Canada*, *supra* Chapter 1, note 357, para. 70 ff. A further interesting case – although touching upon the ‘secrecy issue’ in a different manner – is the judgment issued by the German Federal Constitutional Court on 13 August 2013 (case No. 2 BvR 2660/06). The applicants argued that their right to a fair trial had been violated in lack of the reversion of the burden of proof concerning the attribution of certain violations of international humanitarian law to the German government. According to them, indeed, the military secrecy surrounding the event at stake (*i.e.*, the destruction by NATO of a bridge in the Serbian city of Varvarin in 1999) made the burden of proof impossible to satisfy. The Constitutional Court expressed its concerns and affirmed that, in cases relating to public liability, when the victims do not have access to administrative documents, the burden of proof should be lowered or reversed. That notwithstanding, the Court found that, in the specific case, these elements could not constitute a ground for reform, given that the operation leading to the destruction of the bridge had been conducted by NATO under a “need-to-know” policy (which means that Germany only had limited information). For a comment of this case see S. MEHRING, *The Judgment of the German Bundesverfassungsgericht concerning Reparations for the Victims of the Varvarin Bombing*, in *International Criminal Law Review*, vol. 15, 2015, pp. 191-201.

#### 2.2.4. State secrecy *vis-à-vis* the right to a fair trial

In light of the above, it is clear that the resort to State secrecy in the context of proceedings might raise issues in terms of its compatibility with the right to a fair trial under several perspectives, including, *inter alia*, in the following circumstances: when closed hearings are held or secret evidence is not disclosed in lack of a national security interest legitimizing it; when no *effective* judicial oversight mechanism is in place; when no procedures capable of striking an appropriate balance between competing interests are provided for; in criminal and immigration proceedings, when the balancing exercise does not provide the person concerned with sufficient evidence to defend himself and challenge the allegations brought against him; when secrecy claims are made and upheld with respect to evidence ‘vital’ to the outcome of the case.

In this respect, for instance, some commentators have argued that the public immunity interest principle, as applied in both the UK and Australia, would violate the human right to a fair trial under two aspects.<sup>91</sup> First, the fact that this principle merely allows either the full admission or the complete exclusion of a certain piece of evidence would conflict with the State’s duty to establish mechanisms able to strike a fair balance between the protection of human rights and national security interests.<sup>92</sup> Second, this principle would inherently favour the party requesting non-disclosure as the judiciary, even when assessing the secrecy claim *in camera*, would be inevitably influenced by the only available submissions.<sup>93</sup> Similar allegations could also be made with respect to national legislation related, *inter alia*, to the closed material

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<sup>91</sup> See, *inter alia*, N. MCGARRITY, E. SANTOW, *Anti-Terrorism Laws: Balancing National Security and a Fair Hearing*, in V.V. RAMRAJ, M. HOR, K. ROACH, G. WILLIAMS (eds), *Global Anti-Terrorism Law and Policy*, Cambridge, 2012, p. 135.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

procedure in the UK or to the use of State secrecy as evidentiary privilege in other countries.

While such a criticism is certainly in line with the general standards that have been elaborated at the international and regional level, at least with respect to the UK public immunity interest and closed material procedure, the European Court of Human Rights has excluded it violates *per se* fair trial guarantees. To the contrary, its compatibility with human rights law needs to be assessed on a case-by-case basis by ascertaining whether a proper balance between competing interests has been struck at the domestic level.<sup>94</sup>

It follows that, generally speaking, the resort to State secrecy in domestic proceedings to prevent the disclosure of evidence should be assessed on a ‘individualized’ basis in order to establish whether an appropriate judicial oversight mechanism is in place and whether the judiciary has been able to strike a proper balance between national security interests and the principles of publicity, equality of arms and adversarial system.

Particularly interesting and emblematic of the complexity of the tension between procedural fairness and the protection of national security concerns is also the “dialogue” that the European Court of Human Rights and UK courts have engaged in with respect to the use of the so-called special advocates.<sup>95</sup>

In its judgment related to the *Chalal* case, the European Court of Human Rights found that this system (at the time used in Canada) “accommodate[s] legitimate security concerns about the nature and sources of intelligence information and yet accord[s] the individual a substantial measure of

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<sup>94</sup> See also C. WALKER, *Terrorism Prosecutions and the Right to a Fair Trial*, in B. SAUL (ed.), *Research Handbook on International Law and Terrorism*, *supra* Chapter 1, note 220, p. 427.

<sup>95</sup> This expression is used by R. GOSS, *Balancing Away Article 6 in Home Office v. Tariq*, *Fair Trials Rights in Closed Material Proceedings*, *supra* note 68, p. 60. See also D. JENKINS, *There and Back Again: The Strange Journey of Special Advocates and Comparative Law Methodology*, in *Columbia Human Rights Law Review*, 2011, vol. 42, pp. 279-355; and D. JENKINS, *The Handling and Disclosure of Sensitive Intelligence: Closed Material Procedures and Constitutional Change in the ‘Five Eyes’ Nations*, in G. LENNON, C. WALKER (eds), *Routledge Handbook of Law and Terrorism*, *supra* note 86, pp. 266-280.

procedural fairness”.<sup>96</sup> After the UK introduced it in its domestic legal system, however, the Court was called to decide whether this mechanism, that it had indicated as a means to counterbalance national security interests and procedural fairness, was consistent with due process guarantees as per Article 6 of the European Court of Human Rights. In its recent judgment in the *A. et al. v. United Kingdom* case, the Grand Chamber, while confirming the important role that special advocates may play in ensuring an appropriate balance between competing interests, concluded that this might occur only if the party (in the specific case, the detainee) is provided with sufficient information about the essence of the case (thus, reiterating the ‘gisting approach’ and the identification of an ‘absolute’ core of due process guarantees).<sup>97</sup> As a consequence, the Court found that, in case of special advocates not being allowed to communicate with the party once they had accessed the closed material, fair trial guarantees are not fully respected.<sup>98</sup>

In a subsequent judgment, however, the UK Supreme Court took an opposite stance by rejecting the need for the party to be provided with a minimum of information in cases involving national security.<sup>99</sup> As it has been noted, the importance of this domestic judgment lies in the fact that it underlines the risks connected to the introduction of a public interest balancing process in Article 6 (even in lack of any express provision in the text of the Convention) and the related vagueness surrounding the criteria applicable in this balancing exercise.<sup>100</sup> A case is currently pending before the European Court of Human Rights.<sup>101</sup>

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<sup>96</sup> European Court of Human Rights [GC], *Chalal v. the United Kingdom*, App. No. 22414/93, judgment of 15 November 1996, para. 131.

<sup>97</sup> See again European Court of Human Rights, *A. et al. v. The United Kingdom*, *supra* note 67, para. 220.

<sup>98</sup> *Ibid.*, para. 223.

<sup>99</sup> UK Supreme Court, *Home Office v. Tariq*, UKSC 35, judgment of 13 July 2011.

<sup>100</sup> See again R. GOSS, *Balancing Away Article 6 in Home Office v. Tariq. Fair Trials Rights in Closed Material Proceedings*, *supra* note 68, p. 71.

<sup>101</sup> European Court of Human Rights, *Gulamhussein and Tariq v. The United Kingdom*, App. Nos. 46538/11 and 3960/12, lodged on 21 July 2011 and 10 January 2012 respectively (alleging a violation of Article 6 of the European Convention on Human Rights).

The complexities underpinning the difficult balance between the protection of secrecy claims based on national security concerns, on the one hand, and procedural fairness, on the other hand, are made further evident by the fact that, as already stressed earlier, different human rights treaties monitoring bodies have undertaken a more ‘negative’ approach towards the use of special advocates. As stated earlier, the Committee against Torture has raised doubts as to the actual compatibility of this system with due process guarantees.<sup>102</sup>

Finally, it is worth mentioning that other due process sub-rights have been interpreted as having an absolute character (*i.e.*, they cannot be subjected to any restrictions). The Human Rights Committee, for instance, has explicitly upheld the absolute nature of the right of access to a competent, impartial and independent tribunal.<sup>103</sup>

In this respect, one could therefore hypothetically argue that a deferential approach to the executive’s secrecy claims by the judiciary can indeed violate the absolute right to have one’s case tried by an independent tribunal (any restriction to the independence requirement being illegitimate, even in case of existence of a threat to State security). The fact that deference to the executive over secrecy claims can indeed be inconsistent with fair trial guarantees seems to be implicitly supported by the findings of the European Court of Human

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<sup>102</sup> See again UN Doc. CAT/C/GBR/CO/5, *supra* note 2, para. 12. See also Committee against Torture, *Concluding Observations on Canada*, UN Doc. CAT/C/CAN/CO/6 of 25 June 2012, para. 11. The UK Parliamentary Joint Committee on Human Rights has similarly expressed doubts as to the compatibility of this system with due process guarantees. See, *e.g.*, UK House of Lords and House of Commons, Joint Committee on Human Rights, *Legislative Scrutiny: Justice and Security Bill (Second Report)*, 28 February 2013, p. 5. The resort to special advocates might indeed raise issues as to its consistency with other ‘constituent element’ of fair trial guarantees, such as the right to choose one’s own lawyer. This possible tension has been highlighted also by the Russian Constitutional Court, which has declared unconstitutional the provision of the Russian law on State secrets to the extent it provided that lawyers could be barred from acting as defence counsels in cases involving State secrets if in lack of a specific security clearance. See Russian Constitutional Court, judgment No. 8-II of 27 March 1996 concerning the review of constitutionality of Articles 1 and 21 of the Law of the Russian Federation of 21 July 1993 “On State Secrets” in connection with complaints of V. M. Gurdzhiyants, V.N. Sintsov, V.N. Bugrov and A.K. Nikitin. The case is reported, *inter alia*, in W. SADURSKI, *Rights before Courts: A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*, Dordrecht, 2005, p. 265.

<sup>103</sup> See again UN Doc. CCPR/C/GC/32, *supra* Chapter 2, note 122, para. 19.

Rights in its judgment in the case *Fitt v. United Kingdom*. The Court, by taking note that the applicant had not claimed any violation of the right to an independent and impartial court with respect to the judiciary's upholding of a public interest immunity assertion,<sup>104</sup> seemed to admit that, at least in some circumstances, a deferential approach by the court might be inconsistent with this right.

### 2.3. The right to a fair trial: A non-derogable right?

Given that the potential tension between the use of secrecy in proceedings (in all its possible forms) and the right to a fair trial has stood out with particular intensity in the context of the 'war on terror' or in other alleged states of public emergency,<sup>105</sup> a further aspect which deserves particular attention is whether this right is indeed a derogable one, that is, whether it may be suspended in case of a state of emergency threatening the independence or the security of the State.<sup>106</sup>

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<sup>104</sup> European Court of Human Rights, *Fitt v. The United Kingdom*, *supra* note 40, para. 49.

<sup>105</sup> As a matter of example, one could think of the anti-terrorism laws enacted during the Fujimori's regime in Peru, characterized by a clear reduction of procedural fairness guarantees, including a limited opportunity to review evidence. For an overview, see L. J. LAPLANTE, *Outlawing Amnesty: The Return of Criminal Justice in Transitional Justice Schemes*, in *Virginia Journal of International Law*, vol. 49, 2009, p. 944 ff.; L. J. LAPLANTE, *The Rule of Law in Transitional Justice: The Fujimori Trail in Peru*, in M. SELLERS, T. TOMASZEWSKI (eds), *The Rule of Law in Comparative Perspective*, Dordrecht, 2010, p. 185 and p. 191 ff. Furthermore, concerning the use of the so-called 'national security doctrine' as justification for the suspension of fundamental human rights (including non-derogable human rights and even beyond the 'war on terror') see, e.g., C.R. REINA, *Derecho humanos y seguridad del Estado en Centro América: su situación actual*, in D. ZOVATTO (ed.), *II Seminario interamericano sobre seguridad del Estado, derecho humanitario y derechos humanos in Centroamérica*, San José, 1985, pp. 23-42.

<sup>106</sup> Among the conspicuous literature on the topic see, *inter alia*, R. HIGGINS, *Derogations under Human Rights Treaties*, in *British Yearbook of International Law*, vol. 48, 1976-1977, pp. 281-319; J. F. HARTMAN, *Derogation from Human Rights Treaties in Public Emergencies*, in *Harvard International Law Journal*, vol. 22, 1981, pp. 1-52; J. FITZPATRICK, *Human Rights in Crisis: The International System for Protecting Rights during States of Emergency*, Philadelphia, 1994; A.L. SVENSSON-MCCARTHY, *The International Law of Human Rights and States of Exception. With Special Reference to the Travaux Préparatoires and Case Law of the International Monitoring Organs*, *supra* Chapter 2, note 266, 1998; S. LIVINGSTONE, *Non-Derogable Rights, the Interests of the Nation and International Order*, in S.M. HELMONS (ed.), *Dignité humaine et hiérarchie des valeurs: les limites irréductibles*, Louvain, 1999, pp.



Whereas, with the sole exception of the Arab Charter on Human Rights,<sup>107</sup> international and regional human rights treaties do not expressly list the right to a fair trial among non-derogable rights,<sup>108</sup> the importance of guaranteeing at

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59-85; J. ORAA, *The Protection of Human Rights in Emergency Situations under Customary International Law*, in G. S. GOODWIN-GILL, S. TALMON (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie*, Oxford, 1999, p. 413 ff.; A. MOKHTAR, *Human Rights Obligations v. Derogations: Article 15 of the European Convention on Human Rights*, in *The International Journal of Human Rights*, vol. 8, 2004, pp. 65-87; G. CATALDI, *Le deroghe ai diritti umani in stato di emergenza*, in L. PINESCHI (ed.), *La tutela internazionale dei diritti umani*, Milano, 2006, pp. 752-772; A. MÜLLER, *Limitations to and derogations from Economic, Social and Cultural Rights*, in *Human Rights Law Review*, 2009, p. 557 ff.; E.M. HAFNER-BURTON, L.R. HELFER, C. J. FARIS, *Emergency and Escape: Explaining Derogations from Human Rights Treaties*, in *International Organization*, vol. 65, 2011, pp. 673-707; D. L. RICHARDS, K. CHAD CLAY, *An Umbrella with Holes: Respect for Non-Derogable Human Rights during Declared States of Emergency: 1996-2004*, in *Human Rights Review*, vol. 13, 2012, pp. 443-471.

<sup>107</sup> See Article 4(2).

<sup>108</sup> See Article 4 of the International Covenant on Civil and Political Rights (which expressly excludes any derogation from the following provisions: right to life, right to be free from torture and other ill-treatments, right not to be held in slavery; right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation; right not to be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence; right to recognition as a person before the law; right to freedom of thought, conscience and religion); Article 15 of the European Convention on Human Rights (upholding the non-derogable character of the right to life, the right to be free from torture and other ill-treatment, freedom from slavery, freedom from *ex post facto* laws); Article 27 of the American Convention on Human Rights (“the foregoing provision does not authorize any suspension of the following articles: Article 3 (right to juridical personality), Article 4 (right to life), Article 5 (right to humane treatment), Article 6 (freedom from slavery), Article 9 (freedom from *ex post facto* laws), Article 12 (freedom of conscience and religion), Article 17 (rights of the family), Article 18 (right to a name), Article 19 (rights of the child), Article 20 (right to nationality), and Article 23 (right to participate in government), or of the judicial guarantees essential for the protection of such rights”); Article 4 of the Arab Charter on Human Rights (pursuant to which no derogation shall be made from the following provisions: right to life, right to be free from torture or other ill-treatment, right not to be subjected to medical or scientific experimentation or to the use of one’s organs without free consent, freedom from slavery, right to a fair trial, right to have a case review by a competent court in case of criminal arrest or charge, freedom from *ex post facto* laws, right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation, *ne bis in idem*, right to human treatment in case of detention, right to juridical personality, right to leave the country, right to political asylum, right to nationality and freedom of thoughts, conscience and religion). In addition, the judicial guarantees required for the protection of the aforementioned rights may not be suspended”). Unlike other human rights treaties, the African Charter on Human and Peoples’ Rights does not contain any ‘derogation clause’. In its judgment of 11 October 1995 in the *Commission nationale des droits de l’homme et des libertés v. Chad* case (Communication No. 74/92), the African Commission on Human Rights found that: “The African Charter, unlike other human rights instruments, does not allow for States parties to derogate from their treaty obligations during emergency situations (...)” (para. 21) (see also African Commission on Human Rights, *Constitutional Rights Project v. Nigeria*, Communication No. 102/93, decision of 31 October 1998, para. 58; *Amnesty International et*

least a ‘hard’ core of procedural fairness even in exceptional circumstances has been strongly advocated in academic literature.<sup>109</sup>

These doctrinal assertions are mainly grounded on and find *prima facie* normative support in the recognition that the non-derogable character of at least some basic due process guarantees has had at the international and regional level.

Specific attention was devoted to the issue of the non-derogable character of the right to a fair trial already in the context of the study undertaken under the aegis of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities by the two Special Rapporteurs Stanislav

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al. v. *Sudan*, Communications Nos. 48/90, 50/91, 52/91, 89/93, decision of 15 November 1999, para. 42). The lack of an express derogation clause has been the object of doctrinal debate. For instance, Ouguergouz has argued that States parties might derogate from the Charter by relying on international norms concerning the suspension of treaties under the Vienna Convention on the Law of Treaties. See F. OUGUERGOUZ, *The African Charter of Human and Peoples’ Rights: A Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*, The Hague, 2003, p. 467. For a general overview see, *inter alia*, F. OUGUERGOUZ, *L’absence de clause de dérogation dans certains traités relatifs aux droits de l’homme: les réponses du droit international général*, in *Revue générale de droit international public*, vol. XCVIII, 1994, pp. 289-336; and L. SERMET, *The Absence of a Derogation Clause from the African Charter on Human and Peoples’ Rights: A Critical Discussion*, in *African Human Rights Law Journal*, vol. 7, 2007, pp. 142-161. It has to be stressed, however, that in its judgment in the case *Article 19 v. Eritrea*, the African Commission seems to have implicitly admitted that some rights might be derogable under exceptional circumstances. See African Commission on Human Rights, *Article 19 v. Eritrea*, Communication No. 275/2003, decision of 30 May 2007, para. 98 (see also African Commission on Human Rights, *Civil Liberties Organization, Legal Defence Centre, Legal Defence and Assistant Project v. Nigeria*, *supra* note 46, para. 27).

<sup>109</sup> See, for instance, S. STAVROS, *The Right to a Fair Trial in Emergency Situations*, in *International & Comparative Law Quarterly*, vol. 41, 1992, pp. 343-365 and, more recently, C. OLIVIER, *Revisiting General Comment No. 29 of the United Nations Human Rights Committee: About Fair Trial Rights and Derogations in time of Public Emergency*, in *Leiden Journal of International Law*, vol. 17, 2004, pp. 405-419; K. BOYLE, *Terrorism State of Emergency and Human Rights*, in W. BENEDEK, A. YOTOPOULOS-MARANGOPOULOS (eds), *Anti-Terrorism Measures*, Leiden, Boston, 2004, pp. 95-116; E. SCHMID, *The Right to a Fair Trial in Times of Terrorism: A Method to Identify the Non-Derogable Aspects of Art. 14 of the International Covenant on Civil and Political Rights*, in *Göttingen Journal of International Law*, vol. 1, 2009, pp. 29-44; M. COSTAS-TRASCASAS, *Terrorism, State of Emergency, and Derogation from Judicial Guarantees*, in P. A. FERNÁNDEZ-SÁNCHEZ (ed.), *International Legal Dimension of Terrorism*, Leiden, Boston, 2009, pp. 469-496; and K. AMBOS, A.M. POSCHADEL, *Terrorists and Fair Trial: The Right to A Fair Trial for Alleged Terrorists Detained in Guantánamo Bay*, in *Utrecht Law Review*, vol. 9, 2013, p. 123 ff.

Chernichenko and William Treat.<sup>110</sup> In their 1994 final report on the right to a fair trial,<sup>111</sup> the two Special Rapporteurs even proposed the adoption of a third optional protocol to the International Covenant on Civil and Political Rights aimed at guaranteeing the right to a fair trial also in state of emergency.<sup>112</sup>

While the lack of adoption of the said optional protocol might support the view that States do not intend the right to a fair trial to be non-derogable in nature, such a conclusion clashes with the interpretation that several human rights monitoring bodies – both at the international and regional level – have given to human rights treaties provisions. Human rights courts and treaty supervisory bodies have, in fact, repeatedly upheld the non-derogable character of some basic components of the right to a fair trial.<sup>113</sup>

First of all, the recognition that certain core due process guarantees are vested with an absolute character inevitably implies their non-derogable

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<sup>110</sup> It is noteworthy, however, that even before that time, the non-derogable character of the right to a fair trial had been upheld in the Paris Minimum Standards of Human Rights Norms in a State of Emergency, adopted by the International Law Commission in 1984. While non-binding in nature, this instrument does provide important guidelines. The text is contained in R. B. LILLICH, *Paris Minimum Standards of Human Rights Norms in a State of Emergency*, in *American Journal of International Law*, vol. 79, 1985, pp. 1072-1081. See also Siracusa *Principles on the Limitations and Derogations of Provisions in the International Covenant on Civil and Political Rights*, *supra* Chapter 2, note 20, pursuant to which, while the right to a fair trial might be generally subjected to derogation in a state of emergency, some of its sub-rights fundamental to human dignity can never be suspended. This includes the principle of adversarial system in criminal proceedings (*ibid.*, para. 70). As to the role that these non-binding instruments have played on shaping the case law of the European Court of Human Rights and of the Inter-American Court of Human Rights see, *inter alia*, F. SEATZU, *On the Interpretation of Derogation Provisions in Regional Human Rights Treaties in the Light of Non-Binding Sources of International Humanitarian Law*, in *Inter-American and European Human Rights Journal*, vol. 4, 2011, pp. 3-22.

<sup>111</sup> Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right to a Fair Trial: Current Recognition and Measures Necessary for its Strengthening*, UN Doc. E/CN.4/Sub.2/1994/24 of 3 June 1994.

<sup>112</sup> *Ibid.*, Annex I (Draft Third Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at Guaranteeing under all Circumstances the Right to a Fair Trial and the Right to an Effective Remedy). Article 1 of the proposed third optional protocol stated: “No derogation from articles 2.3, 9.3, 9.4 or 14 of the International Covenant on Civil and Political Rights may be made under the provisions of article 4 of the Covenant”.

<sup>113</sup> This trend was already highlighted in the Tenth Annual Report and List of States which, since 1 January 1985, have proclaimed, extended or terminated a State of Emergency, submitted by Mr. Leandro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council Resolution 1985/37, UN Doc. E/CN. 4/Sub.2/1997/19 of 23 June 1997, para. 110.

nature.<sup>114</sup> It could therefore be argued that, by upholding the absolute character of the right of access to a competent, impartial and independent court or tribunal and the right to be informed of the essence of a case, human rights monitoring bodies have implicitly acknowledged that these rights cannot ever be suspended.

Secondly, human rights treaties supervisory bodies have explicitly upheld the non-derogable character of due process guarantees at least any time their compliance is essential to the protection of other non-derogable human rights. For instance, the Inter-American Commission on Human Rights, recalling Article 27 of the American Convention on Human Rights, pursuant to which States cannot suspend “the judicial guarantees essential for the protection of [non-derogable] rights”, expressly held that:

“where an emergency situation is involved that threatens the independence or the security of a State, the fundamental component of the right to due process and to a fair trial might nevertheless be respected. (...) [W]hen considered in light of the strict standards governing derogation, *the essential role that due process safeguards may play in the protection of non-derogable human rights, and the complementary nature of states’ international human rights obligations*, international authority decidedly rejects the notion that states may properly suspend the rights to due process and to a fair trial”.<sup>115</sup>

In this regard, the Inter-American Commission of Human Rights has confirmed and further elaborated upon the Inter-American Court of Human Rights’ conclusions in its Advisory Opinion No. OC-9/87 on Judicial

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<sup>114</sup> See G. CITRONI, T. SCOVAZZI, *Corso di diritto internazionale. La tutela internazionale dei diritti umani*, *supra* Chapter 1, note 220, p. 26.

<sup>115</sup> Emphasis added. Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, *supra* note 37, para. 245.

Guarantees in States of Emergency.<sup>116</sup> The Court had indeed held that the concept of due process of law enshrined in Article 8 of the American Convention on Human Rights “cannot be suspended in states of exception at least insofar as [it ensures the] necessary conditions for the procedural institutions regulated by the Convention to be considered judicial guarantees”.<sup>117</sup> Hence, according to the Court, while the right to a fair trial cannot be considered a ‘judicial guarantee’ *per se*, its non-derogable character as per Article 27 of the American Convention on Human Rights derives from its being *de facto* an integral part (meaning an essential requirement for their effectiveness) of those judicial guarantees provided for in the Convention (first and foremost, the right to a remedy).<sup>118</sup> Furthermore, the Court found that the ‘non-derogable’ character of due process requirements extends not only to those cases in which they are essential to protect non-derogable rights, but also to those instances in which they ensure the respect of human rights that, although derogable, have not be suspended.<sup>119</sup>

Based on these considerations, the Inter-American Commission of Human Rights even identified – in what has been rightly defined as “one of most comprehensive pronouncements on derogable and non-derogable fair trial rights”<sup>120</sup> – several components of due process standards that can never be suspended: “the right to a fair trial by a competent, independent and impartial court for a person charged with criminal offences, the presumption of innocence, the right to be informed promptly and intelligibly of any criminal charge, the right to adequate time and facilities to prepare a defense, the right to legal assistance of one’s own choice (...), the right not to testify against oneself (...), the right to attendance of witnesses, the right of appeal, as well as

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<sup>116</sup> Inter-American Court of Human Rights, Advisory Opinion OC-9/87 of 6 October 1987, *Judicial Guarantees in State of Emergency (Arts. 27(2), 25 and 8 American Convention on Human Rights)*, requested by the Government of Uruguay, Series A No. 9.

<sup>117</sup> *Ibid.*, para. 30.

<sup>118</sup> *Ibid.*, para. 27.

<sup>119</sup> *Ibid.*, para. 39.

<sup>120</sup> See H.J. STEINER, P. ALSTON, R. GOODMAN (eds), *International Human Rights in Context. Law, Politics, Moral. Text and Materials*, 3rd ed., Oxford, 2008, p. 433.

respect for the principle of non-retroactive application of penal laws”.<sup>121</sup> *A contrario*, the Commission upheld the derogable nature of the right to a public hearing.<sup>122</sup>

The Human Rights Committee has similarly excluded the exceptional suspension of those ‘judicial guarantees’ – including the right to a fair trial – necessary to secure those “non-derogable rights” falling within the scope of application of Article 4 of the International Covenant on Civil and Political Rights,<sup>123</sup> of which the Committee has provided an extensive ‘reading’. According to the Committee, indeed, the fact that only few rights are expressly identified as non-derogable under Article 4 does not mean that other rights enshrined in the Covenant cannot be similarly exempted from derogation in case of exceptional circumstances.<sup>124</sup> The Committee reached this conclusion based first of all on the legal obligation resting on States to “narrow down all derogations to those strictly required (...)”.<sup>125</sup> Hence, although not explicitly referring to them, the Committee *de facto* applied the teleological and *effet utile* criteria of interpretation, aimed at emphasising and securing the ultimate goal of the Covenant (*i.e.*, to ensure the effective protection of human rights). In this respect, the Committee did not depart from the general trend developed by international supervisory bodies with respect to human rights treaties, which Judge Cançado Trindade has well described as the adjustment of “classic postulates of interpretation (...) to [a] new reality”.<sup>126</sup>

The Committee further noted that the list of peremptory norms of international law (*jus cogens*) extends beyond the list of non-derogable rights contained in the Covenant, with the consequence that other rights (or, at least,

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<sup>121</sup> Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, *supra* note 37, para. 247.

<sup>122</sup> *Ibid.*, para. 250.

<sup>123</sup> Human Rights Committee, General Comment No. 29, UN Doc. CCPR/C/21/Rev. 1/Add. 11, *supra* Introduction, note 75, para. 15. See also again UN Doc. CCPR/C/GC/32, *supra* Chapter 2, note 122, para. 6.

<sup>124</sup> See again UN Doc. CCPR/C/21/Rev. 1/Add. 11, *supra* Introduction, note 75, para. 6.

<sup>125</sup> *Ibid.*

<sup>126</sup> Inter-American Court of Human Rights, *Case of the Pueblo Bello Massacre v. Colombia*, judgment of 31 January 2006, Series C No. 140, Separate Opinion, para. 51.

some of their constituent elements) should be considered as sharing the same non-derogable character of those expressly enlisted in Article 4.<sup>127</sup>

Thus, according to the Committee, it is to this ‘broad’ understanding of the content of Article 4 that one should look at when excluding that due process guarantees may be subjected to derogation measures circumventing the protection of non-derogable rights.

The Committee, however, went even further by vesting with non-derogable character certain “fundamental principles of fair trial” (thus, regardless of their essential function in ensuring the protection of other non-derogable rights).<sup>128</sup> The Committee reached this conclusion based on the application of the principles of legality and rule of law inherent to the Covenant, as well as on the fact that, accordingly, no justification would lead to consider derogable in other exceptional circumstances those fair trial guarantees whose suspension is expressly prohibited under international humanitarian law.<sup>129</sup>

Unlike the Inter-American Commission on Human Rights, however, the Committee only enlisted few procedural fairness guarantees whose suspension should always be prohibited: the right to be tried and convicted for a criminal offence before a court of law; the presumption of innocence; and the right to take proceedings before a court to decide without delay on the lawfulness of detention.<sup>130</sup>

The African Commission on Human and Peoples Rights has also clearly upheld the non-derogable character of the right to a fair trial. In its judgment in the *Article 19 v. Eritrea* case, the Commission held indeed that:

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<sup>127</sup> *Ibid.*, para. 11 ff.

<sup>128</sup> *Ibid.*, para. 16. See also UN Doc. CCPR/C/GC/32, *supra* Chapter 2, note 122, para. 6. On the non-derogable character of fair trial guarantees under international humanitarian law see, *inter alia*, D. WEISSBRODT, *International Fair Trial Guarantees*, in A. CLAPHAM, P. GAETA (eds), *The Oxford Handbook of International Law in Armed Conflicts*, Oxford, 2014, p. 415 ff.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid.* The same list has been reiterated in the 2008 Report of the Special Rapporteur on the Protection of Human Rights and Fundamental Freedoms while Countering Terrorism. See again UN Doc. A/63/223, *supra* note 68, para. 12.

“Even if it is assumed that the restriction placed by the [African] Charter [on Human and Peoples’ Rights] on the ability to derogate goes against international principles, there are certain rights such as the right to life, *the right to a fair trial*, and the right to freedom from torture and cruel, inhuman and degrading treatment, that cannot be derogated from for any reason, in whatever circumstances”.<sup>131</sup>

Differently from the other human rights treaty supervisory bodies, the African Commission on Human and Peoples’ Rights has thus recognized the non-derogable character of the right to a fair trial, as embodied in Article 7 of the African Charter, *in its entirety*.

Such a ‘blanket’ assertion could certainly pave the way to those ‘paradoxical objections’ that some commentators have already highlighted, more generally, with respect to the lack of a derogation provision in the context of the African Charter: the possible tensions between this instrument, on the one hand, and derogation clauses embodied in national Constitutions and the less ‘strict’ protection established under the International Covenant on Civil and Political Rights (for those States parties to both the Charter and the Covenant), on the other hand.<sup>132</sup> However, similar issues appear easily surmountable. In both cases, the principle of the ‘maximum protection’ or ‘most favourable standard’ – according to which States are obliged to comply with the most favourable to the individual of their obligations<sup>133</sup> – may easily lead to upheld the prevalence of the non-derogable nature of the right to a fair trial, in all of its ‘constitutive elements’.

Contrary to other human rights monitoring bodies, the European Court of Human Rights has instead refrained from expressly vesting the right to a fair

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<sup>131</sup> Emphasis added. African Commission on Human and Peoples’ Rights, *Article 19 v. Eritrea*, *supra* note 108, para. 98.

<sup>132</sup> See, e.g., L. SERMET, *The Absence of a Derogation Clause from the African Charter on Human and Peoples’ Rights: A Critical Discussion*, *supra* note 108, p. 144 ff.



trial in Article 6 of the European Convention on Human Rights – or, at least, some of its ‘sub-rights’ – with a non-derogable character. As a result, it has been rightly noted that ‘derogation (...) from Article 6 is in theory possible, [although] (...) extremely difficult to justify’.<sup>134</sup>

Whereas, in light of the fragmented scenario described above, the non-derogability of fair trial guarantees may be subjected to dispute and, in any case, be upheld or denied based on the specific human rights treaty *régime* applicable in the case at stake, there are further arguments which may strengthen the view that, in practice, at least a core of due process guarantees should never be suspended. Firstly, one could recall the assertion made by the Special Rapporteur on Human Rights and States of Emergency, Mr. Leandro Despouy, in its 1997 Annual Report, pursuant to which, given the almost complete absence of notifications of suspensions, State practice would confirm the non-derogable character of the right to a fair trial.<sup>135</sup> However, whether this stance may indeed be upheld nowadays appears at least questionable, especially in light of the already underlined developments that have characterized the ‘war on terror’.

Secondly, one could sustain that the close link existing between the substantial and procedural dimensions of the protection of human rights – as expressly recognized in Article 27 of the American Convention on Human Rights and by the Human Rights Committee – generally prohibits any derogation from those judicial guarantees which are necessary to ensure full protection to other non-derogable rights. The European Court of Human Rights, although not expressly referring to Article 6 of the European Convention, has indeed similarly upheld the non-derogable character of those

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<sup>133</sup> On this principle and its application see, e.g., A. L. GRAF-BRUGÈRE, *A Lex Favorabilis? Resolving Norm Conflicts*, in R. KOLB, G. GAGGIOLI (eds), *Research Handbook on Human Rights and Humanitarian Law*, Cheltenham, 2013, p. 253 ff.

<sup>134</sup> P. LEACH, *Taking a Case to the European Court of Human Rights*, Oxford, 2011, p. 458.

<sup>135</sup> See again UN Doc. E/CN. 4/Sub.2/1997/19, *supra* note 113, paras. 111 and 160.

procedural guarantees meant to fully protect non-derogable rights, such as the right not to be subjected to torture or other ill-treatment.<sup>136</sup>

Any different conclusions would indeed end up colliding with the already mentioned teleological and *effet utile* criteria of interpretation of human rights treaties. The very recognition of the non-derogable character of certain rights would in fact be ‘frustrated’ by admitting that those procedural guarantees essential to ensure their effective protection might be suspended.<sup>137</sup>

Thirdly, even if one considers that certain components of the right to a fair trial may be derogated in exceptional circumstances, derogation clauses generally include further substantive and procedural requirements that should be satisfied. For instance, both Article 4 of the International Covenant on Civil and Political Rights and Article 15 of the European Convention on Human Rights require, *inter alia*, the existence of a state of emergency, that the measures undertaken to face the emergency are both strictly required and consistent with other obligations under international law and, under a procedural perspective, the official proclamation of the public emergency<sup>138</sup> and the notification of the act of derogation.

With respect to the existence of a “public emergency threatening the life of the nation”, however, it may be questioned whether the terroristic threat (to go

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<sup>136</sup> See, e.g., European Court of Human Rights, *Aksoy v. Turkey*, *supra* Introduction, note 75, para. 98 (the Court referred to the right to an effective remedy protected under Article 13 of the European Convention on Human Rights).

<sup>137</sup> See again T. SCOVAZZI, *Considerazioni in tema di Segreto di Stato e gravi violazioni dei diritti umani*, in G. VENTURINI, S. BARIATTI (eds), *Diritti individuali e giustizia internazionale, Liber Fausto Pocar, supra* Chapter 1, note 220, p. 886.

<sup>138</sup> Despite Article 15 of the European Convention on Human Rights – unlike Article 4 of the International Covenant on Civil and Political Rights – does not include any reference to the official proclamation of the public emergency, commentators have stressed that, in light of the European Court of Human Rights’ case law, this should be considered as an ‘implicit feature’ of Article 15. See, e.g., again B. RAINEY, E. WICKS, C. OVEY (eds), *The European Convention on Human Rights, supra* note 13, p. 120. It has to be stressed that, with specific reference to the ‘war on terror’, after 9/11 the United Kingdom has formally derogated from its obligations under both the International Covenant on Civil and Political Rights and the European Convention on Human Rights. To the contrary, the United States, while declaring a state of emergency in the aftermath of the attacks (see Proclamation No. 7453: Declaration of National Emergency by Reason of Certain Terrorist Attacks, 14 September 2001, issued by President G. W. Bush), have never notified it pursuant to the procedural requirements provided for in Article 4 of the International Covenant on Civil and Political Rights.

back to the main example adduced in this section) does indeed fit in the abovementioned expression.<sup>139</sup> Whereas it is undeniable that, for instance, the European Court of Human Rights has shown a highly deferential attitude towards States parties' assessment on the point,<sup>140</sup> this approach is neither exempt from criticism,<sup>141</sup> nor consistent with the statements of the Parliamentary Assembly of the Council of Europe, which, in its Resolution 1271(2002), expressly held that "in their fight against terrorism, Council of Europe Member States should not provide for any derogations to the European Convention on Human Rights".<sup>142</sup>

Furthermore, doubts may similarly arise as to whether, in practice, the suspension of fair trial guarantees may indeed be regarded as strictly required by the exigencies of an emergency situation.

In this respect, particularly interesting, especially in light of the object of the present work, appear the findings of the European Court of Human Rights in its recent judgment in the *A. et al. v. The United Kingdom* case. The Grand Chamber found indeed that the assessment of the proportionality of the measures undertaken should necessarily rest with domestic courts,<sup>143</sup> thus rejecting the Government's argument that it itself should be left with exclusive

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<sup>139</sup> For a more general analysis on the role of derogations clauses in human rights treaties in an era of international terrorism see, *inter alia*, C. MICHAELSEN, *Permanent Legal Emergencies and the Derogation Clause in International Human Rights Treaties: A Contradiction?*, in A. MASFERRER DOMINGO (ed), *Post 9/11 and the State of Permanent Legal Emergency: Security and Human Rights in Countering Terrorism*, Dordrecht, 2012, pp. 287-313.

<sup>140</sup> See, recently, European Court of Human Rights, *A. et al. v. The United Kingdom*, *supra* note 67, para. 174 ff.

<sup>141</sup> See, among many others, O. GROSS, F. NÍ AOLÁIN, *From Discretion to Scrutiny: Revisiting the Application of the Margin of Appreciation Doctrine in the Context of Article 15 of the European Convention on Human Rights*, in *Human Rights Quarterly*, vol. 23, 2001, pp. 625-649. On the topic see also J.P. LOOF, *Crisis Situations, Counter Terrorism and Derogations from the European Convention on Human Rights. A Threat Analysis*, in A. BUYSE (ed.), *Margins of Conflict. The ECHR and Transitions to and from Armed Conflict*, Antwerp, Cambridge, Portland, 2010, pp. 35-56.

<sup>142</sup> See Parliamentary Assembly of the Council of Europe, Resolution 1271(2002) of 24 January 2002 on *Combating Terrorism and Respect for Human Rights*, para. 9.

<sup>143</sup> See again European Court of Human Rights, *A. et al. v. The United Kingdom*, *supra* note 67, para. 184.

authority in determining those measures “strictly required” by the emergency situation.<sup>144</sup>

Finally, as far as the compliance with other obligations under international law is concerned, it suffices here to recall the view of those commentators who have argued that a blanket derogation from fair trial guarantees would imply a breach of States’ obligations to ensure the actual enjoyment of human rights and abide by the rule of law and the principle of separation of powers.<sup>145</sup> It is also worth mentioning – albeit apparently paradoxical, at least to the extent it seems to create a ‘vicious circle’ – the argument pursuant to which the expression “other obligations under international law” should be understood to encompass the non-derogable nature of the right to a fair trial as a ‘developing principle of international law’.<sup>146</sup>

While any further analysis would go much beyond the scope of the present work, it can be stated here that, in light of the above considerations, it is unlikely that any claims aimed at justifying a departure from due process guarantees based on the ‘derogability’ of the right to a fair trial in a state of public emergency (thus including a widespread resort on secrecy undermining the principles of equality of arms and adversarial system) could be easily upheld. This is especially true in those cases in which procedural fairness guarantees are essential to ensure full protection to other non-derogable rights.

### **3. State secrecy and the right to an effective remedy**

#### **3.1. The right to an effective remedy in international law**

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<sup>144</sup> *Ibid.*, para. 150.

<sup>145</sup> See again, e.g., C. OLIVIER, *Revisiting General Comment No. 29 of the United Nations Human Rights Committee: About Fair Trial Rights and Derogations in time of Public Emergency*, *supra* note 109, p. 417.

<sup>146</sup> See J. ALLAIN, *Derogation from the European Convention of Human Rights in Light of ‘Other Obligations under International Law’*, in *European Human Rights Law Review*, vol. 10, 2005, p. 490.

As previously highlighted, apart from raising doubts as to its compatibility with due process guarantees, the widespread reliance on State secrecy evidentiary privilege – especially when acting as a ‘bar’ to judicial scrutiny over human rights violations (in both criminal and civil proceedings) – might also hardly comply with States’ duty to provide an effective remedy to the victims of human rights abuses.<sup>147</sup>

Like for the right to a fair trial, any assessment of the aforementioned tension requires a preliminary inquiry into the content and scope of this right under international law, taking into particular account those aspects which appear the most pertinent with respect to the focus of the present work.<sup>148</sup>

As to its content, in particular, it is worth immediately stressing that, under international human rights law, the right to an effective remedy “implies that a wrongdoing State has the primary duty to afford redress to the victim of a violation”.<sup>149</sup> This definition embraces two different ‘sub-concepts’ or ‘sub-rights’: the right of access to justice (*i.e.*, to seek a remedy before independent bodies or institutions capable of affording a fair hearing) and the right to

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<sup>147</sup> See, *e.g.*, Parliamentary Assembly of the Council of Europe, Recommendation 1983 (2011), *Abuse of State secrecy and national security: obstacles to parliamentary and judicial scrutiny of human rights violations*, adopted on 6 October 2011, para. 2.1. See also Council of Europe Commissioner for Human Rights, *Democratic and Effective Oversight of National Security Services*, issue paper prepared by Aidan Wills, Strasbourg, May 2015, pp. 26-27 (“Security service activity can undermine ... the right to an effective remedy in a variety of ways. ... [I]t is often difficult for individuals to bring civil claims against security services. ... This is because governments and security services may invoke State secrecy arguments to prevent challenges from being heard or rely on ‘neither confirm nor deny’ ... policies to frustrate legal proceedings”).

<sup>148</sup> Taking into account the specific subject-matter of the present work, this section will focus on the right to an effective remedy under international human rights law. No specific reference will be made to other fields of general international law (such as, for instance, the law on State responsibility). Similarly, this section does not touch upon the role played by international courts and tribunals in establishing specific remedial strategies. For further considerations on this topic see, *e.g.*, G. NEUMAN, *Bi-Level Remedies for Human Rights Violations*, in *Harvard International Law Journal*, vol. 55, 2014, pp. 323-360.

<sup>149</sup> See D. SHELTON, *Remedies in International Human Rights Law*, 2nd ed., Oxford, 2005, p. 114.

obtain substantive redress for the harm suffered as a consequence of the violation of a right.<sup>150</sup>

As previously said, the former (procedural) ‘dimension’ of the right to an effective remedy – whilst not *explicitly* upheld in human rights instruments – has been at times inferred also from the right to a fair trial.<sup>151</sup>

Taking into account that the invocation of State secrecy may either bar legal proceedings *tout court* (when impeding investigations or leading to the dismissal of the case) or eventually prevent substantive redress for the victims of human rights violations (for instance, when due to the removal of certain evidence from the proceedings, the victims cannot obtain reparation or the perpetrators are not held responsible), it goes without saying that both the aforementioned ‘components’ of the right to an effective remedy might be undermined by the upholding of secrecy claims.<sup>152</sup>

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<sup>150</sup> *Ibid.*, p. 7 ff.; and D. SHELTON, *Human Rights, Remedies*, in R. WOLFRUM (ed.), *Max Planck Encyclopaedia of Public International Law*, 2008, electronic edition, available at: [www.mpepil.com](http://www.mpepil.com) (last accessed on 24 February 2016). See also F. FRANCONI, *The Right of Access to Justice under Customary International Law*, *supra* note 25, pp. 24-25 and I. BANTEKAS, L. OETTE, *International Human Rights Law and Practice*, *supra* note 351, p. 537 ff. For an in-depth analysis of the nature of the right to reparation, especially in relation to serious human rights violations, see, *inter alia*, M. NOVAK, *The Right to Reparation of Victims of Gross Human Rights Violations*, in *Human Rights in Development Yearbook*, vol. 7, 2001, pp. 275-308; S. PETÉ, M. DU PLESSIS, *Reparation for Gross Violations of Human Rights in Context*, in S. PETÉ, M. DU PLESSIS (eds), *Reparing the Past? International Perspectives on Reparations for Gross Human Rights Abuses*, Antwerpen, Oxford, 2007, pp. 3-28; S. G. ECHEVERRIA, *Do Victims of Torture and other Serious Human Rights Violations Have an Independent and Enforceable Right to Reparation?*, in *The International Journal of Human Rights*, vol. 16, 2012, pp. 698-716.

<sup>151</sup> See *supra* section 2. As to the more general interplay between the right of access to justice, the right to an effective remedy and the right to a fair trial see, *inter alia*, A.A. CANÇADO TRINDADE, *The Access of Individuals to International Justice*, Oxford, 2011, p. 63 ff. The Author stressed that the “right of access to justice, considered *lato sensu*, encompasses the right to an effective remedy and the guarantees of due process of law” (*ibid.*, p. 63). This last view is however not unanimous. See, *e.g.*, L. BURGORGUE-LARSEN, *The Right to an Effective Remedy*, in L. BURGORGUE-LARSEN, A. UBEDA DE TORRES (eds), *The Inter-American Court of Human Rights. Case Law and Commentary*, *supra* note 14, p. 688.

<sup>152</sup> As these two dimensions of the right to an effective remedy are clearly interlinked, in most cases the invocation of the State secrecy privilege would infringe contextually the right of access to justice and the right to a substantive redress. This is the case, for instance, of the use of the State secrecy privilege in the United States to deny compensation to victims of extraordinary renditions. About this practice as a ‘denial of justice’ (with specific reference to the already reported *El-Masri* case before US courts) see, *inter alia*, R. S. BROWN, *Access to Justice for Torture Victims*, in F. FRANCONI, M. GESTRI, N. RONZITTI, T. SCOVAZZI (eds),

### **3.1.1. The right to an effective remedy in universal human rights instruments**

Several universal human rights instruments recognize the right to an effective remedy. Article 8 of the Universal Declaration of Human Rights, for instance, provides that: “everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or laws”.

Whereas this provision is *per se* non-binding, its wording has been transposed at large (and further elaborated upon) in universal and regional legally binding instruments.

As a matter of example, at the universal level, Article 2(3) of the International Covenant on Civil and Political Rights expressly states that:

“Each State party to the present Covenant undertakes to (a) ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) to ensure that the competent authorities shall enforce such remedies when granted”.

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*Accesso alla giustizia dell'individuo nel diritto internazionale e dell'Unione Europea*, Milano, 2008, pp. 354-356. In this respect see also Redress, *Amicus Curiae Brief presented to the Inter-American Commission on Human Rights in the Case of Khaled El-Masri v. United States*, 30 March 2009.

In its General Comment No. 31, the Human Rights Committee has further specified the content of the right to an effective remedy embodied in Article 2(3) of the Covenant. In particular, the Committee stressed that this provision imposes on State parties the positive obligation to provide for *accessible* and *effective* remedies enabling the victims of violations in breach of the Covenant to vindicate their own rights.<sup>153</sup> This result may be achieved, for instance, by allowing the judiciary to directly apply the Covenant or to rely on constitutional and other provisions of similar character.<sup>154</sup> The Committee also stressed that Article 2(3) of the Covenant requires contracting States to make reparation to those individuals whose rights have been violated.<sup>155</sup> According to the Committee, reparation may include, *inter alia*, restitution, rehabilitation and measures of satisfaction.<sup>156</sup>

Furthermore, as it will be better illustrated *infra*, especially in those cases involving the most serious human rights abuses (such as tortures, enforced disappearances and arbitrary killings), the right to an effective remedy also imposes on States to investigate promptly, thoughtfully and effectively allegations of human rights violations, as well as bring perpetrators to justice.<sup>157</sup>

Most notably, the Human Rights Committee has also underscored that, especially in cases of systematic and widespread attacks against civilians, full compliance with Article 2(3) of the Covenant implies that “impediments to the establishment of legal responsibility [of public officials or State agents] should

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<sup>153</sup> Human Rights Committee, General Comment No. 31, UN Doc. CCPR/C/21/Rev.1/Add. 13 of 29 March 2004, para. 15.

<sup>154</sup> *Ibid.*

<sup>155</sup> *Ibid.*, para. 16.

<sup>156</sup> *Ibid.*, para. 15.

<sup>157</sup> *Ibid.*, paras. 15 and 17. Similarly, see Human Rights Committee, General Comment No. 20, UN Doc. HRI/GEN.1/Rev. 1 of 10 March 1992, para. 14 (with respect to the prohibition of torture and other ill-treatment). See also, *e.g.*, Human Rights Committee, *Concluding Observations on Spain*, UN Doc. CCPR/C/ESP/CO/5 of 5 January 2009, para. 9; *Djebrouni v. Algeria*, Communication No. 1781/2008, UN Doc. CCPR/C/103/D/1781/2008 of 18 January 2012, para. 7.4.



be removed”.<sup>158</sup> While the Committee explicitly referred to statutory limitations, amnesties, the defence of obedience to the superior’s order and immunities,<sup>159</sup> such a list is clearly structured as a *non-exhaustive* one. Accordingly, although not explicitly mentioned, the State secrecy privilege, at least when granting *de facto* impunity to perpetrators of serious human rights violations, could as well fit among the aforementioned ‘legal impediments’. This assumption seems to be confirmed, *inter alia*, by the Human Rights Committee’s findings in its 2006 *Concluding Observations on the United States of America*. The Committee expressed indeed serious concerns over the invocation of State secrecy (and the consequent dismissal of proceedings) in cases where victims of extraordinary renditions had attempted to pursue a remedy before the State’s courts.<sup>160</sup> To the same conclusion also leads the 2009 Annual Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering-Terrorism, pursuant to which the “*blanket* invocation of State secrets privilege with reference to complete policies (...) prevents effective investigation and renders the right to a remedy illusory”, in breach of Article 2 of the International Covenant on Civil and Political Rights.<sup>161</sup>

Articles 13 and 14 of the Convention against Torture similarly provide for the right to an effective remedy.<sup>162</sup> The former provision expressly upholds the right of the victim to complain to and have his case promptly and impartially examined by States’ competent authorities. This norm is thus strictly interlinked to the obligation of a ‘prompt and impartial’ investigation into alleged tortures or other cruel, inhuman or degrading treatments enshrined in Article 12 of the same international instrument. Article 14 additionally requires each State party to ensure to the victim (or, in case of death, to his

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<sup>158</sup> See Human Rights Committee, General Comment No. 31, *supra* note 153, para. 18.

<sup>159</sup> *Ibid.*

<sup>160</sup> Human Rights Committee, *Concluding Observations on the United States of America*, UN Doc. CCPR/C/USA/CO/3/Rev. 1 of 18 December 2006, para. 16.

<sup>161</sup> UN Doc. A/HRC/10/3 of 4 February 2009, para. 60.

relatives) redress and an enforceable right to fair and adequate compensation. The Committee against Torture has interpreted this last provision to encompass both procedural and substantive obligations. From a procedural perspective, each State party should enact legislation establishing (and ensuring accessibility to) complaint mechanisms, institutions and investigative bodies capable of providing effective redress to the victims.<sup>163</sup> From a ‘substantive’ standpoint, States should instead guarantee the victims full and effective redress, thus including the following forms of reparation: compensation, restitution, rehabilitation, satisfaction, and guarantees of non-repetition.<sup>164</sup>

It is noteworthy that, like the Human Rights Committee, the Committee against Torture has expressly recognized the potential tension existing between contracting States’ full abidance by the abovementioned provisions and the invocation of State secrecy. In its General Comment No. 3, the Committee against Torture has indeed included State secrecy laws (together with amnesties, immunities and similar measures preventing any judicial scrutiny over the merits of a case) among the “specific obstacles that impede the enjoyment of the right to redress and prevent effective implementation of Article 14 [of the Convention against Torture]”.<sup>165</sup> The Committee further noticed that “when impunity is allowed by law or exists *de facto*, it bars victims from seeking full redress as it allows the violators to go unpunished and denies victims the full insurance of their rights under Article 14. (...)

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<sup>162</sup> On the content and scope of this provisions see, *e.g.*, M. NOWAK, E. MCARTHUR (eds), *The United Nations Convention against Torture. A Commentary*, Oxford, 2008, pp. 439-502.

<sup>163</sup> Committee against Torture, General Comment No. 3, UN Doc. CAT/G/GC/3 of 19 November 2012, para. 5. As to the right of access to court as a procedural guarantee, rather than a self-standing human rights, see, *inter alia*, F. FRANCONI, *The Right of Access to Justice in Customary International Law*, *supra* note 25, p. 32 (according to the Author, whereas human rights treaties depict this right as a procedural guarantee, the analysis of international judicial practice makes this conclusion more controversial).

<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*, para. 38.

[U]nder no circumstances may arguments of national security be used to deny redress for victims”.<sup>166</sup>

Along the same line, in its 2014 *Concluding Observations on the United States of America*, the Committee has “expresse[d] serious concern at the use of State secrecy provisions and immunities to evade liability” and at the “draconian system of secrecy surrounding high-value detainees [in Guantánamo] that keeps their torture claims out of the public domain”.<sup>167</sup> More specifically, the Committee noted that “the regime applied to these detainees prevents access to effective remedies and reparations and hinders investigations into human rights violations by other States” in breach of Articles 12, 13 and 14 of the Convention against Torture.<sup>168</sup>

Many other universal human rights instruments – including, *inter alia*, the Convention on the Elimination of Racial Discrimination<sup>169</sup> and the Convention on all Forms of Discrimination against Women<sup>170</sup> – include provisions upholding the right to an effective remedy for violations of the rights enshrined therein.<sup>171</sup>

Additionally, at the global level, several soft-law instruments have also upheld the right to an effective remedy. In particular, it is worth mentioning in

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<sup>166</sup> Emphasis added. *Ibid.*, para. 40.

<sup>167</sup> Committee against Torture, *Concluding Observations on the combined third to fifth periodic reports of the United States of America*, UN Doc. CAT/C/USA/CO/3-5 of 19 December 2014, para. 15.

<sup>168</sup> *Ibid.*

<sup>169</sup> Article 6 (“State parties should ensure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination”).

<sup>170</sup> New York, 18 December 1979, entered into force on 3 September 1981, 1249 UNTS 13, Article 2(c): “States parties (...) undertake: (...) to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination”.

<sup>171</sup> In other cases, the right to an effective remedy, although not explicitly included in human rights instruments, has been inferred from existing provisions by means of interpretation. For instance, in its General Comment No. 5, the Committee on the Rights of the Child stated that: “For rights to have meaning, effective remedies must be available to address violations. This

this regard the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of Humanitarian Law, adopted by the United Nations General Assembly in 2005.<sup>172</sup> Despite the ‘limited scope’ of these Principles and their non-binding character, they nonetheless set important general standards as to the content of the right to a remedy. Principle 11, for instance, confirms the double-fold dimension of this right, which includes both the right to “equal and effective access to justice” and the right to “adequate, effective and prompt reparation for the harm suffered”.

Whereas the Principles contain an express *renvoi* to general international human rights law, they contextually elaborate upon the exact content of the two aforementioned rights with respect to gross human rights violations. The former right imposes on States an obligation to: disseminate information about the available remedies; take measures to protect the victims before, during and after judicial, administrative or other proceedings; provide assistance to victims seeking access to justice; and make available all legal, consular and diplomatic means to enable the victims to exercise their right to a remedy (principle 12). The latter right requires States, *inter alia*, to provide specific mechanisms to enforce domestic judgments and provide full and effective reparation to the victims, which may include, depending on the circumstances at stake, restitution, compensation, satisfaction and guarantees of non-repetition (principles 17 and 18). Additionally, the Principles also envisage a third ‘component’ of the right to a remedy, that is the right of access to

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requirement is implicit in the Convention (...).” See Committee on the Rights of the Child, General Comment No. 5, UN Doc. CRC/GC/2003/5 of 27 November 2003, para. 24.

<sup>172</sup> See Resolution No. 60/147 of 16 December 2005, UN Doc. A/RES/60/147. For a brief comment see, e.g., K. MCCRACKEN, *Commentary on the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, in *Revue internationale de droit pénal*, vol. 76, 2005, pp. 77-79. See also M. C. BASSIOUNI, *International Recognition of Victims’ Rights*, in *Human Rights Law Review*, vol. 6, 2006, pp. 203-279.

information concerning the violations and reparation mechanisms (principle 11).

The right of the victims to have access to a “readily available, prompt and effective remedy” – including substantive reparation – is similarly upheld in the Updated Set of Principles for the Promotion and Protection of Human Rights through Action to Combat Impunity (hereinafter, also “Updated Set of Principles to Combat Impunity”).<sup>173</sup>

Furthermore, the United Nations Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power specifically entitles victims of crimes (or other acts committed by State agents that are not yet crimes under national law but do amount to violations of international human rights norms) to seek redress for the harm suffered.<sup>174</sup>

### **3.1.2. The right to an effective remedy in regional human rights instruments**

The duty of States to provide an effective remedy to victims of human rights violations is also embodied in regional human rights treaties. While, generally-speaking, the relevant provisions mirror the content and scope of Article 2(3) of the International Covenant on Civil and Political Rights, some degree of variance exists in different regional instruments. For instance, Article 25 of the American Convention on Human Rights<sup>175</sup> is wider in scope

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<sup>173</sup> See again United Nations Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, *supra* Introduction, note 62, Principle 32. For a more detailed analysis of this non-binding instrument see also *infra*, Chapter 4. See also the *Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of His or Her Liberty by Arrest or Detention to Bring Proceedings Before Courts*, adopted by the Working Group on Arbitrary Detention on 29 April 2015 (UN Doc. A/HRC/30/37 of 6 July 2015), upholding, *inter alia*, the right to challenge the lawfulness of a detention before a court and to obtain appropriate remedies and reparations (*ibid.*, para. 3).

<sup>174</sup> Adopted by the United Nations General Assembly with Resolution 40/34, UN Doc. A/RES/40/34 of 29 November 1985, Annex, para. 4.

<sup>175</sup> Article 25 of the American Convention on Human Rights states: “Everyone has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal

than both Article 2(3) of the Covenant and Article 13 of the European Convention on Human Rights, which, indeed, similarly upholds this right. Article 25 of the American Convention – by implicitly recalling the Universal Declaration of Human Rights – recognizes in fact the right to a prompt, simple and effective remedy for violations not only of fundamental rights protected under the American Convention, but also under *domestic Constitutions and laws*, even when they are committed by persons acting in their official capacity.

Furthermore, this right includes both a procedural component (right of access to court) and a substantive one (right to a redress for violations of rights protected under national and international law).

The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have interpreted this provision in an extensive manner. For instance, the Inter-American Court has repeatedly held that the individual right to an effective remedy “is one of the basic mainstays, not only of the American Convention, but also of the Rule of Law in a democratic society”.<sup>176</sup> The Court also constantly stressed that the mere accessibility of a judicial remedy does not fully meet *per se* the requirements provided for in Article 25. *A contrario*, this provision requires States to guarantee the victim with an *effective* judicial recourse. In other words, it is not enough for the remedies to exist formally.

In the already reported Advisory Opinion OC-9/87, the Court found indeed that:

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for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties. The States parties undertake: (a) to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the State; (b) to develop the possibilities of judicial remedy; and (c) to ensure that the competent authorities shall enforce these remedies when granted”. Within the Inter-American system of human rights protection, the right to an effective remedy is enshrined also in Article XVIII of the American Declaration of the Rights and Duties of Man.

<sup>176</sup> See, *e.g.*, Inter-American Court of Human Rights, *Bámaca Velásquez v. Guatemala*, judgment of 25 November 2000, Series C No. 70, para. 191.

“(…) for such a remedy to exist, it is not sufficient that it be provided for by the Constitution or by the law or that it be formally recognized, but rather it must be truly effective in establishing whether there has been a violation of human rights and in providing redress. A remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. That could be the case, for example, when practice has shown its ineffectiveness: when the Judicial Power lacks the necessary independence to render impartial decisions or the means to carry out its judgments; or in any other situation that constitutes a denial of justice, as when there is an unjustified delay in the decision; or when, for any reason, the alleged victim is denied access to a judicial remedy”.<sup>177</sup>

In its judgment in the *Gustavo Carranza v. Argentina* case, concerning an alleged denial of justice on the ground of the so-called ‘political doctrine question’, the Inter-American Commission on Human Rights further elaborated on the content of the right to an *effective* remedy. According to the Commission: “[T]he logic of every judicial remedy – including that of Article 25 – indicates that the deciding body must specifically establish the truth or error of the claimant’s allegations. (...) [T]he body in question, after proceedings involving evidence and a discussion of the allegations, must decide whether the claim is valid or unfounded”.<sup>178</sup> Accordingly, the Commission held that the expression ‘effective recourse’ should be understood to refer to a recourse suitable to ensure legal protection to the rights violated, which is *per se* incompatible with any assertions in the sense of a lack of legal

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<sup>177</sup> See again Inter-American Court of Human Rights, Advisory Opinion OC-9/87 of 6 October 1987, *supra* note 116, para. 24.

<sup>178</sup> Inter-American Commission on Human Rights, *Gustavo Carranza v. Argentina*, case No. 10.087, Report No. 30/97, decision of 30 September 1997, para. 73.

jurisdiction.<sup>179</sup> More importantly, the Commission found that the right to an effective judicial remedy under Article 25 of the American Convention establishes the right of any individual to have his rights determined by the competent authority and, as a result, the declaration of non-justiciability of a claim by the judiciary should be regarded as inconsistent with the aforementioned provision.<sup>180</sup>

Likewise, in several cases concerning blanket amnesties, both the Inter-American Commission and the Inter-American Court of Human Rights have found that such measures – by leaving victims with no alternative avenues for redress in relation to serious human rights abuses – violated, *inter alia*, the right to an effective remedy protected under Article 25 of the American Convention.<sup>181</sup>

It is easily inferable from the above that any invocation of the State secrecy privilege – at least when totally barring proceedings (either in criminal or civil *fora*) and leaving no further avenue for redress – would be found to similarly infringe the right to an effective remedy under Article 25 of the American Convention.<sup>182</sup>

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<sup>179</sup> *Ibid.*, para. 75.

<sup>180</sup> *Ibid.*, para. 77.

<sup>181</sup> See, e.g., Inter-American Commission on Human Rights, *Carmelo Soria Espinoza v. Chile*, case No. 11.725, Report No. 133/99, 19 November 1999, para. 86 ff.; Inter-American Court of Human Rights, *Barrios Altos v. Peru*, *supra* Introduction, note 75, para. 42. See, *inter alia*, C. BINDER, *The Prohibition of Amnesties by the Inter-American Court of Human Rights*, in *German Law Journal*, vol. 12, 2011, pp. 1023-1230. More in general, among the copious literature analysing the compatibility of amnesties with international law see, *inter alia*, N. ROHT-ARRIAZA, L. GIBSON, *The Developing Jurisprudence on Amnesties*, in *Human Rights Quarterly*, vol. 20, 1998, pp. 843-885; L. MALLINDER, *Amnesty, Human Rights and Political Transitions. Bridging the Peace and Justice Divide*, Oxford, Portland, 2008; M. FREEMAN, *Necessary Evils: Amnesties and the Search for Justice*, New York, 2009; G. DELLA MORTE, *Le amnistie nel diritto internazionale*, Padova, 2011; R. JEFFERY, *Amnesties, Accountability and Human Rights*, Philadelphia, 2014. As to the practical consequences of the enactment or suppression of amnesty laws in the promotion of accountability see also, recently, L. A. PAYNE, F. LESSA, G. PEREIRA, *Overcoming Barriers to Justice in the Age of Accountability*, in *Human Rights Quarterly*, vol. 37, 2015, pp. 728-754.

<sup>182</sup> While neither the Inter-American Commission nor the Inter-American Court have pronounced yet on whether the resort to the State secrecy privilege in the course of a trial – at least when leading to the dismissal of the case – would breach the right to an effective remedy under Article 25 of the American Convention, it is likely that the Commission will soon take a stance in this respect. Several victims of extraordinary renditions whose claims have been



Moreover, like the Human Rights Committee, the Inter-American Court of Human Rights has also derived from the right to an effective remedy – considered together with the right to a fair trial and the general duty to ensure the rights protected under the Convention (enshrined in Article 1)<sup>183</sup> – the States parties’ obligation to undertake investigations into alleged human rights violations, as well as prosecute and punish those responsible.<sup>184</sup> Notably, in this respect, the Inter-American Court of Human Rights has found that the executive’s resort on secrecy or confidentiality to refuse to provide relevant information to the judicial or administrative authorities in charge of the investigations might amount to a breach of the aforementioned obligation to duly investigate into alleged human rights abuses.<sup>185</sup>

As stated earlier, Article 13 of the European Convention on Human Rights has a limited scope compared to the right to judicial protection embodied in

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dismissed before US courts due to the State secrecy privilege have filed petitions before the Inter-American Commission on Human Rights requesting it to declare that the United States violated the claimants’ right to a remedy under Article XVIII of the American Declaration of the Rights and Duties of Man (whose content mirrors that of Article 25 of the American Convention on Human Rights). See, e.g., Petition alleging violations of the human rights of Binyam Mohamed, Abu Elkassim Britel, Mohamed Farag Ahmad Bashmilah, and Bisher Al-Rawi by the United States of America with a request for an investigation and hearing on the merits, submitted by the American Civil Liberties Union on behalf of the petitioners on 14 November 2011. See also Petition alleging violations of the human rights of Khaled El-Masri by the United States of America with a request for an investigation and hearing on the merits, submitted by the American Civil Liberties Union on behalf of the petitioner on 9 April 2008 (case No. 419-08).

<sup>183</sup> Article 1.1 of the American Convention on Human Rights states: “The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition”.

<sup>184</sup> See, e.g., Inter-American Court of Human Rights, *Neira Alegria et al. v. Peru*, judgment of 19 January 1995, Series C No. 20, para. 69; *Caballero Delgado and Santana v. Colombia*, judgment of 8 December 1995, Series C No. 22, para. 58; *El Amparo v. Venezuela* (reparations), judgment of 14 September 1996, Series C No. 28, para. 61; *Villagran Morales et al. v. Guatemala*, judgment of 19 November 1999, Series C No. 63, para. 225; *Goiborù et al. v. Paraguay*, *supra* Introduction, note 62, para. 110. The Inter-American Court of Human Rights has repeatedly reiterated such approach in its more recent case law. See, for example, Inter-American Court of Human Rights, *Espinoza González v. Peru*, judgment of 20 November 2014, Series C No. 289, para. 309. On this specific aspect see, *inter alia*, N. ROHT-ARRIAZA, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, in *California Law Review*, vol. 78, 1990, p. 478.

Article 25 of the American Convention on Human Rights. This provision, in fact, does not contain any reference to violations of rights protected under domestic Constitutions or laws. Rather, it states that:

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”.

The European Court of Human Rights has further interpreted this provision to impose on States parties an obligation to provide domestic remedies enabling the national competent authority both to deal with the substance of a case and to ensure an appropriate relief.<sup>186</sup> The Court repeatedly held that the entitlement of the right to an effective remedy is, however, strictly dependent on the existence of an ‘arguable claim’ that a violation had indeed occurred.<sup>187</sup>

While States are left with a certain discretion as to the manner for complying with their duty under Article 13, the remedy should nonetheless be ‘effective’, that is: its exercise, both in practice and according to the law, should not be unjustifiably impaired by acts or omissions of State authorities.<sup>188</sup> Interestingly, the Court has further specified that, pursuant to the ‘factual effectiveness’ requirement, a remedy leading to a binding determination (such as a judgment) could still lack effectiveness if the

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<sup>185</sup> See, e.g., once again Inter-American Court of Human Rights, *Tiu Tojin v. Guatemala*, judgment of 26 November 2008, Series C No. 190, para. 77.

<sup>186</sup> See, for instance, European Court of Human Rights [GC], *De Souza Ribeiro v. France*, App. No. 22689/07, judgment of 13 December 2012, para. 78. In general, for an overview of the case law of the European Court on Human Rights on Article 13 see again C. GRABENWATER, *European Convention on Human Rights. Commentary*, supra note 13, p. 333 ff.

<sup>187</sup> On this specific aspect see, *inter alia*, F.J. HAMPSON, *The Concept of an ‘Arguable Claim’ under Article 13 of the European Convention on Human Rights*, in *International & Comparative Law Quarterly*, vol. 39, 1990, pp. 891-899.

<sup>188</sup> See, *inter alia*, European Court of Human Rights [GC], *Çakici v. Turkey*, App. No. 23657/94, judgment of 8 July 1999, para. 112; *Çonka v. Belgium*, App. No. 51564/99,

executive refuses to comply with it.<sup>189</sup> This may be particularly relevant in matters involving secrecy claims (e.g., in the hypothetical case in which the executive refuses disclosure regardless of a binding judgment dismissing the secrecy privilege).

According to the Court, the ‘effectiveness’ requirement does not coincide with a favourable outcome for the applicant nor it imposes a judicial procedure (the corresponding obligation being one of means, and not of result).<sup>190</sup> Still, the powers and guarantees provided for are valuable indicators of the level of effectiveness of the remedy at stake.<sup>191</sup>

In cases involving a violation of Article 2 (right to life), 3 (prohibition of torture or other ill-treatment), 5 (right to liberty and security) and 8 (right to respect for private and family life) of the European Convention on Human Rights, the European Court of Human Rights – like other human rights monitoring bodies – has further held that “Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigation procedures”.<sup>192</sup> This duty resting on States parties is strictly dependent on the gravity and nature of the primary violation.<sup>193</sup>

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judgment of 5 February 2002, para. 75; [GC] *De Souza Ribeiro v. France*, *supra* note 186, paras. 79-80.

<sup>189</sup> See, e.g., European Court of Human Rights, *Iatridis v. Greece*, App. 31107/96, judgment of 25 March 1999, para. 66.

<sup>190</sup> See, e.g., European Court of Human Rights, *Al-Nashif v. Bulgaria*, App. No. 50963/99, judgment of 20 June 2002, para. 132.

<sup>191</sup> *Ibid.*

<sup>192</sup> See, for example, European Court of Human Rights, *Kaya v. Turkey*, App. No. 22535/93, judgment of 28 March 2000, para. 107; *Anguelova v. Bulgaria*, App. No. 38361/97, judgment of 13 June 2002, para. 161; *Isayev v. Russia*, App. No. 43368/04, judgment of 21 June 2011, paras. 186-187. On the specific case law of the European Court of Human Rights on the point see, *inter alia*, A. MOWBRAY, *Duties of Investigations under the European Convention on Human Rights*, in *The International and Comparative Law Quarterly*, vol. 51, 2002, pp. 437-440 and 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 the State?*, in *European Journal of International Law*, vol. 21, 2010, pp. 701-721; R. ARIAV, *National Investigations of Human Rights between National and International Law*, in *Gottingen Journal of International Law*, vol. 4, 2012, pp. 853-871; T. CHRISTODOULIDOU, *The Duty to Investigate and Punish Those Responsible for the Deaths of Missing Persons and its Limits:*

More specifically, according to the Court, the failure to conduct such investigations could determine a self-standing breach of the right to an effective remedy,<sup>194</sup> regardless of the contextual disregard of the duty to investigate under the ‘procedural requirements’ implicit in Article 2, 3 and 5 of the Convention (read in conjunction with Article 1 of the same instrument).<sup>195</sup>

Nevertheless, it is noteworthy that the Court has been generally reluctant to *expressly* address the use of State secrecy in a way to prevent investigations and the punishment of the perpetrators within the context of Article 13 and, rather, has tackled the issue under the ‘procedural requirements’ of the corresponding substantive rights violated.<sup>196</sup> This trend, which may be partly ascribed to the Court’s generally hesitant attitude towards finding an autonomous breach of Article 13,<sup>197</sup> does not seem, however, to raise a substantial matter (but, rather, a more formalistic one).<sup>198</sup>

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*the Cases of Gurtekin, Akay and Eray and others v Cyprus*, in *Cyprus Human Rights Law Review*, vol. 3, 2014, pp. 66-81.

<sup>193</sup> See European Court of Human Rights, *Menteş et al. v. Turkey*, App. No. 58/1998/677/867, judgment of 28 November 1997, para. 89.

<sup>194</sup> It is instead doubtful whether Article 13 of the European Convention on Human Rights also autonomously imposes on States parties a duty to prosecute perpetrators. See in this respect, e.g., A. O’SHEA, *Amnesty for Crime in International Law and Practice*, The Hague, London, New York, 2002, pp. 173-174.

<sup>195</sup> See, e.g., *Ergi v. Turkey*, App. Nos. 66/1997/850/1057, judgment of 28 July 1998, para. 98 (according to which the scope of the obligation established by Article 13 has a broader scope than the ones deriving from Articles 2, 3, or 5 of the Convention). For an analysis of the relationship between these procedural obligations see also, *inter alia*, H. VAN DER WILT AND S. LYNGDORF, *Procedural Obligations Under the European Convention on Human Rights: Useful Guidelines for the Assessment of ‘Unwillingness’ and ‘Inability’ in the Context of the Complementarity Principle*, in *International Criminal Law Review*, vol. 9, 2009, p. 48 ff.

<sup>196</sup> See European Court of Human Rights [GC], *El-Masri v. The Former Yugoslav Republic of Macedonia*, App. No. 39630/09, judgment of 13 December 2012, para. 192; *Al-Nashiri v. Poland*, *supra* Introduction, note 26, para. 494; *Husayn (Abu Zubaydah) v. Poland*, App. No. 7511/13, judgment of 24 July 2014, para. 489 (the Court addressed the issue of secrecy to prevent investigations or scrutiny over the investigations in the context of Article 3 of the European Convention on Human Rights).

<sup>197</sup> See again D. SHELTON, *Remedies in International Human Rights Law*, *supra* note 149, p. 127.

<sup>198</sup> This aspect has however been highlighted (and criticized) by Judges Tulken, Spielman, Sicilianos and Keller in their Joint Concurring Opinion to the European Court of Human Rights’ judgment in the *El-Masri* case.

Furthermore, it is noteworthy that, opposite to this general trend, in its recent judgment of 23 February 2016 in the *Nasr and Ghali* case, the European Court of Human Rights has assessed the invocation of the State secrecy privilege also against the ‘effective remedy’ guarantees provided for in Article 13 of the European Convention on Human Rights. The Court found indeed that the resort to State secrecy by the Italian government had breached the applicants’ right to an effective remedy as enshrined in Article 13 (in conjunction with Articles 3, 5 and 8 of the European Convention on Human Rights).<sup>199</sup> According to the Court, in fact, the lack of effectiveness of the criminal proceedings and the impossibility for the applicants to seek compensation for civil damages due to the executive’s State secrecy claim gave rise to a violation of their right to an effective remedy.<sup>200</sup>

Contrary to other regional human rights treaties,<sup>201</sup> the African Charter on Human and Peoples’ Rights does not contain a specific provision on the right to an effective remedy. That notwithstanding, this right has been inferred by interpretation from existing treaty norms.<sup>202</sup> In its judgment in the case *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, for instance, the African Commission on Human and Peoples’ Rights found that Article 1 of the African Charter – according to

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<sup>199</sup> See again European Court of Human Rights, *Nasr and Ghali v. Italy*, *supra* Chapter 1, note 173, para. 337.

<sup>200</sup> *Ibid.*

<sup>201</sup> See also Article 23 of the Arab Charter on Human Rights pursuant to which: “Each State party to the present Charter undertakes to ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”. The right to an effective remedy is similarly protected under Article 47 of the Charter of Fundamental Rights of the European Union (“Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal (...”).

<sup>202</sup> Interestingly, however, the right to an effective remedy is specifically enunciated in the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (see Article 25(a)). For a general overview see G. MUSILA, *The Right to an Effective Remedy under the African Charter on Human and Peoples’ Rights*, in *African Human Rights Law Journal*, vol. 6, 2006, pp. 442-464. For a general overview of the shortcoming of the absence of a specific provision providing for the right to an effective remedy see also N. ENONCHONG, *The African Charter on Human and Peoples’ Rights: Effective Remedies in Domestic Law?*, in *Journal of African Law*, vol. 46, 2002, pp. 197-215.

which contracting States should recognize and give effect to the rights embodied therein – requires States parties, *inter alia*, to provide an effective remedy in case of violation of human rights.<sup>203</sup> The Commission also held that Article 7 of the Charter (right to a fair trial) should be interpreted to encompass the right of every individual to access the relevant bodies and be granted adequate relief.<sup>204</sup>

Additionally, in clarifying the content and scope of the procedural rule of the previous exhaustion of domestic remedies, the Commission has further elaborated upon the notion of ‘remedy’. In this regard, the Commission has found, in particular, that, in order to be effective, a remedy should have a prospect of success and be capable of providing reparation for the alleged violation.<sup>205</sup> Notably, in cases where investigations into alleged human rights violations are conditioned by law to the prior lift of immunity of State officials, the Commission has excluded that – at least when such a measure is *discretionary* (*i.e.*, merely resting on the executive) and not subjected to any judicial oversight – the victim may be considered to have at his disposal an effective remedy.<sup>206</sup> Some deductions may be inferred from this reasoning with respect to the possible adjudication of cases involving a discretionary use of the State secrecy privilege.

By means of the aforementioned interpretative process, the Commission has thus progressively – albeit implicitly – upheld the recognition of the victims’ right to an effective remedy contained in the already mentioned

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<sup>203</sup> African Commission on Human and Peoples’ Rights, *Social and Economic Rights Action Center and Center for Economic and Social Rights v. Nigeria*, *supra* Chapter 2, note 81, para. 46.

<sup>204</sup> See, *inter alia*, African Commission on Human and Peoples’ Rights, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, Communication No. 245/02, judgment of 15 May 2006, para. 213.

<sup>205</sup> See, *e.g.*, African Commission on Human and Peoples’ Rights, *Sir Dawda K Jawara v. The Gambia*, Communications Nos. 147/95 and 149/96, judgment of 11 May 2000, para. 38. See also, more recently, African Commission on Human and Peoples’ Rights, *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v. Sudan*, Communication No. 379/09, judgment of 10 March 2015, para. 49.

<sup>206</sup> African Commission on Human and Peoples’ Rights, *Monim Elgak, Osman Hummeida and Amir Suliman (represented by FIDH and OMCT) v. Sudan*, *supra* note 205, para. 67.

*Guidelines and Principles on the Right to a Fair Trial and Legal Assistance in Africa*. Pursuant to these (non-binding) Principles, in fact, “everyone has the right to an effective remedy by competent national tribunals for acts violating the rights granted by the constitution, by law or by the Charter, notwithstanding that the acts were committed by persons in an official capacity”.<sup>207</sup> The Principles similarly recognize the double-fold dimension of this right, which includes both the right of access to justice and to receive reparation for the harm suffered.<sup>208</sup>

It is noteworthy that, like other human rights monitoring bodies, the Commission has also held that blanket amnesties that shield perpetrators of human rights abuses would prevent the victims from enjoying their right to an effective remedy.<sup>209</sup> For instance, in its 2008 judgment in the *Mouvement ivoirien des droits humains v. Côte d'Ivoire* case, the Commission noted that “if there appears to be any possibility of an alleged victim succeeding at a hearing, the applicant should be given the benefit of the doubt and allowed to have their matter heard. Adopting laws (...) grant[ing] immunity from prosecution of human rights violators and prevent[ing] victims from seeking compensation render the victim helpless and deprives them of justice” in breach of their right to an effective remedy.<sup>210</sup> Whereas, in the case at stake, the Commission referred to amnesty laws, nothing prevents from applying the same reasoning to State secrecy laws, at least when they constitute a bar from proceedings and no alternative mechanism capable of ensuring redress or bring perpetrators to justice is in place.

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<sup>207</sup> African Commission on Human and Peoples’ Rights, Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, *supra* note 20, para. C(a).

<sup>208</sup> *Ibid.*, para C(b).

<sup>209</sup> In this respect, see also para. C(d) of the already mentioned (non-binding) Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, pursuant to which: “the granting of amnesty to absolve the perpetrators of human rights violations from accountability violates the right to an effective remedy”.

<sup>210</sup> See African Commission on Human and Peoples’ Rights, *Mouvement ivoirien des droits humains v. Côte d'Ivoire*, Communication No. 246/02, judgment of 29 July 2008, paras. 97-98. See also, *e.g.*, African Commission on Human Rights, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, *supra* note 204, para. 213.

### 3.1.3. State practice

As far as State practice is concerned, it is worth mentioning that the right to an effective remedy is inherently embodied in most domestic legal systems.<sup>211</sup> While any comparative analysis in this respect would go much beyond the scope of the present work, it is nonetheless to note that (in line with the already recalled process of ‘erosion’ of States’ *domain réservé*), in general terms, the development of international human rights law has reshaped the content and scope of national provisions “as States have increasingly limited their governmental immunities and developed innovative responses to human rights violations”.<sup>212</sup>

Particularly interesting in this respect is, for instance, the judgment of the Israeli High Court of Justice in the case *Public Committee Against Torture in Israel v. Israel*, where the Court stressed that a case involving violations of human rights is always *justiciable*.<sup>213</sup>

In the specific case at stake, concerning the lawfulness of the preventive strikes launched by the Israeli military as a response to terroristic attacks, the Court found indeed that it should decide over the possible violation of the most basic human right (the right to life) and, as a consequence, the claim should be considered ‘justiciable’.<sup>214</sup>

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<sup>211</sup> One could mention, as a matter of example, the already recalled Canadian Charter of Rights and Freedoms, whose Article 24(1) establishes: “Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances”.

<sup>212</sup> See again D. SHELTON, *Remedies in International Human Rights Law*, *supra* note 149, p. 49. For an overview on this case see, *inter alia*, M. LESH, *The Public Committee against Torture in Israel v. the Government of Israel: The Israeli High Court of Justice Targeted Killings Decision*, in *Melbourne Journal of International Law*, vol. 8, 2007, pp. 375-397.

<sup>213</sup> Case No. HCJ 769/02, judgment of 11 December 2005. The case is reported in 46 *International Legal Materials* 375 (2007).



### **3.2. Possible restrictions to the right to an effective remedy under human rights law**

As already stressed with respect to other human rights, as far as secrecy claims are concerned, one of the most important aspects is to establish whether and to what extent limitations to the right to an effective remedy could be deemed admissible. States are indeed likely to justify their resort to the State secrecy privilege on the basis of national security concerns and the protection of the public interest.

It has been largely anticipated that human rights monitoring bodies have at times expressly found that the *blanket* invocation of the State secrecy privilege – at least when meant to prevent investigations into allegations of serious human rights violations and grant impunity to perpetrators – may indeed violate the right to an effective remedy provided for in human rights treaties. Yet, the analysis of the possible limitations to this right might shed further light on the exact contours of the abovementioned tension (as well as on the conclusions reached by human rights monitoring bodies in specific circumstances), especially taking into account the various ways in which secrecy may be resorted to in the context of proceedings (including the investigation stage).

Human rights monitoring bodies have repeatedly upheld that, under specific circumstances, the right to an effective remedy might indeed be restricted to protect a competing public interest.<sup>215</sup> Any restriction should, however,

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<sup>214</sup> *Ibid.*, para. 50.

<sup>215</sup> See, for instance, European Court of Human Rights, *Klass v. Germany*, *supra* Chapter 2, note 294, para. 68. Concerning the right of access to court see again European Court of Human Rights, *Tinnelly & Sons et al. v. The United Kingdom*, *supra* note 51, para. 72. See also Human Rights Committee, General Comment No. 29, *supra* Introduction, note 75, para. 14 (that, although generally analysing the derogability of the right to an effective remedy under Article 2(3) of the International Covenant on Civil and Political Rights, implicitly refers to the possible restrictions that this right may be subjected to). As to the legal basis for these limitations in the absence of specific restrictions clauses in the conventional provisions see *supra* section 2.2. Apart from human rights monitoring bodies, the ‘relative’ character of the

comply with the necessity and proportionality requirements already underlined in the previous sections.

The European Court of Human Rights, for instance, expressly held that, when national security considerations are concerned, the right to a remedy protected under Article 13 of the European Convention on Human Rights may be legitimately limited, provided that the necessity and proportionality tests are both satisfied.<sup>216</sup> More specifically, as far as secret surveillance practices are concerned, the Court found that a restricted scope of recourse is inherent to the use of secret information and, as a result, the remedy should be ‘*as effective as it can*’ in similar circumstances.<sup>217</sup>

In its judgment in the *Al-Nashif v. Bulgaria* case, concerning an expulsion on the ground of national security, the Court further elaborated upon its findings in cases related to secret information.<sup>218</sup> The Court found indeed that, whereas sensitive material could justify procedural restrictions to the use of evidence in deportation cases and States should be afforded a wide margin of appreciation in this regard, such elements could “by no means justify doing away with remedies altogether whenever the executive has chosen to invoke the term ‘national security’”.<sup>219</sup> Accordingly, the Court also stressed that:

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right to an effective remedy has been recognized also by the Court of Justice of the European Union (in interpreting Article 47 of the European Union Charter of Fundamental Rights). With respect to the right to a judicial remedy, the Court has indeed held that: “It is settled case law that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve (...) a disproportionate and intolerable interference which infringes upon the very substance of the rights guarantees”. See, e.g., Court of Justice of the European Union, *Alassini et al. v. Telecom SpA*, joined cases C-317/08, C-318/08, C-319/08, C-320/08, judgment of 18 March 2010, para. 63.

<sup>216</sup> For an overview of the European Court of Human Rights’ case law with respect to Article 13 and national security see, *inter alia*, D. J. HARRIS, M. O’BOYLE, C. WARBRICK (eds), *Law of the European Convention on Human Rights*, supra Chapter 2, note 300, p. 774 ff.

<sup>217</sup> See, e.g., European Court of Human Rights, *Leander v. Sweden*, supra Chapter 2, note 105, para. 84.

<sup>218</sup> See, e.g., A. MOWBRAY, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Oxford, Portland, 2004, p. 210.

<sup>219</sup> See again European Court of Human Rights, *Al-Nashif v. Bulgaria*, supra note 190, para. 137.

“Even where an allegation of a threat to national security is made, the guarantee of an effective remedy requires *as a minimum* that the competent independent appeals authority must be informed of the reasons grounding the deportation decision, *even if such reasons are not publicly available*. The authority must be competent to reject the executive's assertion that there is a threat to national security where it finds it *arbitrary* or *unreasonable*. There must be some form of adversarial proceedings, if need be through a special representative after a security clearance (...)”<sup>220</sup>

It follows from the above that, regardless of the fact that national security considerations may well constitute a ‘legitimate aim’ for restriction and despite the broad margin of appreciation that States bear with respect to determining the existence of a threat to national security, the requirements of Article 13 cannot be considered fully complied with in lack of specific procedural safeguards (*i.e.*, a judicial scrutiny over the secrecy claim). As it has been correctly underlined, indeed, at a minimum, “the individual must be able to challenge the executive’s position (...)”<sup>221</sup>

Whereas in the case at stake the Court clearly referred to the use of secret evidence in deportation cases, such a reasoning may be similarly applied in other instances where the State secrecy privilege is invoked on the ground of national security concerns. The Court’s findings in the already recalled *Tinnelly* case seem indeed to point towards this conclusion. On that occasion, the Court *de facto* suggested that, at least in cases involving the use of secret information barring the access to justice, the general requirement of a remedy ‘effective as it can’ established by Article 13 of the European Convention on Human Rights (as interpreted by the European Court of Human Rights) should

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<sup>220</sup> Emphasis added. *Ibid.*

<sup>221</sup> See again D. BIGO, S. CARRERA, N. HERNANZ, A. SCHERRER, *National Security and Secret Evidence in Legislation and before the Courts: Exploring the Challenges*, *supra* Chapter 1, note 49, p. 51.

be read in combination with the stricter guarantees imposed by the right of access to court implicitly protected under Article 6 of the same instrument.<sup>222</sup> As a result – and as already previously underlined – the Court found that, although national security grounds may justify limitations to the right of access to a court or tribunal, the proportionality requirement should not be considered abided by if the individual cannot challenge the executive assertion before an independent judicial authority.<sup>223</sup> Thus, in the case at stake, the Court concluded that the practice of the UK Secretary of State to issue the so-called “42 certificates” (*i.e.*, conclusive decisions not to grant public contracts for the purpose of safeguarding national security) constituted a disproportionate restriction on the applicants’ right of access to court as it prevented any judicial determination on the merits of complaints alleging unlawful discrimination.<sup>224</sup> The Court also excluded that the existence of procedural internal mechanisms aimed at ensuring control and accountability of intelligence services involved in the making of the negative-vetting decisions could suffice to compensate the lack of an independent judicial scrutiny.<sup>225</sup>

Albeit more tenuously and – partially – under a different guise, the Inter-American Court of Human Rights has reached similar conclusions by holding that the States’ duty to undertake investigations into serious human rights violations, stemming, *inter alia*, from the right to a judicial protection embodied in Article 25 of the American Convention on Human Rights, should not be considered complied with in the absence of mechanisms allowing a judicial scrutiny over national security / secrecy claims.<sup>226</sup>

It is also noteworthy that the European Court of Human Rights has found that any limitation to the right of access to court should necessarily apply

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<sup>222</sup> See again European Court of Human Rights, *Tinnelly & Sons et al. v. The United Kingdom*, *supra* note 51, para. 77.

<sup>223</sup> *Ibid.*, paras. 77-78.

<sup>224</sup> *Ibid.*, para. 79.

<sup>225</sup> *Ibid.*, para. 77.

foremost to the procedural aspects of this right and must not end up in its complete disregard.<sup>227</sup> Based on this reasoning, it may be easily argued that the reliance on the State secrecy privilege in a way to bar any avenues for redress and/or grant impunity to perpetrators, would indeed hinder the right to an effective remedy in its essence (and could therefore not be considered as a legitimate ground for limitation).

Some additional indications might be inferred also from the case law of human rights monitoring bodies concerning, more generally, ‘limitation clauses’. The Inter-American Court of Human Rights, for instance, has stated that limitations to the rights provided for in the American Convention on Human Rights should both respond to a “compelling governmental interest” (*necessity*) and “be tailored to the accomplishment of the legitimate governmental objective necessitating it” (*proportionality*).<sup>228</sup> In addition, in assessing the notion of ‘general welfare in a democratic society’ embodied in Article 32(2) of the American Convention on Human Rights, the Inter-American Court has explicitly held that this notion “may in no circumstances be invoked as a means of denying a right guaranteed by the Convention or to impair or deprive it of its true content”.<sup>229</sup> Such a reasoning, while specifically devoted to the notion of ‘general welfare’, could be easily applied also to the concept of ‘security’ contained in Article 32(2). This conclusion seems indeed to find support in the judgment related to the *Velásquez Rodríguez* case, where the Inter-American Court held that, whereas the State has the right and duty to ensure its security, its power is not unlimited as it bears the obligation to

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<sup>226</sup> See again, *e.g.*, Inter-American Court of Human Rights, *Goiburù et al. v. Paraguay*, *supra* Introduction, note 62, para. 110.

<sup>227</sup> See, *e.g.*, European Court of Human Rights, *Bellet v. France*, App. No. 23805/94, judgment of 4 December 1995, para. 31 (addressing the issue under Article 6 of the European Convention on Human Rights, pursuant to the already mentioned general approach undertaken by the European Court with respect to the right to access to Court).

<sup>228</sup> Inter-American Court of Human Rights, Advisory Opinion OC-5/85 of 13 November 1985, *Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Arts. 13 and 29 American Convention on Human Rights)*, Series A No. 5, para. 46.

<sup>229</sup> *Ibid.*, para. 67.

organize itself in such a manner as to guarantee the rights protected under the Convention.<sup>230</sup>

It follows from the above that any blanket invocation of secrecy, without an independent judicial scrutiny undertaken over it, especially when leading to the dismissal of proceedings, would inevitably be at odds with the State's obligation to grant an effective remedy to the victims. Indeed, whether applying the dichotomy between the 'destruction' (the right no longer exist) and 'limitation' of a right (the right continues to exist but it might not be exercised in the specific case),<sup>231</sup> it may be argued that, unless certain procedural safeguards are put in place (first and foremost, an independent review of the secrecy claim and the provision of alternative avenues for redress), the State secrecy privilege would *de facto* 'destroy' (and not merely limit) the right to an effective remedy.

In this direction seems to point also the *amici curiae* brief submitted by some international scholars and human rights organizations before the United States Supreme Court in the *Mohamed et al v. Jeppesen Dataplan* case. The brief, after reviewing the use of the State secrecy privilege with respect to the practice of extraordinary renditions under a three-fold lens (the legitimate aim requirement; the 'necessity' and 'proportionality' tests; and the prohibition of a blanket ban to the right to an effective remedy), concluded that the resort to

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<sup>230</sup> *Velásquez Rodríguez v. Honduras*, judgment of 28 July 1988, Series C No. 4, para. 158.

<sup>231</sup> See, e.g., Article 5.1 of the International Covenant on Civil and Political Rights, pursuant to which: "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant". The distinction between 'destruction' and 'limitation' of a right has been relied on by the Human Rights Committee in the elaboration of a 'restrictive approach' to limitations clauses. See, e.g., Human Rights Committee, General Comment No. 34, *supra* Chapter 2, note 36, para. 21. As to the difference between 'limitation' and 'destruction' of a certain right (and its role in assessing the consistency of amnesties with the right to an effective remedy) see again A. O'SHEA, *Amnesty for Crime in International Law and Practice*, *supra* note 194, p. 182.

secrecy conflicted with the United States' international obligation to provide an effective remedy to the victims.<sup>232</sup>

Finally, it should be stressed that, as previously stated and as it will be partly reiterated in the next section, the assumption that the right to an effective remedy is vested with a non-derogable character at least when acting as a procedural corollary to the protection of non-derogable rights might lead to exclude that this right can be lawfully limited in all those cases in which its exercise is essential to the full protection of those rights that cannot ever be suspended. In this respect, it is noteworthy that the Guidelines on Eradicating Impunity for Serious Human Rights Violations, adopted by the Committee of Ministers of the Council of Europe on 30 March 2011, expressly define the duty to investigate in cases of serious human rights violations as one of an 'absolute character'.<sup>233</sup>

### **3.3. The right to an effective remedy: A non-derogable right?**

Taking into account that, as already previously stressed, the resort to the State secrecy privilege to dismiss or obstacle proceedings concerning human rights violations has been a particularly widespread phenomenon in the context of the 'war on terror', just as for the right to a fair trial it is worth examining whether, under international human rights law, the right to an effective remedy might indeed be suspended during a state of public emergency.

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<sup>232</sup> Brief of *Amici Curiae*, International Law Scholars and Human Rights Organizations in Support of the Petition for Writ of Certiorari, submitted on 12 January 2011 before the Supreme Court of the United States in the *Mohamed et al. v. Jeppesen Dataplan* case (see *supra* Chapter 1, note 429). As already underlined *supra*, however, the Supreme Court of the United States did not uphold the view expressed in the amici curiae brief, declining to review the case.

<sup>233</sup> Council of Europe, Guidelines on Eradicating Impunity for Serious Violations of Human Rights, adopted in Strasbourg, by the Committee of Ministers on 30 March 2011 at the 1110th meeting of the Ministers' Deputies, para. V.1.

Like for the right to a fair trial, human rights treaties do not generally enlist the right to an effective remedy among non-derogable human rights. That notwithstanding, human rights monitoring bodies have often upheld the non-derogable nature of this right, at least in connection to ‘primary’ violations of rights sharing this very character.<sup>234</sup>

In its General Comment No. 29, for instance, the Human Rights Committee has stressed that, whereas the right to an effective remedy embodied in Article 2(3) of the International Covenant on Civil and Political Rights does not appear in the list of non-derogable rights contained in Article 4 of the same instrument, States parties are bound to abide by it even during a state of emergency.<sup>235</sup> According to the Human Rights Committee:

“Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective”.<sup>236</sup>

Additionally, as noticed earlier, the Human Rights Committee has also found that States parties to the Covenant have an obligation to secure the non-derogable rights protected under Article 4 by means of procedural guarantees and that “the provisions of the Covenant relating to procedural safeguards may

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<sup>234</sup> The non-derogable character of the right to a remedy was also stressed in the already mentioned Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right to a Fair Trial: Current Recognition and Measures Necessary for its Strengthening*. See again UN Doc. E/CN.4/Sub.2/1994/24 of 3 June 1994, *supra* note 111, para. 141 (which, however, addressed the right to an effective remedy as part of the right to a fair trial). The non-derogable character of the right to a remedy has been upheld also in non-binding instruments. See again, *e.g.*, Paris Minimum Standards of Human Rights Norms in a State of Emergency, *supra* note 110, Article 16; and Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, *supra* Chapter 2, note 20, paras. 59-60.

<sup>235</sup> See again UN Doc. CCPR/C/21/Rev.1/Add.11, *supra* Introduction, note 75, para. 14.



never be made subject to measures that would *circumvent* the protection of non-derogable human rights”.<sup>237</sup> As previously argued, admitting the suspension of the right to an effective remedy for violations of non-derogable human rights would certainly *circumvent* the protection afforded under Article 4 of the Covenant and should, consequently, be considered inconsistent with it.

As to this last aspect, the Human Rights Committee has *de facto* reiterated that existing link between the substantive and procedural dimensions of the protection of human rights that is expressly recognized by both the American Convention on Human Rights<sup>238</sup> and the Arab Charter on Human Rights.<sup>239</sup> Both these instruments state indeed that the procedural guarantees required for the protection of non-derogable rights may never be suspended.

The Inter-American Commission of Human Rights has accordingly held that the right to judicial protection embodied in Article 25 of the American Convention on Human Rights may not be suspended under any circumstances when it is necessary to ensure the protection of non-derogable rights.<sup>240</sup> Transposed in the context of the ‘war on terror’, this means that: “the availability of recourse to judicial protection to persons affected by anti-terrorist initiatives cannot be suspended insofar as they are necessary for the protection of the rights not subject to derogation in times of emergency”.<sup>241</sup>

While the above considerations point towards a certain convergence concerning the nature of the right to an effective remedy, it has to be stressed that both the African and the European systems of human rights protection do not share – at least *prima facie* – the same approach of other human rights monitoring bodies.

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<sup>236</sup> *Ibid.*

<sup>237</sup> Emphasis added. *Ibid.*, para. 15.

<sup>238</sup> See again Article 27(2).

<sup>239</sup> Article 4(2).

<sup>240</sup> See again Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, *supra* note 37, para. 343.

<sup>241</sup> *Ibid.*, para. 352.

The already mentioned absence of a derogation clause in the African Charter on Human and Peoples' Rights might indeed lead to conclude that the right to an effective remedy, implicitly upheld by the African Commission on Human and Peoples' Rights, should never be suspended in any circumstances, regardless of the 'derogable' or 'non-derogable' nature of the right originally violated.

Contrariwise, the European Court of Human Rights has refrained from vesting the right to an effective remedy of a non-derogable character. That notwithstanding, as previously noted with reference to the right to a fair trial, the strict link existing between the substantive and procedural dimensions of the protection of human rights, which has been recognized by the European Court of Human Rights in connection to Article 13 of the European Convention,<sup>242</sup> should lead to conclude for the non-derogable nature of the right to an effective remedy at least when essential to ensure the full protection of other non-derogable human rights.

Finally, even when (and to the extent that) derogations to the right to an effective remedy are admissible, any suspension of the aforementioned right should necessarily meet those procedural and substantial requirements expressly provided for in human rights treaties derogations clauses. Without repeating what has already been said with respect to the right to a fair trial, it is just worth stressing once again that any attempt to justify a departure from the right to an effective remedy based on an alleged state of public emergency necessarily requires the State to demonstrate: the existence of a state of emergency threatening the life of the nation; that the measures undertaken to face the emergency are both strictly required and consistent with other obligations under international law; and, under a procedural perspective, the public emergency derogation has been officially proclaimed and duly notified. Lacking compliance with any of the aforementioned requirements, a State

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<sup>242</sup> See again, *e.g.*, European Court of Human Rights, *Aksoy v. Turkey*, *supra* Introduction, note 75, para. 98.

could not rely on the ‘derogable’ character of the right to an effective remedy to justify its suspension.

#### **4. State secrecy and the duty to investigate serious human rights violations and prosecute and punish perpetrators**

##### **4.1. The duty to investigate, prosecute and punish: international instruments and the case law of human rights monitoring bodies**

Whereas, as stated earlier, the right to an effective remedy has been interpreted by human rights monitoring bodies to require States, *inter alia*, to undertake investigations into serious human rights violations and – in case of evidence supporting prosecution – to bring perpetrators to justice, the broader legal basis of the aforesaid duty, its specific scope of application and, not least, its relevance with respect to State secrecy warrant a separate and more in-depth analysis.<sup>243</sup>

First of all, as far as several human rights treaties are concerned, human rights monitoring bodies have generally inferred – in lack of any express

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<sup>243</sup> While in the present section, for the sake of argument, reference will be cumulatively made to the duty to investigate, prosecute and punish (taking into account the strict link existing between these obligations), it is worth stressing that States have a duty to undertake investigations into serious human rights violations regardless of whether, in the specific circumstances at stake, there is a duty to prosecute or punish those criminally responsible. See, *inter alia*, A. SEIBERT-FOHR, *The Fight against Impunity under the International Covenant on Civil and Political Rights*, *supra* Introduction, note 60, p. 328. For a general overview of the duty to investigate, prosecute and punish in international law see, *inter alia*, D. F. ORENTLICHER, *Setting Accounts: The Duty to Prosecute Human Rights Violation of a Prior Regime*, in *Yale Law Journal*, vol. 100, 1991, pp. 2537-2615; C. EDELENBOS, *Human Rights Violations: A Duty to Prosecute?*, in *Leiden Journal of International Law*, vol. 7, 1994, pp. 5-21; N. ROHT-ARRIAZA, *Sources in International Treaties of an Obligation to Investigate, Prosecute, and Provide Redress*, N. ROHT-ARRIAZA (ed.), *Impunity and Human Rights in International Law and Practice*, Oxford, New York, 1995, pp. 24-38; N. ROHT-ARRIAZA, *Combating Impunity: Some Thoughts on the Way Forward*, in *Law and Contemporary Problems*, vol. 59, 1996, pp. 93-102; M. SCHARF, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crime*, in *Law and Contemporary Problems*, vol. 59, 1997, pp. 41-61; R. MATTAROLLO, *Impunity and International Law*, in *Revue québécoise de droit international*, vol. 11, 1998, pp. 82-94; A. GITTI, *Impunity under National Law and Accountability under International Human Rights Law: Has the Time of a*

acknowledgment – a State’s positive duty to investigate, prosecute and punish perpetrators of human rights violations from different existing provisions, often taken into ‘cumulative’ account.<sup>244</sup>

The Human Rights Committee, for instance, has generally inferred the duty to investigate human rights violations and prosecute and punish perpetrators from substantive rights, such as those of Articles 6 (right to life) and 7 (prohibition of torture) of the International Covenant on Civil and Political Rights, read together with Article 2 of the same instrument.<sup>245</sup> More specifically, and as previously pointed out, as far as this last provision is concerned, the Committee has grounded the duty to investigate human rights and bring perpetrators to justice on the right to an effective remedy protected under Article 2(3) of the Covenant. Conversely, the duty to punish perpetrators has been at times connected to the general obligation to respect, ensure and give effect to human rights enshrined in Article 2(1) and 2(2) of the Covenant.<sup>246</sup>

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*Duty to Prosecute Come?*, in *Italian Yearbook of International Law*, vol. IX, 1999, pp. 64-85; A. SEIBERT-FOHR, *Prosecuting Serious Human Rights Violations*, Oxford, 2009.

<sup>244</sup> For an overview in this respect see also, *inter alia*, C. BAKKER, *Obligations of States to Prosecute Employees of Private Military and Security Companies for Serious Human Rights Violations*, EUI Working Papers No. AEL 2009/1, San Domenico di Fiesole, 2009, pp. 2-8.

<sup>245</sup> See, *inter alia*, Human Rights Committee, General Comment No. 20, *supra* note 157, para. 14; see also *Joaquín Herrera Rubio et al. v. Colombia*, Communication No. 161/1983, UN Doc. CCPR/C/OP/2 of 2 November 1987, para. 11; or, more recently, *Emina Kožljak and Sinan Kožljak v. Bosnia Herzegovina*, Communication No. 1970/2010, UN Doc. CCPR/C/112/D/1970/2010 of 1 December 2014, para. 3.3.

<sup>246</sup> The Human Rights Committee has indeed generally denied the existence of a corresponding right of the victim to request the State to criminally prosecute the alleged perpetrator. See, *e.g.*, Human Rights Committee, *Arhuacos v. Colombia*, Communication No. 612/1995, UN Doc. CCPR/C/60/D/612/1995 of 29 July 1997, para. 8.8. This trend to implicitly deriving the duty to punish perpetrators from the general obligations established in Article 2(1) and 2(2) of the Covenant is supported by a certain amount of pronouncements. See, among others, Human Rights Committee, *Concluding Observations on Paraguay*, UN Doc. CCPR/C/79/Add. 48 of 5 April 1995, para. 25; and *Concluding Observations on Yemen*, UN Doc. CCPR/C/79/Add. 51 of 7 April 1995, para. 19. It has to be noted, however, that this is not a uniform approach: in several cases, the Human Rights Committee has indeed inferred a duty to investigate, prosecute and punish (cumulatively considered) from Article 2(3) of the Covenant. See also, recently, *Messaouda Kimouche, née Cheraitia, and Mokhtar Kimouche v. Algeria*, Communication No. 1328/2004, UN Doc. CCPR/C/90/D/1328/2004 of 16 August 2007, para. 3.5.

As previously anticipated, the Inter-American Commission and Court have instead repeatedly upheld the aforementioned obligation to investigate, prosecute and punish based on a combined reading of Articles 1 (duty to ensure human rights), 8 (right to a fair trial) and 25 (right to judicial protection) of the American Convention on Human Rights.<sup>247</sup>

To the contrary, the European Court of Human Rights has derived the obligation to investigate human rights violations either from a combined reading of substantive rights – such as the right to life and the right to be free from torture and other ill-treatments – and the right to an effective remedy or, alternatively, from those very substantive rights read in conjunction with the general duty to secure human rights recognized in Article 1 of the European Convention on Human Rights.<sup>248</sup> Unlike other human rights courts and monitoring bodies, however, the European Court of Human Rights has for long time refrained from expressly upholding a specific ‘duty to prosecute and punish’ perpetrators, rather asserting, in a more nuanced manner, States parties’ obligation to criminalize serious human rights violations and establish appropriate mechanisms to punish breaches of criminal law.<sup>249</sup> The Court’s recent case law, however has been characterized by the progressive recognition of a duty to prosecute and punish perpetrators of serious human

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<sup>247</sup> This approach has been generally described as grounded on a ‘remedial rights’ rationale. It has to be stressed, however, that, despite this approach is now consolidated and prevailing, early case law often focused on the so-called ‘retrospective protection’ rationale, based on a combined reading of the obligation to ensure conventional rights (embodied in Article 1 of the American Convention on Human Rights) and the substantive rights violated. For an overview see A. SEIBERT-FOHR, *Prosecuting Serious Human Rights Violations*, *supra* note 243, p. 96 ff.

<sup>248</sup> Concerning this latter approach see, *inter alia*, European Court of Human Rights [GC], *Al-Skeini et al. v. The United Kingdom*, App. No. 55721/07, judgment of 7 July 2011, para. 163; and *Hassan v. The United Kingdom*, App. No. 29750/09, judgment of 16 September 2014, para. 62.

<sup>249</sup> See, *e.g.*, European Court of Human Rights [GC], *Öneryildiz v. Turkey*, App. No. 48939/99, judgment of 30 November 2004, para. 94. Regardless of this different ‘wording’, there are Authors who have stressed that the Court’s case law would *de facto* affirm the existence of a duty to punish. See again N. ROHT-ARRIAZA, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, *supra* note 184, p. 478. Other Authors have, *a contrario*, underlined a certain uneasiness of the European Court of Human Rights in expressly upholding a duty to punish perpetrators. See again A. SEIBERT-FOHR, *Prosecuting Serious Human Rights Violations*, *supra* note 243, p. 152.

rights violations, which has culminated in its express acknowledgement especially (but not only) in instances relating to the enactment of amnesties obstructing accountability.<sup>250</sup>

Furthermore, the existence of a duty to prosecute and punish the perpetrators of serious human rights violations has been recently upheld by the Court in its judgment related to the already mentioned *Nasr and Ghali* case. The Court has indeed observed that Article 3 of the European Convention on Human Rights, read in conjunction with Article 1 of the same instrument, requires States to prosecute and punish those responsible of the perpetration of torture or other inhuman or degrading treatment.<sup>251</sup>

Partially similar to the European Court of Human Rights' approach, the African Commission on Human and Peoples' Rights has also upheld the States' duty to investigate, prosecute and punish serious human rights violations, such as extrajudicial killings and slavery, by inferring it from a combined reading of substantive provisions of the African Charter and the general obligation to afford effective protection to those rights, which is embodied in Article 1 of the same instrument.<sup>252</sup>

In light of this fragmented scenario as to the legal ground of the duty to investigate, prosecute and punish, it has been correctly stressed that international and regional case law reveals divergent approaches.<sup>253</sup>

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<sup>250</sup> See, e.g., European Court of Human Rights [GC], *Marguš v. Croatia*, App. No. 4455/10, judgment of 27 May 2014, para. 139. In this respect, the Court has expressly relied on the criterion of systemic interpretation, taking into due account the progressive development of international law. The European Court of Human Rights has expressly upheld States parties' duty to prosecute and punish the perpetrators of acts of torture and other inhuman and degrading treatments also in the case *Cestaro v. Italy*, App. No. 6884/11, judgment of 7 April 2015, paras. 206 ff.

<sup>251</sup> See again European Court of Human Rights, *Nasr and Ghali v. Italy*, *supra* Chapter 1, note 173, paras. 263 and 272.

<sup>252</sup> See, for instance, African Commission on Human Rights, *Amnesty International et al. v. Sudan*, *supra* note 108, para. 51 (referring to extrajudicial killings) and *Malawi African Association et al. v. Mauritania*, Communications Nos. 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98, decision of 11 May 2000, para. 134 (referring to slavery).

<sup>253</sup> See again A. SEIBERT-FOHR, *Prosecuting Serious Human Rights Violations*, *supra* note 243, pp. 189-190.

That notwithstanding, there are clear parallels among the findings of different human rights monitoring bodies, which appear all the more evident when looking closely at the ‘substance’ of the above reported duty.

As to the content of this ‘accountability’ obligation,<sup>254</sup> the Inter-American Court of Human Rights has emphasized, *inter alia*, that the duty to investigate requires States parties to provide victims with an explanation of the circumstances of the violations.<sup>255</sup> The Inter-American Commission has further stressed that States cannot “elude, under any pretext whatsoever, [their] duty to investigate a case involving a violation of fundamental human rights”.<sup>256</sup> Furthermore, as stated earlier, States should conduct investigations in a serious manner and not “as a mere formality preordained to be ineffective”<sup>257</sup>: States are indeed required to act in good faith and in a diligent, exhaustive and impartial way.<sup>258</sup> The investigations should furthermore be undertaken so to allow the identification and punishment of the perpetrators.<sup>259</sup>

Beside an obligation to investigate human rights abuses, States have indeed a duty to prosecute and punish those criminally responsible. The Court has found, in fact, that “if the State apparatus acts in a way that the violations go unpunished (...)”, its obligations under the American Convention on Human Rights should be deemed not abided by.<sup>260</sup>

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<sup>254</sup> This expression is used by H. DUFFY, *The ‘War on Terror’ and the Framework of International Law*, *supra* Chapter 1, note 342, p. 303.

<sup>255</sup> See, *e.g.*, Inter-American Court of Human Rights, *Castillo Páez v. Peru*, judgment of 3 November 1997, Series C No. 34, para. 90.

<sup>256</sup> See, *e.g.*, Inter-American Commission on Human Rights, *Martin Javier Roca Casas v. Peru*, case No. 11233, Report No. 39/97, decision of 19 February 1998, para. 104.

<sup>257</sup> See, *e.g.*, Inter-American Court of Human Rights, *Velásquez Rodríguez v. Honduras*, *supra* note 230, para. 177.

<sup>258</sup> See, *e.g.*, Inter-American Commission on Human Rights, *Ignacio Ellacuría et al. v. El Salvador*, case No. 10.488, Report No. 136/99, decision of 22 December 1999, para. 196.

<sup>259</sup> See, *e.g.*, Inter-American Court of Human Rights, *Miguel Castro-Castro Prison v. Peru*, judgment of 25 November 2006, Series C No. 160, para 256; *Almonacid Arellano et al. v. Chile*, *supra* Introduction, note 62, para. 111; *Goiborù et al. v. Paraguay*, *supra* Introduction, note 62, para. 117; *Case of the Rochela Massacre v. Colombia*, judgment of 11 May 2007, Series C No. 163, para. 148.

<sup>260</sup> See again Inter-American Court of Human Rights, *Velásquez Rodríguez v. Honduras*, *supra* note 230, para. 176. As to the duty to punish perpetrators of human rights violations in the case law of the Inter-American Court of Human Rights see, *inter alia*, F.F. BASH, *The Doctrine of the Inter-American Court of Human Rights Regarding States’ Duty to Punish*

It follows from the above that the duty of States to investigate, prosecute and punish perpetrators is strictly interlinked to the more general duty to end impunity.<sup>261</sup> As noted by the Inter-American Court of Human Rights in its judgment in the *Paniagua-Morales* case, in fact, States have an obligation to use all legal means at their disposal to combat impunity, which is defined as the “total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights protected under the American Convention”.<sup>262</sup>

A similar approach as to the content of the duty to investigate, prosecute and punish has been adopted also by the Human Rights Committee and other regional human rights courts.

The Human Rights Committee, for instance, has emphasized that States parties to the International Covenant on Civil and Political Rights are under a duty to investigate *thoroughly* alleged serious violations of human rights and to prosecute criminally, try and punish those held responsible for such violations.<sup>263</sup> Such an obligation is indeed necessary to combat impunity, which weakens human rights protection by favouring the repetition of human

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*Human Rights Violations and its Dangers*, in *American University International Law Review*, vol. 23, 2007, pp. 195-229.

<sup>261</sup> Among the conspicuous literature related to the so-called ‘fight against impunity’ see, *inter alia*, J. MENDEZ, *Accountability for Past Abuses*, in *Human Rights Quarterly*, vol. 19, 1997, pp. 255-282; M.M. PENROSE, *Impunity, Inertia, Inaction and Invalidity*, in *International Law Journal*, vol. 17, 1999, pp. 269-310; A. EIDE, *Preventing Impunity for the Violator and Ensuring Remedies for the Victim*, in *Nordic Journal of International Law*, vol. 69, 2000, pp. 1-10; J.E. VIÑUALES, *Impunity: Elements for an Empirical Concept*, in *Law and Inequality*, vol. 25, 2007, pp. 115-145.

<sup>262</sup> Inter-American Court of Human Rights, *Paniagua Morales et al. v. Guatemala*, judgment of 8 March 1998, Series C No. 37, para. 173.

<sup>263</sup> See, *inter alia*, Human Rights Committee, *Bautista de Arellano v. Colombia*, Communication No. 563/1993, UN Doc. CCPR/C/55/D/563/1993 of 27 October 1995, para. 8.6. On the duty of the State to investigate and prosecute serious human rights violations see also, e.g., Human Rights Committee, *Hugo Rodríguez v. Uruguay*, Communication No. 322/1988, UN Doc. CCPR/C/51/D/322/1988 of 19 July 1994, para. 12.3; *Blanco v. Nicaragua*, Communication No. 328/1988, UN Doc. CCPR/C/51/D/328/1988 of 18 August 1994, para. 11; *José Vicente and Amado Villafañe Chaparro et al. v. Colombia*, Communication No. 612/1995, UN Doc. CCPR/C/60/D/612/1995 of 29 July 1998, para. 8.8. See also, for instance, *Concluding Observations on Algeria*, UN Doc. CCPR/C/79/Add.95 of 18 August 1998, para. 6; *Concluding Observations on Kuwait*, UN Doc. CCPR/C/KWT of 27



rights violations and obstacles the maintenance and restoration of peace.<sup>264</sup> With respect to the duty to undertake investigations, the Human Rights Committee has further specified that the same should be conducted by an independent authority, irrespective of the submission of a claim by the alleged victim.<sup>265</sup> The independency requirement assumes primary relevance in cases of violations perpetrated by State agents.<sup>266</sup>

The European Court of Human Rights has similarly held that States parties to the European Convention on Human Rights have the duty to undertake *prompt, thorough and independent* investigations and that independency is all the more important when State officials are suspected of being the alleged perpetrators.<sup>267</sup> Moreover, the investigations should be conducted in a manner to lead to the establishment of the circumstances of the violations and the identification of those responsible.<sup>268</sup> According to the Court, public scrutiny over the investigation should be granted, allowing – at a minimum – access to the investigative files for the victims or their next of kin.<sup>269</sup> As far as State secrecy is concerned, this translates, *inter alia*, into the general duty for investigating authorities not to discretionarily rely on confidentiality or secrecy as a ground to refuse disclosure of the file material to the victims and the general public.<sup>270</sup>

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July 2000, para. 13; *Concluding Observations on Colombia*, UN Doc. CCPR/CO/80/COL of 25 March 2004, para. 10.

<sup>264</sup> See, e.g. Human Rights Committee, *Concluding Observations on Argentina*, UN Doc. CCPR/C/79/Add.46 of 5 April 1995, para. 10.

<sup>265</sup> See, e.g. Human Rights Committee, *Concluding Observations on Chile*, UN Doc. CCPR/C/79/Add. 104 of 30 March 1999, para. 10.

<sup>266</sup> See, e.g., Human Rights Committee, *Concluding Observations on Cambodia*, UN Doc. CCPR/C/79/Add. 108 of 27 July 1999, para. 10.

<sup>267</sup> See, e.g., European Court of Human Rights [GC], *Oğur v. Turkey*, App. 21594/93, judgment of 20 May 1999, para. 92.

<sup>268</sup> See, e.g. European Court of Human Rights [GC], *El-Masri v. The Former Yugoslav Republic of Macedonia*, *supra* note 196, para. 182.

<sup>269</sup> See, e.g., European Court of Human Rights, *Anguelova v. Bulgaria*, App. No. 38361/97, judgment of 13 June 2002, para. 140; [GC] *Al-Skeini et al. v. the United Kingdom*, *supra* note 248, para. 167; and *Association 21 December 1989 et al. v. Romania*, App. Nos. 33810 /07 and 18817/08, judgment of 25 May 2011, para. 135.

<sup>270</sup> See, *inter alia*, European Court of Human Rights, *Al-Nashiri v. Poland*, *supra* Introduction, note 26, para. 494.

As previously said, the European Court of Human Rights has also progressively asserted – albeit tenuously and by relying at large on the “international law background”<sup>271</sup> – a duty to prosecute and punish perpetrators of serious human rights violations, following in this respect the ‘route’ already taken by other human rights monitoring bodies.

Apart from being inferred from provisions embodied in general human rights treaties, the States’ duty to investigate, prosecute and punish is expressly embodied also in international instruments addressing specific human rights violations, such as, among others, the Convention against Torture,<sup>272</sup> the Convention on the Prevention and Punishment of the Crime of Genocide,<sup>273</sup> and the Convention for the Protection of All Persons from Enforced Disappearances.<sup>274</sup>

Under international humanitarian law, the four 1949 Geneva Conventions also recognize States parties’ obligation to investigate, prosecute and punish those who have committed grave breaches of the law governing armed conflicts (which include unlawful killings, tortures and other inhuman acts).<sup>275</sup>

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<sup>271</sup> This expression is used by Judge Ziemele with reference to the obligation to prosecute human rights perpetrators of serious human rights violations and to combat impunity in his Concurring Opinion to the Grand Chamber’s judgment in the case *Maktouf and Damjanović v. Bosnia and Herzegovina* (App. Nos. 2312/08 and 34179/08, judgment of 18 July 2013).

<sup>272</sup> Articles 7 and 12.

<sup>273</sup> Concluded in New York on 9 December 1948 and entered into force on 12 January 1951, 78 UNTS 277, Articles IV and VI. See also, for instance, International Convention on the Suppression and Punishment of the Crime of Apartheid (New York, 30 December 1973), entered into force on 18 July 1976, 1015 UNTS 243, Article IV.

<sup>274</sup> Adopted by the UN General Assembly with Resolution A/RES/61/117 of 20 December 2006, opened for signature in Paris on 6 February 2007, entered into force on 23 December 2010, 2716 UNTS 3, Articles 11 and 12.

<sup>275</sup> See Convention for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the Field (Geneva, 12 August 1949) 75 UNTS 31, Articles 49-50; Convention for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva, 12 August 1949) 75 UNTS 85, Articles 50-51; Convention relative to the Treatment of Prisoners of War (Geneva, 12 August 1949) 75 UNTS 135, Articles 129-130; Convention relative to the Protection of Civilian Persons in Time of War (Geneva, 12 August 1949) 75 UNTS 287, Articles 146-147. See also J. M. HENCKAERT, L. DOSWALD-BECK (eds), *Customary International Humanitarian Law*, *supra* note 21, p. 607 ff. (Rule 158). On the topic see, *inter alia*, A. CASSESE, *On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, in *European Journal of International Law*, vol. 9, 1998, pp. 2-17; C. KREB, *Reflections on the Iudicare Limb of the Grave Breaches Regime*, in *Journal of International Criminal Justice*, vol. 7, 2009, pp. 789-

The obligation to investigate serious human rights violations and bring perpetrators to justice has been also upheld in a wide array of non-binding instruments. A conspicuous number of resolutions, documents and declarations by international bodies has indeed asserted the duty of States to investigate cases concerning grave human rights violations, such as torture, genocide, disappearances and extrajudicial executions, and prosecute and punish those responsible.<sup>276</sup> Just to make an example, the final document of the World Conference on Human Rights, held in Vienna in 1993, affirms that all States “should abrogate legislation leading to impunity of those responsible for grave violations of human rights, such as torture, and prosecute such violations, thereby providing a firm basis to the rule of law”.<sup>277</sup>

#### **4.2. The duty to investigate, prosecute and punish: Assessing its customary status**

In light of the above and taking into account the parallel developments in the field of international criminal law (first and foremost, the establishment of an International Criminal Court),<sup>278</sup> it has been noted that, “while the extent of

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809; A. COHEN, Y. SHANY, *Beyond the Grave Breaches Regime: The Duty to Investigate and Prosecute Alleged Violations of International Law Governing Armed Conflicts*, in *Yearbook of International Humanitarian Law*, vol. 14, 2011, pp. 37-84. The States’ duty to investigate and prosecute serious human rights violations and grave breaches of humanitarian law has been repeatedly upheld also by the International Court of Justice. See, in this respect, T. INGADOTTIR, *The ICJ Armed Activities Case – Reflections on States’ Obligation to Investigate and Prosecute Individuals for Serious Human Rights Violations and Grave Breaches of the Geneva Conventions*, in *Nordic Journal of International Law*, vol. 78, 2010, pp. 581-598; T. INGADOTTIR, *The Role of the International Court of Justice in the Enforcement of the Obligation of States to Investigate and Prosecute Serious Crimes at the National Level*, in *Israel Law Review*, vol. 47, 2014, pp. 285-302.

<sup>276</sup> See, e.g., UN General Assembly Resolution No. 2840 (XXVI), UN Doc. A/RES/2840 of 18 December 1971, paras. 1, 2 and 4; UN General Assembly Resolution No. 3074 (XXVIII), UN Doc. A/RES/3074 of 3 December 1973, paras. 1, 3 and 4; Organization of American States resolution No. A.G. RES. 1770 (XXI-O/01) of 5 July 2001, preamble.

<sup>277</sup> Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para. 60.

<sup>278</sup> In the present section the duty to investigate, prosecute and punish is mainly considered from a human rights law angle. More detailed considerations about the major role played by the developments in the international criminal law field (which cannot be detached from the

these ‘accountability’ obligation under *customary* law remains controversial, there is considerable support for the view that there is (...) such a duty [to investigate, prosecute and punish] at least in respect of the most atrocious crimes, such as crimes against humanity”.<sup>279</sup> This statement seems to be further supported, *inter alia*, by the Principles of International Cooperation in Detention, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, which expressly provide that “war crimes and crimes against humanity, wherever they are committed, shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, punishment”.<sup>280</sup> While *per se* non-binding, such Principles may be regarded as useful guidelines supporting the existence of a certain consensus among States.

Arguably, the customary dimension of the duty to investigate, prosecute and punish seems, however, to be possibly ‘expanding’ (at least in terms of an *emerging* rule) to encompass all serious violations of human rights (thus, not limited to war crimes or crimes against humanity).<sup>281</sup> Apart from the case law

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parallel evolutions in human rights law) may be found, *inter alia*, in C.C. JOYNER, M. CHERIF BASSIOUNI (eds), *Reining in Impunity for International Crimes and Serious Violations of Fundamental Human Rights: Proceedings of the Siracusa Conference of 17-21 September 1998*, Toulouse, 1998; M. POLITI, G. NESI (eds), *The Rome Statute of the International Criminal Court: A Challenge to Impunity*, Aldershot, 2001; Y. BEIGBEDER, *International Justice against Impunity: Progress and New Challenges*, Boston, Leiden, 2005.

<sup>279</sup> H. DUFFY, *The ‘War on Terror’ and the Framework of International Law*, *supra* Chapter 1, note 342, p. 303. On the duty to punish war crimes see International Law Commission, First Report on Crimes against Humanity, prepared by the Special Rapporteur S.D. Murphy, UN Doc. A/CN.4/680 of 17 February 2015, para. 112 ff. Concerning the alleged customary nature of the duty to investigate and prosecute see, *inter alia*, N. ROHT-ARRIAZA, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, *supra* note 184, p. 489 ff. See also A. GITTI, *Impunity under National Law and Accountability under International Human Rights Law: Has the Time of a Duty to Prosecute Come?*, *supra* note 243, p. 73 ff. (reporting the debate over the customary nature of the right to prosecute and punish with respect to crimes against humanity); M.M. JACKSON, *The Customary International Law Duty to Prosecute Crimes against Humanity: A New Framework*, in *Tulane Journal of International and Comparative Law*, vol. 16, 2007, pp. 117-156.

<sup>280</sup> UN General Assembly’s resolution No. 3074 (XXVIII) of 3 December 1973, UN Doc. A/RES/3074(XXVIII), para. 1.

<sup>281</sup> Some academic literature has also supported such a broad approach. See, for instance, O’SHEA, *Amnesty for Crime in International Law and Practice*, *supra* note 194, p. 255 ff.

of human rights monitoring bodies, this assertion is supported by several non-binding instruments of recent elaboration. For instance, the already mentioned Updated Set of Principles to Combat Impunity expressly recognizes the duty of States to “undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished (principle 19). These Principles expressly address serious crimes under international law, which are defined to encompass not only war crimes or crimes against humanity, but also “other violations of internationally protected human rights that are crimes under international law and/or which international law requires States to penalize, such as torture, enforced disappearance, extrajudicial execution and slavery”.<sup>282</sup>

The Basic Principles and Guidelines on the Right to a Remedy and Reparation similarly uphold the States’ duty to investigate “gross violations of human rights law and serious violations of humanitarian law constituting crimes under international law” and prosecute and punish those responsible.<sup>283</sup>

The Principles on the Effective Prevention and Extra-Legal, Arbitrary and Summary Execution also expressly provide that “there shall be thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions”<sup>284</sup> and “Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice”.<sup>285</sup>

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*Contra*, see A. SEIBERT-FOHR, *Prosecuting Serious Human Rights Violations*, *supra* note 243, p. 313.

<sup>282</sup> UN Doc. E/CN.4/2005/102/Add.1, *supra* Introduction, note 62, at B.

<sup>283</sup> See again UN Doc. A/RES/60/147, *supra* note 172, para. 4.

<sup>284</sup> Recommended by Economic and Social Council’s resolution No. 1989/65 of 24 May 1989, para. 9.

<sup>285</sup> *Ibid.*, para. 18.

Notably, these Principles expressly state that the complete fulfilment of the obligation to investigate requires that “investigative authority shall have the power to obtain all the information necessary to the inquiry”.<sup>286</sup> This specific aspect has been upheld also by human rights monitoring bodies. In fact, as partly already stressed, both the Inter-American Court of Human Rights and the European Court of Human Rights have stated that governments should not obstacle investigations concerning serious human rights violations by resorting, *inter alia*, on the blanket invocation of official secrecy or other similar mechanisms.<sup>287</sup>

In its 2015 Report on the visit to Ukraine, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has likewise ‘condemned’ the executive’s reliance on secrecy in a way to prevent prosecuting authorities from accessing documents related to alleged ill-treatments perpetrated by State officials. This fact, together with other shortcomings in the cooperation between different investigative units, led the Committee to the conclusion that investigations had not met the “*requirements of effectiveness* as defined by the case law of the European Court of Human Rights and the relevant standards of the Committee”.<sup>288</sup>

The already mentioned Council of Europe’s Guidelines on Eradicating Impunity for Serious Human Rights Violations also expressly provide that States have a duty to both undertake an effective investigation in cases of serious human rights violations<sup>289</sup> and to bring those who have committed them to justice.<sup>290</sup> For the purpose of the Guidelines, ‘serious violations of

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<sup>286</sup> *Ibid.*, para. 10.

<sup>287</sup> See, *e.g.*, Inter-American Court of Human Rights, *Gomez Lund et al. v. Brazil*, *supra* Chapter 2, note 97, para. 202; European Court of Human Rights [GC], *El-Masri v. Former Yugoslav Republic of Macedonia*, *supra* note 196, para. 191.

<sup>288</sup> Emphasis added. See Council of Europe, Report to the Ukrainian Government on the Visit to Ukraine carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment from 9 September to 16 September 2014, *supra* Chapter 1, note 463, para. B.32.

<sup>289</sup> See again Council of Europe, Guidelines on Eradicating Impunity for Serious Human Rights Violations, *supra* note 233, para. VIII.1.

<sup>290</sup> *Ibid.*, para. II.3.

human rights' are defined as "those acts in respect of which States have an obligation under the [European] Convention [on Human Rights] (...) to enact criminal law provisions", provided that the violation reach a specific threshold of 'seriousness'.<sup>291</sup>

In addition to the above reported 'proliferation' of treaty and non-treaty sources upholding States' obligation to investigate serious human rights violations and prosecute and punish those responsible, recent evolutions in State practice may further support the argument that, at least with respect to the most grave violations, such a duty has reached or is progressively reaching the status of a customary norm. Despite States' widespread reluctance to conduct investigations and to prosecute and punish State agents responsible of serious human violations,<sup>292</sup> the growing *corpus* of domestic legislation and judicial decisions restating or implementing the obligation to investigate, prosecute and punish<sup>293</sup> seems indeed to outweigh contrary practice, to the point that the latter is progressively acquiring the status of an 'exception' to the rule (under the terms of the International Court of Justice's *dictum* in the *Nicaragua* case).<sup>294</sup>

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<sup>291</sup> On the topic see, *inter alia*, M. AILINCAI, *Le Conseil de l'Europe et la lutte contre l'impunité*, in *Revue trimestrielle des droits de l'homme*, vol. 25, 2014, pp. 395-418.

<sup>292</sup> The very widespread practice to resort to State secrecy to allow perpetrators of serious human rights violations to escape accountability might be regarded as evidence of this trend. As to the general lack of accountability for human rights violations committed in counter-terrorism see, *inter alia*, J. HAFETS, *Resisting Accountability: Transitional Justice in the Post-9/11 United States*, in *The International Journal of Human Rights*, vol. 19, 2015, p. 439 ff. A further striking example of this reluctant attitude is represented by the recent decision of the African Union to adopt an amendment to the Protocol on the Statute of the African Court of Justice and Human Rights to immunize African heads of State or government from criminal prosecution for serious human rights violations. The amendment (concerning Article 46A*bis* of the Protocol) has been adopted during the 23rd ordinary session of the Summit of the African Union in July 2014 (Doc. AU EX.CL/846 (XXV)). For a comment see, *inter alia*, D. TLADI, *The Immunity Provision in the AU Amendment Protocol. Separating the (Doctrinal) Wheat from the (Normative) Chaff*, in *Journal of International Criminal Justice*, vol. 13, 2015, pp. 3-17.

<sup>293</sup> While accounting for these developments at the domestic level would go much beyond the scope of the present work, a broad overview of national practice supporting the aforementioned in J. M. HENCKAERT, L. DOSWALD-BECK (eds), *Customary International Humanitarian Law*, *supra* note 21, p. 607 ff. (Rule 158).

<sup>294</sup> See International Court of Justice, *Case concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, judgment of 27 June 1986, ICJ Reports

In general, even without taking any conclusive stance as to the customary nature of the duty to investigate, prosecute and punish, it can thus be argued that the progressive “*movement away* from an era of unbridled freedom for the States, in which the decisions were motivated only by reason of political expediency and mostly led to impunity”,<sup>295</sup> towards an age of accountability – which had already been highlighted at the end of the past century – has increasingly crystallized into a consolidated normative reality.

#### **4.3. State secrecy *vis-à-vis* the duty to investigate, prosecute and punish**

Clearly, the affirmation of an obligation to investigate serious human rights violations and prosecute and punish those responsible has relevant implications with respect to the resort to State secrecy. Reliance on secrecy in a manner to prevent or obstruct investigations concerning serious human rights violations and grant impunity to perpetrators, either by leading to the

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p. 100, para. 186 (“The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolute rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule”). It has to be said, however, that domestic judgments have been characterized by a variance of approaches with respect to the exact content and legal nature of the duty to investigate, prosecute and punish. For instance, some national courts have upheld the existence of a customary duty to investigate, prosecute and punish only with respect to crimes against humanity. See, *e.g.*, the recent ruling issued by the South African Constitutional Court, *National Commissioner of the South African Police Service v. Southern African Human Rights Litigation Centre and Another*, case No. (2014) ZACC 30, 30 October 2014, para. 61. For a general comment on this case see, *inter alia*, G. WERLE, P.C. BORNKAMM, *Torture in Zimbabwe under Scrutiny in South Africa*, in *Journal of International Criminal Justice*, vol. 11, 2013, pp. 659-675.

<sup>295</sup> Emphasis added. See again A. GITTI, *Impunity under National Law and Accountability under International Human Rights Law: Has the Time of a Duty to Prosecute Come?*, *supra* note 243, p. 65. See also J.A.E. VERVAELE, *Delitos internacionales: del ius (non) puniendi del Estado-Nation a un deber puniendi imperativo de jus cogens*, in *Inter-American and European Human Rights Journal*, vol. 6, 2013, pp. 104-128. From an historical perspective over the ‘impunity paradigm’ which had characterized certain countries see, in particular, H. CAÑÓN, *La impunidad como esencia del Terrorismo de Estado*, in O. BALABAN, A. MEGGED (eds), *Impunidad y derechos humanos en América Latina. Perspectivas teóricas*, Buenos Aires, 2003, pp. 19-32.



dismissal of proceedings or by ‘shielding’ relevant material in court, is indeed inconsistent with the above summarized duty.

In this respect, the reliance on State secrecy may be included among those “measures designate to eliminate responsibility” that human rights monitoring bodies have often found inconsistent with the obligation of States to investigate serious human rights violations and prosecute and try perpetrators. Just to make an example, in its judgment in the *Barrios Altos v. Peru* case, the Inter-American Court of Human Rights emphasized that:

“[A]ll amnesties provisions, provisions on prescription and *the establishment of measures designed to eliminate responsibility are inadmissible*, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law”.<sup>296</sup>

Similarly, in its recent judgment of 20 November 2014 in the *Espinoza González v. Peru* case, the Inter-American Court expressly found that, taking into account that a serious human right violation was involved (torture), the respondent State should “abstain from using mechanisms such as amnesties to benefit the perpetrators, or any other similar provision, such as prescription, non-retroactivity of the criminal law, *res judicata*, *ne bis in idem*, or any other similar extenuating circumstance in order to evade [its] obligation [to investigate]”.<sup>297</sup> Notably, in its ruling in the *Bulacio v. Argentina* case, the Court further elaborated upon those mechanisms which may be inconsistent

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<sup>296</sup> Emphasis added. Inter-American Court of Human Rights, *Barrios Altos v. Peru*, *supra* Introduction, note 75, para. 41.

<sup>297</sup> Emphasis added. See Inter-American Court of Human Rights, *Espinoza González v. Peru*, *supra* note 184, para. 309.

with the States' duty to investigate, prosecute and punish, specifying that "extinguishment provisions or *any other domestic legal obstacle* that attempts to impede the investigation and punishment of those responsible for human rights violations are inadmissible".<sup>298</sup>

As previously stressed, the Human Rights Committee has likewise found that any legal impediment to the investigation or prosecution of human rights violations recognized as criminal under either international or national law should be removed.<sup>299</sup> Whilst the Committee did not include explicitly State secrecy among those legal impediments, it may still be argued that a blanket resort to it, at least when preventing *ab initio* investigations into serious human rights violations or leading to the dismissal of proceedings, could well be found to be inconsistent with the States' duty to investigate, prosecute and punish.

The African Commission on Human and Peoples' Rights has also acknowledged that the need to eradicate impunity (*de jure* or *de facto*) should prevent States from providing (either by law or practically) indemnity from legal process or exemption from legal responsibility in respect of serious violations of human rights.<sup>300</sup> Although the Commission – similarly to other human rights monitoring bodies – never mentioned explicitly State secrecy among those mechanisms capable to grant indemnity from legal process, as previously stated it is at least arguable that, under certain circumstances, State secrecy may act in practice as a bar to legal proceedings and as a means to grant impunity.

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<sup>298</sup> Emphasis added. See Inter-American Court of Human Rights, *Bulacio v. Argentina*, judgment of 18 September 2003, Series C No. 100, para. 116. For an overview of the case law of the Inter-American Court of Human Rights concerning mechanisms capable of fostering impunity see, *inter alia*, J. DONDÉ MATUTE, *El concepto de impunidad: leyes de amnistía y otras formas estudiadas por la Corte Interamericana de Derechos Humanos*, in Grupo Latinoamericano de Estudios sobre Derecho Penal Internacional, *Sistema interamericano de protección de los derechos humanos y derecho penal internacional*, Montevideo, 2010, pp. 263-293.

<sup>299</sup> See again Human Rights Committee, General Comment No. 31, *supra* note 153, para. 18.

As already stressed, the ‘inclusion’ of the State secrecy privilege among those ‘extenuating circumstances’ or ‘other domestic legal obstacles’ allowing States parties to circumvent their obligation to investigate serious human rights violations and prosecute and punish those responsible – *per se* ‘deductive’ – has been eventually upheld by the Committee against Torture in its General Comment No. 3. The Committee, despite referring specifically to the ‘legal impediments’ to the full realization of the right to an effective remedy for victims of torture, has indeed highlighted the role that State secrecy may generally play in potentially jeopardizing accountability for serious human rights violations.<sup>301</sup>

The European Court of Human Rights’ ruling in the *Nasr and Ghali* case further points towards this direction. The Court has indeed found that the invocation of State secrecy in the context of criminal proceedings with respect to information already in the public domain had the only scope of granting impunity to those responsible for the extraordinary rendition of Abu Omar, thus in breach of the State’s obligation to punish the perpetrators of serious human rights violations.<sup>302</sup>

##### **5. ‘State secrecy privilege’ before human rights courts and States’ duty to cooperate with international monitoring bodies**

From a different – but still relevant – perspective, the resort to the State secrecy privilege in proceedings before human rights courts might also amount to a breach of States’ obligations under human rights treaties.

The European Court of Human Rights, for instance, has found on several occasions that States’ refusal to disclose certain information based on national

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<sup>300</sup> See again African Commission on Human and Peoples’ Rights, African Commission on Human and Peoples’ Rights, *Zimbabwe Human Rights NGO Forum v. Zimbabwe*, *supra* note 204, para. 200.

<sup>301</sup> See again UN Doc. CAT/G/GC/3, *supra* note 163, para. 5.

security grounds violates the duty to cooperate with the Court enshrined in Article 38 of the European Court of Human Rights. According to this provision: “The Court shall examine the case together with the representatives of the parties and, if need it, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned *shall furnish all necessary facilities*”.<sup>303</sup> This obligation is strictly interlinked and constitutes a corollary of the right of individual petition embodied in Article 34 of the European Convention on Human Rights.

In its 2013 judgment in the *Janowiec v. Russia* case, the Grand Chamber of the European Court of Human Rights concluded that Russia violated Article 38 of the European Convention on Human Rights by refusing to submit to the Court documents related to the Katyń massacre which had been classified as ‘top secret’ under domestic law.<sup>304</sup> The Russian government had in fact rejected the evidentiary request of the Court by adducing that national legislation prevented it from communicating classified material to international organizations in the absence of effective guarantees that confidentiality would be ensured.<sup>305</sup>

The Court, recalling Article 27 of the Vienna Convention on the Law of Treaties, found that the State could not rely on domestic law to justify its failure to abide by its treaty obligations.<sup>306</sup> Moreover, the Court was not persuaded that the classification of the document had been genuinely driven by

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<sup>302</sup> See again European Court of Human Rights, *Nasr and Ghali v. Italy*, *supra* Chapter 1, note 173, para. 272.

<sup>303</sup> Emphasis added. On the States’ duty to cooperate with the European Court of human Rights see, *inter alia*, H. DE. VYLDERM, Y. HAECK, *The Duty to Cooperation of the Respondent State During the Proceedings Before the European Court of Human Rights*, in Y. HEACK, E. BREMS (eds), *Human Rights and Civil Liberties in the 21st Century*, Dordrecht, 2014, pp. 37-67. On Article 38 of the European Convention on Human Rights and its interpretation by the European Court of Human Rights see, *inter alia*, C. TRIPODINA, *Articolo 38*, in S. BARTOLE, P. DE SENA, V. ZAGREBELSKI (eds), *Commentario breve alla Convenzione europea dei diritti dell’uomo e delle libertà fondamentali*, *supra* Introduction, note 60, pp. 692-698.

<sup>304</sup> European Court of Human Rights [GC], *Janowiec et al. v. Russia*, App. Nos. 55508/07 and 29520/09, judgment of 21 October 2013, para. 216.

<sup>305</sup> *Ibid.*, para. 192.

<sup>306</sup> *Ibid.*, para 211.

national security considerations, especially considering that the executive's assertions that national security was at stake were not subjected to any meaningful scrutiny before an internal independent body.<sup>307</sup> In this respect, the Court reiterated its previous case law pursuant to which:

“even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to *some form of adversarial proceedings* before an *independent body* competent to review the reasons for the decision and the relevant evidence. If there was no possibility of challenging effectively the executive's assertion that national security was at stake, the State authorities would be able to encroach arbitrarily on rights protected by the Convention”.<sup>308</sup>

The Court also rejected the government's argument that confidentiality could not be guaranteed in the context of the proceedings before it, taking into account that, pursuant to Rule of Procedure 33(2), public access to a document may be restricted any time legitimate reasons – including national security concerns – require so.<sup>309</sup> Interestingly, the Court also recognized for the first time the autonomous nature of the procedural obligation enshrined in Article 38 of the European Convention on Human Rights. According to the Court, in fact, a breach of Article 38 might occur irrespective of any violation of other substantive rights protected under the Convention.<sup>310</sup>

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<sup>307</sup> *Ibid.*, para 214.

<sup>308</sup> Emphasis added. *Ibid.*, para. 213.

<sup>309</sup> *Ibid.*, para. 215.

<sup>310</sup> See European Court of Human Rights [GC], *Janowiec et al. v. Russia*, *supra* note 304, para. 209, confirming the Chamber's findings. See European Court of Human Rights, *Janowiec et al. v. Russia*, App. Nos. 55508/07 and 29520/09, judgment of 16 April 2012, para. 91. It should be stressed, however, that both the decisions of the Chamber and the Grand Chamber on the point had not been unanimous. See Partly Dissenting Opinion of Judge Kovler, joined by Judges Jungwiert and Zupančič to the Chamber's judgment and Joint Partly Dissenting Opinion of Judges Ziemele, De Gaetano, Laffranque and Keller to the Grand Chamber's judgment.

It follows from the aforementioned findings that the Court firmly upheld its own reviewing authority in establishing whether the classification of a certain document as secret is indeed based on solid and reasonable grounds. In this respect, the Court reiterated its previous case law excluding that contracting States can limit themselves to refuse the disclosure of certain evidence requested by the Court without duly motivating their stance.<sup>311</sup> According to the Court, in fact, whether a document should or should not be submitted to it is not a matter to be decided unilaterally by States parties.<sup>312</sup> In a specific instance, the Court even exercised a sort of *a priori* oversight by denying that domestic regulations concerning the review of detainees' correspondence could indeed amount to a 'State secret'.<sup>313</sup>

The Court, while admitting that there may be legitimate security concerns preventing public disclosure of certain pieces of evidence, has repeatedly found that such exigencies can nevertheless be easily accommodated through restricting their access and by holding closed hearings before the Court.<sup>314</sup> In one case, the Court even adopted a more lenient approach by affirming that States are required – at a minimum – to submit the evidence edited out of its sensitive parts or a summary of information.<sup>315</sup>

In none of its judgments touching upon this specific issue, the Court upheld instead the argument pursuant to which the refusal to submit evidence based on national security grounds would amount to a legitimate prerogative protected under Article 10 of the European Convention on Human Rights.<sup>316</sup>

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<sup>311</sup> See, e.g., European Court of Human Rights, *Timurtaş v. Turkey*, App. No. 23531/94, judgment of 13 June 2000, para. 67; *Akkum et al. v. Turkey*, App. No. 21894/93, judgment of 24 March 2005, para. 187; *Mikheyev v. Russia*, App. No. 77617/01, judgment of 26 January 2006, para. 104.

<sup>312</sup> European Court of Human Rights, *Davydov et al. v. Ukraine*, App. Nos. 17674/02 and 39081/02, judgment of 1 July 2010, para. 170.

<sup>313</sup> *Ibid.*, para. 171.

<sup>314</sup> See, e.g., European Court of Human Rights, *Imakayeva v. Russia*, App. No. 7615/02, judgment of 9 November 2006, para. 123; *Sasita Israilova et al. v. Russia*, App. No. 35079/04, judgment of 28 October 2010, para. 145.

<sup>315</sup> European Court of Human Rights, *Nolan and K. v. Russia*, App. 2512/04, judgment of 12 February 2009, para. 56.

<sup>316</sup> *Ibid.*, para. 53.

The Court similarly rejected the view that States' blanket right not to disclose information potentially hindering national security could be inferred from an overall examination of national legislation in the States parties to the European Convention on Human Rights<sup>317</sup> (with an implicit allusion to the existence of a general principle of law in this respect). The Court also declined to consider whether further indications legitimizing States to withhold secret information could be derived from other multilateral or bilateral treaties providing for a specific 'national security exception', such as the European Convention on Mutual Assistance in Criminal Matters and the Agreement between Russia and Poland on Legal Assistance and Legal Relations in Civil and Criminal Cases.<sup>318</sup>

All in all, as also stressed by the Judges Kovler, Jungwiert and Zupančič in their dissenting opinion to the Chamber's majority ruling in the *Janowiec* case,<sup>319</sup> the approach undertaken by the Court seems to reveal a certain attitude towards reducing States' margin of appreciation in assessing the existence of a threat to national security preventing disclosure of evidence. Whereas this trend partly corresponds to the Court's stance with respect to the use of evidentiary privileges in domestic proceedings, the aforementioned findings point at a more 'stricter' approach anytime secrecy claims are resorted to as a ground for not complying with the Court's requests. In the *Janowiec* case, for instance, the Grand Chamber did not show such deferential approach towards domestic courts' assessment that it had instead embraced – as previously stressed – in its judgment in the *A. et al. v. The United Kingdom* case.<sup>320</sup> To the contrary, by constantly referring to the possibility of accommodating national security concerns through restricted access to relevant material or *in camera*

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<sup>317</sup> See European Court of Human Rights [GC], *Janowiec et al. v. Russia*, *supra* note 304, para. 193.

<sup>318</sup> *Ibid.*

<sup>319</sup> European Court of Human Rights, *Janowiec et al. v. Russia*, *supra* note 310, partly dissenting opinion of Judge Kovler joined by Judges Jungwiert and Zupančič.

<sup>320</sup> European Court of Human Rights [GC], *A. et al. v. United Kingdom*, *supra* note 67, para. 219.

hearings,<sup>321</sup> the Court has implicitly entrusted itself with ultimate reviewing authority.

Such slightly differences may however be explained by appealing to the reasoning that some commentators have developed with respect to international criminal courts: “the national security interests of State cannot have the same weight before an international (...) court as before its own national (...) courts”.<sup>322</sup> A regional human rights court has indeed to adjudicate States’ responsibility for human rights violations, which, in a large amount of cases, have been directly perpetrated by or with the involvement of State agents. Accordingly, more than at the domestic level, States are often the only possessors of evidence that appear necessary to clarify the facts at stake.

In its most recent case law, the European Court has widely abided by and further elaborated upon the Grand Chamber’s findings (and approach) in the *Janowiec* case, reiterating that the blanket refusal by States to disclose relevant evidence in the proceeding before the Court violates Article 38 of the European Convention on Human Rights.<sup>323</sup> For instance, in its 2014 judgments in the *Al-Nashiri v. Poland* and *Husayn (Abu Zubaydah) v. Poland* cases, the Court found that the respondent State’s refusal to comply with the Court’s evidentiary request based on the ‘secrecy of investigation’ amounted to a violation of its duty to cooperate with it. Like in the *Janowiec* case, the Court held that contracting States cannot indeed rely on their internal law – including provisions on secrecy and classification of information – to justify their failure to obey to their treaty obligations.<sup>324</sup> The Court further reiterated that, even in cases in which the State alleges legitimate reasons for its refusal to provide

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<sup>321</sup> European Court of Human Rights [GC], *Janowiec et al. v. Russia*, *supra* note 304, para. 215.

<sup>322</sup> See again A. ESER, K. AMBOS, *The Power of National Courts to Compel the Production of Evidence and its Limits. An Amicus Curiae Brief to the International Criminal Tribunal for the Former Yugoslavia*, *supra* Chapter 1, note 250, p. 19.

<sup>323</sup> See, e.g., European Court of Human Rights, *Benzer et al. v. Turkey*, App. No. 23502/06, judgment of 12 November 2013, paras. 160-161.

<sup>324</sup> European Court of Human Rights, *Al-Nashiri v. Poland*, *supra* Introduction, note 26, para. 366; *Husayn (Abu Zubaydah) v. Poland*, *supra* note 196, para. 366.



evidence (such as national security considerations), the Court has nonetheless to satisfy itself that there are reasonable and solid basis for treating a certain document as secret or confidential.<sup>325</sup> Additionally, even when the Court is persuaded as to the need for granting confidentiality or secrecy, a similar exigency can be accommodated in several ways: by restricting public access, by classifying the whole or part of the document contained in the Court's files or, as extreme *ratio*, by holding in *camera* hearings.<sup>326</sup> Finally, the Court considered that the lack of more specific or detailed provisions for processing confidential, secrete or sensitive information in the Rules of Court does not justify *per se* the State's refusal to disclose such a material, considering the existence of a solid practice developed by the Court in processing confidential evidence.<sup>327</sup>

While showing an overall 'consolidating attitude' towards its previous case law, the Court has nonetheless brought some further elements into the picture. Firstly, the Court spelled out more clearly those procedural safeguards that can accommodate legitimate security concerns in the proceedings before the Court. Secondly, and more importantly, the Court explicitly referred to the State's failure to provide evidence before it while addressing the alleged violation of Article 3 of the European Convention on Human Rights, in its procedural limb.<sup>328</sup> In this regard, the Court – albeit implicitly – seemed to have considered the State's refusal to submit requested information before it as further evidence of the overall absence of public scrutiny over alleged serious violations of human rights, in breach of the right to the truth (in its collective dimension). Whereas this right and, more specifically, its 'role' with respect to the use (or abuse) of State secrecy will be the object of *ad hoc* analysis in the

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<sup>325</sup> European Court of Human Rights, *Al-Nashiri v. Poland*, *supra* Introduction, note 26, para 365. See also *Husayn (Abu Zubaydah) v. Poland*, *supra* note 196, para 357.

<sup>326</sup> *Ibid.*

<sup>327</sup> European Court of Human Rights, *Al-Nashiri v. Poland*, *supra* Introduction, note 26, para 371. See also *Husayn (Abu Zubaydah) v. Poland*, *supra* note 196, para 364.

<sup>328</sup> European Court of Human Rights, *Al-Nashiri v. Poland*, *supra* Introduction, note 26, para 496. See also *Husayn (Abu Zubaydah) v. Poland*, *supra* note 196, para 490.

next Chapter,<sup>329</sup> it suffices here to highlight that the Court, by means of the abovementioned reasoning, has threaded (or, better, hinted at) a sort of *fil rouge* linking the resort to secrecy evidentiary privileges at both the domestic and regional level.

For the sake of completeness, it is also worth mentioning the European Court of Human Rights' recent pronouncement in the *Nasr and Ghali* case. Although the issue at stake concerned a peculiar scenario falling outside of the scope of application of Article 38 of the European Convention – *i.e.*, the request made by the respondent government to not take into account those documents of the case file covered by State secrecy – the Court's refusal to uphold such argument and its decision to rather utilize all documents in the case file and in the public domain (regardless of State secrecy claims)<sup>330</sup> can arguably be considered as further evidence of the already mentioned Court's reluctance to adopt a deferential stance with respect to secrecy claims which would prevent it to examine relevant material over alleged violations of the Convention. Clearly, this is (and should be) particularly true when the availability and public diffusion of certain information and documents deprive any secrecy claim based on national security reasons of its legitimate *ratio*.

The Inter-American Court of Human Rights has also condemned State authorities' resort on secrecy to decline compliance with its orders. For instance, in its judgment in the *Cantoral Benavides v. Peru* case, the Inter-American Court found that the government could not rely on domestic legislation imposing to keep secret the names of judges participating in trials for treason or terrorism to elude the Court's order to summon certain witnesses.<sup>331</sup> The Court held indeed that States have a duty to cooperate with it and could not rely on their national legislation to justify their failure to

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<sup>329</sup> For more details see *infra*, Chapter 4, at 5.

<sup>330</sup> See again European Court of Human Rights, *Nasr and Ghali v. Italy*, *supra* Chapter 1, note 173, para. 227.

<sup>331</sup> See Inter-American Court of Human Rights, *Cantoral Benavides v. Peru*, judgment of 18 August 2008, Series C No. 69, para. 54. For a general overview of the procedure before the

comply.<sup>332</sup> Thus, just as the European Court of Human Rights, the Inter-American Court appealed, although tacitly, to the already mentioned rule embodied in Article 27 of the Vienna Convention on the Law of Treaties. The Inter-American Court also clearly stressed the *ratio* underpinning contracting States' obligation to abide by its evidentiary requests by noting that: "In trials dealing with violations of human rights it often happens that the claimant is not in a position to provide evidence, since some, in many cases, cannot be obtained without the cooperation of the State, which exercises control over the means necessary to clarify events that have taken place in their territories".<sup>333</sup> The wording of the Inter-American Court of Human Rights on the point mirrors that of the European Court of Human Rights, which has repeatedly highlighted the evidentiary 'imbalance' inherent to cases related to serious human rights violations.<sup>334</sup>

Furthermore, by agreeing to hear certain witnesses in closed hearings when security considerations adduced by the State suggested so,<sup>335</sup> the Inter-American Court has *de facto* implicitly recognized *in camera* hearings as a possible procedural mechanism capable of accommodating legitimate security interests in proceedings before it.

Whilst the African Commission and the African Court of Human and Peoples' Rights have so far not dealt explicitly with States' refusal to submit evidence based on secrecy claims, it is likely that they might reach the same conclusions when directly confronted with the issue. The African Commission on Human and Peoples' Rights has indeed held that the African Charter

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Inter-American Court of Human Rights see, *inter alia*, J.M. PASQUALUCCI, *The Practice and Procedure of the Inter-American Court of Human Rights*, Cambridge, 2003.

<sup>332</sup> *Ibid.* The duty of cooperation with the Court is expressly provided for in Article 24(1) of its Rules of Procedure.

<sup>333</sup> *Ibid.*, para. 55. See also, *e.g.*, Inter-American Court of Human Rights, *Godínez Cruz v. Honduras*, judgment of 20 January 1989, Series C No. 5, paras. 141-142; and *Gangaram Panday v. Suriname*, judgment of 21 January 1994, Series C No. 16, para. 49.

<sup>334</sup> See, *e.g.*, European Court of Human Rights, *Timurtaş v. Turkey*, *supra* note 311, para. 66.

<sup>335</sup> See again Inter-American Court of Human Rights, *Godínez Cruz v. Honduras*, *supra* note 333, para. 35.

contains a duty on the State to cooperate with it.<sup>336</sup> For instance, in its ruling in the case *Fédération Internationale des Ligues des Droits de l'Homme and Others v. Angola*, the Commission found that Article 57 of the Charter<sup>337</sup> “implicitly indicates that the State party (...) against which the allegation of human rights violations is levelled is required to consider them in good faith and to furnish to the Commission all information at its disposal to enable the latter to come to an equitable decision”.<sup>338</sup>

In all instances, States’ refusal to submit documents – apart from constituting a direct violation of the duty to co-operate – has been interpreted as a ground to draw favourable inferences concerning the applicant’s allegations.<sup>339</sup> This specific element has also been regarded as one of those features making international adjudication more successful than domestic litigation in ensuring the protection of fundamental human rights *vis-à-vis* national security claims. As it has been noted, indeed, “supernational and international courts (...) are not subject to the cut-off application of secrecy claims (because, for example, even if the government asserts a State secrecy privilege, the court can shift the burden of proof onto the government and hold it accountable for its inability to demonstrate that the human rights claims of the applicants are false”.<sup>340</sup>

As a conclusive remark, it is worth mentioning that, under a broader perspective, the highlighted trend undertaken by human rights bodies with

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<sup>336</sup> R. MURRAY, *Evidence and Fact-Finding by the African Commission*, in M. EVANS, R. MURRAY (eds), *The African Charter on Human and Peoples’ Rights. The System in Practice, 1986-2000*, *supra* note 15, p. 157.

<sup>337</sup> Article 57 of the African Charter on Human and Peoples’ Rights states: “Prior to any substantive consideration, all communications shall be brought to the knowledge of the State concerned by the Chairman of the Commission”.

<sup>338</sup> Emphasis added. African Commission on Human and Peoples’ Rights, *Fédération Internationale des Ligues des Droits de l'Homme and Others v. Angola*, Communication No. 159/96, judgment of 11 November 1997, para. 10.

<sup>339</sup> See, *inter alia*, European Court of Human Rights [GC], *Janowiec et al. v. Russia*, *supra* note 304, para. 209. See also African Commission on Human and Peoples’ Rights, *Fédération Internationale des Ligues des Droits de l'Homme and Others v. Angola*, *supra* note 338, para. 10.

<sup>340</sup> F. FABBRINI, *The Interaction of Terrorism Law with Human Rights*, in G. LENNON, C. WALKER (eds), *Routledge Handbook of Law and Terrorism*, *supra* note 86, pp. 97-98.

respect to States' reluctance to submit evidence based on national security considerations mirrors the finding of other international adjudicatory bodies, which have similarly found that States' blanket withhold of information amounts to a violation of their duty to cooperate with them.<sup>341</sup>

Moreover, even beyond international adjudication *strictu sensu*, the State's reliance on secrecy may similarly be inconsistent with its duty to cooperate with international human rights monitoring mechanisms. Just to make an example, in its 2010 report to the Italian government, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment observed that: "as regards the information denied *on the grounds of confidentiality* (...) [t]his is clearly in breach of Article 8, paragraph 2, of the Convention [European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment],<sup>342</sup> which places an obligation on Parties to provide such information, and with the general principle of co-operation set out in Article 3 of the Convention".<sup>343</sup>

## 6. Conclusions

The resort to the State secrecy privilege might conflict with several human rights obligations. Depending on its practical application (*i.e.*, leading to the dismissal of criminal or civil proceedings, introducing secret evidence or requiring secret hearings), the invocation of the State secrecy privilege might

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<sup>341</sup> See again ICTY, *Prosecutor v. Blaškić*, decision on the objection of the Republic of Croatia to the issuance of *subpoenae duces tecum*, *supra* Chapter 1, note 247, para. 130. While not finding any breach of the duty to cooperate with the Tribunal, it is still worth mentioning the judgment of the International Labour Organization Administrative Tribunal in the case *Ballo v. UNESCO* (judgment No. 191 of 15 May 1972). The Tribunal ordered the international organization to produce certain documents for which it had made a confidentiality claim and examined it *in camera*.

<sup>342</sup> Strasbourg, 26 November 1987, entered into force on 1<sup>o</sup> February 1989, ETS No. 126, 1561 UNTS 363.

<sup>343</sup> Emphasis added. Council of Europe, Report to the Italian Government on the Visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment from 27 to 31 July 2009, Doc. CPT/Inf(2010) 14, 28 April 2008, para. E.7.

indeed cast doubts as to States' compliance with their duty to guarantee the right to a fair trial and the right to an effective remedy or to investigate serious human rights violations and prosecute and punish those responsible. Furthermore, if relied on to withhold information concerning human rights violations from international adjudication, secrecy claims may also be inconsistent with the States' duty to cooperate with human rights courts.

While States' claims of secrecy are likely to be grounded on 'national security' or 'public emergency' arguments, the analysis undertaken in this Chapter has demonstrated that the suspension or derogability of said rights and obligations is anything but automatic. To the contrary, at least when violations of absolute and non-derogable rights are concerned, procedural guarantees essential to ensure their respect share their same legal 'nature' (*i.e.*, absoluteness and non-derogability). Furthermore, as previously stressed, even with respect to the States' obligation to investigate serious human rights violations and prosecute and punish those responsible, the case law of human rights monitoring bodies has shown a progressive tendency to adopt a 'restrictive approach' (not to say, a 'total ban') as to the admissibility of procedural mechanisms capable of contributing to impunity (among which, especially after the recent judgement of the European Court of Human Rights in the *Nasr and Ghali case*, the blanket resort to State secrecy may be included).

Additionally, even when the invocation of the State secrecy privilege impairs non-absolute or derogable rights, any restriction or suspension claim is still subject to the fulfilment of specific requirements. As highlighted earlier on, human rights monitoring bodies have interpreted 'limitation' pre-conditions (fore and foremost, the 'proportionality' test) so to impose, at a minimum, an obligation to put in place specific procedural safeguards against abuses. Derogations clauses requirements also require States, *inter alia*, to prove that any specific suspension of human rights guarantees is strictly required by the exigencies of the situation and is not inconsistent with their

international law obligations. As underlined, it is doubtful whether similar conditions may be deemed satisfied by certain derogation arguments advanced in respect of counter-terrorism activities.

Any more in-depth considerations is necessarily dependent on a case-by-case analysis taking into account the specific treaty commitments of the State concerned and the way in which the invocation of the State secrecy privilege works in practice. Yet, it may be certainly held that statements such as the ones issued by the United States Court of Appeals for the Fourth Circuit in an extraordinary rendition case – pursuant to which “some matters are so pervaded by State secrets as to be incapable of judicial resolution” and “no attempt is made to balance the need for secrecy (...) against a party’s need for the information disclosure”<sup>344</sup> – appear clearly inconsistent with the current international legal *régime*.

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<sup>344</sup> See United States Court of Appeals for the Fourth Circuit, *Khaled El-Masri v. United States of America* et al., *supra* Chapter 1, note 222, at 306 and 311.





## CHAPTER 4

# STATE SECRECY AND THE RIGHT TO KNOW THE TRUTH

*“(…) if societies are to prevent recurrences of past atrocities and to cleanse themselves of corrosive enduring effects of massive injuries to individuals and whole groups, societies must understand – at the deepest possible levels – what occurred and why. (…) They must seek, at least, thus to uncover the truth (…).”<sup>1</sup>*

**SUMMARY:** 1. Introduction. – 2. The right to know the truth concerning serious violations of human rights law in international law. – 2.1. The right to the truth: A general overview – 2.1.1. Origins and recognition of the right to the truth at the universal level. – 2.1.2. The right to the truth in non-binding international instruments. – 2.1.3. The recognition of the right to the truth at the regional level. – 2.2. The right to the truth in the case law of human rights monitoring bodies. – 2.2.1. Human rights violations entailing the right to the truth. – 2.2.2. The content of the right to the truth. – 2.2.3. The individual and collective dimensions of the right to the truth. – 2.2.4. The nature of the right to the truth and its relationship with other human rights: An autonomous right? – 2.2.5. Divergences and convergences in the case law of human rights monitoring bodies. – 3. State practice. – 3.1. The right to the truth in domestic legislation. – 3.2. The right to the truth in domestic case law. – 4. The right to know the truth: a customary rule or a general principle of international law? – 5. State secrecy *vis-à-vis* the right to the truth. – 6. Conclusions.

### 1. Introduction

As previously pointed out, classification of documents and the invocation of secret evidentiary privileges in courts can represent, in practice, valuable tools for hiding the truth concerning heinous abuses of human rights. In this respect, ‘secrecy’ may represent a useful expedient in support of ‘deniability’<sup>2</sup> and, hence, impunity.

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<sup>1</sup> R.I. ROTBERG, *Truth Commissions and the Provision of Truth, Justice and Reconciliation*, in R.I. ROTBERG, D. THOMPSON (eds), *Truth v. Justice: The Morality of Truth Commissions*, Princeton, 2000, p. 3.

<sup>2</sup> On how deniability may act in practice see, more generally, T.L. KARL, *US Foreign Policy, Deniability and the Political ‘Utility’ of State Terror. The Case of El Salvador*, in M. COHN (ed.), *The United States and Torture. Interrogation, Incarceration and Abuse*, New York and London, 2011, pp. 69-95.

However, parallel to the development of transitional justice processes, especially in Latin America, the last decades have witnessed the progressive recognition of a right to know the truth about serious human rights abuses as an emerging concept in international human rights law.<sup>3</sup> This right has indeed originally evolved in response to the States' failure to provide information about serious human rights violations perpetrated during periods of dictatorships and civil wars. As recently underscored by the Inter-American Commission of Human Rights, in fact, the "absence of complete, objective and truthful information about what transpired during those periods has been a constant, a policy of the State and even a 'tactic of war'".<sup>4</sup> Furthermore, this attitude permeated any branch of State power. This is made evident, for instance, by the Supreme Court of El Salvador's remarks in commenting on the report issued by the Truth Commission established in the country:

*“La ‘Comisión de la Verdad para El Salvador’ formula ciertos cargos contra el Presidente de la Corte Suprema de Justicia, que en síntesis consisten en atribuirle obstaculización en la obtención de información*

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<sup>3</sup> As to the role that transitional justice processes have played in terms of replacing State secrecy with truth and transparency see, e.g., A. PAIGE, *How ‘Transitions’ Reshaped Human Rights: A Conceptual History of Transitional Justice*, in *Human Rights Quarterly*, vol. 31, 2009, p. 322.

<sup>4</sup> Inter-American Commission on Human Rights, *The Right to the Truth in the Americas*, Doc. OAS/Ser.L/V/II.152, doc. 2, 13 August 2014, para. 44. The practice not to disclose information as a 'policy of State' is not a phenomenon confined only to Latin American countries. See, e.g., R. ENGELMANN, *The ‘Records’, the Public and Collective Memories: The Inspection of Personal Records*, in S. KARSTEDT (ed.), *Legal Institutions and Collective Memories*, Oxford, Portland, 2009, pp. 329-339. The Author also highlights that, apart from supporting criminal prosecutions, the "opening up the Stasi files contributed to and accelerated the process of delegitimation and social system of the GDR [German Democratic Republic], and (...) provide[d] a kind of immunisation against future tendencies towards authoritarian attitudes and regimes" (*ibid.*, p. 338). Similarly, with respect to the situation in the Former Yugoslavia, see A. RESANOVIĆ, *The Violations of Human Rights as a Result of Keeping and Opening Secret Files of State Security Services in Yugoslavia*, in *Yearbook of Balkan Human Rights Network*, vol. 2, 2002, pp. 322-342. More generally, as to the relationship between State and truthful information see, e.g., J. FRÉMONT, *Du droit de l'État à la vérité au droit à la vérité de l'État*, in *Revue générale de droit*, vol. 18, 1987, pp. 883-899.

*de los expedientes instruidos, sobre los casos investigados and injerencia negativa*”.<sup>5</sup>

Already in 1997, the Inter-American Court of Human Rights held that the right to know the truth about serious human rights violations was a concept in “doctrinal and jurisprudential development”.<sup>6</sup> More recently, the Human Rights Council stressed “the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights”.<sup>7</sup>

The very establishment in several States of *Truth* and Reconciliation Commissions dealing with the legacies of past human rights abuses may be regarded as an additional signal of the growing awareness about the importance that truth-seeking processes may have in fostering the protection of human rights.<sup>8</sup>

Against this backdrop, this Chapter aims at investigating the legal foundations of the right to know the truth, as well as its scope and nature, in order to assess *if* and *to what extent* obligations stemming from this right do prevent widespread reliance on ‘State secrets’, at least any time it ends up covering serious human rights violations.<sup>9</sup> This goal appears in fact of

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<sup>5</sup> *Pronunciamento de la Corte Suprema de Justicia de El Salvador sobre el Informe de la Comisión de la Verdad para El Salvador y sus anexos*, San Salvador, March 1993, p. 2.

<sup>6</sup> Inter-American Court of Human Rights, *Castillo-Páez v. Peru*, *supra* Chapter 3, note 255, para. 86.

<sup>7</sup> Human Rights Council, Resolution No. 21/7 of 27 September 2012 (adopted without a vote), UN Doc. A/HRC/RES/21/7 of 10 October 2012, para. 1.

<sup>8</sup> On the topic of Truth and Reconciliation Commissions see, *inter alia*, M. FREEMAN, *Truth Commissions and Procedural Fairness*, Cambridge, 2006; T. BUERGENTHAL, *Truth Commissions: Between Impunity and Prosecution*, in *Case Western Reserve Journal of International Law*, vol. 38, 2007, pp. 217-223; E. WIEBELHAUS-BRAHM, *Truth Commissions and Transitional Societies: The Impact on Human Rights and Democracy*, London, 2010; P. HAYNER, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2nd ed., New York, 2011; A. BISSET, *Truth Commissions and Criminal Courts*, Cambridge, 2012; A. BISSET, *The Role of Truth Commissions in Adjudicating Human Rights Violations*, in J.A. GREEN, C.P.M. WATERS, S GHANDHI (eds), *Adjudicating International Human Rights: Essays in Honour of Sandy Ghandhi*, Leiden, Boston, 2015, pp. 192-211.

<sup>9</sup> As to the possible tension between the right to know the truth and national security secrecy doctrines (including evidentiary privileges) see, *inter alia*, J. DAVIS, *Seeking Human Rights Justice in Latin America: Truth, Extra-territorial Courts, and Process of Justice*, Cambridge,

particular relevance at a moment when commentators have begun advocating the need to apply transitional justice concepts beyond regime changes to shape the legal discourse of accountability for serious human rights abuses also within liberal democracies.<sup>10</sup>

## **2. The right to know the truth concerning serious human rights violations in international law**

### **2.1. The right to the truth: A general overview**

The right to know the truth concerning serious violations of human rights (or ‘right to the truth’) is rapidly emerging as a ‘legal paradigm’<sup>11</sup> under international human rights law.<sup>12</sup>

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2013, p. 107 ff. See also Amnesty International, *USA – Time for Truth and Justice. Reflections and Recommendations on Truth, Remedy and Accountability as Declassification of Senate Committee Summary Report on CIA Secret Detentions Awaited*, London, 2014, p. 9.

<sup>10</sup> See J. HAFETS, *Resisting Accountability: Transitional Justice in the Post-9/11 United States*, in *The International Journal of Human Rights*, *supra* Chapter 3, note 292, pp. 429-446.

<sup>11</sup> This expression is used by 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*, in *Human Rights Law Review*, vol. 14, 2013, p. 100.

<sup>12</sup> The UN Office of the High Commissioner for Human Rights has recently defined the recognition of the right to the truth as one of the main achievements in the progressive expansion of the body of international human rights law (see *United Nations Human Rights Appeal 2014*, Geneva, 2014, p. 27). Among the copious literature on the topic see, *inter alia*, J.M. PASQUALUCCI, *The Whole Truth and Nothing but the Truth: Truth Commissions, Impunity and the Inter-American Human Rights System*, in *Boston University International Law Journal*, vol. 12, 1994, pp. 321-370; M. PARLEVLIET, *Considering Truth: Dealing with Legacy of Gross Human Rights Violations*, in *Netherlands Quarterly of Human Rights*, vol. 16, 1998, pp. 141-174; T. ANTKOWIAK, *Truth as Right and Remedy in International Human Rights Experience*, in *Michigan Journal of International Law*, 2001-2002, pp. 977-1013; Y. NAQVI, *The Right to the Truth in International Law: Fact or Fiction?*, in *International Review of the Red Cross*, 2006, pp. 245-273; K. DYKMANN, *Impunity and the Right to Truth in the Inter-American System of Human Rights*, in *Iberoamericana*, vol. 26, 2007, pp. 45-66; J. MÉNDEZ, *An Emerging ‘Right to the Truth’: Latin-American Contributions*, in S. KARSTEDT (ed.), *Legal Institutions and Collective Memories*, *supra* note 4, pp. 39-60; A. GONZÁLEZ-SALZBERG, *El derecho a la verdad en situaciones de post-conflicto bélico de carácter no-internacional*, in *Revista Colombiana de Derecho Internacional*, vol. 12, 2008, pp. 435-467; V. NEWMAN-PONT, *Falso o Verdadero (El derecho a la verdad es norma imperativa internacional?)*, in *Revista Colombiana de Derecho Internacional*, 2009, pp. 43-69; L. BURGORGUE-LARSEN, *The Right to the Truth*, in L. BURGORGUE-LARSEN, A. UBEDA DE TORRES (eds), *The Inter-American Court of Human Rights. Case Law and Commentary*, *supra*

In general terms, the right to the truth has been defined as the right of the victim (individual dimension) and of the society as a whole (collective dimension) to know the truth about serious violations of human rights, including the identity of the perpetrators and the context in which abhorrent crimes such as enforced disappearances, tortures and extrajudicial executions have been committed.<sup>13</sup> Despite this definition, however, when looking closely at both law and practice, the right to the truth amounts to a blurred concept as to its nature, content and enforceability.

### **2.1.1. Origins and recognition of the right to the truth at the universal level**

The origins of the right to the truth are generally traced back to international humanitarian law and, more specifically, to Articles 32 and 33 of the 1977 Additional Protocol I to the Geneva Conventions.<sup>14</sup> These provisions assert the right of the families to “know the fate of their relatives” by requiring parties to an armed conflict to search for missing persons and record information related to their disappearance.<sup>15</sup>

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Chapter 3, note 14, pp. 695-717; in D. GROOME, *The Right to Truth in the Fight against Impunity*, in *Berkeley Journal of International Law*, 2011, pp. 175-199; A. AGUIAR, *Memoria, Verdad y Justicia. Derechos humanos transversales de la democracia*, Caracas, 2012, p. 109 ff; O. DE FROUVILLE, *The Human Rights to the Truth in International Law*, in *Sorbonne-Assas Law Review*, 2013, available at: <http://lawreview.u-paris2.fr> (last accessed on 24 February 2016). For some early references to the right to the truth see also I. LINDEN, *The Right to the Truth: Amnesty, Amnesia and Secrecy*, in *Development in Practice*, vol. 4, 1994, pp. 141-143.

<sup>13</sup> See Study on the Right to the Truth. Report of the Office of the United Nations High Commissioner for Human Rights, UN Doc. E/CN.4/2006/91, 8 February 2006. See also J. MÉNDEZ, F. BARIFFI, *Truth, Right to, International Protection*, in R. WOLFRUM (ed.), *Max Planck Encyclopaedia of Public International Law*, 2008, electronic edition, available at: [www.mpepil.com](http://www.mpepil.com) (last accessed on 24 February 2016).

<sup>14</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I) (Geneva, 8 June 1977) 1125 UNTS 3.

<sup>15</sup> For a commentary of this provisions see Y. SANDOZ, C. SWINARSKI, B. ZIMMERMANN (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949*, Geneva, 1987.

The right to the truth has been subsequently transplanted into the realm of international human rights law, finding ‘fertile’ ground mainly with respect to enforced disappearances.<sup>16</sup> At the international level, in fact, the right to the truth is expressly recognized in Article 24(2) of the United Nations Convention for the Protection of All Persons from Enforced Disappearances,<sup>17</sup> pursuant to which: “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*. Each State Party shall take appropriate measures in this regard” (emphasis added).<sup>18</sup>

In its 2010 General Comment on the Right to the Truth in relation to Enforced Disappearances, the Working Group on Enforced or Involuntary Disappearances<sup>19</sup> held that the right to know the fate and whereabouts of disappeared persons is one of both absolute and non-derogable character and,

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<sup>16</sup> On the topic see G. CITRONI, T. SCOVAZZI, *The Struggle against Enforced Disappearances and the 2007 United Nations Convention*, Leiden, Boston, 2007.

<sup>17</sup> The right to know the truth is reiterated also in the Preamble of this Convention, in which the Contracting Parties affirm: “the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end”.

<sup>18</sup> On this specific provision see, *inter alia*, M. LOT VERMEULEN, *Enforced Disappearance. Determining State Responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance*, Cambridge, Antwerp, Portland, 2012, p. 86 ff.

<sup>19</sup> The Working Group on Enforced or Involuntary Disappearances has been established by the Commission on Human Rights by Resolution 20(XXXVI) of 29 February 1980 with the aim of “examin[ing] questions relevant to enforced or involuntary disappearances of persons”. After the adoption in 1992 of the Declaration on the Protection of All Persons from Enforced Disappearances (UN General Assembly Resolution No. 47/133 of 18 December 1992), the Working Group is entrusted with the task of monitoring States’ compliance with the provisions of the Declaration. Human Rights Council’s Resolution 27/1 has recently renewed the mandate of the Working Group (UN Doc. A/HRC/RES/27/1 of 1 October 2014). The Working Group works side by side with the Committee on Enforced Disappearances which monitors States’ compliance with the Convention for the Protection of All Persons from Enforced Disappearance. The Committee on Enforced Disappearances has recently reiterated the obligation of States parties to guarantee the right to the truth with respect to enforced disappearances in its observations on Mexico. See Concluding Observations on the Report submitted by Mexico under Article 29, paragraph 1, of the Convention (advanced edited version, 2015), para. 33. See also Concluding Observation on the Report submitted by Argentina under Article 29, paragraph 1, of the Convention, UN Doc. CED/C/ARG/CO/1 of 12 December 2013, para. 35.

as such, cannot be subject to any restrictions or derogations, even when legitimate aims or extraordinary circumstances are invoked to this purpose.<sup>20</sup>

While the Convention for the Protection of All Persons from Enforced Disappearances is the only international human rights *binding* instrument to expressly assert a right to the truth, it has been correctly observed that “there is a growing body of authority within human rights law for the existence of [this] right”.<sup>21</sup> The United Nations General Assembly,<sup>22</sup> the Commission on Human Rights<sup>23</sup> and its successor, the Human Rights Council,<sup>24</sup> have all adopted resolutions upholding this right with respect to both enforced disappearances and, more generally, serious human rights violations. In 2011, the Human Rights Council also established a Special Rapporteur on the Promotion of *Truth, Justice, Reparation and Guarantees of Non-Recurrence*, entrusting him with the task of, *inter alia*, studying and fostering truth-seeking processes.<sup>25</sup>

In 2013, the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism also acknowledged the right of the victims of systematic human rights violations, and of the public at large, to know the truth.<sup>26</sup> The Special Rapporteur defined this right as entailing the victim, his next of kin, and the whole society to

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<sup>20</sup> Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. A/HRC/16/48 of 26 January 2011, p. 15. The Working Group on Enforced or Involuntary Disappearances has recognized the right of the relatives of the victims of enforced disappearances to know the truth about the fate and whereabouts of the missing ones since 1981. See UN Doc. E/CN.4/1435.22 of 22 January 1981, para. 187. More recently, see also Report of the Working Group on Enforced Disappearances, UN Doc. A/HRC/27/49 of 4 August 2014, paras. 77, 78, 86, 96, 108 and 123. Taking into account the specific subject of this work, it is noteworthy that, in this Report, the Working Group expressed particular concern for the latest developments in the trial before Guatemalan courts of José Efraín Ríos Montt and the “uncertainty caused regarding the right to truth and justice of victims” (*ibid.*, para. 77). The case and, in particular, the use of State secrecy in the context of the trial have been briefly referred to *supra*, Chapter 1, at 5.2.

<sup>21</sup> See W. SHABAS, *Unimaginable Atrocities: Justice, Politics, and Rights at War Crimes Tribunals*, Oxford, 2012, p. 171.

<sup>22</sup> See, *inter alia*, UN Doc. A/RES/65/196 of 21 December 2010; UN Doc. A/RES/65/196 of 3 March 2011; UN Doc. A/RES/68/165 of 21 January 2014.

<sup>23</sup> See, *e.g.*, UN Doc. E/CN.4/RES/2005/66 of 20 April 2005.

<sup>24</sup> See, *e.g.*, UN Doc. A/RES/HRC/9/11 of 24 September 2008; UN Doc. A/RES/HRC/12/12 of 1 October 2009.

<sup>25</sup> See UN Doc. A/HRC/RES/18/7 of 13 October 2011.

obtain information concerning serious human rights abuses, including the identity of the perpetrators, the whereabouts of the victim, and, in some instances, the circumstances that led to authorize the abuses.<sup>27</sup> The Special Rapporteur also highlighted the close relationship existing between the right to the truth and other human rights.<sup>28</sup>

Several other special procedures mandate-holders have similarly acknowledged the existence of the right to the truth.<sup>29</sup> For instance, already in 1995, the Special Rapporteur on the Question of Human Rights and States of Emergency endorsed the Report of the meeting of experts on rights not subjected to derogation during states of emergency and exceptional circumstances, which included the right to know the truth within the category of non-derogable human rights.<sup>30</sup> The Report also asserted the customary nature of the said right.<sup>31</sup> More recently, the Special Rapporteur on the Independence of Judges and Lawyers upheld explicitly the right to the truth as a *jus cogens* rule.<sup>32</sup>

The UN Office of the High Commissioner for Human Rights has also repeatedly recognized the right to the truth<sup>33</sup> and, in particular, its inderogable and inalienable character. For instance, in its 2007 report, it concluded that:

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<sup>26</sup> See again UN Doc. A/HRC/22/52, *supra* Introduction, note 41, para. 23.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> See Report of the Special Rapporteur in the Field of Cultural Rights – Memorialization process, UN Doc.A/HRC/25/49 of 23 January 2014, para. 28. See also, *e.g.*, Special Rapporteur on Torture, Mission in Paraguay, UN Doc. A/HRC/7/3/Add.3 of 1st October 2007, para. 83 (acknowledging the importance of the establishment of the Truth and Justice Commission to guarantee the right to the truth about gross and systematic human rights violations perpetrated by the previous regime); UN Doc. A/68/362, *supra* Chapter 1, note 87, para. 12 ff. (stressing the close relationship between the right to the truth and the right of access to State-held information).

<sup>30</sup> Report of the meeting of experts on rights not subjected to derogation during states of emergency and exceptional circumstances (Geneva, 17-19 May 1995), UN Doc. A/CN.4/Sub.2/1995/20 of 26 June 1995, Annex I, para. 39.

<sup>31</sup> *Ibid.*, para. 40.

<sup>32</sup> Report of the Special Rapporteur on the Independence of Judges and Lawyers, UN Doc. E/CN.4/2006/52 of 23 January 2006, para. 16.

<sup>33</sup> See, recently, for instance, Report of the Office of the High Commissioner for Human Rights Investigation on Sri Lanka, UN Doc. A/HRC/30. CRP.2 of 16 September 2015, paras. 7, 13, 190, 444 ff, and 1241.



“Because it is linked to other fundamental rights and to the fundamental obligations of States, particularly the obligation to combat impunity, the right to the truth is an inalienable and inderogable right. *Amnesties and similar measures and restrictions on the right to seek information must not be used to limit, nullify or impair the right to the truth*”.<sup>34</sup>

The relevance that this last assertion may have with respect to State secrecy speaks for itself.

The United Nations Secretary General has also recognized the right to know the truth about serious violations of human rights. For instance, in its 2012 Report on missing persons, the Secretary General held that this right implies knowing the full and complete truth about past human rights abuses, including the circumstances leading to them, the identity of the perpetrators and, in case of enforced disappearances, the fate and whereabouts of the victim.<sup>35</sup>

### **2.1.2. The right to the truth in non-binding international instruments**

Several non-binding international instruments also uphold the right to the truth.<sup>36</sup> The Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, for instance, expressly asserts that: “every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the

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<sup>34</sup> See UN Office of the High Commissioner for Human Rights, Report on the Right to the Truth, UN Doc. A/HRC/5/7 of 7 June 2007, para. 86.

<sup>35</sup> Report of the Secretary General on Missing Persons, UN Doc. A/67/267 of 8 August 2012, para. 5.

<sup>36</sup> See, *inter alia*, the Guiding Principles on Internal Displacement (UN Doc. E/CN.4/1998/53/Add.2 of 11 February 1998), whose Principle 16 recognizes the right of internally displaced persons to know the fate and whereabouts of their missing relatives, contextually requiring States to undertake proper investigations.

circumstances and reasons that led, through massive and systematic violations, to the[ir] perpetration (...).<sup>37</sup>

Pursuant to the Principles, the right to the truth holds both an individual dimension (as imprescriptible and inalienable right of the victim and his family to know the truth about the circumstances in which the violation took place)<sup>38</sup> and a collective one (binding States, *inter alia*, to preserve memory by facilitating access to archives and other evidence on human rights abuses).<sup>39</sup> However, whereas the right to the truth is generally framed as an absolute right, the duty to preserve archives stemming from it admits limited restrictions. According to Principle 16, judicial and non-judicial investigative authorities might be denied access provided that: the restriction is prescribed by law; the government can demonstrate that the restriction is necessary in a democratic society to protect a *legitimate national security interest*; and the refusal is subject to judicial review. As underlined by the Independent Expert to update the Set of Principles to combat impunity, the expression ‘legitimate national security interest’ should be interpreted to exclude any restrictions whose actual purpose is to prevent the exposure of wrongdoings.<sup>40</sup>

Whilst the abovementioned criteria clearly echo those applicable with respect to the right of access to State-held information, the close link that the Principles establish between the right to the truth and the duty of States to preserve archives and facilitate knowledge of evidence about human rights

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<sup>37</sup> United Nations Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, *supra* Introduction, note 62, Principle 2. The Updated Set of Principles amends the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity submitted by the Special Rapporteur on the impunity of perpetrators of violations of civil and political rights, Louis Joinet, to the UN Sub-Commission on the Prevention of Discrimination and the Protection of Human Rights in 1997 (UN Doc. E/CN.4/Sub.2/1997/20/Rev.1 of 2 October 1997).

<sup>38</sup> *Ibid.*, Principles 1 and 4.

<sup>39</sup> *Ibid.*, Principle 3.

<sup>40</sup> See Report of the independent expert to update the Set of Principles to combat impunity, UN Doc. E/CN.4/2005/102 of 18 February 2005, para. 34.

abuses<sup>41</sup> has been recently reiterated, although in a more nuanced manner, by the Human Rights Council. In its 2012 Resolution No. 21/07, the Council has indeed stressed “the importance of [preserving] archives to (...) realize [the] right to the truth”.<sup>42</sup>

Whereas the Commission on Human Rights has *taken note* with appreciation of the Updates Set of Principles “as a *guideline* to assist States in developing effective measures for combating impunity”,<sup>43</sup> neither the Commission nor the Human Rights Council has formally adopted this document.<sup>44</sup> *A contrario*, both the Commission on Human Rights<sup>45</sup> and the United Nations General Assembly<sup>46</sup> have adopted the already-mentioned Basic Principles and Guidelines on the Right to a Remedy and Reparation,

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<sup>41</sup> More generally, on the role that archives might have in respect of unveiling the truth related to severe human rights abuses see, *inter alia*, J.D. CIORCIARI, G.M. FRANZBLAU, *Hidden Files: Archival Sharing, Accountability and the Right to the Truth*, in *Columbia Human Rights Law Review*, vol. 46, 2014-2015, pp. 46-84. See also, *e.g.*: Z. HOWARD, *Secrecy, Archives and Public Interest*, in *Midwestern Archivist*, vol. 2, 1977, pp. 14-27; L. BICKFORD, *The Archival Imperative: Human Rights and Historical Memory in Latin America's Southern Cone*, in *Human Rights Quarterly*, vol. 21, 1999, pp. 1097-1122; L. JOINET, *Le rôle des archives dans la lutte contre l'impunité*, in *Matériaux pour l'histoire de notre temps*, vol. 72, 2003, pp. 50-52; E. JELIN, *Public Memorialization in Perspective: Truth, Justice, and Memory of Past Repression in the Southern Cone of South America*, *The International Journal of Transitional Justice*, vol. 1, 2007, pp. 138-156; M. CASWELL, *Khmer Rouge Archives: Accountability, Truth and Memory in Cambodia*, in *Archival Science*, vol. 10, 2010, pp. 25-44. For a ‘case study’ see also M. ALMADA, *El descubrimiento de los archivos secretos de la policía política de Paraguay. Operativo Condor: impacto sobre la justicia universal*, in Asociación Argentina por Derechos Humanos, *El principio de justicia universal*, Madrid, 2001, pp. 255-263.

<sup>42</sup> UN Doc. A/HRC/RES/21/7, *supra* note 7, para. 10. See also the Report of the UN Office of the High Commissioner for Human Rights (“Right to the Truth”), UN Doc. A/HRC/12/19 of 21 August 2009, containing a study on best practices for the effective implementation of the right to the truth, with particular reference to the preservation of archives and records concerning serious human rights violations. See also Report of the UN Office of the High Commissioner for Human Rights on the seminar on experiences of archives as a means to guarantee the right to the truth, UN Doc. A/HRC/17/21 of 14 April 2011. Interestingly, the seminar acknowledged that, while there is not a common time period after which governments should declassify documents, at least in transitional situations, documents attesting human rights violations should be made accessible as rapidly as possible (*ibid.*, para. 14).

<sup>43</sup> UN Doc. E/CN.4/RES/2005/81 of 21 April 2005.

<sup>44</sup> The Principles have, however, been highly relied on, *inter alia*, by the Committee of Ministers of the Council of Europe in its Guidelines on Eradicating Impunity for Serious Human Rights Violations, *supra* Chapter 3, note 233.

<sup>45</sup> UN Doc. E/CN.4/RES/2005/35 of 19 April 2005.

<sup>46</sup> UN Doc. A/RES/60/147 of 16 December 2005, Chapter 3, *supra* note 172.

whose Principle 24 generally upholds the right of the victims and their families to know the truth about serious violations of human rights.

### **2.1.3. The recognition of the right to the truth at the regional level**

Finally, at the regional level, both the General Assembly of the Organization of the American States<sup>47</sup> and the Parliamentary Assembly of the Council of Europe<sup>48</sup> have expressly recognized the right to know the truth with respect to both enforced disappearances and other serious violations of human rights.<sup>49</sup>

For instance, the General Assembly of the Organization of American States has repeatedly stressed the importance of “recogniz[ing] the right of victims of gross violations of human rights and serious violations of international humanitarian law, and of their families and society as a whole, to know the truth regarding such violations to the fullest extent practicable, in particular

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<sup>47</sup> See, e.g., OAS AG/RES. 2175 (XXXVI-0/06); AG/RES. 2267 (XXXVII-0/07); AG/RES. 2406 (XXXVIII-0/08); AG/RES. 2509 (XXXIX-O/09), AG/RES. 2595 (XL-O/10), AG/RES. 2662 (XLI-O/11), AG/RES. 2725 (XLII-O/12), AG/RES. 2800 (XLIII-O/13); and, more recently, AG/doc.5421/14 (Draft Resolution on the ‘Right to the truth’ agreed upon on 23 May 2014). Within the Latin American regional context, the right to the truth has been upheld also in the *Comunicado conjunto de los Estados Partes del MERCOSUR y Estados Asociados* of 29 June 2011, para. 7.

<sup>48</sup> See, e.g., Parliamentary Assembly of the Council of Europe, Recommendation No. 1056 (1987), adopted on 5 May 1987, on *National Refugees and Missing Persons in Cyprus*, para. 17.2 (“the families of missing persons are entitled to know the truth”); and, likewise, Resolution No. 1414 (2004) of 23 November 2004 on *Persons Unaccounted for as a Result of Armed Conflicts or Internal Violence in the Balkans*, Preamble and para. 9. See also more recently Resolution No. 2067 (2015) of 25 June 2015 on *Missing Persons during the Conflict in Ukraine*, where the Parliamentary Assembly reiterated the right of the relatives to know the fate of the missing ones (para. 7.2). While not expressly upholding a right to know the truth concerning serious violations of human rights, it is noteworthy that the Parliamentary Assembly of the Council of Europe has exhorted States to unveil the *truth* with respect to the practice of extraordinary renditions. See again Resolution 1838 (2011), *supra* Introduction, note 27, paras. 9, 11.3, 12.3.

<sup>49</sup> At the regional level see also the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, *supra* Chapter 3, note 20, pursuant to which the right to an effective remedy also implies having access to information concerning human rights violations (*ibid.*, para C(b)(3)).

the identity of the perpetrators, the causes and facts of such violations, and the circumstances under which they occurred”.<sup>50</sup>

Regardless of a number of acknowledgments both at the international and regional level, however, the exact contours, legal nature and scope of the right to the truth appear anything but conceptually straightforward.<sup>51</sup> In this respect, it is to welcome the statement of Yasmin Naqvi, who, in concluding her 2006 study on the right to the truth, ironically asserted that “the truth about the right to the truth is still to be agreed upon”. This uncertainty has been only partially set aside by the evolving case law of human rights monitoring bodies.

## **2.2. The right to know the truth in the case law of human rights monitoring bodies**

In lack of any express recognition in the context of human rights treaties (with the sole exception of the already mentioned International Convention for the Protection of All Persons from Enforced Disappearances), a main contribution to the assertion of the right to the truth has come from the case law of international and regional treaties monitoring bodies. The Human Rights Committee<sup>52</sup> and the Committee Against Torture<sup>53</sup> – at the international level – and the Inter-American Court of Human Rights,<sup>54</sup> the European Court

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<sup>50</sup> See, *inter alia*, AG/RES. 2406, *supra* note 47, Preamble.

<sup>51</sup> Y. NAQVI, *The Right to the Truth in International Law: Fact or Fiction*, *supra* note 12, p. 273.

<sup>52</sup> See, among others, Human Rights Committee, *Quinteros v. Uruguay*, Communication No. 107/1981, Views of 21 July 1983, UN Doc. CCPR/C/19/D/107/1981, para. 14; *Concluding Observations on Guatemala*, 3 April 1996, UN Doc. CCPR/C/79/Add.63, para. 25; *Khalilova v. Tajikistan*, Communication No. 973/2001, Views of 13 April 2005, UN Doc. CCPR/C/83/D/973/2001, para. 7.7; *Miriam Sankara et al. v. Burkina Faso*, Communication No. 1159/2003, Views of 28 March 2006, UN Doc. CCPR/C/86/D/1159/2003, para. 12(2).

<sup>53</sup> See, *inter alia*, *Concluding Observations on Peru*, UN Doc. CAT/C/PER/CO/4 of 25 July 2006, paras. 3 and 7; *Concluding Observations on El Salvador*, UN Doc. CAT/C/SLV/CO/2 of 9 December 2009, para. 9; *Concluding Observations on Colombia*, UN Doc. CAT/C/COL/CO/4 of 4 May 2010, para. 27; UN Doc. CAT/G/GC/3, *supra* Chapter 3, note 163, para. 16.

<sup>54</sup> See, *inter alia*, Inter-American Court of Human Rights, *Bámaca Velásquez v. Guatemala*, judgment of 22 February 2002, Series C No. 91, para. 76; *Trujillo Oroza v. Bolivia*, judgment of 27 February 2002, Series C No. 92, para. 114; *Gomes Lund et al. v. Brazil*, *supra* Chapter 2,

of Human Rights<sup>55</sup> and the Human Rights Chamber for Bosnia Herzegovina<sup>56</sup> – at the regional level – have all made references to the right to know the truth in their case law.<sup>57</sup> Moreover, the Kosovo Human Rights Advisory Panel<sup>58</sup> has also acknowledged the right to the truth in its recent opinions.<sup>59</sup>

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note 97, para. 202; *Contreras et al. v. El Salvador*, judgment of 31 August 2011, Series C No. 232, para. 170. For a general overview see, *inter alia*, A. F. AMAYA VILLARREAL, “Efecto Reflejo”: La Práctica judicial en relación con el derecho a la verdad en la jurisprudencia de la Corte Interamericana de Derechos Humanos, in *Revista colombiana de derecho international*, vol. 10, 2007, pp. 131-152.

<sup>55</sup> See, *inter alia*, European Court of Human Rights [GC], *El-Masri v. The Former Yugoslav Republic of Macedonia*, *supra* Chapter 3, note 196, para. 192; and European Court of Human Rights, *Al-Nashiri v. Poland*, *supra* Introduction, note 26, para. 495 and *Husayn (Abu Zubaydah) v. Poland*, *supra* Chapter 3, note 196, para. 488. These last two judgments have become final on 17 February 2015 after a panel of five judges rejected the request of Poland to have the cases reviewed by the Grand Chamber. For a comment on these cases see, *inter alia*, N. NAPOLETANO, Extraordinary renditions, *tortura, sparizioni forzate e diritto alla verità: alcune riflessioni sul caso El-Masri*, in *Diritti umani e diritto internazionale*, vol. 7, 2013, pp. 331-264; 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*, *supra* note 11, pp. 1-26; C. M. CERNA, *Introductory Note to the European Court of Human Rights: El-Masri v. The Former Yugoslav Republic of Macedonia*, in *International Legal Materials*, vol. 52, 2013, pp. 558-622; J. M. LÓPEZ ULLA, *El ‘derecho a la verdad’ en la jurisprudencia del Tribunal Europeo de Derechos Humanos*, in *Persona y Derecho*, vol. 69, 2013, pp. 127-164; A. VEDASCHI, *Globalization of Human Rights and Mutual Influence between Courts: The Innovative Reverse Path of the Right to the Truth*, in S. SHETREET (ed.), *The Culture of Judicial Independence: Rule of Law and World Peace*, Leiden, 2014, pp. 107-136; L.A. WALIN, *Responsibility for Secret Detention and Extraordinary Renditions: The Strasbourg Court Holds Poland to Account*, in *Cyprus Human Rights Law Review*, vol. 3, 2014, pp. 185-200; and K. AMBOS, *The European Court of Human Rights and Extraordinary Renditions: A Commentary on El-Masri vs. Macedonia and Husayn and Al-Nashiri vs. Poland*, in *European Criminal Law Review*, vol. 5, 2015, pp. 107-121.

<sup>56</sup> See, e.g., Human Rights Chamber for Bosnia and Herzegovina, *Palić v. Republika Srpska*, case No. CH/99/3196, decision of 11 January 2001 and *Srebrenica cases*, case No. CH/01/8365 et al., decision of 7 March 2003.

<sup>57</sup> No ruling concerning the right to the truth can instead be found in the case law of the African Commission on Human and Peoples’ Rights and the African Court of Human and Peoples’ Rights.

<sup>58</sup> The Kosovo Human Rights Advisory Panel has been established as provisional body during the mandate of the United Nations Interim Administration Mission in Kosovo (UNMIK) to examine complaints related to alleged violations of human rights perpetrated by UNMIK. The Panel is entitled to apply a comprehensive body of international human rights law, which includes, *inter alia*, the Universal Declaration of Human Rights, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. See United Nations Interim Administration Mission in Kosovo, Regulation No. 2006/12, Doc. UNMIK/REG/2006/12 of 23 March 2006, at 1(1) and 1(2).

<sup>59</sup> See, e.g., Kosovo Human Rights Advisory Panel, *P.S. v. UNMIK*, case No. 48/09, opinion of 31 October 2013, para. 150; *Đ.L. v. UNMIK*, case No. 88/09, opinion of 21 November 2013, para. 88; *Dobrića Antić-Živković v. UNMIK*, case No. 147/09, opinion of 16 October

In light of the foregoing, the right to the truth can legitimately be enlisted among those ‘emerging’ legal concepts that have evolved through the authoritative interpretation of pre-existing human rights.<sup>60</sup>

It is thus at the case law of human rights monitoring bodies that one should primarily look in order to attempt to shed more light on the legal foundation, nature and content of said right.

### **2.2.1. Human rights violations entailing the right to the truth**

As it has been correctly observed, “the right to the truth is closely linked at its inception to the notion of victim of serious human rights violations”.<sup>61</sup> Indeed, the right to the truth arises only after a human rights violation has already taken place, entailing the disclosure of information related to the initial perpetration. Under this perspective, as noted by some commentators, the emergence of the right to the truth seems to represent an expression of that ‘shift’ towards an alternative understanding of human rights as ‘threshold procedural rights’.<sup>62</sup>

To entail the right to the truth, the initial human rights violation has to be serious. As previously underlined, this requirement has indeed been widely recognized at the international and regional level by resorting to the general

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2014, paras. 80 and 94. This last case concerned the alleged abduction of the petitioner’s son. The Panel noted that, although UNMIK had received information that the victim had been indeed abducted for the purpose of having his organs harvested, this piece of information had not been communicated to the investigative authorities working on the case. Furthermore, UNMIK did not take any steps to further investigate the alleged abduction.

<sup>60</sup> See J. MÉNDEZ, *An Emerging ‘Right to the Truth’: Latin-American Contributions*, *supra* note 12, p. 41. For a parallel, one could recall the so-called process of “greening” of existing human rights in respect to the recognition of environmental rights. See, *e.g.*, A. BOYLE, *Human Rights and the Environment. Where Next?*, in *European Journal of International Law*, vol. 23, 2012, pp. 613-642.

<sup>61</sup> J. NAQVI, *The Right to the Truth in International Law: Fact or Fiction?*, *supra* note 12, p. 249.

<sup>62</sup> R. TEITEL, *Human Rights Genealogy Symposium: Human Rights on the Eve of the Next Century, Beyond Vienna and Beijing: Human Rights in Theory*, in *Fordham Law Review*, 1997, p. 315.

*formula* “gross violations of human rights and serious violations of humanitarian law”.<sup>63</sup>

Human rights treaty monitoring bodies have also shown a consistent attitude in referring the right to truth to serious violations of human rights. In particular, if, at the outset, human rights monitoring bodies have upheld the right to truth mainly in cases of enforced disappearances, their subsequent practice has been characterized by a progressive expansion towards the application of this right with references to all cases of serious human rights violations.

The Human Rights Committee’s determinations are emblematic in this respect. In 1983, in the *Maria del Carmen Almeida de Quintero and Elena Quintero de Almeida* case, which concerned the enforced disappearance of the latter, the Human Rights Committee concluded that the mother of the disappeared “ha[d] the right to know what has happened to her daughter”.<sup>64</sup> The Human Rights Committee reached similar conclusions in the *Jegatheeswara Sarma v. Sri Lanka* case, which related to the enforced disappearance of a suspected member of the Liberation Tigers of Tamil Eelam.<sup>65</sup> Subsequently, however, the Committee has begun to adopt a broader approach towards the right to the truth, recognizing it also with respect to other serious human rights violations. Accordingly, on a few occasions, the Committee has condemned the State’s refusal to provide information about the

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<sup>63</sup> See, e.g., UN Doc. E/CN.4/2006/91, *supra* note 13, para. 33. It is noteworthy, however, that the Updated Set of Principles refers to the right to know the truth about heinous crimes and the circumstances that led to their perpetration through massive or systematic violations. See again UN Doc. E/CN.4/2005/102/Add. 1, *supra* Introduction, note 62, Principle 2. As explained by the Independent expert to update the Set of Principles to combat impunity, the wording used in Principle 2 was meant to reflect the contextual developments in international criminal law by hinting at the notion of “crimes against humanity” included in Article 7(1) of the Statute of the International Criminal Court. See again Report of the independent expert to update the Set of Principles to combat impunity, UN Doc. E/CN.4/2005/102, *supra* note 40, para. 20.

<sup>64</sup> See again Human Rights Committee, *Quinteros v. Uruguay*, *supra* note 52, para. 14.

<sup>65</sup> Human Rights Committee, *Mr. S. Jegatheeswara Sarma v. Sri Lanka*, Communication No. 950/2000, Views of 16 July 2003, UN Doc. CCPR/C/78/D/950/2000, para. 9.5.



circumstances of detention and execution of a prisoner.<sup>66</sup> In addition, in its 1996 *Concluding Observations on the initial report of Guatemala*, the Human Rights Committee generally exhorted the Guatemalan authorities to, *inter alia*, continue working to enable “the victims of human rights violations to find out the truth about those acts”.<sup>67</sup>

Similar developments can be registered in the context of the Inter-American system of human rights protection. Both the Inter-American Commission and the Inter-American Court of Human Rights initially linked the right to the truth to the phenomenon of enforced disappearances and, thus, framed it as the right of the family to receive information concerning the fate and whereabouts of their relatives.<sup>68</sup> However, soon thereafter, during the phase that the Inter-American Commission of Human Rights has recently defined of “consolidation of the right to the truth”,<sup>69</sup> they began upholding this right also in respect to other serious violations of human rights.<sup>70</sup>

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<sup>66</sup> Human Rights Committee, *Bondarenko v. Belarus*, Communication No. 886/1999, Views of 3 April 2003, UN Doc. CCPR/C/77/D/886/1999, para. 10.2. The alleged victim, Mr. Bondarenko, had been sentenced to death for murder and other crimes. The author of the complaint, mother of the prisoner, alleged that the conviction was based on ambiguous evidence and she was denied any information concerning the date of execution and place of burial. See also *Lyashkevich v. Belarus*, Communication No. 887/1999, Views of 3 April 2003, UN Doc. CCPR/C/77/D/950/2000, para. 9.2. The alleged victim, Mr. Lyashkevich, had been sentenced by the Minsk City Court to death by firing squad in 1997 as he had been found guilty, with four other people, of having kidnapped and killed a man. According to the complaint author’s (the mother of the prisoner) Mr. Lyashkevich was condemned on the ground of circumstantial evidence and no information was given to the mother with respect to the date of his execution and place of burial. See also *Khalilova v. Tajikistan*, *supra* note 52, para. 7.7.

<sup>67</sup> Human Rights Committee, *Concluding Observations of the on Guatemala*, *supra* note 52, para. 25.

<sup>68</sup> See, for instance, Inter-American Commission on Human Rights, *Manuel Stalin Bolaños Quiñones v. Ecuador*, case No. 10.580, Report No. 10/95, OEA/Ser.L/V/II.91 Doc. 7 at 76 (1996), judgment of 12 September 2005, para. 45; *Manuel Garcia Franco v. Ecuador*, case No. 10.258, Report No. 1/97, OEA/Ser.L/V/II.98 Doc. 6 rev (1998), judgment of 12 March 1997, para. 73; *Samuel De La Cruz Gómez v. Guatemala*, case No. 10/606, Report No. 11/98, OEA/Ser.I/V/II/98 Doc. 6 rev. (1998), judgment of 7 April 1998, para. 56. See also Inter-American Court of Human Rights, *Castillo Páez v. Peru*, *supra* Chapter 3, note 255, para. 86; *Bámaca Velásquez v. Guatemala*, *supra* Chapter 3, note 176, para. 201.

<sup>69</sup> See Inter-American Commission on Human Rights, *The Right to the Truth in the Americas*, Doc. OAS/Ser.L/V/II.152, doc. 2, para. 54.

<sup>70</sup> See, e.g., Inter-American Commission on Human Rights, *Alfonso René Chanfeau Orayce et al. v. Chile*, Report No. 25/98, cases No. 1.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.657, 11.675, 11.705 Chile, 7 April 1998,

Recently, also the European Court of Human Rights has shown an expansive attitude towards the recognition of the right to the truth even in relation to serious human rights violations other than enforced disappearances. In its judgment in the *Association 21 December 1989 v. Romania* case, the Court acknowledged the right of the victims and of their families and dependents to obtain information about the circumstances of events involving large-scale violations of fundamental human rights such as the right to life.<sup>71</sup> In the *Janowiec v. Russia* case,<sup>72</sup> concerning the 1940 Katyń massacre, the Court concluded “that the applicants suffered a double trauma: not only had their relatives perished in the war but they were not allowed, for political reasons, to learn the truth about what had happened and forced to accept the distortion of historical fact by the Soviet and Polish Communist authorities for more than fifty years”.<sup>73</sup> Thus, the Court has ascribed to the right to the truth a broader material scope, so to apply it to all serious human rights violations that were perpetrated during the massacre.

The European Court of Human Rights has paid specific attention to the gravity of the alleged violations entailing the right to the truth also in its recent judgments in the *Al-Nashiri v. Poland* and *Husayn (Abu Zubaydah) v. Poland* cases. The Court has indeed stressed that a particularly intense public scrutiny is required in cases of allegations of serious violations of human rights, such as torture, which took place as part of a large-scale programme involving capture, rendition, secret detention and interrogation of suspected terrorists.<sup>74</sup>

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para. 85, where the Commission stated: “Pursuant to the American Convention, the State has the duty to ensure the right (...) to know the truth of the facts connected with the *serious violations to human rights* which occurred in Chile” (emphasis added). See also Inter-American Commission on Human Rights, *Ignacio Ellacuría et al. v. El Salvador*, *supra* Chapter 3, note 258, para. 221. Inter-American Court of Human Rights, *Las Dos Erres Massacre v. Guatemala*, judgment of 24 November 2009, Series C No. 211, para. 149.

<sup>71</sup> European Court of Human Rights, *Case of Association 21 December 1989 v. Romania*, *supra* note 269, paras. 106 and 130.

<sup>72</sup> European Court of Human Rights, *Janowiec et al. v. Russia*, *supra* Chapter 3, note 456.

<sup>73</sup> *Ibid.*, para. 155.

<sup>74</sup> European Court of Human Rights, *Al-Nashiri v. Poland*, *supra* Introduction, note 26, para 497. See also *Husayn (Abu Zubaydah) v. Poland*, *supra* Chapter 3, note 196, para 491.

The application of the right to the truth with respect to torture has been repeatedly acknowledged also by the Committee against Torture.<sup>75</sup>

### 2.2.2. The content of the right to the truth

Given that, as already pointed out, the recognition of the right to the truth has been strictly limited, at its inception, to cases of enforced disappearances, human rights monitoring bodies have initially identified the content of this right in the next-of-kin's entitlement to receive information concerning the fate and whereabouts of the missing ones. This includes the right to know the place of detention and, in case of death, the location of burial, as well as the identity of those responsible.

For instance, in the already mentioned *Quinteros v. Uruguay* case, the Human Rights Committee noted that, although Uruguay had a duty to conduct a full investigation into the enforced disappearance of Elena Quintero de Almeida, this had never happened, leaving the mother in a state of persistent anguish.<sup>76</sup> Following the same reasoning, the Inter-American Commission on Human Rights has held on several occasions that the family of the disappeared has the right to know the truth about what happened to him, the circumstance of his detention and death and the location of his remains. As a result, the Commission has repeatedly inferred from this right an obligation of the State to use all the means at its disposal to carry out a serious investigation and inform the next of kin of the whereabouts and fate of the missing ones.<sup>77</sup> The Inter-American Court of Human Rights,<sup>78</sup> the European Court of Human

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<sup>75</sup> See again, *inter alia*, Committee against Torture, General Comment No. 3, *supra* Chapter 3, note 163, para. 16.

<sup>76</sup> See again Human Rights Committee, *Quinteros v. Uruguay*, *supra* note 52, para. 15.

<sup>77</sup> See, for instance, Inter-American Commission on Human Rights, *Manuel Stalin Bolaños Quiñones v. Ecuador*, *supra* note 68, para. 45. As to the right of the next-of-kin to receive information concerning the place of detention, death and local of burial of the victim see also: Human Rights Committee, *Bondarenko v. Belarus*, *supra* note 66, para. 10.2; *Lyashkevich v. Belarus*, *supra* note 66, para. 9.2; *Khalilova v. Tajikistan*, *supra* note 52, para. 7.7.

<sup>78</sup> See, *inter alia*, Inter-American Court of Human Rights, *Velasquez Rodriguez v. Honduras*, *supra* Chapter 3, note 230, para. 177.

Rights,<sup>79</sup> the Human Rights Chamber for Bosnia-Herzegovina<sup>80</sup> and the Kosovo Human Rights Advisory Panel<sup>81</sup> have all reached similar conclusions in their case law.

In some instances, the content of the right to the truth has been further shaped and expanded in accordance to its general application to serious human rights violations other than enforced disappearances. In the already mentioned case *Association 21 December 1989 v. Romania*, for instance, the European Court of Human Rights held that the right to know the truth concerns all the circumstances surrounding events involving a massive violation of fundamental rights.<sup>82</sup>

However, it is in the context of the Inter-American system of human rights protection that the content of the right to the truth about serious human rights violations has been defined with the most accuracy. In its Report No. 25/98, related to a number of complaints it had received against Chile due to the adoption of an amnesty law which was alleged to shield crimes and gross violations of human rights committed under the Pinochet regime, the Inter-American Commission on Human Rights found that:

“Pursuant to the American Convention, the State has the duty to ensure the right (...) to know the *truth of the facts connected with the serious violations of human rights which occurred in Chile, as well as the identity of those who committed them*”.<sup>83</sup>

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<sup>79</sup> See, e.g., European Court of Human Rights, *Kurt v. Turkey*, App. No. 15/1997, judgment of 25 May 1998, para. 134; *Cyprus v. Turkey*, App. No. 25781/94, judgment of 10 May 2001, para. 157.

<sup>80</sup> See Human Rights Chamber for Bosnia and Herzegovina, *The Srebrenica Cases* (49 applications), decision on admissibility and merits delivered on 7 March 2007, para. 191; *Palić v. Republika Srpska*, *supra* note 56, para. 74.

<sup>81</sup> See, e.g., Kosovo Human Rights Advisory Panel, *P.S v. UNMIK*, *supra* note 59, para. 150.

<sup>82</sup> European Court of Human Rights, *Case of Association 21 December 1989 v. Romania*, *supra* note 269, para. 106. See also Human Rights Committee, *Concluding Observations on Guatemala*, *supra* note 52, para. 25. In this last case, the Committee has recognized that the right of the victims to know the truth about human rights violations includes the right to know the identity of the perpetrators.

<sup>83</sup> Inter-American Commission on Human Rights, Report No. 25/98, *supra* note 70, para. 85.

As subsequently clarified by the same Commission, the expression “*facts connected to the violations*” includes also the circumstances that led to the perpetration.<sup>84</sup>

The Inter-American Court of Human Rights has gone even further by recognizing that the right to know the truth is a fair expectation that the State must satisfy through the obligation to investigate the human rights violations and through the public disclosure of the results of the criminal and investigative process. According to the Court, this “requires the State to determine the patterns of joint action and of all of the people who in some manner participated in the violations and their corresponding responsibility, as well as to redress the victim of the case”.<sup>85</sup> More recently, the Court held that the establishment of the patterns of the violations and the identification of those participating, although necessary, is only one of the actions required. In fact, the right to the truth also requires the procedural determination of the most complete historical record possible.<sup>86</sup> In the Inter-American Court’s view, the State’s duty to determine a complete historical record can be partially fulfilled also by resorting, *inter alia*, to the creation of a Truth Commission. According to the Court, in fact, Truth Commissions are important means by which the State can meet its obligation to guarantee the right to the truth.<sup>87</sup> In this respect, the findings of the Inter-American Court of Human Rights parallel those of the Committee Against Torture that, in its 2010 *Concluding Observations on Colombia, de facto* included the

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<sup>84</sup> In a subsequent 1999 ruling against El Salvador, concerning an extra-judicial execution, the Commission stressed that: “The right to know the truth with respect to the *facts that gave rise to the serious human rights violations that occurred in El Salvador*, and the right to know the identity of those who took part in them, constitutes an obligation that the State must satisfy with respect to the victims’ relatives and society in general” (emphasis added). See *Ignacio Ellacuría et al. v. El Salvador*, *supra* Chapter 3, note 258, para. 221.

<sup>85</sup> Inter-American Court of Human Rights, *Las Dos Erres Massacre v. Guatemala*, *supra* note 70, para. 149.

<sup>86</sup> Inter-American Court of Human Rights, *Gelman v. Uruguay*, judgment of 24 February 2011, Series C No. 221, para. 192.

establishment of an autonomous and independent Truth Commission among the effective measures capable of guaranteeing the right to the truth.<sup>88</sup>

The Inter-American Court of Human Rights has also clarified the existing relationship between Truth Commissions or other non-judicial mechanisms and judicial proceedings. On several occasions, the Court has indeed affirmed that the historical truth obtained through the work of Truth Commissions should not be considered substitutive of the State's obligation to ensure the judicial determination of the individual and State responsibility by jurisdictional means. According to the Court, in the determination of the truth, the work of non-judicial mechanisms, such as Truth Commissions, and that of judicial proceedings should be regarded as complementary.<sup>89</sup>

With reference to specific human rights violations, the Inter-American Court has even developed further the 'content' of the right to the truth. For instance, in a case involving an extra-judicial death, the Court established that the State should act with due diligence in its ascertainment of the truth. Accordingly, the State should: identify the victim; recover and preserve the probative material related to the death, in order to facilitate any investigation; identify possible witnesses and obtain their statements in relation to the death under investigation; determine the cause, method, place and moment of the death, as well as any pattern or practice that could have caused the death, and distinguish between natural death, accidental death, suicide and murder.<sup>90</sup>

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<sup>87</sup> See Inter-American Court of Human Rights, *Gomes Lund et al. v. Brazil*, supra Chapter 2, note 97, para. 297.

<sup>88</sup> Committee against Torture, *Concluding Observations on Colombia*, supra note 53, para. 27.

<sup>89</sup> See also Inter-American Court of Human Rights, *Myrna Mack Chang v. Guatemala*, supra Introduction, note 41, paras. 131 and 134; *Zambrano Vélez et al. v. Ecuador*, judgment of 4 July 2007, Series C No 166, para. 128, *La Cantuta v. Peru*, judgment of 29 November 2006, Series C No. 162, para. 224; *Radilla Pacheco v. Mexico*, judgment of 23 November 2009, Series C No. 209, para. 181; *Ibsen Cárdenas and Ibsen Peña v. Bolivia*, judgment of 1<sup>st</sup> September 2010, Series C No. 217, para. 158.

<sup>90</sup> Inter-American Court of Human Rights, *Zambrano Vélez v. Ecuador*, supra note 89, paras. 115 and 121. See also *Ibsen Cárdenas and Ibsen Peña v. Bolivia*, supra note 89, para. 217.

### 2.2.3. The individual and collective dimension of the right to the truth

As to the entitlement to the right to the truth, human rights monitoring bodies have been unanimous in conferring this right to the victims and their relatives. In cases of enforced disappearances and deaths, human rights bodies have indeed recognized that the right to the truth rests with the next of kin of the disappeared person.<sup>91</sup> When applying or even asserting *in abstracto* the possible application of this right to other serious human rights violations, however, human rights monitoring bodies have inevitably ‘extended’ it to the victim himself.<sup>92</sup>

As to this ‘individual’ dimension of the right to the truth, the approach undertaken by the European Court of Human Rights and the Human Rights Chamber for Bosnia Herzegovina shows peculiar features. Indeed, both these bodies have distinguished between those persons who could assert a violation of their right to obtain information on the fate and whereabouts of the missing ones, and those who, although having suffered as a consequence of the enforced disappearance, could not bring such a claim. In the *Cyprus v. Turkey* case, for instance, the European Court of Human Rights drew this distinction based on the existence of special factors that give a character and dimension to the suffering distinct from the anguish that is inevitably consequent to an

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<sup>91</sup> See, *inter alia*, Human Rights Committee, *Mr. S. Jegatheeswara Sarma v. Sri Lanka*, *supra* note 65, para. 9.5; *Bondarenko v. Belarus*, *supra* note 66, para. 10.2; *Lyashkevich v. Belarus*, *supra* note 66, para. 9.2; Inter-American Commission on Human Rights, *Manuel Stalin Bolaños Quiñones v. Ecuador*, *supra* note 68, para. 45; *Manuel Garcia Franco v. Ecuador*, *supra* note 68, para. 73; Inter-American Court of Human Rights, *Castillo Páez v. Peru*, *supra* Chapter 3, note 255, para. 86; European Court of Human Rights, *Cyprus v. Turkey*, *supra* note 79, para. 157; Human Rights Chamber for Bosnia Herzegovina, *The Srebrenica Cases*, *supra* note 56, para. 191.

<sup>92</sup> See, for instance, Human Rights Committee, *Concluding Observations on Guatemala*, *supra* note 52, para. 25; Inter-American Court of Human Rights, *Bámaca Velásquez v. Guatemala*, *supra* Chapter 3, note 176, para. 201; *Baldeón García v. Peru*, judgment of 6 April 2006, Series C No 147, para. 196; *Blanco-Romero et al. v. Venezuela*, judgment of 28 November 2005, Series C No. 138, para. 62; European Court of Human Rights, *Case of Association 21 December 1989 v. Romania*, *supra* note 269, para. 106.

enforced disappearance.<sup>93</sup> Similarly, in the *Palić* case, the Human Rights Chamber for Bosnia Herzegovina based the distinction on factors like, *inter alia*, the closeness of the family tie, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question and the involvement of the family member in the attempts to obtain information about the disappeared person.<sup>94</sup>

In addition to the acknowledgement of the ‘individual’ entitlement to the right to the truth, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights and, more recently, the European Court of Human Rights have also upheld a ‘collective dimension’ of the right to the truth by conferring this right to the society as a whole.

The Inter-American Commission has repeatedly attributed a collective dimension to the right to the truth by establishing that “apart from the families of the victims, which are directly affected by the violation of human rights, *the society as a whole is also entitled to be informed*”;<sup>95</sup> thus, “[the right of the society to know] does not only constitute a reparation and a way to shed light on the facts which have occurred, but also serves the purpose of preventing future violations”.<sup>96</sup> Similar conclusions have been reiterated in its subsequent case law.<sup>97</sup>

The Inter-American Court of Human Rights has also held on several occasions that not only the victims and their next of kin, but also the society as a whole, is entitled to know the truth about the circumstances in which serious human rights violations have taken place. For instance, in its 2002 judgement

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<sup>93</sup> European Court of Human Rights, *Cyprus v. Turkey*, *supra* note 79, para. 156.

<sup>94</sup> Human Rights Chamber for Bosnia-Herzegovina, *Palić v. Republika Srpska*, *supra* note 56, para. 74.

<sup>95</sup> Emphasis added. Inter-American Commission on Human Rights, Report No. 25/98, *supra* note 70, para. 94.

<sup>96</sup> *Ibid.*, para. 95.

<sup>97</sup> See, among others, Inter-American Commission on Human Rights, *Lucio Parada Cea et al. v. El Salvador*, case No. 10480, Report No. 1/99, judgment of 27 January 1999, para. 148; *Ignacio Ellacuria et al. v. El Salvador*, *supra* Chapter 3, note 258, para. 224; *Monsignor Oscar Arnulfo Romero y Galdamez v. El Salvador*, case No. 11481, Report No. 37/00, judgment of 13 April 2000, para. 142.



in the *Trujillo Oroza v. Bolivia* case, the Court found that the right of the next of kin to know the fate and whereabouts of the missing one constitutes a measure of reparation and, therefore, an “expectation that the State should satisfy for the next of kin and *the society as a whole*”.<sup>98</sup> The Court has repeatedly upheld the collective dimension of the right to the truth and, in many instances, has contextually ordered the State to publically acknowledge the violations, as well as to publish the Court’s ruling as a means to allow the society to know the truth.<sup>99</sup>

The European Court of Human Rights has also recognized the collective dimension of the right to the truth, although more timidly than the Inter-American bodies. In the already mentioned *Association 21 December 1989 v. Romania* case, the Court has strongly emphasized the importance for the Romanian society of uncovering past abuses.<sup>100</sup> In addition, in the *El-Masri v. Macedonia* case, the Court acknowledged “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*”.<sup>101</sup> It is noteworthy, however, that this finding has not been unanimous. In their joint concurring opinion to the judgment, the Judges Casadevall and López Guerra rejected the majority’s view by asserting that: “as far as the right to the truth is concerned, it is the victim, and not the general public, who is entitled to this right”.

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<sup>98</sup> Inter-American Court of Human Rights, *Trujillo Oroza v. Bolivia*, *supra* note 54, para. 114.

<sup>99</sup> See, among others, Inter-American Court of Human Rights, *Caracazo v. Venezuela*, Costs and Reparations, judgment of 29 August 2002, Series C No. 95, para. 118, where the Court states that: “The next of kin of the victims and the surviving victims must have full access and the capacity to act during all stages and levels of said investigations, pursuant do domestic law and to the provisions of the American Convention. Their results must be made known to the public, for Venezuelan society to know the truth”. See also *Manuel Capeda Vargas v. Colombia*, judgment of 26 May 2010, Series C No. 213, para. 217 (“Furthermore, the results of the proceedings must be publicized so that Colombian society may know the truth about the facts”); *Ibsen Cárdenas and Ibsen Peña*, *supra* note 89, para. 238; *Gelman v. Uruguay*, *supra* note 86, paras. 243 and 257.

<sup>100</sup> European Court of Human Rights, *Case of Association 21 December 1989 v. Romania*, *supra* note 269, para. 104.

<sup>101</sup> European Court of Human Rights, *El-Masri v. The Former Yugoslav Republic of Macedonia*, *supra* Chapter 3, note 196, para. 191.

More recently, however, in its ‘twin judgments’ in the *Al-Nashiri v. Poland* and *Husayn (Abu Zubaydah) v. Poland* cases, the European Court of Human Rights consolidated its approach by reiterating both the individual and collective dimensions of the right to the truth.<sup>102</sup>

The case law of the European Court of Human Rights and, in particular, its assertion of the double-fold dimension of the right to the truth, has been recently recalled also by the Kosovo Human Rights Advisory Panel. In its 2014 Opinion in the *Dobriła Antić-Živković v. UNMIK* case, the Panel has indeed stressed the importance of undertaking effective investigations into alleged serious human rights violations to satisfy the right to the truth of both the victim and the society as a whole.<sup>103</sup>

The Committee against Torture also implicitly acknowledged the collective nature of the right to the truth by requiring States to provide full and public disclosure of the truth, at least to the extent it does not harm the safety or other interests of the victim.<sup>104</sup>

The recognition that the right to the truth owes not only to the victim and his family but also to the society at large inevitably raises questions as to the specific nature, content and enforceability of this right in its collective dimension. In this regard, while, other human rights judicial bodies have limited themselves to assert the societal interest in knowing the truth about serious human rights violations, the Inter-American Court of Human Rights has also outlined some additional obligations arising from the right to the truth in its collective dimension. Thus, as previously stated, the Court has, for instance, required the State to make the results of the investigations available to the general public. In addition, on several occasions, the Court has required the State to provide the broader historical record possible in order to comply

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<sup>102</sup> See European Court of Human Rights, *Al-Nashiri v. Poland*, *supra* Introduction, note 26, para 495 and *Husayn v. Poland*, *supra* Chapter 3, note 196, para 489.

<sup>103</sup> See again Kosovo Human Rights Advisory Panel, *Dobriła Antić-Živković v. UNMIK*, *supra* note 59, para. 80.

<sup>104</sup> See again Committee against Torture, General Comment No. 3, *supra* Chapter 3, note 163, para. 16.

with its duty to disclose the truth.

The enforceability of the right to the truth in its collective dimension is probably the most controversial issue. So far, the violation of this right has never been contested as such in court. It is interesting to see if this will ever happen and, in the affirmative, who will claim for the violation of this right. Recalling an expression used in scientific literature,<sup>105</sup> it might be argued that the jurisprudential recognition of a society's right to the truth merely refers to a broad societal interest in knowing the facts concerning past abuses, to be kept distinct from the right to the truth as a legally enforceable right in international law.

More generally, while the entitlement of the right to the truth to the victim and his family is an uncontested fact, its collective dimension has not yet been 'universally' recognized. As noted, indeed, neither the Human Rights Committee nor the Human Chamber for Bosnia Herzegovina has ever found that the right to the truth rests also with the society at large. In addition, differences exist also in the practice of those judicial bodies that have recognized it. While the Inter-American Commission and the Inter-American Court of Human Rights have attempted to elaborate on the possible content of this collective right, the European Court of Human Rights has limited itself to a more 'timid allusion'.

#### **2.2.4. The nature of the right to the truth and its relationship with other human rights: An autonomous right?**

As previously pointed out, in lack of specific provisions in the relevant treaties, the right to the truth has been inevitably inferred from pre-existing conventional rights.

For instance, at least in cases of enforced disappearances, the Human Rights Committee has generally addressed the right to the truth within the

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<sup>105</sup> D. GROOME, *The Right to Truth in the Fight against Impunity*, *supra* note 12, p. 175

context of the right to be free from torture or other cruel, inhuman or degrading treatment. In the *Quinteros v. Uruguay* case, for example, the Committee held that Uruguay, in denying information to the next of kin of the disappeared person,<sup>106</sup> was responsible for what amounted to torture or other cruel, inhuman or degrading treatment, in breach of Article 7 of the International Covenant on Civil and Political Rights.<sup>107</sup> Similarly, in the *Jegatheeswara Sarma v. Sri Lanka* case, the Committee concluded that the author of the complaint and his wife (the parents of the disappeared person) were victims of a violation of Article 7 of the Covenant due to the anguish and stress they suffered as a result of the disappearance of their son and the continuing uncertainty concerning his fate and whereabouts.<sup>108</sup> On a few occasions, the Committee also found that the State's denial of information about the circumstances of detention and execution of a prisoner constitutes a violation of Article 7 of the Covenant.<sup>109</sup> That being the prevailing approach, in some instances, the Committee has also inferred the right to receive information concerning serious human rights violations from the right to an effective remedy. In fact, in cases concerning arbitrary executions, the Committee has found that the State should have unveiled information concerning the burial site in order to comply with its duty to ensure the right of the victims to an effective remedy under Article 2.3(a) of the International Covenant on Civil and Political Rights.<sup>110</sup>

In this regard, the Human Rights Committee's findings match those of the Committee against Torture, which has expressly inferred the right to the truth from Article 14 of the Convention Against Torture and Other Cruel, Inhuman

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<sup>106</sup> Human Rights Committee, *Quinteros v. Uruguay*, *supra* note 52, para. 14.

<sup>107</sup> Article 7 of the International Covenant on Civil and Political Rights states: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment".

<sup>108</sup> Human Rights Committee, *Jegatheeswara Sarma v. Sri Lanka*, *supra* note 65, para. 9.5.

<sup>109</sup> See, *inter alia*, Human Rights Committee, *Khalilova v. Tajikistan*, *supra* note 52, para. 9; *Lyashkevich v. Belarus*, *supra* note 66, para. 9.2; *Bondarenko v. Belarus*, *supra* note 66, para. 10.2.

<sup>110</sup> See, *e.g.*, Human Rights Committee, *Khalilova v. Tajikistan*, *supra* note 52, para. 9.

or Degrading Treatment or Punishment, pursuant to which each contracting State shall ensure redress to the victim.<sup>111</sup>

The Inter-American Commission on Human Rights has adopted a different approach by generally grounding, at least in its early case law, the right of the family to know the whereabouts and fate of those forcibly abducted on a combined reading of Articles 1.1, 8 and 25 of the American Convention on Human Rights. For instance, in the *Manuel Bolaños v. Ecuador* case, the Commission found that Ecuador had failed to honour its obligation to provide simple, swift and effective legal recourse to the victim's family in violation of Article 25 of the American Convention on Human Rights.<sup>112</sup> The Commission also specified that the State's duty to ensure prompt and effective legal recourse and, more specifically, the obligation of the State to carry out a full, independent and impartial investigation into the alleged violation of human rights, was incident to both the government's duty to protect and ensure human rights, recognized in Article 1.1 of the American Convention, and to the right to a fair trial under Article 8.1.<sup>113</sup> In other cases, the Commission reiterated such conclusions.<sup>114</sup>

A slightly different approach has, however, characterised the subsequent practice of the Inter-American Commission. In the already recalled Chilean cases, for instance, the Commission observed that “the access to the truth presupposes freedom of speech”<sup>115</sup> and, thereby, inferred the right to the truth from Article 13 of the American Convention on Human Rights.<sup>116</sup> The Commission reiterated its findings in the *Lucio Parada Cea et al. v. El*

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<sup>111</sup> See again Committee against Torture, General Comment No. 3, *supra* Chapter 3, note 163, para. 16.

<sup>112</sup> Inter-American Commission on Human Rights, *Manuel Stalin Bolaños Quiñones v. Ecuador*, *supra* note 68, para. 45.

<sup>113</sup> *Ibid.*, paras. 47-48.

<sup>114</sup> See, *inter alia*, Inter-American Commission on Human Rights, *Manuel Garcia Franco v. Ecuador*, *supra* note 68, para. 74; *Samuel De La Cruz Gómez v. Guatemala*, *supra* note 68, para. 56.

<sup>115</sup> Inter-American Commission on Human Rights, Report No. 25/98, *supra* note 70, para. 92.

<sup>116</sup> *Ibid.*, para. 85.

*Salvador* case.<sup>117</sup> Furthermore, in another 1999 case brought against El Salvador, the Inter-American Commission also confirmed that:

“The right to know the truth with respect to the facts that gave rise to the serious human rights violations (...) and the right to know the identity of those who took part in them, constitutes an obligation that (...) *arises essentially from the provisions of Articles 1(1), 8(1), 25 and 13 of the American Convention*”.<sup>118</sup>

However, contrary to its previous work in which the Commission had limited its reasoning to the assertion that the right to the truth stems, *inter alia*, from Article 13 of the American Convention, in this specific case the Commission explicitly found that El Salvador directly breached Article 13 by not providing access to information concerning past human rights violations.<sup>119</sup>

Like the Inter-American Commission, the Inter-American Court of Human Rights has developed different approaches as to the legal foundation of the right to the truth. In some early cases and, more recently, in the *Gudiel Álvarez et al. v. Guatemala* case,<sup>120</sup> the Court held that the mental suffering of the next of kin of a disappeared person caused by the lack of information concerning his fate and place of burial amounted to a breach of Article 5 of the American

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<sup>117</sup> Inter-American Commission on Human Rights, *Lucio Parada Cea et al. v. El Salvador*, *supra* note 97, para. 148.

<sup>118</sup> Emphasis added. Inter-American Commission on Human Rights, *Ignacio Ellacuría et al. v. El Salvador*, *supra* Chapter 3, note 258, para. 221.

<sup>119</sup> *Ibid.*, para. 224, according to which: “The right to know the truth is a collective right that ensures society access to information that is essential for the workings of democratic systems, and it is also a private right for relatives of the victims, which affords a form of compensation, in particular, in cases where amnesty laws are adopted. Article 13 of the American Convention protects the right of access to information”. See also *Monsignor Oscar Arnulfo Romero y Galdamez v. El Salvador*, *supra* note 97, para. 142.

<sup>120</sup> Inter-American Court of Human Rights, *Gudiel Álvarez et al. (‘Diario Militar’) v. Guatemala*, *supra* Chapter 2, note 102, paras. 300 and 302.

Convention on Human Rights ('right to human treatment').<sup>121</sup> However, the Court has constantly shown a growing tendency to progressively consider the right to the truth as more than *just* the mental harm of the family caused by the fact of not knowing the fate of their relatives. The Court has indeed subsumed the right to the truth in other fundamental rights guaranteed by the American Convention on Human Rights, especially Articles 8 and 25. In the *Villagrán Morales et al. v. Guatemala* case, for instance, the Court inferred the victims and their families' right to know the fate and whereabouts of the missing persons from Article 8 (read together with Article 1.1) of the American Convention. Thus, the Court implicitly enlisted the 'right to the truth' – although not expressly mentioned as such – among the procedural guarantees to a fair trial.<sup>122</sup> In the *Bámaca Velásquez case*, the Court subsumed the right to the truth not only in Article 8, but also in Article 25 of the American Convention.<sup>123</sup> Accordingly, even if the Court found that the right to the truth of the victims and their next of kin had been violated, it concluded that it was not necessary to deal with the violation of the right to the truth as a separate issue, as it was already addressed as part of the State's violation of Articles 8 and 25.<sup>124</sup> The Court has consolidated this approach in its subsequent judgments.

On several occasions, the Court has furthermore recognized that the right to the truth constitutes an important means of reparation.<sup>125</sup>

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<sup>121</sup> See, for instance, Inter-American Court of Human Rights, *Case of Blake v. Guatemala*, judgment of 24 January 1998, Series C No. 36, para. 116. See also subsequent cases such as *Trujillo Oroza v. Bolivia*, *supra* note 54, para. 114; *Ibsen Cárdenas and Ibsen Peña*, *supra* note 89, para. 130; *Gelman v. Uruguay*, *supra* note 86, para. 133.

<sup>122</sup> Inter-American Court of Human Rights, *Case of the Street Children (Villagrán Morales et al. v. Guatemala)*, judgment of 19 November 1999, Series C No. 63, para. 226.

<sup>123</sup> Inter-American Court of Human Rights, *Bámaca Velásquez v. Guatemala*, *supra* Chapter 3, note 176, para. 201. See also *Barrios Altos v. Peru*, *supra* Introduction, note 75, para. 48.

<sup>124</sup> Inter-American Court of Human Rights, *Bámaca Velásquez v. Guatemala*, *supra* note 176, para. 202.

<sup>125</sup> Inter-American Court of Human Rights, *Tibi v. Ecuador*, judgment of 7 September 2004, Series C No. 114, para. 257. See also *Case of the Plan de Sánchez Massacre*, judgment of 19 November 2004, Series C No. 116, para. 97; *Case of the Serrano-Cruz Sisters*, judgment of 1 March 2005, Series C No. 120, para. 62. In the sense that the right to the truth is also a means of reparation see also *Kawas Fernandez v. Honduras*, judgment of 3 April 2009, Series C No.

More generally, the overall prevailing Court's stance as to the legal foundation of the right to the truth is well illustrated by its judgment in the *Massacre de Pueblo Bello* case. In that case, in light of its previous jurisprudence and taking into account the Inter-American Commission's argument that the denial of the truth amounts also to a breach of Article 13 of the American Convention, the Court held that:

“Regarding the so-called right to the truth, the Court has understood this as part of the right of access to justice, as a reasonable expectation that the State must satisfy to the victims of human rights violations and to their next of kin, and as a form of reparation. Consequently, in its case law, the Court has examined the right to truth in the context of Articles 8 and 25 of the Convention, and also in the chapter on other forms of reparation...[the Court] does not consider that the right to the truth is an autonomous right embodied in Arts. 8, 13, 25 and 1.1 of the Convention (...).”<sup>126</sup>

It is noteworthy, however, that, in the *Gomes Lund et al. v. Brazil* case, in contrast with its previous jurisprudence, the Court directly grounded – and thus did not only ‘subsume’ – the right to the truth in Articles 8, 13, 25 and 1.1 of the American Convention.<sup>127</sup> In addition, the Court expressly recognized

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196, para. 190 (“The Court repeats that the State is required to fight such impunity by all means available, as impunity fosters the chronic repetition of human rights violations and renders victims who have a right to know the truth of the facts completely defenceless. The acknowledgment and exercise of the right to know the truth in a specific situation represent a means of reparation. Therefore, in the instant case, the right to know the truth creates in the victims a legitimate expectation that must be satisfied by the State. The guarantee obligation enshrined in Article 1(1) of the American Convention entails the duty of the States Parties to the Convention to organize the governmental apparatus and, in general, all the structures through which public authority is exercised in a manner such that they may ensure, in legal terms, the free and full exercise of human rights”).

<sup>126</sup> Human Rights Court of Human Rights, *Case of Massacre Pueblo Bello v. Colombia*, *supra* Chapter 3, note 126, paragraph 219.

<sup>127</sup> Inter-American Court of Human Rights, *Gomes Lund et al. v. Brazil*, *supra* Chapter 2, note 97, para. 212.



that “the right to know the truth is (...) linked to the right to seek and receive information enshrined in Article 13”.<sup>128</sup>

By means of this ruling, the Court has both recognized the autonomous nature of the right to the truth and provided a legal foundation for its enforcement as a collective right (linking it to Article 13 of the American Convention on Human Rights). However, in its subsequent decisions, the Court has ‘shifted’ back to its previous approach, thus denying the autonomous nature of the right to the truth. For instance, in its 2012 judgment in the case *González Medina and Family v. Dominican Republic*, the Court again subsumed the right to the truth in the right of the victim and its family to obtain clarifications by State authorities, contextually upholding the corresponding duty of the State to investigate and prosecute serious violations of human rights (stemming from Articles 1.1, 8 and 25 of the American Convention). Therefore, the Court did not deal with the issue of the alleged violation of the right to the truth separately.<sup>129</sup> Furthermore, the Court did not find any direct breach of Article 13 of the American Convention on Human Rights. The Court reiterated this approach in its most recent case law.<sup>130</sup>

The Inter-American Court of Human Rights’ ambivalent attitude as to the autonomous nature of the right to the truth is well illustrated by the concurring opinion of Judge Ferrer Mac-Gregor Poisot (endorsed by Judges Vio Grossi and Ventura Robles) to the 2014 judgment in the case *Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*. Against the

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<sup>128</sup> *Ibid.*, para. 201.

<sup>129</sup> Inter-American Court of Human Rights, *González Medina and Family Members v. Dominican Republic*, judgment of 27 February 2012, Series C No. 240, para. 263. See also *Gudiel Álvarez et al. (“Diario Militar”) v. Guatemala*, *supra* Chapter 2, note 102, para. 267.

<sup>130</sup> See, e.g., Inter-American Court of Human Rights, *Case of the Santo Domingo Massacre v. Colombia*, judgment of 30 November 2012, Series C No. 259, para. 155 (however, the Court eventually did not find any violation of the right to the truth: *ibid.*, para. 173); *Mendoza et al. v. Argentina*, judgment of 14 May 2013, Series C No. 260, paras. 217-218; *Suárez Peralta v. Ecuador*, judgment of 21 May 2013, Series C No. 261, para. 93; *Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, judgment of 14 November 2014, Series C No. 287, para. 511; *Espinoza Gonzales v. Peru*, judgment of 20 November 2014, Series C No. 289, paras. 237-238; *Cruz Sanchez et al. v. Peru*, judgment of 17 April 2015, Series C No. 292, paras. 428-430.

majority's decision to reiterate the Court's main approach by subsuming the right to the truth in Articles 1.1, 8 and 25 of the American Convention on Human Rights, the three judges stressed the need to recognize the right to the truth as an *autonomous* right under the Inter-American system of human rights protection (thus consolidating the Court's stance in the judgment related to the case *Gomez Lund v. Brazil*).<sup>131</sup> The concurring judges grounded this assertion on the fact that subsuming the right to the truth in other conventional rights would "encourage the distortion of the essence and intrinsic nature of each right" and prevent from clearly identifying its content and scope.<sup>132</sup> Furthermore, the lack of recognition of the autonomous nature of the right to the truth would disregard the advances occurred in both domestic legal systems and international human rights law, including the coming into force of the International Convention for the Protection of All Persons from Enforced Disappearance,<sup>133</sup> as well as the clear text of Article 29(c) of the American Convention on Human Rights, pursuant to which "no provision of this Convention should be interpreted (...) as excluding other rights or guarantees that are inherent in the human personality, or derived from representative democracy as a form of government".<sup>134</sup>

A partially different approach, closer to the one adopted by the Human Rights Committee, can be registered in the case law of the European Court of Human Rights. This Court has repeatedly recognized that, in cases of enforced disappearances, the lack of information concerning the whereabouts and fate of the disappeared amounts to a violation of Article 3 of the European Convention on Human Rights ('prohibition of torture and inhuman treatment'). In this regard, one of the leading judgments is that issued in the *Cyprus v. Turkey* case, where the Court found that "the silence of the

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<sup>131</sup> *Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, *supra* note 130, Concurring opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, Introduction (see also Endorsements by Judge Eduardo Vio Grossi and Judge Manuel E. Ventura Robles).

<sup>132</sup> *Ibid.*, para. 24.

<sup>133</sup> *Ibid.*, para. 25 (see also Endorsements by Judge Eduardo Vio Grossi, para. 4).

<sup>134</sup> *Ibid.*, para 23 (see also Endorsements by Judge Eduardo Vio Grossi, para. 1).

authorities of the respondent State in the face of the real concerns of the relatives of the missing persons attains a level of severity which can only be categorised as inhuman treatment within the meaning of Article 3”.<sup>135</sup> In an earlier case, *Kurt v. Turkey* case, the Court similarly held that a mother’s anguish caused by the lack of official information on the subsequent fate of her son amounted to a violation of Article 3 of the European Convention on Human Rights.<sup>136</sup>

In more recent cases, the Court has addressed the right to the truth in the context of the ‘procedural limb’ of Article 3 of the Convention. For instance, in the *Janowiec v. Russia* case, the Court acknowledged that the trauma suffered by the applicants for the death of their relatives and the denial of the historical truth constituted a breach of the procedural obligations stemming from Article 3 of the Convention (States’ duty to undertake prompt and effective investigations into alleged acts of torture or other inhuman or degrading treatments).<sup>137</sup> In the *El-Masri v. Macedonia* case, the Court similarly concluded that the summary investigation that was carried out with regard to the victim’s extraordinary rendition was not effective as it did not lead to establishing the truth of the facts at stake (including the identification of those responsible). Accordingly, the Court found a breach of Article 3 of the European Convention in its procedural ‘dimension’.<sup>138</sup>

In its recent judgments in the *Al-Nashiri* and *Husayn (Abu Zubaydah)* cases, the European Court of Human Rights has *de facto* confirmed the approach already undertaken in the *Janowiec* and *El-Masri* cases. The Court, in fact, has not addressed the right to the truth as an autonomous self-standing

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<sup>135</sup> European Court of Human Rights, *Cyprus v. Turkey*, *supra* note 79, para. 157.

<sup>136</sup> European Court of Human Rights, *Kurt v. Turkey*, *supra* note 79, para. 134.

<sup>137</sup> European Court of Human Rights, *Janowiec et al. v. Russia*, *supra* Chapter 3, note 456, para. 155.

<sup>138</sup> European Court of Human Rights, *El-Masri v. Former Yugoslav Republic of Macedonia*, *supra* Chapter 3, note 196, para. 193.

right, but has inferred it from the procedural obligations enshrined in Article 3 of the Convention.<sup>139</sup>

Eventually, the Court has confirmed – albeit more tenuously – this approach also in its recent judgment in the *Nasr and Ghali* case. The Court observed indeed that, as a matter of principle, the duty to undertake effective investigations into acts of tortures stemming from Article 3 of the European Convention of Human Rights, read in conjunction with Article 1 of the same instrument, also impose the “*établissement de la vérité*”.<sup>140</sup>

In other cases, however, the European Court of Human Rights has linked the right to receive information on the fate and whereabouts of the missing ones also to other rights embodied in the European Convention on Human Rights, namely the right to an effective remedy (Article 13)<sup>141</sup> and the right to life, in its procedural dimension (Article 2). For instance, in its judgment in the *Association 21 December 1989 v. Romania* case, the Court found that the right of the victims and their families to ascertain the truth about serious violations of the right to life amounted to a breach of Article 2 of the European Convention on Human Rights”.<sup>142</sup>

In this regard, the Court’s case law has been *de facto* reiterated by the Kosovo Human Rights Advisory Panel that, in the already-mentioned opinion in the case *Dobriła Antić-Živković v. UNMIK*, expressly enlisted the right to the truth among the general principles underpinning the State’s duty to conduct an effective investigation under Article 2 of the European Convention on Human Rights.<sup>143</sup>

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<sup>139</sup> European Court of Human Rights, *Al-Nashiri v. Poland*, *supra* Introduction, note 26, para 498 and *Husayn (Abu Zubaydah)*, *supra* Chapter 3, note 196, para 492.

<sup>140</sup> European Court of Human Rights, *Nasr and Ghali v. Italy*, *supra* Chapter 1, note 173, para. 262.

<sup>141</sup> European Court of Human Rights, *Kurt v. Turkey*, *supra* note 79, para. 175 (“Given that the authorities have not assisted the applicant in her search for the truth about the whereabouts of her son, [the Court] found a breach of Articles 3 and 13”).

<sup>142</sup> European Court of Human Rights, *Case of Association 21 December 1989 v. Romania*, *supra* note 269, para. 107.

<sup>143</sup> *Dobriła Antić-Živković v. UNMIK*, *supra* note 59, para. 80. See also *P.S. v. UNMIK*, *supra* note 59, para. 89.

The approach of the Human Rights Chamber for Bosnia and Herzegovina partially resembles that held by the European Court of Human Rights. The Chamber has generally found that the mental anguish suffered by the family of the disappeared person as a consequence of the lack of knowledge as to his fate or whereabouts amounts to a violation of Article 3 of the European Convention on Human Rights. Thus, to make an example, in the *Srebrenica* cases, the Chamber found that the respondent State, by failing to inform the applicants about the truth of the fate and whereabouts of their missing relatives had violated the applicants' right to be free from inhuman and degrading treatment.<sup>144</sup> It is noteworthy, however, that, in one instance, the Human Rights Chamber for Bosnia and Herzegovina found that the State's failure to provide information concerning the fate and whereabouts of the missing ones amounted also to a breach of Article 8 of the European Convention on Human Rights ('right to the respect of private and family life').<sup>145</sup>

In light of the above, it is clear that the overall practice of international and regional human rights monitoring bodies, although highly 'fragmented', is quite consistent in denying an autonomous nature to the right to the truth. This attitude collides with the conclusions reached by the Office of the High Commissioner for Human Rights in its 2006 Study on the Right to the Truth – pursuant to which the right to the truth is an inalienable and autonomous right – and with the statements of several international bodies (as well as, with the findings of the Inter-American Court on Human Rights in its 'isolated' judgment in the case *Gomes Lund v. Brazil* case).<sup>146</sup> In light of the general approach undertaken by human rights monitoring bodies, one could argue, however, that the recognition of the right to the truth as a free-standing right

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<sup>144</sup> Human Rights Chamber for Bosnia and Herzegovina, *The Srebrenica Cases*, *supra* note 56, para. 191. See also *Unković v. Bosnia and Herzegovina*, case No. CH/99/2150, decision of review, 10 May 2002, where the Chamber, although affirming that Article 3 of the European Convention of Human Rights protects the families from the suffering consequent to the State's failure to provide information, did not find a violation of Article 3.

<sup>145</sup> See again Human Rights Chamber for Bosnia and Herzegovina, *Unković v. Bosnia and Herzegovina*, *supra* note 144, para. 126.

<sup>146</sup> UN Doc. E/CN.4/2006/91, *supra* note 13, para. 42.

appears more as an attempt to accelerate a process non yet accomplished, than a faithful reflection of the current normative *status quo*.

### **2.2.5. Convergences and divergences in the practice of international and regional human rights monitoring bodies**

The analysis undertaken in the previous sections shows a lack of uniformity in the case law of human rights monitoring bodies concerning the right to the truth, both among them and within their own practice. Indeed, when analysing the emerging recognition of the right to the truth in both the Inter-American and European systems of human rights protection, it is clear that there are different approaches as to the way this concept has been developed even within the same system.

For instance, lacking any express recognition of this right in the American Convention on Human Rights, the Inter-American Commission of Human Rights has repeatedly asserted the autonomous nature of the right to the truth; an approach that, however, has been rejected by the Inter-American Court. In addition, even within the case law of the Inter-American Court, the right to the truth has been either subsumed in other rights guaranteed by the American Convention of Human Rights or upheld as an autonomous right. Finally, even when the right to the truth has been subsumed in other rights, there has been lack of uniformity concerning its clear standing. As previously stressed, in fact, both the Inter-American Commission and the Inter-American Court of Human Rights have at times addressed the violation of the right to the truth as a breach of Article 13 of the American Convention, whilst, in many other cases, this argument, even if raised by the petitioners, has been rejected.

Similarly, the European Court of Human Rights and the Human Rights Chamber for Bosnia Herzegovina have adopted diversified approaches as to the legal basis of the right to the truth, grounding it on different rights

enshrined in the European Convention of Human Rights (such as Articles 2, 3, 8 and 13).

The haziness surrounding the legal foundation of the right to the truth, even within the same system of human rights protection, is well illustrated by the disagreement that accompanied the ruling of the European Court of Human Rights in the *El-Masri* case. Indeed, this judgment listed two different concurring opinions taking opposite views. Judges Tulkens, Spielman, Sicilianos and Keller considered that the Court should have acknowledged that, in the absence of any effective remedy, the applicant had been denied the right to the truth. Thus, according to their opinion, the right to the truth would have been better situated in the context of Article 13 of the European Convention of Human Rights, rather than in the context of Article 3. The same Judges also criticized what they referred to as a “timid allusion” that the Court made to the right to the truth within the context of Article 3, in its procedural limb.<sup>147</sup> On the contrary, Judges Casadevall and López Guerra noted that:

“as regards the violation of the procedural aspect of Article 3 of the Convention on account of the failure of the respondent State to carry out an effective investigation into the applicant’s allegations of ill-treatment, no separate analysis as performed by the Grand Chamber (...) was necessary with respect to the existence of a ‘right to the truth’ as something different from, or additional to, the requisites already established in such matters by the previous case law of the Court”.<sup>148</sup>

While no similar disagreement might be found in the subsequent judgments in the *Al-Nashiri* and *Husayn (Abu Zubaydah)* cases, it still denotes the

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<sup>147</sup> European Court of Human Rights, *El-Masri v. The Former Yugoslav Republic of Macedonia*, *supra* Chapter 3, note 196, Joint Concurring Opinion of Judges Tulkens, Spielman, Sicilianos and Keller.

<sup>148</sup> *Ibid.*, Joint Concurring Opinion of Judges Casadevall and López Guerra.

uncertainties surrounding the exact legal foundation of the right to the truth. Moreover, as it has been correctly pointed out, the divergences in approach embodying in the two concurring opinions well explain the “intermediate stand” embraced by the European Court of Human Rights with respect to this right.<sup>149</sup>

In this regard, it is also noteworthy that, in its recent judgment in the *Nasr and Ghali* case, the European Court of Human Rights seems to have partly upheld the reasoning of Judges Tulkens, Spielman, Sicilianos and Keller’s in their concurring opinion to the *El-Masri* case. Although refraining from any explicit reference to the right to the truth, the Court has indeed observed that the right to an effective remedy enshrined in Article 13 of the European Convention on Human Rights requires that the applicants are entrusted with effective means of recourse capable of leading, *inter alia*, to the establishment of the truth.<sup>150</sup>

Under a different perspective, the comparison between different systems of human rights protection shows that, on the one hand, the Human Rights Committee, at the international level, and the European Court of Human Rights, at the regional level, have often considered the denial of information about serious human rights violations as amounting to torture or other inhuman or degrading treatment, while, on the other hand, the Inter-American Commission and the Inter-American Court have progressively based the right to the truth also on the right to a fair trial and the right to judicial protection (and in some instances also on the freedom of expression and thought). Thus, whilst the Inter-American Court of Human Rights has often addressed the right to know the truth within the context of Articles 1.1, 8, 1, 25 and, seldom, 13 of the American Convention on Human Rights, the Human Rights Committee and the European Court of Human Rights have mainly inferred it from the right to be free from torture and other inhuman and degrading

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<sup>149</sup> See 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*, *supra* note 11, p. 102.



treatment as embodied in Article 7 of the International Covenant on Civil and Political Rights and Article 3 of the European Convention on Human Rights.

It is noteworthy, however, that in its recent case law, the European Court of Human Rights, while relying on Article 3 of the European Convention on Human Rights, has addressed the violation of the right to the truth within its procedural limb, as part of the State's duty to investigate and prosecute the perpetrators of acts of torture or other inhuman or degrading treatment. By means of this reasoning, the European Court seems, by default, to have moved closer to the Inter-American approach, which has repeatedly considered the right to the truth as a procedural guarantee for the victims of human rights violations and their next of kin.

Another important distinction lies in the fact that whilst, for instance, the Inter-American Court of Human Rights has explicitly specified that the right to the truth is *per se* a means of reparation of serious violations of human rights,<sup>151</sup> no similar statement can be found in the practice of other human rights monitoring bodies. This aspect is particularly relevant as far as the legal nature of the right to the truth and its possible autonomous nature are concerned. In fact, if the disclosure of the truth amounts to a means of reparation, its nature as autonomous right should be denied *tout court*.

That said, regardless of the different legal foundations of the right to the truth in the distinct systems of human rights protection, the above analysis has also highlighted some common features as to its scope, entitlement and content. For instance, whilst the right of the truth has been traditionally recognized with reference to cases of enforced disappearances, further developments have shown a general trend to broaden its scope to all serious violations of human rights. Similarly, most human rights monitoring bodies have acknowledged the double-dimension of the right to the truth, as an

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<sup>150</sup> See again European Court of Human Rights, *Nasr and Ghali v. Italy*, *supra* Chapter 1, note 173, para. 334.

<sup>151</sup> Inter-American Court of Human Rights, *Myrna Mack Chang v. Guatemala*, *supra* Introduction, note 41, para. 274.

individual right and as a collective right, owed to the society as a whole. This recognition is nonetheless still missing in the work of the Human Rights Committee.

As to the content of the right to the truth, however, the Inter-American system of human rights protection has shown a more pro-active attitude, likely based on the greater amount, as well as the specific characteristics, of the cases filed before the Inter-American Commission and the Inter-American Court. Thus, for instance, the latter has recognized that the right to the truth also includes, if required by the circumstances, the right of access to States' archives.<sup>152</sup> So far, no similar determination has ever been made by other human rights bodies. The same consideration applies to the Inter-American Court's findings concerning the complementary relationship that should exist between judicial proceedings and the work of Truth Commissions.<sup>153</sup>

It follows from the above that, regardless of the progressive rapprochement underpinning the most recent case law of different monitoring bodies and its undeniable contribution to shape a unitary notion of 'right to the truth' as an emerging concept under international human rights law, the overall 'fragmentation' that still characterizes it and, in particular, the lack of a clear recognition of the right to the truth as a self-standing right, undermines any cut-clear conclusions as to its nature and normative content. It thus no surprise that, in its already cited concurring opinion to the Inter-American Court's judgment in the case *Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, Judge Ferrer Mac-Gregor Poisot hoped that: "in future, the Court [will] evolve its case law so as to strengthen full recognition of the right to know the truth, acknowledging the autonomy of this right, and

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<sup>152</sup> See again Inter-American Court of Human Rights, *Gomes Lund et al. v. Brazil*, *supra* Chapter 2, note 97, para. 292.

<sup>153</sup> The Parliamentary Assembly of the Council of Europe has however upheld this complementary relationship. See Resolution No. 1613 (2008) of 5 June 2008, on the *Use of Experience of the "Truth Commission"*, para. 6.

establishing its content, meaning and scope with increased precision”.<sup>154</sup> While merely referring to the case law of the Inter-American Court of Human Rights, the concurring judge has indeed implicitly provided a more general picture of the current *status* of the recognition of the right to the truth in the case law of human rights monitoring bodies.

### 3. State practice

#### 3.1. The right to the truth in domestic legislation

Parallel to its progressive recognition at the international and regional level, the right to the truth has been increasingly upheld also in the context of domestic legal systems.

In Colombia, for instance, Law No. 975 of 2005 expressly protects the inalienable, full and effective right to know both the fate and whereabouts of the disappeared persons and the circumstances in which serious violations of human rights have been perpetrated.<sup>155</sup> The law also recognizes the double-fold dimension of this right, as pertaining to both the victim and the society as a whole.<sup>156</sup> Article 57 further states that the right to the truth implies that the archives must be preserved.

In Mexico, Chapter V of the *ley general de víctimas* (*‘Del derecho a la verdad’*) expressly recognizes the right of the victims and the society as a whole to know the truth about serious human rights violations, including the identity of those responsible and the circumstances that led to their

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<sup>154</sup> *Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, *supra* note 130, Concurring opinion of Judge Eduardo Ferrer Mac-Gregor Poisot, para. 6.

<sup>155</sup> Law No. 975 of 25 July 2005 issuing provisions for the reincorporation of members of illegal armed groups who effectively contribute to the attainment of national peace and other provisions for humanitarian accords, Article 7.

<sup>156</sup> *Ibid.* On the right to the truth in Colombia see, *inter alia*, L. F. FAJARDO ARTURO, *Elementos estructurales del derecho a la verdad*, in *Civilizar*, vol. 12, 2012, pp. 15-34. See also, more generally, P.S. CUELLAR, *The Influence of Latin American Domestic Courts in the Development of the Right to the Truth*, in *Journal for the Study of Peace and Conflict*, 2014, pp. 1-17.

perpetration.<sup>157</sup> This legislative act also enlists the obligations resting on the State and stemming from this right, including, *inter alia*, the duty to undertake prompt and effective investigations into alleged human rights violations<sup>158</sup> and the duty to preserve archives on human rights abuses.<sup>159</sup> Interestingly, as far as this last aspect is concerned, the law provides the same restrictive criteria for restraining access embodied in the already-mentioned Updated Set of Principles to Combat Impunity. Pursuant to Article 24 of the *ley general de víctimas*, the refusal to disclose archival documents related to serious human rights abuses can never be grounded on ‘national security’ concerns unless, in exceptional circumstances, such a restriction is provided by the law, responds to the necessity to protect a legitimate interest in a democratic society and is subjected to independent judicial review.

To mention a further example, in Argentina, Presidential Decree No. 4/2010, which provides for the declassification of all information concerning the actions of the military during the period between 1976 and 1983, identifies its own *ratio* in the need to comply with the obligations stemming from the right to the truth.<sup>160</sup>

National legislation and peace agreements creating Truth and Reconciliation Commissions have also often indicated the ‘right to the truth’ as one of the legal grounds for their establishment. To make a few examples, Law No. 12,528, enacted by the President of Brazil on 18 November 2011, expressly identifies the primary goal of the creation of the National Truth Commission (*Comissão Nacional de Verdade*) in the need to effectively guarantee “*o direito à memória e à verdade histórica*”.<sup>161</sup> The 1994

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<sup>157</sup> *Ley general de víctimas*, enacted on 30 April 2012, and lastly reformed on 3 May 2013, Article 18.

<sup>158</sup> *Ibid.*, Article 21.

<sup>159</sup> *Ibid.*, Article 24.

<sup>160</sup> Decree No. 4/2010 of 5 January 2010, Preamble.

<sup>161</sup> See law No. 12.528 of 18 November 2011, Article 1. The Brazilian Truth Commission, whose mandate was to study and clarify serious violations of human rights perpetrated in Brazil during the military dictatorships between 1946 and 1988, has recently issued its final Report in December 2014. For an early comment on the Report see, *inter alia*, K. AMBOS, E. ROMERO, *The Report of the Brazilian Truth Commission: Late Truth without Justice?*, in

Agreement on the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer similarly recognizes the right of the Guatemalan people to know the truth about past abuses.<sup>162</sup>

### 3.2. The right to the truth in domestic case law

Several national courts have also upheld the right to know the truth concerning serious human rights violations. The Constitutional Court of Colombia, for instance, has repeatedly recognized this right in its case law starting from the '90s. However, whereas in some of the earliest cases the Court merely alluded to the right to the truth as the entitlement to 'judicial truth' stemming from the right of access to justice,<sup>163</sup> subsequent rulings have been characterized by a constant progression towards a more elaborated recognition of this right. In its judgment No. C-228/02, for example, the Colombian Constitutional Court, while still addressing the right to the truth as a component of the right of access to justice, expressly held that: "*el derecho a la verdad, esto es, la posibilidad de conocer lo que sucedió y en buscar una coincidencia entre la verdad procesal y la verdad real. Este derecho resulta particularmente importante frente a graves violaciones de los derechos humanos*".<sup>164</sup>

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*EJIL:Talk!*, available at: <http://www.ejiltalk.org/12892/> (last accessed on: 24 February 2016). On the right to the truth (and its implementation) in Brazil see, *inter alia*, G.A. MARCON, *Does Brazil have the Right to the Truth?*, in *Macalester Review*, vol. 3, 2013, pp. 1-5; see also Y.S. THANG, *International Justice through Domestic Courts: Challenges in Brazil's Judicial Review of the Amnesty Law*, in *International Journal of Transitional Justice*, vol. 9, 2015, pp. 259-277. See also the Preamble of Supreme Decree No. 065-2001-PCM of 2 June 2001, which identifies the society's right to know the truth as one of main grounds for the establishment of the Peruvian Truth and Reconciliation Commission.

<sup>162</sup> Concluded on 24 June 1994 between the Government of Guatemala and the *Unidad Revolucionaria Nacional Guatemalteca*, Preamble.

<sup>163</sup> See, e.g., judgment No. T-006/92 of 12 May 1992 (Judge M. P. Eduardo Cifuentes Muñoz) and decision No. T-597/92 of December 1992 (judge M. P. Ciro Angarita Barón).

<sup>164</sup> Judgment No. C-228/02 of 3 April 2002, para. 4(4)(1). See also the Constitutional Court's earlier ruling No. T-275/94 of 15 June 1994, where it stated that: "*la validez y la búsqueda de la verdad (...) constituyen elementos consustanciales al derecho de acceso a la justicia. (...)*

These conclusions have been reiterated and further developed in the Court's subsequent judgments. The constitutional judges have indeed repeatedly recognized the right to the truth and its *para*-constitutional rank by relying on Article 93 of the Colombian Constitution. Pursuant to this provision, in fact, international treaties upholding human rights and prohibiting their restriction during states of emergency should take precedence over municipal legislation and should be taken into account (together with the relevant case law of treaty monitoring bodies) in interpreting the constitutional text.

In its recognition of the right to the truth, the Constitutional Court has also repeatedly asserted the double-fold dimension of this right, conferring it to both the victim and to the society as a whole.<sup>165</sup> More specifically, the Court has found that, whilst the individual right to the truth owed to the victim and his next of kin imposes, at its minimum, a duty of the State to undertake effective investigations into allegations of serious violations of human rights, the same right, in its collective dimension, should be understood as entitling the whole society to the preservation of the historical memory of past abuses.<sup>166</sup>

In a recent judgment issued in 2012, the Court provided a particularly elaborated overview of the status of the right to the truth within the Colombian legal system:

*“(...) las víctimas y los perjudicados por graves violaciones de derechos humanos tienen el derecho inalienable a saber la verdad de lo ocurrido; (...) este derecho se encuentra en cabeza de las víctimas, de sus familiares y de la sociedad en su conjunto, y por tanto aparece*

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*Los perjudicados tienen derecho a saber qué ha ocurrido con sus familiares, como lo ha establecido la Corte Interamericana de Derechos Humanos” (ibid., para. 4).*

<sup>165</sup> See, e.g., judgment C-454/06 of 7 June 2006, para. 31. For a comment on this judgment see, *inter alia*, O.H. DÍAZ, F.A. GARCÍA MORENO, V.M. TOVAR, *Los derechos de la víctima del delito en la ley 906 de 2004: análisis de su reconocimiento y evolución jurisprudencial*, in *Verba iuris*, 2011, pp. 165-183.

<sup>166</sup> See, e.g., judgment No. 370/2006 of 18 May 2006, para. 3.1.2.2 ff. See also judgment No. 260/11 of 6 April 2011, para. 5 ff.

*una dimensión individual y una colectiva; (...) el derecho a la verdad constituye un derecho imprescriptible; (...) este derecho se encuentra intrínsecamente relacionado y conectado con el derecho a la justicia y a la reparación.”*<sup>167</sup>

As stressed by some commentators, these recent jurisprudential developments attest that the Court, while *de facto* constantly linking the right to the truth to the right of access to justice, as well as, in some instances, to the right to an adequate reparation, has progressively moved towards the recognition of this right as a self-standing enforceable right.<sup>168</sup>

The Constitution Court of Peru has also reached similar findings. In its judgment in the *Genaro Villegas Namuche* case,<sup>169</sup> the Court found indeed that, despite the absence of any express recognition in the Constitution, the right to the truth is to deem fully protected within the Peruvian constitutional legal framework, as strictly interlinked to the principle of human dignity, as well as with the duty of the State to protect fundamental rights and to grant access to justice, enshrined therein.<sup>170</sup> The Court also upheld the inalienable and autonomous character of said right. In particular, with regard to this last aspect, the Court relied on the ‘implied rights doctrine’ by asserting that, like many other fundamental legal texts, the Peruvian Constitution contains an ‘evolutive clause’ linked to the catalogue of fundamental human rights, whose

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<sup>167</sup> Judgment No. C-715/12 of 13 September 2012, para. 5.2.2.

<sup>168</sup> See again L. F. FAJARDO ARTURO, *Elementos estructurales del derecho a la verdad*, *supra* note 156, p. 26.

<sup>169</sup> Peruvian Constitutional Court, decision No. 2488/2002-HTC/TC, issued on 18 March 2004, paras. 8-20. Before this ruling, the right to the truth had been expressly upheld only by judge Manuel Aguirre Roca in his separate opinion to the judgment No. 013-96-I/TC. The case concerned the compatibility with the Peruvian Constitution of the amnesty laws enacted in the country. One of the challenges brought against these laws was in fact that their application had prevented the effective enjoyment of the right to the truth upheld by several international bodies. The Court, however, refused this argument. See Peruvian Constitutional Court, decision No. 013-96-I/TC of 28 April 1997, separate opinion.

<sup>170</sup> *Ibid.*, para. 20.

purpose is to provide newly-established rights “*con las mismas garantías de aquellos que sí las tienen expresamente*”.<sup>171</sup>

As to the content of the right to the truth, the Peruvian Constitutional Court found that this right applies to all circumstances surrounding heinous acts committed by State agents or non-State actors, including the reasons leading to their perpetration.<sup>172</sup> The Court further recognized its double dimension as individual and collective right.<sup>173</sup>

In Mexico, the Supreme Court of Justice recently relied on the case law of the Inter-American Court of Human Rights to conclude that military courts jurisdiction over serious human rights violations perpetrated against civilians breached, *inter alia*, the victims’ right to the truth by not allowing their participation to the proceedings.<sup>174</sup>

Similarly, in its 2011 judgment in the *Radilla Pacheco v. Attorney General* case, the Supreme Court relied on the right to the truth, as upheld by the Inter-American Court of Human Rights, to order the public release of information related to serious human rights violations, contextually rejecting the claims of secrecy made by the Attorney General.<sup>175</sup>

Mexican lower courts have also recognized the existence of the right to the truth in their case law. For instance, in a recent judgment of 12 June 2014, the *Tribunal Colegiado en Materia Penal del Primer Circuito* concluded that the refusal by official authorities to disclose information related to the investigations undertaken into enforced disappearances violated the right to the truth of the relatives of the disappeared persons.<sup>176</sup> Interestingly, the Court found that the duty of the State to provide information exists regardless of the

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<sup>171</sup> *Ibid.*, para. 11.

<sup>172</sup> *Ibid.*, para. 8.

<sup>173</sup> *Ibid.*, para. 9.

<sup>174</sup> Mexican Supreme Court, case No. 912/2010 of 14 July 2011, para. 40 ff.

<sup>175</sup> Mexican Supreme Court, judgment No. 168/2011 of 30 November 2011, p. 53.

<sup>176</sup> See *Tribunal Colegiado en Materia Penal del Primer Circuito*, case No. 33/2014, in *Gaceta del Semanario Judicial de la Federación*, September 2014, p. 2395 ff. (available at: <http://sjf.sejn.gob.mx>, last accessed on 24 February 2016).



admissibility of legal proceedings.<sup>177</sup> The Court's findings seem thus to support the *autonomous* nature of right to the truth, at least as far as enforced disappearances are concerned.

In Argentina, both the Supreme Court and lower judicial bodies have repeatedly upheld the right to the truth, as implicitly enshrined in international human rights instruments and in the Constitution.

The right to the truth was first invoked in the context of the '*juicios por la verdad*', an alternative form of legal proceedings created to shed light on the crimes perpetrated during the *años de plomo*.<sup>178</sup> Following the fluctuating approach initially undertaken by lower courts,<sup>179</sup> the Argentinian Supreme Court recognized for the first time its existence as an individual enforceable right in 1998. In its judgment in the *Urteaga* case, in fact, the Supreme Court upheld the right of the plaintiff to know the truth about the whereabouts of his brother and the circumstances of his disappearance and grounded it on the protection of the republican order and the principle of publicity embodied in the Constitution.<sup>180</sup>

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<sup>177</sup> *Ibid.*, sixth 'whereas': "(...) *Sin que el hecho de que el a quo de amparo no haya admitido la demanda, tenga por efecto negarle legitimación a los familiares de los desaparecidos para obtener las copias de la averiguación previa, pues ello equivaldría a condicionar el derecho que tienen a saber si el Estado ha realizado investigaciones serias y efectivas para determinar la suerte o paradero de las víctimas, identificar a los responsables y, en su caso, imponerles las sanciones correspondientes, pero sobre todo mantendría el desconocimiento del destino de sus seres queridos y el derecho a conocer los datos con que las autoridades cuentan después de casi siete años de su desaparición; lo que hace evidente que el requisito de la ratificación de la demanda en estos casos no es una formalidad que les impida ejercer su derecho humano a la verdad (...)*".

<sup>178</sup> See, *inter alia*, E. MACULAN, *Prosecuting International Crimes at National Level: Lessons from the Argentine 'Truth-Finding Trials'*, in *Utrecht Law Review*, vol. 8, 2012, pp. 106-121; E. A. ROMANIN, *Decir la verdad, hacer justicia: Los Juicios por la Verdad en Argentina*, in *European Review of Latin American and Caribbean Studies*, vol. 94, 2013, pp. 5-23.

<sup>179</sup> See M. ABREGU, *La tutela judicial del derecho a la verdad en la Argentina*, in *Revista IIDH*, vol. 24, 1996, pp. 11-47.

<sup>180</sup> Argentinian Supreme Court, *Urteaga, Facundo Raul c/ Estado Nacional*, case No. U.14. XXXIII, judgment of 15 October 1998, para. 20. Few months earlier, the same Court had rejected the extraordinary appeal filed by Carmen Aguilar de Lapacó, claiming her right to seek information related to the disappearance of her daughter. See *Aguilar de Lapacó Carmen s/ recurso extraordinario (causa n° 450) Suárez Mason*, case No. S. 1085 LXXXI, judgment of 13 August 1998. Following this decision, the claimant also filed a petition before the Inter-American Commission on Human Rights. See *Carmen Aguilar de Lapacó v. Argentina*, case

In its subsequent judgments the Supreme Court reiterated its findings as to the existence of the right to the truth, increasingly relying on the precedents set by the Inter-American human rights monitoring bodies. Thus, in the *Simón* case, by which it declared Argentinian amnesty laws contrary to the country's international obligations, the Supreme Court upheld the Inter-American Commission and the Inter-American Court of Human Rights' findings, defining the right to the truth as the right of the individual and of the society as a whole to know the circumstances in which serious violations of human rights have occurred.<sup>181</sup>

Another interesting example of the recognition of the right to the truth in Argentinian courts is represented by the ruling that a federal court recently issued in the context of a *juicio por la verdad* initiated by a descendant of victims of the Armenian genocide. The federal judge, to whom the claimant had asked to clarify the historical truth, found indeed that the Turkish State perpetrated the crime of genocide against the Armenian people between 1915 and 1923.<sup>182</sup> As stated by the Court, the judgment did not concern the criminal responsibility of those involved, but merely the establishment of the "truthfulness" of the facts alleged.<sup>183</sup> Hence, the enforcement of the individual and collective right to know the truth about historical abuses represents the very *raison d'être* of this judgment.<sup>184</sup> Remarkably, the same federal judge, while envisaging more appropriate *fora* where the claim could have been brought, recognized that the hearing of the case was prompted by "(...) *la*

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No. 12.059, Report No. 70/99 of 4 May 1999, OEA/Ser.L/V/II.106 Doc. 3 rev., at 161 (decision on admissibility). The case was settled out of court.

<sup>181</sup> See Argentinian Supreme Court, *Simón, Julio Héctor y otros s/ privación ilegítima de la libertad*, case No. 17.768, decision of 14 June 2005, para. 25.

<sup>182</sup> Federal court No. 5 for criminal and correctional matters, case No. 2610/2001 of 1 April 2011 (*Resolución declarativa de los sucesos históricos conocido como el genocidio del pueblo armenio*). The text of this decision is available (in Spanish) at: [www.genocidios.org](http://www.genocidios.org) (last accessed: 24 February 2016). For a comment on this see, *inter alia*, S. GARIBIAN, *Ghosts also Die. Resisting Disappearance through the 'Right to the Truth' and Juicios por la Verdad*, in *Journal of International Criminal Justice*, vol. 12, 2014, pp. 515-538.

<sup>183</sup> *Ibid.*, para. 7.6.

<sup>184</sup> Federal court No. 5 for criminal and correctional matters, case No. 2610/2001, decision of 23 October 2002, para. I.

*justa pretensión del querellante, y para que el denominado ‘derecho a la verdad’ no quede plasmado como una mera formula ritual vacía de contenido”*.<sup>185</sup> In this respect, this judgment seems to open new perspectives on the possible practical applications of the right to the truth. As it has been correctly noted, this decision vests indeed the right to the truth of a new dimension as a “means to validating the factuality of a crime”<sup>186</sup> even beyond the borders of the State where it was actually committed.

Although in a much more nuanced manner than its Latin American counterparts, the South African Constitutional Court has also implicitly recognized the right to the truth (mainly, in its collective dimension) in its judgment in the *Azanian Peoples Organization et al. v. President of South Africa et al* case.<sup>187</sup> In front of the challenges of constitutionality brought by apartheid victims against amnesty provisions, the Court found indeed that traditional means of justice may be partly sacrificed for the purpose of obtaining full disclosure of the truth.<sup>188</sup> In this respect, it is also noteworthy that the Court, in balancing truth and justice, stressed the pressing need to overcome the “secrecy (...) that ha[s] concealed the truth in little crevices of obscurity in [the country’s] history”.<sup>189</sup>

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<sup>185</sup> *Ibid.*, para. III(C).

<sup>186</sup> S. GARIBIAN, *Ghosts also Die. Resisting Disappearance through the ‘Right to the Truth’ and Juicios por la Verdad*, *supra* note 182, p. 536.

<sup>187</sup> J. DAVIS, *Seeking Human Rights Justice in Latin America: Truth, Extra-territorial Courts, and Process of Justice*, *supra* note 9, p. 110. See Constitutional Court of South Africa, *Azanian Peoples Organization (AZAPO) et al. v. The President of the Republic of South Africa et al.*, judgment of 25 July 1996, case No. CCT 17/96.

<sup>188</sup> *Ibid.*, para. 21.

<sup>189</sup> *Ibid.*, para. 17. For a comment on this judgment see, *inter alia*, D.F. WILHELM, *Azanian Peoples Organization v. The President of the Republic of South Africa*, in *American Journal of International Law*, vol. 91, 1997, pp. 360-364; and A. SACHS, *War, Violence, Human Rights and the Overlap between National and International Law: Four Cases before the South African Constitutional Court*, in *Fordham International Law Journal*, vol. 28, 2005, pp. 432-476.

More recently, in a landmark judgment issued in 2011, the Constitutional Court of South Africa also upheld the right to speak the truth about amnestied abuses.<sup>190</sup>

The judgment originated from a defamation claim over the publication of a statement related to amnestied crimes. A newspaper and some journalists had indeed filed a complaint before the Constitutional Court after the High Court and the Supreme Court of Appeal had found that amnesties granted pursuant to statutory law prevented from considering those crimes as true. Some relatives of apartheid victims also filed *amici curiae*, arguing that, by asserting that amnestied crimes should be considered as never occurred, earlier decisions breached, *inter alia*, their constitutional right to the truth. The Court, although refraining from explicitly addressing the constitutional stance of the right to the truth, found that denying the truth collided with the underpinning purpose of the all reconciliation process, as regulated in the Constitution and statutory provisions.<sup>191</sup>

By means of its reasoning, the Court has *de facto* coined a ‘right of freedom of expressing the truth about serious human rights violations’, strictly interlinked to (and implicitly grounded on) the right to the truth *stricto sensu*, which has no equal in the international arena.

In 2014, the Lebanese Supreme Council also recognized that the relatives of disappeared persons have the right to know the fate and whereabouts of their loved ones.<sup>192</sup> The Court grounded its findings on the case law of international human rights monitoring bodies, which have inferred the right to the truth from other human rights enshrined both in international treaties binding Lebanon and in the Lebanese Constitution.<sup>193</sup> By means of this ruling,

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<sup>190</sup> Constitutional Court of South Africa, *The Citizen 1978 (Pty) Ltd. and Others v. McBride*, judgment of 8 April 2011, 2011 ZACC 11.

<sup>191</sup> *Ibid.*, para. 34.

<sup>192</sup> Ruling of 4 March 2014. The original text of the ruling (in Arabic) and some excerpts (in English) are available on the website of the Lebanese NGO The Legal Agenda, at: <http://english.legal-agenda.com> (last accessed on 24 February 2016).

<sup>193</sup> Lebanon has not ratified the International Convention for the Protection of All Persons from Enforced Disappearance.

the Supreme Council eventually overturned the Prime Minister's decision not to disclose the documents related to the investigations undertaken by an *ad hoc* Commission of Inquiry into disappearances occurred during the civil war in the country.

All in all, the above reported examples illustrate a progressive affirmation of the right to the truth also within domestic legal systems, which has paralleled and often interacted with the recognition of this right at the international and regional level. Regardless of some recurring common traits (first and foremost, the assertion of the individual right to the truth and/or its close relationship with other human rights), however, the way in which this right has been upheld in practice varies greatly from State to State. Furthermore, while the right to the truth has been widely recognized in Latin American countries, being regarded as an essential component of the transitional processes taking place therein, it is more unlikely to find similar determinations in domestic legal systems outside the said geographical context. It cannot be excluded, however, that future evolutions will lead to a more widespread recognition of this right in national domestic systems. For instance, in the proceedings initiated before the Kenyan High Court (Constitutional and Human Rights Division) challenging the constitutionality of the final recommendations made by the Truth, Justice and Reconciliation Commission established in the country,<sup>194</sup> the Kenyan section of the *International Center for Transitional Justice* has filed an *amicus curiae* brief arguing that erasing parts of the report would amount to a breach of the right to know the truth.<sup>195</sup> It is to see whether – and, in the affirmative, to what extent – the High Court will eventually take into account the said argument.<sup>196</sup>

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<sup>194</sup> High Court of Kenya, Constitutional and Human Rights Division, petition No. 286/2013, *Njenga Mwangi & Another v. Truth, Justice And Reconciliation Commission & 4 Others*, lodged on 7 June 2013. Several other petitions have challenged the final report of the Kenyan Truth and Reconciliation Commission. For an overview of the pending cases see C.G. NDUNGÚ, *Lessons to be Learned: An Analysis of the Final Report of Kenya Truth, Justice and Reconciliation Commission*, International Center for Transitional Justice Brief, May 2014, p. 10 (available at: <http://www.ictj.org>; last accessed on 24 February 2016).

<sup>195</sup> International Centre for Transitional Justice Kenya, *Amicus curiae* submission, 17

#### **4. The right to know the truth: a customary rule or a general principle of international law?**

As the right to the truth is not embodied in any international treaty (with the sole already-mentioned exception of the International Convention for the Protection of All Persons from Enforced Disappearance), the issue arises as to whether this right does nonetheless amount to an autonomous source of international law, either as a customary rule or as a general principle of international law.<sup>197</sup> More specifically, it is to wonder if the previously examined multiple assertions of this right at the international, regional and domestic level – whether *cumulatively considered* – support the conclusion that this right does entail specific legal obligations resting on the generality of States.

As far as international humanitarian law is concerned, the International Committee of the Red Cross has explicitly recognized that States' duty to search and account for reported missing persons constitutes a rule of customary law applicable with respect to both international and internal conflicts.<sup>198</sup> Furthermore, as previously held, a group of experts convened under the aegis of the United Nations upheld the 'alleged' customary status of the right to know the truth about serious violations of human rights already in

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September 2013, at 37-38, available at the website: [www.ictj.org](http://www.ictj.org) (last accessed on 24 February 2016).

<sup>196</sup> So far, the High Court has issued a decision on admissibility. See Kenyan High Court, Constitutional and Human Rights Division, *Njenga Mwangi & Another v. Truth, Justice And Reconciliation Commission & 4 Others*, decision of 16 July 2013.

<sup>197</sup> Pursuant to Article 38(1) of the Statute of the International Court of Justice: "The Court, whose function is to decide in accordance with *international law* such disputes as are submitted to it, shall apply: a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; b) international custom, as evidence of a general practice accepted as law; c) the general principles of law recognized by civilized nations; d) subject to the provisions of Article 5, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law" (emphasis added).

<sup>198</sup> J. M. HENCKAERT, L. DOSWALD-BECK (eds), *Customary International Humanitarian Law*, *supra* Chapter 3, note 21, p. 421 (Rule 117).

1995.<sup>199</sup> Since then, several commentators have also supported the idea that the right to the truth would amount to custom<sup>200</sup> or, at least, to “something approaching a customary right”.<sup>201</sup> Despite these statements, however, whether the right to the truth has indeed achieved the status of a customary rule of international law is anything but clear-cut.

As stressed in the previous Chapters, according to Article 38(1)(b) of the Statute of the International Court of Justice, customary law requires “evidence of a general practice accepted by law”. Traditionally, this expression has been understood to identify two constitutive elements of custom: State practice and *opinio juris sive necessitatis* (that is, that the relevant practice is accompanied by a sense of legal obligation).<sup>202</sup>

Pursuant to the 2014 ILC Second Report on identification of customary international law, the main forms of ‘practice’ include, *inter alia*: physical actions of States; acts of the executive branch; legislative acts; practice related to treaty; judgment of national courts; States’ conducts related to the adoption of resolutions of organs of international organizations and international conferences.<sup>203</sup> Decisions by international courts and tribunals, while not constituting relevant ‘practice’, may nonetheless provide authoritative statements for the purpose of detecting international customs.<sup>204</sup>

‘Generality’ and ‘consistency’ represent two additional requirements that a certain practice (including inaction) should necessarily meet in order to ground the identification of a customary rule. The first parameter (*i.e.*, ‘generality’) requires that the practice is “extensive, or, in others words, sufficiently

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<sup>199</sup> See again UN Doc. A/CN.4/Sub.2/1995/20, *supra* note 30, para. 36.

<sup>200</sup> See, *inter alia*, J. DAVIS, *Seeking Human Rights Justice in Latin America: Truth, Extra-territorial Courts, and Process of Justice*, *supra* note 9, pp. 106-107.

<sup>201</sup> Y. NAQVI, *The Right to the Truth in International Law: Fact or Fiction?*, *supra* note 12, p. 267.

<sup>202</sup> This traditional ‘two-elements’ approach has been recently upheld in the International Law Commission, Second Report on identification of customary international law, drafted by the Special Rapporteur Michael Wood. See UN Doc. A/CN.4/672 of 22 May 2014, para. 21 ff.

<sup>203</sup> *Ibid.*, para. 41.

<sup>204</sup> See International Law Commission, Third Report on identification of customary international law, UN Doc. A/CN.4/682, *supra* Chapter 3, note 85, para. 59 ff.

widespread”, taking into account both a quantitative and a representative dimension.<sup>205</sup> The second element (*i.e.*, ‘consistency’) refers instead to the need for a certain degree of uniformity of the relevant conducts.<sup>206</sup>

As to the evidence of *opinio juris*, the already cited ILC Second Report enlists, among others: statements of States indicating what amounts to customary law; domestic courts’ case law; opinions of governments’ legal advisors; and the attitude of States with respect to resolutions by deliberative organs of international organizations.<sup>207</sup> It clearly follows from the above that the same ‘conduct’ may be indeed determinative of both State practice and *opinio juris*.

While it has been suggested that the traditional two-fold approach to international customary law would not apply as such<sup>208</sup> or – at a minimum – would raise some theoretical challenges with respect to human rights law,<sup>209</sup> the ILC Special Rapporteur has expressly rejected the idea that, in specific fields (including human rights law), one mere element (*i.e.*, *opinio juris*) would suffice *per se* to establish customary law.<sup>210</sup> According to the Special Rapporteur, in fact, any variation of this kind would inevitably be at odds with

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<sup>205</sup> UN Doc. A/CN.4/672, *supra* note 202, para. 52 ff.

<sup>206</sup> *Ibid.*, para. 55 ff.

<sup>207</sup> *Ibid.*, para. 76 ff.

<sup>208</sup> See, *e.g.*, R. KOLB, *Selected Problems in the Theory of Customary International Law*, in *Netherlands International Law Review*, vol. 50, 2003, p. 128. With specific regard to human right customs, see also, *inter alia*, T. MERON, *Human Rights and Humanitarian Norms as Customary Law*, Oxford, 1981, p. 113 ff.; R. B. LILLICH, *The Growing Importance of Customary International Human Rights Law*, in *Georgia Journal of International and Comparative Law*, vol. 25, 1995-1996, p. 1 ff.; J. WOUTERS, C. RYNGAERT, *Impact on the Process of the Formation of Customary International Law*, in M.T. KAMMINGA, M. SHEININ (eds), *The Impact of Human Rights Law on General International Law*, Oxford, 2009, p. 111 ff.; B.D. LEPARD, *Customary International Law. A New Theory with Practical Applications*, Cambridge, 2010, p. 332. For an accurate view of the different approaches that have been advanced in academic doctrine as to the existence and nature of international human rights customary law see, in particular, P. ALSTON, B. SIMMA, *The Sources of Human Rights Law: Customs, Ius Cogens, and General Principles*, in *Australian Yearbook of International Law*, vol. 12, 1988-1989, p. 84 ff.

<sup>209</sup> See H. THIRLWAY, *Human Rights in Customary Law: An Attempt to Define Some of the Issues*, in *Leiden Journal of International Law*, vol. 28, 2015, pp. 495-506.

<sup>210</sup> UN Doc. A/CN.4/672, *supra* note 202, para. 28. This thesis has also been upheld in doctrine. See, *e.g.*, J. J. PAUST, *The Complex Nature, Sources and Evidence of Customary*



the “systematic nature of international law”.<sup>211</sup> In this respect, the Special Rapporteur has *de facto* implicitly refused also to ascribe any validity to those academic theories denying, more generally, the very existence of human rights customary norms.<sup>212</sup>

It is also worth stressing that the Special Rapporteur, while admitting that there may nonetheless be some differences as to the practical *application* of the two-concept approach to international custom in special regimes,<sup>213</sup> has not followed up and/or better identified these possible ‘distinctions’ in its further codification work, generally upholding the need for ‘a case by case’ exam.<sup>214</sup>

This circumstance leaves inevitably unanswered some ‘open questions’, such as, for instance, whether, with respect to human rights customs, the component of practice should be understood to “include elements (...) that would not normally be regarded as sufficient to establish customary law”<sup>215</sup> or should be considered of limited significance if ‘inconsistent’ or ‘contrary’ to the generality of conducts.<sup>216</sup> More generally, it remains doubtful whether – as it has been argued – State practice in the sense of conduct ‘on the field’ would

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*Human Rights*, in *Georgia Journal of International and Comparative Law*, vol. 25, 1995-1996, p. 148.

<sup>211</sup> *Ibid.*

<sup>212</sup> See, e.g., L. HENKIN, *Human Rights and ‘State Sovereignty’*, in *Georgia Journal of International and Comparative Law*, vol. 25, 1995-1996, p. 38; P.J. KELLY, *The Twilight of Customary International Law*, in *Virginia Journal of International Law*, vol. 40, 1999-2000, p. 451. *Contra*, see, e.g., A. D’AMATO, *Human Rights as Part of Customary International Law: A Plea for Change of Paradigms*, in *Georgia Journal of International and Comparative Law*, vol. 25, 1995-1996, p. 47 ff.; A. T. GUZMAN, *Saving International Customary Law*, in *Michigan Journal of International Law*, vol. 27, 2005, p. 119.

<sup>213</sup> UN Doc. A/CN.4/672, *supra* note 202, para. 28

<sup>214</sup> *Ibid.*: “(...) for example, it may be that “for purposes of [a specific] case the most pertinent State practice” would be found in one particular form of practice that would be given ‘a major role’”. No further mention of the issue is contained in the ILC Special Rapporteur’s Third Report, UN Doc. A/CN.4/682 (*supra* Chapter 3, note 85).

<sup>215</sup> H. THIRLWAY, *Human Rights in Customary Law: An Attempt to Define Some of the Issues*, *supra* note 209, p. 506.

<sup>216</sup> See again B. D. LEPARD, *Customary International Law. A New Theory with Practical Applications*, *supra* note 208, p. 332.

yield less ‘authority’ in the field of human rights law than statements of intergovernmental bodies.<sup>217</sup>

These theoretical constructs, which have been advanced in scientific literature,<sup>218</sup> clearly rest on the *ethical* considerations underpinning human rights law generally.<sup>219</sup> However, while there is no doubt that the peculiarities of international human rights law may raise some legitimate questions as to the soundness of the traditional requirements of the custom-identification process, to uphold specific ‘*distinctive* criteria’ applicable to human rights customs alone would inevitably risk to reflect a specific doctrinal opinion, rather than the current status of international law. Moreover, it seems to deserve some credit the view of those regarding ethical considerations more as implicit ‘influencing factors’ in the development of rules, rather than driving elements explicitly affecting the determination of applicable law.<sup>220</sup>

Hence, in lack of further clarifications coming from the codification work of the ILC, the traditional custom-formation approach (including the general requirements related to the identification of ‘general practice’ and evidence of ‘acceptance as law’) appears as the most appropriate ‘theoretical scheme’ to adhere to in ascertaining whether the right to know the truth about serious human rights violations has achieved the status of a customary international rule.

Based on the above premises, the application of the custom-formation traditional approach to the wide body of international, regional and domestic practice related to the recognition of the right to the truth (analysed in the previous sections) prompts some general remarks that, although not meant to

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<sup>217</sup> H. THIRLWAY, *Human Rights in Customary Law: An Attempt to Define Some of the Issues*, *supra* note 209, p. 503.

<sup>218</sup> For an overview see, *inter alia*, N. ARAJÄRVI, *The Changing Nature of Customary International Law. Methods of Interpreting the Concept of Custom in International Criminal Tribunals*, Abingdon, New York, 2014, p. 30 ff.

<sup>219</sup> See, *inter alia*, H. THIRLWAY, *The Sources of International Law*, Oxford, 2014, p. 83 ff.

<sup>220</sup> *Ibid.*, pp. 87-88. See also N. ARAJÄRVI, *The Lines Begin to Blur? Opinio Iuris and the Moralisation of Customary International Law*, pp. 1-2, available at: <http://papers.ssrn.com> (last accessed on 24 February 2016).

be uncontroversial or – least of all – conclusive, may nonetheless help in getting a sense of the complexity that any determination over the customary nature of this right brings about.

First, as regards both practice and *opinio juris*, it is undeniable that recent years have witnessed the progressive recognition of the right to the truth – either with respect to enforced disappearances and, more generally, in relation to serious human rights violations – in a multitude of *fora*. Legislative acts and domestic case law (including judgments by the highest tribunals)<sup>221</sup> embodying or acknowledging this right, as well as the adoption of resolutions of international organizations upholding it (both at the universal and regional level), all account for this evolving trend.

Second, as already mentioned, the right to the truth has been expressly embodied in Article 24(2) of the International Convention on the Protection of All Persons from Enforced Disappearance. While (to state the obvious) this conventional obligation cannot lead *per se* to prove the existence of a corresponding customary rule, it may nonetheless constitute evidence of it once read in combination with and supported by further practice accepted by law.<sup>222</sup>

That said, at least as far as State ‘practice’ is concerned, doubts arise as to whether the requirements of ‘generality’ and ‘consistency’ should be regarded as fully met in the case at stake. Concerning the former aspect, indeed, it has already been stressed that, at least as far as legislative acts and judicial pronouncements are concerned, the acknowledgment of the existence of the right to the truth at the domestic level has so far failed in exerting an

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<sup>221</sup> As noted by the ILC Special Rapporteur in its second report on identification of international customary law, decisions by the highest courts carry more weight when it comes to determine the existence of a certain customary rule. See again UN Doc. A/CN.4/672, *supra* note 202, para. 41(e).

<sup>222</sup> See again UN Doc. A/CN.4/682, *supra* Chapter 3, note 85, para. 33. As to the contested customary nature of Article 24(2) of the International Convention for the Protection of All Persons from Enforced Disappearance see, *inter alia*, N. KYRIAKOU, *The International Convention for the Protection of All Persons from Enforced Disappearance and its Contributions to International Human Rights Law, with Specific Reference to Extraordinary Renditions*, in *Melbourne Journal of International Law*, vol. 13, 2012, p. 35.

‘extensive’ reach, at least under a quantitative dimension. It has to be stressed, however, that the widespread establishment of Truth Commissions and the adoption of ‘open policies’ with regards to national archives on human rights,<sup>223</sup> whether considered among those ‘physical acts of States’ constituting relevant State practice, inevitably broaden the ‘quantitative count’.

In addition, from a ‘representative’ perspective, it may be argued that those States that have acknowledged the right to the truth internally represent ‘specially affected’ States, whose ‘practice’ should therefore be entrusted with a particular high weight.<sup>224</sup> States that have expressly upheld the right to the truth are indeed those dealing with a legacy of serious and systemic human rights abuses (including a widespread use of ‘enforced disappearances’ as ‘policy of State’). On the other hand, however, one could wonder whether the very notion of ‘specially affected’ States may apply to human rights rules or if, taking into account their importance for the community as a whole,<sup>225</sup> such norms should instead be considered among those affecting all States equally.<sup>226</sup>

As to consistency, it is similarly contentious whether State practice related to the right to the truth holds that character of ‘certainty’ that it should satisfy in order to be relevant. As shown earlier, indeed, the recognition of this right has been generally paralleled, in practice, by a widespread trend towards secrecy and non-disclosure. In addition, while the analysis undertaken in the previous sections has certainly highlighted some common traits among

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<sup>223</sup> See UN Office of the High Commissioner for Human Rights, Right to the Truth – National Archives on Human Rights, submissions received from States, available at: <http://www.ohchr.org> (last accessed on 24 February 2016).

<sup>224</sup> UN Doc. A/CN.4/682, *supra* Chapter 3, note 85, para. 50.

<sup>225</sup> See International Court of Justice, *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)*, judgment of 5 February 1970, ICJ Reports p. 3, paras. 33 and 34: “(...) an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State (...). In view of the importance of the rights involved, all States can be held to have a legal interest in their protection (...). Such obligations derive, for example, from (...) rules concerning the basic rights of the human person (...)”.

different recognitions of this right, a certain degree of variation still exists as to its definition and content.

The fact that, with respect to the right to the truth, different State organs have often undertaken colliding approaches (*i.e.*, the executive's reluctance to unveil information related to serious human rights violations *vis-à-vis* the legislative or judicial upholding of the right to the truth) may also reduce the weight to be attributed to any explicit recognition of this right.<sup>227</sup>

Even admitting that a general and consistent practice exists, doubts may also arise as to whether it reflects a sense of obligation to disclose the truth about serious human rights violations. For instance, despite the creation of Truth Commissions in several countries, only few agreements or legislative acts establishing truth-seeking mechanisms do *explicitly* acknowledge the right to the truth as their legal basis. Furthermore, the attitude of States within international organizations also appears ambivalent, paving the way to opposite interpretations. As a matter of example (and as previously stressed), while the UN Commission on Human Rights took note of the Updated Set of Principles to Combat Impunity, they have never been formally adopted either by the Commission itself, the Human Rights Council or the General Assembly.

At the same time, however, submissions of UN Member States on measures taken to give effects on the right to the truth<sup>228</sup> and on good practices in the establishment, preservation and provisions of access to national archives on human rights<sup>229</sup> seem to support the view that, at least for most of the countries concerned, measures such as the enactment of legislation expressly upholding

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<sup>226</sup> *Ibid.*, para. 54.

<sup>227</sup> See again UN Doc. A/CN.4/682, *supra* Chapter 3, note 85, para. 50.

<sup>228</sup> See again UN Doc. A/HRC/5/7, *supra* note 34. In December 2006, the UN Office of the High Commissioner for Human Rights sent a note verbale inviting States and Member States information on measures adopted to give effects to the right to the truth.

<sup>229</sup> See again UN Office of the High Commissioner for Human Rights, Right to the Truth – National Archives on Human Rights, submissions received from States, *supra* note 223. With a note verbale sent in April 2013, the UN Office of the High Commissioner requested Member States and international organizations to provide information related to good practice related to the preservation and access to national archives on human rights.

the right to the truth, the establishment of special judicial mechanisms and alternative truth-seeking bodies, and the adoption of ‘open archives’ policies should all be understood as aimed at complying with the legal obligations stemming from the said right.

Nevertheless, these submissions are neither global – given that not all UN Member States have expressed their views – nor unanimous. For instance, in its submission related to the measures adopted to give effect to the right to the truth, Switzerland explicitly denied the autonomous nature and collective dimension of this right (thus *de facto* refraining from linking any ‘truth-seeking’ conduct to something different than a moral duty or a legal obligation stemming from other well-established human rights).<sup>230</sup>

Interestingly, the same State that, in recent years, has probably resorted the most to ‘official secrecy’ as a tool to conceal serious violations of human rights, has issued ambivalent determinations as to the legal value of the right to the truth. On the occasion of the proclamation of 24 March as the international day for the right to the truth, US legal advisor Laurie Phipps has indeed held that:

“Respect for the right to truth serves to advance respect for the rule of law, transparency, honesty, accountability, justice and good governance, all key principles underlying a democratic society. My government also strongly supports these principles in practice through programs which encourage dialogue, truth commissions, and forensic research in the effort to uncover the truth behind gross human rights violations”.<sup>231</sup>

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<sup>230</sup> UN Doc. A/HRC/5/7, *supra* note 34, para. 18.

<sup>231</sup> Explanation of Position by Laurie S. Phipps, Advisor, of the Proclamation of 24 March as the International Day for the Right to the Truth Concerning Gross Human Rights Violations and the Dignity of Victims Resolution (UN Doc. A/C.3/65/L.59), Third Committee, 11 November 2010.

The loose wording of the above statement, coupled with the widespread resort to the notion of ‘principles’ and the express denial that the right to know in Article 32 of Additional Protocol I to the Geneva Conventions establishes any obligation *vis-à-vis* the United States,<sup>232</sup> seems to suggest that any inference of a sense of legal obligation from these general assertions should be taken *cum grano salis*.

Notably, the US also opposed the inclusion in the UN Convention for the Protection of All Persons from Enforced Disappearances of an autonomous right to know the truth.<sup>233</sup> According to the United States, in fact, the right to truth would amount to a mere “*notion* (...) in the context of the freedom of information, which is enshrined in Article 19 of the International Covenant on Civil and Political Rights, consistent with our long-standing position under the Geneva Conventions”.<sup>234</sup>

As a final remark, the fact that human rights courts have refrained from explicitly acknowledging the existence of an autonomous customary right to the truth, generally inferring it from other codified rights, hardly assists in reaching a clear conclusion on the matter.

All the above considerations clearly denote the difficulties in ascertaining whether the right to the truth has indeed reached the status of custom. In this respect, such tentative ‘exercise’ does reflect a more generalized issue, that Judge Crawford has well summarized as follows: “the problem with establishing customary law is that it seems impossible”.<sup>235</sup> Certainly, the progressive recognition of the right to the truth has evolved steadily in recent years and it is likely to continue growing at the same pace in the near future. During the last decade, several resolutions by intergovernmental bodies, as

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<sup>232</sup> *Ibid.*

<sup>233</sup> See Report of the Intersessional Open-ended Working Group to Elaborate a Draft Legally Binding Normative Instrument for the Protection of All Persons from Enforced Disappearances, UN Doc. E/CN.4/2006/57 of 2 February 2006, Annex II, p. 48.

<sup>234</sup> *Ibid.* It is noteworthy (and indicative) that, to date (24 February 2016) the United States have not ratified the said Convention.

<sup>235</sup> J. CRAWFORD, *Change, Order, Change: The Course of International Law. General Course on Public International Law*, *supra* Introduction, note 52, p. 49.

well as international and national instruments and case law have increasingly upheld this right, extending its scope from enforced disappearance to other serious violations of human rights, such as torture and extrajudicial executions. The right to the truth has firmly become part of the UN agenda and there are signals towards its distension to apply even beyond transitional situations. However, the question of the customary nature of this right remains a complex one, especially due to States' fluctuating conduct and the close link of this right to other well-established fundamental human rights. Furthermore, whereas more determinative conclusions may be drawn with respect to the right of the relatives to know the fate and whereabouts of disappeared and missing persons (especially after its codification in an international instrument), the contours of the right to the truth about other serious human rights abuses still appear fledging. Against this quite recent and ongoing process, while it might be too early (and too arduous) to firmly acknowledging the customary character of the right to the truth (at least in terms of individual and collective right to know the truth about serious violations of human rights), it seems agreeable the view of those considering the current trend of recognition of this right as suggesting the emergence of something *close* to a customary right, although with different contours.<sup>236</sup> To put it in other words, the signals so far coming from the practice of States and international bodies may be perceived as the outset of a process, which may eventually – but has not yet – lead to the crystallization of the right to the truth as an international customary rule.

One way to overcome the abovementioned shortcomings related to the identification of an international custom might be to characterize the right to the truth as “a general principle of law recognized by civilized nations”. In fact, while this source of international law represents the most controversial among those enlisted in Article 38 of the Statue of the International Court of

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<sup>236</sup> See again Y. NAQVI, *The Right to the Truth in International Law: Fact or Fiction?*, *supra* note 12, p. 267.



Justice,<sup>237</sup> it has often been resorted to in order to vest human rights norms with a legally binding character.<sup>238</sup> In this regard, commentators have either strictly adhered to the letter of the Statue, thus conceiving human rights norms as principles of law common to most municipal legal systems,<sup>239</sup> or have characterized them as general principles of an international character, emerging from international practice irrespective of their acknowledgment at the domestic level.<sup>240</sup> Pursuant to this last approach, “(...) principles brought to the fore in this ‘direct way’ (...) would (and should) then percolate down into domestic *fora*, instead of being elevated from the domestic level to that of international law by way of analogy”.<sup>241</sup> In this respect, consistent State practice at the domestic level would end up playing a limited role compared to ‘authoritative’ statements in international *fora* and institutions.<sup>242</sup>

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<sup>237</sup> B. CHENG, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge, 1987 [1953], at xv. On the topic see, *inter alia*, G. FITZMAURICE, *The General Principles of International Law. Considerations from the Standpoint of the Rule of Law*, in *Recueil des Cours*, Leiden, 1957; G. HERCZEGH, *General Principles of Law and the International Legal Order*, Budapest, 1969; J.G. LAMMERS, *General Principles of Law Recognized by Civilized Nations*, in F. KALSHOVEN (ed.), *Essays on the Development of the International Legal Order. In Memory of Haro F. Van Panhuys*, Alphen aan den Rijn, 1980, pp. 53-76; B. VITÁNYI, *Les principes généraux du droit (tendances doctrinales)*, in *Revue générale de droit international public*, vol. 86, 1982, pp. 48-116; C.M. BASSIOUNI, *A Functional Approach to General Principles of Law*, in *Michigan Journal of International Law*, vol. 11, 1990, pp. 768-818; N. PETERSEN, *Customary Law without Custom? Rules, Principles, and the Role of State Practice in International Norm Creation*, in *American University International Law Review*, vol. 23, 2007, pp. 275-310; N. TSAGOURIAS, *The Constitutional Role of General Principles of Law in International and European Jurisprudence*, in N. TSAGOURIAS (ed.), *Transnational Constitutionalism. International and European Perspectives*, Cambridge, 2007, pp. 71-106; F.O. RAIMONDO, *General Principles of Law in the Decisions of International Criminal Courts and Tribunals*, Leiden, Boston, 2008; G. GAJA, *General Principles of Law*, in *Max Planck Encyclopedia of Public International Law*, 2008, electronic edition, available at <http://opil.ouplaw.com> (last accessed on 24 February 2016).

<sup>238</sup> See again, *e.g.*, P. ALSTON, B. SIMMA, *The Sources of Human Rights Law: Customs, Ius Cogens, and General Principles*, *supra* note 208, p. 102 ff and J. WOUTERS, C. RYNGAERT, *Impact on the Process of the Formation of Customary International Law*, *supra* note 208, p. 120 ff. See also B. CONFORTI, *Diritto internazionale*, 8th ed., Napoli, 2010, p. 47, pursuant to whom the concept of ‘general principles of law’ may be useful in expanding the *corpus* of human rights norms regulated by customary law.

<sup>239</sup> See, *e.g.*, L. HENKIN, *Human Rights and ‘State Sovereignty’*, *supra* note 212, p. 40.

<sup>240</sup> P. ALSTON, B. SIMMA, *The Sources of Human Rights Law: Customs, Ius Cogens, and General Principles*, *supra* note 208, p. 102.

<sup>241</sup> *Ibid.*

<sup>242</sup> *Ibid.*

While this ‘extensive’ approach to encompass also general principles of a genuine international character within the scope of Article 38(1)(c) of the Statute of the International Court of Justice remains highly debated (especially in light of the ‘natural law’ substrate which inherently characterizes it),<sup>243</sup> this theory may help strengthening the view that the right to the truth would exert general legally binding force by itself. Against the widespread resort to secrecy and non-disclosure by States, which undermines any *strong* claim as to the customary status of the right to the truth, the characterization of this right as a general principle of international law would indeed allow to ground its binding character on the great amount of articulations that the said right has had in international *fora*, including manifestations that hardly fit into the traditional ‘notion’ of State practice.

As underlined above, resolutions of international and regional organizations have repeatedly upheld the right to the truth about serious violations of human rights. Furthermore, studies undertaken under the aegis of the United Nations and human rights treaty bodies have also increasingly acknowledged this right. As it has been noted, whilst – contrary to resolutions of international organizations – these last assertions do not amount to either State practice or *opinio juris stricto sensu*, they anyhow “created a *consensus* that a lawyer would be foolish to ignore”.<sup>244</sup> In addition, something similar could be argued with respect to statements by United Nations Special Rapporteurs, given that, as noted in academic literature, they play an increasing role in the progressive

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<sup>243</sup> Some commentators have firmly rejected this approach. See, for instance J.H.W. VERZIJL, *International Law in Historical Perspective*, Leiden, 1968, p. 62. While this Author acknowledges the existence of general principles of law of such fundamental nature that, without their universal recognition, the functioning of the legal community can hardly be imagined and distinguishes them from general principles accepted in municipal legal systems, according to him these basic principles may not be rank as a separate category of sources of law, since they necessarily are already embodied in customs or treaties. See also A. PELLET, *Article 38*, in A. ZIMMERMAN, C. TOMUSCHAT, K. OELLERS-FRAHM, C. TAMS (eds), *The Statute of the International Court of Justice. A Commentary*, Oxford, 2012, p. 836

<sup>244</sup> Emphasis added. See A. BOYLE, C. CHINKIN, *The Making of International Law*, Oxford, 2007, p. 136.

development of international law by, *inter alia*, strengthening the legal force of soft-law instruments.<sup>245</sup>

Finally, it suffices here to stress that the growing recognition of the right to the truth at the international, regional and domestic level could be read also through the alternative lens of ‘subsequent’ practice pursuant to Article 31(3)(b) of the Vienna Convention on the Law of Treaties,<sup>246</sup> thus supporting the view that this legal concept would stem from an ‘authoritative interpretation’ of well-established human rights treaty rules.<sup>247</sup>

Moving this discourse further (beyond strict positivism), it has been argued that, more generally, interpretation is increasingly assuming law-making functions.<sup>248</sup> Moreover, in this respect, interpretative efforts by international and domestic courts, international institutions and non-State actors would be in the process of progressively seizing relevant authority from States alone.<sup>249</sup> From this perspective, the recognition of the right to the truth not only at the domestic level but, first and foremost, at the regional and international level (including the practice of regional human rights courts) would exercise a double-fold function: to interpret pre-existing codified human rights, clarifying their normative content, and to contextually ascribe autonomous legal

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<sup>245</sup> I. NIFOSI, *The UN Special Procedures in the Field of Human Rights*, Antwerpen, Oxford, 2005, p. 134.

<sup>246</sup> Article 31(3)(b) of the Vienna Convention on the Law of Treaties requires States to take into account in the interpretation of a treaty any “subsequent practice in [its] application (...) which establishes the agreement of the parties regarding its interpretation”. See also ILC, First and Second reports on subsequent agreements and subsequent practice in relation to interpretation of treaties by Special Rapporteur George Nolte, respectively UN Doc. A/CN.4/660 of 19 March 2013 and A/CN.4/671 of 26 March 2014.

<sup>247</sup> On the topic see, e.g., J. ARATO, *Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and their Diverse Consequences*, in *The Law and Practice of International Courts and Tribunals*, vol. 9(3), 2010, pp. 443-494; G. NOLTE (ed.), *Treaties and Subsequent Practice*, Oxford, 2013; and A. CHANAKI, *L’adaptation des traités dans le temps*, Paris, 2013, p. 307 ff. On the doubts that may arise, however, with respect to the relevance of pronouncements by human rights monitoring bodies to the identification of subsequent State practice relevant to the interpretation of the treaty see, *inter alia*, G. NOLTE, *Subsequent Agreements and Subsequent Practice of States Outside of Judicial or Quasi-Judicial Proceedings*, in G. NOLTE (ed.), *Treaties and Subsequent Practice*, *supra*, p. 383.

<sup>248</sup> I. VENZKE, *How Interpretation Makes International Law: On Semantic Change and Normative Twists*, Oxford, 2012, p. 17 ff.

normativity to a new right (*i.e.*, the right to the truth) developed through this interpretative process.

Generally-speaking, however, regardless of the ‘theoretical construct’ that one decides to adhere to and apply in the case at stake, it seems that – or, at least, it is pleaded here that – based on an ‘dynamic’ attitude towards international law sources, the legally binding character of the right to the truth may be overall inferred from a combined approach to treaty practice, emerging custom and general principles of law.

## **5. State secrecy *vis-à-vis* the right to the truth**

Regardless of whether the right to the truth has or has not fully reached the status of international customary rule or may exert legal binding force either as a general principle of international law, as a result of treaty interpretative practice, or in light of the combination of the abovementioned elements, it is undeniable that this right has been increasingly upheld as a ‘legal bar’ to the use of State secrecy, at least any time the latter is resorted to (either as classification or evidentiary privilege rule) in order to shield serious human rights violations. At risk of taking a too much descriptive stance, a few examples may provide a better understanding of this trend.

At the international level, the already-quoted 2013 Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism has for instance stressed the underpinning tension existing between the right to the truth and State secrecy.<sup>250</sup> The Report clearly held that:

“(…) *Given the importance of the right to the truth and the principle of accountability, the domestic judiciary is bound to subject (...) to*

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<sup>249</sup>*Ibid.*, p. 71 ff.

<sup>250</sup> UN Doc. A/HRC/22/52, *supra* Introduction, note 41, para. 38 ff.

the most penetrating scrutiny (...) executive claims to exemption from normal rules of disclosure in legal proceedings. (...) *Legitimate national security considerations do not include governmental interests and activities that constitute grave crimes under international human rights law*, let alone policies that are precisely calculated to evade the operation of human rights law”.<sup>251</sup>

The Special Rapporteur also noted that the use of State secrets as a means to cloak serious human rights violations from public scrutiny constitutes a serious abuse of public power contrary to international human rights legal régime.<sup>252</sup>

The existing conflict between the widespread reliance on secrecy and the respect for the truth has more recently been acknowledged also in an Open letter sent to the President of the United States of America by six UN special procedures mandate-holders, urging for the full declassification and release of the US Senate Select Committee on Intelligence’s report on CIA secret detentions and interrogation techniques.<sup>253</sup>

The Human Rights Committee has similarly opposed the duty to unveil the truth, on the one hand, and the resort to classification and State secrets, on the other hand. For instance, in its 2005 *Concluding Observations on Brazil*, the Committee held that, in order to comply with its duty to combat impunity, Brazil should have set truth-seeking inquiries into the serious human right violations perpetrated during the period of military dictatorship in the country and made public all documents related to them, including those classified

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<sup>251</sup> Emphasis added. *Ibid.*

<sup>252</sup> *Ibid.*, para. 40.

<sup>253</sup> Open letter by Special Procedures mandate-holders of the United Nations Human Rights Council to the President of the United States of America, 24 November 2014, available at: <http://www.ohchr.org> (last accessed on 24 February 2016). It is noteworthy that this letter explicitly states that: “Lasting security can only be achieved on the basis of truth and not secrecy”.

pursuant to law.<sup>254</sup> Hence, while not explicitly mentioning the right to the truth, the Committee has *de facto* condemned States' resort to classification of information concerning serious human rights violations as contrary to the truth-seeking process underpinning the fight against impunity.

Within the Inter-American system of human rights protection, the Inter-American Court of Human Rights has repeatedly resorted to the right to the truth to uphold that public bodies cannot shield themselves behind the protective cloak of official secrets to obstruct investigations into alleged serious violations of human rights.<sup>255</sup> For instance, in its 2010 judgment in the *Gomes Lund et al. v. Brazil* case, the Court – immediately after upholding the individual and collective right to the truth – stressed that:

“(…) in case of violations of human rights, the States authorities cannot resort to mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or pending procedures. Moreover, when it comes to the investigation of punishable facts, the decision to qualify the information as secretive or to refuse to hand it over cannot stem solely from a State organ whose members are charged with committing the wrongful acts”.<sup>256</sup>

Notably, by means of the aforementioned ruling, the Inter-American Court of Human Rights reiterated the conclusions it had already reached in its

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<sup>254</sup> Human Rights Committee, *Concluding Observations on Brazil*, UN Doc. CCPR/C/BRA/CO/2 of 2 November 2005, para. 18.

<sup>255</sup> With respect to the right to the truth as a bar to excessive reliance on State secrecy within the Inter-American system of human rights protection see, *inter alia*, International Commission of Jurists, *Consideraciones de la Comisión Internacional de Juristas sobre el acceso a la información y el secreto de Estado en casos de genocidio*, *amicus curiae* brief submitted before the Constitutional Court of Guatemala in the case No. 2290/2007 (concerning the Constitutional Court's judgment see *supra* Chapter 1, note 214).

<sup>256</sup> Inter-American Court of Human Rights, *Gomes Lund et al. v. Brazil*, *supra* Chapter 2, note 97, para. 202.

previous case law related to the right to a fair trial,<sup>257</sup> stressing more clearly the tension existing between indiscriminate secrecy and the full guarantee of the right to the truth about serious human rights violations.<sup>258</sup>

The Inter-American Court of Human Rights has later confirmed the abovementioned approach in its 2011 judgment in the *Gaudiel Álvarez at al. v. Guatemala* case. The Court found indeed that the refusal by military and civilian authorities to disclose to the Historical Clarification Commission information related to the enforced disappearances perpetrated during the civil war based, *inter alia*, on ‘constitutional confidentiality’ violated the right to the truth of the victims and of the society as a whole.<sup>259</sup>

The European Court of Human Rights has also held that unjustifiably broad invocation of State secrets may clash with the full exercise of the right to the truth. In its already-mentioned judgment in the *El-Masri v. Macedonia* case, the Court stressed that the inadequate character of the investigation into the alleged extraordinary rendition of El-Masri had a negative impact on the right of the victim and of the general public to know the truth regarding the relevant circumstances of the case.<sup>260</sup> More generally, the Court found that, with regard to the practice of extraordinary renditions, the concept of ‘State secrets’ had often been invoked to obstruct the search of the truth, granting *de facto* impunity to the State agents involved.<sup>261</sup> Whilst not explicitly stating so, the Court hinted that such circumstances violated the right of both the victim and

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<sup>257</sup> See, e.g., Inter-American Court of Human Rights, *Myrna Mack Chang v. Guatemala*, *supra* Introduction, note 41, para. 180; *La Cantuta v. Peru*, *supra* note 89, para. 111; *Tiu Tojin v. Guatemala*, *supra* Chapter 3, note 185, para. 77; *Radilla Pacheco v. Mexico*, *supra* note 89, para. 258.

<sup>258</sup> As to the tension existing between the right to the truth about serious human rights violations and the broad unjustified resort on official secrecy and confidentiality see again Inter-American Commission on Human Rights, *The Right to the Truth in the Americas*, *supra* note 4, para. 113 ff.

<sup>259</sup> See Inter-American Court of Human Rights, *Gaudiel Álvarez at al. (“Diario Militar”) v. Guatemala*, *supra* Chapter 2, note 102, para. 294 ff.

<sup>260</sup> European Court of Human Rights, *El-Masri v. Former Yugoslav Republic of Macedonia*, *supra* Chapter 3, note 196, para. 191.

<sup>261</sup> *Ibid.*

the general public to know what had happened (leading to a breach of Article 3 of the European Convention on Human Rights, in its procedural limb).

In the 2014 *Al-Nashiri and Husayn (Abu Zubaydah)* judgments, the European Court of Human Rights confirmed the approach already undertaken in *El-Masri*. According to the applicants, in the cases at stake, domestic investigations into their alleged extraordinary renditions had, *inter alia*, lacked transparency as almost all relevant material had been classified as secret or top-secret, hindering the victims' vindications of their own rights. The applicants argued that such a broad reliance on secrecy had the sole illegitimate scope of granting impunity to the State agents that had cooperated with the CIA.

The Court, after having reiterated its previous case law concerning the State's duty to undertake effective investigations into alleged cases of torture and ill-treatment as per Article 3 of the European Convention on Human Rights, acknowledged that investigations may involve national security issues. However, as already previously stressed, this should not mean that the reliance on confidentiality and secrecy gives investigative authorities full discretion in refusing disclosure of material to the victim or the public.<sup>262</sup> The Court emphasised indeed that, even if there is a strong public interest in maintaining the secrecy of sources of information or material, in particular in cases involving the fight against terrorism, it is essential that as much information as possible about allegations and evidence should be disclosed to the parties in the proceedings without compromising national security. The Court further held in this respect that, in cases involving allegations of *serious violations of human rights*, both the individual and the society as a whole hold a right to know the truth regarding the relevant circumstances of the case.<sup>263</sup>

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<sup>262</sup> European Court of Human Rights, *Al-Nashiri v. Poland*, *supra* Introduction, note 26, para. 494. See also *Husayn (Abu Zubaydah) v. Poland*, *supra* Chapter 3, note 196, para. 488.

<sup>263</sup> European Court of Human Rights, *Al-Nashiri v. Poland*, *supra* Introduction, note 26, para. 495. See also *Husayn (Abu Zubaydah) v. Poland*, *supra* Chapter 3, note 196, para. 489.



According to the Court, in fact, in order to secure accountability and avoid any appearance of impunity, collusion in or tolerance of unlawful acts, the obligation to undertake effective investigations into alleged breaches of fundamental human rights should necessarily imply a sufficient element of public scrutiny.<sup>264</sup> In contrast with the abovementioned principles, the Court noted that, as regards the investigations into the alleged extraordinary renditions of the two applicants, only limited, vague information had been disclosed to the victims and the general public.<sup>265</sup>

It has to be stressed that, in the *Al-Nashiri* and *Husayn (Abu Zubaydah)* judgments, compatibly with the circumstances of the cases at stake, the Court further elaborated on the issue of truth *vis-à-vis* secrecy, already tackled in the *El-Masri* case. The Court indeed spelled out more clearly the obligations resting on States parties: to guarantee a certain degree of public scrutiny over investigations concerning allegations of serious violations of human rights; to disclose to the parties of proceedings as much information as possible about any allegations and evidence without compromising national security; where full disclosure is impossible, to counterbalance the need for protecting national security with the right of defence of the parties.<sup>266</sup> Furthermore, the Court made even more stringent the existing link between the need to eradicate impunity and the right of the victims and the general public to know the truth about serious violations of human rights. The Court, in fact, clearly recognised that, even if State authorities' reliance on secrecy and confidentiality may be justified on the grounds of national security interests, contracting States do not enjoy *full discretion* in refusing disclosure of relevant material to the public and to the victims. Otherwise, secrecy and confidentiality could easily become

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<sup>264</sup> *Ibid.*

<sup>265</sup> European Court of Human Rights, *Al-Nashiri v. Poland*, *supra* Introduction, note 26, para. 496. See also *Husayn (Abu Zubaydah) v. Poland*, *supra* Chapter 3, note 196, para. 490.

<sup>266</sup> European Court of Human Rights, *Al-Nashiri v. Poland*, *supra* Introduction, note 26, para. 494. See also *Husayn (Abu Zubaydah) v. Poland*, *supra* Chapter 3, note 196, para. 488.

a means to grant impunity, in contrast with the principle of effective protection of rights inherent to the European Convention on Human Rights.<sup>267</sup>

Quite surprisingly, however, by means of the abovementioned reasoning, the Court seems to have implicitly admitted that the right to the truth is one of a relative nature, as such subject to limitations based on national security concerns.

This stance – which apparently clashes with the same ‘inference’ of the right to the truth from Article 3 of the European Convention on Human Rights, as well as with the more general recognition, at the international level, of the absolute and non-derogable nature of the same right – may be explained with the specific circumstances of the case at stake, in which secrecy was relied on by investigative authorities and did not apparently constitute a bar to further judicial scrutiny and accountability.

Still, the approach of the Court raises some doubts as to its ‘normative appropriateness’ and even appears in contrast with the recent Grand Chamber’s reluctant attitude to uphold the non-absolute nature of the duty to undertake investigations into serious human rights violations, expressed in its judgment in the *Marguš v. Croatia* case.<sup>268</sup>

Furthermore, even if one agrees with the relative nature of the right to the truth, it is to stress that, apart from expressly envisaging independent judicial oversight mechanisms, the European Court has refrained from specifically delving into the analysis of the parameters to be abided by for a restriction to the right to the truth to be legitimate and the role that, in this respect, should be afforded to States’ margin of appreciation. It is certainly true that, as already discussed before, especially in cases involving the confidentiality of information based on national security reasons, national authorities are likely to be the most suitable to strike the proper balance between State security

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<sup>267</sup> According to such a principle, the European Convention on Human Rights is not intended to guarantee rights that are theoretical or illusory, but rights that are practical and effective.

<sup>268</sup> European Court of Human Rights [GC], *Marguš v. Croatia*, *supra* Chapter 3, note 250, para. 139.

interests and the protection of fundamental human rights. As already highlighted earlier, human rights monitoring bodies have indeed shown deference on several occasions to State authorities in situations involving national security concerns.<sup>269</sup> However, the margin of appreciation is never unlimited. States should, in fact, always exercise discretion in good faith, whilst international courts retain ultimate reviewing power over the reasonableness of national decisions.<sup>270</sup> It follows that, whatever balance is struck at the domestic level, deference to States would encounter the limit of the reasonableness of the measures undertaken, inferable, for instance, from the compliance with the general requirements legitimating restrictions to the Convention's rights.<sup>271</sup> However, it may at least be argued that, when the right to know the truth about *serious human rights violations* is concerned, a strong presumption subsists as to the fact that the necessity and proportionality requirements of the secrecy claim would hardly be complied with (along the line of the case law which has developed with respect to the right of access to State-held information concerning serious human rights violations).

On a side note, it is also noteworthy that, in the same twin cases, the Court hinted – under the procedural limb of Article 3 of the European Convention on Human Rights – at the State's obligation to provide for appropriate safeguards – both in law and in practice – against abuses of rights taking place in the context of covert intelligence operations. The duty of States to establish not only *ex-ante* control and oversight mechanisms, but also a framework capable of ensuring *ex-post facto* accountability for human rights violations committed by intelligence services is indeed inherently in contrast with any unjustified resort to secrecy and confidentiality meant to hide the truth and grant

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<sup>269</sup> For a general overview of cases see, *inter alia*, A. LEGG, *The Margin of Appreciation in International Human Rights Law. Deference and Proportionality*, Oxford, 2012, p. 153 ff.

<sup>270</sup> Y. SHANY, *Toward a General Margin of Appreciation Doctrine in International Law*, in *European Journal of International Law*, vol. 16, 2006, p. 910.

<sup>271</sup> See, e.g., European Court of Human Rights, *Klass et al. v Germany*, *supra* Chapter 2, note 294, paras. 49-50.

impunity.<sup>272</sup> In this respect, the Court has in some respect joined the chorus of other international and regional bodies, such as the the United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism and the Parliamentary Assembly of the Council of Europe, which have similarly underlined the potential clash between the blanket resort to secrecy and confidentiality with reference to intelligence activities and States' human rights obligations.<sup>273</sup>

Finally, it suffices here to stress that, parallel to the aforementioned determinations at the international level, the tension between the right to the truth and the resort on State secrecy has been, in some instances, expressly acknowledged also at the domestic level.

To make an example, as pointed out earlier, some domestic legislation providing for declassification of information related to human rights abuses have indeed explicitly identified the right to the truth as their legal ground.<sup>274</sup>

In other instances, States have also explicitly assessed the compatibility of their domestic legislation on State secrecy with their international law obligations, including the right to the truth. An example in this respect is the illustrative report on the Italian draft law on the ratification and implementation of the United Nations Convention on the Protection of All Persons from Enforced Disappearances, which underlined that Italian laws on State secrecy are consistent with the obligations undertaken by Italy through the ratification of the said Convention.<sup>275</sup> Regardless of any criticism that one could possibly move against such conclusion, as said, the very fact of

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<sup>272</sup> European Court of Human Rights, *Al-Nashiri v. Poland*, *supra* Introduction, note 26, para. 498. See also *Husayn (Abu Zubaydah) v. Poland*, *supra* Chapter 3, note 196, para. 492.

<sup>273</sup> Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/HRC/10/3, *supra* Chapter 3, note 161, paras 58 ff. See again, for example, Parliamentary Assembly of the Council of Europe, Resolution 1838 (2011), *supra* Introduction, note 27, paras. 1 and 6.

<sup>274</sup> See again, for instance, Argentinian Decree No. 4/2010, *supra* note 160.

<sup>275</sup> See Camera dei deputati, *Disegno di Legge su ratifica ed esecuzione della Convenzione internazionale per la protezione di tutte le persone dalle sparizioni forzate adottata dall'Assemblea Generale delle Nazioni Unite il 20 dicembre 2006*, introduced on 16 October 2014, p. 14.

addressing the issue of State secrecy in relation to the right to the truth is significant of the tension that may arise in practice any time that State secrecy is unduly relied on to conceal serious human rights violations.

The practice under exam, although far from representing an exhaustive list, well illustrates that the right to the truth has increasingly been invoked as barring any indiscriminate resort on secrecy in relation to information related to serious human rights abuses. The right to the truth requires indeed States not to retain away from the victims and the public information related to grave human rights abuses.

In light of the cases currently pending before international adjudicatory bodies, it is likely that these findings will be reiterated in the near future.<sup>276</sup>

## **6. Conclusions**

As the analysis undertaken in this Chapter has illustrated, in the last decades the right to the truth has rapidly and steadily emerged in international law.

International, regional and national courts, as well as intergovernmental bodies and other human rights mechanisms, have repeatedly upheld this right in their case law or resolutions.

Whereas this right has initially developed mainly as the right of the families to know the fate and whereabouts of disappeared persons (and, as such, is now enshrined in Article 24(2) of the International Convention for the Protection of All Persons from Enforced Disappearance), its scope has progressively expanded beyond enforced disappearances to include the right of the victims and the society as a whole to know the truth about serious human rights violations, including, *inter alia*, tortures and extra-judicial killings. Similarly, this right has ‘overpassed’ the strict boundaries of transitional processes, in

which it originated, to apply to serious human rights violations perpetrated in democratic regimes.

In lack of an express recognition in international treaty law, however, international and regional human rights monitoring bodies have inevitably inferred this right from other ‘pre-existing’ human rights. While this circumstance has inevitably favoured some divergence as to its scope and content and raised doubts as to its autonomous nature, the current *status* of international, regional and national practice seems to vest with anachronistic character any reference to this right as a mere legal ‘paradigm’ or ‘narrative device’.<sup>277</sup> The widespread recognition of this right, as well as the steady progression of this process, does indeed support its general legally binding character. Furthermore, if we isolate the already examined case law of the European Court of Human Rights, this right has been *generally* construed as an absolute (with the sole exception of the right to access archives, admitting limitations on the basis of national security concerns) and non-derogable right.

As to its content, the right to the truth entitles both the victim and the society as a whole to know the circumstances surrounding serious human rights violations, including the identification of those responsible. States are thus bound, *inter alia*, to disclose information related to serious human rights abuses, regardless of competing claims of secrecy grounded on national security concerns, and to ensure, to this purpose, independent oversight mechanisms.

The principle of maximum disclosure applies to all public powers: every State organ (including the judiciary) should indeed act in a way to allow full scrutiny over serious human rights violations, either in proceedings (where secrecy may be invoked as evidentiary privilege) or out-of-court (in relation to the classification of certain documents).

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<sup>276</sup> See, e.g., European Court of Human Rights, *Husayn (Abu Zubaydah) v. Lithuania*, App. No. 46454/11, lodged on 14 July 2011; *Al-Nashiri v. Romania*, App. No. 33234/12, lodged on 1st June 2012.

Hence, as far as information related to serious human rights violations are concerned, the right to the truth represents a legal bar to the reliance on secrecy and classification. In this respect, this right establishes a corresponding obligation of *conduct* resting on States, which are bound, among others things, to put in place effective and independent oversight mechanisms capable of preventing any abuse of power aimed at shielding the truth under a ‘black veil’ (regardless of whether the full truth is eventually disclosed).

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<sup>277</sup> This expression is used by Y. NAQVI, *The Right to the Truth in International Law: Fact or Fiction?*, *supra* note 12, p. 248.





## CHAPTER 5

# STATE SECRECY *VIS-À-VIS* THE PROTECTION OF FUNDAMENTAL HUMAN RIGHTS: CURRENT PERSPECTIVES AND CHALLENGES AHEAD

*“La théorie de l’État démocratique libéral réclame un minimum de secret pour certaines actions pour lesquelles personne ne devrait être contraint de rendre compte (...). On peut certes se demander où se situent exactement les limites de cette liberté”.*<sup>1</sup>

**SUMMARY:** 1. Introduction. – 2. Abusive resort to State secrecy *vis-à-vis* human rights protection. – 2.1. State secrecy and the protection of human rights: Some overall considerations. – 2.2. The obligation not to unduly rely on State secrecy to conceal serious human rights violations: towards a customary norm? – 2.3. The issue of practical implementation. – 2.4. State of necessity: A circumstance precluding wrongfulness? – 3. Open issues. – 3.1. Access to secret information and ‘third countries’. – 3.1.1. Selected examples and current legal framework. – 3.1.2. A critical assessment. – 3.1.3. *De lege ferenda* proposals to amend the current legal framework concerning inter-State cooperation. – 3.1.4. Access to information classified in ‘third countries’: Which means available to the victim? – 3.2. The issue of potentially conflicting international obligations. – 3.2.1. Solving the issue pursuant to the rules of the Vienna Convention on the Law of Treaties – 3.2.2. Solving the issue pursuant to the rules governing hierarchy of sources in international law. – 3.2.3. The issue of potentially conflicting international obligations: From theory to (States and international organizations’) practice. – 3.3. Protection of whistleblowers as a key element in fostering disclosure and accountability. – 3.3.1. – Protection of whistle-blowers in international binding and non-binding instruments. – 3.3.2. Protection of whistle-blowers in the case law of human rights monitoring bodies and statements of special procedures mandate holders. – 3.3.3. Protection of ‘national security whistle-blowers’. – 3.3.4. Some conclusive remarks. – 4. Conclusions.

### 1. Introduction

Depending on the circumstances of each specific case, the resort to State secrecy (either as classification of information or as evidentiary privilege in

court) may violate one or more human rights obligations (either in terms of treaty-based provisions or, at least in some instances, of customary rules).

Whilst, in fact, the main human rights treaties provide for the possibility to limit certain human rights on the ground of ‘national security’ concerns, the relevant exception has to be interpreted in a restrictive way. As a result, the admissibility of said limitations would strictly depend on the fulfilment of specific requirements, including the necessity and proportionality test.

Clearly, there is a strong presumption that the use of national security arguments to justify the concealment of information related to serious human rights abuses would struggle in successfully meeting the aforementioned ‘threshold’.

Furthermore, some of the human rights norms that may be breached by the State’s undue resort to secrecy (including those judicial guarantees necessary to grant effective protection to certain substantive rights) do not admit any restrictions or derogations. In these cases, ‘national security’ (or, with respect to derogations, ‘state of emergency’) claims would therefore fail in providing a solid legal argument capable of ‘legitimizing’ the encroachment on the full enjoyment of the said rights.

Building upon the above considerations, the present Chapter will attempt to draw some overall conclusions with respect to the proper ‘normative contours’ of the dialectic tension that may arise between secrecy, on the one hand, and the international protection of human rights, on the other hand.

After briefly reviewing the findings reached in the previous Chapters through the lens of a ‘systematic approach’, specific attention will be eventually devoted to some ‘open issues’ that – taking into account the growing inter-State cooperation and information-sharing in security matters, the proliferation of multiple actors and legal orders, as well as the very peculiarities of the concept of ‘secrecy’ – may represent possible additional

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<sup>1</sup> O. PFERSMANN, *Norme de secret, normes secrètes et État modern*, in *Cités*, vol. 26, 2010, at 7-8.

legal hurdles and future challenges ahead.

## **2. Abusive resort to State secrecy *vis-à-vis* human rights protection**

It hardly seems open to doubt that, parallel to the rise of the so-called ‘national security State’ (and, to a certain extent, the strengthening of the ‘collective security’ concerns in the face of the terrorist global threat), State authorities and international organizations have increasingly relied on secrecy as a tool for allegedly protecting national (or collective) interests.<sup>2</sup>

Regardless of the role that such an ‘extensive’ practice may have in militating against the customary dimension of a specific prohibitive rule (an argument highly debatable in light of colliding signals), the analysis undertaken in the previous Chapters has undoubtedly demonstrated that, at least in some instances, reliance on secrecy does amount to a breach of treaty-based human rights obligations. As already noted, in fact, whilst the resort to State secrecy is in principle a legitimate means to protect national security interests, in some instances it may nonetheless end up leading to a violation of human rights norms.

Depending on the circumstances of each specific case, in fact, the undue resort to secrecy (either as classification or as evidentiary privilege) might clash with the right of access to State-held information, the right to a fair trial, the right to an effective remedy, the right to know the truth, as well as with the obligation to investigate serious human rights abuses and prosecute perpetrators (often in combination among them).

All these obligations have in fact been quite homogeneously interpreted so as to bar the *abusive* use of secrecy on the ground of alleged national security

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<sup>2</sup> Whilst, as illustrated in the previous Chapters, secrecy has increasingly been resorted to also in the context of international organizations, this section will mainly focus on the use of ‘State secrecy’ by State authorities. This does not exclude, however, that some of the following considerations can similarly apply to international organizations, taking especially into account that they are under an obligation to comply with human rights customary norms (as well as with human rights provisions contained in treaties that they have ratified).

concerns.

In this respect, the mere adoption of State secrecy laws at the domestic level (or even the inclusion of *ad hoc* provisions in national Constitutions) cannot act as a justification for the States' failure to abide by their treaty commitments.

### **2.1. State secrecy and the protection of human rights: Some overall considerations**

As previously said, human rights treaties generally admit national security as a ground for restricting certain human rights. This, however, does not mean that human rights may be arbitrarily curtailed. To the contrary, limitations to human rights must meet specific requirements in order to be lawful under human rights law.

With reference to State secrecy this means that, although in principle human rights treaties do accommodate States' legitimate interest not to disclose certain information that – if revealed – could harm their national security, such a prerogative is not 'unlimited' and should instead be balanced against the need for human rights protection.

In particular, restrictions should conform to a strict necessity and proportionality test and should respond to a legitimate aim in a democratic society. In this respect, the very lack of a definition of 'national security' – which makes this concept prone to abuses – calls for a particularly stringent scrutiny any time interferences with human rights are grounded on national security claims.

Clearly, the subsidiarity of the international system of human rights protection entrusts States (through all their organs) with the primary responsibility of ensuring that the aforementioned requirements are satisfied in a specific circumstance. However, human rights monitoring bodies retain ultimate reviewing authority over States' compliance with their treaty

obligations (provided that all internal mechanisms have been exhausted).

Yet, with respect to State secrecy, the establishment of *ad hoc* adequate legislative provisions and the effectiveness of oversight mechanisms at the domestic level might support broad deference to States' discretion (or – to use the words of the European Court of Human Rights – to States' 'appreciation').

The existence of procedural safeguards (thus including, in the case under exam, the enactment of legislation capable of preventing abuses, oversight mechanisms and the provision, at the national level, of an 'overriding public interest' test) may also be relevant under the so-called 'necessity and proportionality test'. Especially in cases involving a balance between competing interests, human rights monitoring bodies have indeed increasingly taken into account procedural matters in assessing whether a certain interference with human rights should be considered admissible. As previously illustrated, this trend has been largely upheld also in cases involving State secrecy claims.

Hence, the existence of domestic legislative provisions, drafted in a manner to prevent abuses, and the effectiveness of internal oversight mechanisms (either judicial or parliamentary) – although far from setting an *absolute* standard of review – may result in a determinant factor in establishing whether the restriction to human rights brought about by the invocation of State secrecy should be deemed legitimate. *Vice versa*, the vagueness of domestic provisions or the lack of internal checks over classification and secrecy claims may constitute an indicator of possible abuses, as such hardly consistent with the State's human rights commitments.<sup>3</sup> As it has been correctly observed, in fact, in cases where members of the executive are left with absolute discretionary authority in determining what may jeopardize national security, there is an inherent risk of abuse of States secrecy laws (or, more generally,

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<sup>3</sup> Based on the universal assumption that "unchecked power is always prone to abuse". See G. VERDIRAME, *A Normative Theory of Sovereign Transfer*, in *Stanford Journal of International Law*, vol. 49, 2013, p. 374.

secrecy claims) so as to conceal wrongdoings.<sup>4</sup> Needless to say, the level of discretion left to the executive – and thus the likelihood of abuses – would much depend on the very language of ‘national security’ exemptions at the domestic level and by the existence of adequate oversight mechanisms. Vaguely worded provisions would indeed more likely lead to a possible distortion of the security argument and would also undermine effective oversight reviews.

Other procedural expedients, such as, for instance, the use of *in camera* hearings or special advocates may similarly amount to crucial elements under the necessity and proportionality test (and the underpinning balancing exercise between the interest in human rights protection, on the one hand, and national security, on the other hand). Admittedly, as for the existence of adequate domestic provisions and effective oversight mechanisms, the resort to similar procedural instruments does not exclude *per se* the illegitimate character of the related restrictions to human rights. However, it may provide evidence that, in practice, a proper balance between the colliding interests at stake has been attained.

Whilst compliance with the requirements for limitations must be assessed on a case-by-case basis, further general considerations may be drawn from human rights monitoring bodies’ ‘judicial’ and ‘quasi-judicial’ practice related to cases involving State secrecy claims.

First, where State secrecy is invoked on the ground of national security, the admissibility of the related restrictions to human rights obligations should be assessed against an ‘overriding public interest’ test, pursuant to which no departure from the full respect of human rights norms would be admissible any time the interest in the protection of the human right which would be restricted clearly outweighs that in secrecy.

Second (but still intuitively interlinked to the first point), reliance on State secrecy to conceal information concerning *serious* human rights abuses and/or

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<sup>4</sup> H. NASU, *State Secrets Laws and National Security*, *supra* Introduction, note 73, p. 398.

prevent accountability would hardly comply with the ‘legitimate aim’ requirement, as well as with the necessity and proportionality test.

In this respect, international human rights monitoring bodies seem indeed to have progressively set an absolute (almost unrebuttable) presumption that national security claims, whether relied on in the aforementioned way, could in no case constitute a valid ground for justifying restrictions to human rights provisions. Just to make an example, as previously highlighted, there is an emerging recognition that no limitation could be legitimately placed on the right of access to State-held information (first and foremost, by means of classification) in all those cases where secrecy would end up hiding (and prevent accountability for) international crimes and serious human rights violations.

Notably, similar practical ‘determinations’ may be reached also under a separate line of arguments (although, in practice, any theoretical ‘difference’ may lose relevance in light of the fact that, as previously observed, reliance on secrecy may contextually infringe on different human rights). As discussed at large, a number of human rights treaties contain a list of absolute and non-derogable rights, whose restriction or suspension is never allowed. Without repeating all considerations that have been developed in the previous Chapters, it suffices here reiterating that in no case these rights may be limited on the ground of national security considerations (with the consequence that any balancing exercise between potentially competing interests is excluded *a priori* due to the seriousness of the possible violation). Likewise, the application of these human rights norms cannot be suspended even in case of ‘public emergency’ (an argument that, as seen, has been widely relied on with respect to terrorism).

Furthermore, the principle of effective protection of human rights suggests that, even when no explicit provision in this respect is included in the relevant human rights treaties, procedural guarantees essential for ensuring the respect

of such rights would share their same legal ‘nature’ (*i.e.*, absoluteness and non-derogability).

With respect to State secrecy, this means that the ‘national security’ argument on which the reliance on secrecy is generally grounded (or, hypothetically, the ‘public emergency’ discourse that can be similarly invoked) could in no way provide a legal ground for justifying interferences with (or suspension of) the said rights (including those procedural guarantees necessary to their effective protection, such as, for instance, fair trials guarantees).

On top of the above, human rights monitoring bodies have increasingly interpreted States’ obligation to investigate serious human rights violations and prosecute and punish those responsible so to ‘restrict’ (not to say, ‘ban’) the admissibility of procedural mechanisms capable of contributing to impunity. The possibility to extend this ‘interpretation’ to include the invocation of State secrecy has recently found support, *inter alia*, in the Committee against Torture’s General Comment No. 3<sup>5</sup> and in the European Court of Human Rights’ ruling in the *Nasr and Ghali* case.<sup>6</sup>

The absolute prohibition to rely on secrecy in a way to conceal serious human rights violations or grant *de facto* impunity to perpetrators is further strengthened – and, rather, finds its utmost expression – in the very notion of the ‘right to know the truth about serious human rights violations’.

Regardless of the still open issues related to its legal nature and character – mostly due to the quite recent interpretative process leading to its recognition – this right provides indeed a solid legal ground to exclude that States may legitimately invoke secrecy in a way to conceal serious human rights violations and grant impunity to perpetrators.

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<sup>5</sup> See again Committee against Torture, General Comment No. 3, *supra* Chapter 3, note 163, para. 38.

<sup>6</sup> See again European Court of Human Rights, *Nasr and Ghali v. Italy*, *supra* Chapter 1, note 173, para. 272.



In being this the current legal framework inferable from the main human rights treaties – as interpreted by human rights monitoring bodies – room is left, however, for some additional question-begging aspects, which will be analysed in the following sub-paragraphs.

## **2.2. The obligation not to unduly rely on State secrecy to conceal serious human rights violations: towards a customary norm?**

As to the binding reach of the obligation not to rely on secrecy to conceal serious human rights violations and grant impunity, it is open to debate whether (and to which extent) ‘customary *status claims*’ may be actually put forward.<sup>7</sup> As noted earlier, in fact, the very customary nature of the right to know the truth concerning serious human rights violations, although supported by increasing State practice and *opinio juris*, is anything but undisputed.

The growing recognition (even through the enactment of specific domestic provisions) that State secrecy should not be used to cover serious human rights abuses has indeed been paired by a quite extensive colliding trend towards classification and secrecy to hide wrongdoings and shield those responsible from prosecution.

This ‘inconsistency’ cannot be overlooked. Nevertheless, the speed pace and the *quasi*-universal dimension of the recent recognition of a ‘ban’ to secrecy and classification in cases involving serious human rights violations – stemming not only from the right to the truth but, more generally, from several human rights – seem to support the view that – at a minimum – an argument could be made on the ground of this overall practice in the sense that an ‘embryonic’ customary rule has come or is in the process of coming into being.

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<sup>7</sup> For a broader reference as to the evidence of customary international law see, *inter alia*, *supra* Chapter 2, at 2.7 and Chapter 4, at 4.

Furthermore, the fact that States relying on secrecy to hide the truth and prevent accountability have mainly justified their conduct under a national security ‘pretext’ may be read as evidence of the inherent acknowledgment that a rule had been breached (according to the already recalled International Court of Justice’ *dictum* in the *Nicaragua* case).

In addition, the homogeneity of certain recent regional practices (*i.e.*, Latin American countries) may even provide a viable ground for the tentative argument that a ‘special custom’ may have come into existence.<sup>8</sup>

Clearly, however, the broad ‘coverage’ of the main human rights treaties partially vests the ‘customary issue’ of a less pressing character.

### **2.3. The issue of practical implementation**

A second question that may naturally arise is whether the aforementioned ‘theoretical results’ may actually have a practical implementation (especially in terms of establishing the effective breach of human rights law).

It is hardly deniable that any assessment of the ‘substantial’ dimension of secrecy claims (necessary for evaluating their compliance with limitations requirements and, more specifically, their possible ‘barring’ function in terms of accountability for serious human rights abuses) requires a certain degree of reviewing authority over the information classified or shielded under the State secrecy evidentiary privilege.

As noted, however, it may occur that domestic legal systems are not ‘equipped’ with effective oversight mechanisms entrusting judicial or parliamentary organs with substantive reviewing powers. Furthermore, the analysis undertaken has shown that States may be reluctant to disclose information for which they have invoked classification or secrecy before

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<sup>8</sup> On the notion of ‘special custom’, see, *inter alia*, ICJ, *Colombian-Peruvian asylum case (Colombia v. Peru)*, judgment of 20 November 1950, ICJ Reports 1950, p. 266, pp. 276-278. A local or special custom being a customary rule binding only a group of States. On the topic

international adjudicatory bodies (regardless of the possible consequences in terms of their responsibility for the breach of the duty to cooperate).

While these aspects should not be set aside – and, to the contrary, may be relevant under a *de iure condendo* perspective – they cannot be overestimated.

First, there is the general consideration that obstacles in the practical implementation of a rule cannot undermine its very existence, content and scope and, at most – under the international legal regime – may be relevant in terms of State practice. Second, where oversight mechanisms are in place, they generally require the disclosure of the classified information, even if often paired with the provision of procedural expedients such as *in camera* hearings. As a result, at least where directly applicable, relevant human rights rules, would provide important legal parameters to abide by in the actual oversight (and, possibly, balancing) exercise, taking into account the very character of the protected information. Third, there are cases in which the use of State secrecy, either as classification or as evidentiary privilege, concerns information already in the public domain (for instance, following a leak). Whilst this circumstance would deprive secrecy claims of their own proper *ratio* (as also acknowledged by the European Court of Human Rights), it also may furnish clear evidence of a possible abuse by the executive, in breach of international human rights norms (for which the State would be responsible).

#### **2.4. State of necessity: A circumstance precluding wrongfulness?**

Finally, from the perspective of the State's international responsibility for breaching human rights norms (due to undue reliance on secrecy), it may also be wondered whether *necessity* (*état de nécessité*) may in practice act as a circumstance precluding wrongfulness. According to Article 25 of the Draft

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see, *inter alia*, A. D'AMATO, *The Concept of Special Custom in International Law*, in *American Journal of International Law*, vol. 63, 1969, pp. 211-223.

Articles on Responsibility of States for Internationally Wrongful Acts,<sup>9</sup> necessity may indeed be invoked by a State as a ground precluding an act not in conformity with its international obligations when the latter is “the only way for the State to safeguard an essential interest against a grave and imminent peril” (para. 1(a)).

With respect to violations of primary human rights obligations determined by the undue use (abuse) of secrecy, States could therefore argue that the relevant act (*i.e.*, the use of secrecy in a way not consistent with its human rights obligations) was motivated by the need to protect an essential interest (*i.e.*, its national security) from a grave and imminent peril (to be alleged and demonstrated on a case-by-case basis).

At least two considerations, however, militate against the validity of such an argument.

First, Article 25 of the International Law Commission’s Draft Articles also subjects the invocation of necessity to the circumstance that the act “does not *seriously* impair an essential interest of the State or States towards which the obligation exists, *or of the international community as a whole*” (para. 1(b); emphasis added). It is self-evident that this last provision (evoking the very notion of ‘*erga omnes* obligations’, thus including human rights norms)<sup>10</sup> would be hardly deemed satisfied any time necessity is invoked to preclude wrongfulness with respect to a violation of human rights rules. More clearly, the ‘threshold’ of seriousness provided for in Article 25 would further exclude any successful resort to the necessity defence at least in those cases in which secrecy is used in a way to prevent accountability for the most serious human rights abuses.

Second, from a theoretical point of view, it may be even questioned whether the defence set by Article 25 could indeed apply in the field of human

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<sup>9</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentary*, UN Doc. A/56/10, in *Yearbook of the International Law Commission*, 2001, vol. II, Part II.

rights, regardless of the fact that human rights conventional texts often provide for their own ‘necessity defence’ and even exclude it in specific circumstances.<sup>11</sup>

Article 25.2(a) of the Draft Articles expressly excludes the invocation of necessity “(...) if the international obligation in question [the one infringed on by the act of the State] excludes the possibility of invoking necessity”. Whether applied to human rights law, this provision may be read so to exclude the invocation of the “necessity defence” under Article 25 with respect to breaches of absolute and non-derogable rights.<sup>12</sup>

The concepts of relativity and derogability of human rights are indeed the main tools through which the necessity defence is accommodated in the field of human rights. As a consequence, the very absolute or non-derogable nature of certain human rights norms – *de facto* excluding “the possibility of invoking necessity” – would further prevent the application of the ‘necessity defence’ under Article 25 of the Draft Articles.

Hence, the fact that, as largely discussed, the very absolute and non-derogable character of certain judicial guarantees essential to provide effectiveness to absolute and non-derogable rights (as well as, arguably, the absolute and non-derogable character of the right to the truth) exclude reliance on secrecy at least in cases of serious human rights abuses also lead to outlaw any invocation of the necessity defence under Article 25 of the Draft Articles.

In light of the above, it may be concluded that a State breaching its human rights obligations by unduly relying on secrecy would be internationally responsible for its conduct and, at least when its invocation would result in the lack of accountability for serious human rights abuses, no ground could be invoked to preclude wrongfulness.

That notwithstanding, however, it appears unlikely that a State could

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<sup>10</sup> See again International Court of Justice, *Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)*, *supra* Chapter 4, note 225, paras. 33 and 34.

<sup>11</sup> C. RYNGAERT, *State Responsibility, Necessity and Human Rights*, Leuven Institute for International Law, Working Paper No. 141, 2009, p. 4.

invoke the international responsibility of another State for a breach of its human rights obligations. Moreover, even admitting that this (unlikely) scenario occurs, the benefits for the victim of the violation would in the end be limited (if any at all).

### **3. Open issues**

Against the above-illustrated background, there are some additional practical ‘open issues’ that currently characterize the dialectic relationship between secrecy and the protection of fundamental human rights. The next sections will attempt to highlight and analyse some of these unsettled questions, based on the assumption that their ‘solution’ constitutes a necessary step in the clarification of the current legal regime governing the resort to State secrecy and its possible limits under human rights law.

#### **3.1. Access to secret information and ‘third countries’**

As stated earlier, human rights law increasingly requires States not to resort to classification and/or secrecy with respect to documents or information concerning serious human rights violations.

Some issues may however arise when documents are classified in ‘third countries’, *i.e.*, States different from the ones under whose jurisdiction serious human rights violations have taken place and/or are investigated or prosecuted.<sup>13</sup>

Practically speaking, these pieces of classified information may play a key role in shedding light on the truth and fostering accountability, especially when archives in countries where human rights abuses have occurred have

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<sup>12</sup> *Ibid.*, p. 9.

<sup>13</sup> This use of the expression ‘third country’ has been adopted, *inter alia*, by the United Nations Office of the High Commissioner for Human Rights, Report on the seminar on

been destroyed. To use an expression coined by Louis Joinet, “*les archives des oppresseurs*”<sup>14</sup> may indeed often be suppressed or concealed.<sup>15</sup>

### 3.1.1. Selected examples and current legal framework

A few practical examples might help clarifying the aforementioned assertion. United States’ declassified documents, for instance, have helped to reveal past abuses occurred in Latin American countries and to hold perpetrators accountable.<sup>16</sup> They have been used as evidence, *inter alia*, in the trial of the former Peruvian President Fujimori<sup>17</sup> and in the context of the criminal proceedings taking place in Argentina in relation to the serious violations of human rights perpetrated during the military dictatorship.<sup>18</sup>

Furthermore, US declassified documents have been relied on by Truth Commissions, such as in the case of Brazil,<sup>19</sup> East Timor,<sup>20</sup> Guatemala,<sup>21</sup> and

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experiences of archives as a means to guarantee the right to the truth, UN Doc. A/HRC/17/21, *supra* Chapter 4, note 42, para. 52.

<sup>14</sup> L. JOINET, *Le rôle des archives dans la lutte contre l’impunité*, *supra* Chapter 4, note 41, p. 50.

<sup>15</sup> See, e.g., L. VALLADARES LANZA, S.C. PEACOCK, *In Search of Hidden Truths, An Interim Report on Declassification by the National Commissioner for Human Rights in Honduras*, 1998, Introduction, available at [http://nsarchive.gwu.edu/latin\\_america/honduras/hidden\\_truths/hidden.htm](http://nsarchive.gwu.edu/latin_america/honduras/hidden_truths/hidden.htm) (last accessed on 24 February 2016).

<sup>16</sup> A database of these documents (‘human rights in Latin America’) is available on the CIA’s website at: <http://www.foia.cia.gov> (last accessed on 24 February 2016).

<sup>17</sup> See, *inter alia*, A. SULLIVAN, *The Judgment against Fujimori for Human Rights Violations*, in *American University Law Review*, vol. 25, 2010, p. 708.

<sup>18</sup> See National Security Archive, *Operation Condor: National Security Archive Present Trove of Declassified Documents in Historic Trial in Argentina*, 6 May 2015, available at: <http://nsarchive.gwu.edu> (last accessed on 24 February 2016).

<sup>19</sup> The Brazilian Truth Commission has relied, *inter alia*, on some US declassified documents attesting the torture techniques used by the military dictatorship in the seventies. The documents are now publicly available on the website of the Brazilian Truth Commission, at: [www.cnv.gov.br](http://www.cnv.gov.br) (last accessed on 24 February 2016).

<sup>20</sup> The East Timor’s Commission for Reception, Truth and Reconciliation (*Comissão de Acolhimento, Verdade e Reconciliação*) relied on many US declassified documents related to serious human rights violations committed in East Timor at the hand of the Indonesian military between 1974 and 1999. The Commission also had at this disposal UK declassified documents. The 2005 Report of the Truth Commission (*Chega!* Report) is available at: <http://www.cavr-timorleste.org> (last accessed on 24 February 2016).

<sup>21</sup> See, *inter alia*, P. HAYNER, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, *supra* note 24 February 2016, p. 241.

Liberia.<sup>22</sup>

Just to make another example, Paraguayan and Mexican archives have been resorted to as evidence of the perpetration of grave violations of human rights in the context of criminal proceedings conducted in neighbouring countries.<sup>23</sup>

The importance of third countries' archives has been recently highlighted also by the United Nations Office of the High Commissioner for Human Rights, which has stressed that "the archives of (...) third countries are important for addressing human rights violations".<sup>24</sup> Accordingly, it further recognized that States should be able to access archives in other countries to prosecute human rights violations.<sup>25</sup>

Non-binding instruments, such as the already-recalled Updated Set of Principles to Combat Impunity, similarly uphold third countries' duty to cooperate in communicating or returning archives as a means for enabling the full realization of the right to the truth.<sup>26</sup>

Some authors have, however, recently noted that "[binding] law seldom requires third countries to share their secret files, and voluntarily disclosure remains relatively rare. This constitutes an important *weak link in the international human rights regime*".<sup>27</sup>

Whether this statement reflects a mere practical trend or – to the contrary – an effective legal scenario much depends on the 'normative perspective' one relies on.

For instance, as far as bilateral and multilateral agreements in the field of

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<sup>22</sup> See S. RUBLI, B. JONES, *Archiving for a Peaceful Future. Cases Description*, SwissPeace, 2013, p. 7.

<sup>23</sup> National Security Archive, *Operation Mexico: Secret Argentine Rendition Program Illuminated by Declassified Documents*, 8 December 2009, available at: <http://nsarchive.gwu.edu> (last accessed on 24 February 2016).

<sup>24</sup> See again UN Office of the High Commissioner for Human Rights, Report on the seminar on experiences of archives as a means to guarantee the right to the truth, UN Doc. A/HRC/17/21, *supra* Chapter 4, note 42, para. 52.

<sup>25</sup> *Ibid.*, para. 11.

<sup>26</sup> United Nations Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, UN Doc. E/CN.4/2005/102/Add.1, *supra* Introduction, note 62, Principle 18(c).



mutual assistance in legal matters are concerned, they generally provide for the sharing of records, useful to criminal cases or investigations, between the parties. However, these treaties often contain broadly drafted exemption clauses, which allow the requested country to refuse assistance on the ground of essential interests, such as sovereignty, security and public order.<sup>28</sup> As it has been noted, the rationale behind these provisions is represented by States' reluctance to bind themselves to disclose certain evidence, such as official secrets.<sup>29</sup> The requested State might therefore discretionally refuse to provide evidentiary material on the basis of its secret or classified nature (and regardless of its content).<sup>30</sup>

Multilateral human rights treaties, such as the Convention against Torture and the Convention for the Protection of All Persons from Enforced Disappearances, similarly impose on States parties disclosure obligations. Both these instruments require indeed States parties to afford one another legal assistance in criminal proceedings related to torture or enforced disappearances respectively, "including the supplying of all the evidence at

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<sup>27</sup> Emphasis added. J.D. CIORCIARI, G.M. FRANZBLAU, *Hidden Files: Archival Sharing, Accountability and the Right to the Truth*, *supra* Chapter 4, note 41, p. 1.

<sup>28</sup> See, for instance, United Nations Model Treaty on Mutual Assistance in Criminal Matters, adopted by the UN General Assembly with Resolution No. 45/117 of 14 December 1990, UN Doc. A/RES/45/117 and further amended by Resolution No. 53/112 of 9 December 1998, UN Doc. A/RES/53/112), Article 4.1(a): "Assistance may be refused if: the requested State is of the opinion that the request, if granted, would prejudice its sovereignty, security, public order (*ordre public*) or other essential public interest". See also Inter-American Convention on Mutual Assistance in Criminal Matters (Nassau, 23 May 1992), entered into force on 14 April 1996, OASTS No. 75, Article 9(e); European Convention on Mutual Assistance in Legal Matters (Strasbourg, 20 April 1959), entered into force on 12 June 1962, ETS No. 30, 72 UNTS 185, Article 2(b). Among bilateral treaties see, for instance, Article 6(c) of the Treaty on Mutual Assistance in Criminal Matters between Australia and the Republic of Italy (Melbourne, 28 October 1988), entered into force on 1 April 1994; Article 6(1)(b) of the Treaty between the United States of America and France on Mutual Legal Assistance in Criminal Matters (Paris, 10 December 1998), entered into force on 1 December 2001; Article 4(1)(a) of the Treaty between the United Kingdom of Great Britain and Northern Ireland and the Government of the Federative Republic of Brazil on Mutual Legal Assistance in Criminal Matters (London, 7 April 2005), entered into force on 13 April 2011.

<sup>29</sup> R. J. CURRIE, *Human Rights and International Mutual Legal Assistance: Resolving the Tension*, in *Criminal Law Forum*, vol. 11, 2000, p. 160.

<sup>30</sup> On this point see also A. BISSET, *Truth Commissions and Criminal Courts*, *supra* Chapter 4, note 9, p. 163.

their disposal that is necessary for the proceedings”.<sup>31</sup> However, both these instruments also include vaguely worded exceptional clauses to the duty of States to provide mutual legal assistance. Article 14(2) of the Convention for the Protection of All Persons from Enforced Disappearances, for instance, states that assistance is subject to “the conditions provided for by the domestic law of the requested State Party or by applicable treaties on mutual legal assistance, including, in particular, the conditions in relation to the ground upon which the requested State party may refuse to grant mutual legal assistance or make it subject to conditions”. The Convention against Torture equally provides that the obligation to share information embodied in Article 9(1) should be interpreted in accordance with the mutual assistance agreements existing among the parties (which, as stated before, generally include specific security ‘exclusion clauses’).<sup>32</sup>

### **3.1.2. A critical assessment**

*Prima facie*, the aforementioned exemptions to information sharing might provide a legitimate tool for third States to retain documents that, whether disclosed, could help shedding light on serious human rights violations and held perpetrators accountable. These provisions could easily be relied on to conceal information related to the possible involvement of the classifying State in the abuses or, more generally, to retain documents that could provide evidence of the responsibilities of political allies.

Moreover, States practice subsequent to the conclusion of the agreements (and related to their application)<sup>33</sup> does not seem to provide sufficient ground to draw the conclusion that information related to serious human rights violations would be exempted from the scope of application of the ‘security’

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<sup>31</sup> See Convention against Torture, Article 9(1) and Convention for the Protection of All Persons from Enforced Disappearance, Article 14(1).

<sup>32</sup> See again Convention against Torture, Article 9(2).

<sup>33</sup> See again Article 31(3)(b) of the Vienna Convention on the Law of Treaties.

exclusion clauses. Taking the United States' practice as an example, the government has in several instances refused to comply with requests of information sharing pursuant to the existing mutual legal assistance treaties, although they could have certainly aided requiring authorities to shed light on serious human rights violations and bring perpetrators to justice.<sup>34</sup> On other occasions, however, the same government has disclosed information related to human rights abuses occurred abroad, expressly grounding the release on the mutual assistance agreements concluded with other countries. For instance, with respect to the declassification of information related to human rights abuses occurred in Argentina between 1975 and 1984, the US Department of State declared that:

“We are releasing these documents to assist Argentina in investigating acts of violence during the time period covered. This release responds to a variety of requests, including from the Government of Argentina; the Government of Uruguay; the Grandmothers of the Plaza de Mayo; and the United States Congress. *These documents are also responsive to mutual legal assistance treaty (MLAT) requests to the Department of Justice from Argentina, Italy and Spain in connection with criminal investigations of human rights violations*”.<sup>35</sup>

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<sup>34</sup> The United States, for instance, have been disinclined to provide evidence to assist European countries in the investigations of alleged tortures (perpetrated in the context of the extraordinary renditions programme). See, e.g., OpenTheGovernment.com, *The Impact of Executive Branch Secrecy on the United States' Compliance with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Shadow Report prepared for the 53rd Session of the United Nations Committee Against Torture in Connection with its Review of the United States, 17 October 2014, para. D (available at: <http://www.openthegovernment.org>; last accessed on 24 February 2016). See also, *inter alia*, the refusal by the United States to abide by the mutual legal assistance request addressed by Spain for sharing classified information related to the serious human rights violations perpetrated in Chile under the Pinochet regime. See, e.g., P. KORNBLUH, *The Pinochet File: A Declassified Dossier on Atrocity and Accountability*, 2003, pp. 467-471.

<sup>35</sup> Emphasis added. Department of State of the United States, Press Release, *Argentina: Declassification of Documents related to Human Rights Abuses occurred between 1975-1984*, 20 August 2002, available at: <https://foia.state.gov> (last accessed on 24 February 2016).

Some further considerations may, however, downsize the practical shortcomings potentially arising out of the said provisions. In particular, according to the criterion of systemic interpretation of treaties,<sup>36</sup> ‘national security’ exemptions provisions contained in mutual assistance agreements should be interpreted so as to take into account other international norms (*i.e.*, human rights rules) binding on States parties. These would likely include those norms (analysed in the previous Chapters) prohibiting States to resort to secrecy and national security grounds to conceal serious human rights violations.

Clearly, the effective ‘viability’ of this approach rests in part on the normative dimension of the related human rights provisions (customary? Treaty-based?). Nevertheless, even leaving aside the already-illustrated indications coming from State practice and *opinio juris*, the widespread ratification of the human rights treaties from which monitoring bodies have progressively inferred a duty of States not to resort to classification in certain circumstances allows considering them as generally “applicable in the relations between the parties”, as per Article 31(3)(c) of the Vienna Convention on the Law of Treaties, thus entrusting the aforesaid approach of an extensive ‘reach’. For the sake of argument, it should nevertheless be observed that the reliance on the abovementioned criterion of interpretation, whether grounded on the alleged *customary* dimension of the norms prohibiting the resort to secrecy for serious human rights violations, would

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<sup>36</sup> *Ibid.*, Article 31.3(c), pursuant to which in the interpretation of a treaty “there should be taken into account together with the context (...) any relevant rules of international law applicable in the relations between the parties”. For an overview of the content of this provision see, *inter alia*, M.E. VILLAGER (ed.), *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden, Boston, 2009, pp. 432-434. See also, *e.g.*, M. CAMPBELL, *The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention*, in *The International and Comparative Law Quarterly*, vol. 54, 2005, pp. 279-320; D. FRENCH, *Treaty Interpretation and the Incorporation of Extraneous Legal Rules*, in *The International and Comparative Law Quarterly*, vol. 55, 2006, pp. 281-314; U. LINDERFALK, *Who are the ‘Parties’?: Article 31, Paragraph 3(c) of the 1969 Vienna Convention and the ‘Principle of*

inescapably require evidence of the ‘well-established character’ of that very rule. As noted by the Arbitral Tribunal in the *Mox Plant* case, indeed, Article 31(3)(c) of the Vienna Convention on the Law of Treaties would exclude from the scope of its application any “law *in status nascendi*” (*i.e.*, which has not reached full customary *status*).<sup>37</sup> On the other hand, however, it cannot be neglected that the International Court of Justice, in its judgment related to the *Gabčíkovo-Nagymaros* case, expressly found that “(...) new norms have to be taken into consideration, and (...) *new standards given proper weight*, not only when States contemplate new activities but also when continuing with activities begun in the past”.<sup>38</sup>

Additionally, in the case of human rights treaties such as the Convention against Torture or the Convention against Enforced Disappearances, the very textual criterion of interpretation, which requires States to interpret the terms of a treaty in their context,<sup>39</sup> thus including other provisions of the same agreement, would suffice to support the conclusion that national security exemptions would exclude from the scope of their application information related to tortures or enforced disappearances. Any different interpretation would indeed end up upholding a sort of ‘inner normative short circuit’. This appears especially true with respect to the Convention on the Protection of All Persons from Enforced Disappearances that, as stressed earlier, explicitly recognizes the right to know the truth.

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*Systemic Interpretation’ Revisited*, in *Netherlands International Law Review*, vol. 55, 2008, pp. 343-364.

<sup>37</sup> *Dispute concerning Access to Information under Article 9 of the OSPAR Convention between Ireland and the United Kingdom of Great Britain and Northern Ireland*, decision of 2 July 2003, in *Reports of Arbitral Awards*, Vol. XXIII, pp. 59-151, para. 99 ff. See also on this topic A. ORAKHELASHVILI, *The Interpretation of Acts and Rules in Public International Law*, Oxford, 2008, p. 366.

<sup>38</sup> See International Court of Justice, *Case concerning the Gabčíkovo-Nagymaros project (Hungary v. Slovakia)*, judgment of 25 September 1997, ICJ Reports p. 7, para. 140. It has to be noted, however, that the Arbitral Tribunal in the recalled Award related to the *Mox Plant* case has interpreted the Court’s *dictum* as referring merely on the developments in *law* (para. 103) (that notwithstanding the Court’s express distinction between new norms and new standards).

### 3.1.3. *De lege ferenda* proposals to amend the current legal framework concerning inter-State cooperation

In light of the above, it seems desirable that, *de lege ferenda*, newly drafted agreements on mutual assistance will include an ‘exception to the exception’ clause, expressly excluding information related to serious human rights violations from those that a State may legitimately refuse to hand over based on national security grounds.

Furthermore, it is worth stressing that current mutual legal assistance treaties do not provide any binding legal ground for the sharing of information with Truth Commissions. This has led, in practice, to the rejection of requests of information submitted by these Commissions to third States. An example is represented by the United States government’s refusal to provide to the East Timor’s Commission for Reception, Truth and Reconciliation documents concerning the violations perpetrated in the country between the seventies and the nineties.<sup>40</sup> Hence, when Truth Commissions have relied in their work on third countries’ declassified documents, this was made possible mainly by voluntary disclosure. The proliferation of Truth Commissions and their importance in recovering the truth make however compelling to address this apparent legal *vacuum*, especially when the same are entrusted with *quasi-judicial* powers, such as in the case of the South African Truth Commission.<sup>41</sup> In this regard, this aspect may even be seen as a corollary element of the more

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<sup>39</sup> Vienna Convention on the Law of Treaties, Article 31.2.

<sup>40</sup> See National Security Archive, *A Quarter Century of US Support for Occupation*, 28 November 2005 (available at: <http://nsarchive.gwu.edu>; last accessed on 24 February 2016). See also the request of the East Timor Truth Commission addressed to the United States’ President George Bush, dated 24 January 2003, in which it stressed that “Government archives as accurate and comprehensive as those kept by the United States Government could, in many instances, provide essential information for supporting or dismissing certain allegations of human rights abuses”. The text of the letter is available at: <http://nsarchive.gwu.edu/> (last accessed on 24 February 2016).

<sup>41</sup> On the experience of the South-African Truth Commission see, *inter alia*, T. SCOVAZZI, *L’ammnistia nell’esperienza della Commissione per la Verità e la Riconciliazione del Sudafrica*, in F. FRANCONI, M. GESTRI, N. RONZITTI, T. SCOVAZZI (eds), *Accesso alla*

general debate concerning the role of restorative justice and its relationship with retributive justice mechanisms.

#### **3.1.4. Access to information about serious human rights violations classified in “third countries”: Which means available to the victim?**

The above notwithstanding, under certain circumstances, the right of access to State-held information may provide – if and to the extent that domestic legislation allows so – a legal basis for the victims (directly or through NGOs) to obtain declassification of information in third countries.

So far, several NGOs and private citizens have in fact relied on domestic freedom of information laws to obtain access to classified documents related to human rights abuses perpetrated in other countries.<sup>42</sup> In the United States, for instance, the Freedom of Information Act entails any person – including foreign *nationals* and *governments* – with the right to file a request for disclosure.<sup>43</sup> Often, however, such requests have been rejected on the ground of national security secrecy exemptions embodied in the related freedom of information legislation.<sup>44</sup>

As previously discussed, to date, only few domestic legal systems include

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*giustizia dell'individuo nel diritto internazionale e dell'Unione Europea, supra* Chapter 3, note 152, pp. 615-634.

<sup>42</sup> An example is represented by the work of the National Security Archive in the United States which has filed several freedom of information law requests with respect to US documents concerning serious human rights violations perpetrated elsewhere. Several of the related declassified documents have been used in proceedings concerning gross human rights violations in other States. See again National Security Archive, *Operation Condor: National Security Archive Present Trove of Declassified Documents in Historic Trial in Argentina*, *supra* note 18.

<sup>43</sup> See, e.g., United States Court of Appeals for the Fifth Circuit, *Stone v. Export-Import Bank of United States*, 552 F2d 132, 13 May 1977, para. 16. The case of the United States is not isolated. See, for instance, the 2010 Freedom of Information Act of Liberia, ensuring to “every person, irrespective of their nationality and residence” the right to access State-held information (Section 3.2).

<sup>44</sup> See again L. VALLADARES LANZA, S.C. PEACOCK, *In Search of Hidden Truths, An Interim Report on Declassification by the National Commissioner for Human Rights in Honduras*, *supra* note 15, describing the effort to obtain access to US classified documents related to human rights violations perpetrated in Honduras through the Freedom of Information Act as “frustrating”.

provisions outlawing the resort to secrecy with respect to information concerning serious human rights violations. Whereas so far no case law or interpretative order has clarified the material scope of application of the aforementioned provisions, it should be presumed that they cover information related to all serious human rights violations irrespective of the country of their perpetration.<sup>45</sup>

No similar provisions are to be found, however, in States that, due to their consolidated systems of intelligence, are the most likely to dispose of information related to serious human rights violations occurred in other Countries.

Interestingly, in the United States, a proposal brought forward in 1997 to introduce a new piece of legislation aimed at accelerating the process of declassification of information related to human rights abuses perpetrated in Latin American countries (so-called 'Human Rights Information Act') met strong opposition in the Congress and was later abandoned.<sup>46</sup>

As previously stressed, however, under the main human rights treaties, the right to *receive* information has been progressively interpreted so as to encompass a right of access to State-held information. Restrictions (including on the ground of national security) to the aforementioned right may be deemed legitimate only if responding to specific requirements, including a necessity and proportionality test. Furthermore, a strong presumption exists in the sense that the refusal to disclose information related to serious human rights abuses would not meet the aforementioned criteria.

Accordingly, States' resort to confidentiality or classification (generally, on national security ground) to not release information related to serious human rights violations perpetrated abroad would likely constitute a breach of treaty

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<sup>45</sup> J.D. CIORCIARI, G.M. FRANZBLAU, *Hidden Files: Archival Sharing, Accountability and the Right to the Truth*, *supra* Chapter 4, note 41, p. 17.

<sup>46</sup> See United States Congress, *Access to government information and H.R. 2635, Human Rights Information Act: Hearing before the Subcommittee on Government Management, Information, and Technology of the Committee on Government Reform and Oversight, House of Representatives, One Hundred Fifth Congress, second session, 11 May 1998.*



provisions, entailing international responsibility (provided that the State withholding the information is party to the relevant treaties).

Practically speaking, however, some issues may arise from the fact that treaty provisions bind States parties to ensure the right of access to State-held information only with respect to those individuals under their jurisdiction or within their territory.<sup>47</sup> However, as it has been noted, civil society actors (present on the territory of the classifying State) could anyway rely on the above right (at least, whether directly applicable in the domestic legal system) to obtain disclosure of information to be used later on in proceedings abroad.<sup>48</sup>

More perplexities surround the possible reliance on other treaty provisions to obtain declassification of information in third countries. The right to an effective remedy or the right to the truth, in its individual dimension, would inevitably presuppose the quality of ‘victim’ of the claiming party. The collective dimension that has been progressively afforded to the right to the truth may however represent an important tool to overcome such practical shortcomings.

Finally, it has to be stressed that if one upholds the view that the current international human rights regime encompasses an autonomous customary norm prohibiting States from unduly relying on secrecy to conceal serious human rights abuses (likely inferable from the customary dimension of the right to the truth), any unjustified classification of certain information would amount *per se* to a wrongful act, the cessation of which would require the immediate disclosure of the relevant information on the part of the State. This, regardless of whether the human rights violations occurred abroad and irrespective of the specific treaty obligations binding the State at the international level.

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<sup>47</sup> See, *e.g.*, Article 2(1) of the International Covenant on Civil and Political Rights; Article 1 of the European Convention on Human Rights; Article 1 of the American Convention on Human Rights. For a more complete list and the issues related to the content and scope of application of the said provisions see, *inter alia*, M. MILANOVIĆ, *Extraterritorial Application of Human Rights Treaties. Law, Principles, and Policy*, Oxford, 2011.

In this respect, it might be useful to further recall the already-mentioned 2013 Tshwane Principles, which, as stated, although non-binding, may nevertheless be seen as reflective of evolving normative standards and as an important influencing tool for current and future State practice. According to Principle 10(5), the overriding interest in disclosure of information concerning serious human rights violations, which would exclude any withholding based on national security grounds, applies to “information about violations that have occurred or are occurring, (...) regardless of whether the violations were committed by the State that holds the information or others”.

### **3.2. The issue of potentially conflicting international obligations**

As illustrated earlier, it may happen that a State – although required under human rights law to disclose in specific circumstances classified information (either against a request of access or in the context of proceedings) – is contextually obliged to abide by its bilateral or multilateral treaty commitments imposing secrecy or confidentiality on security grounds. As a matter of example, this may occur when a State has concluded a bilateral or multilateral agreement requiring non-disclosure of intelligence information shared among the parties or subordinating disclosure to the consent of the State where the information was generated (the already recalled ‘originator control principle’).<sup>49</sup> As it has been noted, in fact, in domestic proceedings, arguments based on the sensitivity of information exchanged through intelligence cooperation have been growingly invoked to refuse disclosure of

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<sup>48</sup> See again J.D. CIORCIARI, G.M. FRANZBLAU, *Hidden Files: Archival Sharing, Accountability and the Right to the Truth*, *supra* Chapter 4, note 41, p. 26.

<sup>49</sup> Practically speaking, a conflict of norms situation may also arise with respect to those already-recalled international rules imposing the inviolability of diplomatic archives (at least when interpreted so to prohibit, for instance, the disclosure of leaked documents before the hosting country’s courts) and human rights provisions requiring disclosure in certain circumstances (such as when they concern or would help to shed light on serious human rights violations).

certain evidence.<sup>50</sup> Whilst this trend is likely a consequence of the increase in number of intelligence cooperation agreements, it may nonetheless provide a further legal ‘challenge’ to the full compliance with human rights obligations.

*Lato sensu*, the aforementioned hypothesis may also concern the case in which the confidentiality of certain information is *de facto* imposed by the obligation to comply with the acts of an international organization (such as in the case of Security Council’s resolutions imposing targeted sanctions against suspected terrorists).

Finally, as far as EU Member States are concerned, the issue further arises as to the potential conflict that may exist between the Member States’ duty to disclose certain information, on the one hand, and the obligation to maintain secrecy and classification imposed by EU law,<sup>51</sup> on the other hand.

On top of the above, recent events have clearly outlined the difficulties inherent to the interplay among the domestic, regional and international legal regimes. The tension that may arise between EU Member States’ obligation to abide by Security Council’s resolutions (imposing confidentiality) and the EU framework of human rights protection (requiring States not to restrict certain fundamental rights by relying on confidentiality or secrecy) is a valuable example in this respect.

### **3.2.1. Solving the issue pursuant to the rules of the Vienna Convention on the Law of Treaties**

At first sight, it could be argued that at least some of the above-illustrated

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<sup>50</sup> I. LEIGH, *National Courts and International Intelligence Cooperation*, in H. BORN, I. LEIGH, A. WILLS (eds), *International Intelligence Cooperation and Accountability*, *supra* Chapter 1, note 257, p. 246.

<sup>51</sup> As far as international treaty commitments and EU norms referring to the originator control principle are concerned, it is evident that the existence of a ‘conflict’ with human rights norms would rest on the assumption that human rights rules impose on States not only an obligation not to classify but, more generally, a positive obligation to disclose certain information (at least in case of information related to serious human rights violations).

scenarios would not give rise to a ‘norm conflict’,<sup>52</sup> which – according to the prevailing approach – would occur when the State’s abidance to one rule inescapably leads to the breach of the other.<sup>53</sup> It has been observed indeed that when a norm provides for an exception to a more general rule, any conflict would merely be apparent, given that, “pursuant to the principle of ‘effective treaty interpretation’, the rule must simply be carved out to the extent required to give effect to the exception”.<sup>54</sup>

Yet, according to some scholarship, at least with respect to treaty provisions, the concrete application of this ‘accumulation of norms’ principle would require the general rule to *explicitly* exclude from its scope of application those circumstances provided for in the relevant exception and the exempting norm to *explicitly* acknowledge its exceptional dimension with respect to the general rule.<sup>55</sup>

In the cases under study here, it seems hardly open to doubt that the prohibition to classify documents or resort to secrecy as evidentiary privilege if it unduly restricts fundamental human rights and, more generally, ends up concealing information concerning serious human rights violations would provide for an exception (in the last case, *ratione materiae*) to the obligation of non-disclosure. That notwithstanding, bilateral and multilateral agreements

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<sup>52</sup> The problem of norm conflicts in international law and its possible solution have been the object of a specific study by a Study Group of the International Law Commission. See International Law Commission, Report of the Study Group, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, UN Doc. A/CN.4/L.682 of 13 April 2006.

<sup>53</sup> J. PAUWELYN, *Conflict of Norms in Public International Law. How WTO Law Relates to Other Rules of International Law*, Cambridge, 2003, p. 176. On the topic more generally see also, *inter alia*, E. VRANES, *The Definition of ‘Norm Conflict’ in International Law and Legal Theory*, in *European Journal of International Law*, vol. 17, 2006, pp. 395-418; M. MILANOVIĆ, *Norm Conflict in International Law: Whiter Human Rights?*, in *Duke Journal of International and Comparative Law*, vol. 20, 2009, pp. 69-131; J. KLABBERS, *Beyond the Vienna Convention: Conflicting Treaty Provisions*, in E. CANNIZZARO (ed.), *The Law of Treaties Beyond the Vienna Convention*, Oxford, 2011, pp. 192-205; J. VIDMAR, *Norm Conflicts and Hierarchy in International Law: Towards a Vertical International Legal System?*, in E. DE WET, J. VIDMAR (eds), *Hierarchy in International Law. The Place of Human Rights*, Oxford, 2012, pp. 13-41.

<sup>54</sup> See again J. PAUWELYN, *Conflict of Norms in Public International Law. How WTO Law Relates to Other Rules of International Law*, *supra* note 53, p. 163.

<sup>55</sup> *Ibid.*

imposing classification (or, more generally, non-disclosure) of certain information do not generally contain any explicit reference to a possible exception in cases of undue restrictions to human rights (including the case in which secrecy and confidentiality cover information related to serious human rights violations).

Furthermore, from a theoretical point of view, the very definition of what constitute a ‘conflict of norm’ is subject to debate. Pursuant to a broader notion, “situations where an obligation under international law does not (...) lead to a breach of another norm (...) but rather to its limitation” would also give rise to a norm conflict.<sup>56</sup>

These considerations alone do not lead, however, to fully rule out the possibility that the conflicts of norms depicted at the outset of this section would be ‘avoidable’ (and, thus, amounting to a merely apparent conflict).<sup>57</sup> Rather, interpretation means and, more specifically, the already recalled principle of systemic interpretation enshrined in Article 31(3)(c) of the Vienna Convention on the Law of Treaties,<sup>58</sup> may provide valuable grounds to reconcile two (apparently) colliding rules.<sup>59</sup> As noted by Klabbbers, in fact, a norm conflict may be considered existent only insofar as the same cannot be solved (or, better, avoided) by means of ‘reconciliative’ – or even ‘balancing’ or ‘proportionality’ – interpretation.<sup>60</sup>

As previously stressed, under this approach, international norms requiring

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<sup>56</sup> E. DE WET, J. VIDMAR, *Introduction*, in E. DE WET, J. VIDMAR (eds), *Hierarchy in International Law. The Place of Human Rights*, *supra* note 53, p. 2.

<sup>57</sup> This term is used by M. MILANOVIĆ, *Extraterritorial Application of Human Rights Treaties. Law, Principles, and Policy*, *supra* note 47, p. 236.

<sup>58</sup> For the sake of argument, it should be stressed that the cases here under consideration differ from the one examined in the previous section (interpretation of mutual legal assistance treaties, providing for a legitimate prerogative of States not to disclose certain information, in light of human rights rules). The current analysis focuses in fact only on conflicting norms (*i.e.*, obligations not to disclose certain information *vis-à-vis* contextual obligations of disclosure).

<sup>59</sup> See again International Law Commission, Report of the Study Group, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, *supra* note 52, para. 410 ff.

<sup>60</sup> J. KLABBERS, *Beyond the Vienna Convention: Conflicting Treaty Provisions*, in E. CANNIZZARO (ed.), *The Law of Treaties Beyond the Vienna Convention*, *supra* note 53, p. 193.

non-disclosure could be interpreted so as to accommodate the growing recognition, under human rights law, that classification (including reliance on secrecy as evidentiary privilege) should not unduly restrict the protection of fundamental human rights and, in particular, should not be resorted to in order to conceal serious human rights violations. In this direction seems to point, although implicitly, the recommendation made by the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, according to which:

“States should establish clear policies, regulations and procedures covering the exchange of information with foreign intelligence agencies. *Where such procedures exist, by way of binding instruments or understanding, they should be reviewed in light of relevant human rights standards*”.<sup>61</sup>

Whilst this approach has certainly the merit to avoid *ex ante* the issues that may arise from the possible conflicts of norms reported above (and be consistent with judicial practice and doctrinal opinions), two sets of considerations demand for a more in-depth analysis. First, the controversial character of the subject matter makes appropriate to further evaluate the criteria of solution that would possibly apply in case a *genuine* conflict of norms is deemed existent (even if the argument here supported is that is not). Second, specific scenarios (such as in the case of conflicting obligations resting with EU Member States or when Security Council’s resolutions are involved) may beg additional normative questions, deserving to be further addressed.

As to the first aspect (*i.e.*, assuming a genuine conflict of norms), it should be recalled that, at the international level – with the sole exclusion of the hierarchical element embodied in the already-mentioned Article 103 of the

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<sup>61</sup> Emphasis added. Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights, *Assessing Damages, Urging Action*, *supra* Introduction, note 34, p. 90.

United Nations Charter – sources of law are generally considered equal.<sup>62</sup> Against this background – and taking into account the limited scope of application of Article 30 of the Vienna Convention on the Law of Treaties (which merely refers to the possible conflicts arising between treaties on the same subject matter binding identical States parties) – the *lex posterior* and the *lex specialis* principles represent the general criteria of solution of norm conflicts.<sup>63</sup>

At first sight, whether applied to the case at hand, the *lex posterior* principle would likely lead to conclude for the prevalence of those norms imposing classification (at least with respect to bilateral and multilateral treaties on sharing of information). Such provisions are indeed generally included in agreements entered into force after the main human rights treaties. The said conclusion would however hardly respect the main *rationale* behind the *lex posterior* principle, that is, to mirror political changes as much as possible.<sup>64</sup>

Nevertheless, if one assumes that the prohibition to unduly classify (or not disclose) certain information has nowadays reached the status of a customary norm (either *per se* or as a consequence of the customary character of the rights from which such an obligation may be derived in a specific case), the application of the *lex posterior* principle would support opposite conclusions (*i.e.*, the prevalence of human rights considerations over the norm imposing blanket non-disclosure).

The uncertainty surrounding the legal nature of the relevant human rights provisions could be nonetheless overcome by relying on the *lex specialis* principle. Yet, the issue may arise as to which norm is indeed the special one. With regard to allegedly colliding treaty provisions, for instance, the number

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<sup>62</sup> See M. MILANOVIĆ, *Norm Conflict in International Law: Whiter Human Rights?*, in *Duke Journal of International and Comparative Law*, *supra* note 53, p. 74.

<sup>63</sup> See again International Law Commission, Report of the Study Group, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, *supra* note 52, para. 56 ff (*lex specialis*) and para. 234 ff (*lex posterior*). See also T. TREVES, *Corso di diritto internazionale*, Milano, 2005, p. 245 ff.

<sup>64</sup> J. KLABBERS, *Beyond the Vienna Convention: Conflicting Treaty Provisions*, in E. CANNIZZARO (ed.), *The Law of Treaties Beyond the Vienna Convention*, *supra* note 53, p. 198.

of parties concluding the two agreements could be significant of the speciality of the related provisions. However, as it has been noted in academic literature, this approach could lead in practice to “morally unpleasant situations”,<sup>65</sup> such as in the case of a bilateral agreement providing blanket non-disclosure with respect to all exchanged documents on the ground of security concerns being considered *lex specialis* against the background of general human rights agreements.

In the circumstances at stake, however, the same substance of the two potentially colliding norms may point at a different application of the *lex specialis* principle. Taking into account that, as previously stressed, human rights norms seem to carve out a possible exception to an obligation of classification (even if undertaken only by two States in their bilateral relationships), the aforementioned criterion of conflict solution could be declined in the sense that the ‘exemption norm’ would constitute *lex specialis* (as such, prevailing).<sup>66</sup>

### **3.2.2. Solving the issue pursuant to the rules governing hierarchy of sources in international law**

Given the specific subject matter at hand, consideration should also be paid to the chorus of doctrinal voices that, growingly, supports the idea of a human rights-based hierarchy emerging in the realm of international law.<sup>67</sup> Pursuant to this view, the international legal order would be in a transition phase towards a vertical system where human rights norms would hold primacy over the others.<sup>68</sup> Clearly, from a theoretical point of view, these assertions mainly rely on the notion of *jus cogens* and the consequent postulation that, at least

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<sup>65</sup> *Ibid.*, p. 199.

<sup>66</sup> As to this theoretical possibility see again J. PAUWELYN, *Conflict of Norms in Public International Law. How WTO Law Relates to Other Rules of International Law*, *supra* note 53, p. 163.

<sup>67</sup> See again E. DE WET, J. VIDMAR, *Introduction*, in E. DE WET, J. VIDMAR (eds), *Hierarchy in International Law. The Place of Human Rights*, *supra* note 53, p. 3.



those human rights norms of a peremptory character, would be hierarchically superior and, as such, would prevail over other conflicting rules.<sup>69</sup>

In the case at stake, it has been largely illustrated that human rights monitoring bodies have at times inferred the prohibition not to unduly rely on secrecy – at least with respect to information related to serious human rights violations – from human rights norms of peremptory character, such as the prohibition of torture.<sup>70</sup>

In this respect, however, it may well be argued that the right (and the corresponding obligation to provide) access to information, justice or to the truth concerning acts of (for instance) tortures do not amount *per se* to norms of *jus cogens*, given that the scope of application of the peremptory rule prohibiting torture would not encompass, at least so far, a corollary obligation not to resort to secrecy to conceal such violations.

More generally, the difficulties related to the clear establishment of what constitutes a peremptory norm could in practice prevent – or at least obstacle – any effective reliance on this ‘normative argument’ as a possible means of solution of norm conflicts.<sup>71</sup>

Furthermore, regardless of the wide acceptance of the primacy of *jus*

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<sup>68</sup> *Ibid.*

<sup>69</sup> On the topic see, *inter alia*, A. ORAKHELASHVILI, *Peremptory Norms in International Law*, Oxford, 2006. For a general overview of the subject of hierarchy in international law see also C. CHINKIN, *Jus Cogens, Article 103 and Other Hierarchical Techniques of Conflict Solution*, in *Finnish Yearbook of International Law*, vol. 17, 2008, pp. 63-82.

<sup>70</sup> See, *inter alia*, International Criminal Tribunal for the Former Yugoslavia, *Prosecutor v. Anto Furundizija*, case No. IT-95-17/1, judgment of 10 December 1998, para. 153; and European Court of Human Rights [GC], *Al-Adsani v. The United Kingdom*, App. No. 35763/97, judgment of 21 November 2001, para. 61. See also International Court of Justice, *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, *supra* Introduction, note 62, para. 99.

<sup>71</sup> Article 53 of the Vienna Convention on the Law of Treaties defined it generally as “(...) a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. As it has been noted, this definition is characterized by a ‘disturbing circularity’. See again, in this respect, International Law Commission, Report of the Study Group, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, *supra* note 52, para. 375.

*cogens* norms,<sup>72</sup> judicial practice has been generally cautious in explicitly upholding the hierarchical superiority of *jus cogens* norms over colliding rules. As a matter of example, whether the prohibition of torture would provide a ground for lifting immunity still remains a highly debated issue.<sup>73</sup>

Not surprisingly, this reluctant attitude on the part of the judiciary has more generally concerned any idea of a human rights-based hierarchy in international law (even beyond the concept of *jus cogens*). This includes also the doctrinal argument according to which the notion of *erga omnes* obligations would add a further hierarchical element in the international law order (so-called “theory on the superior status of obligations *erga omnes*”).<sup>74</sup>

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<sup>72</sup> *Ibid.*, para. 379.

<sup>73</sup> See, however, International Court of Justice, *Jurisdictional Immunities of the State (Germany v. Italy; Greece Intervening)*, judgment of 3 February 2012, I.C.J. Report 2012, p. 99 (excluding it). For a general overview of the extensive doctrinal debate (before and after the judgment) see, *inter alia*, L. M. CAPLAN, *State Immunity, Human Rights and a Critique of the Normative Hierarchy Theory*, in *American Journal of International Law*, vol. 97, 2003, pp. 741-781; P. DE SENA, F. DE VITTOR, *State Immunity and Human Rights: The Italian Supreme Court Decision on the Ferrini Case*, in *European Journal of International Law*, vol. 16, 2005, pp. 89-112; S. HUMES-SCHULZ, *Limiting Sovereign Immunity in the Age of Human Rights*, in *Harvard Human Rights Journal*, vol. 21, 2008, pp. 105-142; R. VAN ALEBEEK, *The Immunity of States and their Officials in International Criminal Law and International Human Rights Law*, Oxford, 2008, p. 301 ff; A. BELLAL, *Immunités et violations graves des droits humains. Vers une évolution structurelle de l'ordre juridique international?*, Bruxelles, 2011; E. CANNIZZARO, B. BONAFÉ, *Of Rights and Remedies: Sovereign Immunity and Fundamental Human Rights*, in U. FASTENRATH, R. GEIGER, D.E. KHAN, A. PAULUS, S. VON SCHORLEMER, C. VEDDER (eds), *From Bilateralism to Community Interest. Essays in Honour of Judge Bruno Simma*, Oxford, 2011, pp. 825-842; O. SVAČEK, *Serious Human Rights Violations: Eclipse of Mere Twilight of State Immunity?*, in *International and Comparative Law Review*, vol. 11, 2011, pp. 77-92; O. BARKICIOGLU, *Germany v. Italy: The Triumph of Sovereign Immunity over Human Rights Law*, in *International Human Rights Law Review*, vol. 1, 2012, pp. 93-109; F. BOUDREAU, *Identifying Conflict of Norms: The ICJ Approach in the Case of the Jurisdictional Immunities of the State (Germany v. Italy)*, in *Leiden Journal of International Law*, vol. 25, 2012, pp. 1003-112; L. MCGREGOR, *State Immunity and Human Rights*, in *Journal of International Criminal Justice*, vol. 11, 2013, pp. 125-145; C. ESPÓSITO, *Of Plumbers and Social Architects: Elements and Problems of the Judgement of the International Court of Justice in the Jurisdictional Immunities Case*, in *Journal of International Dispute Settlement*, vol. 4, 2013, pp. 439-456.

<sup>74</sup> U. LINDERFALK, *International Legal Hierarchy Revisited: The Status of Obligations Erga Omnes*, in *Nordic Journal of International Law*, vol. 80, 2011, pp. 1-23 (highlighting the shortcoming of this theory). On the concept of *erga omnes* obligations (including their potential role in terms of transformation of the international legal order to a ‘vertical normative system’) see, *inter alia*, P. PICONE, *Comunità internazionale e obblighi erga omnes: studi critici del diritto internazionale*, 2nd ed., Napoli, 2010; and P. PICONE, *Gli obblighi erga omnes tra passato e futuro*, in *QIL*, 2015 (online at: [www.qil-qdi.org](http://www.qil-qdi.org), last accessed on 24 February 2016)

Apart from the lack of judicial practice supporting this conclusion, this approach has been explicitly rejected by the International Law Commission, which has stressed that: “(...) the *erga omnes* nature of an obligation (...) indicates no clear superiority of that obligation over other obligations”.<sup>75</sup>

Generally, it has been observed that “no clear or consistent patterns of human rights-based hierarchy in international law can currently be adduced from the manner in which courts resolve norm conflicts in international law (...). This is due to the fact that courts or other judicial bodies prefer to avoid the need to resolve the conflict by means of a norm hierarchy”.<sup>76</sup>

This reluctance to solve norms conflicts on the ground of hierarchical considerations has similarly characterized international, regional and domestic courts’ attitude towards Article 103 of the United Nations Charter.<sup>77</sup> As previously illustrated, UN Member States may be increasingly caught in the potential conflicts between collective security measures (in the form of Security Council’s resolutions) and human rights norms (including those rules prohibiting any undue resort to classification or non-disclosure of certain information or evidence). In all these cases, Article 103 may come into play, together with more general considerations over its (hierarchical) relationship with human rights norms (and, in particular, *jus cogens* rules).<sup>78</sup> However, apart from the never-ending debate over the exact content and scope of application of the said provision<sup>79</sup> and the possible abuses it may lead,<sup>80</sup>

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<sup>75</sup> See again International Law Commission, Report of the Study Group, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, *supra* note 52, para. 380. On the distinction between *erga omnes* and *jus cogens* norms see instead, *inter alia*, P. PICONE, *La distinzione tra norme internazionali di jus cogens e norme che producono obblighi erga omnes*, in *Rivista di diritto internazionale*, vol. XCI, 2008, pp. 5-38.

<sup>76</sup> E. DE WET, J. VIDMAR, *Introduction*, in E. DE WET, J. VIDMAR (eds), *Hierarchy in International Law. The Place of Human Rights*, *supra* note 53, p. 309.

<sup>77</sup> On this provision see, *inter alia*, R. KOLB, *L’article 103 de la Charte des Nations Unies*, in *Recueil des cours*, Leiden, Boston, 2013, pp. 9-252.

<sup>78</sup> See again International Law Commission, Report of the Study Group, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, *supra* note 52, para. 324 ff.

<sup>79</sup> See, e.g., D. HAYIM, *L’article 103 de la Charte des Nations Unies: technique juridique ou instrument symbolique*, in *Revue belge de droit international*, vol. 44, 2011, pp. 125-169.

general practice has shown a clear attempt to circumvent Article 103 considerations by avoiding the conflict in the first instance (as also demonstrated by some examples *infra*).<sup>81</sup> Furthermore, it has been suggested that – even if relied on as a tool for solving norm conflicts – such a provision should anyhow be subjected to an ‘interpretative reading’ aimed at avoiding “stretching the relationship between general international law and human rights to a breaking point”.<sup>82</sup>

Hence, whilst norm conflict principles hardly provide any clear solution (as above demonstrated), current judicial developments further support the view that – regardless of the formalist toolbox one decides to adhere to (apparent or genuine collision of norms) – it is likely that, in practice, a conflict of the sort illustrated at the outset of the current section would be addressed by relying on interpretative means and, more specifically, on systemic interpretation.

Such a ‘solution’ would also remove *ex ante* any potential issue in terms of international responsibility for the breach of one of the colliding norms,<sup>83</sup> or –

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Some Authors even deny the hierarchical character of this provision. See again A. TZANAKOPOULOS, *Collective Security and Human Rights*, in E. DE WET, J. VIDMAR (eds), *Hierarchy in International Law. The Place of Human Rights*, *supra* note 53, p. 64.

<sup>80</sup> M. MILANOVIĆ, *Norm Conflict in International Law: Whiter Human Rights?*, *supra* note 53, p. 129.

<sup>81</sup> A. TZANAKOPOULOS, *Collective Security and Human Rights*, in E. DE WET, J. VIDMAR (eds), *Hierarchy in International Law. The Place of Human Rights*, *supra* note 53, p. 52 ff (reporting a few practical cases). See also, as one of the several examples, the European Court of Human Rights’ approach in *Al-Jedda*. The Court, after recalling Article 103 of the UN Charter, held that: “(...) there must be a presumption that the Security Council does not intend to impose any obligation on member States to breach fundamental principles of human rights. In the event of any ambiguity in the terms of a United Nations Security Council resolution, the Court must therefore choose the interpretation which is most in harmony with the requirements of the Convention and which avoids any conflict of obligations. In the light of the United Nations’ important role in promoting and encouraging respect for human rights, it is to be expected that clear and explicit language would be used were the Security Council to intend States to take particular measures which would conflict with their obligations under international human rights law”. See European Court of Human Rights [GC], *Al-Jedda v. United Kingdom*, App. No. 27021/08, judgment of 7 July 2011, para. 102.

<sup>82</sup> M. MILANOVIĆ, *Norm Conflict in International Law: Whiter Human Rights?*, *supra* note 53, p. 129.

<sup>83</sup> As noted by Sheinin and Vermeulen, in fact, where States parties to an intelligence cooperation agreement “fail to take human rights properly into account, or where a treaty leads to the infringements of human rights, whether or not such violations could be anticipated when the treaty was concluded, the parties concerned can be held responsible for such violations”. See M. SHEININ, M. VERMEULEN, *International Law. Human Rights Law and State*

to resort once again to doctrinal classifications – the possibility of an ‘unresolvable norm conflict’.<sup>84</sup>

The European Court of Human Rights has upheld the abovementioned approach with respect to the conflict potentially arising between the State’s duty to implement Security Council’s binding resolutions (based on *secret evidence*), on the one hand, and its human rights obligations, on the other hand. In the already analysed *Nada* case, for instance, the Court has relied on the principle of ‘systemic integration’ to conclude that the respondent State had failed in harmonize, as far as possible, obligations that it regarded as divergent.<sup>85</sup> Whilst it is certainly true that, as stressed earlier, in other cases the Court has relied on a different criterion of solution (*i.e.*, the equivalent protection principle),<sup>86</sup> both these mechanisms have in common the Court’s attempt to avoid the norm conflict, rather than to solve it recurring either to general criteria of conflict solution or to hierarchical considerations.

In doctrine, the very reliance on the notion of ‘conflict’ with respect to the dialectic relationship between security and human rights norms (to which – as extensively demonstrated in the previous Chapters – the issue of secrecy may be ascribed) has been increasingly criticized.<sup>87</sup> In this respect, the explicit reference included in UN Security Council’s resolution 2178 (2014)<sup>88</sup> to the obligation to protect human rights has even been welcomed as a possible means to avoid once and for all any attempts to resort to hierarchical elements as a means of conflict solution.<sup>89</sup> Regardless of whether one agrees or not with

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*Responsibility*, in H. BORN, I. LEIGH, A. WILLS (eds), *International Intelligence Cooperation and Accountability*, *supra* Chapter 1, note 251, p. 255.

<sup>84</sup> M. MILANOVIĆ, *Extraterritorial Application of Human Rights Treaties. Law, Principles, and Policy*, *supra* note 47, p. 242.

<sup>85</sup> European Court of Human Rights [GC], *Nada v. Switzerland*, *supra* Chapter 1, note 280, p. 197.

<sup>86</sup> European Court of Human Rights, European Court of Human Rights, *Al-Dulimi and Montana Management Inc. v. Switzerland*, *supra* Introduction, note 38, paras. 134-135.

<sup>87</sup> See, e.g., M. FEINBERG, *International Counter-terrorism, National Security and Human Rights: Conflict of Norms or Check and Balance?*, *supra* Chapter 1, note 289, pp. 388-407.

<sup>88</sup> UN Doc. RES/2178 (2014) of 24 September 2014, Preamble and para. 11.

<sup>89</sup> M. FEINBERG, *International Counter-terrorism, National Security and Human Rights: Conflict of Norms or Check and Balance?*, *supra* Chapter 1, note 289, p. 400.

such academic stance, the inclusion of human rights obligations in the context of counter-terrorism legal instruments seems indeed to further reinforce the view that the (apparent) conflict between security and human rights norms can be overcome by means of a systemic reading of the two sets of rules.

### **3.2.3. The issue of potentially conflicting international obligations: From theory to (States and international organizations') practice**

Arguably, the above consideration does not exclude that 'hierarchy' may nonetheless play a key role in the solution of norms conflicts within domestic legal systems (issues of international responsibility apart). Under a dualist approach, the potential conflict between colliding international norms may indeed be reshaped and solved based on domestic hierarchical criteria. In this respect, the (still likely) prevalence of human rights rules would however be grounded on domestic law (including those pertaining to the incorporation of international law), rather than on international law directly. Depending on a case-by-case analysis, it may even occur that the above-delineated conflicts might translate into a balancing exercise between colliding constitutional values to be likely solved on the ground of 'harmonious interpretation' (as already noted, at the national level, the protection of national security and the consequent secrecy of certain information are indeed often entrusted of constitutional value).<sup>90</sup>

As it has been illustrated, however, the analysis of State practice shows that domestic judicial authorities have at times proved reluctant to give proper weight to international law norms and have even avoided any 'harmonious interpretation' of potentially conflicting constitutional provisions. For instance, with respect to the *Abu Omar* case (which, although indirectly, touched upon the potential conflict between the obligation to confidentiality owed to third States and human rights norms), the Italian Constitutional Court

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<sup>90</sup> See *supra* Chapter 1, at 3.1.4.

has ended up entrusting the protection of national security with a prevailing character over human rights considerations.<sup>91</sup> This despite the fact that the constitutional character of the protection of national security appears at least debatable in the light of the mere text of the Italian Constitution. Unlike the protection of fundamental human rights, which is expressly upheld as a supreme value under Article 2 of the Italian Constitution and the right to access to justice, embodied in Article 24 of the same instrument,<sup>92</sup> norms on State secrecy are indeed contained in ordinary laws, as such ‘situated’ at a lower rank compared both to the above-recalled Articles 2 and 24 of the Constitution and to international human rights norms incorporated in the Italian legal system (first and foremost, the European Convention on Human Rights, as interpreted by the European Court of Human Rights).<sup>93</sup>

Needless to say, the postulation of the customary character of the right to the truth or of a more general norm prohibiting the resort to secrecy at least in cases related to serious human rights violations (whether consolidated) would strengthen further – by means of the automatic transposition mechanism provided for in Article 10 of the Italian Constitution – the argument of the

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<sup>91</sup> Italian Constitutional Court, decision of 13 February 2014, *supra* Chapter 1, note 173.

<sup>92</sup> Interestingly, in its subsequent decision No. 238/2014 of 22 October 2014, the same Court has instead given great weight to Articles 2 and 24 of the Italian Constitution. With respect to the letter provision it even stated that the right to judicial protection is among the great principles of legal civilization in every democratic system of our time. An English summary of this decision is available at: <http://www.qil-qdi.org> (last accessed on 24 February 2016). For a comment see, among others, P. DE SENA, *The Judgment of the Italian Constitutional Court on State Immunity in Cases of Serious Violations of Human Rights or Humanitarian Law: A Tentative Analysis under International Law*, in *QIL*, 2014 (online); P. FARAGUNA, *La sentenza n. 238/2014: i controlimiti in azione*, in *Quaderni costituzionali*, 2014, pp. 899-901; R. KOLB, *The Relationship Between the International and the Municipal Legal Order: Reflections on Decision No. 238/2014 of the Italian Constitutional Court*, in *QIL*, 2014 (online); P. PALCHETTI, *Judgment 238/2014 of the Italian Constitutional Court – In search of a Way Out*, in *QIL*, 2014 (online); A. TANZI, *Un difficile dialogo tra Corte Internazionale di Giustizia e Corte Costituzionale*, in *La Comunità Internazionale*, vol. LXX, 2015, pp. 13-36.

<sup>93</sup> On the topic see, *inter alia*, U. VILLANI, *Sul valore della Convenzione europea dei diritti dell'uomo nell'ordinamento italiano*, in AA.VV., *Studi in onore di Umberto Leanza*, vol. II, Napoli, 2008, pp. 1425-1444; P. CARETTI, *Le norme della Convenzione europea dei diritti umani come norme interposte nel giudizio di legittimità costituzionale delle leggi: problemi aperti e prospettive*, in *Diritti umani e diritto internazionale*, vol. 2, 2008, pp. 311-320; L. CONDORELLI, *La Corte costituzionale e l'adattamento dell'ordinamento italiano alla CEDU o*

prevalence of human rights norms over national security concerns.

The potential reach of the ‘internal approach’ is not limited to domestic legal systems, but might well apply also to the EU legal order. As already stressed in Chapter 1, in the *Kadi I* case, for instance, the Grand Chamber of the European Court of Justice eventually upheld the prevalence of human rights norms (and, more specifically, of the right to a fair trial) over obligations arising under UN Security Council’s Chapter VII resolutions. In doing so, the Court relied on a sort of ‘dualistic approach’ model pursuant to which, given the independence of the EU legal system, UN Security Council’s resolutions could not penetrate it and prevail over EU human rights guarantees on the ground of the application of Article 103 of the United Nations Charter.<sup>94</sup>

This reasoning has been reiterated by the Grand Chamber in its judgment in *Kadi II*, where it eventually found that the measures undertaken against the suspected terrorist as a consequence of its UN listing had violated EU human rights standards to the extent in which no fair balance had been struck between the right to disclosure of evidence and the possible public interest militating in favour of secrecy.<sup>95</sup>

The approach followed by the European Court of Justice has thus avoided, rather than solved, the possible conflict between different international obligations. As a result, whilst it had certainly shed light on the EU ‘internal reading’ of the norm conflict at stake, it failed in providing indications of a more general reach. In this respect, the European Court of Justice’s rulings (and their underpinning ‘dualistic approach’) may be seen as further evidence of the already-mentioned judicial trend towards circumventing possible norm conflicts (relying, in the specific case, on what has generally been called

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*a qualsiasi altro obbligo internazionale?*, in *Diritti umani e diritto internazionale*, vol. 2, 2008, pp. 301-310.

<sup>94</sup> *Yassin Abdullah Kadi and Al Barakaat Foundation v. Council of the European Union and Commission of the European Communities*, *supra* Introduction, note 37, para. 326.

<sup>95</sup> See again *European Commission and United Kingdom v. Yassin Abdullah Kadi*, *supra* Introduction, note 37, para. 176.



‘creative avoidance’)<sup>96</sup>.

Finally, as previously observed, with respect to EU Member States, the issue may also arise of a possible ‘conflict’ between international human rights norms requiring disclosure, on the one hand, and EU rules imposing classification, on the other hand (at least with respect to information generated in other EU Member States or directly by EU institutions).

As illustrated in Chapter 1, non-disclosure obligations may be included either in *ad hoc* treaties concluded among EU Member States or in EU secondary legislation (in the form of decisions).<sup>97</sup>

As far as the first hypothesis is concerned, the (apparent) conflict possibly arising between human rights norms and treaty commitments imposing classification would clearly amount to a further case of ‘norm conflict’ between international obligations (to which the above-developed considerations would apply).

With regard to the second scenario, instead, the fact that general principles of EU law (including ‘fundamental rights’)<sup>98</sup> and the EU Charter of Fundamental Human Rights – amounting to primary law – act both as a means to assess the validity of secondary rules and as an interpretative guideline for EU (secondary) legislation suggests that potential conflicts between human rights rules and a EU decision could *de facto* be ‘avoided’: any norm imposing classification should indeed be necessarily interpreted in the light of human rights rules. The Court of Justice of the European Union has indeed expressly

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<sup>96</sup> M. MILANOVIĆ, *Extraterritorial Application of Human Rights Treaties. Law, Principles, and Policy*, *supra* note 47, p. 241.

<sup>97</sup> Hypothetically, a norm conflict could further arise with respect to the international agreements concluded by the EU (imposing classification of certain information). The EU is indeed bound to respect international customary human rights norms, as well as those norms contained in human rights treaty to which the EU is party. Furthermore, under Article 351 of the Treaty on the Functioning of the European Union, as interpreted by the Court of Justice of the European Union, the EU should refrain from interfering with pre-existing treaty obligations of Member States.

<sup>98</sup> Article 6(3) of the Treaty on European Union states: “Fundamental rights, *as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms* and as they result from the constitutional common to the Members States, shall constitute general principle of the Union’s law” (emphasis added).

held that EU secondary legislation needs to be interpreted in a way that does not conflict with the fundamental rights protected under EU primary law.<sup>99</sup>

Hence, secondary legislation imposing classification or resort to the evidentiary privileges (even if limited to information generated in the EU or in other Member States) would necessarily be ‘read’ in light of those norms embodied in the EU Charter of Fundamental Rights and the European Convention on Human Rights that, as previously stressed, require States not to unduly restrict disclosure of certain information or evidence. In this respect, it is worth recalling also the European Parliament’s findings, pursuant to which, in light of EU law, “only genuine grounds of national security can justify secrecy; (...) in no circumstance does state secrecy take priority over inalienable fundamental rights and (...) therefore arguments based on state secrecy can never be employed to limit states’ legal obligations to investigate serious human rights violations (...)”.<sup>100</sup> Interestingly, especially in relation to the specific hypothesis at stake, the European Parliament also stressed that State authorities should not invoke intelligence cooperation has a means to block accountability and redress.<sup>101</sup>

Yet, the lack of discretion that EU decisions leave to Member States may paradoxically obstacle in practice an effective human rights-based ‘reading’ of EU secondary legislation, with the consequence that Member States would eventually breach their human rights commitments under other treaty regimes. At least as far as responsibility under the European Convention on Human Rights is concerned, however, it is likely that the already recalled ‘equivalent

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<sup>99</sup> See, e.g., case C-101/01, *Lindqvist*, judgment of 6 November 2003, para. 87.

<sup>100</sup> European Parliament, *Resolution on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the TDIP Committee Report*, adopted on 11 September 2012, doc. No. 2012/2033(INI), para. 3.

<sup>101</sup> *Ibid.*, para. 28. The European Parliament has expressed its concerns over EU Member States’ resort to secrecy in a way to grant *de facto* impunity to perpetrators of serious human rights violations. See, e.g., European Parliament, *Resolution of 11 February 2015 on the US Senate Report on the use of torture by the CIA*, adopted on 11 February 2015, doc. No. 2014/2997(RSP), para. 7.

protection doctrine' would apply.<sup>102</sup> Hence, actions taken by EU Member States to implement EU secondary legislation would be presumed compatible with the Convention if the protection specifically afforded to human rights within the EU (taking into account the competence of the European Court of Justice in reviewing EU secondary legislation) would be deemed at least equivalent to that provided for by the Convention itself and no manifest deficiency would exist in the specific case.<sup>103</sup>

### **3.3. Protection of whistle-blowers as a key element in fostering disclosure and accountability**

Another interesting aspect directly related to the resort to secrecy under the current human rights regime is represented by the protection of whistle-blowers, *i.e.*, those persons bringing into the public domain information that would otherwise be largely unknown and that they believe, at the time of disclosure, “to be true and to constitute a threat or harm to a specified public interest, such as a violation of national or international law (...)”.<sup>104</sup>

As previously stressed, oversight mechanisms and access to information guarantees, even when in place, may often be ineffective. The very secretive nature of classified information and the possible deferent attitude among different State powers can indeed prevent the proper functioning of any normative mechanism compelling disclosure or demanding reviewing authority. As noted by the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression

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<sup>102</sup> The leading case in this respect is represented is the so-called *Bosphorus* case. See European Court of Human Rights [GC], *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Şirketi v. Ireland*, App. No. 45036/98, judgment of 30 June 2015.

<sup>103</sup> For an overview see, *inter alia*, J. KLABBERS, *On the Primacy of the European Convention on Human Rights over Other International Treaties*, in *Finnish Yearbook of International Law*, vol. 22, 2011, p. 182 ff.

<sup>104</sup> Report of the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, UN Doc. A/70/361, *supra* Chapter 2, note 288, para. 28.

in its 2015 Report, in fact, “as a general rule, secrets do not out themselves”.<sup>105</sup> In this regard, the protection of whistle-blowers, at least if public servants, may be seen as an important enhancing factor in limiting abusive reliance on State secrecy. To put it in other words, practically speaking, the absence of provisions protecting whistle-blowers against retaliation for disclosing public interest information (thus, including information related to serious human rights violations) could undermine the effective implementation of the right to the truth and, more generally, the right to have access to information related to human rights violations.

As highlighted in the Introduction, recent developments – such as the *WikiLeaks* and *Snowden* cases – have brought into the spotlight the key role that whistle-blowers might play in revealing governments’ misconducts and favouring accountability, especially in cases involving human rights abuses.<sup>106</sup> Apart from these massive leakages, whistle-blowers have also had an essential role in revealing tortures and inhuman treatments perpetrated against the detainees of the Abu Ghraib prison in Iraq and in Guantanamo,<sup>107</sup> as well as targeted killings carried out by the Israeli government against Palestinian militants.<sup>108</sup> Wrongdoings committed by international organizations have also

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<sup>105</sup> *Ibid.*, para. 1.

<sup>106</sup> For an overview see, *inter alia*, B. MARTIN, *Strategy for Public Interest Leaking*, in M. KUMAR, G. MARTIN, R. SCOTT BRAY (eds), *Secrecy, Law and Society*, Chapter 1, note 481, pp. 219-233. The proactive role that the protection of informants might have in terms of prevention of serious human rights violations has been strongly advocated in doctrine. See, for instance, E.T. JENSEN, *Incentivizing and Protecting Informants Prior to Mass Atrocities such as Genocide: An Alternative to Post Hoc Courts and Tribunals*, in *Houston Journal of International Law*, vol. 29, 2006, p. 136 ff. The ‘normative impact’ of these events is well represented by the recent adoption by the European Parliament of *Resolution on the follow-up to the European Parliament Resolution of 12 March 2014 on the electronic mass surveillance*, adopted on 29 October 2015, No. 2015/2635 (RSP), para. 2 (where the Parliament requires Member States to grant protection to Edward Snowden as whistle-blower and human rights defender).

<sup>107</sup> This case is examined in detail in R. FULLER, *A Matter of National Security: Whistleblowing in the Military as a Mechanism for International Law Enforcement*, in *San Diego International Law Journal*, vol. 15, 2014, pp. 249-298.

<sup>108</sup> *Ibid.* The indictment of Anat Kamm, a former soldier and journalist sentenced to prison for leaking State secrets (District Court of Tel Aviv, Serious Crimes case No. 17959-01-10, *The State of Israel v. Arat Kamm*, 7 April 2010), is available (in English) at: [www.reider.wordpress.com](http://www.reider.wordpress.com) (last accessed on 24 February 2016).

been brought to the public attention through whistle-blowing.<sup>109</sup>

Currently, however, only about sixty countries have enacted specific legislation protecting whistle-blowers from retaliations or sanctions.<sup>110</sup> Similarly, only few international organizations have so far adopted *ad hoc* policies or internal regulations.<sup>111</sup> On top of the above, both domestic laws and international organizations' regulations vary greatly among them as to their content and scope of application.<sup>112</sup>

### **3.3.1. Protection of whistle-blowers in international binding and non-binding instruments**

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<sup>109</sup> See, for instance, the whistle-blowing report related to the alleged sexual abuses of children by UN peacekeeping troops in the Central African Republic. The whistle-blower was suspended by the Office of the High Commissioner for Human Rights and put under investigation for leaking confidential information. On 5 May 2015, the UN Dispute Tribunal lifted the administrative leave. See United Nations Dispute Tribunal, *Kompass v. Secretary General of the United Nations*, order on an application for suspension of action, case No. UNDT/GCA/2015/126, order No. 99 (GVA/2015).

<sup>110</sup> *Ibid.*, para. 27. For an overview of whistle-blower laws see, e.g., P. LATIMER, A.J. BROWN, *Whistleblower Laws: International Best Practice*, in *University of New South Wales Law Journal*, vol. 31, 2008, pp. 766-794; R. G. VAUGHN, *The Successes and Failures of Whistleblower Laws*, Cheltenham, 2012; B. FASTERLING, *Whistleblower Protection: A Comparative Law Perspective*, in A.J. BROWN, D. LEWIS, R.E. MOBERLY, W. VANDEKERCKHOVE (eds), *International Handbook on Whistleblowing Research*, Cheltenham, 2014, pp. 331-349. With specific reference to whistle-blower legislation in the United States see, *inter alia*, D.E. POZEN, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosure*, in *Harvard Law Review*, vol. 127, 2013-2014, pp. 512-635. For a comparative study between French and United States legislation see also J.P. FOEGLE, *Les lanceurs d'alerte. Etude comparée France-Etats-Unis*, in *La revue des droits de l'homme*, vol. 6, 2014, pp. 1-167.

<sup>111</sup> Report of the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, UN Doc. A/70/361, *supra* Chapter 2, note 288, para. 51 ff. For an overview see, e.g., S. WALDEN, B. EDWARDS, *Whistleblower Protection in International Governmental Organizations*, in A.J. BROWN, D. LEWIS, R.E. MOBERLY, W. VANDEKERCKHOVE (eds), *International Handbook on Whistleblowing Research*, *supra* note 110, pp. 431-456. Concerning specifically the EU, see more specifically S. WHITE, *Le "Whistleblower" dans les institutions de l'Union européenne: l'oiseau est-il apprivoisé?*, in *Revue du marché commun*, 2010, pp. 441-445.

<sup>112</sup> Just to make an example, in some countries (such as Bosnia and Herzegovina), whistle-blowing protection concerns only disclosure of information related to alleged cases of corruption. For a more general overview see the replies of States to the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression on the questionnaire concerning the protection of sources and whistle-blowers available at: <http://www.ohchr.org> (last accessed on 24 February 2016).

From an international law viewpoint, treaty-based provisions expressly binding States parties to ensure protection to whistle-blowers constitute an exception. The already recalled United Nations Convention against Corruption is indeed the only universal instrument that, so far, explicitly requires States parties to incorporate in their domestic legal systems “appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with the Convention”.<sup>113</sup> At the regional level, a similar provision is contained in the African Union Convention on Preventing and Combating Corruption.<sup>114</sup>

In lack of any further express recognition under treaty law, a duty to protect whistle-blowers, at least under certain circumstances, can however be inferred from non-binding instruments.

Just to make an example, the so-called Declaration on Human Rights Defenders provides that: “everyone is entitled (...) to be protected effectively under national law in reacting against or opposing, through peaceful means, activities and acts, including those by omission, attributable to States that result in violations of human rights and fundamental freedoms”.<sup>115</sup> Arguably,

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<sup>113</sup> Article 33. See, *inter alia*, K. SOLTES, *Facilitating Appropriate Whistleblowing: Examining Various Approaches to what Constitute “Fact” to Trigger Protection under Article 33 of the United Nations Convention against Corruption*, in *American University International Law Review*, vol. 27, 2012, pp. 925-954. It is also noteworthy that the Organization of American States have adopted on 31 March 2013 a Draft Model Law to facilitate and encourage the reporting of acts of corruption and to protect whistle-blowers and witnesses. The text of the Draft Model Law is available at: <http://www.oas.org> (last accessed on 24 February 2016). On this last topic (and, in particular, the process leading eventually to the adoption of the said Draft Model Law) see, *inter alia*, R.G. VAUGHN, T. DEVINE, K. HENDERSON, *The Whistleblower Statute Prepared for the Organization of American States and the Global Legal Revolution Protecting Whistleblowers*, in *George Washington International Law Review*, vol. 35, 2003, pp. 857-902.

<sup>114</sup> Article 5.5. Concerning the protection of whistle-blowers in the context of the fight against corruption in the EU see, *inter alia*, F. SPIEZIA, *How to Improve Cooperation between Member States and European Union Institutions so as to Better Ensure the Protection of Whistle-blowers*, in *ERA Forum*, vol. 12, 2011, pp. 387-407.

<sup>115</sup> Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, adopted by the United Nations General Assembly on 9 December 1998, UN Doc. A/RES/53/144 of 8 March 1999, Annex, Article 12(3).

this provision may be interpreted in the sense that whistle-blowers revealing human rights abuses have a right to be protected from retaliation. This conclusion seems to be confirmed, *inter alia*, by the recent report issued by the United Nations Special Rapporteur on the Situation of Human Rights Defenders, pursuant to which whistle-blowers who disclose information concerning human rights abuses should be considered as “human rights defenders”.<sup>116</sup>

Along the same line, the 2014 OSCE Guidelines on the Protection of Human Rights Defenders expressly require States to ensure protection to whistle-blowers acting in the public interest to uncover human rights violations.<sup>117</sup>

The States’ duty to protect whistle-blowers has been upheld at large also at the regional level.

The Council of Europe, for instance, has repeatedly required Member States to enact appropriate measures to protect whistle-blowers.<sup>118</sup> In its Resolution No. 1729 (2010), for example, the Parliamentary Assembly of the Council of Europe has encouraged Member States to enact or review their legislation so as to protect *bona fide* warnings against various types of unlawful acts, including all serious violations of human rights which affect or threaten the life, health, liberty and any other legitimate interests of individuals.<sup>119</sup>

The Parliamentary Assembly of the Council of Europe has also asserted the prominence of internal whistle-blowing mechanisms, whilst admitting external

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<sup>116</sup> UN Doc. A/HRC/28/63 of 29 December 2014, para. 74. On the specific topic of the protection of human rights defenders under international human rights see, *inter alia*, K. BENNETT, D. INGLETON, A.M. NAH, J. SAVAGE, *Critical Perspectives on the Security and Protection of Human Rights Defenders*, in *The International Journal of Human Rights*, vol. 19, 2015, pp. 883-895.

<sup>117</sup> OSCE Office for Democratic Institutions and Human Rights, *Guidelines on the Protection of Human Rights Defenders*, Warsaw, 2014, para. 48.

<sup>118</sup> For an overview see again D. KAGIAROS, ‘Protecting ‘National Security’ Whistleblowers in the Council of Europe: An Evaluation of Three Approaches on How to Balance National Security with Freedom of Expression, *supra* Introduction, note 71, pp. 408-428.

disclosure as a last resort.<sup>120</sup>

Furthermore, in the already-mentioned Resolution No. 1954 (2013), the Parliamentary Assembly partly reiterated its previous findings by stating that “a person who discloses wrongdoings in the public interest (whistle-blower) should be protected from any type of retaliation, provided he or she acted in good faith and followed applicable procedures”.<sup>121</sup> The Assembly even upheld the existence of a specific *individual right to disclose public interest information* as a counterpart of the right of the public to be informed pursuant to Article 10 of the European Convention on Human Rights.<sup>122</sup>

The Committee of Ministers of the Council of Europe has similarly upheld that Member States should enact comprehensive whistle-blowing legislation encouraging disclosure of public interest information, including – at least – human rights abuses.<sup>123</sup>

### **3.3.2. Protection of whistle-blowers in the case law of human rights monitoring bodies and statements of special procedures mandate-holders**

Under international human rights law, whistle-blowers’ protection has been generally inferred from the right to freedom of expression and to impart and receive information embodied in the main human rights treaties.<sup>124</sup>

The European Court of Human Rights, for instance, has found that “a consensus appears to exist among the Member States of the Council of Europe on the need for appropriate criminal sanctions to prevent disclosure of certain

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<sup>119</sup> Parliamentary Assembly of the Council of Europe, Resolution No. 1729 (2010), *supra* Chapter 3, note 336, para. 6.1.1.

<sup>120</sup> *Ibid.*, para. 6.2.3.

<sup>121</sup> Parliamentary Assembly of the Council of Europe, Resolution No. 1954 (2013), *supra* Chapter 1, note 88, para. 9.7. See also Resolution No. 1838 (2011), *supra* Introduction, note 27, para. 8.

<sup>122</sup> Parliamentary Assembly of the Council of Europe, Resolution No. 1877 (2012) on *The protection of freedom of expression and information on the internet and online media*, adopted by 25 April 2012, para. 4.

<sup>123</sup> Committee of Ministers of the Council of Europe, Recommendation CM/Rec(2014)/7, *supra* Chapter 2, note 336, para. I.2.



confidential items of information”.<sup>125</sup> That notwithstanding, beginning with the Grand Chamber’s judgment in the *Guja v. Moldova* case, the Court has found that, regardless of the strong duty of discretion owed by public employees, “(...) the signalling by a civil servant or an employee in the public sector of illegal conduct or wrongdoing in the workplace should, in certain circumstances, enjoy protection”.<sup>126</sup> More specifically, according to the Court, “the interest that the public may have in particular information may sometimes be so strong to override even a legally imposed duty on confidence”.<sup>127</sup>

The Court further emphasized that, whereas disclosure should be made in the first place to the superior or to the internal competent body or authority, when such path is not viable or clearly impracticable, as a last resort, the information could be disclosed directly to the public.<sup>128</sup>

The Court also enucleated a catalogue of elements to be taken into account in ascertaining the proportionality of the interference with the right to freedom of expression: the public interest in the disclosure of information; the authenticity of the information disclosed; the damage potentially caused by the disclosure; the reasons motivating the whistle-blower; the nature of the penalty imposed as a consequence of the breach of the duty of confidentiality; the availability of alternative means for remedying to the wrongdoing.<sup>129</sup>

The Court has confirmed the abovementioned approach in subsequent

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<sup>124</sup> See *supra* Chapter 2.

<sup>125</sup> European Court of Human Rights [GC], *Stoll v. Switzerland*, App. No. 69698/01, judgment of 10 December 2007, para. 155 (the case concerned the sanction that domestic courts had ordered against the applicant for having published secret official documents related to the negotiations between the World Jewish Congress and Swiss banks about compensation for Holocaust victims; as the applicant was not responsible for the leak, this case cannot be regarded as one dealing specifically with whistle-blowers’ protection).

<sup>126</sup> European Court of Human Rights [GC], *Guja v. Moldova*, *supra* Chapter 2, note 216, para. 72. On this case and, more generally, on the case law of the European Court of Human Rights see, *inter alia*, A. AUSTIN, *Whistleblowers: The New Watchdogs?*, in J. CASADEVALL, E. MYJER, M. O’BOYLE, A. AUSTIN (eds), *Freedom of Expression. Essays in Honour of Nicolas Bratza*, Oisterwijk, 2012, pp. 421-433.

<sup>127</sup> *Ibid.*, para. 74.

<sup>128</sup> *Ibid.*, para. 73.

<sup>129</sup> *Ibid.*, para. 74 ff.

rulings concerning both private employees<sup>130</sup> and public servants.<sup>131</sup> Just to mention an example, in its judgment in the *Bucur and Toma v. Romania* case, the Court repeated that, in certain instances, the public interest in the disclosure of information (in the case at stake, wrongdoings committed by the Romanian Intelligence Services) overrides the general interest in maintaining confidence in the institutions.<sup>132</sup> Furthermore, like in the *Guja* judgment, the Court upheld the same ‘balancing test’ to establish whether, in a specific case, restrictions to the right to freedom of expression should be deemed lawful under Article 10 of the European Convention on Human Rights.<sup>133</sup>

In the *Bacur* case, the Court further reiterated that doubts over the effectiveness of internal complaint mechanisms would suffice *per se* to legitimize the public disclosure of information.<sup>134</sup>

Concerning this last aspect, it is noteworthy that the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression recently stressed that:

“(...) the public may have an exceptionally strong right to know about some kind of information or allegations, such that they override even potentially effective or oversight processes. For example, *public disclosure of serious violations of international human rights law, international humanitarian law or other fundamental rights in a State’s constitutional or statutory framework should be encouraged regardless of the effectiveness of internal mechanisms (...)*”<sup>135</sup>

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<sup>130</sup> See, e.g., European Court of Human Rights, *Heinisch v. Germany*, App. No. 28274/08, judgment of 21 July 2011, para. 62 ff.

<sup>131</sup> See also, *inter alia*, European Court of Human Rights, *Matúz v. Hungary*, App. No. 73571/10, judgment of 21 October 2014 (concerning the public disclosure of information related to censorship in the State television), para. 47 ff.

<sup>132</sup> See European Court of Human Rights, *Bucur and Toma v. Romania*, *supra* Chapter 3, note 56, para. 101 ff.

<sup>133</sup> *Ibid.*, para. 94 ff.

<sup>134</sup> *Ibid.*, para. 95 ff.

<sup>135</sup> Emphasis added. Report of the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, UN Doc. A/70/361, *supra*

In this respect, the United Nations Special Rapporteur has built upon the case law of the European Court of Human Rights and further clarified that – when whistle-blowing activity concerns serious violations of human rights – public disclosure should be protected regardless of the practicability of internal oversight mechanisms.

The fact that whistle-blowers should be protected for releasing public interest information concerning, *inter alia*, a breach of human rights or humanitarian law and should therefore not be subjected to any legal, administrative or employment sanction if they acted in good faith has been upheld also in the 2004 Joint Declaration on International Mechanisms for Promoting Freedom of Expression, issued by the UN Special Rapporteur on the Promotion and Protection of the Right of Opinion and Expression, the OSCE Representative on Freedom of the Media and the OAS Special Rapporteur for Freedom of Expression.<sup>136</sup>

It is noteworthy however that, while NGOs have advocated special protection by means of ‘including’ whistle-blowers among vulnerable groups,<sup>137</sup> no explicit finding in this respect has so far been upheld by human rights bodies. Furthermore, it is questionable whether subsuming whistle-blowers under the abovementioned ‘category’ – which has been mainly

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Chapter 2, note 288, para. 38. See also Joint Statement on WikiLeaks by the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression and by the Inter-American Commission on Human Rights Special Rapporteur for Freedom of Expression (available at: [www.oas.org](http://www.oas.org); last accessed on 24 February 2016), para. 3 (“... government whistle-blowers releasing information ... on a breach of human rights or humanitarian law should be protected against legal, administrative, employment-related sanctions in they acted in good faith”).

<sup>136</sup> The text of the Joint Declaration (issued on 6 December 2004) is available at: <http://www.oas.org> (last accessed on 24 February 2016).

<sup>137</sup> See, for instance, Center for Constitutional Rights, Written Submission to the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, 22 June 2015, p. 4 ff. On the concept of ‘vulnerable groups’ under international human rights law see, *inter alia*, L. PERONI, A. TIMMER, *Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law*, in *International Journal of Constitutional Law*, vol. 11, 2013, pp. 1056-1085; F. IPPOLITO, S. IGLESIAS SÁNCHEZ (eds), *Protecting Vulnerable Groups: The European Human Rights Framework*, Oxford and Portland, 2015.

developed to foster substantive equality – would indeed reach the scope of enhancing protection against disclosure of public interest information.

Arguably, the aforementioned statements by special procedures mandate-holders allow to conclude that, even in lack of a well-established case law on the specific subject matter by human rights treaty monitoring bodies (with the sole exception of the European Court of Human Rights), there seems to be an increasing consensus in the sense that the right to freedom of expression protected under the main human rights treaties sets a minimum threshold of protection for those disclosing public interest information (thus including those information concerning alleged violations of human rights or humanitarian law).

In addition to statements by human rights special procedures mandate-holders, such consensus also emerges from States' declarations. The United States, for instance, have expressly asserted that the adoption of a national framework for whistle-blowers' protection admitting restrictions only for compelling governmental interests abides by the State's obligation to ensure the right to freedom of expression under Article 19 of the International Covenant on Civil and Political Rights.<sup>138</sup>

### **3.3.3. Protection of 'national security whistle-blowers'**

The most troubling aspect concerning whistle-blowers protection (but also the most relevant in the context of the present work) is its effective implementation with respect to the national security and intelligence

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<sup>138</sup> See Permanent Mission of the United States of America to the United Nations and Other International Organizations in Geneva, reply to the questionnaire regarding the protection of sources and whistle-blowers of the UN Special Rapporteur on the Promotion and Protection of the Freedom of Opinion and Expression, 29 July 2015, p. 2.

sectors.<sup>139</sup> In many countries where provisions related to the protection of whistle-blowers are in place, specific exemptions clauses are indeed provided for with respect to ‘national security whistle-blowers’.<sup>140</sup> As a matter of example, it has been noted that in the United States “(...) several laws protect executive branch employees who disclose information regarding alleged abuses to designated agencies or congressional committees under specified procedures (...) [b]ut these laws offer significantly less succour when it comes to classified information”.<sup>141</sup>

Additionally, domestic secrecy laws generally criminalize whistle-blowing with respect to official secrets whose disclosure could undermine national security.<sup>142</sup> As it has been correctly observed, in this respect, “secrecy based on national security can prevent the adoption of whistle-blower laws and limit the scope of those enacted”.<sup>143</sup> Only in few cases, national legislation provides for a public interest defence in cases concerning the disclosure of State secrets.<sup>144</sup> Interestingly, in those few countries where similar provisions are in place, no specific mention is made to the inherent public interest dimension of breaches of human rights or humanitarian law (or international law more

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<sup>139</sup> On this specific topic see again, *inter alia*, R. FULLER, *A Matter of National Security: Whistleblowing in the Military as a Mechanism for International Law Enforcement*, *supra* note 107, pp. 249-298.

<sup>140</sup> See, for instance, the UK Public Interest Disclosure Act (1998), ch. 23, section 11(3).

<sup>141</sup> See again D.E. POZEN, *The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosure*, *supra* note 110, p. 527. On national security whistle-blowers in the United States see also, among others, P.M. RAHILL, *Top Secret – The Defence of National Security Whistle-blowers: Introducing a Multi-Factor Balancing Test*, in *Cleveland State Law Review*, vol. 63, 2014-2015, pp. 237-267.

<sup>142</sup> See again H. NASU, *State Secrets Laws and National Security*, *supra* Introduction, note 73, p. 384 ff. The Author, in particular, identifies four categories of domestic legislation as regards the criminalization of disclosure of State secrets: States that blankly criminalize disclosure irrespective of the underpinning purpose and the function of the person revealing information; States that sanction only the unauthorized disclosure of information by public employees; States which have included in their legislation a sort of harm test (such as that penalties are established based on the harm caused by disclosure); States whose legislation is characterized by a public interest defence test.

<sup>143</sup> See R. G. VAUGHN, *The Successes and Failures of Whistle-Blower Laws*, *supra* note 110, p. 212.

<sup>144</sup> See, for instance, Thailand Official Information Act of 1997, section 20 and Danish Criminal Code (as last amended in 2008), section 152(e)(2), according to which the

generally). That notwithstanding, the use of expressions such as ‘illegal conduct’ or ‘wrongdoing’<sup>145</sup> could be read – at least in monist legal systems – in the sense that the ‘public interest defence’ would apply also to the disclosure of information concerning serious violations of human rights.

Arguably, a further thorny issue may still arise insofar as the very existence of an alleged violation of international law, revealed through disclosure of classified documents, is disputed. Just to make an example, journalists and academic sources have reported that the Tel Aviv District Court expressly excluded that whistle-blower protection may apply when the person revealing an alleged violation of international law (in the case at stake, the leak involved targeted killings carried out against Palestinian militants) does not possess enough knowledge to establish *ex ante* whether the conduct constituted indeed a breach of international rules.<sup>146</sup> Whereas the said approach undoubtedly stresses a possible legal hurdle, it does not seem convincing. Making the effective knowledge of the person revealing the information a condition for whistle-blower protection would frustrate in practice the very scope of public interest disclosure, hindering – rather than fostering – future revelations.

In addition to the above, it is also noteworthy that, regardless of the inclusion of a public interest defence test, domestic State secrecy laws tend to entrust State authorities with a wide discretion with respect to the prosecution of offences related to the disclosure of official secrets.<sup>147</sup> Accordingly, it has been observed that: “political intervention into prosecutorial decisions on the initiation and extent of criminal prosecutions has not been an uncommon experience, even in liberal democracies (...)”.<sup>148</sup>

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publication of State secrets is not criminalized when a person is acting in the legitimate exercise of a public interest.

<sup>145</sup> See, for instance, the Australian Public Interest Disclosure Act No. 133 of 2013, section 25.

<sup>146</sup> The content of the judgment is reported, *inter alia*, in R. FULLER, *A Matter of National Security: Whistleblowing in the Military as a Mechanism for International Law Enforcement*, *supra* note 107, p. 275 ff.

<sup>147</sup> See again H. NASU, *State Secrecy Laws and National Security*, *supra* Introduction, note 73, p. 387.

<sup>148</sup> *Ibid.*, p. 388.

From an international law point of view, it is further evident that the ‘balancing test’ elaborated with respect to whistle-blowers in general (duty of discretion *vis-à-vis* public interest) is made more complex by the involvement of national security secrets (given that the safeguarding of national security should respond to a general interest of the entire community).

As stressed by the United Nations Special Rapporteur on the Protection and Promotion of Freedom of Opinion and Expression, however, whereas human rights treaties do include ‘national security exemptions’ to the right of expression and information, this could not be translated into entrusting national security institutions with “a greater claim to hide instances of wrongdoing or other information where the value of disclosure outweighs the harm to the institution”.<sup>149</sup> While national security may indeed justify restrictions to the right to freedom of expression, it is at least doubtful whether the threat of arrest or prosecution for revealing State secrets concerning public interest information would meet in practice the requirements of necessity and proportionality provided for under international human rights law.<sup>150</sup>

Yet, in this respect, human rights monitoring bodies’ case law appears anything but consistent. In its ruling in the *Pasko v. Russia* case, for instance, the European Court of Human Rights excluded that the Respondent State had breached Article 10 of the European Convention of Human Rights by imposing criminal sanctions on the applicant – a member of the military – for having collected and kept State secrets concerning environmental pollution (more specifically, the alleged dumping of nuclear waste by the Russian navy). The Court found indeed that, in the case at stake, the interference with the

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<sup>149</sup> Report of the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, UN Doc. A/70/361, *supra* Chapter 2, note 288, para. 43. According to the Special Rapporteur, under international human rights law, national security restrictions to whistle-blowing disclosure (and the criminalization of the latter) should be admissible only when responding to a genuine national security interest and not when meant to conceal wrongdoings, including serious human rights violations (*ibid.*, para. 47).

<sup>150</sup> On this specific aspect see, *inter alia*, Open Society Justice Initiative, Inter-American Commission on Human Rights, Thematic Hearing on Freedom of Expression and Communications Surveillance by the United States, Written Submission by Emi MacLean, 28 October 2013, para. 3.

applicant's right to freedom of expression under Article 10 of the Convention had met the necessity and proportionality requirements.<sup>151</sup> This case may be seen as an example of the more 'reluctant' approach – also on the part of human rights monitoring bodies – to ensure protection of whistle-blowers in the field of national security and intelligence. However, especially taking into account the restrictive interpretation that the Court has progressively developed with respect to the 'national security' exemption embodied in Article 10 of the European Convention on Human Rights in its case law related to the right of access to State-held information (analysed *supra*), the reported stance taken by the Court in the *Pasko* case appears at least 'surprising'.

Unlike the European Court of Human Rights, the Human Rights Committee, in its General Comment No. 34, has specifically recognized that it is not compatible with Article 19(3) of the International Covenant on Civil and Political Rights to invoke treason laws or other provisions related to national security (including official secrecy laws) to “suppress or withhold from the public information of legitimate public interest that does not harm national security”.<sup>152</sup> In this regard, in its 2001 *Concluding Observations on the United Kingdom*, the Human Rights Committee expressed its concerns for the use of powers under the 1989 Official Secrets Act to prevent government's employees to disclose information of “genuine public concern” and stressed that States parties “should ensure that [their] powers to protect information genuinely related to matters of national security are narrowly utilized and limited to instances where it has been shown to be necessary to suppress release of information”.<sup>153</sup>

The Parliamentary Assembly of the Council of Europe has also repeatedly stressed that the State's legitimate interest in protecting official secrets must

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<sup>151</sup> See European Court of Human Rights, *Pasko v. Russia*, App. No. 69519/01, judgment of 22 October 2009, para. 64 ff.

<sup>152</sup> Human Rights Committee, General Comment No. 34, *supra* Chapter 2, note 36, para. 30.



not be used as a ground for unjustified restrictions to the right of freedom of opinion and expression.<sup>154</sup> Accordingly, the Assembly requested Member States to “ensure that the laws governing States secrets protect the whistle-blowers (...) from possible disciplinary or criminal sanctions”.<sup>155</sup>

The Assembly further noted that “Member States must not curtail the right of the public to be informed by restricting the right of individuals to disclose information of public concern, for example by applying defamation and insult laws as well as *national security* and anti-terrorist laws in an overly broad and non-proportional manner”.<sup>156</sup>

Importantly, the Assembly also expressed its concerns over the possible breaches of the right to a fair trial that may arise in the context of criminal proceedings against whistle-blowers when the disclosure of national security information is at stake. In particular, the Assembly stressed that, as a general principle, “information that is already in the public domain cannot be considered as a State secret” to the purpose of trial.<sup>157</sup>

More recently, in June 2015, the Parliamentary Assembly of the Council of Europe confirmed and further advanced its previous findings. The Assembly expressly stated that “(...) whistle-blower protection should cover all individuals who denounce wrongdoing which place fellow human beings at risk of violations of their rights protected under the European Convention on Human Rights, *including people working for national security or intelligence services (...)*”.<sup>158</sup> The Assembly even encouraged the Committee of Ministers

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<sup>153</sup> Human Rights Committee, *Concluding Observations on the United Kingdom and Northern Ireland*, UN Doc. CCPR/CO/73/UK of 6 December 2001, para. 21.

<sup>154</sup> See Parliamentary Assembly of the Council of Europe, Resolution No. 1551 (2007), *supra* Introduction, note 27, para. 1.

<sup>155</sup> Parliamentary Assembly of the Council of Europe, Resolution No. 1507 (2006) on *Alleged secret detentions and unlawful inter-state transfers of detainees involving Council of Europe Member States*, adopted on 27 June 2006, para. 19.5

<sup>156</sup> Emphasis added. See again Parliamentary Assembly of the Council of Europe, Resolution No. 1877 (2012), *supra* note 122, para. 4.

<sup>157</sup> See again Parliamentary Assembly of the Council of Europe, Resolution No. 1551 (2007), *supra* Introduction, note 27, para. 101.

<sup>158</sup> Emphasis added. Parliamentary Assembly of the Council of Europe, Resolution No. 2060 (2015) on *Improving the protection of whistle-blowers*, adopted on 23 June 2015, para. 8. In

to “promote further improvements for the protection of whistle-blowers by launching the process of negotiating a binding legal instrument in the form of a framework Convention that would be open to non-member States and cover disclosure of wrongdoings *by persons employed in the field of national security and intelligence*”.<sup>159</sup>

As underscored in his explanatory memorandum by the Council of Europe’s Rapporteur Pieter Omtzigt:

“More so than in other whistle-blowing cases, different and sometimes contradictory interests come to bear when disclosures involve national intelligence information. The whistle-blower’s freedom of expression and the people’s freedom of information clashes with the intelligence agent’s duty to protect secret information; transparency and democratic accountability clash with the need for secrecy for intelligence operations to be effective. *Yet, the legitimate need for secrecy and confidentiality should not be abused as a cloak to conceal human rights violations committed by government agents*”.<sup>160</sup>

The importance of protecting national security whistle-blowers has been upheld also in non-binding instruments. The aforementioned OSCE Guidelines on the Protection of Human Rights Defenders, for instance, expressly provide that whistle-blowers should be protected from retaliation for disclosing State secrets unveiling the responsibility of State officials or non-State actors for

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light of the international dimension of national security and intelligence whistle-blowing, the Assembly even resolved that Council of Europe Member States should, in accordance with their national law, grant asylum to whistle-blowers at risk of prosecution in their home country (*ibid.*, para. 9).

<sup>159</sup> Emphasis added. Parliamentary Assembly of the Council of Europe, Recommendation 2073 (2015) on *Improving the Protection of Whistleblowers*, adopted on 23 June 2015, para. 3.1.

<sup>160</sup> Parliamentary Assembly of the Council of Europe, Report of the Legal Committee on Legal Affairs and Human Rights on improving the protection of whistle-blowers, Explanatory Memorandum of Rapporteur Omtzigt, Doc. 13791 of 19 May 2015, para. 4.

serious human rights abuses.<sup>161</sup>

The already-recalled 2013 Tshwane Principles similarly recognize the need to protect national security whistle-blowers. Pursuant to Principle 37, any disclosure by public employees of classified information concerning, *inter alia*, violations of human rights law and humanitarian law should be protected from retaliation under national law (including criminal and civil proceedings for disclosure of classified information). Furthermore, under Principle 40, public servants have the right to bring such information in the public domain without fear of prosecution or punishment anytime internal oversight mechanisms are not in place, have proved ineffective, or their activation could pose a serious risk in terms of concealment or destruction of evidence. Moreover, public disclosure should be subjected to a ‘reasonableness test’, pursuant to which the whistle-blower has to *reasonably* believe, at the time of disclosure, that the public interest in the information outweighs the harm that may eventually be caused by its disclosure.

It follows from the above that national security whistle-blowers should be entrusted with the same level of protection of other whistle-blowers and, therefore, a public interest balancing test should be undertaken even where disclosure concerns information protected under official secrecy for reasons of national security. Furthermore, under such a public interest ‘balancing exercise’, there is a strong presumption that information concerning serious human rights violations, even when classified on national security grounds, should be included among those information entailing legitimate disclosure. Domestic state secrecy and whistle-blower protection laws should therefore be framed in a way to ensure that unauthorized disclosure of classified national security and intelligence information would not be subjected to retaliation or punishment any time the interest in their disclosure overrides the interest in protecting national security (such as in the case of serious violations of human

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<sup>161</sup> OSCE Office for Democratic Institutions and Human Rights, *Guidelines on the Protection of Human Rights Defenders*, *supra* note 117, para. 48.

rights) and no internal effective oversight mechanism is in place. In this regards, the best approach to abide by the abovementioned standards could be the identification by law of categories of wrongdoings – in terms of protected disclosures or exceptions to secrecy – whose external release would be protected from retaliation. As it has been noted, in fact, “this approach, where the balancing exercise between national security and the interest in disclosure is enshrined in law, allows whistle-blowers a greater degree of certainty that their disclosures will be protected and ensures that they will not proceed to arbitrary public interest assessments”.<sup>162</sup>

Importantly, the protection afforded to whistle-blowers should be extended also to those members of the public disseminating the information, especially if entrusted with watchdog functions. The Human Rights Committee, for instance, has repeatedly expressed its concerns as to the lawfulness under Article 19 of the International Covenant on Civil and Political Rights of the conviction on treason charges of researchers, activists and journalists disseminating information of public interest.<sup>163</sup>

In a joint statement issued on 4 September 2013, the United Nations Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression and the United Nations Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering-Terrorism similarly emphasized that the protection of national security secrets must never be used as a ground to intimidate the press and undermine its work aimed at revealing human rights abuses.<sup>164</sup>

The aforementioned Tshwane Principles similarly stress that “a person who is not a public servant may not be sanctioned for the receipt, possession, or

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<sup>162</sup> See again D. KAGIAROS, ‘*Protecting ‘National Security’ Whistleblowers in the Council of Europe: An Evaluation of Three Approaches on How to Balance National Security with Freedom of Expression*’, *supra* Introduction, note 71, p. 410.

<sup>163</sup> See, e.g., Human Rights Committee, *Concluding Observations on the Russian Federation*, UN Doc. CCPR/CO/79/RUS of 1 December 2003, para. 21. See also again General Comment No. 34, *supra* Chapter 2, note 36, para. 30.

<sup>164</sup> The text of the joint statement is available at: <http://www.ohchr.org> (last accessed on 24 February 2016).

disclosure to the public of the classified information”.<sup>165</sup>

#### **3.3.4. Some conclusive remarks**

To conclude, even in lack of a solid case law on the point, the right to freedom of expression and information has been increasingly relied on to uphold the States’ duty to protect whistle-blowers from retaliation (as well as those disseminating the disclosed information), including in cases involving official secrets and information classified on the ground of national security. Whilst there is a general understanding that States have a legitimate prerogative to rely on secrecy to protect national security interests, any interference with the right to freedom of expression and information should indeed comply with the restrictive interpretation of national security exemption clauses embodied in the main human rights treaties. In this respect, there seems to be an emerging consensus in the sense that national security concerns cannot constitute a legitimate reason for restriction of the right to freedom of expression and information if the public interest in disclosure outweighs the interest in secrecy, such as in case of information related to serious human rights violations.

To date, however, these developments amount to an emerging interpretative trend (often shaped in terms of recommendations or non-binding provisions), not yet consolidated. For this reason, and taking into account the pressing need for a clear legal framework that recent events have underscored,<sup>166</sup> the pleading for the negotiation and conclusion of a treaty specifically dealing with the issue of whistle-blower protection is to welcome. Such an approach would indeed allow to further elaborate on the minimum threshold of

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<sup>165</sup> See Tshwane Principles, *supra* Chapter 1, at 3.1, Principle 47.

<sup>166</sup> Clearly, the provision of whistle-blower protection would not solve all the possible practical problems. For instance, pursuant to what has been described as the new ‘dilemma of State secrecy’, it still remains challenging to distinguish between true and false assertions of wrongdoings. See R. SAGAR, *Secrets and Leaks: The Dilemma of State Secrecy*, Princeton, 2013, p. 2014.

protection inferable from treaty provisions upholding the right to freedom of expression, as well as to formulate a legal framework capable of accommodating other corollary issues that whistle-blowing may raise (such as, for instance, the possible breaches to the right to a fair trial in the context of treason or espionage trials).

#### **4. Conclusions**

The previous analysis has attempted both to provide some tentative conclusions on the state of art of the dialectic relationship between secrecy and human rights protection and to highlight some further challenges and legal hurdles whose solution is partly still uncertain.

As to the first aspect, the analysis undertaken in the previous Chapters has clearly demonstrated that, based on the specific circumstances of the case at stake, undue resort to State secrecy may breach several human rights rules, including the right of access to State-held information, the right to a fair trial, the right to an effective remedy and the right to the truth in cases concerning serious human rights violations, as well as the duty to investigate, prosecute and punish.

More specifically, whereas human rights treaties generally provide for national security as a ground justifying interferences to certain human rights, such limitation clause cannot translate into an abusive discretionary reliance on State secrecy on the part of the State. To the contrary, it requires an inherent balancing exercise between the two colliding interests (*i.e.*, national security and the protection of human rights), according to strict parameters set by the treaties themselves, as further interpreted by human rights monitoring bodies.

In particular, the proportionality and necessity standards and the public interest test to which restrictions on national security grounds should abide by are hardly complied with any time classification and secrecy are resorted to

in order to shield accountability and hide the truth concerning serious human rights violations. In this respect, human rights treaty-monitoring bodies' case law has indeed increasingly accommodated a sort of absolute presumption in the sense of the prevalence of the interest in the protection of human rights over national security concerns.

This same 'conclusion' (*de facto* banning secrecy and classification any time they are relied on in a way to prevent accountability for serious human rights violations) may similarly be drawn from the progressive recognition of a right to know the truth concerning serious human rights violations, as well as – still depending on the specific circumstances of each single case – by the absolute (and non-derogable) character of certain human rights (and of the judicial guarantees essential to their effective protection).

The case law of human rights monitoring bodies – although clearly evolving along a case-by-case pattern – seems to support, whether overall considered, these conclusions. The recent ruling of the European Court of Human Rights in the *Nasr and Ghali* case represents indeed the last 'tile' of a broader practice which has progressively outlawed (from an international human rights law perspective) any abusive blanket resort to State secrecy.

As to the second perspective (*i.e.*, future challenges), it is instead to hope that the above illustrated 'open issues' will be increasingly accommodated in future treaty-making or codification attempts. That notwithstanding, even lacking similar actions, a 'systemic' approach may already aid – at least in part – to overcome some of the possible underpinning shortcomings.

As illustrated earlier, in fact, both the issue of potentially conflicting obligations and third-States' disclosure duties may be partly outplayed through a systemic interpretation of different legal provisions.

Furthermore, the protection of whistle-blowers, while certainly in need of proper law-making efforts, may in part be inferred from an extensive reading of existing human rights rules, taking into account the parallel developments related to the existing limits to the resort on States secrecy with respect to

serious human rights violations.



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