EUROPEAN COURT OF HUMAN RIGHTS
GRAND CHAMBER

Case of Janowiec and Others v. Russia
Application Nos. 55508/07 and 29520/09

Written observations of Amnesty International

These comments are submitted by Amnesty International pursuant to article 36 § 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter European Convention on Human Rights) following the leave granted by the Deputy Registrar of the Court in accordance with rule 44 of the Rules of the Court.

The interest of Amnesty International
Amnesty International's mission is to conduct research and generate action to prevent and end grave abuses of human rights—including the rights to life, health, private life, equality and non-discrimination—and to demand justice for those whose rights have been violated. The organisation works independently and impartially to promote respect for human rights based on research and on legal standards agreed by the international community.

I. The obligation to investigate war crimes, crimes against humanity, and other crimes under international law extends to such crimes committed prior to the drafting and entry into force of the European Convention on Human Rights

A. By 1939, customary international law prohibited the murder and ill-treatment of prisoners of war and civilians, and these war crimes carried individual criminal responsibility

Under the Charter of the International Military Tribunal (the Nuremberg Charter), violations of the laws and customs of war (war crimes) and crimes against humanity were recognised as "crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility."[1] The Charter explicitly provided that the Tribunal had jurisdiction over crimes against humanity committed well before 1939.[2] The Charter provided that war crimes "shall include, but not be limited to" the murder, ill-treatment, or deportation of civilians and the murder or ill-treatment of prisoners of war.[3] As this Court observed in *Kononov v. Latvia,* "the definition of war crimes included in Article 6(b) of the Nuremberg Charter was found to be declaratory of international laws and customs of war as understood in 1939."[4]

In addition to the examples listed in the charter, it was clear well before 1939 that violations of the laws and customs of war included the following specific acts:

[1] Charter of the International Military Tribunal, art. 6.
[2] *Id.,* art. 6(c),
[3] *Id.,* art. 6. *See also* Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal, U.N. G.A. Res. 177(II), *in Yearbook of the International Law Commission, 1950,* vol. II, ¶ 97 .
[4] *See Kononov v. Latvia,* App. No. 36376/04 (Grand Chamber 17 May 2010), ¶ 186.

- Inhumane treatment of prisoners of war[5] and reprisals against prisoners of war[6]
- "To kill or wound treacherously individuals belonging to the hostile nation or army"[7]
- "To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion . . . ."[8]
- Any "general penalty . . . inflicted upon the population on account of acts of individuals for which they cannot be regarded as jointly and severally responsible"[9]
- The failure to accord due process in sentencing prisoners of war[10]

As the Chamber judgement in this case notes, these provisions reflected and were a codification of customary international law.[11] Individual criminal responsibility attached for these and other war crimes.[12]

Moreover, the actions of the USSR immediately following World War II confirm that it recognised both the prohibition of war crimes as well as the obligation to investigate and prosecute war crimes. For instance, Soviet officials supported the work of the IMT in Nuremberg. They attempted to charge several German suspects with the responsibility for the Katyn massacre at the Nuremberg Tribunal. Soviet authorities prosecuted war crimes suspects under their domestic justice system during and after the war.[13]

B. Customary international law obligated states to investigate, prosecute, and punish war crimes well before 1939, with no statutory or other limitations on prosecution

As this Court observed in *Kononov v. Latvia,* "in 1944 no limitation period was fixed by international law as regards the prosecution of war crimes."[14] The Court's analysis in *Kononov* strongly supports the conclusion that the same was true in 1939.[15]

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[5] Convention with Respect to the Laws and Customs of War on Land (Hague Convention II), 29 July 1899, *entered into force* 4 September 1900, art. 4; Convention Respecting the Laws and Customs of War on Land (Hague Convention IV), 18 October 1907, *entered into force* 26 January 1910, annex, art. 4; Convention Relative to the Treatment of Prisoners of War, 27 July 1929, art. 2 (protecting "particularly against acts of violence").
[6] Convention Relative to the Treatment of Prisoners of War, art. 2.
[7] Hague Convention IV, art. 23(b).
[8] *Id.* art. 23(c).
[9] *Id.* art. 50.
[10] *Id.* arts. 61, 63.
[11] *Janowiec and Others v. Russia,* App. Nos. 55508/07 and 29520/09 (5th Section judgement 16 April 2012, referred to the Grand Chamber 24 September 2012), ¶ 140 [hereinafter "Chamber judgement"]. *See also Kononov v. Latvia,* App. No. 36376/04 (Grand Chamber 17 May 2010), ¶ 202 ("[*J] us in bello* recognised in 1944 the right to prisoner of war status if combatants were captured, surrendered or were rendered hors de combat, and prisoners of war were entitled to humane treatment. It was therefore unlawful under *jus in bello* in 1944 to ill-treat or summarily execute a prisoner of war."); Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol. 1: Rules* (Cambridge: ICRC, 2005), at 306 (noting that "[t]he obligation to treat prisoners of war humanely was already recognised in the Lieber Code, the Brussels Declaration and the Oxford Manual and was codified in the Hague Regulations.").
[12] *See Kononov,* ¶¶ 205-213.
[13] *See, for example, id.,* ¶¶ 106-110.
[14] *Id.,* ¶ 232.
[15] *See id.,* para. 231. *See also* Henckaerts and Doswald-Beck, *Customary International Humanitarian Law, Vol. 1,* at 614-618; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, G.A. Res. 2391, U.N. GAOR, 23d Sess., Supp. No. 18, at 40, U.N. Doc. A/7218 (1968), *entered into force* 11 November 1970, pmbl. & art. 1 ("No statutory limitation shall apply to" war crimes and crimes against humanity as defined in the Charter of the International Military Tribunal, "irrespective of the date of their commission").

C. States have an ongoing obligation to investigate war crimes, crimes against humanity, and other crimes under international law

The customary international law prohibition of the murder and ill-treatment of prisoners of war and civilians, other war crimes, and crimes against humanity implies a duty on the part of the state to investigate these acts. As 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 note, "[i]n cases of gross violations of international human rights law and serious violations of international humanitarian law constituting crimes under international law, States have the duty to investigate and, if there is sufficient evidence, the duty to submit to prosecution the person allegedly responsible for the violations and, if found guilty, the duty to punish her or him."[16]

Other international human rights standards and jurisprudence clarify that the obligations to "secure," "ensure," and "give effect to" human rights[17] require the state to investigate allegations of extrajudicial executions and other violations of human rights. For example, the U.N. Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions call for the "thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions."[18] The Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity note the state's duty to "[i]nvestigate violations effectively, promptly, thoroughly and impartially and, where appropriate, take action against those allegedly responsible in accordance with domestic and international law."[19] This Court has recognised the general obligation of the state to carry out effective investigations into suspicious deaths.[20]

This obligation is a continuing obligation. This Court observed in *Brecknell v. United Kingdom* that "there is a little ground to be overly prescriptive as regards the possibility of an obligation to investigate unlawful killings arising many years after the events since the public interest in obtaining the prosecution and conviction of perpetrators is firmly recognised, particularly in the context of war crimes and crimes against humanity."[21]

Although the present case was not characterised by this Court as an enforced disappearance case, the jurisprudence of the Inter-American Court of Human Rights in

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[16] UN General Assembly, 60th sess., agenda item 71(a), 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, G.A. Res. 60/147, annex, U.N. Doc. A/RES/60/147 (2006), art. 4.

[17] European Convention on Human Rights, art. 1; International Covenant on Civil and Political Rights, arts. 2 and 3.

[18] Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, ECOSOC Res. 1989/65, annex, 1989 U.N. ESCOR Supp. (No. 1) at 52, U.N. Doc. E/1989/89 (1989), princ. 9. In full, Principle 9 provides: "There shall be thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances. Governments shall maintain investigative offices and procedures to undertake such inquiries. The purpose of the investigation shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death. It shall include an adequate autopsy, collection and analysis of all physical and documentary evidence and statements from witnesses. The investigation shall distinguish between natural death, accidental death, suicide and homicide."

[19] Commission on Human Rights, 61st sess., provisional agenda item 17, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, U.N. Doc. E/CN.4/2005/102/Add.1 (2005), art. 3(b).

[20] *See Nachova v. Bulgaria,* App. Nos. 43577/98 and 43579/98 (Grand Chamber 6 July 2005), ¶ 110.

[21] *Brecknell v. United Kingdom,* App. No. 32457/04 (27 November 2007), ¶ 69.

Velásquez Rodríguez v. Honduras and other cases involving enforced disappearances can usefully be applied to cases that involve mass killings characterised as war crimes or extrajudicial or summary executions.

First, as the Inter-American Court recognised in *Verlásquez Rodríguez,* the obligation to investigate is not limited to enforced disappearance: "The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation."[22]

Second, the "[t]he continuous or permanent nature of the enforced disappearance of persons"[23] has several parallels where the facts of a mass killing have not been ascertained and the fates of individual victims clarified. The Inter-American Court noted in *Gomes Lund,* for example, that enforced disappearance "commences with the deprivation of liberty of the person, followed by the lack of information regarding the whereabouts, and continues until the whereabouts of the disappeared person are found and the true identity is revealed with certainty."[24] The failure to investigate and account for instances of extrajudicial or summary executions leaves those who have been killed "in a state of legal limbo or undetermined situation before society and the State"[25] much in the same way that the victims of enforced disappearances are. Moreover, the Inter-American Court has underscored the connection between the lack of an effective investigation and the impact on the next of kin.[26] As discussed in section II of this submission, this aspect of the Inter-American Court's jurisprudence is of particular relevance in the present case, given the Chamber's finding that Russia's failure to account for the fate of those killed at Katyn and the manner in which Russian authorities responded to the relatives' request for information amounted to inhuman treatment.[27]

Third, the Inter-American Court has repeatedly emphasized in these cases that enforced disappearance often leads to extrajudicial execution and that its analysis is also applicable to violations of the right to life.[28]

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[22] *Case of Velásquez Rodríguez v. Honduras,* Merits, Judgement of 29 July 1988, Inter-Am. Ct. H.R. (Ser. C), No. 4 (1988), ¶ 174.

[23] *Gomes Lund et al. ("Guerrilha do Araguaia") v. Brazil,* ¶ 17 (citing *Velásquez Rodríguez,* ¶ 155; *Chitay Netch et al. v. Guatemala,* Preliminary Objections, Merits, Reparations, and Costs, Judgement of 25 May 2010, Inter-Am. Ct. H.R. (Ser. C), No. 212, ¶¶ 81, 87; *Ibsen Cárdenas and Ibsen Peña v. Bolivia,* Judgement of 1 September 2010 (Inter-Am. Ct. H.R.), ¶¶ 59-60).

[24] *Gomes Lund,* ¶ 103.

[25] *Id.,* ¶ 122. Similarly, this Court observed in *Varnava v. Turkey,* "Where disappearances in life-threatening circumstances are concerned, the procedural obligation to investigate can hardly come to an end on discovery of the body or the presumption of death; this merely casts light on one aspect of the fate of the missing person. An obligation to account for the disappearance and death, and to identify and prosecute any perpetrator of unlawful acts in that connection, will generally remain." *Varnava v. Turkey,* App. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90, and 16073/90 (Grand Chamber 18 September 2009), ¶ 145. *See also id.* ¶ 148 ("It cannot therefore be said that a disappearance is, simply, an 'instantaneous' act or event; the additional distinctive element of subsequent failure to account for the whereabouts and fate of the missing person gives rise to a continuing situation. Thus, the procedural obligation will, potentially, persist as long as the fate of the person is unaccounted for; the ongoing failure to provide the requisite investigation will be regarded as a continuing violation.").

[26] *See Gomes Lund,* ¶¶ 241-42.

[27] *See* Chamber judgement, ¶¶ 165-67.

[28] *See Velásquez Rodríguez,* ¶ 188 (""The above reasoning is applicable to the right to life recognized by Article 4 of the Convention. The context in which the disappearance of Manfredo Velasquez occurred and the lack of knowledge seven years later about his fate create a reasonable presumption that he was killed." (internal references omitted); *Gomes Lund,* ¶ 256(c).

Drawing on the Inter-American Court's jurisprudence and applying its analysis to cases of extrajudicial execution, "each time there is reasonable cause to suspect that a person was subject to" an extrajudicial execution "an investigation must be initiated."[29] Further, "[i]n any case, every State authority, public official or individual, that has had notice of acts" relating to extrajudicial executions "must immediately report said facts."[30] To the extent possible, the investigation must identify the remains of those killed. Moreover, "the location where the bodily remains are found can be a valuable place to obtain information regarding the perpetrators of the violations or the institutions to which they belong,"[31] as the Inter-American Court observed in *Gomes Lund.*

And as the Inter-American Court said in *Velásquez Rodríguez:* "The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains."[32]

D. The obligation to investigate extends to violations committed before the entry into force of the European Convention on Human Rights

The procedural obligation under article 2 of the Convention to investigate suspicious deaths extends to acts that took place before the entry into force of the Convention, as the Chamber judgement notes.[33] This Court's judgement in *Šilih v. Slovenia* establishes that the obligation to investigate exists if there is a genuine connection between the deaths and the Convention's entry into force. Such a connection is established if "a significant proportion of the procedural steps required . . . will have been or ought to have been carried out after the critical date."[34] A connection "could also be based on the need to ensure that the guarantees and the underlying values of the Convention are protected in a real and effective manner."[35]

Adopting a test similar to that employed by the European Court of Human Rights, the Inter-American Court has repeatedly found violations of the obligation to investigate, prosecute, and punish acts that took place before the entry into force of the American Convention on Human Rights.

In the *Gomes Lund* case, for example, Brazil argued that the Inter-American Court lacked jurisdiction over alleged enforced disappearances and subsequent extrajudicial executions that occurred prior to 10 December 1998, the date Brazil recognised the Inter-American Court's contentious jurisdiction. The Inter-American Court ruled that it had jurisdiction

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[29] *Gomes Lund,* ¶ 108. *See also id.,* ¶ 137 ("Since its first judgement, this Court has highlighted the importance of the State's obligation to investigate and punish for human rights violations. The obligation to investigate, and where possible prosecute and punish, has particular importance given the severity of the crimes committed and the nature of the injured rights, particularly given that the prohibition of enforced disappearance of persons and its related obligation to investigate and punish those responsible have, for much time now, reached a nature of *jus cogens."*).

[30] *Id.,* ¶ 108.

[31] *Id.,* ¶ 261 (citing *Los Dos Erres Massacre v. Guatemala,* Preliminary Objections, Merits, Reparations, and Costs, Judgement of 24 November 2009, Inter-Am. Ct. H.R. (Ser. C), No. 211, ¶ 245).

[32] *Velásquez Rodríguez,* ¶ 181.

[33] *See* Chamber judgement, ¶ 131 (citing *Šilih v. Slovenia,* App. No. 71463/01 (Grand Chamber 9 April 2009), ¶¶ 159-60).

[34] *Šilih v. Slovenia,* ¶ 163. Such procedural steps "include not only an effective investigation into the death of the person concerned but also the institution of appropriate proceedings for the purpose of determining the cause of the death and holding those responsible to account." *Id.*

[35] *Id.*

"to analyze the alleged facts and omissions of the State that occurred after [10 December 1998], which are related to the failure to investigate, prosecute, and punish those responsible, *inter alia,* for the alleged disappearance and extrajudicial execution; the alleged lack of effectiveness of judicial remedies of a civil nature aimed at obtaining information regarding the facts; the alleged restrictions on the right to access information, and the alleged suffering of the next of kin."[36] The Court went on to hold Brazil responsible for its failure after 1998 to investigate and provide effective judicial remedies for alleged cases of enforced disappearance and extrajudicial execution that took place prior to the American Convention's entry into force in 1978.

In a very similar case, the Inter-American Court affirmed that Chile—which recognised the competence of the Court in 1990 and stated that its recognition applied to events subsequent to the date of deposit of ratification (and in any case to events subsequent to 11 March 1990)—cannot ignore the obligation to investigate and punish serious human rights violations, as in the case of Luís Almonacid Arellano, who was executed in 1973 soon after the coup d'état led by Augusto Pinochet. The Court held: "The State cannot argue the existence of any law or provision of domestic law to justify its exemption from fulfilling the Court order to investigate and punish those responsible for the death of Mr. Almonacid Arellano. Child cannot apply Decree-Law No. 2.191 [its amnesty law] again . . . . Additionally, the State cannot argue the prescription or non-retroactive enforcement of criminal law, or the applicability of the principle of *ne bis in idem,* or any other rule to exempt it from the responsibility and duty to investigate and punish those responsible."[37]

1. The European Court of Human Rights' "genuine connection" test should be met if new information becomes available or the state takes action to withhold information after the Convention has entered into force for that state

This Court observed in *Brecknell v. United Kingdom,* "it may be that some time later, information purportedly casting new light on the circumstances of the death comes into the public domain. The issue then arises as to whether, and in what form, the procedural obligation to investigate is revived."[38] Under *Brecknell,* the test is met "where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing"; in such cases, "the authorities are under an obligation to take further investigative measures."[39]

Similarly, the Inter-American Court observed in *Gomes Lund,* "The duty to investigate is an obligation of means and not of results, which should be assumed by the State as a legal obligation in and of itself . . . ."[40] The Court's analysis continues: "From this obligation, once the State authorities are notified of the facts, they must initiate *ex officio* and without delay, a serious, impartial, and effective investigation. This investigation must be carried out in all of the available legal venues and be aimed at determining the truth."[41]

[36] *Gomes Lund,* ¶ 18.
[37] *Almonacid Arellano et al. v. Chile,* Preliminary Exceptions: Question of Law and Costs, Judgement of 26 September 2006, Inter-Am. Ct. H.R. (Ser. C), No. 154, ¶ 151.
[38] *Brecknell,* ¶ 66.
[39] *Id.,* ¶ 71.
[40] *Gomes Lund,* ¶ 138.
[41] *Id.,* ¶ 138.

In this regard, a change in policy that has resulted in the availability of new information[42] would trigger anew the obligation to investigate. The extent to which the state conducted investigations after the date of entry into force[43] is also a relevant consideration.

Other acts by the state may also establish a "genuine connection" between the events that predate entry into force and the state's Convention obligation to investigate those events. For example, a state's decision to discontinue investigations[44] after the entry into force of the Convention is a state act that has bearing on the availability of information. Similarly, the state's classification of materials as state secrets and its reliance on that classification to prevent disclosure of information also create a link between the events in question and the state's Convention obligation to investigate.[45]

2. The Court's test regarding the "underlying values of the Convention" is met when the acts to be investigated are violations of customary international law and crimes under international law

The Chamber judgement understood a connection based on the "underlying values" of the Convention to require that "the event in question must be of a larger dimension than an ordinary criminal offence and constitute a negation of the very foundations of the Convention, such as for instance, war crimes or crimes against humanity."[46]

War crimes and crimes against humanity are indeed of such dimension. The prohibition of war crimes and crimes against humanity is *jus cogens,* a peremptory norm of international law. The commission of these crimes gives rise to an *erga omnes* obligation[47] to prosecute and punish them.

Indeed, the drafters of the European Convention clearly intended for crimes committed during the Second World War to be investigated and prosecuted and to this effect Art 7(2) is worded in such a way to allow prosecutions of past crimes: "This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

The context of the European Convention's adoption and a foundation of its object and purpose were to prevent a recurrence of human rights violations on the scale of the Second World War.[48] Reflecting this understanding, Council of Europe states continue to investigate and prosecute alleged perpetrators of crimes committed during World War II. For example, in 2001 Germany prosecuted Julius Viel as well as Anton Malloth, securing convictions of each in separate trials. Anthony Sawoniuk was convicted in the United Kingdom in 1999. John Demjanjuk was convicted in Germany in 2011.

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[42] *See* Chamber judgement, ¶ 21.
[43] *See id.*, ¶ 124.
[44] See Chamber judgement (dissenting opinion of Speilman, Villiger and Nussberger).
[45] In this regard, see *Gomes Lund,* ¶ 202 ("[T]he Court has also established that in cases of violations of human rights, the State authorities cannot resort to mechanisms such as official secret or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or pending procedures.").
[46] Chamber judgement, ¶ 139.
[47] *Barcelona Traction Light and Power Co., Ltd.,* Judgement, 5 February 1970, I.C.J. Reports 1970, ¶¶ 33-34.
[48] *See generally* Vienna Convention on the Law of Treaties, art. 31 ("A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be givem to the terms of the treaty in their context and in the light of its object and purpose.").

As noted above, the pre-1939 customary international law prohibition of war crimes and crimes against humanity with no statutory or other limitation on prosecution implied a continuing obligation to investigate, prosecute, and punish those crimes. The Convention's entry into force for a particular state adds an additional dimension to this ongoing obligation, requiring that investigations be effective, prompt, independent, and impartial.[49]

E. The passage of time may inform the remedies the state takes, but it does not alter the state's obligation to conduct an investigation

Investigation of war crimes and crimes against humanity should aim at establishing the facts and identifying all who are criminally responsible, at all levels. The lapse of time may make prosecution impractical for the reasons the chamber cites in its judgement,[50] but such a determination can be made only after "an exhaustive and effective investigation, which allows for the identification . . . of those responsible."[51] Put another way, the results of the investigation determine whether any prosecution is possible or appropriate. And even if prosecution is not appropriate, the state must nevertheless provide suitable, effective remedies to victims.[52] As described below, the state will be unable to meet its obligation to provide suitable and effective remedies unless it conducts an investigation.

The Inter-American Court characterises the right to a remedy in this way: "any violation of an international obligation that has produced harm entails the obligation to repair it adequately."[53] As 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 note, remedies include victims' equal and effective access to justice; adequate, effective, and prompt reparation for harm suffered; and access to relevant information concerning violations and reparation mechanisms.[54]

1. The right of victims to equal and effective access to justice includes the right to be heard

States have a duty to "[p]rovide those who claim to be victims of a human rights or humanitarian law violation with equal and effective access to justice . . . irrespective of who may ultimately be the bearer of responsibility for the violation"[55] As the Inter-American Court put it in the *Gomes Lund* case, victims should be afforded "ample possibilities to be heard and act in the respective procedures, in the search to ascertain

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[49] *See, for example, Šilih,* ¶¶ 192-96; *Brecknell,* ¶ 72 (noting that the extent to which each of these requirements applies "may well be influenced by the passage of time").
[50] *See* Chamber judgement, ¶ 133.
[51] *Gomes Lund,* ¶ 145 (citing European Court of Human Rights jurisprudence).
[52] The Basic Principles and Guidelines on the Right to a Remedy and Reparation use the term "victims" to mean "persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term 'victim' also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization." Basic Principles and Guidelines on the Right to a Remedy and Reparation, art. 8.
[53] *Gomes Lund,* ¶ 245.
[54] *See* Basic Principles and Guidelines on the Right to a Remedy and Reparation, art. 11.
[55] *Id.,* art. 3(c). *See also id.* ¶ 12.

the facts and in the punishment of those responsible, as well as the search for due reparation."[56]

2. Full and effective reparation includes restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition

Principle 31 of the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity provides: "Any human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator." As the Basic Principles and Guidelines on the Right to a Remedy and Reparation note, "Adequate, effective and prompt reparation is intended to promote justice by redressing gross violations of international human rights law or serious violations of international humanitarian law."[57]

Full and effective reparation includes restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition.[58] All forms of reparation should be provided wherever possible.

Satisfaction includes "[v]erification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses, or persons who have intervened to assist the victim or prevent the occurrence of further violations"[59] and "[t]he search for the whereabouts of the disappeared, for the identities of the children abducted, and for the bodies of those killed, and assistance in the recovery, identification and reburial of the bodies in accordance with the expressed or presumed wish of the victims, or the cultural practices of the families and communities."[60] The Inter-American Court specified in *Gomes Lund* that satisfaction includes a public acknowledgement of international responsibility.[61]

Guarantees of non-repetition include access, systematisation, and publication of documents in the custody of the state, as well as "the construction and preservation of the historic memory, clarification of the facts, and determination of the institutional, social and political responsibilities of specific historic periods in a society."[62]

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[56] *Gomes Lund,* ¶ 139.
[57] Basic Principles and Guidelines on the Right to a Remedy and Reparation, art. 15.
[58] *Id.,* art. 18.
[59] *Id.,* art. 22(b).
[60] *Id.,* art. 22(c). Similarly, the Inter-American Court stated in *Gomes Lund* that "the right to next of kin of the victims to identify the whereabouts of the disappeared persons, and where applicable, to know the location of their bodily remains is a measure of reparation." *Gomes Lund,* ¶ 261 (citing *Neira Alegría et al. v. Perú,* Merits, Judgement of 19 January 1995, Inter-Am. Ct. H.R. (Ser. C), No. 20, ¶ 69; *Chitay Nech,* ¶ 240; *Ibsen Cárdenas and Ibsen Peña,* ¶ 214). Once identified, bodily remains "should be delivered to the next of kin as soon as possible and at no cost to them, in order for a proper burial to be carried out pursuant to their beliefs. Furthermore, the State should cover the funeral costs in agreement with the next of kin." *Gomes Lund,* ¶ 262 (citing *La Cantuta v. Perú,* Merits, Reparations, and Costs, Judgement of 29 November 2006, Inter-Am. Ct. H.R. (Ser. C), No. 162, ¶ 232; *Chitay Nech,* ¶ 241; *Ibsen Cárdenas and Ibsen Peña,* ¶ 242).
[61] *Gomes Lund,* ¶ 277 ("The act should be carried out during a public ceremony, in the presence of high-ranking national authorities and of the victims in the present case. The State should agree on the terms of compliance of the public act of acknowledgment with the victims or their representatives, as well as the particularities required, such as location and date for it to be carried out. Said act should be disseminated via the media, and the State has a period of one year as of the notification of the present Judgment to carry out the act.").
[62] *Id.,* ¶ 297 (citing *Zambrano Vélez et al. v. Ecuador,* Merits, Reparations, and Costs, Judgement of 4 July 2007, Inter-Am. Ct. H.R. (Ser. C), No. 166, ¶ 128; *Anzualdo Castro v. Perú,* Preliminary Objection,

3. The state cannot guarantee the right of victims to relevant information concerning violations unless it conducts a full investigation

The right to a remedy and reparation includes victims' access to relevant information on the human rights violations committed and available reparation mechanisms.[63] Such access to information cannot be realised without a full investigation, meaning that this aspect of the right to a remedy is closely related to the state's obligation to investigate.[64]

II. The lack of an effective investigation adversely impacts the right of next of kin to humane treatment

As the Inter-American Court observed in *Gomes Lund,* the failure to conduct an effective investigation has a bearing on the right of family members to be treated humanely. The Court's judgement notes:

> 241. [T]he Court considered that the violation of the right to integrity of the next of kin is also due to the lack of effective investigations to ascertain the facts, the lack of initiatives to punish those responsible, the lack of information regarding the facts, and in general, in regard to the impunity that remains in the case, which has generated feelings of frustration, impotence, and anguish. In particular, in cases that involve enforced disappearances of persons, it is possible to understand that the violation of the right to psychological and moral integrity of the next of kin of the victims is a direct consequence of this phenomenon that causes severe suffering, which tends to increase, among other factors, given the constant failure of the State authorities to offer information regarding the whereabouts of the victims or to initiate an effective investigation in order to ascertain information on what occurred.
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> 242. The Court finds that the uncertainty and lack of information from the State about what occurred, which remains to date in a large sense, has been a source of suffering and anguish, and of a feeling of insecurity, frustration, and helplessness for the next of kin, given the failure of the public authorities to investigate the facts. Similarly, the Court noted that before the enforced disappearance of persons, the State has the obligation to guarantee the right to personal integrity of the next of kin also by means of effective investigations. These effects, fully encompassed in the complexity of enforced disappearances, remain in existence while the verified factors of impunity persist.[65]

Applying a similar line of analysis, when the state violates the rights of next of kin under article 3 of the Convention by refusing to provide them sufficient information about the fate of their relatives,[66] that fact strongly supports a finding that the state has not met its obligation to conduct an effective investigation, as required under the procedural limb of article 2 of the Convention.

Merits, Reparation and Costs, Judgement of 22 September 2009, Inter-Am. Ct. H.R. (Ser. C), No. 202, ¶ 119; *Radilla Pacheco v. México,* Preliminary Objections, Merits, Reparations, and Costs, Judgement of 23 November 2009, Inter-Am. Ct. H.R. (Ser. C), No. 209, ¶ 74).

[63] *See* Basic Principles and Guidelines on the Right to a Remedy and Reparation, arts. 11(c), 24.

[64] *See Gomes Lund,* ¶¶ 200-202.

[65] *Gomes Lund,* ¶¶ 241-242.

[66] See in this regard Chamber judgement, ¶ 166 (noting that the state had exhibited "flagrant, continuous and callous disregard for their concerns and anxieties"). *See also id.* ¶¶ 161-65.