

# Hidden Files: ARCHIVAL SHARING, ACCOUNTABILITY, AND THE RIGHT TO THE TRUTH

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## ABSTRACT

*Societies undertake a variety of truth and accountability measures to deal with legacies of gross human rights violations. For those measures to be effective, courts, commissions, victims and their representatives, and the general public need access to official records and archives. Archival materials can shed light on specific acts of abuse, as well as the larger patterns of violence or repression in which those acts were embedded. In addition to domestic government archives, the classified records of “third countries”—states outside the jurisdiction in which a particular crime occurred—can be crucial in advancing truth and accountability. Nevertheless, the law seldom requires third countries to share their secret files, and voluntary disclosure remains relatively rare. This constitutes an important weak link in the international human rights regime.*

*In this article, we argue for enhanced third-country disclosure of human rights files. We argue both for enhanced voluntary declassification and stronger legal norms to mandate the release of information about gross human rights violations, emphasizing the role of civil society organizations in driving both forms of disclosure. We use examples from Latin America and elsewhere to show the power of declassified U.S. documents and other third-country records to elucidate specific crimes and the bureaucratic systems and international cooperation behind them. We discuss the case of Libya to demonstrate the need for similar disclosure to illuminate abuses in the*

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*Middle East and North Africa and other regions suffering from droughts in truth and accountability. We then consider the benefits of disclosure to third countries and some means of addressing their national security and diplomatic concerns. We conclude by examining pathways for the development of stronger legal norms on third-country disclosure going forward.*

## I. INTRODUCTION

Secret official records are often keys to uncovering the truth about gross human rights violations. Classified intelligence reports, security memoranda, and diplomatic cables contain facts and analysis vital to uncovering abuses. Archival evidence about human rights violations often exists in multiple locations, including the secret files of countries outside of the state in which specific violations occurred. These “third countries”<sup>1</sup> sometimes hold documents with vital clues about specific violations being investigated and the broader policies and institutions that enabled or encouraged abuses. Third-country files are particularly useful in documenting the international cooperation that accompanies many systematic human rights violations. In such cases, archival sharing between states is crucial to clarifying past abuses and holding the perpetrators accountable.

This article makes the case for enhanced voluntary declassification, as well as stronger norms requiring the release of human rights records in support of truth and accountability efforts. The information in third-country documents can help provide a foundation for successful trials, truth commissions, and other forms of transitional justice, helping combat impunity and perhaps reducing the likelihood of future atrocities. By revealing facts about human

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1. The term “third countries,” when used in connection with an inquiry into alleged human rights violations, refers to countries outside of the state in which those violations took place. Louis Joinet introduced this use of the term in an influential 1997 U.N.-commissioned report on combatting impunity. U.N. Comm’n for Hum. Rts., *Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119*, Annex I, princ. 17, U.N. Doc. E/CN.4/Sub.2/1997/20/Rev.1 (Oct. 2, 1997) [hereinafter Joinet Report]. Other U.N. bodies and scholars have since adopted the term as well. See, e.g., *Report of the Office of the United Nations High Commissioner for Human Rights on the seminar on experiences of archives as a means to guarantee the right to the truth*, ¶ 52, U.N. Doc. A/HRC/17/21 (Apr. 14, 2011) [hereinafter 2011 OHCHR Report]; Antoon De Baets, *Responsible History* 212 n.64 (2009) (using the term “third countries” to similar effect).

rights violations, third-country records can furnish an important form of redress for victims and their loved ones and contribute to a people's collective memory.

In states transitioning from conflict or widespread repression, archival revelations can help the new government establish a break from the past and forge a new social contract premised on greater transparency, accountability, and respect for human rights.<sup>2</sup> Indeed, the revelation of official records of past abuses has been an important part of domestic political transformations in a number of states, most notably in Eastern Europe and Latin America.<sup>3</sup> As the Open Society Justice Initiative argues, the “realization of the collective right to truth concerning prior abuses in periods of transition, or following periods of conflict, empowers the body politic to educate itself, reform institutions and promote policies that prevent recurrence of past violations.”<sup>4</sup> To the extent that successful transitional justice processes advance political reforms, third-country records can contribute to the process.<sup>5</sup>

Where the third country itself played a role in committing or enabling past abuses, disclosure may help repair damaged interstate relationships. Actual or perceived complicity in a cover-up of past abuses generates ill will in the victimized population and is more than a matter of popularity; it can generate added security challenges and impede a third country's political and economic agenda.<sup>6</sup>

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2. See Eduardo González, Int'l Ctr. for Trans. Just., *Building Democracies on a Foundation of Truth* (Mar. 26, 2013), <http://bit.ly/1tHobSE>.

3. See Antonio González Quintana, Int'l Council on Archives, *Archival Policies in the Protection of Human Rights* (2009), available at <http://bit.ly/1yQ4vjA>.

4. Brief for Open Society Justice Initiative et al. as Amici Curiae Supporting Petitioners at ¶ 36, José Miguel Gudiel Álvarez y otros (“Diario Militar”) Guatemala, Case 12.590, Inter-Am. Comm'n H.R., Report No. 116/10 (May 10, 2012) [hereinafter OSJI *Diario Militar* brief].

5. Demonstrating the independent effect of transitional justice processes on political reform is difficult, but studies show that truth and accountability and democratization have been closely connected and mutually reinforcing in many instances. See *The Politics of Memory: Transitional Justice in Democratizing Societies* (Alexandra Barahona De Brito et al. eds., 2001); Kathryn Sikkink & Carrie Booth Walling, *The Impact of Human Rights Trials in Latin America*, 44 *J. Peace Res.* 427 (2007); Tricia D. Olsen et al. *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (2010) (discussing the relationship between transitional justice processes and broader political reforms).

6. Chilean Senator Isabel Allende describes the U.S. role in the 1973 coup against her father, former President Salvador Allende, as representing “an unpaid

Disclosing records to promote truth and accountability can serve as a form of “archival diplomacy,”<sup>7</sup> signaling a change in foreign policy that provides the basis for more sustainably favorable country-to-country relations.

Despite these potential benefits, access to relevant third-country documents is not easy to obtain. Governments are generally loath to open secret files. Third-country officials fear that disclosure could reveal intelligence sources and methods, compromise security, or impair diplomatic relations. Disclosure may also prove self-incriminating if records demonstrate third-country knowledge about violations or complicity in them. Although some domestic laws require states to disclose documents concerning gross human rights violations in their home jurisdictions, the law seldom requires states to share archives across borders. States retain broad authority to withhold documents on national security or other grounds, which reflects the abiding strength of sovereignty norms in the management of official records. Archival sharing remains essentially voluntary and relatively rare. Thus, many third-country files with potential human rights value remain hidden from public view.

This article argues that insufficient third-country disclosure constitutes an important weak link in the international human rights regime. In Part I, we demonstrate the imbalance between broad international recognition of rights to truth and justice after gross human rights violations and the nearly non-existent obligations on third countries to disclose relevant secret files. Part II illustrates the power of third-country records by showing their contributions in a series of seminal human rights cases in Latin America and elsewhere. Part III highlights the continuing need for archival sharing by discussing Libya and the broader Middle East, a region where implementation of the right to the truth is sorely lacking and where third-country records have great potential to advance memory and accountability efforts. Part IV explores some of the benefits of enhanced disclosure to third countries and some means of addressing

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debt for the justice system, to acknowledge the numerous crimes committed that day, identify those who participated, establishing their criminal responsibilities and knowing the entire truth of that day.” Michael Warren & Eva Vergara, *Investigators: Secret CIA files could help Chile*, Wash. Post, Feb. 27, 2011, <http://wapo.st/1Emt8CU>.

7. “Archival diplomacy” is a term used by openness proponents working to provide victims with access to third-country files with relevant information for human rights investigations. *See id.* (quoting Peter Kornbluh).

national security concerns without unduly impairing accessibility. Finally, we conclude with reflections on ways in which stronger norms of third-country disclosure may become embedded in international human rights law and practice.

## II. INSUFFICIENT ARCHIVAL SHARING: A WEAK LINK IN THE HUMAN RIGHTS REGIME

The normative rationales for third-country disclosure include challenging impunity, preserving social memory, providing redress to victims, and promoting more transparent and accountable government in the future. These interrelated normative aspirations are best encapsulated in the principle of the “right to the truth,” which has risen to prominence within the international human rights regime over the past two decades. The right to the truth invests both individual victims and societies with a right to know the facts surrounding gross human rights violations. It emerged during the era of military rule in Latin America, when a scourge of enforced disappearances led to demands for information about the *desaparecidos*. Numerous authorities have since recognized the principle and its application to other crimes including genocide, war crimes, crimes against humanity, and torture.<sup>8</sup>

U.N. Human Rights Council (HRC) resolutions,<sup>9</sup> reports by the U.N. Office of the High Commissioner for Human Rights (OHCHR),<sup>10</sup> regional courts and commissions,<sup>11</sup> and civil society

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8. See Yasmin Naqvi, *The right to the truth in international law: fact or fiction?* 88 Int'l Rev. of the Red Cross 245, 254–68 (2006); John D. Ciorciari, *Archiving Memory after Mass Atrocities* 3–9, Rapoport Center Working Paper No. 04/2012 (2012).

9. See Human Rights Council Res. 9/11, U.N. Doc. A/HRC/RES/9/11 (Sept. 24, 2008); Human Rights Council Res. 12/12, U.N. Doc. A/HRC/RES/12/12 (Oct. 12, 2009); Human Rights Council Res. 21/7, U.N. Doc. A/HRC/RES/21/7 (Oct. 10, 2012).

10. See U.N. Office of High Comm'r for Hum. Rts., *Study on the Right to the Truth*, ¶¶ 33–36, 47–55, U.N. Doc. E/CN.4/2006/91 (Feb. 8, 2006) [hereinafter 2006 OHCHR Report]; U.N. Office of High Comm'r for Hum. Rts., *Right to the Truth: Report of the Office of the High Commissioner for Human Rights*, U.N. Doc. A/HRC/5/7 (June 7, 2007); U.N. Office of High Comm'r for Hum. Rts., *Right to the Truth: Report of the Office of the High Commissioner for Human Rights*, U.N. Doc. A/HRC/12/19 (Aug. 21, 2009) [hereinafter 2009 OHCHR Report]; 2011 OHCHR Report, *supra* note 1.

11. For a discussion of key cases, see *infra* Part I.C.

groups<sup>12</sup> have affirmed the right to the truth and urged states to take measures to make it effective. The International Convention for the Protection of All Persons from Enforced Disappearance (ICCPED), which entered into force in 2010, requires states parties to take concrete measures to uphold the right.<sup>13</sup> In late 2010, the UN General Assembly even resolved that March 24 would be recognized as an “International Day for the Right to the Truth.”<sup>14</sup> A number of national governments have also embraced the right to the truth, with courts affirming the positive duty of governments to provide access to information on state-sponsored violence and redress for victims of past violations.<sup>15</sup>

Human rights lawyers and archivists have long recognized the importance of official records and archives—including third-country records—in giving effect to the right to the truth. In a seminal 1997 report adopted by the UN Commission on Human Rights, which laid out principles for combatting impunity and upholding the right to the truth, French lawyer Louis Joinet

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12. See, e.g., Int’l Ctr. for Trans. Just., Truth Seeking: Elements of Creating an Effective Truth Commission 1–4 (2013) available at <http://bit.ly/1tQngl7>; Amnesty Int’l, Support for the Draft Global Principles on National Security and the Right to Information (2012), available at <http://bit.ly/1iislNd>; Rupert Skilbeck, *Case Watch: The Katyn Massacre and the Right to Truth*, Open Society Foundations. (Jan. 18, 2013), <http://osf.to/1tHs5uU> (all promoting enhanced access to archival materials to uphold the right to the truth).

13. International Convention for the Protection of All Persons from Enforced Disappearance, *opened for signature* Feb. 6, 2007, 2716 U.N.T.S. 9 (entered into force Dec. 23, 2010) [hereinafter ICCPED]. See *infra* Part I.A for a more detailed discussion of the ICCPED.

14. G.A. Res. 65/196, U.N. GAOR, 65<sup>th</sup> Sess., U.N. Doc. A/RES/65/196 (Dec. 21, 2010) (creating an “International Day for the Right to the Truth Concerning Gross Human Rights Violations and the Dignity of Victims”).

15. In Mexico, for example, federal district court judges have issued resolutions ordering the Public Prosecutor to disclose files in the interest of the right to the truth in cases involving violations against migrants. Judge Fernando Silva García of Mexico found that when grave violations of human rights exist, these affect society as a whole, and therefore the principle of maximum disclosure guarantees that citizens can access information about the indirect way they are affected. See Eighth Court of the Federal District (DF), decision in case 137/2013 (Apr. 11, 2011). Another judge found that the right to information is a “human right” that supersedes “disproportional” application of exemption pertaining to legal investigations. Juicio de Amparo 1189/2013, Juzgado Sexto de Distrito en Materia Administrativa en el Distrito Federal [Sixth District Court of Administrative Matters in the Federal District], 13 de Marzo de 2014, Página 1, 57 (Mex.).

emphasized that “the right to know implies that archives must be preserved,” and that inventories must be kept, including those of “relevant archives held by third countries, who shall be expected to cooperate with a view to communicating or restituting archives for the purpose of establishing the truth.”<sup>16</sup> In 2011, an OHCHR report on the role of archives in advancing the right to the truth asserted that “[s]tates need access to archives in other countries to prosecute human rights violators,” and that third-country records must be preserved and inventoried to make them effective.<sup>17</sup> It added:

[t]he archives of regional organizations, intergovernmental bodies and third countries are important for addressing human rights violations. These archives must cooperate with victims and their families, human rights investigators and judicial authorities that request their help, and provide both information about their holdings and access to the relevant materials.<sup>18</sup>

Some official pronouncements characterize the right to the truth as both a right to seek and *receive* information. The Inter-American Commission on Human Rights (IACHR),<sup>19</sup> Inter-American Court on Human Rights (IACtHR),<sup>20</sup> and European Court of Human

16. Joint Report, *supra* note 1, princs. 13, 17. Jointet acknowledged that under prevailing law, any transfer of third-country files would require the originating state’s consent. *Id.* ¶ 25(b). In 2005, American legal scholar Diane Orentlicher updated the principles, likewise expressing an expectation that third countries will share archives in pursuit of the truth. U.N. Comm’n for Hum. Rts., *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, princ. 18(c), U.N. Doc. E/CN.4/2005/102/ADD.1 (Feb. 8, 2005) [hereinafter *Jointet-Orentlicher Principles*].

17. 2011 OHCHR Report, *supra* note 1, ¶ 11.

18. *Id.* ¶ 52.

19. *See, e.g.*, Lucio Parada Cea, Héctor Joaquín Miranda Marroquín, Fausto García Funes, Andrés Hernández Carpio, Jose Catalino Meléndez y Carlos Antonio Martínez v. El Salvador, Case 10.480, Inter-Am. Comm’n H.R., Report No. 1/99 ¶ 151 (1999) (describing the right to the truth as a “collective right which allows a society to gain access to information essential to the development of democratic systems, and also an individual right for the relatives of the victims, allowing for a form of reparation . . .”).

20. *See, e.g.*, Velasquez Rodriguez v. Honduras, 1988 Inter-Am. Ct. H.R. (ser. C) No. 4 (July 29, 1988), ¶ 181 (finding that even absent prosecution, 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”); Myrna Mack Chang v. Guatemala, 2003 Inter-Am. Ct. H.R. (ser. C) No. 101 (Nov. 25, 2003), ¶ 180 (holding “in cases of human rights violations, the State

Rights (ECtHR)<sup>21</sup> have all issued decisions to this effect. The ICCPED also emphasizes the right to seek, receive, and impart information about disappeared persons.<sup>22</sup> Indeed, the right to the truth has little practical meaning if not coupled with corresponding duties on states and other key owners of information to provide it. Without that “other half,” the right to the truth is little more than an exhortative device, protecting the right to seek information about gross human rights violations but doing little to ensure that those demands will be satisfied.

Nevertheless, the law has been slow to require states to disclose files pertaining to human rights abuses. Official human rights bodies have tended to neglect discussion of archival sharing<sup>23</sup>—likely in deference to member states’ sovereignty concerns—and have stopped well short of asserting a duty of third countries to disclose human rights records. In a 2012 resolution, the UN Human Rights Council

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authorities cannot resort to mechanisms such as official secrets or confidentiality of the information, or reasons of public interest or national security, to refuse to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or proceeding”).

21. See, e.g., *Musikhanova v. Russia*, App. No. 27243/03, ¶ 107 (Eur. Ct. H.R. Dec. 4, 2008), available at <http://bit.ly/1stokoP> (challenging Russian withholding of documents); *Israilova v. Russia*, App. No. 35079/04, ¶ 145 (Eur. Ct. H.R. Oct. 28, 2010), available at <http://bit.ly/1GKj9vc> (challenging Russia’s reliance on a provision in the domestic criminal procedure code prohibiting release of files from an active investigation).

22. ICCPED, *supra* note 13, preamble. See also Human Rights Council, *Framework Principles for securing the accountability of public officials for gross or systematic human rights violations committed in the context of States-sanctioned counter-terrorism initiatives*, ¶ 23, U.N. Doc. A/HRC/22/52 (Apr. 17, 2013) (including the assertion by Ben Emmerson, Special Rapporteur on the promotion of human rights and fundamental freedoms while countering terrorism, that: “[t]he right to truth entitles the victim, his or her relatives and the public at large to seek and obtain all relevant information concerning the commission of [an] alleged violation” in connection with an enforced disappearance).

23. See, e.g., 2006 OHCHR Report, *supra* note 10 (stressing the importance of access to archives but not discussing third-party obligations). A follow-up 2009 OHCHR study on best practices for implementing the right to the truth discussed archival practices at length and stressed the importance of non-state archives. It ignored third-country records, however, except to say that “a few [truth commissions] have been able to use declassified documents obtained from other countries that shed light on military activities.” 2009 OHCHR Report, *supra* note 10, ¶ 25.

*[e]ncourage[d]* States and international organizations to provide requesting States the necessary and appropriate assistance regarding the right to the truth by means of, among other actions, technical cooperation and exchange of information concerning administrative, legislative and judicial and non-judicial measures, as well as experiences and best practices that have as a purpose the protection, promotion and implementation of this right, including practices regarding the protection of witnesses and the preservation and management of archives . . . .<sup>24</sup>

The HRC notably did not urge third countries to provide one of the most obvious and useful forms of assistance—access to official records with information about the human rights violations in question.

Human rights laws—mainly at the regional level in Latin America and Europe—and domestic freedom of information (FOI) laws have only begun to challenge states' rights to withhold files relevant to human rights inquiries. In that sense, the legal development of the right to the truth has been highly unbalanced. The law has dealt even more gingerly with archival sharing, usually focusing only on state duties to provide information about abuses within their own borders. With rare exceptions, third-country records remain behind the sovereign wall and largely immune from disclosure requirements. The absence of norms mandating their disclosure, even in the face of credible allegations of widespread atrocities, is an important weak link in the global human rights regime.

#### A. Porous Disclosure Obligations in Mutual Legal Assistance Treaties

Many states already have legal frameworks in place for sharing their official records with other governments for the purpose of criminal cases and investigations. Bilateral mutual legal assistance treaties (MLATs) are common and outline a number of ways in which

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24. Human Rights Council Res. 21/9, U.N. Doc. A/HRC/RES/21/9, ¶ 5 (Sept. 24, 2012). Previous Human Rights Council resolutions contained similar provisions: *see* Human Rights Council Res. 12/12, U.N. Doc. A/HRC/RES/12/12, ¶ 5 (Oct. 12, 2009); Human Rights Council Res. 9/11, U.N. Doc. A/HRC/RES/9/11, ¶ 5 (Sept. 24, 2008).

third-country states can assist their partners with information and other forms of support. The United States alone has nearly sixty, as well as others under negotiation.<sup>25</sup> Such agreements typically obligate each side to produce documents in relation to legal proceedings in the partner state. For example, the U.S.-U.K. MLAT includes provisions requiring that each side shall assist the other partly by “providing documents, records, and evidence” and, more specifically, “shall provide the Requesting Party with copies of publicly available records of government departments and agencies of the Requested Party.”<sup>26</sup> Multilateral conventions on mutual legal assistance also exist in Europe and in the Inter-American System under the aegis of the Organization of American States (OAS).<sup>27</sup>

MLATs are the principal legal conduits through which states are to assist one another under multilateral treaties concerning gross human rights violations. The treaty most directly addressing third-party records is the ICCPED, which establishes some of the most specific and extensive disclosure obligations on third countries to date.<sup>28</sup> Article 14(1) of the Convention reads: “States Parties shall afford one another the greatest measure of mutual legal assistance in connection with criminal proceedings brought in respect of an offence of enforced disappearance, including the supply of all evidence at their disposal that is necessary for the proceedings.”<sup>29</sup>

Such evidence is likely to include official state records, but the obligation to share those records is subject to important qualifications. Article 14(2) provides:

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25. 2012 INCSR: *Treaties and Agreements*, U.S. Dep’t of State (Mar. 7, 2012), <http://1.usa.gov/1gL6WIo>.

26. Mutual Legal Assistance, U.S.-U.K., arts. 2(b), 9(1), Jan. 6, 1994, 96 T.I.A.S. 1202.

27. Org. of Amer. States, *Inter-American Convention on Mutual Assistance in Criminal Matters*, May 23, 1992, O.A.S.T.S. No. 75; Council of Europe, *European Convention on Mutual Assistance in Criminal Matters*, Dec. 13, 1957, C.E.T.S. No. 30.

28. As of April 2014, 93 states had signed the Convention, and 42 states had acceded to or ratified it. United Nations Treaty Collection, *International Convention for the Protection of All Persons from Enforced Disappearance*, <http://bit.ly/118yPOI> (last visited Oct. 5, 2014). Twenty-eight of the States Parties to the ICCPED are in Europe or Latin America, showing the geographic concentration of the norm. The other 14 States Parties include Armenia, Burkina Faso, Cambodia, Gabon, Iraq, Japan, Kazakhstan, Lesotho, Mali, Mauritania, Morocco, Nigeria, Samoa, Senegal, Tunisia, and Zambia. *Id.*

29. ICCPED, *supra* note 13, art. 14(1).

[s]uch mutual legal assistance shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable treaties of mutual legal assistance, including, in particular, the conditions in relation to the grounds upon which the requested State Party may refuse to grant mutual legal assistance or may make it subject to conditions.<sup>30</sup>

The Convention Against Torture presents a more general duty of third-country assistance, including the provision of evidence. Article 9(1) requires that:

States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of any of the offences referred to in article 4, including the supply of all evidence at their disposal necessary for the proceedings.<sup>31</sup>

However, the ensuing paragraph notes that states shall carry out such obligations “in conformity with any treaties on mutual judicial assistance that may exist between them.”<sup>32</sup>

MLATs consistently include important carve-outs. For example, the U.S.-U.K agreement enables either side to refuse to provide assistance if it believes giving such aid would “impair its sovereignty, security, or other essential interests or would be contrary to important public policy.”<sup>33</sup> It also provides that while a party “may provide a copy of any record or information in the possession of a government department or agency but not publicly available to the same extent and on the same conditions as to its own law enforcement or judicial authorities,” it may refuse any request for such materials “entirely or in part.”<sup>34</sup> Other MLATs provide similar exemptions and consistently leave the sharing of classified files to the

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30. *Id.* art. 14(2).

31. Convention Against Torture, art. 9(1), Dec. 10, 1984, U.N. Doc. A/RES/39/46, 1465 U.N.T.S. 85.

32. *Id.* art. 9(2). The Genocide Convention’s requirement that states take measures to prevent and punish genocide could reasonably be read to include similar obligations to assist proceedings in other states, subject to MLAT provisions. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, art. I, 102 Stat. 3045, [Statutes at Large 3045], 78 U.N.T.S. 277, [U.N.T.S. 280] (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

33. Mutual Legal Assistance, U.S.-U.K., *supra* note 26, art. 3(1)(a).

34. *Id.* art. 9(2).

discretion of the requested party, often using language nearly identical to the U.S.-U.K. example above.<sup>35</sup> Similar exemptions for national security and public order appear in the European and OAS conventions.<sup>36</sup>

Since the third-country records most likely to be relevant to gross human rights violations are security and intelligence files, state discretion to withhold any non-public files—and even public files that could jeopardize security or other national interests—renders support in this area almost entirely voluntary. Moreover, there are practical challenges, since governments or courts addressing past human rights violations often do not know what non-public documents third countries possess. Like the 1997 Joinet principles and 2005 principles updated by Diane Orentlicher, a 2009 report authored by Spanish archivist Antonio González Quintana for the International Council on Archives recommended, “[a]n inventory [should] be created of those archives available, which should include those in custody of other countries, which would co-operate by making them available or by returning them.”<sup>37</sup> The 2011 OHCHR report discusses the possibility of using groups of experts to develop inventories of relevant

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35. See, e.g., Mutual Assistance in Criminal Matters and Extradition, U.S.-Can., Mar. 18, 1985, S. Treaty Doc. No. 100-14 (allowing the requested state to deny assistance if contrary to public interest); Mutual Legal Assistance, U.S.-Fr., Dec. 12, 1998, T.I.A.S. 13010 (entered into force Dec. 1, 2001) (allowing the requested state to deny a request for information in whole or in part, based on its discretion); Treaty on Cooperation Between the United States of America and the United Mexican States for Mutual Legal Assistance, U.S.-Mex., Dec. 9, 1987, art. 3(b), S. Treaty Doc. No. 100-13 (allowing a party to deny a request if it would “prejudice its security or other essential public policy or interest”); Treaty on Mutual Legal Assistance in Criminal Matters between the United Kingdom of Great Britain and Northern Ireland and the Hashemite Kingdom of Jordan, Mar. 24, 2013, arts. 3(1), 20, Cm. 8612 (allowing refusal of assistance if it would prejudice an essential interest); Treaty between Australia and the Republic of India on Mutual Legal Assistance in Criminal Matters, June 23, 2008, arts. 5(3)(c), 17 (allowing assistance to be refused if it would impair requested state’s essential public interest); Agreement between the Government of the Hong Kong Special Administrative Region of the People’s Republic of China and the Government of the Republic of Korea Concerning Mutual Legal Assistance in Criminal Matters, Feb. 25, 2000, arts. 4(1)(a), 12 (allowing refusal of assistance if it would impair sovereignty, security, or public order).

36. European Convention on Mutual Assistance in Criminal Matters, *opened for signature* Apr. 20, 1959 (entered into force June 12, 1962), art. 2(b); Inter-American Convention on Mutual Assistance in Criminal Matters, *opened for signature* May 23, 1992 (entered into force Apr. 14, 1996), art. 9(e).

37. González Quintana, *supra* note 3, at 29.

archives,<sup>38</sup> but the idea of international inventories of records and archives relevant to specific gross human rights violations remains decidedly aspirational.<sup>39</sup>

In some cases, third-country officials have acknowledged the importance and human rights value of information within their files and disclosed this information with the intent of assisting accountability and historical clarification efforts in other states. However, they have been loath to concede that their disclosure of human rights files is a matter of legal duty, and this absence of expressed *opinio juris* undermines the development of a customary norm of archival sharing at international law. MLATs thus remain limited vehicles for ensuring third-country disclosure of human rights records.

A key case occurred in 1997, when Spanish authorities invoked the provisions of their MLAT with the United States to request that a reluctant Clinton administration share U.S. government records on torture, targeted killings, enforced disappearances, and other human rights abuses in Chile and Argentina during the era of military dictatorships.<sup>40</sup> U.S. files contained extensive information on “Operation Condor,” a campaign of political repression involving secret cooperation between the security and intelligence agencies in the Southern Cone to undertake kidnappings and targeted killings of their regimes’ political opponents around the world from 1975 until the early 1980s.<sup>41</sup>

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38. 2011 OHCHR Report, *supra* note 1, ¶ 12.

39. There have been important advances in the last decade in the organization of large collections of human rights archives, according to international archiving guidelines and standards. For example, the Historical Archive of the National Police (AHPN) in Guatemala has engaged in a massive effort to digitize over 10 million state records and apply archiving standards to preserve them for researchers and citizens for use in ongoing work to uncover the violence of the past. *See generally* Kirsten Weld, *Paper Cadavers: The Archives of Dictatorship in Guatemala* (2014) (providing a detailed account on how the archival process has helped ensure investigators can locate evidence to support criminal prosecutions of perpetrators of acts of kidnappings and disappearances carried out decades ago).

40. Peter Kornbluh, *The Pinochet File: A Declassified Dossier on Atrocity and Accountability* 469–71 (2003).

41. Secret archives from U.S. agencies, later declassified and made public, reveal the close relationship between the United States to the Latin American intelligence agencies responsible for the Operation Condor assassinations and other systematic human rights violations. *See generally* John Dinges, *The Condor*

The U.S. government resisted the Spanish requests, largely because it objected to efforts by Spanish judges to indict retired foreign officials—including former Chilean President Augusto Pinochet—pursuant to the principle of universal jurisdiction. U.S. intelligence agencies were also reluctant to declassify files that would reveal further details about the role of the Central Intelligence Agency (CIA) in the September 11, 1973 coup that ousted elected Chilean president Salvador Allende and brought Pinochet to power, as well as subsequent U.S. support for the Pinochet dictatorship and sensitive intelligence-gathering methods and operational procedures.<sup>42</sup>

In October 1998, Pinochet was detained in London in response to an international arrest warrant issued by Spain's National Court (*Audiencia Nacional*), increasing pressure for the U.S. government to respond with files that could be helpful to the case. Specifically, the Spanish MLAT requests asked for files on Operation Condor, including acts of international terrorism such as the September 1976 car bombing that killed Chilean opposition figure Orlando Letelier and his colleague Ronni Moffitt as they rounded Sheridan Circle in Washington, DC.<sup>43</sup> The U.S. government did not respond for more than a year. When it did, it sent only a box of

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Years: How Pinochet and His Allies Brought Terrorism to Three Continents (2004) (describing the CIA's involvement in Operation Condor).

42. Human Rights Watch, Chile: When Tyrants Tremble § 5 (1999), available at <http://bit.ly/1fb6Ltv>. Chief legal counsel to the U.S. National Security Council (NSC) Jamie Baker reportedly sought to “do as little as possible as slowly as possible” to declassify documents under the MLAT, while Clinton's NSC advisor on Latin America James Dobbins reportedly justified non-disclosure to avoid “upset[ting] Chilean democracy.” Peter Kornbluh, *Prisoner Pinochet: The Dictator and the Quest for Justice*, *The Nation*, Dec. 21, 1998. NSC and State Department officials in the democracy and human rights offices favored disclosure. *Id.*

43. Orlando Letelier served as Secretary of Defense and as a diplomat during the presidency of Salvador Allende. After the 1973 coup, he was imprisoned. International pressure prompted his release, and he became a leading opponent in exile of the Pinochet dictatorship. He was in Washington, DC bringing attention to Chile's human rights violations when he and his colleague, 25-year-old American Ronni Moffitt, were killed by a car bomb on Massachusetts Avenue as they drove to work. The head of Pinochet's intelligence directorate Manuel Contreras was later convicted for orchestrating the assassination. See Dinges, *supra* note 41, at 7, 175–79, 191–98, 242; see generally John Dinges & Saul Landau, *Assassination on Embassy Row* (1980) (describing the events of Letelier's life and his assassination).

unsolicited Chilean newspaper clippings, a box of files describing an operation by Nicaraguan Contras in Honduras called “Condor” unrelated to Operation Condor in South America, and two boxes of files on the prosecution of anti-Castro Cubans involved in the Letelier assassination.<sup>44</sup> The U.S. response to the MLAT request was thus unhelpful to the Pinochet prosecution in Spain. With little recourse under its MLAT, Spanish authorities had to rely on other sources of information that lacked important details available in U.S. records.<sup>45</sup>

Information in U.S. files became available only after the Clinton administration responded to international pressure and civil society demands by launching a voluntary “Chile Declassification Project” in 1999. That project required the State Department, CIA, Pentagon, and Federal Bureau of Investigation (FBI) to release files related to human rights abuses, terrorism, and other political violence before and during the Pinochet years in Chile.<sup>46</sup> That initiative, undertaken outside of the MLAT scheme, demonstrated the importance of developing norms that encourage voluntary third-country disclosure in support of transitional justice efforts even where MLAT obligations and other legal duties are porous.

## B. Broad Exemptions in Domestic Freedom of Information Laws

Partly due to the difficulty of using MLATs to secure the transfer of human rights records from one state to another, civil society actors have often used a less direct legal route to achieve

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44. Kornbluh, *The Pinochet File*, *supra* note 40, at 469–70. One U.S. official reported that Secretary of State Madeleine Albright and National Security Advisor Sandy Berger decided to “declassify what we can so that we can say we did our share.” Kornbluh, *Prisoner Pinochet*, *supra* note 42. State Department spokesman Jamie Rubin announced that the U.S. government would “make public as much information as possible, consistent with U.S. laws and the national security and law enforcement interests of the United States.” Kornbluh, *The Pinochet File*, *supra* note 40, at 471.

45. Other key sources of information used included the findings of the 1991 Rettig Report, commissioned by Chilean President Patricio Aylwin to detail crimes of the Pinochet regime, and the Paraguayan “Archives of Terror” (*Archivo del Terror*), which include Paraguayan documents detailing cooperation among South American intelligence agencies during Operation Condor. Richard J. Wilson, *Prosecuting Pinochet: International Crimes in Spanish Domestic Law*, 21 *Hum. Rts. Q.* 927, 965–75 (1999).

46. See Press Release, U.S. Dep’t of State, Chile Declassification Project (June 30, 1999), <http://1.usa.gov/1idx3uO>. See *infra* Part II.A.3 for further discussion of this groundbreaking voluntary declassification project.

similar results: securing the release of files from their home governments under domestic freedom of information (FOI) laws and making them available to rights groups, lawyers, judges, and investigators working to bring cases in courts in other countries. This strategy offers an important parallel legal channel to access information and is responsible for much of the archival sharing to date. Domestic FOI regimes thus constitute a key aspect of the international human rights regime as it relates to third-country disclosure of relevant records for human rights cases and investigations in other states.

### 1. Human Rights Overrides

By September 2013, some 95 countries had passed and implemented national-level right to information laws or regulations.<sup>47</sup> Many of the states that have such laws—such as Bangladesh, Bosnia and Herzegovina, Chile, China, Rwanda, Serbia, Uganda, and Zimbabwe—have endured periods of gross human rights violations in the past and likely have considerable information about those abuses in their files.<sup>48</sup> Others such as France, the United Kingdom, and the United States have long histories of robust intelligence and security activity abroad and are likely to hold extensive information about violations in other states, as well as their own.

Domestic FOI laws include many of the same exemptions that MLATs do—such as exemptions to protect privacy, national security, law enforcement, and public order<sup>49</sup>—which weakens them greatly as

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47. *Access to Information Laws: Overview*, Right2Info.org (Jan. 20, 2012, 01:30 PM) <http://bit.ly/1byKbT1>.

48. For example, Rwanda became the most recent country to pass a freedom of information law in 2013. *See* Law Relating to Access to Information (Rwanda), No. 04/2013 (Feb. 8, 2013), *in* Official Gazette no. 10 (Mar. 11, 2013). States with FOI laws include 38 in Europe, 22 in the Western Hemisphere, 20 in Asia and Oceania, 10 in Africa, and 4 in the Middle East. *See* Roger Vleugels, *Overview of all FOI laws*, Fringe Special, at Table A1.2 (2012), *available at* <http://bit.ly/19Hx6XS>.

49. David Banisar, *Freedom of Information Around the World 2006 22* (2006), *available at* <http://bit.ly/10SoGyP>. For example, the U.S. FOIA exempts nine types of materials: documents classified for national security purposes, internal agency personnel rules or practices, materials exempted by statute, trade secrets and privileged or confidential commercial or financial information, personnel and medical files that would compromise privacy interests, certain investigatory records, certain financial regulatory or supervisory reports, and

vehicles for accessing the truth about past atrocities. However, some FOI laws do provide explicit overrides for documents with information on gross human rights abuses. Mexico's federal law on access to information, passed in June 2002,<sup>50</sup> prohibits the retention of documents describing "grave violations" of human rights and asserts that "[i]nformation may not be classified when the investigation of grave violations of fundamental rights or crimes against humanity is at stake."<sup>51</sup> Archivist and disclosure advocate Antonio González Quintana cites the Mexican law as a model for legislation aimed at the right to the truth,<sup>52</sup> urging states to "make laws which would impede the protection of information about violations of human rights, under the banner of official secrecy."<sup>53</sup>

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certain data on oil and gas wells. Freedom of Information Act, 5 U.S.C. § 552 (amended 1996, 2002, 2007, 2009), § 552(b)(1)–(9) [hereinafter FOIA].

50. The strength of Mexico's federal transparency law reflects the work of a civil society coalition of reporters and editors, academics, lawyers, and public interest organizations known as *Grupo Oaxaca*, which launched a campaign for the right to the truth after Fox's election in 2000. As the FOI law was passed, Fox also issued an executive order for the secretariats of the interior and defense to turn over tens of thousands of formerly secret records about state-sponsored abuses carried out during the country's "dirty war" of the 1960s–80s. See Kate Doyle, "Forgetting is Not Justice": Mexico Bares Its Secret Past, *World Pol'y J.*, Summer 2003, at 61–62, 65–66.

51. Ley Federal de Transparencia y Acceso a la Información Pública Gubernamental [Federal Transparency and Access to Public Governmental Information Law], art. 14, Diario Oficial de la Federación [DO], 11 de junio de 2002 (Mex.). The clause in article 14 which prohibits the withholding of documents with information on "grave violations" of human rights has been cited in several subsequent cases, including successful appeals for access to investigative files of the Attorney General relating to state-sponsored abuses during Mexico's "dirty war." Jesse Franzblau, *Mexico selection of new IFAI important for migrant rights*, Freedominfo.org (Apr. 7, 2014), <http://bit.ly/Os96Ua>. See generally Kate Doyle, *Mexico's New Freedom of Information Law*, Nat'l Sec. Archive Elec. Briefing Book No. 68 (June 10, 2002), <http://bit.ly/1swW0CX> (providing background on the history of the passage and implementation of Mexico's transparency law); *RTI Case Law*, Right2Info.org, <http://bit.ly/1gUi3gW> (last visited Nov. 10, 2014) (providing a summary of relevant right to information cases in Mexico and elsewhere).

52. González Quintana, *supra* note 3, at 36. Mexico also created an independent oversight body to monitor implementation, enforce agency compliance, and rule on disputes when agencies deny information to petitioners. John M. Ackerman, *Mexico's Freedom of Information Law in International Perspective*, in *Mexico's Right-to-Know Reforms* 314, 314–19 (Jonathan Fox et al. eds., 2007).

53. González Quintana, *supra* note 3, at 88.

Several other Latin American states have followed, notably countries with historical concerns over the abusive use of national security justifications to keep information secret and cover up grave violations. Peru's 2002 FOI law includes a provision that "any information related to human rights violations or the Geneva Convention of 1949 under any circumstance, by any person, should not be considered classified information."<sup>54</sup> Guatemala's 2008 Law on Free Access to Public Information similarly declares that: "[i]n no case, can information related to human rights violations or crimes against humanity be classified as confidential or reserved."<sup>55</sup> Uruguay passed a law in 2009 requiring the mandatory release of documents pertaining to past human rights abuses,<sup>56</sup> and Brazil followed in 2011.<sup>57</sup> In 2012, the OAS adopted a Model Inter-American Law on Access to Public Information that would likewise bar exemptions "in cases of serious violations of human rights or crimes against humanity."<sup>58</sup> The plain meaning of the language in progressive Latin American FOI laws suggests that their human rights provisions apply to gross human rights violations inside and outside of the country, though neither case law nor explicit executive rulings have clarified their precise scope.

Although the trend toward requiring disclosure of human rights files is significant, real challenges exist to the implementation of these laws, such as resistance and capacity shortfalls in the key security agencies and weak enforcement mechanisms for

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54. Ley No. 27806, Ley de Transparencia y Acceso a la Información Pública [Law No. 27806, Law of Transparency and Access to Public Information], art. 15, 2002 (Peru).

55. Decreto No. 57-2008, Ley de Acceso a la Información Pública [Decree No. 57-2008, Law on Access to Public Information], art. 24, 23 de septiembre de 2008 (Guatemala).

56. Ley No. 18.381, Derecho de Acceso a la Información Pública [Law No. 18.381, Law on Access to Public Information], 17 de octubre de 2008 (Uruguay). The Uruguayan National Archives are subject to the law. *Id.* art. 6.

57. Lei No. 12.527, de 18 de Novembro de 2011, Diário Oficial da União [D.O.U] de 18.11.2011 (Braz.).

58. Org. of Amer. States, Model Inter-American Law on Access to Public Information, AG/Res. 2607 (XL-O/10), June 8, 2010, ¶¶ 44–45; *see also* Inter-American Judicial Committee, Principles on the Right of Access to Information, CJI/Res. 147 (LXXIII-o/08), Aug. 7, 2008 (laying out principles on the right of access to information and asserting that exceptions should be "clear and narrow" and provide for appeal to a court of law).

noncompliance.<sup>59</sup> Moreover, the governments with the greatest potential contributions to human rights inquiries and prosecutions outside their borders—such as the permanent five members of the UN Security Council—have not adopted laws requiring disclosure of human rights information. U.S. Executive Order 13526, which governs the classification and declassification of Federal agency records, comes closest. It bars the use of classification to “conceal violations of law, inefficiency, or administrative error” or protect officials or agencies from embarrassment.<sup>60</sup> This provision could apply to non-disclosure of some human rights files. Defense and State Department regulations pursuant to the U.S. Freedom of Information Act (FOIA) also include provisions that can be used to request expedited processing of files germane to human rights proceedings.<sup>61</sup>

To a significant degree, the wave of FOI laws passed in the 1990s has been offset by a counter-current of new secrecy laws and practices. In Central and Eastern Europe, several post-communist governments opened the files of their predecessors and enacted FOI

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59. For example, since Mexico’s 2002 FOI law took effect, agencies have at times defied the rulings of the information oversight body, and in some cases have refused to locate or disclose material with human rights value. See Emilene Martínez Morales, *Transparency Advances in Mexico . . . in Reverse*, FreedomInfo.org (Feb. 5, 2010), <http://bit.ly/1faMnZA>; Doyle, *supra* note 50, at 71–72; see also Anupama Dokeniya, *Implementing Right to Information: Lessons from Experience 18–29* (2013), available at <http://bit.ly/1oDNfdN> (describing how in some countries, progressive FOI laws do not provide for strong oversight); Toby Mendel, *The Right to Information in Latin America: A Comparative Legal Survey 167–70, 175–76* (2009), available at <http://bit.ly/1ugsGET> (describing how underfunding and lack of political will and enforcement have been pervasive challenges to making FOI laws effective).

60. Exec. Order 13526, Dec. 29, 2009, 75 Fed. Reg. 707, 710–11 (Dec. 29, 2009); see also *Classified Information and Controlled Unclassified Information: Memorandum for the Heads of Executive Departments and Agencies*, 74 Fed. Reg. 26277, 26277 (May 27, 2009) (asserting that “democratic government accountable to the people must be as transparent as possible and must not withhold information for self-serving reasons or simply to avoid embarrassment”).

61. Defense and State Department regulations pursuant to the FOIA allow expedited processing of requests on humanitarian grounds or to avoid jeopardizing the due process rights of the requester. 32 C.F.R. § 286.4(d)(3)(iv) (1998) (including a Defense Department regulation that “an imminent loss of substantial due process rights and humanitarian need” merit expedited processing); 22 C.F.R. § 171.12(b)(1) (2004) (including a State Department regulation allowing expedited processing if “[f]ailure to obtain requested information on an expedited basis could reasonably be expected to . . . impair substantial due process rights; or harm substantial humanitarian interests”).

laws only to promulgate new secrecy laws to protect their own classified files a few years later.<sup>62</sup> Secrecy laws generally bar the release of sensitive security information, such as intelligence sources and methods, and the relationship between secrecy legislation and FOI laws is often unclear.<sup>63</sup> FOI laws generally do not include provisions indicating that they override secrecy laws,<sup>64</sup> and some such laws—including the laws in relatively liberal states such as Belgium and Spain—deny the public a right to any classified information.<sup>65</sup>

Even democratic governments have reduced access to documents in recent years, particularly amid the post-9/11 campaign against terrorism.<sup>66</sup> The George W. Bush administration presided over expanded use of state secrecy claims to bar access to classified documents in legal proceedings.<sup>67</sup> The Obama administration has been criticized widely for failing to fulfill pledges to strengthen the FOIA and improve on the dismal transparency of the Bush years, and for responding to the Wikileaks and Edward Snowden affairs with increased secrecy and an unprecedented campaign against whistleblowers and journalists who report on national security matters.<sup>68</sup> Japan's passage of a new secrecy law in 2013, which won

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62. Alasdair Roberts, *Transparency in the Security Sector*, in *The Right to Know: Transparency for an Open World* 309, 310–13 (Ann Florini ed., 2007).

63. Dokeniya, *supra* note 59, at 26, 46.

64. One exception is India's law. *See* Right to Information Act, No. 22 of 2005, § 22, India Code (2005) *as modified* Feb. 1, 2011 [hereinafter Indian Right to Information Act] (overriding antecedent secrecy laws, such as the 1923 Official Secrets Act).

65. *See id.* § 8.

66. *See, e.g.*, Alasdair Roberts, *Blacked Out: Government Secrecy in the Information Age* 34–38 (2006) (examining the rise in state secrecy in relation to enhanced U.S. security concerns); Timothy L. Ericson, *Building Our Own "Iron Curtain": The Emergence of Secrecy in American Government*, 68 *Am. Archivist* 18, 45–47 (2005) (arguing that the U.S. government has constructed a bloated "secrecy machine . . . as often misused as it is employed to protect national security or the national interest"); Meredith Fuchs, *Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy*, 58 *Admin. L. Rev.* 131, 133–36 (2006) (discussing the dramatic increase in government secrecy, including the multiplication of security classifications of information since September 11, 2001).

67. *See* William G. Weaver & Robert M. Pallitto, *State Secrets and Executive Power*, 120 *Pol. Sci. Q.* 85, 85, 90–92, 106–12 (2005) (analyzing several legal cases involving the withholding of information based on the state secrets privilege).

68. *See, e.g.*, Leonard Downie Jr., *The Obama Administration and the Press*, *Comm. to Protect Journalists* (Oct. 10, 2013), <http://bit.ly/1dZ4w5P>

praise from U.S. officials in the wake of the WikiLeaks and Snowden affairs, was another significant step away from transparency in many major states.<sup>69</sup>

Moreover, there is a constant threat that changing administrations or security environments can impair efforts to access records with human rights value. Latin America, which has some of the most progressive freedom of information provisions, has experienced several attempts to roll back access to government documents. In Peru, President Ollantá Humala issued an executive decree in December 2012 that includes a sweeping secrecy provision in the areas of security and national defense.<sup>70</sup> In June 2012, Colombia's legislature approved a draft right to information law that would have excluded from its scope information related to defense and national security, public order, and international relations before the Constitutional Court struck some of the law down the following year for exempting broad categories of information, without stating specification and reasoning behind the withholding.<sup>71</sup> Honduras passed a law on secret information in January 2014, contravening principles of the country's transparency law and severely limiting

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(including reports by journalists and transparency advocates on how aggressive prosecution of leakers of classified information and broad electronic surveillance programs deter government sources from speaking to journalists); James Ball, *Obama Administration Struggles to Live up to Its Transparency Promise, Post Analysis Shows*, Wash. Post, Aug. 3, 2012 (finding that media organizations and individuals requesting information under the FOIA in 2011 were less likely to receive the material than in 2010 at 10 of the 15 Cabinet-level departments).

69. Lucy Craft, *Japan's State Secrets Law: Hailed by U.S., Denounced by Japanese*, NPR, Dec. 31, 2013, <http://n.pr/1swWpoJ>.

70. Decreto Legislativo que regula el Sistema de Defensa Nacional [Legislative Decree No. 1129], published Dec. 7, 2012. Peru's national ombudsman office has a pending challenge to this measure before the Constitutional Court. See Emi MacLean, *Case Watch: Colombia Says No to Blanket Limits on the Right to Information*, Open Society Foundations (Jan. 27, 2014), <http://osf.to/MUxjU>.

71. Corte Constitucional [C.C.] [Constitutional Court], enero 21, 2014, Sentencia C-247/13, Derecho de Acceso a la Informacion Publica (Colom.); see also MacLean, *supra* note 70 (explaining the decision of Colombia's Constitutional Court to strike down certain provisions of the country's proposed right to information law); Brief for the Open Society Justice Initiative as Amicus Curiae, *Intervention Concerning the Constitutional Review of Colombia's Proposed Transparency and Access to Information Law*, Constitutional Court of Colombia (Dec. 2012), available at <http://osf.to/1f7Fatt> (arguing that the absolute exclusion of information related to defense and national security, public order, and international relations in the scope of Colombia's draft transparency law was inconsistent with Colombia's international human rights treaty obligations).

freedom of expression.<sup>72</sup> After the Honduran Congress suspended the law briefly for review following a campaign of criticism from transparency proponents internally and internationally,<sup>73</sup> the law was published and went into effect in March 2014.<sup>74</sup> Upholding access to human rights files requires regular monitoring and reporting, awareness campaigns, and, importantly, the capacity to challenge secrecy measures in court.

## 2. Balancing Tests

Many FOI laws include explicit “public interest tests” requiring or permitting government officials to disclose information that would otherwise be exempt if the public interest in disclosure outweighs the harm to protected interests.<sup>75</sup> For example, U.S. Executive Order 13526 sets forth that in some cases: “the need to protect . . . information [that meets the normal standards for classification] may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified.”<sup>76</sup> Although FOI laws generally do not define the “public interest” in disclosure,<sup>77</sup> official guidelines, regulations, and court judgments consistently have considered it to include transparency

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72. *Secrecy Law Deals Major Blow to Public’s Right to Be Informed*, Reporters Without Borders, Jan. 16, 2014, <http://bit.ly/1dyOKDK>.

73. Inter-American Press Association, *Following criticism, Honduras suspends new secrecy law* (Jan. 21, 2014), available at <http://bit.ly/1uUZcya>.

74. Ley para la Clasificación de Documentos Públicos Relacionados con la Seguridad y la Defensa Nacional [Act for the Classification of Public Documents Related to National Security and Defense] (Honduras), Decreto No. 418-2013 [Legislative Decree No. 418-2013] (Honduras); Thelma Mejía, *Ley de secretos hondureña potencia corrupción y limita a la prensa*, Honduprensa (July 10, 2014), <http://bit.ly/1yrDZJJ>.

75. See, e.g., Right to Information Act, *supra* note 64, § 8(2) (noting that notwithstanding the law’s exemptions, “a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests”).

76. Exec. Order No. 13526, Dec. 29, 2009, 75 Fed. Reg. 707 (Jan. 5, 2010), § 3.1(d).

77. Maeve McDonagh, *The Public Interest Test in FOI Legislation* 8, 11 (June 2012) (unpublished paper presented at the Transatlantic Conference on Transparency Research, Utrecht University, Netherlands) available at <http://bit.ly/1tzV1RN>.

and accountability, public awareness and participation in key policy debates, and exposure of wrongdoing.<sup>78</sup>

By these standards, the disclosure of possible human rights abuses clearly qualifies as a compelling “public interest.” Nevertheless, most FOI regimes leave ample room for authorities to resist disclosure.<sup>79</sup> Some FOI laws exclude documents classified on national security grounds from the public interest test—precisely the documents that tend to be of greatest concern to human rights victims.<sup>80</sup> Others, such as the Israeli FOI law, exclude security services altogether.<sup>81</sup> Moreover, concepts such as “national security” and “public order” are also ill-defined in most FOI laws, leaving much to the discretion of state officials with privileged access to information about what the records contain.<sup>82</sup> Domestic courts typically provide executive officials with considerable scope for interpretation.<sup>83</sup>

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78. Megan Carter & Andrew Bouris, *Freedom of Information: Balancing the Public Interest* 8–14 (2006); Marcus Turle, *Freedom of Information Manual* 377–87 (2005).

79. For example, Zimbabwe’s FOI law legalized new classification practices but led to few disclosures. Dylan Bushell-Embling, *FOI—The International Situation*, 78 *Australia Q.* 30, 31 (2006).

80. Freedom of Information Act 2000, c.36, (U.K.), §2(2) (distinguishing between “absolute” and “qualified” exemptions, subjecting only the latter to a public interest test).

81. Freedom of Information Law, 5758-1998, SH No. 1667 §14(a) (Isr.) (exempting security services).

82. For example, China adopted its first ever “Open Government Information” regulations in 2007, pledging to promote disclosure but exempting information containing “state secrets”—a term defined in a 1988 Chinese law as “matters that affect the security and interests of the state,” including among other things “economic and social development,” diplomatic and defense matters, and “important policy decisions on state affairs.” Jamie P. Horsley, *China Adopts First Nationwide Open Government Information Regulations* (May 9, 2007), at 4, available at <http://bit.ly/ROQksF>.

83. This is true even in liberal democratic states. For example, U.S. courts generally have shown significant deference to the Executive’s interpretation of what documents should be exempted from FOIA requests based on national security. See David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 *Yale L.J.* 628, 645–63 (2005) (arguing that the “mosaic theory,” which allows non-disclosure of individually harmless documents that could reveal important national security information if assembled with other files, significantly increased the Executive’s ability to prevent disclosure of documents after 9/11); Christina E. Wells, “*National Security*” *Information and the Freedom of Information Act*, 56 *Admin. L. Rev.* 1195, 1195–1217 (2004) (examining the national security exemption to the Freedom of Information Act and noting judicial deference to Executive decisions claiming the exemption);

### 3. Civil Society FOI Requests

In many cases, right to information advocacy organizations and research institutes have used the FOIA to gain access to U.S. files and have made the records available directly to the human rights groups seeking the information in support of their cases in domestic or international tribunals. One key advantage of this indirect approach relates to capacity. NGOs such as the National Security Archive, located at The George Washington University in Washington, D.C., have specialized expertise in how official files are organized, what relevant laws apply, and what procedures to use to pursue information effectively.<sup>84</sup>

Still, absent explicit provisions establishing a human rights trump card to disclosure exemptions, civil society actors are highly constrained in their ability to access files withheld on national security grounds. Intelligence and security agencies in particular often cite national security concerns to withhold the release of documents with important human rights information, arguing that the disclosure of such records will reveal intelligence-gathering methods and expose sensitive information. The CIA, for example, has a special exemption for “operational files”—records considered sensitive as they relate to clandestine activities, technical foreign intelligence gathering, and recruitment of foreign sources—which can only be released by executive order.<sup>85</sup> These exemptions are widely cited even decades after such files are produced and cover many of the most important files for human rights purposes.<sup>86</sup> The obstacles to disclosure are even more formidable in other national systems, where agencies’ unwillingness to release files and judicial loathness to

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Robert P. Deyling, *Judicial Deference and De Novo Review in Litigation over National Security Information under the Freedom of Information Act*, 37 Vill. L. Rev. 67 (1992) (examining hundreds of cases between 1974 and 1992 and showing that courts affirmed executive decisions to withhold information in nearly every instance).

84. The National Security Archive is an independent non-governmental research institute and library that collects and publishes declassified documents acquired through the FOIA. Nat’l Sec. Archive, *About the National Security Archive: 25 Years of Opening Governments at Home and Abroad*, <http://bit.ly/QIvXfL> (last visited Nov. 10, 2014).

85. 50 U.S.C. § 3141 (2012).

86. See, e.g., Peter Kornbluh, *CIA Withholds its Chile Files*, Baltimore Sun, Aug. 27, 2000, available at <http://bit.ly/1jmu9qf> (discussing the CIA’s refusal to declassify “operational files” relating to its operations in Chile in the 1970s).

challenge executive security pronouncements are compounded by a weaker infrastructure for processing requests.<sup>87</sup>

In some states, public access to human rights files is often limited to leaks because the state lacks a progressive FOI regime, the political will to disclose information, bureaucratic capacity, or all of these factors. One example is the infamous video taken by a Serbian Special Forces unit called the “Scorpions.” It shows Scorpion members carrying out extralegal executions during the Srebrenica massacre in Bosnia, where more than 7,500 Bosnian Muslim men and boys were killed.<sup>88</sup> Nataša Kandić, founder of the Belgrade-based Humanitarian Law Center, obtained the video and gave copies to the ICTY and Serbian War Crimes Chambers, providing crucial evidence of Serbian responsibility for the massacre.<sup>89</sup> Guatemalan human rights lawyers and family members of victims have had to rely on leaked records for information regarding past atrocities. These include military plans with information on a 1982 campaign of targeted massacres<sup>90</sup> and military intelligence logbooks on enforced disappearances from 1983 to 1985.<sup>91</sup> U.S. war log records emanating from Chelsea Manning’s leaked documents include secret reports of detainee abuse and incidents of torture, rape, and murder in Iraq.<sup>92</sup> Such leaks are rare,

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87. See Roberts, *supra* note 66, at 116–19; *Results of the Open Society Justice Initiative Access to Information Monitoring Tool*, Open Society Foundations (Sept. 28, 2004), <http://osf.to/QBx4Oy> (finding that 36% of FOI requests sent to various agencies in Armenia, Bulgaria, Macedonia, Peru, and South Africa were simply ignored, partly due to capacity issues).

88. Tim Judah & Daniel Sunter, *How video that put Serbia in dock was brought to light*, *Guardian*, June 4, 2005, available at <http://bit.ly/1zfK78Z>.

89. Press Release, Humanitarian Law Ctr., *Origin of Video Footage of Execution of Six Bosniaks from Srebrenica* (Dec. 18, 2007), available at <http://bit.ly/1mE9D1S>; Nataša Kandić, *Transitional Justice in Post-Conflict Societies of Former Yugoslavia*, Speech given at the University of Michigan, Ann Arbor (Jan. 22, 2007); Sharon Weill, *The Role of National Courts in Applying International Humanitarian Law* 55–60 (2014).

90. These files include Victoria 82, Firmeza 83 Military Plans, and Sofia Operational Plan. See Open Society Foundations, *Judging a Dictator: The Trial of Guatemala’s Ríos Montt* 22, Nov. 2013, available at <http://osf.to/JCmLpv>.

91. For more information on the case of the Guatemalan *Diario Militar*, see *Litigation: Diario Militar Case* (Aug. 27, 2012), <http://osf.to/1rpxMeO>; José Miguel Gudiel Álvarez y otros (“*Diario Militar*”) v. Guatemala, Case 12.590, Inter-Am. Comm’n H.R., Report No. 116/10 (Oct. 22, 2010) [hereinafter *Diario Militar* report], <http://bit.ly/1pK5Ndh>.

92. See Nick Davies et al., *Iraq war logs: secret files show how US ignored torture*, *Guardian*, Oct. 22, 2010, <http://bit.ly/1yrEl2Z>.

however, and certainly do not offer a reliable mechanism for gaining civil society access to official state records.<sup>93</sup>

### C. Embryonic Disclosure Duties under International Human Rights Law

Alongside FOI laws, international human rights law has developed a qualified right of citizens' access to information. Both the Universal Declaration on Human Rights (UDHR) and International Covenant on Civil and Political Rights (ICCPR) assert that the right to expression includes freedom "to seek, receive and impart information and ideas . . . ."<sup>94</sup> Similar language appears in the American Convention on Human Rights and European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>95</sup> These treaties do not extend the right of access to information to foreign states or individuals; each state party to the ICCPR undertook only to respect the rights enumerated in the Covenant for "all individuals in its territory and subject to its jurisdiction,"<sup>96</sup> and similar provisions apply in the American and European Conventions on Human Rights.<sup>97</sup> Nevertheless, civil society groups can use these rights to press for information and share it across borders.

In recent years, several key decisions in the IACtHR and ECtHR have begun to read these provisions to encompass a right to

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93. Leaked documents also are much more susceptible to challenges in courts, as opposed to officially released files with clearly defined provenance. *See infra* § II for more on use and challenges of official government records used as evidence in court cases.

94. Universal Declaration on Human Rights, G.A. Res. 217A (III), art. 19, U.N. GAOR, 3d Sess., U.N. Doc A/810 at 75 (Dec. 10, 1948) [hereinafter UDHR]; International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 19(2), 999 U.N.T.S. 171, 178 (entered into force Mar. 23, 1976) [hereinafter ICCPR].

95. *See* American Convention on Human Rights, *opened for signature* Nov. 22, 1969, art. 13(1), O.A.S.T.S. No. 36, 1144 U.N.T.S. 143, 148–49 (entered into force July 18, 1978) [hereinafter American Convention]; [European] Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 10(1), Europ. T.S. No. 5, 213 U.N.T.S. 221 (entered into force Sept. 3, 1953) [hereinafter European Convention].

96. ICCPR, *supra* note 94, art. 2(1).

97. American Convention, *supra* note 95, art. 1(1); European Convention, *supra* note 95, art. 1.

access official state records.<sup>98</sup> The IACtHR and ECtHR have both acknowledged that important disclosure exemptions are also written into the major human rights instruments, including the ICCPR,<sup>99</sup> European Convention,<sup>100</sup> and American Convention.<sup>101</sup> Nevertheless, the IACtHR issued a pivotal decision in December 2010 in the case of *Gomes Lund v. Brazil*, ruling that Brazilian authorities had to provide all relevant public records to the families of left-wing militants disappeared by security forces during the 1970s.<sup>102</sup> The Court asserted 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” and that non-disclosure decisions must never depend only on the government agency whose members are implicated in the crime.<sup>103</sup> The *Gomes Lund* decision factored into discussions leading to a new Brazilian

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98. *Társaság a Szabadságjogkért v. Hungary*, Application No. 37374/05, Judgment, Eur. Ct. H.R. (Apr. 14, 2009) (holding that government refusal to give a civil liberties NGO a parliamentary document on controversial drug laws violated the European Convention); *Kenedi v. Hungary*, Application No. 31475/05, Judgment, Eur. Ct. H.R. (May 26, 2009) (holding that Hungary violated the right to information when denying a researcher access to official documents pertaining to state security services in the 1960s); *Claude-Reyes et al. v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 151 (Sept. 19, 2006), ¶¶ 76–77 (ruling, in a case on NGO access to official environmental impact assessments on a controversial logging project, that the American Convention “protects the right of the individual to receive [State-held] information and the positive obligation of the State to provide it” and a “justification when, for any reason permitted by the Convention, the State is allowed to restrict access to the information in a specific case”); *Toktakunov v. Kyrgyzstan*, Merits, U.N. Human Rights Comm., No. 1470/2006 at 9, U.N. Doc. CCPR/C/101/D/1470/2006 (Mar. 28, 2011) (in which the U.N. Human Rights Committee concluded that article 19(2) of the ICCPR encompasses the “right of access to State-held information”).

99. See ICCPR, *supra* note 94, art. 19(3) (noting that the freedom of expression may be subject to “certain restrictions” provided by law and necessary “(a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order (*ordre public*), or of public health or morals”).

100. See European Convention, *supra* note 95, art. 10(2).

101. See American Convention, *supra* note 95, art. 13(2).

102. *Gomes Lund et al. v. Brazil*, Preliminary Objections, Merits, Reparations, and Costs, Inter-Am. Ct. H.R. (ser. C.) No. 219, ¶¶ 1–2 (Nov. 24, 2010).

103. *Id.* ¶ 202.

Access to Information Law in 2012,<sup>104</sup> which includes a provision that “[i]nformation or documents that deal with conduct involving human rights violations committed by public officials or by orders of public authorities may not be subject to access restrictions.”<sup>105</sup>

In 2009, the Council of Europe (CoE) adopted an unprecedented Convention on Access to Official Documents. The CoE Convention provides a typical list of exemptions,<sup>106</sup> but it narrows the scope for abuse in a number of ways. It imposes a public interest test, permitting non-disclosure on one of the enumerated grounds “unless there is an overriding public interest in disclosure.”<sup>107</sup> The text provides no indication of what an “overriding public interest” would be, but the interest in promoting accountability for gross human rights violations is certainly a strong candidate to justify an override. The CoE Convention also requires that state officials take measures to preserve and organize records, process requests for information promptly, provide reasons for any refusal, and make available a review procedure by a court or “another independent and impartial body established by law.”<sup>108</sup> Further, it creates an independent Group of Specialists on Access to Official Documents to monitor implementation of the convention, report on progress, and issue recommendations.<sup>109</sup> The CoE Convention requires ten ratifications to

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104. Par Engstrom, Remarks for a conference on Post-Transitional Justice in Brazil: Brazilian Post-Transitional Justice and the Inter-American Human Rights System at 5 (Mar. 4, 2013), *available at* <http://bit.ly/1swWTvd>.

105. Lei No. 12.527, Lei de acesso a informações [Law No. 12.527, Law on Access to Information], art. 21, 18 de novembro de 2011 (Brazil). *See* Decreto No. 5.584, Publicado por Presidência da Republica [Decree No. 5.584, Published by the President of the Republic], 18 de novembro de 2005 (Brazil) (authorizing disclosure, in a preceding decree, of documents pertaining to government investigations conducted by selected security agencies of Brazil’s military regime between 1966 and 1985).

106. These include exemptions similar to those in the U.S. FOIA, including national security, defense, diplomatic relations, public safety, privacy, and certain aspects of law enforcement. Council of Europe, *Council of Europe Convention on Access to Official Documents* C.E.T.S No. 205, art. 3(1)(a)–(k) (2009) [hereinafter CoE Convention].

107. *Id.* art. 3(2).

108. *Id.* arts. 4–10.

109. *Id.* art. 11(1)–(5).

enter into force, and as of April 2014, fourteen European states had signed it, and only six had ratified.<sup>110</sup>

Civil society actors, including human rights advocates and leading archivists, have long pressed for third-country disclosure of human rights files and have driven progress on the issue.<sup>111</sup> In 2013, a group of twenty-two civil society organizations worked together to produce the most detailed framework to date outlining how such duties could be incorporated into law. They consulted with hundreds of experts and officials in seventy different countries to draft the Global Principles on National Security and the Right to Information, better known as the “Tshwane Principles” in reference to the South African city that hosted the group’s final meeting. Principle 10(1) of the Tshwane Principles asserts:

[t]here is an overriding public interest in disclosure of information regarding gross violations of human rights or serious violations of international humanitarian law, including crimes under international law, and systematic or widespread violations of the rights to personal liberty and security. Such information may not be withheld on national security grounds in any circumstances.<sup>112</sup>

The information contemplated includes all records of the human rights violations in question, when and where the acts occurred, the identity and whereabouts of the victim or his or her remains, information about the perpetrators and about the causes for the violation. Importantly: “[t]his Principle applies to information about violations that have occurred or are occurring, and applies

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110. Ratifying states include Bosnia and Herzegovina, Hungary, Lithuania, Montenegro, Norway, and Sweden. *Council of Europe Convention on Access to Official Documents*, <http://bit.ly/QBQyIZ> (last visited Nov. 10, 2014).

111. See, e.g., González Quintana, *supra* note 3, at 36 (urging third countries to share relevant archives). The National Security Archive has long led campaigns for foreign country disclosure, promoting the release of classified U.S. files and supporting partner civil society organizations in other countries to access, preserve, and organize government records relevant to human rights abuses in Latin America and other regions. See, e.g., Letter from National Security Archive to President Clinton (Oct. 8, 1997), *available at* <http://bit.ly/1mJ2LTq> (urging Clinton to release files relevant to human rights cases in Latin America).

112. Global Principles on National Security and the Right to Information princ. 10(A)(1), *issued* June 12, 2013, Open Society Justice Initiative [hereinafter Tshwane Principles].

regardless of whether the violations were committed by the state that holds the information or others.”<sup>113</sup>

This represents one of the most forward-leaning statements on third-country records to date. Several UN and regional human rights officials have endorsed the Tshwane Principles as reflective of best practices, including: UN Special Rapporteur on Counter-Terrorism and Human Rights Ben Emmerson, Organization of American States Special Rapporteur on Freedom of Expression and Access to Information Catalina Botero, and Pansy Tlakula, Special Rapporteur on Freedom of Expression and Access to Information appointed by the African Commission on Human and People’s Rights.<sup>114</sup> The Tshwane Principles have also been endorsed by the Parliamentary Assembly of the Council of Europe.<sup>115</sup> Although wholesale state adoption of the Tshwane Principles is highly unlikely in the near term, the principles put archival sharing (and other issues) on the human rights agenda more clearly than ever before.

Neither the Tshwane Principles nor the OHCHR or HRC instruments on the right to the truth create binding disclosure duties on third countries, and their directives must be understood as exhortations more than statements of existing law. The principle of a human rights override to disclosure exemptions thus remains in its infancy and certainly does not ensure that the indirect mechanism of seeking third-country files through domestic FOI laws will be successful in a broad range of countries.

#### D. Qualified Duties at International Courts and Commissions

In addition to requests to disclose human rights documents under MLATs and domestic FOI laws, states may encounter requests from international courts or commissions. Most international courts and commissions lack the power to issue binding orders on states to produce documents. The Statute of the International Court of Justice (ICJ) grants that Court only the authority to “call upon” agents of the

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113. *Id.* princ. 10(5).

114. See Press Release, Open Society Justice Initiative, New Principles Address the Balance Between National Security and the Public’s Right to Know (June 12, 2013), available at <http://osf.to/RORBAa>.

115. Eur. Parl. Ass., Recommendation of the Assembly, 32nd Sess., Doc. No. 2024 (2013), adopted Oct. 2, 2013, ¶ 1.3; Eur. Parl. Ass., Resolution of the Assembly, 32nd Sess., Doc. No. 1954 (2013), adopted Oct. 2, 2013, ¶¶ 7–9, available at <http://bit.ly/1ptLwrr>.

parties to produce documents and take note of any refusal to comply.<sup>116</sup> Few exercises of this power have taken place, and when the United Kingdom refused a request to produce documents in the *Corfu Channel* case on grounds of secrecy, the ICJ merely took note of the refusal without adopting adverse presumptions.<sup>117</sup>

Other courts, including the Inter-American Court and hybrid criminal tribunals in Cambodia and Sierra Leone, include more limited provisions on state cooperation and make no explicit mention of the power to order document production.<sup>118</sup> The inability to issue binding, enforceable orders for documents has challenged international courts dealing with human rights cases but has not prevented them from finding compromise solutions in some instances. In the *Godínez Cruz* case, the Inter-American Court requested that the Honduran government provide an organizational chart of the infamous Battalion 316 military unit accused of political assassinations, torture, and disappearances. In response, the Honduran government requested that the Court instead hear the testimony of its Commandant *in camera* “because of strict security reasons,” and the Court agreed (over the objection of the Inter-American Commission).<sup>119</sup> To date, human rights commissions and temporally limited truth commissions have also lacked the power to command third countries to produce relevant files.<sup>120</sup> Where third

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116. Statute of the International Court of Justice, June 26, 1945, art. 49, 59 Stat. 1055, 1062, 3 Bevans 1153, 1165 (entered into force Oct. 24, 1945).

117. *Corfu Channel* (U.K. v. Alb.), Judgment, 1949 I.C.J. 4, at 32 (Apr. 9, 1949).

118. See Rules of Procedure of the Inter-American Court of Human Rights art. 26 (*as amended* Jan. 19–31, 2009) (obligating states only to facilitate execution of notices, communications, or summonses). See also Special Court for Sierra Leone, Rules of Evid. and Procedure, R. 8(C) (*as amended* May 27, 2008) (allowing the Special Court of Sierra Leone (SCSL) to “invite [foreign] States not party to the Agreement [creating the Court] to provide assistance on the basis of an ad hoc arrangement”); Extraordinary Chambers in the Courts of Cambodia (ECCC), Internal Rules (rev. 8), R. 5 (*as amended* Aug. 3, 2011) (enabling the ECCC to invite states not party to the Court’s constitutive agreement to cooperate on an ad hoc basis).

119. *Godínez Cruz*, Merits, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 4 (Jan. 20, 1989), ¶¶ 32–35.

120. The statutes establishing truth commissions generally allow them to request government assistance, sometimes including access to secret documents, but typically confer no power to issue binding orders and make no reference to foreign materials. See, e.g., Promotion of National Unity and Reconciliation Act 34 of 1995 § 29(2)(b) (S. Afr.) (allowing the South African Truth and Reconciliation

countries have contributed files in connection with truth commission proceedings, they have done so voluntarily.<sup>121</sup>

The ECtHR has been more forward-leaning. Article 38 of the European Convention requires that States Parties “furnish all necessary facilities” in connection with the ECtHR’s investigations and proceedings.<sup>122</sup> The court’s rules also require parties to “cooperate fully,” grant the court the power to request state documents, enable the court to “draw such inferences as it deems appropriate,” and take other unspecified measures when states fail to comply.<sup>123</sup> Where states have refused to provide documents on grounds of secrecy or confidentiality, the ECtHR has looked to whether there exist “reasonable and solid grounds for treating the documents in question as secret or confidential.”<sup>124</sup> The court has challenged government secrecy claims in a number of cases, particularly those pertaining to

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Commission (TRC) to call upon any person who is in possession of or has the custody of or control over any article or other thing which in the opinion of the Commission is relevant to the subject matter of the investigation or hearing to produce such article or thing to the Commission); Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan people to suffer [Guatemala] (June 23, 1994), Operation (V) (noting that the commission would “invite all interested parties to present their information”); Supreme Decree No. 065-2001-PCM (Peru), art. 5 (stating that the executive would “lend its support and collaboration” to the commission).

121. This occurred in 1993, when the report of the UN-backed Truth Commission Investigation for El Salvador prompted a U.S. Congressional request that the Clinton administration declassify documents relevant to the 32 cases investigated by the Commission. Letter from Senator Claiborne Pell, et al., to President William J. Clinton (Mar. 26, 1993), *available at* <http://bit.ly/1faPlxf>. A subsequent Executive Order led to declassification of roughly 12,000 documents from the State Department and the CIA about abuses in El Salvador in the early 1980s. Arthur Jones, *El Salvador Revisited: a look at declassified State Department documents*, Nat’l Cath. Rep. (Sept. 23, 1994), *available at* <http://bit.ly/1xExZxi>; *see also* Kate Doyle, *The Right to Information is the Right to Justice: Declassified Documents and the Assassination of the Jesuits in El Salvador*, Unredacted (Nov. 16, 2009), <http://bit.ly/1iddGIH> (noting that although 12,000 documents were declassified, 3,000 were kept secret in their entirety, mostly to protect intelligence sources and methods, and others were reclassified in 1999).

122. European Convention, *supra* note 95, art. 38.

123. European Court of Human Rights, Rules of Court 44A–44C (entered into force Jan. 1, 2014).

124. *Janowiec v. Russia*, App. Nos. 55508/07 & 29520/09, ¶ 205, (Eur. Ct. H.R. Oct. 21, 2013), *available at* <http://bit.ly/1xFID6U>.

disappearances in Chechnya,<sup>125</sup> and pointed out in one instance that if the Russian government did have legitimate security concerns, it should have provided a redacted version of the document in question or provided a summary of the relevant factual grounds.<sup>126</sup> The ECtHR has made available special procedures for dealing with state secrecy concerns, including *in camera* proceedings and limitations on access to sensitive files.<sup>127</sup> Although the ECtHR lacks strong enforcement mechanisms, it has drawn negative inferences from state failure to comply with requests to produce evidence pursuant to Article 38.<sup>128</sup>

In contrast to most international courts and commissions, international criminal tribunals possess the formal authority to order states to produce sensitive documents. The UN Security Council resolutions that created the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR) require that states cooperate fully with the tribunals,<sup>129</sup> and the ICTY and ICTR statutes assert that states “shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber,” including “the production of evidence” and “service of documents.”<sup>130</sup>

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125. See, e.g., *Musikhanova v. Russia*, App. No. 27243/03, ¶ 107 (Eur. Ct. H.R. Dec. 4, 2008), available at <http://www.ECHR.coe.int> (challenging Russian withholding of documents); *Israilova v. Russia*, App. No. 35079/04, ¶ 145 (Eur. Ct. H.R. Oct. 28, 2010), available at <http://www.ECHR.coe.int> (challenging Russia’s reliance on a provision in the domestic criminal procedure code prohibiting release of files from an active investigation).

126. *Nolan & K v. Russia*, App. No. 2512/04, ¶ 56 (Eur. Ct. H.R. Rep. 977, 991 (Feb. 12, 2011)), available at <http://bit.ly/1u46tdm>.

127. ECHR Rules, *supra* note 123, r. 33; *Janowiec* Judgment, App. Nos. 55508/07 & 29520/09, ¶ 215. European Court of Human Rights, Rule of Court 33; *Janowiec*, App. Nos. 55508/07 & 29520/09, ¶ 215.

128. See, e.g., *Shakhgiriyeve v. Russia*, App. No. 27251/03 ¶¶ 134–140 (Eur. Ct. H.R. Jan. 8, 2009), available at <http://bit.ly/1xEyabR> (drawing negative inferences when the Russian government failed to provide documents from a criminal investigation into alleged kidnapping and murder of civilians by servicemen); *Utsayeva v. Russia*, App. No. 29133/03, ¶¶ 149–53 (Eur. Ct. H.R. May 29, 2008), available at <http://bit.ly/1xEyabR> (drawing negative inferences from Russian refusal to produce requested files).

129. S.C. Res. 827, ¶ 4, U.N. Doc. S/RES/827 (May 25, 1993); S.C. Res. 955, ¶ 2, U.N. Doc. S/RES/955 (Nov. 8, 1994).

130. *Statute of the International Criminal Tribunal for the former Yugoslavia*, S.C. Res. 1877, U.N. SCOR, 6155th mtg., U.N. Doc. S/RES/827 (2009), implementing proposals submitted by the President of the International Tribunal, U.N. GAOR, annex, 53, art. 29 (2009); *Statute of the International Criminal Tribunal for Rwanda*, S.C. Res. 955, U.N. SCOR, 3454th mtg., U.N. Doc. S/RES/955 (1994), implementing the reports of the Secretary-General pursuant to

The Rome Statute for the International Criminal Court (ICC) similarly requires states parties to cooperate and comply with requests from the court for “provision of records and documents, including official records and documents.”<sup>131</sup>

In 1997, the ICTY considered the question of whether it has the power to require states to turn over official government records when Croatia refused to release requested military documents, claiming that their disclosure would prejudice national security, and appealed a subpoena order issued by an ICTY judge at the request of the Prosecutor.<sup>132</sup> Although the ICTY Appeals Chamber ruled unanimously that the tribunal does not have the power to subpoena records because the ICTY lacks a means of imposing penal sanctions against states,<sup>133</sup> it held that the ICTY may issue binding orders on states under its Statute and Resolution 827 and report non-compliance to the Security Council.<sup>134</sup> Notably, the Appeals Chamber also held that states may not “unilaterally assert national security claims and refuse to surrender [requested] documents,” reasoning that “to grant States a blanket right to withhold, for security purposes, documents necessary for trial might jeopardize the very function of the International Tribunal, and ‘defeat its essential object and purpose.’”<sup>135</sup> The ICTY Appeals Chamber distinguished between the “horizontal” relationship between equal sovereign states assisting one another in criminal matters and the “vertical”

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*paragraph 3 of resolution 935 (1994) 1 July 1994 (S/1994/879 and S/1994/906), and the reports of the Special Rapporteur for Rwanda of the United Nations Commission on Human Rights (S/1994/1157, annex I and annex II), U.N. GAOR, 79, art. 28 (1994), as amended Jan. 10, 2010 by U.N.S.C. Res. 1901.*

131. Rome Statute of the International Criminal Court, *opened for signature* July 17, 1998, arts. 86, 93(1)(i), 37 I.L.M. 999, 1051, 1056, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

132. Press Release, Int’l Crim. Trib. for the Former Yugoslavia, *Blaskic case: Croatia and Bosnia and Herzegovina ordered to comply with Prosecutor’s request for production of documentary evidence* (Feb. 14, 1997), available at <http://bit.ly/1hs2Nr1>.

133. Prosecutor v. Blaskic, Case No. IT-95-14-AR108 bis, Judgment on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, ¶ 25 (Int’l Crim. Trib. for the Former Yugoslavia Oct. 29, 1997) [hereinafter ICTY Subpoena Decision] (arguing that “the International Tribunal does not possess any power to take enforcement measures against States. Had the drafters of the Statute intended to vest the International Tribunal with such a power, they would have expressly provided for it.”).

134. *Id.* ¶¶ 26–31.

135. *Id.* ¶ 65.

relationship between the ICTY and states that enables the tribunal to issue orders such as those for document production.<sup>136</sup>

The ICTY has used its power to issue binding orders on states to produce documents on multiple occasions, issuing orders to Croatia, Bosnia and Herzegovina, Serbia,<sup>137</sup> and other foreign states and organizations.<sup>138</sup> The ICTR has issued similar orders to Burundi,<sup>139</sup> Belgium,<sup>140</sup> and others. Nevertheless, the enforcement mechanisms available to the international criminal tribunals are weak. The Security Council has never gone beyond reprimanding a state for noncompliance,<sup>141</sup> and absent assistance from third parties,<sup>142</sup> the tribunals have few means of their own to compel compliance. Thus, the formal “verticality” of the legal relationship between the tribunals and recalcitrant states becomes somewhat

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136. *Id.* ¶ 47.

137. *See, e.g.*, Prosecutor v. Blaskic, Case No. IT-95-14-T, Order to the Republic of Croatia for the Production of Documents (Int'l Crim. Trib. for the Former Yugoslavia July 21, 1998) (ordering files from Croatia); Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2, Order to the Federation of Bosnia and Herzegovina for the Production of Documents (Int'l Crim. Trib. for the Former Yugoslavia Feb. 4, 1999) (ordering Bosnian documents); Prosecutor v. Mladic, Case No. IT-95-5/18-I, Order to the Republika Srpska for the Production of Documents (Int'l Crim. Trib. for the Former Yugoslavia Sept. 1, 2004) (ordering documents from Serbia).

138. *See, e.g.*, Prosecutor v. Karadzic, Case No. IT-95-5/18-T, Decision on the Accused's Application for Binding Order Pursuant to Rule 54 bis (Federal Republic of Germany) (Int'l Crim. Trib. for the Former Yugoslavia May 19, 2010) (ordering the German government to search for certain files relevant to the case); Prosecutor v. Milutinovic et al., Case No. IT-05-87-PT, Decision on Second Application of Dragoljub Ojdanic for Binding Orders Pursuant to Rule 54 bis (Int'l Crim. Trib. for the Former Yugoslavia Nov. 17, 2005) (ordering the production of official records from Canada, Iceland, Luxembourg, the United States, and NATO at the request of one of the defendants, former Serbian defense minister and army chief of staff Dragoljub Ojdanic).

139. Prosecutor v. Bizimungu et al., Case No. ICTR-99-50-T, Decision on Prosper Mugiraneza's Motion Regarding Cooperation with the Republic of Burundi (Oct. 30, 2008), *available at* <http://bit.ly/1wMoEoO>.

140. Prosecutor v. Bizimungu et al., Case No. ICTR-99-50-T, Decision on Urgent Second Motion of Defendant Bicamumpaka Regarding Cooperation of the Kingdom of Belgium (Feb. 27, 2008), *available at* <http://bit.ly/1zHNMzy>.

141. Antonio Cassese & Paola Gaeta, *Cassese's International Criminal Law* 300 (2013).

142. In the late 1990s, NATO troops in Bosnia helped ICTY investigators conduct raids to seize documents withheld by Bosnian and Croatian authorities, but NATO forces did so voluntarily, not under an ICTY order to assist. *Id.* at 300–01.

more comparable to the “horizontal” relations among sovereign states in actual practice. For example, ICTY prosecutors quickly found that securing sensitive third-country intelligence records required extensive negotiation and led to rules allowing the prosecutors to accept such information in confidence.<sup>143</sup> Without stronger enforcement tools, the tribunals have used their power to order document production sparingly and have sought means of accommodating state sovereignty concerns. The ICTY Rules of Procedure and Evidence lay out detailed principles for orders to states to produce documents and steps to minimize intrusions into state sovereignty. The rules require a party requesting an order to identify desired documents as specifically as possible and satisfy the court that the documents are relevant, probative, and that the applicant has taken reasonable measures to obtain the state’s assistance.<sup>144</sup> The rules also require that states be given notice of the application and an opportunity to be heard unless the court has “good reasons” to the contrary.<sup>145</sup> In any event, a state may raise objections “on the grounds that disclosure would prejudice its national security interests.”<sup>146</sup> A state objecting to disclosure on national security grounds may also request protective measures. These include asking the court to conduct an *ex parte* hearing and order that no transcript be made, to permit documents in redacted form (with an explanation from a senior state official), to return documents promptly after their use by the court, and to order that no copies be kept.<sup>147</sup>

The ICC similarly allows a state to intervene when it “is of the opinion that disclosure would prejudice its national security

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143 . Laura Moranchek, *Protecting National Security Evidence While Prosecuting War Crimes: Problems and Lessons for International Justice from the ICTY*, 31 *Yale J. Int’l L.* 477, 483–85 (2006).

144. ICTY Rules of Procedure and Evidence (Rev. 49), *as amended* May 22, 2013, IT/32/Rev.49, r. 54 *bis* (A), (B). The ICTR follows similar principles. Prosecutor v. Bizimungu et al., Case No. ICTR-99-50-T, Decision on Urgent Second Motion of Defendant Bicomumpaka Regarding Cooperation of the Kingdom of Belgium, ¶ 9 (Feb. 27, 2008).

145. *Id.* r. 54 *bis* (E).

146. *Id.* r. 54 *bis* (E), (F).

147. *Id.* r. 54 *bis* (F). See also ICTY Subpoena Decision, *supra* note 133, ¶ 68 (noting these means by which the court can take account of states’ national security concerns). The ICTY and other courts have struggled to devise measures that provide adequate protection from disclosure while also upholding the rights of the defense. Moranchek, *supra* note 143, at 491–97.

interests.”<sup>148</sup> The state is to take “all reasonable steps” with the ICC Prosecutors, defense, and chambers to resolve the matter cooperatively, such as modifying the request for information, seeking relevant information from another source, and providing information in summary or redacted form or via *in camera* or *ex parte* proceedings.<sup>149</sup> When those efforts fail to satisfy state security concerns, the state is to provide “the specific reasons for its decision, unless a specific description of the reasons would itself necessarily result in . . . prejudice to the State’s national security interests.”<sup>150</sup> If the ICC deems the materials necessary, it may request further consultations with the state before referring the matter to the Assembly of States Parties or Security Council.<sup>151</sup> The court may also “make such inference in the trial of the accused as to the existence or non-existence of a fact, as may be appropriate in the circumstances”<sup>152</sup>—a provision designed to soften the impact in cases where important state records are withheld.<sup>153</sup>

The ICC has faced this challenge in Kenya, as the Kenyan government has refused to provide documents requested by the ICC prosecutor, forcing the Court to delay its case against President Uhuru Kenyatta.<sup>154</sup> In Libya, where the government has refused to submit individuals wanted for prosecution in the Hague, the ICC prosecutor has taken the approach of concluding a memorandum on

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148. Rome Statute, *supra* note 131, arts. 72(4), 93(4). Article 73 requires the originating state’s consent even when another state has possession of the document. *Id.* art 73.

149. *Id.* art. 72(5).

150. *Id.* art. 72(6).

151. *Id.* arts. 72(7)(a)(i)–(ii), 87(7). Referrals to the Security Council are permitted when the Council referred a matter to the ICC. *Id.* art. 87(7).

152. *Id.* art. 72(7)(a)(iii). Under some circumstances, when the court has not requested cooperation from a State Party, art. 72(7)(b) allows it simply to “[o]rder disclosure,” but when such circumstances would exist is unclear, and commentators agree this provision is rarely apt to apply. Peter Malanczuk, *Protection of National Security Interests*, in *The Rome Statute of the ICC* (Antonio Cassese et al., eds., 2002), at 1385; Karin N. Calvo-Goller, *The Trial Proceedings of the International Criminal Court: ICTY and ICTR Precedents 268* (2006).

153. Calvo-Goller, *supra* note 152, at 268–69.

154. Judie Kaberia, *Uhuru’s trial now set for October 7*, Capital News (Kenya), Mar. 31, 2014, <http://bit.ly/1uWgFpS>; Nzau Musau, *Kenya: ICC Accuses State of Withholding Evidence on Cases*, The Star (Kenya), Sept. 28, 2012, <http://bit.ly/1swXptb>.

burden sharing with Libyan authorities,<sup>155</sup> and establishing commitments to support “each other’s investigations and prosecutions through the exchange of information, subject to confidentiality and protection obligations.”<sup>156</sup>

The rules and practices developed by the ECtHR and international criminal tribunals offer important examples of how third-country obligations to produce human rights records can be reconciled with legitimate national security concerns. Promoting access to third-country files requires extending similar qualified obligations on states to support truth and accountability efforts in other forums.

## II. THE POWER OF THIRD-COUNTRY RECORDS

When third countries do disclose records relevant to gross human rights violations, those files can play important roles in advancing truth and accountability. Third-country documents can provide details on individual abuses and help elucidate the state policies, bureaucratic practices, and international cooperation that enabled or encouraged violations. In some cases, disclosure also represents a form of partial reparation and accountability for the third country’s own complicity in the violence. Third-country records have already played major roles in advancing justice and historical clarification in numerous states, most prominently as evidence in courtrooms and truth commissions. This section presents illustrative cases from Latin America and elsewhere.

### A. Declassified U.S. Documents in Latin America

Some of the clearest examples of the power of third-country records come from Latin America. Declassified U.S. documents in particular have been critical in advancing the right to the truth in a

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155. Prosecutor v. Gaddafi & Al-Senussi, Case No. ICC-01/11-01/11 Public Redacted version of Request for Disclosure of Memorandum on Burden Sharing between the ICC Office of the Prosecutor and the Government of Libya, (Mar. 14, 2014) [hereinafter ICC Request for Disclosure].

156. Fatou Bensouda, Prosecutor of the International Criminal Court, Statement to the U.N. Security Council on the situation in Libya pursuant to UNSCR 1970 (2011) (Nov. 14, 2013) [hereinafter Bensouda Statement] (calling on UN member states to provide telephone intercepts and bank data that would help locate suspects), *available at* <http://bit.ly/1xdURGX>.

number of Latin American states. Given the depth of U.S. involvement in Latin America and close American cooperation with many of the region's security services, U.S. government archives contain abundant evidence relevant to human rights abuses, including systematic campaigns of kidnappings and disappearances, death squad operations, and massacres of civilian populations. U.S. and other third-country records have been introduced as evidence in trials of former military and civilian leaders in charge of security forces responsible for past crimes, including groundbreaking prosecutions of former heads of state. Declassified U.S. embassy cables were used as evidence in the prosecution of former Peruvian president Alberto Fujimori, sentenced to 25 years in prison in 2007 for his role in the *La Cantuta* and *Barrios Altos* cases involving death squad assassinations and enforced disappearances.<sup>157</sup> U.S. and Paraguayan documents were used in Uruguayan courts in the prosecution of former head of state Juan Bordaberry, sentenced to 30 years in prison in 2010 for violating the state's constitution and for his responsibility in disappearances and political assassinations.<sup>158</sup> Foreign records have been used to bolster efforts to prosecute former

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157. The 763-page court ruling on the Fujimori decision lists all 30 U.S. documents introduced as evidence and describes seven in detail, noting that U.S. Embassy cables include evidence of the counter-terror policy implemented by Fujimori, his direct knowledge of death squad activity, and resistance by his government to investigate extralegal killings, despite U.S. pressure to do so. In spite of challenges by the defense, which argued that the Embassy cables did not identify their sources of information, the court accepted the documents as evidence in its decision to sentence the former president to 25 years in prison. *Sentencia Alberto Fujimori Fujimori por delitos de asesinato y otros en agravio de Luis Leon Borja y otros*, Exp. No. AV-19-2001 (Sala Penal Especial) (Sup. Ct., Peru) (Apr. 7, 2009). See also Jo-Marie Burt, *Guilty as Charged: The Trial of Former Peruvian President Alberto Fujimori for Human Rights Violations*, 3 Int'l J. of Trans. Just. 384 (2009) (providing a detailed summary of the Fujimori trial and the evidence presented by the prosecution).

158. Javier A. Galvan, *Latin American Dictators of the 20<sup>th</sup> Century* 139–40 (2013). For the 2010 sentence by Judge Mota, see *Sentencia condenatoria contra Juan María Bordaberry por un delito de atentado contra la Constitución y crímenes contra la humanidad* (Criminal Ct., Montevideo, Uruguay) (Feb. 11, 2010), available at <http://bit.ly/1rp8mfl>. Another decision from 2007 includes details on several declassified U.S. cables related to Operation Condor cited in support of the prosecution and discusses the introduction of archives from the Paraguayan Archive of Terror that contain evidence of the 1970's campaign of cross-border information sharing and kidnappings in the Southern Cone. Bordaberry Arocena Juan Maria, and Blanco Estrade Juan Carlos, *Sentencia No. 136* (Uruguay, June 1, 2007) (on file with the authors).

heads of military intelligence, police chiefs, military commanders, and civilian officials throughout the region. Moreover, they have been integral in unearthing the truth behind collaborative kidnapping and secret interrogation campaigns, such as the “Condor” Southern Cone operations, which foreshadowed later coordination between military governments in the Middle East and North Africa (MENA) region and the extraordinary rendition program orchestrated by U.S. and allied intelligence services in the post-9/11 war on terror.<sup>159</sup>

### 1. Guatemala

Declassified U.S. government files released via the FOIA have been important in clarifying gross human rights violations carried out by state security forces during Guatemala’s 36-year internal armed conflict. The National Security Archive initiated a targeted FOIA campaign in 1994 to obtain the release of secret U.S. files to support the human rights investigations of the U.N.-backed Historical Clarification Commission (CEH).<sup>160</sup> In addition to providing information integral to understanding abuses during Guatemala’s civil war, declassified U.S. military files revealed that following the announcement of the CEH investigation, Guatemalan military leaders issued field orders to destroy evidence that could implicate state officials in past violations.<sup>161</sup>

The declassified files have been particularly crucial in revealing the truth about enforced disappearances. The power of enforced disappearances, which have a long history as tools of state terror and repression, lies in their secrecy. A lack of information about missing persons allows the government to deny abducting its enemies and maintain a veneer of normalcy while creating a fog of fear and uncertainty that discourages victims’ families and others

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159. See *infra* § III.B.

160. The CEH was established pursuant to the 1994 Peace Accords signed as part of the negotiations to end Guatemala’s civil war. The National Security Archive gave more than 5,000 pages of U.S. records to the CEH investigators in January of 1998. See Kate Doyle, *The Guatemalan Military: What the U.S. Files Reveal*, Nat’l Sec. Archive Elec. Briefing Book No. 32 (June 1, 2000), <http://bit.ly/1iihAKZ>.

161. Sources told U.S. military officials in 1994 that pits that had been used to hold prisoners during the 1980s were filled with concrete in an effort by Guatemalan military intelligence to remove evidence of the torture and killing of prisoners in custody. See Memorandum from U.S. Def. Intelligence Agency to U.S. Dep’t of Def. (Apr. 11, 1994), available at <http://bit.ly/1xszJeK>.

from challenging the regime. The state's security services have powerful incentives to withhold information about disappearances, and they usually do. Disclosure subjects state agents to possible accountability measures, even years after the fact. It also reveals intelligence about perceived political opponents and the state's means of tracking their movements, affiliations, and activities—information states guard jealously, especially amid counter-insurgency or counter-terrorist campaigns. Third-country records have therefore been integral to clarifying cases of enforced disappearance.<sup>162</sup>

The first recorded act of political disappearance in Latin America took place in 1966 in Guatemala. The disappearances were part of a U.S.-designed operation carried out by Guatemalan security forces to capture and secretly detain at least 30 leaders of the leftist workers' party Partido Guatemalteco de Trabajo (PGT).<sup>163</sup> Declassified CIA records on the operation describe in intimate detail how the leaders were tortured and summarily executed after extensive interrogation.<sup>164</sup> The operation became an emblematic case and embodied the hallmark tactic that became widespread throughout Latin America during the Cold War.<sup>165</sup>

The cases discussed in this section demonstrate that enforced disappearances often involve third countries and lead to the production of official records by foreign agents who collaborate in the acts, cover up the crimes, intercept intelligence, or receive information from government officials with knowledge of the

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162. See generally Weld, *supra* note 39, at 23, 36, 63–5, 248–49 (discussing the importance of archival information in exposing the truth behind enforced disappearances).

163. See Greg Grandin, *The Last Colonial Massacre: Latin America in the Cold War* 97–101 (2004).

164. Memorandum from Cent. Intelligence Agency Station in Guatemala City to Langley (Mar. 1966), available at <http://bit.ly/1xsZJeK>.

165. The practice was especially prominent in the Southern Cone region, where military dictatorships in Chile, Argentina, Uruguay, Paraguay, Brazil, and Peru carried out secret detentions and renditions of political opponents across borders in the late 1970s. See generally Dinges, *supra* note 41 (discussing the campaign of kidnapping and assassination known as Operation Condor, the role it played in Latin American politics in the 1970s, and U.S. relations with the right-wing regimes in the region that implemented it); J. Patrice McSherry, *Predatory States: Operation Condor and Covert War in Latin America* (2005) (discussing the key U.S. role in state terrorism in Latin America during the Cold War and the Condor military network created to eliminate political opponents of Latin American regimes).

disappearances. The power of third-country records relating to disappearances, and the complicity or acquiescence implicit in withholding them, provide compelling reasons to require archival sharing.

Declassified U.S. documents have also provided important information for investigations and have been used in legal proceedings in numerous court cases in Guatemala, Spain, Belgium, and the IACtHR. These include cases featuring the investigations into former head of state Efraín Ríos Montt, charged in 2013 for crimes of genocide;<sup>166</sup> the charges against eight former government officials in the “Genocide Case” in Spain;<sup>167</sup> and the case of the *Diario Militar*—a military intelligence logbook listing 183 Guatemalans monitored, kidnapped by security forces, and forcibly disappeared.<sup>168</sup>

In March 2009 two police officials, one still on active duty, were arrested in Guatemala and charged with the February 1984 disappearance of student activist and union leader Edgar Fernando García.<sup>169</sup> U.S. records released through FOIA requests provided supporting information that placed the García disappearance in the context of the wave of kidnappings of labor leaders that was taking place at the time.<sup>170</sup> On October 28, 2010, a Guatemalan court

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166. Ríos Montt’s conviction was annulled days after the sentencing by the country’s Constitutional Court on procedural grounds. See Justice on trial in Guatemala: The Ríos Montt Case, Int’l Crisis Grp. (Sept. 23, 2013), <http://bit.ly/lideh6L>; see also Jesse Franzblau, *One Decade Later: National Security Archive Documents Continue to play an Important Role in the Guatemala Genocide Case*, El Quetzal (Mar. 2009).

167. For more information on the Genocide Case, see generally Naomi Roht-Arriaza & Almudena Bernabeu, *The Guatemalan Genocide Case in Spain*, Berkeley Rev. of Latin Am. Stud., Fall 2008, 1, available at <http://bit.ly/1oDP0Yp> (discussing the initiation, investigation, and use of witness testimony in the Genocide Case); Kate Doyle, *The Guatemala Genocide Case*, Nat’l Sec. Archive (July 2, 2008), <http://bit.ly/1yrFIUP>.

168. For more information on the *Diario Militar* case, see generally *Litigation: Diario Militar*, supra note 91 (discussing the discovery of the *Diario Militar* and the case filed by family members of the victims); *Diario Militar* report, supra note 91.

169. See Daniel Guzmán, *Speaking Stats to Justice: Expert Testimony in a Guatemalan Human Rights Trial Based on Statistical Sampling*, Chance, Sept. 2011, at 23, available at <http://bit.ly/1mJ3WT2>.

170. See Jesse Franzblau, *Information Control and Human Rights: Transforming Government Archives into Tools for Civil Society*, 9 Mich. J. of Pub. Aff. 4, 11 (Spring 2012). During the trial, National Security Archive analyst Kate Doyle presented on the declassified U.S. records, including a 1984 analysis by the

sentenced the two police agents to 40 years in prison for the crime of enforced disappearance.<sup>171</sup> The official ruling includes a detailed description of the relevant U.S. documents on the case, describing the importance of the records in providing evidence of the Guatemalan government's policy in disappearances produced contemporaneously to the crimes.<sup>172</sup>

Information contained in U.S. government archives also provided key pieces of evidence on Guatemala's state-sponsored crimes that took place in the 1990s, including the case of Myrna Mack, an internationally renowned anthropologist murdered by a military specialist on September 11, 1991.<sup>173</sup> U.S. reports from the time of her death provided illuminating information on the context of Myrna's murder, indicating that the Guatemalan military was engaging in a campaign of violence, intent on eliminating leftist leaders who could emerge politically influential after the impending signing of the Peace Accords.<sup>174</sup> Such U.S. files were later used in the

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State Department asserting that “[g]overnment security services have employed assassination to eliminate persons suspected of involvement with the guerrillas or who are otherwise left-wing in orientation.” Kate Doyle, *“I wanted him back alive.” An Account of Edgar Fernando García’s Case from Inside “Tribunals Tower,”* Unredacted (Oct. 26, 2010), <http://bit.ly/QIyztR>; see also Kate Doyle & Jesse Franzblau, *Historical Archives Lead to Arrest of Police Officers in Guatemalan Disappearance*, Nat’l Sec. Archive (Mar. 17, 2009), <http://bit.ly/1k9yXMi> (summarizing and linking to the declassified U.S. documents).

171. *Important Cases and Political Actors*, Guat. Hum. Rts. Comm’n/USA, <http://bit.ly/1mJ4k3R> (last visited Nov. 10, 2014).

172. C-01069-1997-00001 Oficial Tercero, Tribunal Octavo de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente [Eighth Tribunal of Penal Sentencing, Narcotics Crimes and Crimes Against the Environment], 28 de Octubre del 2010, Organismo Judicial, 1, 9 (Guat.), available at <http://bit.ly/Px1Wyr>.

173. Myrna Mack had become a target of the military because of her research and reporting on the effects of the military's counterinsurgency operations of the early 1980s that led to massacres and large-scale enforced displacement of the indigenous Mayan population. See C-5-99 Oficial Tercero, Tribunal Tercero de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente [Third Tribunal of Penal Sentencing, Narcotics Crimes and Crimes Against the Environment], 3 de Octubre del 2002 (Guat.), available at <http://bit.ly/10NDOZa>.

174. Documents included a U.S. Embassy cable that discusses the tactics of selective violence organized by government security forces to spread fear among members of leftist organizations thought by the government to be supportive of the guerrillas. See Declassified diplomatic cable from the U.S. Embassy in Guat.,

Inter-American Human Rights Court hearings,<sup>175</sup> and in Guatemala to establish the context in which Myrna's murder took place.<sup>176</sup> Declassified U.S. documents presented in a Guatemalan court in 2002 helped provide crucial details gleaned from official sources about the way Guatemalan military intelligence units operated at the time of Myrna's death and the intimate connection between high level officials and death squad activities.<sup>177</sup>

## 2. Mexico

U.S. records have been pivotal to advancing the right to the truth with respect to human rights violations committed during Mexico's "Dirty War" of the 1960s-80s. Three successive presidential administrations engaged in systematic campaigns of violence that involved targeted kidnappings, torture, killings, disappearances, and massacres of rural populations.<sup>178</sup> Declassified U.S. files, first published in 1998, were important in revealing secrets behind the country's most emblematic cases, such as the October 2, 1968 massacre of student protesters in the days leading up to the Olympic

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*Selective Violence Paralyzes the Left*, Doc. No. 91GUATEM04628 (May 10, 1991) (on file with the authors).

175. Case of Myrna Mack Chang v. Guatemala, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 101 (Nov. 25, 2003).

176. In 2002 Colonel Juan Valencia Osorio was found guilty and sentenced to 30 years in prison, while General Augusto Godoy Gaitan and Colonel Juan Guillermo Oliva were acquitted. Mary Jane West-Eberhard & Morton Panish, *Report of the 2002 Mission, in Guatemala: Human Rights and the Myrna Mack Case* 7, 10–11, 14 (Torsten Wiesel & Carol Corillon eds., 2003).

177. See C-5-99 Oficial Tercero, Tribunal Tercero de Sentencia Penal, Narcoactividad y Delitos Contra el Ambiente [Third Tribunal of Penal Sentencing, Narcotics Crimes and Crimes Against the Environment], 3 de Octubre del 2002 (Guat.), available at <http://bit.ly/10SrGLG>.

178. Close cooperation between U.S. and Mexican security forces led to an abundance of U.S. files with details on the officials who shaped repressive Mexican policies. CIA officials, in particular, obtained highly sensitive information on internal and foreign intelligence matters through CIA liaisons in the upper echelons of government. See Jefferson Morley & Kate Doyle, *LITEMPO: The CIA's Eyes on Tlatelolco, CIA Spy Operations in Mexico*, Nat'l Sec. Archive Elec. Briefing Book No. 204 (Oct. 18, 2006), <http://bit.ly/1pK7cAv>; see also generally Kate Doyle, *Official Report Released on Mexico's "Dirty War,"* Nat'l Sec. Archive Elec. Briefing Book No. 209 (Nov. 21, 2006), <http://bit.ly/1wMp0vA>; Sergio Aguayo Quezada, *La Charola: Una historia de los servicios de inteligencia en México* (2001).

games in Mexico City (the Tlatelolco massacre).<sup>179</sup> The disclosure of U.S. files on one of Mexico's watershed events helped groups in Mexico push for access to their own government's files and press the Mexican government to pass a freedom of information law.<sup>180</sup> Domestic pressure also led to the disclosure of Mexico's own internal intelligence files on the 1968 massacre and other Dirty War abuses, released in 2002.<sup>181</sup> As discussed in section B, *infra*, documents from Mexico's intelligence archives have also provided key pieces of evidence in human rights trials in South America, demonstrating the cascading effect that the disclosure of secret archives can have on human rights advancements across borders.

### 3. Chile & Argentina

Declassified U.S. files have also provided important information about gross human rights violations in Chile and Argentina. Despite U.S. resistance to Spain's MLAT request for files about abuses in those countries,<sup>182</sup> the Clinton Administration ordered a large declassification project of U.S. records from the CIA, State Department, Department of Defense, FBI, and other agencies, to be coordinated by the National Security Council. Part of the rationale behind the declassification project was that it allowed the U.S. government to help clarify past human rights violations in Chile without responding directly to the Spanish court, and avoid advancing the "Pinochet precedent" in international law. The first release of over 5,000 records was announced on June 30, 1999. The State Department released a press statement noting that the documents were "part of a voluntary review of U.S. government files

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179. Kate Doyle, *The Tlatelolco Massacre: U.S. Documents on Mexico and the Events of 1968*, Nat'l Sec. Archive Elec. Briefing Book No. 99 (Oct. 10, 2003), <http://bit.ly/1f7HHE2>.

180. *Mexico freedom of information: overview*, freedominfo.org, <http://bit.ly/1faQIMj> (last visited Nov. 10, 2014); see also Carlos Puig, *Tlatelolco 68: Todos los documentos de inteligencia de EU*, Milenio, Sept. 14, 1998, at 36, available at <http://bit.ly/1tHbnvq> (analyzing the declassified U.S. files regarding the Tlatelolco massacre in depth).

181. The documents are housed in Mexico's National Archives (*Archivo General de la Nacion*—AGN). See Doyle, *supra* note 50, at 61–2; see also Kate Doyle & Jesse Franzblau, *Archival Evidence of Mexico's Human Rights Crimes: The Case of Aleida Gallangos*, Nat'l Sec. Archive Elec. Briefing Book No. 307 (Mar. 9, 2010), <http://bit.ly/11crBDp> (providing sample documents from the U.S. and Mexican archives). See generally Quezada, *supra* note 178.

182. See *supra* Part I.A.

related to human rights abuses, terrorism, and other acts of political violence prior to and during the Pinochet era in Chile.”<sup>183</sup>

The declassification project led to the disclosure of a large trove of files with information on the overthrow of Allende in 1973, the aftermath of targeted killings, torture, and disappearances that were ushered in with the advent of Pinochet. A set of the documents relevant to the charges against Pinochet was provided directly to the Spanish Judge Juan E. Garcés and presented in the National Court on July 22, 1999, by an analyst and leading expert on Chile, Peter Kornbluh.<sup>184</sup> The documents provided particularly useful evidence with respect to investigations into Operation Condor operations.<sup>185</sup> The records with the most pertinent details on the cases of kidnapping and rendition campaign, however, were in the archives of the CIA—the agency most defiant in disclosing its internal papers. Instead of releasing files it considered too sensitive to disclose, the CIA agreed to produce a report (the Hinchey report) that exposed greater details about the CIA’s role in Chile but did not provide records with the types of information needed for the ongoing efforts to prosecute past officials.<sup>186</sup> The CIA’s failure to release key pieces of evidence on human rights violations was a major setback to international efforts to give effect to Chilean survivors’ right to the truth.

Although nearly three decades had passed since many of the CIA documents were authored, and there was little reason to believe disclosure would imperil U.S. security, the CIA invoked national security as its legal justification for continuing to hold hostage important records on Chile. The absence of a human rights override in U.S. law—or even a balancing test for sensitive security records—meant that the immense human rights value of the files and profound public interest in their disclosure were effectively removed from the requisite legal calculation. The CIA’s own dubious assertion regarding national security sufficed for continued classification, and

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183. U.S. Dep’t of State, *supra* note 46.

184. Comparecencia de Peter Robert Kornbluh, A.N., July 22, 1999 (Procedimiento: Sumario 19/97-L, Terrorismo y Genocidio) (Spain) (on file with the authors).

185. The documents include files from the Defense Intelligence Agency (DIA), the U.S. State Department, and three documents from the Central Intelligence Agency (CIA), demonstrating the importance of information in the limited number of U.S. intelligence files released. *See id.*

186. Kornbluh, *supra* note 40, at 476–79.

given judicial reluctance to challenge security agencies on such matters, the law left little reprieve.<sup>187</sup>

Similar to the Chile declassification project, the U.S. enacted a large-scale effort to declassify internal U.S. records relating to Argentina in 2002. The decision came in response to the growing calls for the information in U.S. files on the abuses committed during the height of the Argentine dictatorship years, from 1976–79. A great deal of the pressure was placed on the U.S. State Department by victims' groups, such as the *Abuelas*—grandmothers of the missing children who were taken from their parents in a systematic program of kidnapping and disappearances that led to an estimated 15,000–30,000 victims.<sup>188</sup> Along with Argentine human rights groups, European and Argentine judges and members of the U.S. Congress called on the U.S. government to authorize the declassification of more records from its archives.<sup>189</sup> In August 2000, then-Secretary of State Madeleine Albright met representatives of the *Abuelas* and from the human rights Center for Legal and Social Studies (CELS) in Buenos Aires, and three months later pledged to declassify State Department documents on cases of enforced disappearances, including disappeared children, and Operation Condor.<sup>190</sup> The documents were released in August 2002, along with a press statement from the State Department that announced:

[w]e 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

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187. Most other national legal systems include similar weaknesses. *See supra* Part I.B.

188. *See, e.g., Some Closure for the 'Dirty War,'* L.A. Times, Aug. 18, 2000, <http://lat.ms/1tzZmo1> (discussing the *Abuelas'* demands for declassification to Madeleine Albright).

189. Human Rights Watch, *Reluctant Partner: The Argentine Government's Failure to Back Trials of Human Rights Violators* 11 (2001), available at <http://bit.ly/1hs3WyR>.

190. *Id.*; Albright, *triste por los desaparecidos*, Agence France-Presse, Aug. 17, 2000, available at <http://bit.ly/1uV1HjM>.

Spain in connection with criminal investigations of human rights violations.<sup>191</sup>

The State Department's explicit reference to its MLATs with Argentina, Italy, and Spain contrasted starkly with its initial reluctance to comply with Spanish requests. It also set a rare example of third-country disclosure of classified information pursuant to MLAT requests, where sustained pressure from victims groups and U.S. Congress helped spur the eventual disclosure of the responsive records.

The declassified documents have served as powerful tools for rights groups in Argentina pushing cases through the domestic courts, which have accepted U.S. declassified documents as reliable evidence. In 2008 the federal courts allowed U.S. records to be admitted in the case against ex-intelligence agents from a notorious military unit called Battalion 601, accused of kidnapping and disappearance operations carried out during the dictatorship years despite defense admissibility challenges.<sup>192</sup>

#### B. South American Sharing in the Operation Condor Cases

In addition to the U.S. files, archives discovered in other countries have provided critical links for lawyers and investigators piecing together cases that involved the coordinated operations of kidnappings and renditions in the Southern Cone. In December 1992, a large cache of records was discovered in Asuncion, Paraguay, exposing acts of internal repression by Paraguayan secret police under General Alfredo Stroessner (head of state from 1954–89), as well as providing evidence of the clandestine exchange of intelligence and prisoners between Argentina, Chile, Brazil, Uruguay, Peru, and Paraguay.<sup>193</sup> Paraguayan judges and human rights defenders have

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191. Press Release, U.S. Dep't of Def., Argentina: Declassification of Documents Related to Human Rights Abuses Occurring Between 1975–1984 (Aug. 20, 2002), available at <http://1.usa.gov/1hpSwQl>.

192. *Consideraciones Técnicas a Partir del Derecho Internacional y el Derecho Comparado Sobre el Valor Probatorio de Aglunas Pruebas Documentales en Procesos Penales*, Int'l Ctr. for Trans. Just. (2008), available at <http://slidesha.re/1iwSyH0>; *Guerrieri, Pascual y otros s/condena*, Causa no. 26.349, Federal Criminal Chamber, Argentina (July 18, 2008), available at <http://bit.ly/1lJhaQ5>.

193. See R. Andrew Nickson, *Paraguay's Archivo del Terror*, 30 Latin Am. Res. Rev. 125 (1995) (detailing the process through which the *Archivo del Terror* was seized, and giving examples as to what it contained); see also Comité de

organized the files, which have been accepted as evidence for human rights legal proceedings in foreign courts in Spain, Italy, France, Chile, Argentina, and Uruguay.<sup>194</sup>

Paraguayan records have been used as evidence in cases such as the one involving a clandestine detention center that was the site of Condor operations, referred to as “Automores Orletti,” run by Argentine intelligence in Buenos Aires from May to December 1976. In May 2011, Argentine courts used Paraguayan records to secure the first domestic conviction of participants in the Condor operations.<sup>195</sup> The court sentenced military officials in charge of Orletti for crimes against humanity committed there.<sup>196</sup> Paraguayan files continue to be used as evidence in ongoing trials in Argentina, most notably the ongoing “*mega juicio*” (mega-trial) charging former head of state Jorge Rafael Videla and twenty-four former military officers for their roles in the Condor operations.<sup>197</sup>

The “dirty war” intelligence records from Mexico’s National Archives have also provided evidence in a prominent human rights trial in Argentina. In 1978, Mexican security officials disrupted and interrogated Argentine intelligence agents who had travelled to Mexico City on “Operation Mexico,” a failed effort to capture and

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Iglesias para Ayudas de Emergencia, Testimonio contra el Olvido, *Reseña de la infamia y el terror, Paraguay 1954–1989* (1999); Keith M. Slack, *Operation Condor and Human Rights: A Report from Paraguay’s Archive of Terror*, 18 Hum. Rts. Q. 492, 497–505 (1996) (discussing the documentary evidence of the intelligence sharing programs between countries); *Rendition in the Southern Cone: Operation Condor Documents Revealed from Paraguayan ‘Archive of Terror’*, Nat’l Sec. Archive Elec. Briefing Book No. 239 (2007), <http://bit.ly/1gUnrAF> (summarizing the contents of previous reports on information exchanges between the countries).

194. Judges in Paraguay initially took control over the *Archivo del Terror* records in 1992, and in 1993 the Paraguayan Supreme Court passed a resolution officially placing the documents under their authority. Nickson *supra* note 193, at 125–27; Comité de Iglesias, *supra* note 193.

195. *World Report 2012: Argentina*, Human Rights Watch (Jan. 2012), [http://www.hrw.org/sites/default/files/related\\_material/argentina\\_2012\\_0.pdf](http://www.hrw.org/sites/default/files/related_material/argentina_2012_0.pdf).

196. GUILLAMONDEGUI, Néstor Horacio y otros s/privación ilegal de la libertad agravada, imposición de tormentos y homicidio calificado, Causa no. 1.627, Federal Criminal Court, Argentina (May 31, 2011), available at <http://bit.ly/1f7IBjT>.

197. Emily Tarbuck, *Plan Cóndor: The Search for Justice*, The Argentina Independent (Mar. 20, 2013), available at <http://bit.ly/1f7ICnR>; Megajuicio por crímenes de lesa humanidad en Argentina, Agence France-Presse (Nov. 28, 2012), available at <http://bit.ly/1ptNF6g>.

assassinate Argentine guerrilla leaders (*Montoneros*) living in exile.<sup>198</sup> The Mexican authorities kept records, and both these documents and relevant Paraguayan files were presented as evidence in the 2009–10 trial of five retired Argentine military intelligence officials.<sup>199</sup> An Argentine court convicted the officials of human rights violations, including the assassination of fourteen *Montonero* prisoners in a clandestine Argentine detention center to cover up “Operation Mexico.”<sup>200</sup>

### C. Examples from Other Regions

The use of third-country records in human rights investigations and trials is by no means limited to the Americas. The creation of international and hybrid criminal courts, spread of regional human rights courts and commissions, and application of the principle of universal jurisdiction have enhanced the demand for official documentary evidence that transcends borders.

#### 1. West Africa

The hybrid Special Court for Sierra Leone (SCSL), established to prosecute crimes committed during the country’s civil war, is one such example. More than 4,000 pages of U.S. cables were declassified in response to FOIA requests made by the National Security Archive and made available to civil society groups working on investigations into high-level officials responsible for political violence in Liberia. Among them was former head of state Charles

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198. Mexican agents disrupted the operation, detaining and interrogating the Argentine military operatives who revealed details of their kidnapping plot. The Mexico Operation is described in detail in Miguel Bonasso, *Recuerdo de la Muerte* (1994); *1978: Operación Clandestina de la Inteligencia Militar Argentina en México*, Nat’l Sec. Archive Elec. Briefing Book No. 241 (Jan. 20, 2008), <http://bit.ly/11K5TdZ>.

199. *See Operation Mexico: Secret Argentine Rendition Program Illuminated by Declassified Documents*, Nat’l Sec. Archive Elec. Briefing Book No. 300 (Dec. 8, 2009), <http://bit.ly/1strKb7>.

200. *Sentencia del Tribunal Oral Federal de Rosario Nro. 1, No. 03/2010*, Rosario, Argentina, June 14, 2010, 122. The court decision is available at “DDHH: Difundieron Fundamentos del Fallo que Condenó a Prision Perpetua a Cinco ex Militares,” *Centro de Información Judicial: Agencia de Noticias del Poder Judicial* (Argentina), June 14, 2010, available at <http://bit.ly/QBB15L>.

Taylor, whom the SCSL prosecuted for crimes against humanity in 2012.<sup>201</sup>

The records provide important details about Taylor's role in atrocities during Liberia's civil war from 1990 to 2003.<sup>202</sup> The Catholic Justice and Peace Commission (JPC), a prominent Liberian civil society organization, also used the U.S. records to identify other individuals and groups responsible for acts of systemic abuse.<sup>203</sup> In 2007, the JPC provided the U.S. documents as evidence for Liberia's Truth and Reconciliation Commission.<sup>204</sup> The Liberian government and key international actors have reportedly discussed the possibility of a war crimes court in Liberia.<sup>205</sup> Such a court would benefit considerably from the use of declassified U.S. records and from the release of further records from other agencies, such as the Defense Intelligence Agency (DIA) and the CIA.<sup>206</sup>

## 2. Investigations into Crimes of the Second World War

Investigations into World War II human rights violators living in the United States also demonstrate the importance of extending the obligation to disclose information on human rights violations to third countries. With the end of the Cold War and the opening of files from the Eastern European communist countries, new

201. *Taylor Verdict Milestone for International Justice*, Nat'l Sec. Archive Elec. Briefing Book No. 376 (Apr. 26, 2012), <http://bit.ly/ROUpNq>.

202. Urban Morgan Institute for Human Rights, *Liberia: Freedom of Information Act Project Report* xii (2012), available at <http://bit.ly/QBBgOi>.

203. *Id.*

204. *Liberia's truth body gets war atrocities classified report from US*, Agence France-Presse, Oct. 31, 2007, available at <http://bit.ly/1xEzECS>; Amnesty International, *Liberia: Towards the final phase of the Truth and Reconciliation Commission 16–17* (2008), available at <http://bit.ly/1fuxhcj>.

205. In June 2012, the Chief Prosecutor for the SCSL announced that the UN Security Council might consider the establishment of a similar special war crimes court for Liberia. O. Testimony Seongar, *Liberia: War Crimes Court for Liberia If . . .*, Heritage (Liberia) (June 12, 2012), available at <http://bit.ly/1iij5sz>. Liberian legislators have also proposed such a court, and U.S. officials reportedly discussed the possibility with Liberian officials in mid-2014. See *Liberia: War Crimes Court Loom for Liberia? Top Officials Visa Rejected*, FrontPageAfrica (July 21, 2014), <http://bit.ly/1qB6Ln2>.

206. After compiling the U.S. records it obtained through the National Security Archive's FOIA request, the Catholic Justice and Peace Commission wrote that it planned to "utilize the information obtained from the FOIA request[s] on behalf of the Liberian community to bring perpetrators to justice in the local courts." Urban Morgan Institute, *supra* note 202, at xii.

information surfaced with details on atrocities committed by security forces in the region during the Second World War. Investigators from the U.S. Office of Special Investigations (OSI)<sup>207</sup> uncovered records revealing atrocities carried out by members of the security forces in Eastern Europe, including Nazi *Schutzstaffel* (SS) Battalion rosters discovered in the Czech and Slovak archives with names of hundreds of men who were part of the Guards Forces and received SS training in Poland.<sup>208</sup>

With these rosters, OSI was able to track down a number of former concentration camp guards living in the United States and generate new investigations into Nazi crimes.<sup>209</sup> The records played a pivotal part in the OSI cases, and led to the extradition of dozens of perpetrators of World War II atrocities who would have likely gone on living freely in the United States.

### 3. Truth and Accountability Efforts in Asia

Third-country records have also shed light on the circumstances surrounding gross human rights violations in Asia. For example, the U.K. government elected to declassify diplomatic documents pertaining to the Indonesian invasion of East Timor in 1975 and accompanying human rights violations as East Timor's Commission for Reception, Truth, and Reconciliation (CAVR) released its final report in 2005.<sup>210</sup> The National Security Archive also

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207. OSI was established as an office in the Criminal Division of the Justice Department, and in 1979 the U.S. Attorney General transferred responsibility for pursuing participants in Nazi persecutions from the Immigration and Naturalization Service (INS) to OSI, which was charged with investigating such persons and, if appropriate, bringing denaturalization proceedings against them. See Elizabeth B. White, *History in the Courthouse: The Presentation of World War II Crime in U.S. Courts Sixty Years Later*, in *Nazi Crimes and the Law 176* (Nathan Stoltzfus & Henry Friedlander, eds., 2008). The office's name changed in 2010 to the Human Rights and Special Prosecutions Section (HRSP) after OSI merged with the Criminal Division's Domestic Security Section (DSS). See Press Release, U.S. Department of Justice, Assistant Attorney General Lanny A. Breuer Announces New Human Rights and Special Prosecutions Section in Criminal Division (Mar. 30, 2010), available at <http://1.usa.gov/QBBkO3>.

208. White, *supra* note 207, at 186.

209. *Id.*

210. Richard Lloyd Parry, *Government lied to cover up war crimes in 1975 invasion of island*, *The Times* (London), Nov. 30, 2005, available at <http://thetim.es/1xnh8Qd>; Hugh Dowson, *Declassified British Documents Reveal*

secured declassification of thousands of pages of U.S. documents relating to human rights abuses in East Timor after the CAVR unsuccessfully requested relevant documents from the Bush administration.<sup>211</sup> While many of the documents were released after the completion of the truth commission process, and there have been no legal actions for past atrocities, the declassified records remain a critical source for historical clarification of the nature of human rights violations during the decades of rule under Suharto.<sup>212</sup>

#### D. The Consequences of Non-Disclosure: Truth and Justice Delayed

The cases described above show that third-country records can be crucial to truth and accountability efforts when made available, and many other examples show how truth-telling and accountability can be frustrated when third countries withhold their files. In fact, the delayed release of information is itself an abuse, particularly with regard to forced disappearances, where family members of victims continue to suffer from not knowing what happened to their loved ones. These cases highlight the need for timely third-country disclosure to prevent lasting impunity and lost opportunities for justice.

For example, in 1993, Honduran National Human Rights Commissioner Leo Valladares led a Commission of Inquiry into human rights violations by Honduran military units in the 1980s. He issued written requests to the U.S. government for files shedding light on those crimes, noting that “Honduran military documents have been destroyed long ago” and arguing that “documents in U.S. files represent our best chance to substantiate charges against

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*U.K. Support for Indonesian Invasion and Occupation of East Timor, Recognition of Denial of Self-Determination, 1975–76*, Nat’l Sec. Archive Elec. Briefing Book No. 174 (2005), <http://bit.ly/1fuxtbm>.

211. *A Quarter Century of U.S. Support for Occupation*, Nat’l Sec. Archive Elec. Briefing Book No. 174 (Nov. 28, 2005), <http://bit.ly/1tHcUlf>.

212. The files are important in the modern political context, for example, where a current presidential candidate, Pradowo Subianto, is a former Special Forces commander who is among the individuals the CAVR recommended should be prosecuted for rights abuses committed during the Suharto era. See Joe Cochrane, *Indonesia Candidate Tied to Human Rights Abuses Stirs Unease*, N.Y. Times, Mar. 26, 2014, <http://nyti.ms/1u2ZS36>.

Honduran officers responsible for violations of human rights.”<sup>213</sup> The State Department provided some documents,<sup>214</sup> and the *Baltimore Sun* successfully used the FOIA to obtain declassified CIA manuals on the training of Honduran units,<sup>215</sup> but the CIA resisted and delays ensued for most of the relevant files. Valladares accused the U.S. government of sending “a message in favor of impunity.”<sup>216</sup>

Some U.S. senators agreed. Sen Patrick Leahy (D-VT) opined: “I am sure there is nothing in the files that would harm national security if it is disclosed . . . [b]ut I am sure that there are things in there that would embarrass several high-level people if it was disclosed.”<sup>217</sup> In fact, Valladares’s initial report in 1993 had emphasized CIA training of Battalion 316, the most notorious of the Honduran “death squads.”<sup>218</sup> Senators Christopher Dodd (D-CT) and Barbara Mikulski (D-MD) co-sponsored a bill that would have forced U.S. agencies to disclose records detailing human rights violations by U.S.-backed forces in Honduras and Guatemala during the Cold War.<sup>219</sup> U.S. intelligence agencies fought the bill, with CIA Director George Tenet calling the bill “woefully inadequate” to protect American national security, and Republican-led opposition in the Senate blocked the bill from becoming law.<sup>220</sup>

In 2005, additional declassified U.S. cables became available after a successful FOIA request by the *Washington Post*,<sup>221</sup> but most

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213. Ginger Thompson, *Hondurans accuse CIA of stalling on documents*, *Baltimore Sun*, Jan. 12, 1997, <http://bit.ly/1xnhdDt>.

214. *Id.*

215. See Gary Cohn et al., *Torture was taught by CIA*, *Baltimore Sun*, Jan. 27, 1997, <http://bit.ly/1EmzFgS>.

216. Thompson, *supra* note 213.

217. *Id.*

218. See *The Facts Speak for Themselves: The Preliminary Report on the Disappearances of the National Commissioner for the Protection of Human Rights in Honduras*, Center for Justice & International Law & Human Rights Watch/Americas, trans., (1994), available at <http://bit.ly/1EvHRgO>.

219. Human Rights Information Act, S. 1220, 105th Cong. (1997), 143 Cong. Rec. S9970–72 (daily ed. Sept. 25, 1997).

220. Mark Matthews, *Republicans kill bill to open files on rights abuses*, *Baltimore Sun*, Sept. 3, 1998, <http://bit.ly/1EvHUZS>.

221. Approximately 470 State Department cables files were declassified and provided to former U.S. ambassador to Honduras John Negroponte in 1998, but most did not become public until 2005 in the run-up to Negroponte’s confirmation as Director of National Intelligence. See Michael Dobbs, *Papers Illustrate Negroponte’s Contra Role*, *Wash. Post*, Apr. 12, 2005,

of the key CIA documents have not been disclosed. Truth about the abuses of the 1980s remains limited, and with few exceptions, members of Battalion 316 and other death squads have escaped justice.<sup>222</sup> Additional U.S. files could have strengthened the hands of human rights investigators and prosecutors. Disclosure would likely bring embarrassment by adding details about widely-known U.S. links to abusive Honduran military units, and it would encourage demands for further declassification that agencies wish to avoid. Nevertheless, non-disclosure in this case is difficult to justify. There is little reason to believe that it would prejudice U.S. national security, especially given the passage of time and possibility of redaction.

Other examples abound. Before the fall of the Soviet Union and the accessibility of Eastern European archives, the capacity of U.S. investigators to successfully prosecute Nazi-related cases suffered from lack of evidence from third countries. As OSI historian Elizabeth White writes:

[t]he inaccessibility of Soviet archives to OSI historians considerably hampered OSI's ability to conduct investigations. It could take years for the Soviets to reply to a request for evidence of an individual's activities and for the most part they answered in the negative if they ever replied at all . . . [A] number of investigations languished for lack of sufficient evidence of assistance in prosecution to meet the [U.S.] government's burden.<sup>223</sup>

In one high-profile case, victims' groups in Poland are seeking records from the Russian government on the case of the Katyn Massacre—the 1940 killing of more than 20,000 Polish prisoners of war by Soviet security forces.<sup>224</sup> Many of the internal records that resulted from a decades-long investigation of the massacre were re-classified and have been kept secret since the abrupt termination of the investigation in 2004.<sup>225</sup> Family members of those killed in

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<http://wapo.st/1uV2gKu>; *The Negroponte File*, Nat'l Sec. Archive Elec. Briefing Book No. 151—Part 1 (Apr. 12, 2005), <http://bit.ly/1k9mtGS>.

222. U.S. Institute of Peace, *Commission of Inquiry: Honduras 93*, <http://bit.ly/1nJsed0> (last visited Nov. 10, 2014).

223. White, *supra* note 207, at 183.

224. Press Release, Amnesty International, *The full truth about the Katyn massacre must come out* (Jan. 18, 2013), available at <http://bit.ly/QBBFjC>.

225. In the early 1990s, then-President Boris Yeltsin ordered release of some of the materials. Celestine Bohlen, *Russian Files Show Stalin Ordered*

1940 brought their claims before the European Court of Human Rights in the case of *Janowiec and Others v. Russia*.<sup>226</sup> Third-party interveners argued that the Russian government had the duty to investigate the killings and was “obliged to disclose documents establishing why it closed the investigation as well as archival documents concerning the circumstances of the massacre.”<sup>227</sup> The Russian government refused repeated ECtHR requests for the 2004 document closing the Katyn investigation,<sup>228</sup> and many of the investigation findings remain shrouded from view.<sup>229</sup>

After the fall of the communist governments in Eastern Europe, new governments underwent efforts to open their files in response to civil society demands for clarification and accountability for past repression. A number of states passed FOI laws and legislation granting public access to the files of Cold War-era security services. These include the well-known Stasi files of the East German communist state police, which provide meticulous detail on the organs responsible for internal repression,<sup>230</sup> and files of communist-era repression in Bulgaria, the Czech Republic, Estonia,

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*Massacre of 20,000 Poles in 1940*, N.Y. Times, Oct. 15, 1992, <http://nyti.ms/1zfLlRA>. Some were later published in 2010 by an order of President Dmitri Medvedev. *Russia publishes previously secret files on 1940 Katyn massacre*, Telegraph, Apr. 28, 2010, <http://bit.ly/1pK848h>.

226. See *Janowiec Judgment*, *supra* note 124.

227. Emi MacLean, *Families of World War Two Massacre Victims Invoke the Right to Truth*, Open Society Justice Initiative (Feb. 28, 2013), <http://osf.to/1nJsp8a>. Given the bar on statutes of limitations for certain gross human rights violations, prosecutions of World War II crimes remain possible, and civil society groups have emphasized Russia’s obligation to investigate and provide full access to the truth about the killings until families obtain effective remedies. Amnesty International, *supra* note 224.

228. The ECHR concluded that Russia had violated article 38 of the European Convention, which requires states parties to comply with such requests or provide compelling justifications for non-compliance, which Russia failed to do. *Janowiec Judgment*, *supra* note 124, ¶¶ 207–16.

229. *Europe court criticizes Russia over Katyn massacre inquiry*, BBC News, Oct. 21, 2013, <http://bbc.in/1471K0K>. The “top-secret” documents filled 36 of the 183 case files. *Janowiec Judgment*, *supra* note 124, ¶ 45.

230. For an overview of the Stasi files, see Federal Commissioner for the Records of the State Security Service of the former German Democratic Republic, *Tasks of the BStU*, <http://bit.ly/1idgOOm> (last visited Apr. 1, 2014). Numerous scholarly works have analyzed information within the Stasi files of relevance to human rights. See Barbara Miller, *The Stasi Files Unveiled: Guilt and Compliance in a Unified Germany* (2004); John O. Koehler, *Stasi: The Untold Story of the East German Secret Police* (1999).

Hungary, Latvia, Lithuania, Poland, Slovakia, and Ukraine.<sup>231</sup> Russia also passed a 1991 Law on the Rehabilitation of Victims of Political Repression that grants victims some rights of access to Soviet-era files and explicitly applies to citizens in states that were formerly part of the USSR.<sup>232</sup> Some former Soviet files pertaining to human rights abuses inside and outside of Russian territory have also been made accessible outside the country, most notably at the Hoover Institution in California.<sup>233</sup> In practice, however, as with the case of the Katyn massacre, many relevant files of the former Soviet Union remain shielded from view, hindering efforts to achieve justice and accountability throughout the former Eastern bloc countries.

In other cases, third-country records could have provided timely and important evidence for international criminal investigations into perpetrators of international crimes, including genocide. Prime examples are the French documents regarding the Rwandan genocide.<sup>234</sup> Some such records were used in the French parliamentary commission carried out in 1998 to investigate France's role in the Rwanda conflict, including support for the Hutu military. The records, referred to as the "Mitterrand archive,"<sup>235</sup> were only disclosed as a result of leaks to French researchers. Although the documents were eventually disclosed and used in the ICTR, the unauthorized nature of their release raised problems for the investigations.<sup>236</sup> The withholding of the records by the French government undermined survivors' effective right to the truth about the internal and international policies behind the Rwandan genocide.

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231. For an overview of the laws and decrees establishing security archives in these and other states, see Open Society Foundations, Archives of States Security Service Records (2013), available at <http://osf.to/Px3CYE>.

232. Law on Rehabilitation of Victims of Political Repression, arts. 2, 11 (Russia) (Oct. 18, 1991, amended Dec. 17, 1992), translated and reprinted in *Transitional Justice: Laws, Rulings, and Reports 797* (Neil J. Kritz, ed., 1995).

233. See Hoover Institution, Archives of the Soviet Communist Party and Soviet State Microfilm Collection, <http://bit.ly/1xsAF2L> (last visited Nov. 10, 2014).

234. See Nat'l Sec. Archive, *The Rwandan Crisis Seen through the Eyes of France*, Nat'l Sec. Archive Elec. Briefing Book No. 461 (Mar. 20, 2014), <http://bit.ly/1k9B2II>.

235. For online access to relevant records, see La France au cœur du génocide des Tutsi: Documents provenant d'archives Mitterrand, <http://bit.ly/1iREBTN> (last updated Oct. 10, 2014). For a detailed review of the archive's content, see Jacques Morel, *La France au Cœur du Génocide des Tutsi* (2010).

236. See Nat'l Sec. Archive, *The Rwandan Crisis*, *supra* note 234.

Also, U.S. records relating to atrocities in Darfur, including declassified embassy cables, State Department analysis, and satellite imagery, could have provided support for ICC investigations and efforts to prosecute Sudanese President Al Bashir, which began in 2005 with a U.N. Commission of Inquiry report into Sudan.<sup>237</sup> Instead, U.S. withholding of documents on acts of violence—which it reported internally as genocide being carried out by the Al Bashir government—held up peacekeeping deployments and contributed to delays in the eventual indictment of the Sudanese leader.<sup>238</sup>

Importantly, the examples referenced here all pertain to cases in which leaks or partial disclosure revealed the existence of relevant third-country files. In many instances, especially outside of liberal Western societies, third countries have not released any documents at all, and one can only speculate as to the existence of relevant files. Nowhere is this truer than in the People's Republic of China, where disclosure of human rights files is nearly non-existent. Chinese disclosure could likely make a seminal contribution to the proceedings against former Khmer Rouge leaders in Cambodia and efforts to clarify atrocities in North Korea, among other cases.<sup>239</sup> Many other states likewise hold files that could be impactful. For example, Vietnam may hold information germane to the Khmer Rouge trials,<sup>240</sup> and India may possess information vital to the new

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237. Rep. of the Int'l Comm'n of Inquiry on Darfur to the U.N. Secretary-General, pursuant to Security Council Res. 1564 of Sept. 18, 2004 (Jan. 25, 2005), available at <http://bit.ly/1f7JqJF>.

238. *U.S. Opposition to International Criminal Court in 2004–2005* Held Up Peacekeeping, Slowed Justice for Genocide Perpetrators, Nat'l Sec. Archive Elec. Briefing Book No. 335 (Feb. 1, 2011), <http://bit.ly/1nJsI2C>; see generally Rebecca Hamilton, *Fighting for Darfur* (2011) (describing the movement in the US towards intervention in Darfur). Bashir was indicted for crimes against humanity in 2009 and genocide in 2010 but remains at large, beyond the ICC's reach. *UN: Demand al-Bashir's surrender to the International Criminal Court*, Amnesty International (Sept. 20, 2013), <http://bit.ly/1tzXUIA>.

239. The Documentation Center of Cambodia (DC-Cam) has given the UN-backed Khmer Rouge tribunal commercial documents signed by Chinese officials, but these were discovered in Cambodia rather than being released by Beijing. John D. Ciorciari with Youk Chhang, *Documenting the Crimes of Democratic Kampuchea*, in *Bringing the Khmer Rouge to Justice: Prosecuting Mass Violence before the Cambodian Courts* 229 (Jaya Ramji & Beth Van Schaack, eds., 2005).

240. In 2008, the Vietnamese government gave DC-Cam films allegedly taken by Vietnamese troops shortly after the ouster of the Pol Pot regime in early 1979. The films showed the infamous Khmer Rouge prison at Tuol Sleng but were not accepted into evidence at the Khmer Rouge tribunal due to concerns about the

U.N. commission on abuses during Sri Lanka's civil war.<sup>241</sup> As the Latin American example suggests, third-country disclosure by regional neighbors can be as impactful as declassification by the great powers.

### III. A NEW FRONTIER: SHARING RECORDS ON LIBYA AND THE BROADER MIDDLE EAST

To date, third-country disclosure and associated norms pertaining to the right to the truth have been strongest in the Western Hemisphere and Europe. Norms are much weaker, and archival sharing is much rarer, in other parts of the world where regional and domestic human rights frameworks and institutions are weaker and where political incentives to disclose files differ. Yet it is precisely in some of those areas that the need for third-country records is greatest, as states deal with legacies of state abuse and try to make difficult transitions from autocratic and repressive rule toward more democratic futures.

Nowhere is the need for enhanced archival sharing more acute than the broader Middle East and North Africa, where even the term “Arab Spring” has come to possess a bittersweet quality, and where efforts to deal with decades of oppressive rule have borne little fruit to date. In an area that L. Carl Brown famously called one of the “most penetrated” regional substructures in the world; outside powers have long been deeply immersed in security affairs through military and intelligence cooperation and confrontation.<sup>242</sup> Both outside powers—such as the United States, Russia, Britain, and France—and

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difficulty of ascertaining their reliability. *Prosecutor v. Kaing*, Case No. 001/18-07-2007/ECCC/TC, Decision on the Vietnamese Film Footage Filed by the Co-Prosecutors and on Witnesses CP3/3/2 and CP3/3/3, ¶¶ 3–8 (July 29, 2009).

241. India's interest in abuses against the Sri Lankan Tamil population and handling of Sri Lankan refugees for many years virtually guarantees that relevant information exists in Indian agency files. The United Nations—which lacks its own FOI equivalent—and member states that contribute peacekeepers to U.N. missions may also possess files on violations in Sri Lanka and elsewhere. The U.S. government has relevant records, as illustrated by declassified CIA reports on Tamil demands for inquiries into alleged genocide in the 1980s, as well as more recent State Department intelligence bureau reports. *See* U.S. Central Intelligence Agency, *Sri Lanka-India: Aid to Refugees* (Feb. 23, 1985) (available in the CIA FOIA electronic reading room).

242. L. Carl Brown, *International Politics and the Middle East* 3–5, 16–18 (1984).

regional states almost certainly have files replete with information about the misdeeds of area regimes. This section uses the case of Libya to illustrate how and why third-country records are crucial to upholding the fragile right to the truth that exists in that troubled region.

### A. The Case of Libya

In the wake of the uprisings and revolutions that swept through the Middle East and North Africa in 2011, mounting evidence has come to light exposing the extent of human rights violations in the region during decades of opaque, dictatorial rule and during the violent throes of the Arab Spring. Public demands for the truth about past atrocities lay at the core of movements for political transformation in the region. A key spark for Libya's revolution was the February 2011 arrest of Fathi Terbil, a lawyer who represented families organizing a "day of rage" to demand that the government confirm the identities and release the remains of prisoners killed in a 1996 state-sponsored massacre of some 1,200 people at Abu Salim prison—the endpoint for many of Libya's disappeared.<sup>243</sup> In Libya and elsewhere, the toppling of repressive regimes has given hope to survivors seeking information about past crimes, details on the fates of disappeared family and friends, and official accountability. Third-country records will be keys to unlocking secrets of the past.

#### 1. A Legacy of State Secrecy and Terror

The Libyan security forces used arbitrary detention and enforced disappearances to dismantle organized political resistance inside and outside the country during the more than four decades of Qadhafi's rule.<sup>244</sup> For years, human rights groups called on the Qadhafi government to reveal information on missing persons such

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243. See Libya, *From Repression to Revolution: A Record of Armed Conflict and International Law Violations, 2011–2012* 99–100 (M. Cherif Bassiouni ed., 2013). The Libyan government kept the massacre secret until 2001, when it began informing some victims' families, but subsequently refused to provide the names of people killed or return their remains. *Libya: Abu Salim Prison Massacre Remembered*, Human Rights Watch (June 27, 2012), <http://bit.ly/QIBd2I>.

244. See, e.g., Rep. of the Working Grp. on Enforced or Involuntary Disappearances, U.N. HRC, 13th Sess., ¶ 333, U.N. Doc. A/HRC/13/31 (Dec. 21, 2009) (noting that the Working Group transmitted 14 cases of unresolved disappearances to Libya in 2009 and only received clarification on five).

as the Lebanese Shia cleric Imam Sayed Musa al-Sadr, disappeared in Libya in 1978, and opposition figures Jaballa Hamed Matar and Izzat al-Megaryef, disappeared in Egypt in 1990.<sup>245</sup> Many prisoners emerged from the infamous Abu Salim and Ain Zara political prisons, referred to as “Black Holes” by the U.N. Mission in Libya.<sup>246</sup> The revolution fostered hope that disappeared persons would be found. For some, like Hisham Matar—a prominent author and son of the disappeared Jaballa Hamed Matar—mysteries remain unsolved. Hisham determined that his father was held in Abu Salim prison but has been unable to confirm if his father was killed during the 1996 massacre of 1,200 inmates at Abu Salim, transferred to another prison, or killed at a later time.<sup>247</sup>

Hisham’s story is one of many in Libya’s lurid history of extreme political repression. Under Qadhafi, Libyan authorities led by the Internal Security Agency (ISA) oversaw disappearances within the country and obstructed family members from discovering the truth about the whereabouts of their relatives.<sup>248</sup> As of 2009, the number of victims of enforced disappearance under Qadhafi was

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245. Matar, a prominent dissident who organized against the Qadhafi regime while living in exile, was arrested by Egyptian security forces in Cairo with Izzat al-Megaryef on March 13, 1990 and delivered to Libyan security forces the next day. *Libya: Reveal Fate of “Disappeared,” Use Arab League Summit to Resolve Longstanding Case*, Human Rights Watch (Mar. 26, 2010), <http://bit.ly/Px41KU>.

246. See Rep. of the Int’l Comm’n of Inquiry on Libya, U.N. HRC, 19th Sess., Annex I, ¶ 42, U.N. Doc. A/HRC/19/68 (Mar. 2, 2012). A report produced by the U.N. Support Mission in Libya (UNSMIL) referred to these prisons as “black holes.” See *Transitional Justice-Foundation for a New Libya*, U.N. Support Mission in Libya (Sept. 17, 2012), <http://bit.ly/1roZAxS>.

247. Hisham Matar wrote a vivid account in April 2013 of his search for his father and his return to Libya after the fall of Tripoli to rebel forces in 2011. He spoke by telephone with one of the revolutionaries inside Abu Salim as they broke down the last door to a secret cell, hoping his father was inside. Instead, the revolutionaries found an older man in a windowless room who had been in solitary confinement so long that his memory was gone. The man held a picture of Jaballa Matar with him but could not provide any information on how he obtained the picture or what happened to Jaballa. Hisham Matar, *Letter from Libya: The Return, A father’s disappearance, a journey home*, *The New Yorker*, Apr. 8, 2013.

248. Geoff Simons, *Libya and the West: From Independence to Lockerbie* 106 (2003). The ISA was responsible for countering internal threats to the regime, and monitored groups and individuals perceived as regime opponents. Rep. of the Int’l Comm’n of Inquiry to investigate all the alleged violations of international human rights law in the Libyan Arab Jamahiriya, U.N. HRC, 17th Sess., ¶ 40, U.N. Doc. A/HRC/17/44 (Jan. 12, 2012); Bassiouni, *supra* note 243, at 100.

estimated in the thousands.<sup>249</sup> Qadhafi's security forces continued the practice of secret arrests and detentions to counter the uprising that began in February 2011.<sup>250</sup> Additionally, the ICC found the existence of a "cover-up" campaign by the Qadhafi regime to conceal the commission of crimes by the security forces.<sup>251</sup>

## 2. The Need for Third-Country Records

Efforts to clarify past abuses and seek justice in the wake of the Libyan revolution have been stymied by the lack of access to evidence, including official records. Gaining access to information in Libyan state files has posed a major hurdle for those involved in seeking truth and accountability. There have been some breakthroughs. For example, opposition groups entering Abu Salim prison in August 2011 confiscated prison records, and Human Rights Watch investigators documented the discovery of the internal files of the former intelligence chief, Musa Kusa, in the offices of the foreign intelligence services.<sup>252</sup> These include signed letters from CIA and MI6 agents sent to Kusa, revealing the involvement of U.S. and British intelligence in the detention and secret rendition of Libyan exiles to Qadhafi's intelligence operatives.<sup>253</sup> The documents also have information that could be useful to disentangle the chain of command

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249. See Human Rights Watch, *Truth and Justice Can't Wait: Human Rights Developments in Libya Amid Institutional Obstacles* 42 (2009) [hereinafter Human Rights Watch, *Truth and Justice*]; Dirk Vandewalle, *A History of Modern Libya* 120, 147 (2006).

250. See Rep. of the Int'l Comm'n of Inquiry on Libya, *supra* note 246, Annex I, ¶ 255; Rep. of the Int'l Comm'n of Inquiry to investigate all the alleged violations of international human rights law in the Libyan Arab Jamahiriya, *supra* note 248, ¶ 90 (also including information on numerous disappearances before the revolution).

251. See *Prosecutor v. Gaddafi & Al-Senussi*, Case No. ICC-01/11, Warrant of Arrest (June 27, 2011), <http://www.icc-cpi.int/iccdocs/doc/doc1099332.pdf>.

252. *Secret Intelligence Documents Discovered in Libya*, Human Rights Watch (Sept. 9, 2011), <http://bit.ly/1mJ7CEg>.

253. Human Rights Watch, *Delivered into Enemy Hands: US-Led Abuse and Rendition of Opponents to Gaddafi's Libya* 9 (2012) [hereinafter Human Rights Watch, *Delivered into Enemy Hands*], available at <http://bit.ly/1roZIOA>. See also James Orr, *Jack Straw sued over illegal rendition of Abdel Hakim Belhadj*, *Guardian*, Apr. 18, 2012, <http://bit.ly/1EvIcA4> (reporting on the lawsuits Libyan victims of the rendition campaign filed against high-level British officials for their knowledge of the kidnappings, including former Foreign Secretary Jack Straw).

and role of security officers within the web of intelligence that existed under Qadhafi.

Security installations, hospitals, and other official buildings throughout the country contain relevant records with details on security forces' abuses before and during the 2011 uprising. During the height of the conflict, for example, reports surfaced of documents with evidence that Qadhafi issued orders to siege the town of Misrata in March 2011, intent on starving the city's civilian population.<sup>254</sup> Some records have trickled into the legal process on a piecemeal basis, but files such as those discovered at Abu Salim generally remain in disarray, and there has been no systematic effort to protect and organize relevant domestic files. The lack of accessible, organized domestic records within Libya heightens the need for third-country files.

Foreign government archives clearly hold information important for the clarification of Libya's past violations. U.S. government archives released over the years demonstrate the type of relevant information that exists outside of Libya. U.S. intelligence agencies kept close tabs on Libyan security operations, reporting closely on the Qadhafi regime's decades-long support for international terrorist activities and assassination campaigns abroad. In 1995, for example, the CIA reported that Libya's intelligence apparatus continued to target Libyan dissidents in foreign territories and was "reinvigorating terrorist links."<sup>255</sup> It called attention to the 1994 appointment of a new head of Libyan Intelligence, Musa Kusa, a "long-time intelligence officer . . . wanted by French authorities for questioning about his involvement in the UTA 772 bombing [of a French civilian plane in 1989]."<sup>256</sup>

The case of former Libyan Foreign Minister Mansour Kikhia—a case emblematic of broader abuses by the Qadhafi

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254. See Chris Stephen, *Qadhafi Files Show Evidence of Murderous Intent*, Guardian, June 18, 2011, <http://bit.ly/1ptPLDr>; Physicians for Human Rights, *Witness to War Crimes: Evidence from Misrata, Libya* 24 (2011), <http://bit.ly/1k9BBBR>.

255. U.S. Central Intelligence Agency, Counterterrorism Center, *Secret Terrorism Review: Special Edition-1993 in Review 1 (1995)* (on file with authors and available in CIA reading room).

256. *Id.* at 1. Musa Kusa later defected from the Qadhafi regime, and fled to London, where British police and Scottish prosecutors questioned him on the 1988 Lockerbie bombing. *Musa Kusa traced to Qatar Resort*, Express, Oct. 23, 2011, <http://dexpr.es/10NEHpu>.

regime—illustrates the potential contribution of third-country records. Kikhia served as Qadhafi's foreign minister in the early 1970s before defecting to the United States and becoming the Libyan regime's most prominent critic.<sup>257</sup> In 1993, while in Egypt to organize a human rights conference, Kikhia disappeared. Days later, a secret CIA document reported that Kikhia had been on Tripoli's short list for assassination, and the disappearance fit the modus operandi of the Libyan intelligence services.<sup>258</sup> After a four-year investigation, the CIA concluded that he had been abducted by Egyptian agents, given to Libyan intelligence, and killed as part of Qadhafi's longstanding program to "eliminate leading exiles."<sup>259</sup> Indeed, Kikhia's remains were discovered in 2012,<sup>260</sup> reportedly with the help of information from Qadhafi's former intelligence chief, Abdullah al-Senussi.<sup>261</sup> Senussi now faces an array of criminal charges in Libya and at the ICC.<sup>262</sup> Among other things, U.S. files contain information suggesting

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257. *Libya mourns Gaddafi opponent, body found after 19 years*, Times Live Dec. 3, 2012, <http://bit.ly/QBCZmH>. U.S. officials had met with Kikhia and supported his work calling attention to human rights abuses under Qadhafi. Unclassified Report, U.S. Dep't of State, Human Rights Presentation Materials (Jan. 20, 1995) (on file with the authors).

258. That document was later declassified in redacted form in 2000. U.S. Central Intelligence Agency, DCI Counterterrorism Center, *The Disappearance of Libya Oppositionist Mansur Kikhia* (Dec. 15, 1993), available at <http://1.usa.gov/1lK8ggP>.

259. See Jim Hoagland, *Egypt, Libya Linked to Abduction*, Wash. Post, Sept. 28, 1997, <http://wapo.st/1yrGVpM>.

260. Investigators from Libya's transitional government found the remains of three bodies buried beside the house. DNA tests later confirmed that one of the bodies belonged to Kikhia. *Libya tests DNA in search for missing imam*, Agence France-Presse, Apr. 14, 2012.

261. Rana Muhammad Taha, *The body of Libyan opposition figure resurfaces after 20 years*, Daily News (Egypt), Sept. 11, 2012, <http://bit.ly/1AWSdrK> (reporting leaks from Libyan prosecutors that Senussi acknowledged Kikhia's abduction and killing); Hadi Fornaji, *The remains of Libyan dissident Mansour Al-Kikhia may have been found . . .*, Libya Herald, Nov. 18, 2012, available at <http://bit.ly/1wMq1DV> (reporting that Senussi admitted Kikhia had been taken to an intelligence facility in Tripoli).

262. Senussi is now in custody in Tripoli, facing numerous charges of human rights violations and oversight of the internal security forces responsible for torture and assassination of perceived political opponents of the Qadhafi regime. David D. Kirkpatrick, *Spy Chief for Qaddafi Is Extradited to Libya*, N.Y. Times, Sept. 5, 2012, <http://nyti.ms/10St0yc>. Domestic interest in trying Senussi is strong in Libya, especially given his alleged role in the Abu Salim prison massacre in 1996, when he oversaw Libyan internal security. Human Rights Watch, *Libya*, *supra* note 243.

that Senussi interrogated Kikhia shortly after his 1993 abduction in Egypt.<sup>263</sup>

U.S. and British documents produced during negotiations with Libya in the late 1990s—talks aimed at convincing Qadhafi to give up unconventional weapons and pay compensation for past acts of terrorism—also contain useful information. The negotiations involved meetings with high level officials, such as foreign intelligence chief Musa Kusa, and Saif al-Islam—Qadhafi’s son who is currently wanted for extradition by the ICC and preparing to stand trial in Libya for crimes committed during the 2011 uprising.<sup>264</sup> U.S. Embassy cables provide important information on the nature of Saif’s authority, describing meetings with him and his staff that reveal important details about his role within the chain of authority under Qadhafi. For example, cables report on meetings where members of Saif al-Islam’s staff requests approval for weapons sales and the refurbishing of armored personnel carriers, on behalf of military units such as the Khamis Brigade<sup>265</sup>—a unit that protected the regime and took part in abuses against protesters during the 2011 uprising.<sup>266</sup> The documents demonstrate that information in foreign archives can provide important evidence in the ongoing investigations into Saif al-Islam’s responsibility for crimes committed in 2011.

### 3. Third-Country Disclosure as a Form of “Positive Complementarity”

The disclosure of official records is an important means by which third countries can empower states dealing with human rights violations and can be considered a form of “positive complementarity” in the parlance of international criminal law. The principle of complementarity, developed to guide the work of the International Criminal Court and its relationship vis-à-vis national courts, holds that the ICC may only exercise jurisdiction when a state is unable or

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263. Hoagland, *supra* note 259.

264. Saif al-Islam appeared in a Libyan court in Zintan (Western Libya) in September 2013. See *Qaddafi’s son Saif appears in Libyan court*, Al Jazeera, Sept. 19, 2013, <http://aje.me/118fQDs>.

265. *Saif al Islam al-Islam’s Staff Reaches out on Pol-Mil Relations*, Telegraph, Dec. 14, 2009, <http://bit.ly/1nJtWed> (posting a document passed to the newspaper by WikiLeaks).

266. Varun Vira & Anthony H. Cordesman, Center for Strategic and International Studies, *The Libyan Uprising: An Uncertain Trajectory* 22 (2011), available at <http://bit.ly/1ptQmoG>.

unwilling to investigate or prosecute serious crimes.<sup>267</sup> Positive complementarity, by contrast, emphasizes the role of the ICC and States Parties to the Rome Statute in strengthening national jurisdictions and building domestic judicial capacity.<sup>268</sup>

Discussion of positive complementarity is *à propos* in Libya, as the ICC and Libyan government have disputed where Saif al-Islam and Abdullah al-Senussi should be tried. Both are wanted by the ICC for alleged crimes during the throes of Libya's 2011 transition but are being held in Libya for trials in national courts.<sup>269</sup> That dispute reveals the difficulty of applying complementarity in the exercise of ICC jurisdiction but does not preclude positive complementarity in which the ICC and third countries support domestic trials and human rights inquiries.<sup>270</sup> In Libya and elsewhere, domestic proceedings have important potential advantages for advancing the right to the truth. Credible domestic trials offer greater opportunities to involve survivors and family members of victims directly and engage them in the search for the truth. Domestic ownership also sends the signal

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267. See Rome Statute, *supra* note 131, art. 17. Complementarity is a partial safeguard for the right to the truth, because ICC investigations and prosecutions incentivize states to act and provide means for the international community to pursue justice and bring facts to light where states fail to do so.

268. In a report to the Assembly of States Parties (ASP), the ASP Bureau defined positive complementarity as "international efforts aimed at strengthening national jurisdictions," such as rule of law development programs. The Bureau emphasized that while the ICC has limited resources for capacity-building, states, the United Nations, and specialized agencies have major roles to play. *Report of the Bureau on complementarity*, 11th Sess., ¶¶ 6–9, Doc. ICC-ASP/11/24 (Nov. 7, 2012), available at <http://bit.ly/1xdVH6y>.

269. Concerned about Libya's will and capacity to hold high-level trials, and relying on a 2011 referral of the Libyan situation from U.N. Security Council Resolution 1970, the ICC indicted Qadhafi (before his death), Senussi, and Saif al-Islam. S.C. Res. 1970, ¶ 4, U.N. Doc. S/RES/1970 (Feb. 26, 2011). Although Resolution 1970 obligates Libya to cooperate with the ICC, its new government has refused to transfer Senussi and Saif al-Islam to The Hague and plans to try them domestically for crimes, including some that predate the ICC's temporal jurisdiction. See *Prosecutor v. Gaddafi & Al-Senussi*, Case No. ICC-01/11-01/11, *Decision on the admissibility of the case against Saif al-Islam Gaddafi*, ¶¶ 155, 208 (May 31, 2013), available at <http://bit.ly/1lK9tVv>; *ICC: Libya's Bids to Try Gaddafi, Sanussi*, Human Rights Watch (May 13, 2013), <http://bit.ly/1jW2Deb>.

270. This is reflected in the MoU between the ICC prosecutor and the government of Libya, in which both parties agreed to support each other's investigations, with the ICC prioritizing suspects outside of Libya, and Libyan authorities focusing on suspects inside Libya. Bensouda Statement, *supra* note 156.

that the government is committed to forging a new social contract based on enhanced transparency and respect for basic rights.<sup>271</sup> Dozens of former officials in the Qadhafi regime are now standing or awaiting trial in Libyan courts,<sup>272</sup> and third countries can help advance justice and elucidate the truth.

Sharing official records is one of the principal ways in which the ICC and states can assist national prosecutions.<sup>273</sup> The ICC Prosecutor can share her investigative files,<sup>274</sup> and the Court Registry has indicated that it envisages sharing the ICC's public archives with countries in which it has conducted investigations.<sup>275</sup> However, the ICC lacks the depth of information some states possess in their intelligence and security files—particularly those that monitored the activities of the Qadhafi regime for decades and the NATO-led coalition that participated in its overthrow. Too little attention has been given to the wealth of relevant and probative information that could be mobilized through the disclosure of third-country files. Providing information for truth processes can help contribute to the country's political transition and build a more credible and effective judicial system.<sup>276</sup>

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271. Some international experts have observed that within Libya there has been a strong desire to prosecute domestically and have suggested that a new and willing Libyan government should be given every chance, and every resource, to try cases such as that of Saif al-Islam. See, e.g., Timothy William Waters, *Libya's Home Court Advantage: Why the ICC Should Drop Its Qaddafi Case*, Foreign Aff. (Oct. 2, 2013), available at <http://fam.ag/1stsUTS> (making the case for domestic prosecution, arguing that a trial in The Hague would do little to address the root causes of political instability and breakdown in governance in Libya).

272. The Libyan authorities have announced their intention to commence the trial of Saif al-Islam, along with thirty-six other defendants, including Abdullah al-Senussi, and former special forces commander Saadi Qadhafi. ICC Request for Disclosure, *supra* note 155.

273. International technical support for the judiciary and civil society actors is also vital for developing secure, organized and accessible domestic archives of past abuses. Since the fall of the Qadhafi regime, international NGOs have supported local civil society actors to access and bring attention to government records in Libya.

274. Dermot Groome, *The Right to Truth in the Fight against Impunity*, 29 Berkeley J. Int'l L. 175, 190–93 (2011).

275. Marieke Wierda, Int'l Ctr. for Trans. Just., Stocktaking: Complementarity 2 (2010), available at <http://bit.ly/1jW49gB>.

276. Numerous related initiatives have been underway to build Libyan judicial capacity, including workshops led by UN agencies and NGOs on forensic investigations, trial monitoring, and transparency and accountability in transitional justice proceedings. See, e.g., Tom Westcott, *Libya: Lawyers learn the*

## B. Illuminating Transnational Abuses in the Middle East and North Africa

Both outside powers—such as the United States, Russia, Britain, and France—and regional states have information in their files germane to upholding the right to the truth in Libya and elsewhere in the MENA region. Disclosure is particularly important now, as the uprisings and regime changes in the region create opportunities for significant advances in truth-seeking and justice.<sup>277</sup>

If managed well, such efforts can contribute to the solidification of more democratic rule in some of the region's troubled states. Access to records with information on those responsible for past violations is essential to weed out those who should be prosecuted or banned from participating in security or political affairs.

The matter of enforced disappearance and state secrecy is a central consideration when dealing with transitions in these countries. Uncovering the truth about prior human rights violations in periods of rapid political transition helps establish a break from the legacies of a repressive regime. International experts on the right to the truth have found that the “realization of the collective right to truth concerning prior abuses in periods of transition, or following periods of conflict, empowers the body politic to educate itself, reform

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*power of forensics*, Libya Herald, Mar. 19, 2013, available at <http://bit.ly/1nsc6zl> (discussing workshops in Libya run by the Argentine Forensic Anthropology Team, an NGO set up in Argentina in 1984 to deal with some 30,000 cases of missing persons); *Libya: NPWJ fosters establishment of Libyan Trial Monitoring Network*, No Peace Without Justice (June 15, 2013), <http://bit.ly/1mJ9NHP> (discussing the role of groups such as No Peace Without Justice in creating a civil society network to carry out trial monitoring in Libya); *UN representatives urges reconciliation in Libya*, Int'l Ctr. for Trans. Just. (Dec. 13, 2012), <http://bit.ly/1faVJEz> (discussing an international conference involving the UN Support Mission in Libya, UN Development Program, and officials and activists from Libya and abroad).

277. This applies to countries such as Syria, where the disclosure of information on atrocities is critically important for investigations and clarification of ongoing acts of repression and violence. See, e.g., UN Independent International Commission of Inquiry on the Syrian Arab Republic, OHCHR, <http://bit.ly/1e8gHgH> (last visited Nov. 10, 2014) (noting that the Commission was established in August 2011 to investigate and establish the facts and circumstances of all alleged violations of international human rights law since March 2011 in Syria); *France Pushes for Syrian Referral to ICC*, Voice of America, Apr. 15, 2014 (reporting on international calls for Syria's referral to the ICC).

institutions and promote policies that prevent recurrence of past violations.”<sup>278</sup> It is in this context that transitional justice processes can benefit from the contribution of third-country files, particularly in cases of enforced disappearances.<sup>279</sup>

A pattern similar to that of Libya emerges in other countries in the region, where family members of victims of enforced disappearance have attempted to obtain information on the whereabouts of their relatives. The UN Working Group on Enforced or Involuntary Disappearances report of March 2012 addressed cases in Egypt, where “[i]t was reported that the practice of enforced disappearances by the State Security Investigations (SSI) was used routinely before 2011.”<sup>280</sup> Human rights groups also reported on cases of enforced disappearances, and called for the Egyptian authorities under Mubarak to disclose the fate and whereabouts of disappeared persons.<sup>281</sup>

There are also cases of enforced disappearances that directly link the experiences of regional actors under dictatorships. After re-establishing relations in 1989, Egypt and Libya developed a working relationship that involved transferring detained dissidents. The SSI and other Egyptian agencies, as mentioned above, were suspected of involvement in the kidnappings of Libyan exiles living in Cairo and their transfer to Qadhafi’s intelligence services. The family members of Izzat al-Megaryef told Human Rights Watch that Egyptian intelligence officers had come to the family house in Cairo

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278. OSJI *Diario Militar* brief, *supra* note 4, ¶ 36.

279. Although we focus on a few illustrative cases here, other countries in the region with histories of political violence are likewise engaged in right to the truth efforts, such as Lebanon, which is working to address the legacy of enforced disappearances from the country’s 1975–90 civil war period. *See, e.g., Lebanon; Families Propose Draft Law for the Missing and Forcibly Disappeared Persons*, Int’l Ctr. for Trans. Just. (Feb. 28, 2012), <http://bit.ly/1lJw2Oy> (discussing a proposed law on the missing and forcibly disappeared persons, which was part of the ongoing project “Lebanon’s unaddressed legacy: the missing and the families’ right to know,” funded by the European Union and the Embassy of Switzerland in Lebanon). These efforts stand to benefit significantly from third-country records, given the historical role of foreign actors in Lebanon’s civil conflict and internal politics.

280. Rep. of the Working Grp. on Enforced or Involuntary Disappearances, U.N. HRC, 19th Sess., Annex I, ¶ 162, U.N. Doc. A/HRC/19/58/Rev. 1 (Mar. 2, 2012).

281. *Egypt: Disclose Fate of ‘Disappeared’ Student*, Human Rights Watch (Sept. 3, 2010), <http://bit.ly/1k9F4QU>.

and taken away Magaryef for questioning.<sup>282</sup> Additionally, the CIA confirmed through its investigations into the disappearance of Mansour Kikhia that Egyptian agents were involved in his abduction and transfer to the Libyan regime.<sup>283</sup>

The case of Qadhaf al-Dam, Muammar al-Qadhafi's first cousin and former foreign liaison and special advisor to Egypt, further highlights the transnational connections to human rights cases in the MENA region. Al-Dam served as a liaison to the Mubarak government and had direct contact with the Egyptian intelligence services.<sup>284</sup> Al-Dam was detained in Cairo in March 2013 in response to an Interpol red notice requesting his arrest.<sup>285</sup> Libyan authorities have alleged that Al-Dam took part in planning operations against Libyan dissidents abroad,<sup>286</sup> including the abduction and disappearance of Mansour Kikhia.<sup>287</sup> As discussed above, documents in the archives of U.S. agencies and other governments could also be relevant to other rendition operations that took place in Cairo, such as the Jaballa Matar kidnapping that took place in 1990, three years before Kikhia's disappearance.<sup>288</sup>

The U.S. government archives are full of information useful for human rights advancements in the region. U.S. files include diplomatic cables, military reports, and intelligence assessments, produced as a result of years of collaboration with their counterparts in the Egyptian government.<sup>289</sup> Because Egyptian military units received U.S. funding, they were susceptible to regular vetting and reporting on their human rights practices in accordance with the

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282. Human Rights Watch, *Libya*, *supra* note 243.

283. Hoagland, *supra* note 259.

284. Hadi Fornaji, *Egyptian Court Blocks Qaddafi al-Dam Extradition*, *Libya Herald*, Apr. 3, 2013, available at <http://bit.ly/1tVEzPh>.

285. *Ensure due process for extradited Libyans*, Human Rights Watch (Mar. 13, 2013), <http://bit.ly/QBImSN>.

286. Bradley Hope, *Qaddafi Cousin: Egypt Sold Me out for Aid*, *The National*, May 15, 2013, available at <http://bit.ly/1zHPdxI>.

287. Farah Waleed, *Qaddafi Al-Dam implicated in disappearance of Mansour El-Kikhia*, *Libya Herald*, Mar. 28, 2013, available at <http://bit.ly/1swYRf5>.

288. See Afua Hirsch, *Ministers press Libya over detentions*, *Guardian*, Jan. 18, 2010, <http://bit.ly/1pK8Hi5>.

289. The diplomatic cables made public by WikiLeaks provide a glimpse of the type of reporting available in the U.S. archives. See Mark Landler & Andrew W. Lehren, *Cables Show Delicate U.S. Dealings With Egypt's Leaders*, *N.Y. Times*, Jan. 27, 2011, <http://nyti.ms/1swYSj3>.

Leahy Amendment.<sup>290</sup> The files also include internal reporting by U.S. officials, voicing concern over Egypt's human rights practices.<sup>291</sup> Releasing this information, therefore, can help promote the image of the United States in the region.

Additionally, there are records in police and military installations in Egypt that could be relevant to human rights cases in Libya. In March 2011, Egyptians stormed the headquarters of Amn Al-Dawla, the State Security Police, in Nasr City about 30 miles south of Cairo, to halt the destruction of police and intelligence documents.<sup>292</sup> The documents in the police files reveal the inner workings of Egypt's repressive state apparatus, as well as provide answers for the victims and family members who suffered the gravest abuses under Mubarak's dictatorship.<sup>293</sup> These records could potentially contain information on the detention of Libyan exiles, and their transfer to Qadhafi officials.

When addressing the role of third-country files on cases of forced disappearance in the MENA region, it is also important to consider the program of extraordinary rendition that emerged after the terrorist attacks of September 11, 2001.<sup>294</sup> Interstate cooperation was crucial to the functioning of this program that involved at least fifty governments around the world.<sup>295</sup> Due to the transnational nature of the rendition campaign, and the widespread allegations of torture that took place, there is high public interest in the right to the truth around the program. However, the U.S. intelligence services

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290. *An Overview of the Leahy Vetting Process*, HumanRights.gov (July 9, 2013), <http://1.usa.gov/1qB7sN7>.

291. WikiLeaks cables reveal that U.S. officials recorded abuses of authority, including jailing dissidents and bloggers and reports of torture by security forces, and voiced their concerns to their Egyptian counterparts. *See* Landler & Lehren, *supra* note 289.

292. Frank Hornig, *The Inner Logic of Evil: A Stasi Expert Advises Egypt on Secret Policy Legacy*, Spiegel Online, Apr. 4, 2011, <http://bit.ly/1EvIBm8>.

293. Liam Stack & Neil MacFarquhar, *Egyptians Get View of Extent of Spying*, N.Y. Times, Mar. 9, 2011, <http://nyti.ms/10StJzi>.

294. *See* Human Rights Watch, *Delivered into Enemy Hands*, *supra* note 253. For more on U.S. extraordinary rendition policy; *see also* M. Cherif Bassiouni, *The Institutionalization of Torture by the Bush Administration: Is Anyone Responsible?* 141–82 (2010) (discussing the policy behind practices of secret kidnapping and torture programs that emerged during the Bush administration).

295. Open Society Justice Initiative, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition* 61–118 (2013), *available at* <http://osf.to/1zHPnW3>.

have been unwilling to disclose pertinent information on the scale of kidnappings that took place as part of the program. This is evidenced in the allegations of CIA obstruction of the Senate intelligence investigations into the post-9/11 CIA interrogation programs.<sup>296</sup> The battle over the classification of the 6,300-page inquiry by the Senate intelligence committee and accusations of CIA spying on committee members shows the great lengths the intelligence agencies will go to keep from disclosing information on past abuses.<sup>297</sup>

Nonetheless, the transnational nature of the rendition operations has led to cases in other countries that have the potential to clarify these activities. Court cases in the United Kingdom, for example, have forced the release of government files that shed light on the role of British officials in the rendition campaign, including former foreign secretary Jack Straw.<sup>298</sup> Straw, along with former MI6 counterterrorism chief Sir Mark Allen, were sued in civilian court by Libyan victims of extraordinary rendition only after evidence surfaced in 2011 that the programs involved collaboration between the U.S. and British intelligence and the Qadhafi regime.<sup>299</sup> In Italy, the courts have investigated and charged CIA officials (in absentia) with the kidnapping and rendition of the Milan cleric Osama Moustafa Hassan Nasr (known as Abu Omar).<sup>300</sup> Hassan was kidnapped in Milan and taken to Ramstein Air Base in Germany before being transferred to Egypt, where he was allegedly tortured by Egyptian state agents.<sup>301</sup> The disclosure of classified records in cases

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296. Spencer Ackerman, *Obama Knew CIA Secretly Monitored Intelligence Committee, Senator Claims*, Guardian, Mar. 5, 2014, <http://bit.ly/1yrHGiy>.

297. Senator Dianne Feinstein called reports of CIA interrogation programs “chilling,” and noted that the interrogations and the conditions of confinement at CIA detention sites were “far different and far more harsh than the way the CIA had described them to us.” *Dianne Feinstein Statement on CIA Torture Report 'Cover-Up' - Full Text*, Guardian, Mar. 11, 2014, <http://bit.ly/1cQ17vU>.

298. Owen Bowcott & Ian Cobain, *Jack Straw's Role in UK Rendition Revealed*, Guardian, July 15, 2010, <http://www.theguardian.com/world/2010/jul/15/rendition-jack-straw-martin-ubanga>; *Italy: The Abu Omar Case*, Amnesty Int'l (Nov. 4, 2009), <http://bit.ly/1ugvXnG>.

299. *Libyan Politician Questioned by British Police over Rendition Allegations*, Leigh Day (July 19, 2012), <http://bit.ly/1oDR4jk>.

300. Colleen Barry, *Italy Upholds Last US Convictions in Rendition*, Assoc. Press (Mar. 31, 2014), <http://bit.ly/1pK92Bx>.

301. *Italy Upholds Verdict on CIA Agents in Rendition Case*, BBC (Sept. 19, 2012), <http://bbc.in/1xsBj0e>.

like these can contribute to clarification and justice processes in Western states, as well as the MENA region.

#### IV. ADDRESSING STATE CONCERNS

Encouraging archival sharing requires overcoming strong, relatively pervasive state reluctance to share secret records relevant to human rights cases outside of their borders. The reasons include both fears of self-incrimination and more legitimate concerns about security and continued interstate cooperation. However, national security concerns are often exaggerated, and risks can be mitigated when necessary by adopting protective measures similar to those used for sensitive information applied by the ECtHR and international criminal tribunals. Concerns about diplomatic damage are frequently overblown as well, and while some such hazards do exist, third countries stand to gain much from disclosure as they seek to build or preserve favorable relations with states emerging from conflict.

##### A. Mitigating Security Risks

The most common and compelling state rationale for non-disclosure is that some measure of secrecy is necessary for the functioning of government, particularly in the areas of military operations and intelligence collection.<sup>302</sup> Even documents that are partially redacted to avoid compromising sources and methods reveal information about the government that created the file. In significant numbers, such documents can be assembled to develop an understanding of how that government functions that could help its adversaries threaten its security or other legitimate interests.<sup>303</sup> For this reason, the CIA declassified database collections at the National Archives and Records Administration (NARA) do not include any

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302. See Louis Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 Penn. L. Rev. 271, 274–75 (1971) (outlining major rationales for non-disclosure); Laura A. White, Note, *The Need for Government Secrecy: Why the U.S. Government Must Be Able to Withhold Information in the Interest of National Security*, 43 Va. J. Int'l L. 1071, 1078–85 (2002) (emphasizing the importance of secrecy for military and intelligence activities).

303. This “mosaic theory” has long been invoked by U.S. officials. See generally Pozen, *supra* note 83 (describing the evolution and application of the theory).

index, inventory, document description, or accompanying information to help researchers locate records. Rather, since 2000 the CIA maintains two databases with a “full-text searchable system,” that researchers can use to search the collection of CIA documents declassified according to Executive Order 13256.<sup>304</sup>

Concern about disclosures of sensitive material could also impede certain forms of information-sharing within and between governments. The WikiLeaks scandal demonstrates the damage that disclosure of classified material can have on government relations, as the massive and uncoordinated release of sensitive information has reportedly made it more difficult for U.S. officials to engage with contacts abroad from fear that the latter will be exposed as informants or that intelligence methods will be exposed.<sup>305</sup>

These grounds for withholding information are both lawful and legitimate and have to be taken seriously for any disclosure norms to gain acceptance among states and to be effective in shaping their behavior. It is appropriate that the preamble to 2013 Tshwane Principles, which are very forward-leaning in terms of advocating disclosure, include a clause:

*[r]ecognizing* that states can have a legitimate interest in withholding certain information, including on grounds of national security, and emphasizing that striking the appropriate balance between the disclosure and withholding of information is vital to a democratic society and essential for its security, progress, development, and welfare, and the full

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304. The automatic declassification provisions of Executive Order 13526 (formerly Executive Order 12958, as amended) require the declassification of nonexempt historically valuable records 25 years or older. Exec. Order 13526, *supra* note 60, § 3.3. Since 2000, the CIA has installed and maintained an electronic full-text searchable system, which it has named CREST (the CIA Records Search Tool), at NARA II in College Park, Maryland. The CREST system is the publically accessible repository of the subset of CIA records reviewed under the 25-year program in electronic format. See CIA Library, *CREST: 25-Year Program Archive*, U.S. CIA, <http://1.usa.gov/19IrD8N> (last visited Nov. 10, 2014).

305. See, e.g., Bruce Riedel, *Wikileaks Will Make Intelligence Gathering in Afghanistan Harder*, The Independent, July 28, 2010, <http://ind.pn/1zHPC3i> (discussing the challenges presented to U.S. officials in Afghanistan in the wake of the Wikileaks disclosures); Anna-Katherine Staser McGill & David H. Gray, *Challenges to International Counterterrorism Intelligence Sharing*, 3 Global Security Stud. (2012) (discussing the need for secrecy to ensure international cooperation between governments for intelligence matters).

enjoyment of human rights and fundamental freedoms.<sup>306</sup>

National security concerns cannot be eliminated entirely, but there are proven ways to address them. These include permitting redaction of information not relevant to the alleged human rights violation and using *in camera* or *ex parte* proceedings when particularly sensitive information is involved. Having independent courts (or, at a minimum, interagency committees) in the third country make determinations about redaction and the need for special judicial procedures to protect information—rather than allowing the authoring agency to make those decisions—can reduce the likelihood that these safeguards will become a slippery slope for blanket non-disclosure.<sup>307</sup> These processes would require administrative and judicial resources, but not an inordinate amount when compared to the overall FOI regime already operating in nearly 100 states.

These are essentially the methods used when international courts request and receive third-country files.<sup>308</sup> There is no evidence that disclosure has led to significant breaches in national security of the disclosing state. Governments are apt to fear that even a relatively narrow exception for enumerated gross human rights violations would become the thin end of a wedge. In theory, critics or adversaries of the government could use a human rights justification to engage in “fishing expeditions” to request and sift through information for purposes other than the alleged violations in question. This, too, is a legitimate concern, but one that can be managed by requiring a requesting party to provide a relatively specific indication of the crimes alleged, much as parties at international court are required to be specific in requesting court orders for document production, and researchers must specify the scope of their requests under FOI laws. This approach has the obvious drawback of reducing the breadth of information likely to be disclosed about a period in which abuses occurred, and indeed broad

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306. Tshwane Principles, *supra* note 112, pmbl.

307. Such committees could be modeled after extant interagency bodies, such as the Interagency Security Classification Appeals Panel (ISCAP), created in the U.S. under Executive Order 12958, “Classified National Security Information.” See National Archives and Records Administration (NARA) and Declassification, Interagency Security Classification Appeals Panel (ISCAP), <http://1.usa.gov/1rp5WNK> (last visited Nov. 10, 2014).

308. See *supra* Part I.D.

disclosure via declassification is preferable to narrow, itemized releases of files. However, requiring specificity can facilitate timely responses and promote state compliance with requests.

In contrast to the cases of large leaks of classified material, such as WikiLeaks, controlled declassification processes that allow for redactions to protect sources and sensitive information have not led to discernible adverse effects on national security. Even when the United States has declassified information that could be perceived as damaging to diplomatic or security relations, adverse effects on U.S. interests have been difficult to discern. In Guatemala, for example, declassified DIA records reveal information that implicate the current president, Otto Pérez Molina, in past abuses when he served as a general during the height of the country's violence.<sup>309</sup> Moreover, disclosed files have exposed connections with intelligence assets accused of past violations.<sup>310</sup> Despite the risk that the files would have an impact on U.S. intelligence relations, the U.S. government chose to declassify the information in response to strong public pressure and in the interest of human rights clarification. While the disclosures may have had some impact on intelligence sharing, they do not appear to have had a negative impact on relations on a diplomatic or social level. The two states continue to engage in significant military cooperation—on more limited terms due to

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309. In 1994, the DIA reported that the military officers of Pérez Molina's generation were "progressives that grew up with blood stains on their hands" and that they rose through the ranks of the army's intelligence directorate (D-2) during the worst years of the violence in the early 1980s "when the D-2 carried out extrajudicial executions." U.S. Defense Intelligence Agency, [redacted] *Colonel Otto (Perez) Molina 2* (Apr. 20, 1994), available at <http://bit.ly/1hsegXH>.

310. In 1995, prompted by strong Congressional, media, and public interest, both President Clinton and the Senate Select Committee on Intelligence (SSCI) requested the Department's records on the deaths of Michael Devine, Efraim Bamaca Velasquez, Jack Shelton, Nicholas Blake and Griffin Davis; the abuse of Sister Diana Ortiz; and the reported role of Guatemalan military Colonel Julio Roberto Alpiroz in the deaths of Devine and Bamaca. U.S. Department of State, FOIA Document Collections, <http://1.usa.gov/1iRTGVj> (last visited Nov. 10, 2014). See also Guatemala: Volume III, CIA Relationship with Julio Roberto Alpiroz (July 15, 1999) (discussing U.S. intelligence ties to Guatemalan intelligence with military Colonel Julio Roberto Alpiroz), available at <http://1.usa.gov/1EvINls>; Press Release, White House: Office of the Press Sec'y, Fact Sheet, The Intelligence Oversight Board's Guatemala Review (June 28, 1996), available at <http://1.usa.gov/1pu0oWQ> (reporting the findings of the Intelligence Oversight Board, including that several CIA assets were credibly alleged to have ordered, planned or participated in serious human rights violations).

Congressionally-imposed restrictions on U.S. aid attributable partly to documentary evidence of past human rights abuses—and the Pérez Molina administration has requested additional U.S. defense support.<sup>311</sup>

## B. Potential Diplomatic Impacts

In addition to concerns about a state's own security, governments are generally keen to avoid self-incrimination or disclosures that would incriminate, antagonize, or jeopardize security in their foreign partners. There is no duty of confidentiality among states—such as exists in many legal systems between psychiatrist and patient or lawyer and client—but the adverse political consequences of disclosure can be significant. This is most vividly apparent in the political fallout following the revelations of NSA spying on government officials of friendly countries.<sup>312</sup> Developing constructive and cooperative interstate relationships requires a measure of trust, and honoring explicit or implicit pledges of confidentiality affects a state's ability to secure foreign cooperation on a wide range of policy issues. Government officials quite reasonably fear that revealing other states' misdeeds puts those relationships at risk and may lead to reduced cooperation, less information, and various forms of retaliation.

Although the diplomatic risks of disclosure tend to be lower after regime transitions in which the new government welcomes evidence of the abuses of its predecessors, disclosing files may still

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311. Maureen Taft-Morales, Cong. Research Serv., R42580, Guatemala: Political, Security, and Socio-Economic Conditions and U.S. Relations 9–13 (May 16, 2013). The U.S. State Department also provides millions of dollars in assistance to Guatemala and works closely on counter-drug, anti-corruption, judicial reform, anti-gang, and law enforcement efforts through the Central American Regional Security Initiative. Charles Michael Johnson, Jr., U.S. Gov't Accountability Office, GAO-13-295R, Status of Funding for the Central America Regional Security Initiative 1 (Jan. 30, 2014), *available at* <http://1.usa.gov/1ijazUc>.

312. *See, e.g.*, Dan Robert et al., *White House on the Back Foot over CIA Role in German Spying Scandal*, *Guardian*, July 7, 2014 (discussing the tension between the U.S. and Germany as a result of CIA spying efforts); Martha T. Moore, *NSA Denies Obama Knew of Spying on German Leader*, *USA Today*, Oct. 27, 2013 (discussing European criticism of the U.S. over NSA surveillance of Germany's chancellor); Colum Lynch, *Brazil's President Condemns NSA Spying*, *Wash. Post*, Sept. 24, 2013 (discussing diplomatic fallout with Germany and Brazil following disclosure of evidence of NSA spying programs).

send the message to other current partners that they, too, could be betrayed should they lose power. These potential costs cannot be ignored, which is a further reason to promote orderly declassification and focus disclosure duties on egregious international crimes such as genocide, war crimes, crimes against humanity, torture, and enforced disappearances. Strong consensus exists that those crimes are well beyond the pale of tolerable state behavior, making disclosure of evidence about such activities easier for a government to justify to its foreign partners, as well as its own domestic constituents.

States' concerns about the diplomatic effects of disclosure are often overblown. At times, they amount merely to fears of embarrassment about the disclosing states' past knowledge or complicity in human rights abuses. Non-disclosure on such grounds is illegal in some national systems,<sup>313</sup> and it would be difficult to argue that avoiding such embarrassment outweighs the public interest in disclosure of files pertaining to gross human rights violations. Nevertheless, the law in most states does not require a balancing test or lacks means of enforcing such a test effectively. This enables governments to overuse exemptions to shield embarrassing or self-incriminating disclosures by asserting that release of information will harm its foreign relations.<sup>314</sup>

One example appeared in a leaked 2006 cable by the U.S. Ambassador to Uruguay Frank Baxter. The cable noted efforts by disclosure advocate Carlos Osorio to promote declassification of U.S. files relevant to human rights abuses in Uruguay. It warned that Uruguayan leftists were "dredging up . . . the past" and using declassified U.S. documents to paint the United States as "the intellectual author of Plan Condor."<sup>315</sup> Baxter argued that this "assault on U.S. credibility and intentions" could prove deeply

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313. Non-disclosure of this type is explicitly prohibited by executive order in the United States. Exec. Order 13526, *supra* note 60, § 1.7(2). See also Dept. of the Prime Minister and Cabinet of Australia, *Freedom of Information Guidelines: Exemption Sections in the FOI Act* § 1.6.3.2.4 (Oct. 9, 2009), available at <http://bit.ly/10NFYgm> (barring non-disclosure to shield an agency from "mere inconvenience or embarrassment").

314. In the United States, documents may be classified or withheld from declassification when disclosure "could reasonably be expected to cause identifiable or describable damage" to "foreign relations or foreign activities of the United States, including confidential sources." Exec. Order 13526, *supra* note 60, § 1.4(d) (emphasis added).

315. Cable from U.S. Embassy in Montevideo to U.S. Sec'y of State (Dec. 13, 2006) ¶¶ 1, 6, available at <http://bit.ly/RP6AKc>.

damaging, as “our core interests in the region (fostering economic growth, stability and democracy) depend on our reputation.”<sup>316</sup> Later, a U.S. official refused to declassify the leaked cable, even though it had been in the public domain for nearly two years, arguing—untenably—that official declassification would damage U.S. foreign relations.<sup>317</sup>

There is scant evidence that organized disclosure of files detailing gross human rights violations has led to serious damage in the foreign relations of the disclosing states. Rather, in many cases it has helped repair the disclosing state’s relationship with the victimized population and build trust with the new authorities. This was clearly part of the rationale for the Clinton administration’s decision to disclose documents on abuses in Latin America. The Clinton administration formed task forces to carry out special declassification projects related to Chile, Guatemala, and El Salvador.<sup>318</sup> Like Libya and many of its Arab neighbors, these countries were overcoming periods of authoritarian rule, and victims were seeking records with information on past atrocities. Documentary disclosure helped distance the United States from the role of supporting the military governments of the region during the Cold War. In the wake of the release of Guatemala’s truth commission report in 1999, which documented widespread state-sponsored repression during the internal conflict, President Clinton went so far as to apologize for the U.S. role in supporting the security forces responsible for the human rights violations, and pledged U.S. support for reconciliation in Guatemala and throughout Central America.<sup>319</sup> The declassification of U.S. files was a key part of that process.

U.S. declassification efforts in Latin America helped marginalize military and police officials who were part of the prior regimes and helped usher in new reformers who supported the human rights clarification efforts. It also helped transitional governments establish new relations with Washington based on

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316. *Id.* ¶ 7.

317. Nate Jones, *The Department of State Accuses the National Security Archive of “Dredging Up the Past;” Won’t Declassify the Accusation*, Unredacted (June 29, 2012), <http://bit.ly/1nsiPcl>.

318. *Document Collections*, U.S. Dep’t of State, <http://1.usa.gov/1iRTGVj> (last visited Nov. 10, 2014).

319. John M. Broder, *Clinton Offers His Apologies To Guatemala*, N.Y. Times, Mar. 11, 1999, <http://nyti.ms/1wciiuI>.

stronger foundations of public support and built trust with new leaders, many of whom were associated with victims of state repression and thus had adverse personal experiences with U.S.-backed security forces. Current Chilean President Michelle Bachelet, for example, was imprisoned along with her family by the Pinochet military, and reported being interrogated by the same intelligence chief who coordinated the Condor operations.<sup>320</sup> Current Brazilian President Dilma Rousseff was part of the country's guerrilla movement, imprisoned in 1970 and tortured by Brazil's military police during the dictatorship years.<sup>321</sup> Uruguayan President Jose Mujica, a member of the former opposition Tupamaros guerrilla group, spent fourteen years in a military prison during that country's same period of dictatorship.<sup>322</sup> El Salvador's Mauricio Funes, who became president in 2009 as the candidate of the FMLN—a former coalition of guerrilla organizations that became a legal political party—signaled a sharp break from the past in becoming the first president to commemorate the six Jesuit martyrs murdered in 1989 by the U.S. supported military during the country's civil war.<sup>323</sup> Many similar examples exist throughout the world. Sharing archival information is one important means whereby a third country can develop trust with new leaders—even those it formerly helped to repress—demonstrate commitment to the new government, and set a foundation for strong state-to-state relations going forward.

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320. Rodrigo Cae, *Bachelet revela que fue interrogada por el jefe de la policía secreta de Pinochet*, El País, Oct. 8, 2013, <http://bit.ly/1nJFzC9>. Bachelet's father, General Alberto Bachelet was tortured by his former comrades in arms in 1973 on the premises of the Air Force Academy. See Centro de Derechos Humanos ud, Truth, Justice and Memory for Dictatorship-Era Human Rights Violations, 40 Years After the Military Coup 2 n.2 (Sept. 13, 2013), available at <http://bit.ly/1iiqVlQ>.

321. Robin Yapp, *Dilma Rousseff profile: former guerrilla primed to become Brazil's first female president*, Telegraph, Oct. 31, 2010, <http://bit.ly/1wcijPx>.

322. Jonathan Watts, *Uruguay's president José Mujica: no palace, no motorcade, no frills*, Guardian, Dec. 13, 2013, <http://bit.ly/10SutEB>.

323. Margarita Moreno, *Mártires jesuitas reciben Orden José Matías Delgado* (Nov. 16, 2009), <http://bit.ly/1jWjKNd>. Secretary Hillary Clinton attended the inauguration of the President, and called the Funes' election a testament to democracy. See *Salvador leftist leader sworn in*, BBC News, (June 2, 2009), <http://bbc.in/1pXxmZs>; John Whitesides, *Clinton Attends El Salvador Leftist Inauguration*, Reuters (June 1, 2009), <http://reut.rs/1ugwndH>; *20th Anniversary of the Six Jesuits' Murder in El Salvador Commemorated with Country's Highest Award*, Washington Office on Latin America (Nov. 10, 2009), <http://bit.ly/1yrli7Z>.

For example, the U.S. State Department received praise from human rights monitors after it responded to pleas from victims groups (such as the *Abuelas* and *Madres de la Plaza*) and released thousands of pages of records in the Argentina declassification campaign. Rights defenders in Argentina proclaimed the “great public importance” of such files in clarifying “dirty war” abuses and the period of military rule.<sup>324</sup> U.S. declassification of documents pertaining to Chile brought similar approbation.<sup>325</sup> In November 2000, after releasing a new collection of declassified documents related to Chile, the White House press release emphasized the link between documentary disclosure and democratization, stating: “[t]he United States will continue to work closely with the people of Chile—as their friend and partner—to strengthen the cause of democracy in Latin America and around the world.”<sup>326</sup>

The international community has similarly pledged support for transitions to more liberal and democratic governance in the MENA region. The U.S. government has emphasized the importance of fact-finding inquiries and human rights clarification as part of that process.<sup>327</sup> One way to do so is to open official files for truth recovery efforts in cases of gross human rights violations—a step that the U.S., British, and French governments have been slow to take.<sup>328</sup> Such

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324. Press Release, George Washington Univ.’s Nat’l Sec. Archive, State Department Opens Files on Argentina’s Dirty War (Aug. 20, 2002), *available at* <http://bit.ly/1idtTqU>.

325. In 1999, a *Los Angeles Times* editorial praised President Clinton for “presid[ing] over an era of growing optimism in U.S.-Latin American relations,” citing the Chile declassification project as “his most dramatic step.” *Some Closure for the ‘Dirty War’*, L.A. Times, Aug. 18, 2000, <http://lat.ms/1tzZmo1>.

326. Press Release, The White House: Office of the Press Sec’y, Statement by the Press Sec’y on Chilean Document Declassification, (Nov. 13, 2000), *available at* <http://bit.ly/1hseG02>.

327. U.S. officials have acknowledged the important role of access to information and transitional justice efforts to advance democracy. U.S. Dep’t of State: Working Grp. on Transitional Justice in Iraq, *The Future of Iraq Project*, Appendix U (No. 10), *available at* <http://1.usa.gov/Pxe02M> (emphasizing importance of fact-gathering commissions).

328. An example of a long-delayed release of information relevant to the MENA region by the UK government includes records relating to the killing of Yvonne Fletcher—a British policewoman shot dead in 1984 by a gunman inside the Libyan embassy in London. *See Documents: Libya Warned UK Ahead Of 1984 Shooting*, Assoc. Press, (Jan. 3, 2014), <http://bit.ly/1wMraLE>. The U.S. has blocked access to files for British MPs looking into cases of extraordinary rendition. *See Cahal Milmo & Nigel Morris, CIA wins fight to keep MPs in dark on rendition*, Independent, Apr. 11, 2012, <http://ind.pn/1zHPUXU>. French authorities

disclosure would show that third countries are serious about the human rights and democracy promotion agenda they profess. These benefits give third countries incentives to engage in voluntary disclosure even when the law does not require them to do so.

## V. CONCLUSION: STRENGTHENING THE WEAK LINK

Given the wealth of information in third-country files and the inherently transnational nature of many human rights abuses—which makes it impossible to get to the truth and present a clear picture of events without multiple inputs—archival sharing is crucial for an effective right to the truth. Indeed, such a right has little meaning if not paired with norms and binding obligations that require actors who possess relevant information to produce it. However, this article has shown that the legal and normative framework surrounding third-country disclosure is exceedingly weak. In general, such disclosure remains voluntary, and even where limited obligations do exist, those entitled to information lack strong enforcement mechanisms to compel recalcitrant third countries to comply.

The remedy comprises two essential parts: encouragement of enhanced voluntary disclosure and development of stronger norms and laws requiring release of human rights information. Both processes are bound to be gradual, as state concerns over sovereignty and security will limit voluntary disclosure and remain formidable barriers to the establishment of binding law. Still, there are several avenues through which normative evolution can continue, driven both by concerned officials and robust civil society engagement.

UN and regional human rights bodies offer some of the clearest mechanisms for further normative change. To date, UN Human Rights Council resolutions on the right to the truth have largely tip-toed around the issue of third-country disclosure. More specific language on third-country obligations represents one of the most realistic near-term steps forward. A study on the subject by the OHCHR would also be modest but useful. Further updates to the

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have refused to disclose information to UN investigative bodies looking into weapons shipments during the 2011 conflict. *See* U.N. Panel of Experts on Libya, Rep., transmitted by letter dated Feb. 15, 2013 from the Coordinator of the Panel of Experts on Libya established pursuant to Resolution 1973 (2011) addressed to the President of the Security Council, ¶ 179, U.N. Doc. S/2013/99 (Mar. 9, 2013).

revised Joinet-Orentlicher Principles, now approaching their tenth anniversary, could have a similar function. The Tshwane Principles guidelines provide a ready blueprint for enhanced archival disclosure that pay due attention to legitimate national security needs.

Human rights courts provide further venues for change. The IACtHR and ECtHR have already laid down important case precedents on the disclosure duties of the states in which alleged violations occurred, and the ECtHR has ordered the production of documents from third countries in rendition and disappearance cases. It is a small additional leap for those courts to assert that third countries bear duties to disclose secret files pertaining to gross human rights violations outside their jurisdictions. Although enforcement mechanisms are weak, such bodies do have the ability to name and shame. The same is true of regional human rights commissions in Latin America, Africa, and elsewhere. To date, the law on the right to the truth has been developed through a cascade of non-binding resolutions and judicial rulings in the IACtHR and ECtHR, and that mechanism remains the most likely to introduce and flesh out binding obligations on states beyond cases of enforced disappearance.

Another channel is through the development of new and existing multilateral treaty obligations. As more states ratify the ICCPED, they become bound by its specific disclosure provisions in relation to enforced disappearances. Other human rights treaties could also be amended to require similar provisions on information-sharing. Official formulations of the right to the truth have long ago moved beyond enforced disappearances to include several other serious crimes as well, and corresponding duties of disclosure must keep pace if the right is to be effective. The Convention Against Torture, which already contains a provision on the sharing of evidence, would be a logical place to start.

Revisions to MLATs that require disclosure of records to a counterparty state in cases involving gross human rights violations would also advance binding legal norms. Although such changes are unlikely to occur en masse in the near term, revisions to MLATs could occur gradually, with small numbers of like-minded states essentially test-driving new disclosure provisions before others adopt similar reforms. Leading states have roles in setting examples of disclosure and driving the process of normative change by indicating that their decisions to disclose certain files—with or without an MLAT request—reflect their *opinio juris* that doing so constitutes an obligation under human rights law. Although few states are apt to be

willing in the short term, such statements will be keys to establishing the scope of applicable customary law in the future.

Finally, changes to domestic FOI laws are possible and could facilitate information transfer through transnational civil society networks. Latin American laws establishing human rights overrides for disclosure exemptions have paved the way. Should others follow suit, the availability of human rights records will rise, as will the support for a disclosure obligation under customary international law.

As this article has emphasized, archival sharing has extraordinary potential to help societies deal with legacies of gross human rights violations. Over time, increased voluntary declassification, as well as disclosure undertaken out of a sense of legal obligation, can advance accountability norms, historical clarification, and thus an effective right to the truth in societies around the world.