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Legal Commentary

By the International Bar Association's Human Rights Institute of and the Human Rights Clinic of the University of Texas to the *Fundamental Principles of Public Policies on Memory Sites* by the MERCOSUR Institute of Public Policies on Human Rights

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Commentary to the *Fundamental Principles of Public Policies on Memory Sites* by the MERCOSUR Institute of Public Policies on Human Rights¹

Introduction

The present document is the result of an investigation developed by the International Bar Association's Human Rights Institute (IBAHRI)² and the Human Rights Clinic of the University of Texas at Austin School of Law in coordination with Memoria Abierta. The purpose of the commentary is to support a regional legal framework to develop regional public policies on memory. The document comments on the *Fundamental Principles of Public Policies on Memory Sites* developed by the MERCOSUR Institute of Public Policies on Human Rights in light of the case law of the Inter-American Court of Human Rights (the 'Inter-American Court').

The Inter-American Court has made references touching on two dimensions of the right to memory – individual memory and collective memory:

[T]he Court considers that the recovery of the memory and dignity of the victims in this case is of the utmost importance. In this regard, the Court finds it pertinent to order the production of a documentary on the facts of this case, because such initiatives are significant for both the preservation of the memory and the satisfaction of the victims, and for the recovery and re-establishment of the historical memory in a democratic society.³

The 'recovery of the memory and dignity of the victims' relates to the notion of individual memory: a private or reflective process centered on the memory of the victims. In this regard, the Court characterises

¹ Authors: Verónica Hinestroza, Senior Programme Lawyer, IBAHRI; María de Lezcano-Mújica, consultant, IBAHRI and Justin Chung, Karim Kebaish, Ruth Matamoros and Aiden Johnsen, students of the Human Rights Clinic under the supervision of the Clinic's Director, Ariel Dulitzky.

² Andrea Hansen and Camila Dupret Torres, interns of the IBAHRI, worked on this Project under the supervision of Verónica Hinestroza.

³ *Case of Gudiel Álvarez et al (Diario Militar) v Guatemala. Merits, Reparations and Costs*. Judgment of 20 November 2012. Series C No 253, para 345.

the importance of memory as restoring the dignity of the victims and providing reparations for the victims.⁴ The Court's reference to 'the recovery and re-establishment of the historical memory in a democratic society' pertains to a collective memory – a historic and cultural heritage for future generations – a process by which different individuals and groups participate to construct collective identities.⁵ While the concept of individual memory is also relevant to these purposes, this aspect of memory relates more closely to facilitating the recollection of memories,⁶ aiding understandings of past events and framing them in a wider context,⁷ conveying past events to future generations,⁸ furthering the creation of national and/or regional identities,⁹ strengthening links of solidarity and reconciliation,¹⁰ and promoting democratic engagement.¹¹

⁴ The Court has referred to victims as encompassing the victims' families or next of kin. See, eg, *Case of the 19 Merchants v Colombia. Merits, Reparations and Costs*. Judgment of 5 July 2004, Series C No 109, para 274 ('[T]he Court considers it necessary, in order to repair the damage to the reputation and honor of the victims *and their next of kin*[,]... that the State must carry out a public act to acknowledge its international responsibility regarding the facts of this case and to make amends to the memory of the tradesmen') (emphasis added).

⁵ *Cf. infra* Commentary, Principle 4.

⁶ *Cf. supra* note 3, para 298 ('The Court considers it pertinent to reiterate, as it has in other cases, that States may establish truth commissions that contribute to constructing and preserving the historical memory, clarifying facts, and determining institutional, social and political responsibilities in certain historical periods of a society').

⁷ *Cf. Case of the Plan de Sánchez Massacre v Guatemala. Reparations*. Judgment of 19 November 2004. Series C No 116, para 80 ('[P]erforming acts or implementing projects with public recognition or repercussion, such as broadcasting a message that officially condemns the human rights violations in question and makes a commitment to efforts designed to ensure that it does not happen again[,] ... [has] the effect of restoring the memory of the victims, acknowledging their dignity, and consoling their next of kin.').

⁸ *Cf. Case of the Ituango Massacres v Colombia. Preliminary Objections, Merits, Reparations and Costs*. Judgment of 1 July 2006. Series C No 148, para 408 ('[T]he State must erect a plaque in an appropriate public place... so that the new generations are aware of the events that took place in this case').

⁹ *Cf. Case of Goiburú et al v Paraguay. Merits, Reparations and Costs*. Judgment of 22 September 2006. Series C No 153, para 132 ('[T]he mechanisms of collective guarantee established in the American Convention, together with the regional and universal international obligations on this issue, bind the States of the region to collaborate in good faith in this respect').

¹⁰ *Cf. supra* note 3, para 299 ('The United Nations has recognized the importance of determining the truth about gross violations of human rights for the consolidation of peace and reconciliation processes. This is supported by international humanitarian law, according to which family members have the right to know the truth about the fate of the disappeared victims').

¹¹ *Cf. supra* note 3; *Supra* note 6; *Case of Massacres of El Mozote and Nearby Places v El Salvador. Merits, Reparations and Costs*. Judgment of 25 October 2012. Series C No 252. Concurring opinion of Judge Diego Garcia-Sayán, paras 34–35 ('[A]n essential ingredient of reparation, not only for the victims but also for society as a whole, consists in the apologies and accounts of the perpetrators and the acknowledgments of responsibility [,]... [which] has been introduced consistently in the case law of the Inter-American Court. This is an essential ingredient of transitional justice that seeks to reconstruct the conditions for democratic institutional viability in a society').

According to both the MERCOSUR Principles and the jurisprudence of the Inter-American Court, the right to memory supports and intersects with other human rights: right to justice, truth, non-recurrence and reparation. For instance, the adequate and timely preservation of memory sites promotes justice by safeguarding their probative value for investigations.¹² In addition, memory sites can further the right to truth by providing valuable information to reconstruct events that violence has hidden or altered, and/or to prevent against negationism or revisionism.¹³ Memory sites also provide symbolic, commemorative, pedagogical or reparative significance, while also contributing to non-repetition and processes of institutional reform and democratisation.¹⁴ Finally, memory sites serve reparative functions by restoring the memory and dignity of the victims.¹⁵

I. General Principles

Principle 1

For the purposes of these principles, memory sites are considered all those places where grave violations of human rights were committed, or where those violations were resisted or encountered, or where for any reason the victims, their families or the communities associate those events, or those places that are utilized to recover, to reconsider, and to transmit traumatic processes, and/or to pay homage and remedy to the victims.

COMMENTARY

Principle 1 defines memory sites as encompassing all places where serious human rights violations occurred or that are in any way associated with those events. The Inter-American Court has referred to the following as sites that would fit the document's definition of memory sites: former torture and detention centres, concentration camps, sites of killings or burial sites containing the remains of

¹² *Cf. infra* Commentary, Principle 3.

¹³ *Cf. infra* Commentary, Principle 4.

¹⁴ *Cf. infra* Commentary, Principles 5–6.

¹⁵ *Cf. supra* note 8, para 383 (explaining that reparations for non-pecuniary damage include public acts that 'have the effect of recovering the memory of the victims, acknowledging their dignity and consoling their next of kin').

disappeared victims.¹⁶ On the other hand, memory sites might encompass places where archives or important information related to the violations in question are stored.¹⁷ Additionally, as contemplated by the Court through its orders of reparations, memory sites might take a symbolic or commemorative form, such as monuments,¹⁸ museums, parks,¹⁹ plaques,²⁰ street names²¹ and other establishments created to commemorate victims or symbolise historical events that took place.²²

While the scope of this document pertains specifically to memory sites, the Inter-American Court has supported other initiatives that relate to memory, such as ceremonies,²³ documentaries,²⁴ publication of judgments²⁵ and development programmes for the community affected.²⁶ These activities and cultural expressions included in the jurisprudence of the Court align with international standards on memorial initiatives.²⁷

¹⁶ Cf. *Supra* note 11, *El Mozote*, para 332 (referring to ‘interment or burial sites’).

¹⁷ Cf. *infra* note 136.

¹⁸ *Case of the Moiwana Community v Suriname. Preliminary Objections, Merits, Reparations and Costs*. Judgment of 15 June 2005. Series C No 124, para 218 (use of the terms ‘monument’ and ‘memorial’ as synonyms).

¹⁹ *Supra* note 3, para 349 (‘[T]he State should proceed to establish a park or plaza to honor the memory of the victims of this case’).

²⁰ *Supra* note 8, para 394(f); *Case of Ruano Torres et al v El Salvador. Merits, Reparations and Costs*. Judgment of 5 October 2015. Series C No 303, para 225.

²¹ *Case of Myrna Mack Chang v Guatemala. Merits, Reparations and Costs*. Judgment of 25 November 2003. Series C No 101, para 286 (‘The State must also name a well-known street or square in Guatemala City in honor of Myrna Mack Chang’).

²² Cf. *infra* note 184.

²³ *Supra* note 8, para 394(c).

²⁴ *Supra* note 3, para 346.

²⁵ *Case of González et al (‘Cotton Field’) v Mexico. Preliminary Objection, Merits, Reparations and Costs*. Judgment of 16 November 2009. Series C No 205, para 468 (‘the State must publish once in the official gazette of the Federation, in a daily newspaper with widespread national circulation and in a daily newspaper with widespread circulation in the state of Chihuahua, paragraphs... of this Judgment... Additionally... the State must publish this judgment in its entirety on an official web page of the Federal State, and of the state of Chihuahua’); *Case of Río Negro Massacres v Guatemala. Merits, Reparations and Costs*. Judgment of 4 September 2012. Series C No 250, para 274 (‘[T]he State must publish once, in Spanish and Maya Achí languages, in the official gazette and in another daily newspaper with national circulation, the official summary of this Judgment. In addition, as the Court has ordered on previous occasions, this Judgment must be published in its entirety, in both languages, for at least one year, on an official website of the State’).

²⁶ *Supra* note 25, *Río Negro*, para 284.

²⁷ For example, the Special Rapporteur in the field of cultural rights has defined memorial expressions as follows:

‘Memorial expressions are extremely diverse. Major forms include authentic sites (for example concentration camps, former torture and detention centres, sites of mass killings and graves and emblematic monuments of repressive regimes); symbolic sites (such as permanent or ephemeral

Principle 2

The States where serious human rights violations were committed should implement public policies on memory sites. These should guarantee the creation, preservation, operation, management and sustainability of the said sites. In particular, their creation should be sought in places where they do not exist yet.

COMMENTARY

This principle refers to the obligation of those States where serious human rights violations were committed to implement public policies on memory sites. For this purpose, it states that public policies on memory sites should cover specific aspects of memory sites such as the creation, preservation, operation, management and sustainability of memory sites. Each of these aspects is addressed in depth in the different principles contained in this document of public policies on memory sites.

In accordance with these principles, memory sites aim to ensure both their probative value²⁸ and their historical, patrimonial and/or cultural value.²⁹ The measures to be taken for the adequate preservation of memory sites are specifically contemplated in Principles 9 to 19 and include the adoption of all relevant judicial, legal and administrative measures for their physical assurance, conservation and maintenance.³⁰ With this purpose, the recommendations of expert professionals on the subject will be incorporated³¹ and the collaboration of public institutions such as the armed and security forces will be ensured.³² The State must also contemplate mechanisms for the participation of interested people or institutions in the preservation of such sites, as well as the availability and accessibility of judicial and

constructed monuments carrying the names of victims, renamed streets, buildings or infrastructure, virtual memorials on the Internet and museums of history/memory); and activities (such as public apologies, reburials, walking tours, parades and temporary exhibits). In addition, although outside the scope of this report, various cultural expressions (artworks, films, documentaries, literature and sound and light shows addressing a tourist audience, etc.) also contribute to memorialization processes.'

United Nations (UN) Human Rights Council, Report of the Special Rapporteur in the field of cultural rights, A/HRC/25/49, 23 January 2014, www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/25/49, para 6.

²⁸ Cf. *infra* Commentary, Principles 3, 10–11 and 19.

²⁹ Cf. *infra* Commentary, Principles 10, 17.

³⁰ Cf. *infra* Commentary, Principles 9, 11–12.

³¹ Cf. *infra* Commentary, Principle 13.

³² Cf. *infra* Commentary, Principle 18.

administrative mechanisms of any person with a legitimate interest in the preservation of the sites.³³ The necessary measures will also be adopted to guarantee the preservation and access to archives.³⁴

The operation of memory sites is contemplated in Principles 20 to 24, which address aspects related to the obligation to identify and signal memory sites contained in Principle 20. This includes the determination of the format and content of the said sites as well as the participation of the victims and their families in that process,³⁵ the publicity and accessibility of the files related to serious violations of human rights,³⁶ and the participation of experts in different disciplines in the study of the sites.³⁷

The obligations related to the creation, management and sustainability of memory sites are contemplated in Principles 25 to 29. Principle 25 recognises the obligation of States to adopt an adequate legal framework for the creation, management and operation of memory sites. To these ends, States must guarantee their institutional and budgetary sustainability, and these aspects should have legislative status.³⁸ The principles also contemplate the need to have an adequate team of professionals so that each memory site achieves the set objectives.³⁹ The adequate management and sustainability of memory sites includes transparency, accountability, monitoring and evaluation by civil society,⁴⁰ and the participation of victims, their families, local communities and society in general in the institutional design of memory sites.⁴¹

³³ *Cf. infra* Commentary, Principles 15–16.

³⁴ *Cf. infra* Commentary, Principle 14.

³⁵ *Cf. infra* Commentary, Principles 21–22.

³⁶ *Cf. infra* Commentary, Principle 23.

³⁷ *Cf. infra* Commentary, Principle 24.

³⁸ *Cf. infra* Commentary, Principle 26.

³⁹ *Cf. infra* Commentary, Principle 27.

⁴⁰ *Cf. infra* Commentary, Principle 29.

⁴¹ *Cf. infra* Commentary, Principle 28.

Principle 3

Public policies on memory sites should especially consider the sites' importance for the investigation and sanctioning of those responsible for serious human rights violations, and public policies should therefore ensure the preservation of the probative value of memory sites.

COMMENTARY

Principle 3 recognises that memory sites contribute to justice by providing evidence for the investigation and sanctioning of those responsible for human rights violations.

According to the Court, preserving material evidence at sites where violations occurred is essential to an adequate investigation, which in turn is necessary to promote the truth, combat impunity, provide reparations and prevent recurrence.⁴² This is particularly evident in the context of forced disappearances, which often involve secret executions and the elimination of material evidence to ensure impunity.⁴³ In *Case of Anzualdo Castro v Peru*, for example, the State had destroyed material evidence at a clandestine detention centre where it conducted executions.⁴⁴ This frustrated attempts to discover the whereabouts of the victim in question, but the discovery of incinerators and human remains onsite at the detention centre furthered justice by facilitating the Court's finding of State responsibility.⁴⁵ Accordingly, 'it is fundamental [to an adequate investigation] that investigating authorities have unrestricted access to detention centers'.⁴⁶

The Court has ordered States to preserve sites where serious human rights violations occurred for their probative value. In *El Mozote*, the Court ordered the State to preserve burial sites containing the

⁴² *Supra* note 25, *Cotton Field*, para 452, 455(a). *Cf. supra* note 21, *Myrna Mack*, para 77 (acknowledging that the victim's next of kin had a right to know the truth through 'full elucidation of the facts'); *Supra* note 11, *El Mozote*, paras 321, 331 (ordering an adequate investigation to elucidate all facts, to prosecute and punish those responsible, to identify and return the victims' remains to the next of kin, and to ensure access to all 'relevant and useful information for the ongoing [human rights] investigations').

⁴³ *Case of Anzualdo Castro v Peru. Merits, Reparations and Costs*. Judgment of 22 September 2009. Series C No 202, para 85 ('the Court has considered that the practice of disappearances often involves secret execution without trial, followed by concealment of the body to eliminate any material evidence of the crime and to ensure the impunity of those responsible').

⁴⁴ *Ibid* at paras 82–83.

⁴⁵ *Ibid* at paras 83, 86.

⁴⁶ *Ibid* at para 135.

remains of victims to exhume and return the remains to victims' next of kin.⁴⁷ In doing so, the Court reasoned that these measures could provide 'useful information to clarify the facts, because [the remains] provide details of the treatment that the victims received, the way in which they were executed, and the *modus operandi*'.⁴⁸ Moreover, the Court emphasised that the '*place* where the remains are found may provide valuable information on the perpetrators or the institution to which they belonged'.⁴⁹ Thus, the Court recognised the probative value of memory sites – there 'burial sites' – while also imposing a legal obligation on the State to preserve those sites.

Principle 4

Public policies on memory sites should contribute to carrying out the right to truth and to constructing collective memories concerning serious human rights violations.

COMMENTARY

Memory sites promote the truth and contribute to the construction of collective memories regarding serious violations of human rights. In the context of memory initiatives, carrying out the right to truth refers to memory as providing information to reconstruct the truth, prevent negationism or revisionism, and to reconstruct events that violence has concealed or altered. Collective memories refer to collective identities; historical and cultural heritages constructed through processes by which individuals and groups with varying, and perhaps contradictory, memories participate. That various actors have contrasting 'memories' may raise concerns of historical negationism or revisionism, especially within the context of serious human rights violations. Within that context, the construction of collective memories intersects with the right to truth – the collective knowledge of a community's suffering must be protected so that

⁴⁷ *Supra* note 11, *El Mozote*, para 332.

⁴⁸ *Ibid* at para 331.

⁴⁹ *Ibid* (emphasis added). *Cf. supra* note 3, para 333 ('the Court emphasizes that the remains of a deceased person and the place where they are found may provide valuable information on what happened and about the perpetrators of the violations or the institution to which they belonged, particularly when State officials are involved').

future generations know the truth of past events. Public policies on memory sites can contribute to this end by garnering the active participation of the community or civil society to build, reconstruct and preserve the truth of historical events and the memories of those affected.

The Inter-American Court has embraced the relationship between memory initiatives and carrying out the right to truth. For example, in *Diario Militar*, the Court ordered the production of a documentary on the facts of that case ‘because such initiatives are significant... for the recovery and re-establishment of the historical memory in a democratic society’.⁵⁰ As mentioned in the introduction, the Court’s statement touched on the notion of collective memory (the ‘historical memory in a democratic society’). In turn, the documentary would further the right to truth: it would clarify and shed light on the facts of the events that occurred. To that end, the Court required the State to cover all expenses related to the documentary, show the documentary on a ‘State television channel with national coverage’, and to provide copies to the representatives ‘so that they may distribute it widely among the victims, their representatives, other civil society organizations, and the main universities of the country for promotion purposes’.⁵¹ In addition, the Court has used language supporting the relationship between memory and truth in the context of truth commissions: ‘[T]o guarantee the right to... truth, States may establish truth commissions that contribute to the construction and preservation of the historical memory, the clarification of the facts, and the determination of institutional, social, and political responsibilities during specific historical periods of a society.’⁵²

As mentioned in Principle 3 and further expounded upon in Section III,⁵³ measures aimed at preserving memory sites where violations occurred contribute to carrying out the right to truth by

⁵⁰ *Supra* note 3, para 345.

⁵¹ *Ibid* at para 346.

⁵² *Supra* note 11, *El Mozote*, para 298; *Cf. supra* note 25, *Río Negro*, para 259 (‘[T]he Court assesses positively the publication of the report of the CEH, *Guatemala: Memoria del Silencio*, which includes the case of the Río Negro massacres, as an effort that has contributed to the search for and determination of the truth concerning an historical period in Guatemala’).

⁵³ *Infra* Commentary, Principle 3; Section III.

preventing the mishandling or destruction of evidentiary material at the sites where violations occurred. In other words, preserving the sites where violations were committed can prove essential to clarifying the truth of the violations committed.⁵⁴ Furthermore, preserving sites allows for the proper remembrance of the victims.⁵⁵

As for the relation between memory initiatives and the promotion of collective memories, the Court has supported the determination of measures of reparation from a collective perspective – measures that construct or preserve the collective memory of the community affected.⁵⁶ In *Case of Río Negro Massacres v Guatemala*, the Court ordered the State to design and implement a programme to rescue and preserve the culture of the Maya Achí, the indigenous community most affected by the massacres.⁵⁷ To achieve this, the State had to design and implement the programme ‘with the active participation of the members of the Río Negro community’, and it had to provide sufficient resources to ‘guarantee the viability and continuity of the program’.⁵⁸ While the Court did not specifically refer to these obligations as constructing a collective memory, the Court mentioned that the representatives requested such measures ‘in order to preserve the collective memory, the cultural sustainability and all expressions of the cultural practices of the community’.⁵⁹ Either way, requiring the active participation of the community to rescue and preserve their culture supports these ends.

⁵⁴ Cf. eg, *supra* note 11, *El Mozote*, para 331 (Ordering the preservation of burial sites where disappeared victims were found to provide ‘useful information to clarify the facts’, such as ‘details of the treatment that the victims received, the way in which they were executed, and the *modus operandi*’).

⁵⁵ Cf. *supra* note 25, *Río Negro*, paras 269–270 (ordering the State to safeguard the information of remains found and exhumed through a ‘genetic information bank’ to allow the victims’ next of kin to identify and collect the remains of their loved ones). Cf. *supra* note 11, *El Mozote*, para 332; *Supra* note 18, *Moiwana*, para 208 (‘Suriname must employ all technical and scientific means possible... to recover promptly the remains of the Moiwana community members killed... [and] shall deliver them as soon as possible thereafter to the surviving community members so that the deceased may be honored according to the rituals of N’djuka culture’).

⁵⁶ *Supra* note 7, para 90(a).

⁵⁷ *Supra* note 25, *Río Negro*, para 285 (‘...The purpose of this program will be the rescue, promotion, dissemination and conservation of the ancestral customs and practices, based on the values, principles and philosophies of the Maya Achí people and, in particular of the community of Río Negro. This program should create a space for the promotion of the community’s artistic, linguistic, and cultural expressions...’).

⁵⁸ *Ibid.*

⁵⁹ *Ibid* at para 281 (footnote 355).

The Court has also implicitly touched on the construction of collective memories in relation to memory sites:

The State expressed its willingness to agree to and create spaces to recognize the dignity of the victims and remember them... In this regard, the State indicated that it had begun the corresponding procedure to declare the site where the massacre of El Mozote occurred as a cultural site, as a measure of moral reparation for the victims and their next of kin and that, in addition, it would draw up a plan to create different spaces in the affected villages to recognize the dignity of the victims, *all this in coordination with the communities concerned*... The Court assesses positively and takes note of the State's willingness to agree to and create spaces to recognize the dignity of the victims and remember them, and urges El Salvador to comply with this undertaking, which will not be supervised by the Court.⁶⁰

The Court does not make explicit references to 'collective memories' or 'memory sites'. However, by embracing the State's efforts to designate the site where serious human rights violations occurred as a cultural site to dignify and remember the victims, the Court, in effect, embraces the construction of a memory site.⁶¹ Moreover, by coordinating with the victim communities to draw up plans to create spaces related to memories of the victims and the violations that took place, the State effectively contributes to the construction of collective memories. In other words, rather than handling the sites according to its own agenda, the State allows for the collective participation of the communities affected to create spaces related to memories of the victims and the violations that took place. Similarly, the Court in *Case of the Plan de Sánchez Massacre v Guatemala* stated, 'The measures of reparation... can only be determined from a collective perspective, based on an understanding of the socio-cultural characteristics of the Mayan people, such as their cosmovision, spirituality[,] and community social structure, and recognizing the magnitude of the genocidal acts committed against them.'⁶² While the Court did not make specific references to how such an understanding relates to memory sites, the Court referred to the creation of a commemorative museum 'designed to recover the memory of the victims' as a 'measure of reparation'.⁶³

⁶⁰ *Supra* note 11, *El Mozote*, paras 371–372 (emphasis added).

⁶¹ *Cf. infra* Commentary, Principle 1.

⁶² *Supra* note 7, para 90(a).

⁶³ *Supra* note 25, *Río Negro*, para 280.

Also implicit within the Court's orders is the proper role of the State in implementing memory sites. Given the State's tendency to misrepresent the truth when it holds responsibility for human rights violations,⁶⁴ the State should support, facilitate and preserve memory initiatives, but it should not construct memory sites in a way that represents a single-sided narrative or that justifies a particular political agenda.⁶⁵ Instead, memory initiatives should involve the active participation of the communities affected to ensure measures are implemented even-handedly, truthfully and collectively.⁶⁶ The appropriate degree of State participation might vary according to the type of initiative or the circumstances of each case; for example, in some cases, State participation might be limited to financing memory initiatives. The Court touched on this notion in *Plan de Sánchez Massacre*, where it referred to a '[g]uarantee of non-repetition by providing resources for the collective memory'.⁶⁷ The Court ordered the State to pay for the 'maintenance and improvements to the infrastructure of the chapel in which the victims pay homage to those who were executed'.⁶⁸ The Court demanded that the members of the community affected or their representatives would administer the sum delivered by the State.⁶⁹ This would 'help raise public awareness' to avoid repetition and 'keep alive the memory of those who died'.⁷⁰ Accordingly, States should contribute to memory sites in a way that fosters a collective participation to further the truth and the construction of collective memories.

⁶⁴ *Cf., eg, supra* note 43, *Anzaldo Castro*, paras 82–83 (finding the truth of the victim's whereabouts impossible to determine given the State had destroyed material evidence at a detention center to conceal the executions of 'disappeared' victims).

⁶⁵ *Cf., eg, ibid* at para 198 (noting the importance of vindicating the victim in light of the State's false characterisation of the victim as a 'terrorist').

⁶⁶ *Cf. supra* note 8, para 408 (ordering the State to erect plaques – the contents of which 'must be agreed by the representatives of the victims *and* the State' – so that future generations gain awareness of the past events) (emphasis added); *Supra* note 3, para 349 (ordering the State to proceed establishing a memorial park or plaza – the location and design of which 'should be agreed on by the State *and* the next of kin of the victims, taking into account their expectations and needs') (emphasis added).

⁶⁷ *Supra* note 7, para 104.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

Principle 5

Public policies on memory sites should integrate the initiatives of reparation for victims of serious human rights violations. The creation of sites and their proper management can represent a symbolic reparation measure and a guarantee of non-repetition, by contributing to the reform and democratisation processes of the institutions directly involved in the commission of serious violations of human rights (armed and security forces).

COMMENTARY

Principle 5 refers to the need for public policies on memory sites to integrate in a privileged manner the reparation measures issued in favour of victims of serious human rights violations. The creation of memory sites has the potential to dignify victims and guarantee non-repetition. To that end, the creation of memory sites alone does not suffice; the sites also require proper management. This principle reaffirms the Commentary on Principle 18: the combination of these elements leads to the reform and democratisation of institutions that have committed human rights violations, which would eventually guarantee non-repetition.

The Court has explicitly referred to the contribution of memory initiatives to guarantees of non-repetition. In *Diario Militar*, the Court expressed the importance of ‘establishing the facts that gave rise to State responsibility’ in that case ‘to preserve the historical memory and to avoid the repetition of similar events, and as a form of reparation to the victims’.⁷¹ In *El Mozote*, the Court reiterated that its ruling contributed to the ‘urgent need to prevent similar events from happening again’.⁷² The Court affirmed that ‘based on the preservation of the historical memory... the Court emphasizes’ the relevance of the case and its significance in the context of systematic violations of human rights.⁷³

This principle also refers to the importance of reform and democratisation of institutions that have engaged in violations of human rights in order to avoid their repetition, and it assumes that this process would result from the creation and proper management of memory sites. The jurisprudence of

⁷¹ *Supra* note 3, para 51.

⁷² *Supra* note 11, *El Mozote*, para 208.

⁷³ *Ibid.*

the Court has repeatedly highlighted the need to develop education programmes aimed at security forces in order to avoid repetition of acts of human rights violations. In *Case of Miguel Castro-Castro Prison v Peru*, the Court considered that the State had to design and implement ‘human rights education programs, addressed to agents of the Peruvian police force’.⁷⁴ Moreover, in *Río Negro*, the Court considered it important to ‘enhance the State’s institutional capacities by training judges, prosecutors and members of the Armed Forces’ to prevent such events from reoccurring.⁷⁵ In this case, the Court included judges and prosecutors as recipients of human rights training programmes, in addition to armed forces personnel.⁷⁶ This demonstrates how educational reform of institutions can guarantee non-repetition.

The Court has also referred to the importance of memory sites as a form of symbolic reparation to victims and their descendants given the impossibility, in some cases, of assigning a precise pecuniary value to the non-pecuniary damage caused by human rights violations. In *Ituango*, the Court stated that in such cases it is necessary to provide compensation through ‘acts or projects with public recognition or repercussion’.⁷⁷

The Court refers in two ways to memory initiatives in relation to the reparation of victims. First, it valued memorials, existing memory sites or the unilateral will of the State to create them. For example, in *Case of Rocha Hernández et al v El Salvador*, the Court appreciated the construction of monuments, usually accompanied by the affixing of a plaque detailing the facts of the case and the names of the victims, or the establishment of memorial plaques on existing monuments or in significant public spaces.⁷⁸ In *Castro-Castro*, the Court repeatedly referred to the monument ‘The Eye that Cries’ and recognised it as

⁷⁴ *Case of Penal Miguel Castro-Castro v. Peru. Merits, Reparations and Costs*. Judgment of 25 November 2006. Series C No 160, para 452.

⁷⁵ *Supra* note 25, *Río Negro*, para 291.

⁷⁶ *Cf. ibid* at para 277.

⁷⁷ *Supra* note 8, para 383.

⁷⁸ *Case of Rocha Hernández et al v El Salvador. Merits, Reparations and Costs*. Judgment of 14 October 2014. Series C No 285, para 235.

‘an important public acknowledgement to the victims of violence in Peru’.⁷⁹ Similarly, in *El Mozote*, the Court assessed positively the willingness of the State to ‘create spaces to recognize the dignity of victims and remember them’, and it urged the State to comply with that responsibility.⁸⁰

Second, in some cases, the Court has ordered the construction of monuments. In *Cotton Field*, the Court ordered the State to ‘erect a monument[,] and... the decision on the type of monument shall correspond to the public authorities, who must consult the opinion of civil society organizations by means of an open, public procedure in which the organizations who represented the victims... shall be included’.⁸¹ In that case, the Court not only ordered the construction of the monument but also demonstrated how to execute that order by requiring involvement of the victims’ relatives. Involving the relatives of the victims in the creation of memory initiatives increases their reparative potential. See Commentary on Principles 7, 21, 22 and 29 for further analysis on the participation of victims and their families in the management of memory sites. In *Case of the Moiwana Community v Suriname*, the Court ordered the construction of a monument as simultaneously a reparation and a guarantee of non-repetition: ‘[T]o prevent the recurrence of such dreadful actions in the future, the State shall build a monument and place it in a suitable public location.’⁸²

Principle 6

Public policies on memory sites should consider their pedagogical value for the implementation of plans and action for education on human rights and citizenship.

COMMENTARY

This principle recognises the value of memory sites in transmitting historical events and in providing training in the fields of human rights and citizenship. Defined as the grouping of citizens of a nation or a

⁷⁹ *Supra* note 74, para 454.

⁸⁰ *Supra* note 11, *El Mozote*, para 372.

⁸¹ *Supra* note 25, *Cotton Field*, paras 471–472.

⁸² *Supra* note 18, para 218.

town, the principle's reference to citizenship can be understood in light of Principle 5 and the processes of constructing regional identities referred to in Principle 8, which implies the importance of memory sites in these processes. In that way, this principle considers it a duty of the State to contemplate the pedagogical value of memory sites.

Although the Court has not explicitly referred to the potential pedagogical value of memory sites, it has referred to other ways of transmitting memory that guarantee the right to memory and promote democracy and citizenship through the teaching and transmission of history, such as the production of videos, documentaries and other audiovisual formats. In *Diario Militar*, the Court 'consider[ed] it appropriate that the State make an audio-visual documentary on the facts and victims of this case' and recognised the impact of this measure in the promotion of democratic values.⁸³

Principle 7

The States should provide adequate instances for the victims, their family members, the local community, human rights organizations, as well as society in general to participate in the decisions related to the design and implementation of public policies on memory sites.

COMMENTARY

Principle 7 relates to the notion of collective memories, expounded upon in the commentary on Principle 4.⁸⁴ This principle calls for the participation of key stakeholders in the decisions and implementation of public policies on memory sites. Serious human rights violations affect each specified actor to some extent, and each actor can contribute to memory initiatives in unique ways. First, victims, family members and the local community will have special perspectives and knowledge about the impact of the crimes committed, as well as the customs, culture and needs of the communities affected. Human rights organisations, moreover, can provide specialised knowledge and expertise related to international human rights standards and initiatives. Finally, the broader participation of society helps foster a culture of

⁸³ *Supra* note 3, paras 345–346.

⁸⁴ *Cf. infra* Commentary, Principle 4.

democratic engagement, raising public awareness and stimulating discussion on contemporary challenges. Such involvement may generate institutional reform of those institutions responsible for or complicit in serious violations. Accordingly, States should facilitate the involvement of the specified actors when deciding on the design and implementation of public policies on memory sites.⁸⁵

The Inter-American Court has obliged States to consult several actors in the design and implementation of initiatives related to memory. In relation to victims and their family members, for example, the Court in *Castro-Castro* ordered the State to coordinate with the victims' next of kin in the construction of a commemorative monument to allow them to 'include an inscription with the name of the victim as corresponds according to the monument's characteristics'.⁸⁶ Moreover, the Court has alluded to the role of victims and their family members in providing special knowledge about the context and impact of crimes committed. In *Río Negro*, for instance, the Court ordered the State to implement – in consultation with the victims or their representatives – several measures to improve the living conditions of the victims who were displaced and subsequently forced to resettle.⁸⁷ In doing so, the Court seemingly touches on the role of victims in providing their perspectives and knowledge about the context and impact of the crimes committed – there the needs of the victims given the forced displacements. While the Court did not reference it, the role of victims and families could also extend to the creation of memory sites, such as 'commemorative museums' created to 'recover the memory of the victims'.⁸⁸ There, too, the victims and family members' perception and knowledge of the impact of the crimes committed can ensure the proper implementation of reparative memory initiatives.

In addition, the Court in *Río Negro* ordered the State to secure the participation of the local community in the design and implementation of a programme for the 'rescue, promotion, dissemination

⁸⁵ See also *infra* Commentary, Principles 21–22, 29.

⁸⁶ *Cf. supra* note 74, para 454.

⁸⁷ *Supra* note 25, *Río Negro*, para 284.

⁸⁸ *Ibid* at paras 279–280.

and conservation of the ancestral customs and practices, based on the values, principles and philosophies of the Maya Achí people'.⁸⁹ While this was not a memory site, the Court emphasised that the programme should 'create a space for the promotion of the community's artistic, linguistic, and cultural expressions'.⁹⁰ To this end, the State had to design and implement the programme with the 'active participation of the members of the Río Negro community and their representatives'.⁹¹

The Court has also referenced civil society and human rights organisations as participants in initiatives related to memory. In *Cotton Field*, when ordering the creation of a commemorative monument at the site where victims' were found, the Court ordered the State to 'consult the opinion of civil society organizations by means of an open, public procedure in which the organizations that represented the victims... shall be included'.⁹² Thus, in effect, the Court obligates the State to consult civil society and human rights organisations to contribute to the design of a memory site.⁹³ Additionally, the Court in *Río Negro* recognised that 'the monitoring, denunciation[,] and educational activities carried out by human rights defenders make an essential contribution to the observance of human rights, since they act as guarantors against impunity'.⁹⁴ This can be extended to the involvement of human rights organisations in the design and implementation of memory sites. To monitor, denounce and educate to ensure compliance with human rights standards would also strengthen memory sites' contribution to truth, justice and non-reoccurrence by guaranteeing against impunity.⁹⁵

⁸⁹ *Ibid* at para 285.

⁹⁰ *Ibid*.

⁹¹ *Ibid*.

⁹² *Supra* note 25, *Cotton Field*, para 472.

⁹³ The 'organizations that represented the victims' included national and international human rights organisations: Asociación Nacional de Abogados Democráticos A.C., Red Ciudadana de No Violencia y por la Dignidad Humana and the Centro para el Desarrollo Integral of the Mujer A.C. and the Latin American and Caribbean Committee for the Defense of Women's Rights. *Supra* note 25, *Cotton Field*, para 4.

⁹⁴ *Supra* note 25, *Río Negro*, para 260.

⁹⁵ *Cf. supra* note 74, para 452 ('[T]he State must design and implement... human rights education programs... on the international standards applicable to matters regarding treatment of inmates in situations of alterations of public order in penitentiary centers').

Principle 8

Public policies on memory sites may contemplate a regional approach in order to contribute to the construction of memories and common identities and to strengthen the processes of political integration among peoples.

COMMENTARY

Principle 8 relates to the creation of regional identities: memory sites can help construct memories, foster common identities and strengthen political integration among nations within a region.⁹⁶ As mentioned in the commentary of Principle 7, memory sites can help foster a culture of democratic engagement by raising public awareness and stimulating discussion on contemporary challenges. In turn, memory sites will contribute to democratisation and institutional reform – especially of those institutions responsible for, or complacent in, serious violations of human rights.⁹⁷ These principles are applicable on a regional scale: inter-state cooperation could further the political integration and the construction of memories and common identities among States in the Inter-American region. In turn, regional memory initiatives will help clarify facts, raise awareness, combat impunity, and contribute to nourishing cultures and individuals capable of sustaining prevention aims over time.⁹⁸

The Inter-American Court has called for regional cooperation to address human rights concerns. For example, the Court in *Case of Ivcher-Bronstein v Peru* stated that the American Convention and other treaties encompass a set of higher common values ‘centered around the protection of the human person... [and] applied as a collective guarantee’.⁹⁹ The Court expounded upon this collective guarantee principle in *Case of Goiburú et al v Paraguay*:

Access to justice is a peremptory norm of international law and, as such, gives rise to obligations erga omnes for the States to adopt all necessary measures to ensure that such violations do not remain unpunished, either by exercising their jurisdiction to apply their

⁹⁶ For discussion on the construction of collective memories and community participation, see the commentary of Principles 4 and 7.

⁹⁷ *Infra* Commentary, Principle 7.

⁹⁸ *Ibid.*

⁹⁹ *Case of Ivcher-Bronstein v Peru. Competence*. Judgment of 24 September 1999. Series C No 54, para 42.

domestic law and international law to prosecute and, when applicable, punish those responsible, or by collaborating with other States that do so or attempt to do so.¹⁰⁰

In that case, the Court applied those principles to extraditions, declaring that ‘the mechanisms of collective guarantee established in the American Convention, together with the regional and universal international obligations on this issue, bind the States of the region to collaborate in good faith in this respect’.¹⁰¹ Also addressing extradition, the Court in *Case of La Cantuta v Perú* declared, ‘In view of the nature and seriousness of the events, all the more since the context of this case is one of systematic violation of human rights, the need to eradicate impunity reveals itself to the international community as a duty of cooperation among States for such purpose.’¹⁰²

Although the Court has not demanded inter-state cooperation for the implementation of memory initiatives, in many cases, the underlying purpose of the duty to cooperate could extend to public policies on memory sites. Especially in the context of serious, systematic violations of human rights, policies on the preservation of sites where serious human rights violations occurred, for example, could play an essential role in combating impunity. In many cases, therefore, the pursuit of justice might warrant inter-state cooperation with respect to memory site initiatives. In turn, inter-state cooperation could further the political integration and the construction of memories and common identities among States in the Inter-American region.

Likewise, while the Court has not explicitly referred to regional memory approaches as a means of fostering political integration, democratisation or institutional reform, it has ordered States to implement initiatives that support these ends. In *Plan de Sánchez Massacre*, for instance, the Court ordered the State to implement development programmes on health, education, production and

¹⁰⁰ *Supra* note 9, para 131.

¹⁰¹ *Ibid* para 132.

¹⁰² *Case of La Cantuta v Perú. Merits, Reparations and Costs*. Judgment of 29 November 2006. Series C No 162, para 160.

infrastructure as a measure of reparation to several Mayan communities affected in that case.¹⁰³ These initiatives would include a ‘study and dissemination of the Maya Achí culture in the affected communities... maintenance and improvement of the road systems between the said communities and the municipal capital, [and the] supply of teaching personnel trained in intercultural and bilingual teaching for... schooling in these communities’.¹⁰⁴ While the Court did not explicitly state it, all of these measures could contribute to political integration. Improved roadways facilitate greater contact between the communities, and the common educational and cultural initiatives can help generate solidarity and cultivate a community able to sustain prevention aims in the future. Similarly, with respect to measures related to memory sites, the Court in *Río Negro* appreciated the State’s willingness to construct a commemorative museum – with the active participation of the communities affected – to recover the memory of the victims from several different Mayan communities within the region.¹⁰⁵ This, too, could generate integration between the communities, raise awareness and motivate the communities towards the common goal of constructing and preserving collective memories and preventing repetition.

II. Principles on the preservation of sites where serious human rights violations were committed

Principle 9

States must adopt judicial, legal, administrative or any other decisions necessary to ensure the physical safeguarding of sites where serious human rights violations were committed. These may contemplate the implementation of physical, technical and legal measures to avoid the destruction or alteration of said properties, including technical studies, restrictive use and/or access, informational duties and/or duties of prior consultation, designation of depositories or guarantors, cautionary sanctions, among others.

¹⁰³ *Supra* note 7, paras 109–110.

¹⁰⁴ *Ibid* at para 110.

¹⁰⁵ *Supra* note 25, *Río Negro*, paras 279–280.

COMMENTARY:

This principle refers to the physical safeguarding of places where human rights violations were committed. In particular, it refers to the responsibility of the State to guarantee the adoption of the necessary procedures for the physical safeguarding of said places, including judicial, administrative or other legal decisions. This principle is consistent with Article 2 of the American Convention on Human Rights, which contemplates the obligation of Member States to adopt in their domestic legislation the necessary measures for the fulfillment of the rights recognised therein. The Article states the following:

Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.¹⁰⁶

In *Case of Mendoza et al v Argentina*, the Court refers explicitly to this State duty and describes in detail the measures that States must adopt to comply:

The Court has established that Article 2 (Domestic Legal Effects) of the American Convention establishes the general obligation of the State Parties to adapt their domestic law to the provisions of the Convention in order to guarantee the rights recognized therein. This obligation entails the adoption of measures of two kinds. On the one hand, the elimination of norms and practices of any kind that involve the violation of the guarantees established in the Convention; on the other hand, laws must be enacted and practices must be implemented leading to the effective observance of the said guarantees.¹⁰⁷

The decisions referred to in this principle are crucial to the safeguarding of memory sites since they are oriented towards the adoption of technical, legal or physical measures that prevent the alteration or destruction of sites where serious human rights violations occurred.

¹⁰⁶ American Convention on Human Rights (Pact of San José, Costa Rica) Subscribed to the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, 22 November 1969. Entry into Force: 18 July 1978, in accordance with Article 74.2, Art 2.

¹⁰⁷ *Case of Mendoza et al v Argentina. Preliminary Measures, Merits and Reparations*. Judgment of 14 May 2013. Series C No 260, para 293.

The jurisprudence of the Court has referred to the need to safeguard memory sites and the responsibility of the State to guarantee this protection. In *El Mozote*, the Court specifically points to El Salvador to protect and preserve the sites where serious violations were committed: 'The Court considers that the State... must carry out a survey of available information on possible burial or burial sites to which it must be protected for its preservation.'¹⁰⁸ In this ruling, the Court referred to two components of this obligation: first, it ordered the State of El Salvador to gather all the information relevant to interment or burial sites, and second, to contribute to the processes that were already underway for that purpose. In that case, the Court joined the proceedings that were already underway by the Argentine Forensic Anthropology Team, and it ordered El Salvador to have the 'human and economic' resources to carry out any other action necessary to complete the exhumation and identification of the persons executed.¹⁰⁹ Although it does not refer to the measures that must be adopted, it required the use of 'all necessary technical and scientific means'.¹¹⁰

In that ruling, the Court also referred to the timing in which the State must comply with its obligation: first, it ordered that the process be initiated within six months from the notification of the ruling, and second, it ordered that it be completed within two years.¹¹¹ Finally, it is important to note that the Court also highlighted the need to involve the victims' families, obtain their informed consent and maintain close coordination with them throughout the process.¹¹² The Court's allusion to the need to obtain the informed consent of the members of the community is closely related to the prior consultation component referred to by this principle. The Court has also addressed the need to obtain the informed consent of the parties involved in the context of indigenous rights.¹¹³

¹⁰⁸ *Supra* note 11, *El Mozote*, para 332.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.*

¹¹² *Ibid.*

¹¹³ *Cf., eg, Case of Pueblo Saramaka v Surinam. Preliminary Measures, Merits, Reparations and Costs.* Judgment of 28 November 2007. Series C No 172, para 129.

The Court has also ordered the designation of depositaries to which the victims and their representatives can address 'in the search or reconstruction of the information'.¹¹⁴

In *Diario Militar*, the Court positively valued the commitment made by Guatemala to search for disappeared victims and recognised the need to use appropriate judicial and administrative channels.¹¹⁵ Although that case referred to the search for missing persons and not to the physical safeguarding of a memory site, the places where remains of missing persons are found may constitute memory sites, and in this sense, the Court recognised the need to have the appropriate legal and administrative means necessary to carry out those tasks.

In addition, in *Río Negro*, the Court ordered the State of Guatemala to implement a genetic information bank in order to safeguard the information on the victims' skeletal remains and the genetic information of their relatives.¹¹⁶ Although this measure does not specifically refer to the physical protection of a memory site, it relates to this principle because the objective of implementing the genetic information bank was to safeguard genetic information – to avoid the destruction of information that may serve to identify the victims in that case.

In that ruling, the Court also touched on the time and manner in which the State must protect the information by demanding the State of Guatemala to implement the genetic information bank within a year and obtain the prior and informed consent of the members of the Río Negro community who offered to provide genetic materials for the identification of victims.¹¹⁷

Finally, the Court noted that, in the search for disappeared persons, the State should 'employ or use the required relevant national and/or international scientific and technical standards' and cited the

¹¹⁴ *Case of Serrano Cruz Sisters v El Salvador. Monitoring Compliance with Judgment* of 1 September 2016, para 36(c) (vii) (referring to the representatives' request to designate a liaison officer with sufficient rank in the army's military intelligence to whom the victims and representatives could address in the search or reconstruction of the information).

¹¹⁵ *Supra* note 3, para 334.

¹¹⁶ *Cf. supra* note 25, *Río Negro*, para 269.

¹¹⁷ *Ibid.*

United Nations Manual on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions and its model autopsy protocol.¹¹⁸

For information on the preservation of archives, see Commentary on Principle 14.

Principle 10

The main purpose of physically safeguarding sites where serious human rights violations were committed is: a) to obtain evidence that can be evaluated in court, by conducting expert studies, or examining the scene, among others; and b) to prevent structural modifications that alter the historical or patrimonial value of the said sites.

COMMENTARY

As Principle 9, this principle refers to the physical securing of memory sites. However, unlike Principle 9, this principle does not emphasise the responsibility of the State but refers to the objective of physically safeguarding such sites. The principle recognises two fundamental objectives: a) to obtain evidence; and b) to prevent modifications that alter the historical or patrimonial value of said sites.

The proper preservation of memory sites contributes to the collection and preservation of evidence, and consequently, to adequate investigations and reparations.¹¹⁹ It also contributes to the construction of memory by guaranteeing historical and cultural heritage (on this aspect, refer to Principle 17).¹²⁰

The Court recognises the importance of preserving sites that could contain evidence of serious violations of human rights and the duty of the State to provide the means to that end. For example, in

¹¹⁸ *Supra* note 25, *Rio Negro*, para 268(a)–(b).

¹¹⁹ *Supra* note 74, para 383 ('[I]t is necessary to thoroughly investigate the crime scene, autopsies and competent professionals employing the most appropriate procedures must carefully practice analysis of the human remains').

¹²⁰ On the notion of heritage, refer, for example, to the Report of the UN Independent Expert in the field of cultural rights, 21 March 2011, A/HRC/17/38, www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/17/38, para 5 ('The concept of heritage reflects the dynamic character of something that has been developed, built or created, interpreted and re-interpreted in history, and transmitted from generation to generation. Cultural heritage links the past, the present and the future as it encompasses things inherited from the past that are considered to be of such value or significance today, that individuals and communities want to transmit them to future generations').

Diario Militar, after recognising the probative and reparation value of the sites that contain remains of victims of disappearances, the Court ordered the State to carry out ‘a serious search through the appropriate judicial and administrative channels... [and] have adequate and adequate human, technical and scientific resources’.¹²¹ In that case, the Court recognised the need to use the necessary judicial and administrative resources referred to in Principle 9 for the physical safeguarding of memory sites in order to obtain and preserve evidence to assist in the investigation of human rights violations. For more on the probative value of memory sites, see Commentary on Principle 3, and for more on the jurisprudence of the Court in relation to the preservation of archives, see Commentary on Principle 14.

Principle 11

The physical safeguarding of the sites where serious human rights violations were committed implies both internal and external custody, as well as the exclusion of those persons who could put the preservation of evidence at risk.

COMMENTARY

As in Principles 9, 10, 12 and 13, Principle 11 references the physical safeguarding of the sites where serious human rights violations occurred.

This principle focuses on the ways sites should be safeguarded and specifies that custody should be both internal and external. Internal custody could refer to the conservation tasks referred to in Principle 12. On the other hand, external custody could mean the protection of memory sites from external forces such as modernisation/globalisation, population increase and accelerated economic growth, among others,¹²² in addition to the protection against abuses stemming from States or non-state

¹²¹ *Supra* note 3, paras 333–334.

¹²² Report of the UN Working Group on Enforced or Involuntary Disappearances on its mission to Peru, 8 July 2016, A/HRC/33/51/Add.3, www.un.org/en/ga/search/view_doc.asp?symbol=A/HRC/33/51/Add.3, para 36

(‘Not all places where the remains of disappeared persons might be located benefit from proper protection and conservation measures. This jeopardizes the possibility not only of finding and identifying disappeared persons but also of gathering evidence to bring the persons responsible to justice. One of the biggest challenges noted is that many military bases have not been searched or excavated. It has also been reported

actors like individuals or companies that represent a threat or that cause vulnerability or an irreversible change or damage to the places where serious violations occurred, or that alter the evidence they contain.¹²³

In addition, this principle includes an element on the conservation of evidence. This element is closely related to the probative value of the memory sites contemplated in Principles 3 and 10, insofar as all three refer to the need to protect said sites in order to protect evidence that helps determine the violations committed and the consequent criminal indictments to those responsible. For more on the jurisprudence of the court regarding the preservation of archives, see Commentary on Principle 14.

Finally, although the Court has not said so, the State cannot use the exclusion of persons referred to in this principle as an excuse to restrict the work of human rights defenders, as indicated by the UN Special Rapporteur in the field of cultural rights.¹²⁴

Principle 12

The physical assurance measures adopted to preserve the sites where serious human rights violations were committed must include both conservation and maintenance work.

COMMENTARY

This principle highlights two elements in the physical safeguarding of memory sites: conservation and maintenance. Conservation could be interpreted as the tasks directed to the care and protection of past

that schools or other structures are being built on the site of other former military bases without due attention being given to the possibility of finding the remains of disappeared persons...').

¹²³ *Supra* note 120, para 64 ('While "preservation" is used for tangible heritage with a focus on maintaining their "authenticity" and "integrity"; "safeguarding" focuses on the "viability" and "continuity" of intangible heritage. "Protection" at WIPO means protecting the creativity and distinctiveness inherent in expressions against unauthorized or illegitimate use by third parties').

¹²⁴ Report of the Special Rapporteur in the field of cultural rights, 25 July 2018, A/73/227, <http://undocs.org/A/73/227>, para 35 ('The increasing attacks in many countries on human rights defenders, including cultural rights defenders, and limitations on their ability to engage in universal human rights work, including through labelling them as "foreign agents", curtailing their ability to receive international funding or adopting additional norms that disproportionately restrict the work of human rights organizations, are very worrying and must be ended in accordance with international standards').

elements that provide historical and patrimonial value to memory sites. Maintenance, on the other hand, implies tasks aimed at preventing the deterioration of sites where serious violations were committed. Both elements on the physical assurance of memory sites contemplated in this principle imply the implementation of policies that facilitate the sustainable promotion of memory from generation to generation. For more on the value of memory sites and their proper conservation, see Commentary on Principles 3, 9, 10 and 11, and see Commentary on Principle 14 for more on the preservation of archives.

Principle 13

The physical assurance measures adopted to preserve the sites where serious human rights violations were committed should account for the recommendations made by professionals or specialists respective to each case, including, among others, anthropologists, archeologists, architects, historians, museum professionals, conservationists/restorers, archivists and/or lawyers.

COMMENTARY

Principle 13 emphasises the importance of considering expert recommendations when adopting measures to preserve physically the sites where serious human rights violations occurred. The recommendations of specialists can help ensure the proper handling of memory sites to protect them against neglect or destruction and put them to their most effective use.

Specialists can contribute to the physical preservation of sites where serious human rights violations occurred by advising on how to maximise their reparative and probative value. The Inter-American Court has directly or indirectly supported this principle. In *Diario Militar*, the Court noted that the State would create a ‘National Search Commission’, which would carry out the search for the remains of victims with the coordination of the Forensic Science Institute and the Guatemala Forensic Anthropology Foundation.¹²⁵ Likewise, in *El Mozote*, the Court ordered the State to follow up on the Argentine Forensic Anthropology Team’s work in collecting information on possible interment or burial sites to protect and preserve them so that the State could exhume and identify any other victims

¹²⁵ *Supra* note 3, para 331.

'systematically and rigorously, with adequate human and financial resources'.¹²⁶ Thus, the Court has explicitly required the involvement of anthropologists and forensic scientists, though it has not expressly mentioned the role of other specialists, such as lawyers, archivists and others. Either way, the Court has supported the notion that specialists can play a critical role in the identification and handling of sites where violations occurred.

Specialists can also contribute to combating impunity and the intentional destruction of evidence at sites where violations occurred.¹²⁷ In *Cotton Field*, for example, the Court concluded that irregularities occurred regarding:

(i) absence of information in the report on the discovery of the bodies; (ii) inadequate preservation of the crime scene; (iii) lack of rigor in gathering evidence and in the chain of custody; (iv) contradictions and deficiencies in the autopsies; and (v) irregularities and deficiencies in the identification of the bodies, as well as in their improper return to the families.¹²⁸

Likewise, in *El Mozote*, the Court found that the State delayed and obstructed the exhumation process at the site where a massacre took place. Specifically, the Argentine Forensic Anthropology Team indicated that the State had deliberately obstructed their work 'at a time when [the State] lacked experts in the area of forensic anthropology and archeology'.¹²⁹ Such irregularities frustrate attempts to achieve justice and effective judicial protection, and they violate 'the right of the next of kin and of society to know the truth about what happened'.¹³⁰ Accordingly, it is essential that physical preservation measures include the recommendations of specialists to ensure the adequate handling and protection of the sites.

¹²⁶ *Supra* note 11, *El Mozote*, para 332.

¹²⁷ *Cf. supra* note 74, para 385 ('[T]he State authorities incurred in important omissions regarding the recovery, preservation, and analysis of the evidence, such as: records were not prepared for the removal of the bodies... [and] the autopsy certificates and the forensic medical reports limited themselves to describing the injuries... without indicating the bullets recovered from the victims' bodies').

¹²⁸ *Supra* note 25, *Cotton Field*, para 333.

¹²⁹ *Supra* note 11, *El Mozote*, para 261.

¹³⁰ *Supra* note 25, *Cotton Field*, para 388.

Indeed, by facilitating the identification of victims and their proper exhumations, expert opinions on the physical preservation of sites where violations occurred allow for families and communities to honour, recover and preserve the memory of the victims.¹³¹ For instance, the Court has noted that delaying and obstructing exhumations relates to both the ‘collection of evidence and to the possibility of returning the remains to the next of kin so they can close their mourning process’.¹³² While the Court did not explicitly make this connection, physical preservation measures with the inclusion of expert recommendations may contribute to the family’s ability to appropriately recover and honour the memory of victims. Further, the participation of specialists can help ensure that exhumations are accomplished in a way that maximises their symbolic value: garnering widespread attention and societal participation in the commemoration of the victims and in remembrance of the historical events that took place.

Principle 14

States have the obligation to preserve the archives connected to the sites where serious human rights violations were committed and to guarantee their accessibility. Specifically, they should adopt a series of physical, technical and legal measures aimed at preventing their removal, destruction or falsification.

COMMENTARY

Principle 14 relates to the duty of States to preserve and guarantee access to archives collected from – or in any way connected to – the sites where serious human rights violations occurred. Such archives include those in the possession of States or those owned by private persons. Specifically, this principle highlights the obligation to adopt adequate measures to protect the removal, theft, destruction or falsification of all archives. This addresses the obstacles victims frequently face in obtaining access to information in their search for the truth. States are often reluctant to allow access to archives, and in many cases, they

¹³¹ Cf. *supra* note 11, *El Mozote*, para 305 (highlighting the physical, psychological and collective damage furthered by the absence of State support in the effective search and identification of victims’ remains and the impossibility of honoring loved ones appropriately).

¹³² *Ibid* at para 262.

deliberately destroy them.¹³³ Accordingly, it is essential that States implement adequate physical, technical and legal measures to preserve and guarantee access to archives at sites where serious offences occurred.

The Inter-American Court has required States to provide access to archives. In *Diario Militar*, for example, the Court stated that ‘State authorities must refrain from taking measures that prevent access to the information contained in State archives or agencies concerning the facts of this case’.¹³⁴ In that case, the State had withheld from investigating a document titled *Diario Militar* – a Guatemalan State intelligence document taken from the Guatemalan Army’s archives.¹³⁵ This document contained information including a ‘list of 183 people with their personal data... [and] the acts perpetrated against the said person, including: clandestine detention, kidnapping and murder’.¹³⁶ It also contained information on the place of capture and detention¹³⁷ – meaning it had a direct connection to sites where serious violations occurred.

More recently, the Court in *Case of Gutiérrez Hernández et al v Guatemala* expounded on the State’s obligation to guarantee the accessibility of archives. In that case, the Court first recognised and appreciated the State’s efforts at preserving a military archive containing information on disappeared victims – which prevented any theft or destruction of the archive meant to guarantee impunity over the authors of the human rights violations.¹³⁸ However, the Court found that declassifying an archive did not alone suffice to lift the State’s veil of secrecy – the State must also implement pertinent measures to

¹³³ *Supra* note 74, para 385 (explaining that State authorities ‘incurred in important omissions regarding the recovery, preservation, and analysis of the evidence’, and a ‘great part of the domestic case file’ was burned).

¹³⁴ *Supra* note 3, para 327(e). See also *Case of the Serrano-Cruz Sisters v El Salvador. Merits, Reparations and Costs*, Judgment of 1 March 2005. Series C No 120, para 186 (‘The State must ensure that all its institutions and authorities are obliged to cooperate by... providing access to all files and records that could contain information on the possible fate of these young people’).

¹³⁵ *Ibid* at para 59.

¹³⁶ *Ibid* at para 60.

¹³⁷ *Ibid* at para 61.

¹³⁸ *Case of Gutiérrez Hernández et al v Guatemala. Preliminary Objections, Merits, Reparations and Costs*. Judgment of 24 August 2017. Series C No 339, para 194.

permit access to the information the archive contains.¹³⁹ Specifically, the Court found that the State failed to make accessible the origin, object, motives or consequences of the archive, and it also failed to implement measures to fully decipher or interpret its content.¹⁴⁰ Accordingly, the State had failed to satisfy its legal obligations related to the investigation of disappeared victims.¹⁴¹

In addition, the Court in *Diario Militar* referenced physical and legal measures aimed at protecting archives – embracing the willingness of the State to ‘take the necessary measures to ensure the physical safekeeping, legal protection, and sustainability of the Historical Archive of the National Police’.¹⁴² This archive complemented *Diario Militar* and contributed ‘specific and objective data to the investigation concerning the forced disappearances’.¹⁴³ The archive also included information related to the sites where violations occurred, since it provided information on the planning and organisation involved in the crimes, the actors responsible and information that shed light on the investigation of bodies found in former military bases.¹⁴⁴ Hence, the Court has used language supporting the preservation and guaranteed access of archives connected to the sites where violations occurred, as well as embracing physical and legal measures to protect said archives from removal, theft or destruction.

Similarly, in *El Mozote*, the Court found that the State failed to take several measures necessary for an adequate investigation, including the failure to inspect ‘archives that might have provided information on those who participated in the military operations carried out in the place and on the date of the events’.¹⁴⁵ Accordingly, the Court emphasised that States must abstain from actions that obstruct

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid* at para 195.

¹⁴¹ *Ibid* at para 196.

¹⁴² *Supra* note 3, para 355. *Cf. supra* note 9, para 170 (‘The Court assesses positively the creation of the Center of Documentation and Files for the Defense of Human Rights, known as the “Terror Files”, which has contributed to the search for the historic truth not only of Paraguay, but of the entire region. The preservation, classification and systematization of these documents’).

¹⁴³ *Ibid, Diario Militar*, at para 254.

¹⁴⁴ *Ibid* at paras 213–214.

¹⁴⁵ *Supra* note 11, *El Mozote*, para 256.

the investigative process, and they must guarantee investigative bodies access to ‘pertinent documentation and information’ to investigate facts and obtain ‘evidence of the location of the victims’.¹⁴⁶

Principle 15

States should guarantee the availability and accessibility of legal and administrative mechanisms so that any person or institution with a legitimate interest can request the preservation of those sites where serious human rights violations were committed, through measures that ensure their intangibility. The legal measures should be transmitted as part of autonomous actions or as precautionary measures prior to the issuance of sentences.

COMMENTARY

Principle 15 refers to the right to request the preservation of sites where serious human rights violations occurred. This principle addresses the risk that States or other actors may harmfully delay investigations or mishandle or destroy evidence at the sites where serious offences were committed.¹⁴⁷ Moreover, especially given interested parties may hesitate or refrain to submit requests out of fear or distrust of state institutions, States must guarantee this measure through autonomous actions or as precautionary measures prior to the issuance of sentences. Accordingly, the principle addresses protection for the purposes of prosecuting persons responsible of human rights violations, and it also encompasses administrative actions to preserve sites in general. In addition, the principle requires not only the availability of legal and administrative measures but the accessibility of such measures as well. Accessibility might require access to free justice, public transparency and access to information, translators, a scheme of protection in cases involving risks to life or physical integrity, and other measures appropriate given the particular facts of each case.¹⁴⁸

¹⁴⁶ *Ibid* at para 257.

¹⁴⁷ *Cf. infra* Commentary, Principles 9–10; *Cf. Supra* note 11, *El Mozote*, para 251 (‘[F]or nine years the State failed to open an investigation that would ensure that the evidence allowing what happened to be determined was obtained promptly and preserved.’); *Cf. supra* note 43, *Anzaldo Castro*, paras 82–83 (explaining that the State had destroyed material evidence at a clandestine detention centre where it conducted secret executions).

¹⁴⁸ Report of the Independent Expert in the field of cultural rights, 21 March 2011, A/HRC/17/38, <https://undocs.org/en/A/HRC/17/38>, para 71:

The Inter-American Court touched on the necessity of timely preserving evidence at sites where violations occurred in *El Mozote*: the ‘obligation to investigate cannot be fulfilled randomly’, but instead, it entails creating ‘an adequate domestic regulatory framework and/or organizing the system for the administration of justice in a way that its operation ensures that serious, impartial and effective investigations are conducted *ex officio*, without delay’.¹⁴⁹ Given the context of the investigations – concerning exhumations and evidence at the site where massacres occurred – the Court’s statement likely supports that the State’s obligation entails the provision of legal and administrative mechanisms to allow interested persons to request the preservation of sites where serious human rights violations occurred.

The Court in *El Mozote* found that the State, despite having awareness of the possible occurrence of a massacre, delayed for nine years to open an investigation needed to ‘ensure that the evidence allowing what happened to be determined was obtained promptly and preserved’.¹⁵⁰ Moreover, the State had not initiated the late investigation on its own initiative.¹⁵¹ Instead, it occurred only after one of the forcibly displaced survivors had returned to file a complaint.¹⁵² Consequently, the Court found that, at least since the possibility of a massacre was made public nine years prior to the filing of the complaint,

(‘The independent expert further wishes to stress that public, fair, and just procedures should be established to arbitrate competing demands for resources by communities who wish to develop and implement cultural heritage preservation/safeguard programmes. The principle of non-discrimination should be robustly reaffirmed in this regard. More generally, effective remedies, including judicial remedies, should be made available to individuals and communities who feel that their cultural heritage is not fully respected and/or protected, or that their right of access to and enjoyment of cultural heritage has been infringed upon.’);

Report of the Special Rapporteur in the field of cultural rights, 9 August 2016, A/71/317, <https://undocs.org/en/A/71/317>, para 58:

(‘Adopting a human rights approach entails consulting the people who have particular connections with heritage, including for the purpose of understanding and incorporating the multiplicity of interpretations of that heritage, and determining whether (or not) they wish to rebuild, reconstruct and re-establish such a heritage and if so, how. Such consultations must include marginalized groups; further, women must be fully involved. Consultations must aim at obtaining free, prior and informed consent, in particular where the rights of indigenous peoples are at stake.’).

¹⁴⁹ *Supra* note 11, *El Mozote*, para 247.

¹⁵⁰ *Ibid* at para 251.

¹⁵¹ *Ibid* at para 250.

¹⁵² *Ibid* at para 251.

the State 'should have initiated ex officio and without delay a serious, impartial and effective investigation'.¹⁵³ This provides indirect support for the principle's call for legal measures transmitted as part of autonomous actions or as precautionary measures prior to the issuance of sentences. Because of the internal armed conflict underway in that case, the survivors and family of the victims executed refrained from denouncing the facts of the massacre until several years after the massacre took place.¹⁵⁴ Such circumstances expose the need for autonomous and precautionary measures for the preservation of sites where violations may have occurred, for this may prove essential for the proper handling of exhumations, collection of evidence and investigations at the site where violations occurred.

Principle 16

States should guarantee victims, their families, as well as any person or institution with a legitimate interest the full access and capacity to intervene in any judicial action in connection with the preservation of sites where serious human rights violations were committed.

COMMENTARY

Principle 16 calls for States to guarantee interested parties the full access and capacity to intervene in legal actions concerning the preservation of sites where serious violations occurred. Such intervention includes the right of victims and their families 'to be heard and to act in the respective proceedings, both in order to clarify the facts and punish those responsible, and to seek appropriate reparation'.¹⁵⁵ Surviving victims or other interested parties may feel restricted by fear or distrust to pursue action against serious human rights violations.¹⁵⁶ Accordingly, the State should facilitate access to victims, their families, institutions and any other interested party to intervene in judicial actions concerning the preservation of

¹⁵³ *Ibid* at para 252.

¹⁵⁴ *Ibid* at para 251.

¹⁵⁵ *Cf. Case of Carera García and Montiel Flores v Mexico. Preliminary Objection, Merits, Reparations and Costs.* Judgment of 26 November 2010. Series C No 220, para 192.

¹⁵⁶ *Cf. supra* note 11, *El Mozote*, para 210 ('[O]wing to the internal armed conflict that was underway, the fear and distrust of State institutions, the surviving victims and the next of kin of the victims who were executed did not denounce the facts of this case before the corresponding instances until October, 1990').

sites. Ensuring such access will further efforts to identify all individuals affected and work to hold the State accountable for timely and adequate preservation measures.

This principle finds support in measures ordered by the Inter-American Court. In *El Mozote*, the Court addressed the State's delay in advancing investigations to inspect, collect evidence and conduct exhumations at the site where massacres occurred.¹⁵⁷ The Court highlighted the subsequent problems associated with identifying survivors and the family of victims, which made it 'impossible to know with certainty how many survivors were displaced'.¹⁵⁸ Accordingly, the Court did not have sufficient evidence to adequately identify the victims in its judicial proceedings.¹⁵⁹ In response, the Court ordered the State to implement measures for the identification of executed victims, surviving victims and their next of kin so that they could 'request and receive the corresponding reparation in the terms of this Judgment'.¹⁶⁰ While these measures do not directly address the preservation of sites, they still constitute a form of judicial intervention as understood by the principle. In an action challenging the State's delay in investigating the massacre sites, the Court's order to identify and provide reparations to any victim effectively provides interested parties the capacity to intervene in a judicial action connected to the preservation of sites.

The Court in *El Mozote* also required the State to ensure 'full access and legal standing' to the victims or their families 'at all stages of the investigation and prosecution'.¹⁶¹ Again, given that the case involved the State's failure to preserve the massacre sites – to inspect, collect evidence and conduct exhumations in a timely manner – the Court at least indirectly supports the principle's call for full access

¹⁵⁷ *Cf. ibid* at para 262.

¹⁵⁸ *Ibid* at para 207.

¹⁵⁹ *Ibid*.

¹⁶⁰ *Ibid* at para 310.

¹⁶¹ *Ibid* at para 319(g).

and capacity to intervene in judicial actions in connection with the preservation of sites.¹⁶² Thus, in accordance with Inter-American case law, States must facilitate access to interested parties to intervene in judicial actions concerning the preservation of sites where serious human rights violations occurred.

Principle 17

The application of cultural or historical heritage forms, or similar forms, to sites where serious violations of human rights were committed can be an effective tool to guarantee the preservation of those properties. To this end, it is advisable to review and where appropriate adapt the current general regulations on these figures to the present Principles.

COMMENTARY

This principle, like Principles 9 to 16, is aimed at preserving places where serious human rights violations were committed. To this end, the sites should be given special attributions to declare them as cultural and/or historical heritage to ensure their preservation and to endure in the collective memory.¹⁶³

The Court has not developed a unified and exhaustive definition of heritage; however, international standards offer certain considerations.¹⁶⁴ The Convention Concerning the Protection of the World Cultural and Natural Heritage indicates:

¹⁶² The 'full access at all stages of the investigation and prosecution' might allow interested parties to intervene even in the case that the State has already implemented preservation measures; it affords parties the opportunity to make alternative proposals for the management or preservation of the sites. *Cf. infra* Commentary, Principle 7.

¹⁶³ In this respect, see the MERCOSUR *Fundamental Principles on Public Policies on Memory Sites*, p 11 (stating that the notion of cultural heritage has been developed in diverse international mechanisms that arrange to preserve and support special protection to those monuments, projects, places and intangible assets that are perceived by communities as culturally valuable and components of their identity. From this perspective, the preservation of heritage is a means of transmitting to present and future generations the history and culture of the people. Based on this approach, some persons and institutions consulted propose to develop a form of 'heritage of memory' that yields protection to those places connected to serious human rights violations and that allow them to guarantee the long-term sustainability of preservation measures).

¹⁶⁴ European Convention on the Value of Cultural Heritage for Society (Faro Convention), 2005, www.coe.int/en/web/conventions/full-list/-/conventions/treaty/199, art 2 (a) ('cultural heritage is a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. It includes all aspects of the environment resulting from the interaction between people and places through time'); ASEAN Declaration on Cultural Heritage, 2000, <http://arc-agreement.asean.org/file/doc/2015/02/asean-declaration-on-cultural-heritage.pdf>, art 1 ('... Cultural heritage means: (a) significant cultural values and concepts; (b) structures and artifacts...; (c) sites and human habitats...; (d) oral or folk heritage...; (e) the written heritage; (f) popular cultural heritage...').

For the purposes of this Convention, the following shall be considered as 'cultural heritage': a) monuments: architectural works, works of monumental sculpture and painting, elements or structures of an archaeological nature, inscriptions, cave dwellings and combinations of features, which are of outstanding universal value from the point of view of history, art or science; b) groups of buildings: groups of separate or connected buildings which, because of their architecture, their homogeneity or their place in the landscape, are of outstanding universal value from the point of view of history, art or science; (c) sites: works of man or the combined works of nature and man, and areas including archaeological sites which are of outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view.¹⁶⁵

The 2011 Report of the Independent Expert in the field of cultural rights on the right of access to and enjoyment of cultural heritage contains a more inclusive definition of cultural heritage and describes it as:

'tangible heritage (e.g. sites, structures and remains of archaeological, historical, religious, cultural or aesthetic value), intangible heritage (e.g. traditions, customs and practices, aesthetic and spiritual beliefs; vernacular or other languages; artistic expressions, folklore) and natural heritage (e.g. protected natural reserves; other protected biologically diverse areas; historic parks and gardens and cultural landscapes).'¹⁶⁶

Although the sites where serious violations of human rights were committed are not among the objects or places recognised by the Cultural Heritage Convention and the United Nations expert report as cultural heritage, they could be provided with this character due to their universal value from a historical perspective, which would ensure its proper preservation for posterity.

The Court has reflected on the need to preserve cultural and historical heritage. In *El Mozote*, the Court appreciated the willingness of the State to create spaces to recognise the dignity of the victims, for which it initiated the corresponding procedures so that the place where the massacre occurred was

¹⁶⁵ UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972, <https://whc.unesco.org/en/conventiontext>, art 1; UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, 2003, <https://ich.unesco.org/en/convention>, art 2(2) ('The "intangible cultural heritage", as defined in paragraph 1 above, is manifested inter alia in the following domains: (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship').

¹⁶⁶ *Supra* note 120, para 4.

declared as a cultural site.¹⁶⁷ In *Plan de Sánchez*, the Inter-American Commission on Human Rights argued before the Court that:

The measures of reparation to try and eradicate the effects of the violations committed by the State can only be determined from a collective perspective, based on an understanding of the socio-cultural characteristics of the Mayan people, such as their cosmovision, spirituality and community social structure, and recognizing the magnitude of the genocidal acts committed against them.¹⁶⁸

In this statement, the Commission suggests that reparative measures adopted for the Mayan people should consider characteristics of Mayan culture, which in addition to a measure of reparation, could ensure the preservation of the Mayan culture. Additionally, in *Río Negro*, the Court established that the living conditions in the Pacux colony had adversely affected the cultural integrity of the Río Negro community, adversely affecting the Mayan Achí worldview and culture, as well as the possibilities of its inhabitants to exercise their labour activities and traditional spiritual practices. Consequently, the Court ordered the State to design and implement, within one year of notification of this Judgment, a programme for the rescue of the Maya Achí culture. This programme would generate a space to promote the artistic, linguistic and cultural expressions of the community.¹⁶⁹ Although the Court did not explicitly refer to the declaration of the Achí Mayan culture as intangible heritage, it is evident that it recognises the importance of it and the need to conserve it.¹⁷⁰

The principle also refers to the need to adapt the existing general rules on the management of sites designated as cultural or historical heritage. Although the principle does not refer to any specific regulatory body, the Convention Concerning the Protection of the World Cultural Heritage and Natural Heritage establishes, among other things, the need for each of the State parties to adopt ‘a general policy which aims to give the cultural and natural heritage a function in the life of the community and to integrate

¹⁶⁷ *Supra* note 11, *El Mozote*, paras 371–372.

¹⁶⁸ *Supra* note 7, para 90(a).

¹⁶⁹ *Supra* note 25, *Río Negro*, para 285.

¹⁷⁰ See also *infra* Commentary, Principle 4.

the protection of that heritage into comprehensive planning programmes'.¹⁷¹ For more on the obligation of States to adopt domestic legislative measures necessary for the fulfillment of their obligations, see Commentary on Principle 9.

Principle 18

States have the obligation to adopt the necessary measures to obtain, when appropriate, the collaboration of public institutions, such as the armed and security forces, and the prison and judicial agencies, among others, in the tasks of identifying and preserving the places where serious human rights violations were committed.

COMMENTARY

This principle refers to the obligation of States to acquire the collaboration of public institutions in matters of security, administration and the procurement of justice to identify the places where serious human rights violations occurred and to take preservation and protective measures. Principles 9 to 13 have already addressed the importance of preserving such sites in their multiple dimensions, ranging from their physical security to the preservation of evidence that is vital to hold those criminally responsible accountable and to provide reparations for damages to victims and their families, and the full preservation of these sites due to their historical value and their contribution to the preservation of memory and to non-recurrence.

In *El Mozote*, the Court recognised that the lack of will of the States authorities in the search and identification process of the human remains intensified the damages to the victims since it hindered the tasks aimed at offering their consolation and satisfaction.¹⁷²

¹⁷¹ *Supra* note 165, art 5(1).

¹⁷² *Cf. supra* note 11, *El Mozote*, para 305 ('This Court has indicated that this damage is increased by the absence of support from the State authorities in the effective search for and identification of the remains, and the impossibility of honoring their loved ones appropriately').

This collaboration is particularly relevant in cases of direct responsibility and/or acts of omission, acquiescence or collaboration in human rights violations,¹⁷³ since State entities could possess privileged information about the places where serious human rights violations occurred. In such cases, the Court has ordered continuous and mandatory human rights training for the State entities involved, including armed forces, law enforcement, intelligence agencies, judges and prosecutors.¹⁷⁴ Such training could serve to ensure adequate collaboration among these public entities.

Likewise, the collaboration of State authorities is fundamental when memory sites where serious human rights violations were committed are still managed by those authorities, as could be the case with detention centres or military bases. This is touched on by the MERCOSUR Principles, which state that ‘public policies on the identification, signaling and/or creation of memory sites on properties that were, or continue to be, under the purview of the armed forces or security forces can provide information on the events that occurred’, citing as an example resolutions of the Ministries of Defense and Security ‘that provide for the placement of memorial plaques in places where serious human rights violations were committed and that remain under the purview of these institutions’.¹⁷⁵ Furthermore, the document states that ‘It is recognized that these marks not only have an effect on the outside but also on the inside of these institutions, by transmitting a clear and forceful message of rejection of the crimes perpetrated in those places and of commitment to democracy and human rights.’¹⁷⁶

Principle 19

Physical assurance measures of the sites where serious human rights violations were committed should contemplate prevailing international standards in matters of crime-scene management.

¹⁷³ *Supra* note 8, para 132 (‘The State’s responsibility for these acts, which occurred in the context of a pattern of similar massacres, arises from the acts of omission, acquiescence and collaboration by members of the law enforcement bodies based in this municipality’).

¹⁷⁴ *Cf. ibid* at para 409; *Supra* note 74, para 452; *Supra* note 34, para 193; *Supra* note 25, *Río Negro*, para 291.

¹⁷⁵ *Supra* note 163, p 15, n 37.

¹⁷⁶ *Ibid* at p 18.

COMMENTARY

This principle calls for the implementation of prevailing international standards in matters pertaining to the management of crime scenes. As mentioned in the commentary on Principle 8, the Inter-American Court has repeatedly referenced international obligations and collective guarantees among States party to international bodies.¹⁷⁷ To ensure the adequate implementation of physical preservation measures at sites where grave violations occurred, therefore, States should contemplate the international standards appropriate for the maintenance of crime scenes.

This principle finds explicit support in Inter-American case law. For example, in *El Mozote*, the Court ordered the State to consider the ‘pertinent national and international standards’, such as those contained in the ‘United Nations Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions’,¹⁷⁸ when collecting information on sites where disappeared victims were buried.¹⁷⁹ The Court ordered these measures for the protection and preservation of those sites to properly exhume and identify individuals executed in that case.¹⁸⁰ Likewise, in *Río Negro*, the Court referenced the same UN manual when it required the State to employ the ‘required relevant national and/or international scientific and technical standards’ in exhumation and autopsy processes.¹⁸¹ The Court highlighted the manual’s autopsy protocol, which provided guidelines and procedures for crime-scene investigations and related measures.¹⁸² Consequently, the Court has expressly ordered the type of measure called upon by Principle 19: to contemplate prevailing international standards on crime-scene management in the implementation of physical preservation measures at sites where grave violations occurred.

¹⁷⁷ Cf. *infra* Commentary, Principle 8.

¹⁷⁸ *Supra* note 11, *El Mozote*, para 332, n 505.

¹⁷⁹ *Ibid* at para 332.

¹⁸⁰ *Ibid*.

¹⁸¹ *Supra* note 25, *Río Negro*, para 268(b).

¹⁸² *Ibid* n 343.

More recently, the Court in *Case of Miembros de la Aldea Chichupac y Comunidades Vecinas del Municipio de Rabinal v Guatemala* declared that the obligation to investigate in cases of grave human rights violations had to be achieved in accordance with prevailing international standards and jurisprudence.¹⁸³ In that case, the Court found the State had failed to investigate adequately forced disappearances, extrajudicial executions, forced labour, torture and sexual violence occurring during an internal armed conflict.¹⁸⁴ Moreover, the State had failed to aim its investigations at locating all of the disappeared victims, and the State had not adequately and opportunely identified all of the remains found.¹⁸⁵ Accordingly, the State had failed to comply with its obligations to investigate and sanction serious human rights violations in conformity with international standards, such as the American Convention on Human Rights and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women ('Convention of Belém do Pará').¹⁸⁶ Thus, here too the Court demands compliance with international standards in investigations related to the sites where serious human rights violations occurred.

This principle might also extend to the training of prosecutors and other individuals or agencies that may have an impact on crime scene management. For example, crime scene management is governed by laws and regulations, so prosecutors and other legal personnel may play a role in matters related to crime scene management. Accordingly, they too should undergo adequate training in international standards. The Court has supported this notion by demanding that judges, prosecutors, members of armed forces and other security personnel undergo education or training programmes in international human rights standards in light of cases involving grave human rights violations.¹⁸⁷

¹⁸³ Cf. *Case of Miembros de la Aldea Chichupac y Comunidades Vecinas del Municipio de Rabinal v Guatemala. Preliminary Measures, Merits, Reparations and Costs*. Judgment of 30 November 2016. Series C No 328, para 328.

¹⁸⁴ Cf. *ibid* at para 257.

¹⁸⁵ Cf. *ibid* at para 263.

¹⁸⁶ Cf. *ibid* at para 244.

¹⁸⁷ Cf. *supra* note 43, *Anzualdo Castro*, para 193 ('[T]he Tribunal considers equally necessary for the State to implement, within a reasonable time, permanent education programs on human rights addressed to members of

III. Principles on the identification, signposting and determination of the content of memory sites

Principle 20

Public policies on memory sites should include the identification and signposting of the property where serious human rights violations were committed, taking into account the facts and context of each case.

COMMENTARY

Principle 20 relates to the duty to mark or identify property where serious human rights violations occurred. Identifying or signposting such places contributes to reparations and commemorative initiatives, to the right to truth and non-recurrence, and to the preservation of the historical memory of society.

The Inter-American Court has supported this principle by requiring States to mark commemorative structures at sites where serious human rights offences occurred or sites that have significance to those offences. In *Cotton Field*, for example, the Court ordered the State to erect a commemorative monument in the Cotton Field where victims were found.¹⁸⁸ This initiative would dignify the victims and serve as a ‘reminder of the context of violence they experienced’.¹⁸⁹ Similarly, in *Myrna Mack*, the Court ordered the State to ‘name a well-known street or square in Guatemala City in honor of Myrna Mack Chang, and place a prominent plaque in her memory at the place where she died or nearby,

the intelligence services, the Armed Forces, as well as judges and prosecutors. Said program must mention, specially, the instant Judgment and the international human rights treaties and, specifically, the treaties related to forced disappearance of people and torture.’); *Supra* note 21, *Myrna Mack*, at para 282 (‘The State must specifically include education on human rights and on International Humanitarian Law in its training programs for the members of the armed forces, of the police and of its security agencies.’); *Supra* note 25, *Río Negro*, at para 291 (‘[T]he Court has also noted the impunity of the facts... ; therefore, it is important to enhance the State’s institutional capacities by training judges, prosecutors and members of the Armed Forces in order to avoid a repetition of facts such as those analyzed in this case’).

¹⁸⁸ *Supra* note 25, *Cotton Field*, para 471.

¹⁸⁹ *Ibid.*

with a reference to the activities she carried out'.¹⁹⁰ This would 'contribute to awakening public awareness to avoid recidivism of facts... and to maintain remembrance of the victim'.¹⁹¹

Principle 21

States should guarantee to victims, their families, local communities, human rights organisations and society in general the widest participation possible in the identification and determination of the format and content of the signposting of sites where serious human rights violations occurred.

COMMENTARY

Principle 21 calls for broader societal participation in decisions related to the format and content of the signposting of sites where grave violations occurred. As mentioned in the introduction, the Inter-American Court has made references touching on both individual and collective memories.¹⁹² This principle encompasses both: the participation of the victims and the families should contribute to keeping the individual memories of the victims alive, while the broader societal participation allows for the construction of collective memories.¹⁹³ To find support from the Inter-American Court on societal participation related to memory initiatives, see Commentary on Principle 7.

The Court has ordered States to guarantee victims' participation in decisions related to the formatting and content of structures that signpost or otherwise draw attention to the human rights violations that occurred. In *Ituango*, the Court ordered the State to erect a plaque in communities where human rights violations were committed (El Aro and La Granja) and specified that 'the contents must be

¹⁹⁰ *Supra* note 21, *Myrna Mack*, para 286.

¹⁹¹ *Ibid*; *Cf. supra* 43, *Anzualdo Castro*, para 201 ('[I]n order to preserve the memory of Mr. Anzualdo Castro and as a guarantee of non-repetition, the Court considers it is appropriate... to order the State to erect a plaque in the Museum of Memory.');

Supra note 11, *El Mozote*, paras 371–372 (appreciating the State's willingness to 'create spaces to recognize the dignity of the victims and remember them', which included the designation of the site where the massacres occurred as a 'cultural site');

Supra note 18, *Moiwana*, para 218 ('[T]he Court also notes with satisfaction Suriname's assertion that it "has no objections to establish a memorial to point out the occurrences that took place in the Village of Moiwana [. . .] this memorial must be a reminder to the whole nation of what happened and what may not [be] repeat[ed] in the future"').

¹⁹² *Supra* Commentary, Principle 1.

¹⁹³ *Ibid*.

agreed by representatives of the victims and the State'.¹⁹⁴ While the plaque did not necessarily mark a specific site where violations occurred, it served a similar purpose: to ensure 'that the new generations are aware of the events that took place'.¹⁹⁵

Similarly, in *Cotton Field*, the Court ordered the construction of a commemorative monument at the cotton field in which the victims were found 'as a way of dignifying them and as a reminder of the context of violence they experienced'.¹⁹⁶ In doing so, the Court required that the decision on the type of monument correspond to 'the public authorities', who had to 'consult the opinion of civil society organizations by means of an open, public procedure in which the organizations that represented the victims in this case shall be included'.¹⁹⁷ The Court privileged the consultation of civil society organisations because the monument concerned 'more individuals than those considered victims in this case'.¹⁹⁸ Moreover, the monument in *Cotton Field* had a double dimension: it would encompass both individual and collective memories. The Court's reference to dignifying the victims relates to the notion of individual memory, while the monument would also contribute to collective memories: by requiring the State to determine the type of monument through an 'open, public procedure' whereby civil society organisations and the human rights organisations that represented the victims would participate, the Court effectively supports broader societal participation in relation to the content of an initiative that identifies the place where violations occurred.

Principle 22

Public policies on memory sites should guarantee victims, their families, local communities, human rights organisations and society in general the widest participation possible in the definition of the format and content of such sites.

¹⁹⁴ *Supra* note 8, para 408.

¹⁹⁵ *Ibid.*

¹⁹⁶ *Supra* note 25, *Cotton Field*, para 471.

¹⁹⁷ *Ibid* at para 472.

¹⁹⁸ *Ibid.*

COMMENTARY

Principle 22 closely resembles Principle 21; it calls for broad societal participation in defining the format and content of sites where grave violations occurred. While Principle 21 makes a more abstract reference to the obligation of States, Principle 22 refers more specifically to public policies on memory sites. The same support from the Inter-American Court found in the commentary of Principle 21 applies to this principle. Refer also to Commentary on Principle 7 for discussion of societal participation related to memory initiatives.

Principle 23

Memory sites should guarantee the publicity and accessibility of its archives connected to serious human rights violations.

COMMENTARY

Principle 23 calls for the publicity and accessibility of archives related to grave human rights violations. For support from the Inter-American Court on the preservation of archives connected to the sites where serious violations occurred, see Commentary on Principle 14.

Principle 24

Memory sites should contemplate the configuration of interdisciplinary research teams that study and widely disseminate the themes pertaining to each site.

COMMENTARY

Principle 24 references the importance of interdisciplinary research in ensuring the adequate implementation of memory sites: to contemplate and adequately address the particularities of each case. This principle relates to Principle 13, which underlines the need to incorporate recommendations made by relevant professionals and specialists (including anthropologists, archeologists, historians, museum professionals, conservationists/restorers, archivists and/or lawyers) in the implementation of

preservation measures at memory sites.¹⁹⁹ It also correlates with Principle 27, which calls for adequate working teams.²⁰⁰

This principle's call for interdisciplinary research teams finds support in Inter-American case law. In *Case of Gomes Lund et al ('Guerrilha do Araguaia') v Brazil*, several expeditions consisting of several bodies or teams with varying functions, including various State organs and commissions, various international human rights bodies, the Argentine Forensic Anthropology Team and other actors, were carried out for the search and identification of the bodily remains of disappeared victims.²⁰¹ The representatives in *Guerrilha do Araguaia* requested that the State continue to investigate and identify victims – work which should be 'planned, directed, and effectuated by an interdisciplinary team that is particularly prepared for this task'.²⁰² While the Court did not specifically order the creation of an interdisciplinary team, it required that the searches 'be carried out in a systematic and rigorous manner, and have the adequate human and technical resources, taking into account the relevant norms on the matter, all of the measures necessary to locate and identify the remains of the disappeared victims'.²⁰³ Interdisciplinary teams may be necessary to achieve those ends.

Similarly, the Court in *Case of Gelman v Uruguay* admitted testimonial evidence related to the forced disappearances in that case from psychologists, attorneys, journalists, historians, forensic anthropology teams and medical experts.²⁰⁴ Moreover, in *Anzualdo Castro*, after noting the expert testimony indicating that 'the approach of the forensic investigation in cases of forced disappearance is very specific and different from the approach applied to normal criminal investigations',²⁰⁵ the Court held

¹⁹⁹ *Infra* Commentary, Principle 13.

²⁰⁰ *Infra* Commentary, Principle 27.

²⁰¹ *Cf. Case of Gomes Lund et al ('Guerrilha do Araguaia') v Brazil. Preliminary Objections, Merits, Reparations and Costs.* Judgment of 24 November 2010. Series C No 219, paras 94–100.

²⁰² *Ibid* at para 259.

²⁰³ *Ibid* at para 263.

²⁰⁴ *Cf. Case of Gelman v Uruguay. Merits and Reparations.* Judgment of 24 February 2011. Series C No 221, paras 34–35, 179–181.

²⁰⁵ *Supra* note 43, *Anzualdo Castro*, para 152 n 198.

that 'due diligence required that the proceedings be carried out taking into account the complexity of the facts, the context in which they occurred, and the patterns that explain why the events occurred, ensuring that there were no omissions in gathering evidence or in the development of logical lines of investigation'.²⁰⁶ In other words, an inter-disciplinary approach would be appropriate for investigations related to the forced disappearances in that case.

Further support for Principle 24 comes from *Plan de Sánchez Massacre*, where the Court ordered the State to implement a programme for the 'study and dissemination of the Maya-Achí culture in the affected communities through the Guatemalan Academy of Mayan Languages or a similar organization'.²⁰⁷ The Court ordered these measures to address the harm caused to the particular communities affected, as part of a broader programme to develop the health, education, production and infrastructure of the communities.²⁰⁸ While this study would not necessarily pertain to a memory site, the Court's support for research efforts to study and disseminate themes pertaining to the particular communities affected could also extend to memory initiatives.

In *Cotton Field*, moreover, the Court relied on an 'in-depth study on all forms of violence against women' from the UN Secretary-General to determine the appropriate 'comprehensive measures' for the State to implement in addressing cases of violence against women.²⁰⁹ Within that context, the Court ordered the State to adopt measures of reparations 'adopted from a gender perspective, bearing in mind the different impact violence has on men and on women'.²¹⁰ Among those measures, the Court ordered the State to 'erect a monument to commemorate the women victims of gender-based murder... as a way of dignifying them and as a reminder of the context of violence they experienced'.²¹¹ The monument

²⁰⁶ *Ibid* at para 154.

²⁰⁷ *Supra* note 7, para 110.

²⁰⁸ *Ibid* at paras 109–110.

²⁰⁹ *Supra* note 25, *Cotton Field*, para 257 nn 275, 258.

²¹⁰ *Ibid* at para 451.

²¹¹ *Ibid* at para 471.

would be built in the cotton field where the victims of that case were found, and the decision on the type of monument would correspond to ‘public authorities, who [had to] consult the opinion of civil society organizations that represented the victims’.²¹² In doing so, the Court implicitly supported research efforts aimed at studying and disseminating themes pertaining to a specific site – in that case gender-based violence in the State of Chihuahua in Mexico. The Court not only relied on comprehensive studies to determine the appropriate measures for gender-based violence, but it also required the State to provide reparations from a gender-based perspective. While the Court did not explicitly require the configuration of independent research teams to study and disseminate themes of gender-based violence, such efforts could prove necessary to accomplish those ends.

IV. Principles on the institutional design of memory sites

Principle 25

States have the obligation to adopt a precise and adequate legal framework for the creation, preservation, operation and management of memory sites.

COMMENTARY

This principle refers to the State’s obligation to adapt its domestic legislation to optimise the creation, preservation, operation and management of memory sites. This principle is related to Principle 9, which establishes the obligation to adopt all legal or administrative measures for the preservation of sites, and more specifically to Principle 17, which recommends adjusting current international regulations on cultural or historical heritage to preserve memory sites.

Although the Court has not expressly referred to the need to adopt an adequate legal framework for the preservation and operation of memory sites, it has highlighted the need for States, in the fulfillment of their duties related to the conservation of memory, to adhere to the existing national and

²¹² *Ibid* at paras 471–472.

international guidelines on the matter. In *El Mozote*, the Court ordered the State to consider the relevant national and international standards in the process of locating and preserving interment and burial sites.²¹³

Principle 26

The institutional design of memory sites must guarantee institutional and budgetary sustainability. Its regulation by law can contribute to its institutional strengthening.

COMMENTARY

This principle refers to the need to design memory sites so that they can be both financially and institutionally sustainable. The principle recommends the legal regulation of these aspects so that the budget for memory sites has greater institutional formality.

The Court has recognised the need for an adequate budget for the creation and management of memory sites. In *Diario Militar*, the Court positively assessed the State's willingness to negotiate the construction of a museum with the corresponding authorities; however, it considered it necessary for the State to also implement measures requested by the representatives, including a request that the State grant 'sufficient and prompt resources' for the construction of a remembrance park in memory of the victims, and it gave the State two years to comply with that obligation.²¹⁴

On other occasions, the Court has referred to the need for States to have an adequate budget in relation to other memory initiatives. In *El Mozote*, the Court demanded the State create a specific budget to comply with the reparation measure aimed at training the armed forces in human rights.²¹⁵ In *Myrna Mack*, the Court indicated that the order to finance a scholarship to the victim should be implemented each year, which suggests that the Court required the State to provide a specific budget to guarantee

²¹³ Cf. *supra* note 11, *El Mozote*, para 332; *Infra* Commentary, Principle 9.

²¹⁴ Cf. *supra* note 3, paras 347–349.

²¹⁵ Cf. *supra* note 11, *El Mozote*, paras 369.

compliance with the order.²¹⁶ In *Río Negro*, the Court established that the ‘State must provide reasonable logistic and budgetary resources through legal, administrative or any other mechanism to guarantee the viability and continuity of the program’.²¹⁷ In that case, the Court referred to a conservation and maintenance programme for the Maya Achí culture.²¹⁸

Principle 27

The institutional design of memory sites must contemplate the formation of suitable work teams that allow achieving the purposes set out in each site.

COMMENTARY

Principle 27 addresses the necessity of relying on the appropriate staff for the design of memory sites according to the particularities of each case. This principle relates to Principles 13 and 24, which establish that public policies on memory sites should consider expert and professional recommendations in the design of memory sites, and such efforts should incorporate interdisciplinary investigation teams.²¹⁹

Principle 28

The institutional design of memory sites should include transparency, monitoring and evaluation mechanisms that allow for accountability and control by society, including budgetary execution.

COMMENTARY

This principle highlights the importance of the legitimate and adequate use of economic, material and human resources that support the integral operation of memory sites. In this sense, transparency in the administration of funds from entities that regulate memory sites is crucial for their proper functioning. This administration is not limited to budgetary transactions for the execution of external activities, such

²¹⁶ *Supra* note 21, *Myrna Mack*, para 285.

²¹⁷ *Supra* note 25, *Río Negro*, para 285.

²¹⁸ *Ibid.*

²¹⁹ *Cf.* Commentary, Principles 13, 24.

as social, cultural and didactic events, but also in relation to the internal budget for the payment of payroll and maintenance costs of infrastructure.

The Court in *Case of Claude Reyes et al v Chile* referenced the Inter-American Democratic Charter,²²⁰ in particular Article 4, which refers to the importance of '[t]ransparency in government activities, probity, [and] responsible public administration on the part of governments'.²²¹ The Court considered that:

In this regard, the State's actions should be governed by the principles of disclosure and transparency in public administration that enable all persons subject to its jurisdiction to exercise the democratic control of those actions, and so that they can question, investigate and consider whether public functions are being performed adequately. Access to State-held information of public interest can permit participation in public administration through the social control that can be exercised through such access.²²²

The Court continued:

Democratic control by society, through public opinion, fosters transparency in State activities and promotes the accountability of State officials in relation to their public activities. Hence, for the individual to be able to exercise democratic control, the State must guarantee access to the information of public interest that it holds. By permitting the exercise of this democratic control, the State encourages greater participation by the individual in the interests of society.²²³

Although the Court did not make explicit reference to transparency in the management of resources destined for memory sites, it did highlight the importance of proper management and transparency in the use of public funds and, above all, the need to ensure that society has full knowledge and capacity to participate in decisions related to the use and management of such funds.

Principle 29

The institutional design of memory sites should contemplate the broadest participation possible of the victims, their family members, the local communities and society in general.

²²⁰ *Case of Claude Reyes et al v Chile. Merits, Reparations and Costs*. Judgment of 19 September 2006. Series C No 151, para 79.

²²¹ Inter-American Democratic Charter approved by the General Assembly of the OAS on 11 September 2001, at the twenty-eighth extraordinary session held in Lima, Peru.

²²² *Supra* note 220, para 86.

²²³ *Ibid* at para 87.

COMMENTARY

This principle refers to the integral involvement of victims and their families, communities and society as a whole in the institutional design of memory sites. The importance of the participation of victims, their families, communities and society in the creation of memory sites has already been highlighted in Principles 7, 21 and 22, which contemplate the participation of victims and their families in the design and content of the memory sites as well as the format and content of those sites.²²⁴

This principle, on the other hand, refers to the participation of victims in the institutional design of memory sites. In accordance with the MERCOSUR Principles, institutional design implies the design of public policies related to memory sites; in other words, ‘the legal framework... for the creation, preservation, operation, management and sustainability of memory sites’.²²⁵ The MERCOSUR Principles identify three institutional management modules: first, ‘memory sites that operate in the framework of public administration’; second, ‘memory sites that are outside public administration but rely on some time of States financing’; and third, ‘memory sites that form part of the state apparatus but have autonomous management’.²²⁶ Participation (whether of victims, family members, communities and/or civil society) is essential to determine the type of institutional design appropriate for memory sites.

Conclusion

The review carried out by the IBAHRI and the Human Rights Clinic on the jurisprudence of the Inter-American Court shows that the Court has understood that memory initiatives relate to different rights that receive and deserve international protection. Given that memory sites contain evidence of crimes committed in the past, their preservation is necessary as an element of the duty and right of justice. In

²²⁴ Cf. *infra* Commentary, Principles 7, 21–22.

²²⁵ *Supra* note 163, p 19.

²²⁶ *Ibid* at p 20.

addition, as memory sites serve to remember the victims and restore their dignity, the Court has recognised the reparatory value of various memory initiatives and ordered States to develop such initiatives in coordination with the victims. Likewise, the Court has recognised the social dimension of memory and its value as a guarantee of prevention and non-repetition of serious human rights violations. In sum, the MERCOSUR Principles find firm support in inter-American case law and call for the Principles to be expanded. A broader set of principles should cover all memory initiatives and not simply memory sites. Those broader principles should reach the whole Western Hemisphere and not just the MERCOSUR countries. In this endeavour, the Inter-American Commission and Court of Human Rights are called to play a fundamental role.