

***For the Rule of Law***

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***The Review***

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***International Commission of Jurists***

***Impunity, Crimes Against Humanity  
and Forced Disappearance***

***Editor: Louise Doswald-Beck***

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## *International Commission of Jurists*

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## Foreward

For close to fifty years, the International Commission of Jurists has worked to ensure a just rule of law. Central to that mission is the struggle against impunity- perpetrators of human rights abuses must be held accountable for their actions. This Review is dedicated, in a broad sense, to that struggle.

This activism is not recent. Already back in April 1974, the International Commission of Jurists was the first non governmental organization (NGO) to conduct a fact finding mission to post-coup Chile. In graphic shorthand, the then Secretary General Niall MacDermot described a situation of "government by intimidation";

"...at any given moment, there may be as many as a further 3,000 people under arrest...sometimes these arrests are made anonymously by persons coming in plain clothes in vehicles with no number plates. No one is able to find out who has arrested them or where they are held. Many are held incommunicado for long periods ... We believe that the various forms of ill treatment, sometimes amounting to severe torture, are carried out systematically by

some of those responsible for interrogation and are not, as many people sought to persuade us, in isolated instances at the time of arrest".<sup>1</sup>

When this chilling account was written over twenty five years ago, the term "involuntary" or "forced disappearance" had not yet entered our collective consciousness. The term featured only obliquely in human rights lexicon and the ICJ mission report spoke euphemistically of "missing persons". But with the passage of time, the brutality of the military regimes in Latin America became a matter of historical record. The term "forced disappearances" gained greater currency and became synonymous with their authoritarian rule.

But it would be a mistake to believe that such events reflect a uniquely Latin American experience. In his article, Wilder Tayler writes that the last fifteen years have also seen thousands of cases of "forced disappearances" in Asia, Africa, Europe and the Middle East. Indeed, in its annual report to the 56<sup>th</sup> session of the UN Commission on Human Rights, the Working Group on Enforced or Involuntary Disappearances indicated that it had received information on three

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1 ICJ Mission Report to Chile, page 3 , 17 May 1974.

hundred new cases that had taken place in twenty three countries. Nineteen of these were located outside of Latin America.

The term "forced disappearance" thus has a contemporary and global application.

For close to two decades, the International Commission of Jurists and other NGOs (Amnesty International, Human Rights Watch, Fedefam, FIDH, International Service for Human Rights) have been campaigning for a Convention on Forced Disappearances. Those efforts are the subject of comment in the articles by both Wilder Tayler and Federico Andreu who walk the reader through the origins, history and merits of the project.

There are still those who, however, doubt the need for a Convention. Some feel it may duplicate existing provisions of humanitarian and human rights law. But no existing instrument addresses in totality either the constituent elements of this crime nor its scale. A Convention should define the elements of the crime, provide measures to prevent its practice, at both national and international levels, provide for reparations, address the problem of the kidnapping and adoption of children of disappeared parents, and establish an innovative supervisory/reporting mechanism.

This year the UN Commission on Human Rights agreed to the establishment of a working group to examine the

draft Convention. The ICJ and its partners had worked hard for this outcome and we are committed to seeing this process to its end. But the Convention is only one means of combating impunity. Judicial activism, including through the exercise of universal jurisdiction, is another.

In his article, Rodolfo Mattarollo examines the extent to which international law, both customary and treaty law, is binding on Argentina today. He explores the proposition that customary international law renders null and void those pardons and statutes of limitations (existing in municipal law) designed to shield perpetrators of crimes against humanity from prosecution. In this same vein, Alejandro Artucio gives an eminently readable account of the complicated legal arguments which led to the lifting of former General Pinochet's parliamentary immunity. With this procedural roadblock removed, justice can continue to take its course.

It is often said that justice delayed is justice denied. And it is also true that for many victims of gross violations of human rights the wheels of justice are painfully slow. But there are encouraging developments.

Last month we saw former Yugoslav President Milosevic appear before the Hague Tribunal. Despite his mocking and defiant refusal to enter a plea ("this is a false tribunal), he must now account to

the international community for his actions. His appearance served as a catalyst- it has triggered moves to surrender other indicted criminals from Croatia and Bosnia and Herzegovina. Pinochet too faces legal proceedings. Even if his alleged frail health precludes the law taking its full course, an important principle has been reiterated: impunity for gross violations of international law will not be tolerated, irrespective of the office of the perpetrator. Courts in Belgium, Denmark, Germany and Switzerland have over the last few years convicted persons responsible for international

crimes committed in Rwanda or Bosnia on the basis of universal jurisdiction. Other cases have been brought before courts in Austria, France, Spain and the United Kingdom and are either still pending or have not resulted in a conviction for insufficient evidence.

The ICJ will continue to maintain its longstanding efforts to ensure that no-one is beyond the reach of justice. This is a pillar of the rule of law and integral to our mission.

LOUISE DOSWALD-BECK  
Secretary -General



# Articles

## *Recent Argentine Jurisprudence in the Matter of Crimes Against Humanity*

Rodolfo Mattarollo\*

### I. Introduction

During the past eleven years, the courts in Argentina have applied the category of crimes *under* international law<sup>1</sup> in their examination of a certain number

of cases. In some of these cases the issue dealt with involved atrocities committed during the Second World War, and in others the violation of human rights during the military dictatorship in

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1: The international criminal offences analyzed in this article which have been taken into account by our jurisprudence in the last decade are crimes *under* international law, i.e. crimes committed by individuals.

Besides this category of offences there also exists the category of international crimes, crimes committed by the State, which are likewise governed by international law and which may be delineated as such simultaneously with crimes of the other category.

There exists a third juridical category of international offences which some authors refer to as “international offenses by incrimination alone” (Claude Lombois: “infractions internationales par le seul mode d’incrimination”) or “offences of international concern” (Roger S. Clark).

The first category of international criminal offenses, crimes under international law, entail the individual penal responsibility of their perpetrators, accomplices or abettors. Among these offences figure



Argentina. In one case the issue revolved around acts committed in our country involving the criminal responsibility of Chilean military officers, among other persons.

The source of the category "crimes under international law" is to be found both in international treaties and in general or customary international law, traditionally called in our national Constitution, jurisprudence and legal

doctrine "the law of nations" (*derecho de gentes*), an illustrious expression dating back more than two millennia.

The objective of this article is to contribute to the already considerable effort undertaken within the framework of national jurisprudence and legal doctrine aimed at specifying to what extent international law, both customary and treaty-based, is binding on Argentina today in this area.

(...)

the trilogy of crimes judged by the International Military Tribunal (the Nuremberg Tribunal) or the International Military Tribunal for the Far East (Tokyo Tribunal): crimes against peace, war crimes and crimes against humanity. This category also includes genocide (Article 1 of the Convention on the Prevention and Punishment of the Crime of Genocide "confirms" that genocide "is a crime under international law", because it was already specified as such under general international law), *Apartheid* (Article I of the International Convention on the Suppression and Punishment of the Crime of *Apartheid* declares that "*Apartheid* is a crime against humanity"), the crimes judged by the two Ad Hoc International Criminal Tribunals (for the former Yugoslavia and for Rwanda) and those scheduled to be judged by the International Criminal Court created by the Rome Statute of 17 July 1998.

An important contribution to the codification of crimes under international law has been made by the International Law Commission of the United Nations through elaboration of the Draft Code of Crimes against the Peace and Security of Mankind (see UN document ONU A/51/332 of 30 July 1996). According to art. 1 (2) of the text of 1966, "crimes against the peace and security of mankind are crimes under international law and punishable as such, whether or not they are punishable under national law." This draft code (article 18) defines as crimes against humanity "(...) when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group (...) " the following acts, among others: murder, torture, enslavement and the forced disappearance of persons. However, an even more decisive step in the codification of crimes under international criminal law is the Rome Statute of the International Criminal Court adopted on 17 July 1998.

The second type of offenses, international crimes, involve the assignment of criminal responsibility to States as such, which entails, among other things, the obligation to indemnify. Systematic or massive violations of fundamental human rights, such as summary executions, forced disappearances and acts of torture, can at the same time constitute crimes under international law, in particular crimes against humanity, and international crimes.

What constitutes an international crime has been defined for its part by another draft international instrument also elaborated by the International Law Commission, the Draft Articles on State Responsibility. Article 19 (2) of this project establishes that "An internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole constitutes an international crime."

Finally, among the third category of international offences – international offences by incrimination alone or offences of international concern – are counted acts such as counterfeiting of money, drug trafficking or offences against the safety of air or maritime traffic.

The National Constitution reformed in 1994, in its article 75, paragraph 22, concedes constitutional hierarchy to a series of international instruments, including two “solemn” Declarations<sup>2</sup> – one universal, the other regional – and nine international treaties – eight of which universal and one regional. Subsequently, with the qualified majority established in the Constitution, constitutional hierarchy was also conceded to the Inter-American Convention on the Forced Disappearance of Persons.

Although article 102 of the National Constitution – today article 118 – had confirmed the operation in our country of customary international law – *derecho de gentes* – the new constitutional standard (article 75, paragraph 22) reiterates this, inasmuch as it includes the Universal Declaration of Human Rights among the

international instruments having constitutional hierarchy.

In fact, the Universal Declaration is not a treaty, though its compulsory character is no longer subject to doubt, at least not since the first International Conference on Human Rights held in Teheran in 1968.<sup>3</sup> This is the case insofar as for quite some time now the Declaration has been considered an expression of customary international law, i.e. of “international custom, as evidence of a general practice accepted as law” (article 38 of the Statute of the International Court of Justice). Moreover, the Universal Declaration expresses a set of obligations incumbent on States which have the character of “*erga omnes*”, to borrow the expression used by the International Court of Justice in the famous *obiter dictum* from the Barcelona Traction case.<sup>4</sup>

2 Concerning “solemn Declarations” within the framework of the United Nations see Erica-Irene A Daes, Freedom of the Individual under Law: an Analysis of Article 29 of the Universal Declaration of Human Rights, Human Rights Study Series n° 3, United Nations, New York, 1990, p.53 ff., in particular p. 54, par. 179.

3 Proclamation of Teheran, 13 May 1968, “The International Conference on Human Rights, (...) Solemnly proclaims that: (...) 2. The Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community (...)”.

4 International Court of Justice, Barcelona Traction Light and Power Company, Limited, (second phase), Judgment of 5 February 1970, 3,32: “An essential distinction should be drawn between the obligations of a State toward the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*”

“Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports, 1951, p.23*); others are conferred by international instruments of a universal or quasi-universal character.”

The purpose of this article is not historical. Nevertheless a number of factors need to be mentioned, both juridical and extra-juridical, in the recent evolution of our jurisprudence – starting in particular with the vote of Judge Leopoldo H. Schiffrin *in re Schwamberger*.

This evolution is certainly linked with the “progressive development” of international law which has accelerated since the end of the Second World War and which stems in turn from much earlier developments. However, it will not be a question here of going back to the classics of international law, beginning with the Renaissance, or to even more distant periods in which the foundations were laid for natural law, which is generally associated with customary international law (*derecho de gentes*).<sup>5</sup>

It will suffice to rapidly recall the background of the Nuremberg jurispru-

dence and the developments that preceded it during the last world war and which emerged already prior to the end of the conflict.<sup>6</sup> The most important of these is the Moscow Declaration of 30 August 1943, signed by President Franklin Delano Roosevelt, Marshal Joseph Stalin and Prime Minister Winston S. Churchill. The three signatories declared that they were speaking on behalf of the 32 United Nations. The Moscow Declaration on war crimes subsequently became an integral part of “Nuremberg law”.

It will be useful to bear this historical background in mind for our subsequent discussion concerning the requirement of prior knowledge in relation to the principle of legality in international law, with regard to prosecution of acts related to the crimes of Nazism or to subsequent acts which can be qualified as crimes under international law.

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5 “Antigone” by Sophocles has often been pointed to as “the tragedy of human rights” and constitutes an abiding legacy of Athens to the conception of natural law. The re-implanting of the roman concept of “jus gentium” by Francisco de Vitoria, has been analyzed by Andrés Upegui Jiménez, “La conquista de América y el derecho de guerra: el pensamiento jurídico de Francisco de Vitoria”, in Cinco siglos: La conquista de América y el derecho de guerra y otros ensayos, Centro de Estudios Internacionales of the Universidad de los Andes, Bogotá, 1992, p. 7 ff.

6 The first of the allied declarations concerning atrocities in the war is dated 17 April 1940, when the French, British and Polish governments issued a “formal and public appeal to the conscience of the world” against the crimes committed by the German occupation forces in Poland. Already on this occasion they denounced the violation of the IV Hague Convention of 1907.

On 25 October 1941, Prime Minister Churchill mentioned for the first time what could be understood as a penal sanction for the crimes which were being committed.

Of even greater significance is the Saint James Declaration of 13 January 1942, signed in London by representatives of the governments of the occupied countries. The acts mentioned in the Declaration were crimes committed by the Third Reich and its allies against the civilian population in these countries.

Account should also be taken of the Allied Declaration of 17 December 1942 concerning the persecution and extermination of the Jews, published simultaneously in London, Washington and Moscow.

Among the most recent events which may be cited in order to place the evolution of our legal doctrine and jurisprudence in context, particular mention should be made of the creation of the two *ad hoc* international tribunals to judge crimes committed in the former Yugoslavia<sup>7</sup> and in Rwanda and the countries neighbouring

Rwanda.<sup>8</sup> Likewise, a major element is the subsequent adoption of the Rome Statute of the International Criminal Court, inasmuch as this clarifies a large number of questions linked both to the “general section” as well as to the “special section” of a statute delineating crimes under international law.<sup>9</sup>

7 See Resolution 827 (1993) adopted by the Security Council of the United Nations on 25 May 1993. UN document S/RES/827 (1993) and UN/RES/1166 and its annex: Statute of the International Tribunal.

8 See Resolution 955 (1994) adopted by the Security Council on 8 November 1994. UN document S/RES/955 (1994) and its annex: Statute of the International Criminal Tribunal for Rwanda.

9 Rome Statute of the International Criminal Court.

Article 5. Crimes within the jurisdiction of the Court

1. The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

- (a) The crime of genocide;
- (b) Crimes against humanity;
- (c) War crimes;
- (d) The crime of aggression.[...]

Article 7. Crimes against humanity

1. For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Another element having great importance for this process, due to its unquestionable impact on local jurisdiction, is the application of universal jurisdiction on the part of European courts investigating crimes committed by Latin American military personnel in their countries of origin during the dictatorships that practiced state terrorism, both within the region and beyond, during the 1970s.

As is well known, this involves legal proceedings for grave violations of human rights constituting crimes under international law, which have been opened against individual Argentine<sup>10</sup> and Chilean<sup>11</sup> military officers in various European countries and particularly in Spain. A major result of this process involved the request for extradition of Augusto Pinochet from the United Kingdom.

As with other aspects of the progressive development of international law, this evolution is inseparable from a marked heightening of the ethical conscience of the civil society – especially in the countries of the region,<sup>12</sup> though not only in these<sup>13</sup>. I am referring both to countries that have experienced a difficult transition toward democracy from the starting point of military dictatorships and authoritarian regimes, especially in the “Cono Sur” region, as well as those in which no less arduous peace and reconciliation processes are underway following armed internal conflicts, albeit largely internationalized ones, in Central America.

This evolution appears to be the result of a conjunction of factors, including the human rights movement – in which organized bodies of those directly affected have played a decisive role,

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10 Writ of second November nineteen ninety-nine by Baltasar Garzón Real, Magistrate-Judge of the Central Court of Instruction Number Five of the High Court (Audiencia Nacional) of Madrid, Spain, in Pre-Trial proceeding N° 19/97-L TERRORISM and GENOCIDE, by which he declares prosecuted a group of individuals headed by Jorge Rafael Videla, Emilio Eduardo Massera and Omar Rubens Graffigna and provides for international search and arrest warrant to be issued to secure the international detention of the indicted parties in whatever country of the world they may be found, by means of extradition.

11 See House of Lords, Session 1998-99, Opinions of the Lords of Appeal. Regina v. Bartle and the Commissioner of Police for the Metropolis and Others *ex parte* Pinochet and Regina v. Evans and another and the Commissioner of Police for the Metropolis and others *ex parte* Pinochet. For Judgment by the House of Lords on Wednesday, 24th March 1999.

12 To get a sense of the magnitude of these proceedings in the region, which has even affected an unexpected country, see Rodolfo Mattarollo, “Transition to Democracy and Institution-Building: A Case Study of Haiti”, in Reining in Impunity for International Crimes and Serious Violations of Fundamental Human rights: Proceedings of the Siracusa Conference, 17-21 September 1998, Christopher C. Joyner, Special Editor, Association Internationale de Droit Pénal, ères, 1998, p. 483 ff. and especially p. 494 ff.

13 In Senegal recently a public action has been initiated for the institution of criminal proceedings against the former dictator of Chad, Hissène Habré, for atrocities committed under his regime. The deposed former dictator resides in Senegal.

maintaining a continuity of action and the high level of their demands throughout the last three decades, passing at times through a veritable "period in the desert" – the unflinching juridical militancy of certain magistrates and human rights lawyers,<sup>14</sup> and the decisive role played by many journalists and members of the news media.

Without this combined activity and that of other activists, social movements, writers, artists, university professors, etc., often carried out at the international level, the process would have been very difficult or even decidedly impossible of getting beyond a period which one United Nations expert charged with studying the question of impunity called the era of "law vs. the victim"<sup>15</sup>. These multiple efforts succeeded in overcoming the obstacles of this period and lending national and international legitimacy to the struggle against impunity, as confirmed by the final document of the World Conference on Human Rights, the Vienna Declaration and Program of Action, of June 1993.<sup>16</sup>

## II. Customary International Law

The need to establish the characteristics of customary international law would seem to be especially important, since in large part the question of the application in Argentina of the penal category of crimes against humanity can run up, among other things, against objections stemming from the reserve to article 15, paragraph 2 of the International Covenant on Civil and Political Rights (ICCPR) formulated by the Argentine government in ratifying this international instrument.

In fact, this reserve, beyond any political motivations aimed at limiting the action of the justice system for past violations, is legally based in the argument that the above-mentioned provision of the ICCPR would be contrary to the principle of legality recognized by article 18 of the National Constitution.

In the current situation of international law, in which codification has advanced considerably, the importance of identifying the norms of customary international law derives from the fact

14 The decisive role played by human rights organizations and lawyers, as well as by Spanish magistrates, in the proceedings instituted by Judge Baltasar Garzón, is a subject requiring a special study.

15 The expression is taken from French jurist Louis Joinet, an expert of the United Nations Subcommission on the Prevention of Discrimination and Protection of Minorities.

16 According to the World Conference, in which Argentina participated actively, "States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law." (Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights, 25 June 1993, II, par. 60).

that such norms are binding even on those States which are not party to the treaties that contain them. In such cases, what is binding for these States of course is not the treaty-based norm but rather the customary norm.

The principal argument for maintaining the position that Nuremberg law was not applied retroactively is precisely the binding character of the customary international law already in effect prior to the adoption of the racial laws by Nazi Germany.

A significant illustration of the manner in which the norms of general or customary international law operate is the disposition of each one of the four Geneva Conventions, which govern the lasting applicability of international law, in the case of a denunciation of the Convention.

In fact the four Geneva Conventions stipulate that if a denunciation of the

given Convention occurs, this "[...] shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience."<sup>17</sup>

Among these obligations is included due respect of article 3, common to the four Geneva Conventions, which is applicable to armed internal conflicts.

In ratifying the four Geneva Conventions of 1949, Argentina expressly recognized the non-derogable character of the "law of nations" (*derecho de gentes*) in the field of international humanitarian law, even in the case of a denunciation of the Conventions.

This is entirely in keeping with the provisions of the Vienna Convention on the Law of Treaties, ratified by our country, in its article 43:

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17 C. I, art. 63, C. II, art. 62, C. III, art. 142, C. IV, art. 158. Additional Protocol I of 1977, art. 1(2), Additional protocol II of 1977, fourth paragraph of the Preamble.

In this connection, the official Commentary on the Geneva Conventions issued by the International Committee of the Red Cross (ICRC) says concerning the provision cited in the text that it "[...] reaffirms the value and permanence of the lofty principles underlying the Convention. These principles exist independently of the Convention and are not limited to the field covered by it. The clause shows clearly [...] that a Power which denounced the Convention would nevertheless remain bound by the principles contained in it insofar as they are the expression of inalienable and universal rules of customary international law. [...] Its affinity to the eighth paragraph of the Preamble to the Fourth Hague Convention of 1907 – the so-called Martens clause – is evident." (See: Commentary published under the general editorship of Jean S. Pictet, I. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, International Committee of the Red Cross, 1952, p. 413. See also: Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, International Committee of the Red Cross, Geneva 1987, p. 38, pp. 52 ff. and p. 1365, pars. 4432 ff.)

**“Article 43.- Obligations imposed by international law independently of a treaty**

“The invalidity, termination or denunciation of a treaty, the withdrawal of a party from it, or the suspension of its operation, as a result of the application of the present Convention or of the provisions of the treaty, shall not in any way impair the duty of any State to fulfill any obligation embodied in the treaty to which it would be subject under international law independently of the treaty.”<sup>18</sup>

Reference is thus made immediately to the imperative norms of general or customary international law (*jus cogens*). This question is also regulated by the Vienna Convention on the Law of Treaties in its article 53:

**“Article 53. Treaties conflicting with a peremptory norm of general international law (*jus cogens*)**

“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general inter-

national law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”

Not all of the norms of customary international law are imperative in nature (*jus cogens*), although opinions on this point are not unanimous and some authors assimilate the two categories.<sup>19</sup> Nevertheless, those which beyond all doubt have this character cannot be the object of reserves. In this respect it has been observed that “if States cannot ratify a treaty which is contrary to a *jus cogens* regulation, it would seem logical that they also cannot formulate reserves to those provisions of the treaty that incorporate *jus cogens* norms.”<sup>20</sup>

This is the case, as we will see, of the principle of legality in international criminal law, as reflected in article 15, paragraph 2 of the International Covenant on Civil and Political Rights.

In turn it has been affirmed that international offences having the character of *jus cogens* constitute *obligatio erga*

18 Among the non-derogable obligations contracted by virtue of ratification of the Conventions is included the suppression of “grave breaches” to the Geneva Conventions: C. I, art. 50, C. II, art. 51, C. III, art. 130, C. IV, art. 147.

19 M. Cherif Bassiouni cites in this context the opinion of Professor Anthony D’Amato in “The Concept of Custom in International Law”, 132 (1971) in his “International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*”, published in Christopher C. Joyner, op. cit., p. 139 and note 17.

20 See in Theodor Meron, Human Rights and Humanitarian Norms as Customary Law, Clarendon Press – Oxford, 1991, the opinion of I. Sinclair, p. 20.



*omnes* and are not derogable. Among the consequences of this legal status of crimes established by *jus cogens* regulations, M. Cherif Bassiouni cites the following binding imperatives for States:

“(...) the duty to prosecute or extradite, the non-applicability of statutes of limitations for such crimes, the non-applicability of any immunities up to and including Heads of State, the non-applicability of the defence of “obedience to superior orders” (save as mitigation of sentence), the universal application of these obligations whether in time of peace or war, their non-derogation under “states of emergency”, and universal jurisdiction over perpetrators of such crimes.”<sup>21</sup>

### III. The Principle of Legality in International Law

Local legal doctrine and jurisprudence have analyzed the formulation of the principle of legality in international treaty-based law, as found in article 15 of the International Covenant on Civil and Political Rights of the United Nations<sup>22</sup> – which enjoys constitutional hierarchy, “in the full force of its provisions”, in accordance with art. 75, par. 22 of the National Constitution.

However, as mentioned earlier, the instrument by which Argentina ratified the International Covenant on Civil and Political Rights formulates a reserve to the effect that application of the second paragraph of art. 15 of the Covenant

21 See M. Cherif Bassiouni, “International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*” in Christopher C. Joyner, op. cit. p. 133. Bassiouni affirms that *jus cogens* refers to the legal status attained by certain international offences and that *obligatio erga omnes* refers to the legal consequences that arise from the qualification of a specific crime as *jus cogens*. (Op. cit. loc. cit.). The numerous reserves expressed in the legal literature concerning the scope of these categories had to be overcome, according to Bassiouni, by the adoption of “legislation” in the field of application of international criminal law. This was finally achieved with the adoption of the Rome Statute of the International Criminal Court on 17 July 1998. This international treaty clarifies a good number of the questions to which Bassiouni makes reference in the work cited in this note.

For the much argued question of establishing whether every violation of a *jus cogens* provision constitutes an international criminal offense, see P.M. Dupuy, “Observations sur le “Crime International de l’État”, Extrait de la *Revue Générale de Droit International Public*, Avril – Juin 1980 – No 2, Editions A. Pedone, Paris, 1980, p. 12 ff. and note 57. The question has been addressed by Juan Antonio Travieso in *Derechos Humanos y Jurisprudencia*, Buenos Aires, Eudeba, 1998, p. 46.

22 International Covenant on Civil and Political Rights. Article 15:

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”

remains subject to the provisions of article 18 of the Constitution, which establishes the principle of legality.

This makes it necessary to interpret the expression of article 75, paragraph 22 of the Constitution which, in conceding constitutional hierarchy to various specific international instruments of human rights, additionally specifies "in the full force of their provisions (*en las condiciones de su vigencia*)."

According to the understanding of the Supreme Court of Justice – in its ruling of 7 April 1995 in judgements "Giroldi Horacio David and others/ motion to vacate" (point 11) – the expression "in the full force of their provisions" requires that the various clauses of the international instruments be interpreted exactly as they apply in the international sphere and that their actual jurisprudential application by international courts be considered when interpreting and applying them (in the case cited, specific reference was made to the American Convention on Human Rights).<sup>23</sup>

In the opinion of Guillermo R. Moncayo, the International Covenant on Civil and Political Rights applies within our judicial framework with the reserve indicated above (observance of article 18 of the National Constitution)". And this because "[...] when art. 75, par. 22 of the Constitution speaks of the conventions having constitutional hierarchy "in the full force of their provisions", it must be understood that the international norm acquires constitutional hierarchy with the reservations that our country has made and also with the reserves that third party States have made and which are binding on Argentina."<sup>24</sup>

In reality, the jurisprudential application by international courts is not in contradiction with the formulation of reserves, if these respect the provisions of the Vienna Convention on the Law of Treaties (Section 2, Reservations, articles 19 ff.).

But the question cannot be resolved through a mere reference to international treaty-based law. As the Chamber for Federal Criminal and Correctional Matters said "in re" Jorge Rafael Videla,<sup>25</sup>

23 Juan Antonio Travieso, op. cit., p. 196. The Court had opened the way to this innovative jurisprudence in the well-known case *Ekmekdjian Miguel A.c/ Sofovich, Gerardo and others*. CS, 7 July-1992.

24 24 Guillermo R. Moncayo, "Criterios para la aplicación de las normas internacionales que resguardan los derechos humanos en el derecho argentino", in La aplicación de los tratados sobre derechos humanos por los tribunales locales, compilers: Martín Abregú and Christian Courtis, CELS, Editores del Puerto, s.r.l., Buenos Aires, 1997, p. 97 and 98. In the same sense, Miguel Ángel Perrotta, "Tratados Internacionales", in La reforma constitucional de 1994 y su influencia en el sistema republicano y democrático, coordinators: Miguel Ángel Ekmekdjian and Raúl Gustavo Ferreyra, Depalma, Buenos Aires, 1999, p. 326.

25 Exp. 30312, Videla J.R. s/ pre-trial detention, 9 September 1999.

in relation to the principle of legality, reservations on a specific subject can in no way modify international regulations and the weight of the obligations stemming from the remaining sources of international norms. It added that internal law cannot be in opposition to *jus cogens*, not even norms of a constitutional character. Similar considerations were also developed by this court in the proceedings entitled "Massera s/Excepciones".<sup>26</sup>

This position also has a dogmatic basis which is important to keep in mind, although it does appear to be mentioned expressly in the jurisprudential precedents considered here. Indeed, article 75, paragraph 2 of the National Constitution concedes constitutional hierarchy to a series of international treaties and non-conventional instruments, including, among the latter, the Universal Declaration of Human Rights.

Now, the Universal Declaration in its article 11(2) enunciates the principle of legality in national and international law:

"No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed (...)"

This involves a synthetic formulation of the principle of legality substantially similar to that of article 15(2) of the International Covenant on Civil and Political Rights. With one difference: no reserves can be formulated with regard to an international instrument which is not a treaty, which today incontestably forms part of general or customary international law and whose norms with regard to the principle of legality possess an imperative character (*jus cogens*).<sup>27</sup>

The American Convention on Human Rights, in its article 9 concerning the principle of legality and retroactivity, formulates this rule in a manner compatible with article 15 of the International Covenant on Civil and

26 Exp. 30514, "Massera s/ excepciones", 9 September 1999.

27 There exists an abundant literature, including international jurisprudential antecedents, concerning the juridical value of the Universal Declaration, its directly operative and binding character, and even concerning the hierarchy of its provisions (*jus cogens*). One of the best studies for identifying the norms of *jus cogens* in the Universal Declaration is that of Richard B. Lillich, "Civil Rights", in *Human Rights in International Law. Legal and Policy Issues*, edited by Theodor Meron, Clarendon Press-Oxford, 1985, p. 115 ff. It is interesting to cite this work, because its author does not think that all the norms of the Universal Declaration form part of *jus cogens*. Nevertheless, concerning art. 11 (2) he maintains that the reference to international law was included to "dispel any doubt about the Nuremberg and Tokyo trials" and "to ensure that nobody would escape punishment for crimes under international law by alleging that the act was legal according to national law" (op. cit. p. 145). Mónica Pinto has drawn attention to the recognition of the binding character of the Universal Declaration on the part of the International Court of Justice in the Barcelona Traction case, judgment of 5 February 1970. See Mónica Pinto, *Temas de derechos humanos*, Editores del Puerto s.r.l., Buenos Aires, 1997, p. 36 and note 63.

Political Rights and Article 11 (2) of the Universal Declaration of Human Rights. According to the American Convention:

“No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed.”

The principle of legality in international criminal law is also confirmed by the Convention for the Protection of Human Rights and Fundamental Freedoms [European Convention of Human Rights of 4 November 1950] (article 7 (2)) in a manner similar to the way this would later be defined by the International Covenant of Civil and Political Rights of the United Nations in 1966. This treaty provision was clarified through its application in the regional European human rights system, where for example a verdict was upheld based on a retroactive Norwegian law making collaboration with the German occupation administration a criminal offence.<sup>28</sup>

It is frequently said that the principle of legality, which constitutes a fundamental axiom of guarantee-based criminal law, is alien to international criminal law. This is not accurate.

The philosophical, historical and political basis of the principle of legality

in modern criminal law is the protection of individual rights in the face of state arbitrariness. The value legally protected by this metaguarantee<sup>29</sup> of due process, which expresses itself in the principle of legality, is thus the individual liberty of the accused and the trustworthiness of the penal process – which is expressed in the requirement of prior knowledge of the illicit criminal character of a specific act. It is a matter of protecting the individual, this little David, from the Goliath that is the State.

Now, in the face of crimes under international law, including genocide, torture and the forced disappearance of persons, perpetrated in a systematic or massive form – acts of obvious illegality which move the conscience of humanity, and which are almost always committed via an organized apparatus of power – a metaguarantee of legal due process is constituted in turn of the right to jurisdiction, security and dignity for the victims, for society as a whole and even for the international community.

It is here that equilibrium must be sought between the value of the right to justice for the victims of crimes and the value of the individual freedom of the accused. Here human dignity is protected against the power of those who have carried out generally in a deliberate and

28 30 May 1961, Req. 931/60, cited by Claude Lombois, *Droit pénal international*, Second edition, Dalloz, Paris, 1979, note to paragraph 188 concerning the principle of legality.

29 A metaguarantee conditions the remaining guarantees of due legal process. In this sense it has been said that the independence of the judiciary is a metaguarantee within the minimal judicial guarantees recognized by art. 14 of the International Covenant on Civil and Political Rights.

conscious manner a "criminal exercise of state sovereignty"<sup>30</sup> in the commission of their crimes.

In its time, the question of the principle of legality in Nuremberg law received three different responses. For some, both the Statute of the International Military Tribunal as well as Law No. 10 of the Allied Control Council,<sup>31</sup> respected the maxim *nullum crimen, nulla poena sine lege*. Others affirmed that the principle had been disregarded, but justified this deviation. Finally, some observers maintained that the principle of legality had been violated and that this nullified the legal value of the two texts in question as well as of the trials carried out on this basis.<sup>32</sup>

The principle of legality assumes prior knowledge of what is prohibited and the punishment that the prohibited act will occasion, as a presupposition for the general preventative efficacy of the crimi-

nal norm.<sup>33</sup> The principle of prior knowledge, together with the principles of accusation and punishment, have become the basis itself of modern criminal law.

More than fifty years have passed, and the objections formulated at the time, particularly concerning the inclusion of crimes against humanity in the Statute of the International Military Tribunal of Nuremberg, in that of Tokyo and in Law No. 10 of the Allied Control Council, cannot be maintained today in the same form. In the intervening period, a progressive development of international law has taken place, and this independently of the positions articulated by those who from the beginning were of the opinion that the principle of legality as it is conceived in international law had not been violated even at the origins of this process, when the three texts mentioned above began to be applied.

30 The expression was coined by the Roumanian jurist Eugène Aroneanu, one of the first great theorists on crimes against humanity after the Second World War. See Eugène Aroneanu, Le crime contre l'humanité, Paris, Librairie Dalloz, 1961.

31 Law No. 10 of the Allied Control Council, of 20 December 1945, which enacted the normative content of the Statute of the International Military Tribunal of Nuremberg, with certain modifications, was intended to be applied in Germany by the courts established by each occupation authority within its respective zone. The purpose of the law was to provide a uniform legal basis for trials against war criminals and delinquents similar to those who were to be judged by the International Military Tribunal of Nuremberg, which were persons whose crimes were confined to no precise geographical location.

32 Concerning the state of the question immediately following Nuremberg, see the fundamental work by Henri Meyrowitz, La Répression par les Tribunaux Allemands des Crimes contre l'Humanité et de l'Appartenance à une Organisation Criminelle en application de la loi No 10 du Conseil de Contrôle Allié, Librairie Générale de Droit et de Jurisprudence, Paris, 1960, p. 348 ff..

33 This prior knowledge is of a similar nature to the principle of legality in the formulation of Paul Johann Anselm von Feuerbach, made in 1801, which as is well known constitutes a fundamental doctrinal precedent in the matter.

With regard to knowledge of the criminal character of the censured acts, the opening statement of indictment by Robert H. Jackson before the International Military Tribunal of Nuremberg in the hearing of 21 November 1945 is very clear concerning the legal basis of the trial. According to the famous Justice Jackson:

“The defendants had [...] clear knowledge. Accordingly, they took pains to conceal their violations. It will appear that the Defendants Keitel and Jodl were informed by official legal advisors that the orders to brand Russian prisoners of war, to shackle British prisoners of war, and to execute commando prisoners were clear violations of international law. Nevertheless, these orders were put into effect [...]”.

“The fourth Count of the indictment is based on Crimes against Humanity. Chief among these are mass killings of countless human beings in cold blood. Does it take these men by surprise that murder is treated as a crime?”<sup>34</sup>

The Chief Prosecutor stated:

“It may be said that this is new law, not authoritatively declared at

the time they did the acts it condemns, and that this declaration of the law has taken them by surprise. I cannot, of course, deny that these men are surprised that this is the law; they really are surprised that there is any such thing as law.”<sup>35</sup>

In international criminal law, contrary to what is sometimes affirmed, the principle of legality does indeed exist, but it has particular characteristics and has been expressed in a manner specifically its own: *nullum crimen sine iure*, which means that accusations must have a basis in law and not be arbitrary, even if the penalties are not formulated in an express and specific manner.

The principle of legality in international criminal law starts from a fundamental distinction between **norms of conduct** and **norms of repression**. Custom can give rise to norms of conduct: a certain conduct becomes prohibited because the majority of States refrain from performing it out of a sense of fulfilling a legal obligation.

Here lies the peculiar character of the principle of legality in international criminal law. This principle requires the existence of a text, but only vis-à-vis a given norm of conduct and as proof of

34 Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946 William S. Hein & Co. Inc., Vol. 2, p.143-144.

35 Vol. 2 International Military Tribunal p.143, 144 cited by M. Cherif Bassiouni in Crimes Against Humanity in International Criminal Law, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1992, p. 117 and note 60.

the underlying custom that gave rise to it. This is necessary for defining specific conduct as criminal and not merely illicit, a distinction which custom, unformulated in a text, does not always make clear. The norm of repression on the other hand is a consequence of the customary norm of conduct. To require identification of a customary norm of repression in the same way would be like requiring a custom of transgression. In this sense international criminal law is not retroactive<sup>36</sup>

Thus the International Military Tribunal at Nuremberg considered that, with regard to war crimes, the accused had violated a series of norms of conduct clearly established by international law at a much earlier date than the penalties announced in the London Agreement of 1945, and which had been collected in the international conventions of The Hague (1907) and Geneva (1929).<sup>37</sup>

In Argentine law, in addition to the Universal Declaration and the

International Covenant on Civil and Political Rights, there are other instruments of international law which also expressly refer back to general international law to define the principle of legality with regard to international offenses.

The Third Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War, ratified by Argentina, establishes in article 99:

“No prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed.”

For its part, the Additional Protocol I of 1977 to the Geneva Conventions of 12 August 1949, ratified by Argentina, in its article 75 (4) c provides:

“No one shall be accused or convicted of a criminal offence on account of any act or omission

36 For this special aspect of international criminal law, see Claude Lombois, *op. cit.*, in particular paragraphs 49 and 50. Concerning the non-retroactive character of international criminal law as reflected in the Charter of the International Military Tribunal at Nuremberg, it has been said that using the rule of “*ejusdem generis*” it can be demonstrated that the pre-existing prohibitions under the regulation of armed conflicts were similar to article 6 c) of the Charter. As a consequence, there was no violation of the principle of legality under international criminal law. See M. Cherif Bassiouni, *op.cit.* p.129.

37 “[...] with respect to war crimes, however, [...] the crimes defined by Article 6, Section b, of the Charter [of the International Military Tribunal at Nuremberg] were already recognised as war crimes under international law. They were covered by Articles 46, 50, 52 and 56 of the Hague Convention of 1907 [the Tribunal is referring to the Regulations Concerning the Laws and Customs of War on Land, annexed to the Convention], and Articles 2, 3, 4, 46 and 51 of the Geneva Convention of 1929. That violation of these provisions constituted crimes for which the guilty individuals were punishable was too well settled to admit of argument”. See the quotation from the International Military Tribunal at Nuremberg in Edoardo Greppi, “The evolution of individual criminal responsibility under international law”, in International Review of the Red Cross, September 1999, Volume 81, No. 835 p. 548 and note 45.

which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed.”

All of the trials for crimes under international law brought before national courts since 1946 rejected the argument that they were applying laws *ex post facto*. Israel judged Adolf Eichmann in 1960, France tried Klaus Barbie in 1987 and Canada prosecuted Imre Finta in 1989. In these and in other cases, the argument of retroactive law was rejected.

The question was raised in relation to the Nuremberg Charter in the request for the extradition of Demjanjuk formulated by Israel to the United States. The Court ruled that the Charter was declarative of international law and did not constitute a law subsequent to the holding of the trial.<sup>38</sup>

With regard to the non-applicability of statutory limitations for war crimes and crimes against humanity, this principle derives from general international law, as is clearly confirmed in the preamble and articulated provisions of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

Particular attention in this regard should be paid to Article IV of the Convention, according to which State Parties undertake to adopt the measures necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of the crimes referred to in the Convention “and that, where they exist, such limitations shall be abolished”.

#### **IV. The Question of Specific Penalties in International Criminal Law**

The lack of specific penalties in the instruments of international criminal law, including in the Charters of the Nuremberg and Tokyo Tribunals, does not violate the principle of legality in international law, since specific sanctions for acts designated as criminal are absent from all instruments of international criminal law prior to adoption of the Rome Statute of the International Criminal Court in July 1998 (article 77).<sup>39</sup>

According to M. Cherif Bassiouni, this absence confirms a customary rule regarding the application of international law, according to which penalties by

38 Matter of Extradition of Demjanjuk, 612 F. Supp. 544 (D.C.), aff'd 776 F.2d 571 (6th Cir. 1985), cert. denied 475 U.S. 1016 (1986), cited by M. Cherif Bassiouni in *op. cit.*, p. 145 note 131.

39 See below a contrary view in the dissenting opinion of Argentine Supreme Court Justice Enrique Santiago Petracchi *in re* “Priebke, Eric *s/* extradition”.



analogy are valid.<sup>40</sup> With respect to sanctions, a constant principle of international criminal law has been to refer back to the penalties established for similar offenses by national criminal law. This has been demonstrated by the practice of States in trials for war crimes, crimes against humanity and acts of piracy.

A clear example of the above is provided by the provision in the Statute of the International Criminal Tribunal for the former Yugoslavia according to which the penalties imposed by the Tribunal will be limited to imprisonment. In determining the terms of imprisonment, the Tribunal shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia (article 24 (1) of the Statute).

With respect to crimes against humanity prosecuted under national jurisdictions directly applying international law, an instructive example is provided by the trial of Klaus Barbie in France. On July 4, 1987, the Criminal Court of the Rhone (*Cour d'Assises du Rhône*) sentenced the former head of the

Gestapo in Lyon to life imprisonment for 17 crimes against humanity. The only norm governing crimes against humanity in France at that time was article 6(c) of the Charter of the International Military Tribunal at Nuremberg.

Indeed in France, the law of Nuremberg forms part of the applicable law in force. The London Agreement of August 8 1945 and its Annex, which established the constitution, jurisdiction and functions of the International Military Tribunal at Nuremberg, is considered an international treaty with binding applicability for France, which continues to be a State Party to said treaty.<sup>41</sup> Article 27 of the Charter establishes that "The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just." In the trial of Barbie the Charter of Nuremberg was used for the legal-criminal qualification of the acts committed and the French Penal Code in force at the time of the verdict, which had abolished the death penalty, for determining the penalty involving imprisonment.

40 None of the 315 instruments of international criminal law elaborated between 1815 and 1988 include respective sanctions. See M. Cherif Bassiouni, *op. cit.*, p. 111.

41 Claude Lombois, *op. cit.* paragraph 158 "in fine" and corresponding note. The French law on the non-applicability of statutory limitations for crimes against humanity, of 26 December 1964, refers to the definition of those crimes figuring in the United Nations resolution of 13 February 1946, which in its turn confirms the definition contained in the Charter of the International Military Tribunal at Nuremberg. According to French jurisprudence, crimes against humanity constitute specific offenses from the material point of view – ordinary offences committed in specific circumstances and for specific motives – and in a formal sense – crimes defined by art. 6 (c) of the Charter of the International Military Tribunal of 8 August 1945 (*Crim.* 6 février 1975, D. 75.386, rap. Chapar, note P. Coste-Floret). The Allied Agreement of 8 August 1945 [Charter of the Tribunal] is an international treaty whose authority continues to be of binding applicability (*Crim.*, 30 juin 1976, D. 76, I.R. 259).

## V. Crimes against Humanity in Applicable International Law

Today both genocide as well as other crimes against humanity – such as extra-legal or summary executions, torture, forced disappearances –<sup>42</sup> constitute crimes under international customary law (*crimina juris gentium*) and not merely crimes under international treaty-based law. In fact, as in other fields of international law, custom preceded codifi-

cation in specific treaty texts – in some cases very clearly, as for instance concerning genocide or torture.

It has been recalled here that the London Agreement of 8 August 1945 – signed by France, the United Kingdom, the United States of America and the Soviet Union – established the International Military Tribunal of Nuremberg and its Statute. Prior to the opening of the trial at Nuremberg,<sup>43</sup> 19 countries

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42 The category of war crimes should be considered to include both serious breaches of Geneva Convention law and violations of the law of the Hague conventions.

With regard to Geneva law, this includes serious breaches of the four Geneva Conventions of 12 August 1949 and the Additional Protocol I of 1977. But also included today are serious breaches to the article 3 common to all four Geneva Conventions and to Additional Protocol II of 1977, which regulate armed internal conflicts (see article 4 of the Statute of the International Criminal Tribunal for Rwanda, article 8 of the Rome Statute of the International Criminal Court and article 20 (f) of the Draft Code of Crimes against the Peace and Security of Mankind). In this respect, the concept should be considered past by which only crimes committed in armed international conflicts constitute war crimes.

With regard to the law of the Hague, war crimes include violations of the laws and customs of war, which in part coincide with those declared under Geneva law (see article 8 of the Rome Statute of the International Criminal Court, article 3 of the Statute of the International Criminal Tribunal for the Former Yugoslavia and the Report of the Secretary General of the United Nations concerning the establishment of this tribunal, UN document S/25704 of 3 May 1993, paragraphs 41 ff.

The difference between war crimes and crimes against humanity derives from the fact that the latter can be committed both in times of peace as well as during an armed conflict of whatever nature. In addition, crimes against humanity include acts committed against a person who is not necessarily an enemy, including acts against a person of the same nationality as the perpetrator of the offense.

The connection between crimes against humanity and war established in article 6 (c) of the London Statute of the International Military Tribunal was transcended in the progressive development of international law subsequent to the trial at Nuremberg. Thus Article 1 of the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity establishes the non-applicability of statutes of limitations to crimes against humanity “whether committed in time of peace or in time of war”. In turn, the Statute of the International Criminal Tribunal for Rwanda establishes the autonomous character of crimes against humanity (article 3). The Rome Statute of the International Criminal Court legislates to the same effect (article 7). Likewise the Draft Code of Crimes against the Peace and Security of Mankind has foreseen the autonomous character of such crimes in its article 18. The character of crimes against humanity as offenses under customary international law is openly affirmed in the verdict of the International Criminal Tribunal for the former Yugoslavia in the Tadic case (Cited by Edoardo Greppi, *op. cit.* p. 549).

43 The opening of the Nuremberg trial took place on November 20, 1945. The verdict was pronounced on September 30, 1946. The judgments were issued on October 10, 1946.

adhered to this Agreement.<sup>44</sup> Subsequently, two resolutions of the General Assembly of the United Nations confirmed the definition of war crimes and crimes against humanity contained in the Statute (resolutions 3 (1) of 13 February 1946 and 95 (I) of 11 December 1946).

The notion of crime against humanity, although arising, as mentioned, from a long historical evolution, is subject to penal sanction in the London Agreement as a violation of the rule of conduct formulated in the famous clause proposed by the humanist and professor Fiodor Fiodorovich Martens, Russian delegate to the Peace Conference at the Hague in 1899.

The clause, subsequently referred to as the Martens Clause, first appeared in the Preamble of the (II) Hague Convention of 1899 with Respect to the Laws and Customs of War on Land. It establishes the following:

“Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between

civilized nations, from the laws of humanity, and the requirements of the public conscience”.

The Martens Clause was subsequently included in various similar versions in later treaties concerning the application of international humanitarian law in armed conflicts. It is found in the Preamble to the (IV) Hague Convention of 18 October 1907 Respecting the Laws and Customs of War on Land, as well as in the four Geneva Convention of 12 August 1949 for the protection of the victims of armed conflicts and in their two Additional Protocols of 8 June 1977, to which reference has been made earlier in noting that they are not subject to derogation.

The expression “crime against humanity” as such was used already on May 28, 1915 by the governments of France, Great Britain and Russia in relation to the massacres committed against the Armenian population in Turkey. The three countries described the events in Turkey as “crimes against humanity and civilization, for which all of the members of the Government of Turkey will be held responsible together with their agents involved in the massacres”.

The first appearance of the notion of crimes against humanity in an international treaty is to be found in the Treaty

<sup>44</sup> Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxemburg, Norway, New Zealand, Panama, Paraguay, the Netherlands, Poland, Uruguay, Venezuela and Yugoslavia.

of Sèvres (10 August 1920, concluded between Turkey and the Allies) whose article 230 obliges the Turkish government to hand over to the Allies for judgment those responsible for the massacres committed from the beginning of hostilities on Turkish territory, including against subjects of Turkish nationality. This treaty was never ratified.

In turn, as already indicated, the first codification of the offense of crimes against humanity in an applied instrument of international criminal law was that undertaken in the Statute of the International Military Tribunal at Nuremberg.<sup>45</sup>

On December 11, 1946, the General Assembly of the United Nations adopted

by consensus Resolution 95 (I), referred to earlier, in which it “reaffirmed” the “principles of international law recognized by the Charter of the International Tribunal at Nuremberg and the Judgment of the Tribunal” and ordered the formulation of these principles for their subsequent codification “in the context of a general codification of offences against the peace and security of mankind or of an International Criminal Code”.

¿What is the binding force of these instruments for a country which, without being one of the four original State Parties of the London Agreement, subsequently signed these instruments or accepted as a Member State of the United Nations – the case of Argentina – the aforementioned Resolution adopted

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45 Statute of the International Military Tribunal.

II.- Jurisdiction and general principles

Article 6.

The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes:

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

- a) crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
- b) war crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;
- c) crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

by consensus? In one of the most authoritative works on legal doctrine, "International Law. A Treatise" by L. Oppenheim, this question is answered as follows:

"It may not be easy to define the exact nature of the binding force, in the sphere of conventional International Law, of the Charter of the International Military Tribunal, upon the States which signed it without formally accepting any obligations *inter se*, which adhered to it, or which participated in its affirmation by the General Assembly. However, International Law is not created by treaty alone. Insofar as the instruments referred to above give expression to the views of the States concerned as to the applicable principles of International Law – applicable generally and not only as against the defeated enemies – they may be fairly treated as evidence of International Law and as binding upon them."<sup>46</sup>

One of the international documents which most clearly allows the affirmations of the preceding paragraph to be maintained is the Report of the Secretary General of the United Nations to the Security Council concerning the estab-

lishment of an international tribunal for the prosecution of the persons responsible for gross violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.

As the report observes:

"34. In the view of the Secretary General, the application of the principle nullum crimen sine lege requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.

"35. The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention

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46 See L. Oppenheim, M.A., LL.D. International Law. A Treatise, Seventh Edition, Edited by H. Lauterpacht, LL.D. Longmans, Green and Co. London/New York/Toronto, Vol.II "Disputes, War and Neutrality," par. 257.

(IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907; the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948; and the Charter of the International Military Tribunal of 8 August 1945".<sup>47</sup>

If this text makes specific reference to the "law applicable in armed conflict", it is precisely in order to recall that genocide is a crime under international law "whether committed in time of peace or in time of war" (art. I of the respective Convention) and that the linking of crimes against humanity with war has been transcended in the period since the Second World War, as has been demonstrated earlier.

A clear indication of the legal assets protected by suppression of crimes against humanity was given by the International Criminal Tribunal for the former Yugoslavia in its decision in the Endemovic case:

"Crimes against humanity are serious acts of violence which harm human beings by striking what is

most essential to them: their life, liberty, physical welfare, health and/or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity".<sup>48</sup>

The legal qualification of crimes against humanity is not alien to American international law. The Inter-American Convention on Forced Disappearance of Persons, which enjoys constitutional hierarchy in Argentina, reaffirms that the systematic practice of the forced disappearance of persons constitutes a crime against humanity (paragraph VI of the Preamble) and recognizes various consequences of this legal qualification, including, among others, universal jurisdiction (Article IV) and the non-applicability of statutory limitations to this offence (Article VII).

47 Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993) UN Document S/25704, 3 May 1993.

48 Decision of 29 November 1996, UD Doc. IT-96-22-T. Cited by Edoardo Greppi, in op. cit., p. 545 and note 35.

## VI. Recent Argentine Jurisprudence in the Matter

It seems clear that crimes under international law committed outside Argentine territory can be judged within Argentina itself by virtue of article 118 of the National Constitution.<sup>49</sup> However this provision and others concordant with it in the Constitution have implications which extend beyond its application to crimes committed outside Argentine territory.

The question of the application of international criminal law in our country was raised in 1989 in connection with the request for extradition of a Nazi criminal for crimes against humanity, in a ruling of the Federal Court of Appeals in La Plata, in which the extensive and well-grounded vote of Judge Leopold Schiffrin was a defining element. This vote opened the way to a truly advanced jurisprudence on the matter.<sup>50</sup>

We would only point out here that on this occasion the aforementioned appeals court judge referred extensively to Argentina's acceptance of the basic instruments of international criminal

law. Particularly interesting in this respect is the jurisprudential reference to general or customary international law, which, as Schiffrin demonstrates, dates back several decades.

In effect, the decision recalls that according to Argentine Supreme Court Justice Tomás D. Casares, the "unformulated international law" to which articles 102 (prior to the reform of 1994, today art. 118), 1 and 21 of Law 48 refer is a law "[...] of greater latitude and comprehensiveness than is the positive material of the treaties" (see vote of Dr. Casares in re "S.A.Merk Química Argentina c. Nación Argentina", June 9-1948; Rulings 211-162, 218/219).<sup>51</sup>

At a later point in his vote, Dr. Schiffrin considers that "Despite the regrettable lack of ratification by Argentina, the aforementioned Convention [he is referring to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity] is an undeniable indication of the non-applicability of statutory limitations to crimes against humanity, as a principle of public international law, to which – as Tomás

49 National Constitution, Art. 118.- The trial of all ordinary criminal cases not arising from the right to impeach granted to the House of Deputies, shall be decided by jury once this institution is established in the Nation. The trial shall be held in the province where the crime has been committed; but when committed outside the territory of the Nation against customary international law (*Derecho de gentes*), the trial shall be held at such place as Congress may determine by a special law.

50 Extradition: Prescription; applicable law. Operation of law 1612; naturalized citizen; option of judgment before Argentine courts. 41.979 – Cfed. La Plata, court III penal, August 30-1989 – S., J.F.L. *El Derecho* (t. 135) p. 326 ff.

51 See op.cit. in previous note, p. 335.

D. Casares stated – the Nation is subordinated in accordance with article 102 of the Fundamental Law.”<sup>52</sup>

However, Germán Bidart Campos, commenting on this ruling and particularly on the vote of Dr. Schiffrin, has maintained that “customary international law” can be invoked to grant extradition by virtue of a retroactive foreign law which declares the non-applicability of statutory limitations under international law, but that “[...] in Argentina a guilty verdict cannot be rendered without the prior existence of a criminal law, even if a crime has been committed in its territory against international law (this for now); [and it would have to be seen whether a prior law would also be necessary if this crime were committed outside our country but judged within its borders; in Tome III of our “Treatise”<sup>53</sup> cited earlier, we accept – also for now – the thesis that even for this latter case the principle of *nullum crimen* is required<sup>54</sup>]”.

Let us say already that the question may be analyzed from an angle other than that adopted by Bidart Campos if it is accepted that the suppression of certain offences under international criminal law, such as genocide<sup>55</sup> and torture, today form an integral part of the imperative norms of general or customary international law (*jus cogens*).

This seems to be the reading of the question according to the votes of Argentine Supreme Court Justices Antonio Boggiano and Guillermo A. F. Lopez *in re* Priebke, Eric *s/* Extradition (case No. 16.063/94) when they affirm “that the qualification of crimes against humanity does not depend on the wishes of the requesting or the requested States in the process of extradition but rather on the principles of *jus cogens* in international law.”

The vote of the President of the Court, Julio S. Nazareno, and the Vice-

52 See *op. cit.* In note 50, p. 341.

53 The author is referring to his work entitled Tratado elemental de derecho constitucional argentino (Los Pactos Internacionales sobre Derechos Humanos y la Constitución) [Elementary Treatise on Argentine Constitutional Law (International Human Rights Treaties and the Constitution)], Ediar, Buenos Aires, 1989.

54 “The Extradition of a Nazi Criminal for Crimes Against Humanity” by Germán J. Bidart Campos, in El Derecho, (t. 135) p. 327 par. 11.

55 In the famous consultative opinion of the International Court of Justice concerning reservations to the Convention for the Prevention and Punishment of the Crime of Genocide, the highest international court affirmed that the provisions of the Convention codify rules of general international law and are binding on States even without any treaty-based obligation. See “Réserves à la Convention pour la Prévention et la Répression du Crime de Génocide”, Avis consultatif du 28 mai 1951 in Pierre Michel Eisemann, Vincent Coussirat-Coustere, Paul Hurm, Petit Manuel de la Jurisprudence de la Cour Internationale de Justice, A. Pedone, Paris, 1984, p. 235.



President, Eduardo Moliné O'Connor, considers that the application of customary international law (*derecho de gentes*) is recognized by Argentine legislative statute (art. 118 of the National Constitution) and that the acts for which Eric Priebke is reproached constitute "crimes sanctioned by General International Law" (Consideration 28). This qualification is repeated at a later point in the vote, where it is said that the qualification of crimes against humanity including elements of genocide "(...answers to the principles of *jus cogens* in international law" (Consideration 57).

But it is Consideration point 51 of this vote which contains the most important development in this direction: "[...] among the basic norms covering the inalienable rights recognized by the international community are the prohibition of genocide [and] the principle of freedom from racial persecution and crimes against humanity [...] Regulations established by customary law can neither be set aside by treaties nor derogated by the elaboration of a subsequent norm of General International Law having the same character The concept of *jus cogens* was accepted by the International Law Commission and incorporated by the Vienna Convention on The Law of Treaties in 1969 (art. 53) – ratified by law 19.865."

The vote of Justice Gustavo A. Bossart returns to the matter of statutory limitations in the regulation of crimes

under general international law, in stating (consideration 49) that "(...) in order to resolve the point, recourse should be had to international custom and to the general principles of International Law, which form part of internal Argentine law (No. 70.XXIII, "Nadel", cited previously)."

The dissenting votes of Justices Augusto César Belluscio and Ricardo Levene (h.) contrast with those of the majority of the Court. These two judges believe that the principle of non-retroactivity confirmed in art. 18 of the National Constitution should prevail and cannot be set aside "by means of a construction based in a customary law which has not been proven to be binding." And they add that disregard of the principle of *nullum poena sine lege* is tantamount to "going against the current of civilization" (Consideration 8).

For its part, the dissenting opinion of Justice Enrique Santiago Petracchi revolves around the argument by which "war crimes" or, in this case "crimes against humanity" do not have their source "in ordinary criminal law" but rather in "international usages and customs and in certain instruments (treaties, conventions, declarations) produced in that sphere" (Consideration 4).

This judge thinks that in order to resolve the case "[...] the question has to be asked whether an Argentine judge could hypothetically – irrespective of the provisions of art. 80 of the Penal Code – find

Priebke guilty on the basis of such norms, for example, as the aforementioned art. 50 of the Hague Convention of 1899 or other similar dispositions cited in the majority opinion and which also suppress "war crimes". If the answer is positive, the acts committed will – in accordance with the terms of the conventions signed with Italy – be subject to penalties and their perpetrator therefore liable to extradition.

He concludes by stating "(...) but the negative response is necessary for the simple reason that the acts described as "war crimes" – or in this case "crimes against humanity" – by international law, have not until now been assigned a specific penalty. The Argentina judge in the example could not find the defendant guilty since the principle of legality enshrined in art. 18 of the National Constitution "requires inseparably the double specification by the law of the punishable acts and the penalties to be applied" (Verdicts: 311-2453, among many others).

"Nor could the vacuum caused by the lack of a penalty be filled by reference to ordinary criminal law, combining the penalty for the latter – whose commission, it should be remembered is subject to statutory limitations – with a norm of "international customary law" (*derecho de gentes*). Such a case

would involve inventing a third category of offence – call it "mixed" – which obviously does not fall within the powers of a judge of the Republic.

"In short: that for Argentine law it can and should be maintained that acts configured as "war crimes" (and also "crimes against humanity") are contrary to law, but are not automatically punishable. (Consideration 6)

A similar argument had been maintained by Pablo A. Ramella. According to this author, in the law of Nuremberg and Tokyo the principle "*nullum crimen sine lege*" had been fully respected. Not so the other principle of "*nulla poena sine lege*", since neither wars of aggression nor violations of the rules of war had been assigned concrete penalties to be applied to their perpetrators.<sup>56</sup>

More recently, on 13 July 1998 federal judge Roberto José Marquevich, in ordering pre-trial detention of Jorge Rafael Videla in the case involving presumed infringement of arts. 146, 293 and 139, par. 2 of the Penal Code – an order later confirmed by the National Chamber for Federal Criminal and Correctional Matters – advanced a legal qualification covering the grave offences of which the former dictator was accused.

56 Pablo A. Ramella, Crímenes contra la Humanidad, Depalma, Buenos Aires, 1986, p. 19.

Specifically, this magistrate analyzed the legal framework with regard to Jorge Rafael Videla as the intermediate perpetrator criminally responsible for the offences of abduction, concealment and retention of a minor of less than 10 years of age on five occasions in concurrence with other offences. According to this intervening federal judge: "[...] the specified classification which has been made of the acts imputed to the aforementioned defendant in terms of offences under our penal legislation does not imply removal of their concurrence with offences conceived of as crimes against humanity (especially those recognized by the conventions alluded to in article 75, paragraph 22 of the National Constitution)".<sup>57</sup>

In handling what in the final analysis constitute cases of "forced disappearance" of children, the above-mentioned judge considers that he is in front of criminal offences not subject to statutory limitations and which are suppressed by international law.<sup>58</sup> And he further believes that "(...) the gravity of these illicit acts was taken into account by the National Parliament, given that it expressly excluded from the final texts of the laws known as "Full Stop" (article 5 of law 23.492) and "Due Obedience" (article 2 of law 23.521) crimes of abduction and con-

cealment of minors committed on the occasion of the struggle against subversion."<sup>59</sup>

But this magistrate goes even farther by affirming that as a member of the international community, Argentina is bound both by the international human rights instruments having constitutional hierarchy (art. 75, par. 22 of the National Constitution) and customary international law – *Derecho de Gentes* – (article 118 of the National Constitution). This legislation "[...] would be weakened if it were limited to subsuming the acts committed as offenses under article 139, paragraph 2, article 146 and article 293, paragraphs 1 and 2 of the Penal Code [principle extracted from the ruling of the Supreme Court *in re* "Erich Priebke, previously cited]."<sup>60</sup>

Furthermore, Judge Marquevich was very clear concerning the binding force on Argentina not only of international treaty-based law but also of general or customary international law, citing extensively the vote of Dr. Leopold Schiffrin of 30 August 1989 in the extradition trial of Joseph Franz Leo Schwammberger. In this respect he affirmed that the application both of international treaties as well as customary international law would be unavoidable

57 See warrant for pre-trial detention of Jorge Rafael Videla of 13 July 1998, fs.2882 vta.

58 See resolution cited in the previous note, fs. 2878.

59 Op.cit.loc.cit. in previous note.

60 Op.cit. in note 57 fs. 2911.

for the presiding judge in conformity with the provisions of article 21 of Law 48.<sup>61</sup>

The warrant in question transposes this "*non plus ultra*" which, at least provisionally, Germán Bidart Campos had raised in objection to the application of international law, and which would allow the national judge to concede an extradition in conformity with international law, but without judging the basis of the case in accordance with its principles.

For its part, the Chamber for Federal Criminal and Correctional Matters of the Capital, in its ruling of 9 September 1999 concerning the appeal against the pre-trial detention of Jorge Rafael Videla, recalls that the forced disappearance of persons constitutes a crime against humanity, and as such is not subject to statutory limitation, whatever the date of its commission. Moreover the Chamber maintains that this characteristic prevails over any contrary dispositions that may be contained in internal laws, again irrespective of the date on which the offence was committed.<sup>62</sup>

Among other norms, the Federal Court cites article 7 of the Rome Statute of the International Criminal Court which,

given a combination of certain conditions, qualifies forced disappearance as a crime against humanity, and in the same sense mentions article 18 of the Draft Code of Crimes against the Peace and Security of Mankind of 1996. On the question of the non-applicability of statutory limitations to these offences, the Court mentions article VII of the Inter-American Convention on the Forced Disappearance of Persons and article 26 of the Rome Statute of the International Criminal Court.

The Court acknowledges that it does not share the above-mentioned restrictive doctrinal viewpoint of Germán Bidart Campos and affirms that in its opinion "distinctions should not be made such as those proposed by the prestigious legal scholar Germán Bidart Campos, based on whether the crime against humanity was committed outside or inside the country".

The court affirms that:

"it does not seem reasonable to make this distinction, which, as we have seen, would amount to disregarding laws established by the international legal system which take precedence over internal laws, without it being able to

61 According to art. 21 of Law 48: "The National Courts and Judges in exercising their functions will proceed by applying the Constitution as the supreme law of the Nation, the laws which the Congress has and will approve, the treaties concluded with foreign countries, the specific laws of the Provinces, the general laws that have previously governed the Nation and the principals of customary international law, according to the requirements of the cases submitted to their attention, in the order of priority which will be established".

62 See Exp. 30312, Videla Jorge Rafael s/ pre-trial detention. 9 September 1999.

be affirmed that Argentine public order would be compromised by the prosecution of these crimes, even if this implies assigning a significance to the principle of legality distinct from that which has traditionally been accorded it by internal courts and by the Argentine government, whose reserves in the matter can in no way modify the international regulations and the weight of the obligations arising from the other sources of international legal norms.

“On the other hand, and by virtue of the express constitutional acceptance of customary international law, it would be inadmissible for one of its provisions to be considered as being contrary to internal public order.

“It should be noted that both the American Convention on Human Rights as well as the International Covenant on Civil and Political Rights limit this guarantee to questions relating to the category and penalty of an offence but not to other penal aspects (comp. Bidart Campos, G., Tratado Elemental de Derecho Constitucional Argentino, Ediar, Bs. Aires, 1989, p. 222 ff.; La extradición de un criminal nazi por delitos contra la humanidad, E.D., t. 135, p. 323).

“Likewise, it should not be disregarded that article 15.2 of the International Covenant on Civil and Political Rights expressly establishes that “nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”

“Nor is there evidence of any damage to the principle of constitutional supremacy, given the Constitution’s own normative framework, which expressly accepts customary international law and consequently all of its implications, among which is the assumption of *jus cogens* as a binding imperative law with *erga omnes* effect, which can only be modified by a subsequent norm of general international law of the same character and which is not opposable by the internal laws of States, not even those of a constitutional nature (comp. Zuppi, A.L., El Derecho Imperativo (“Jus Cogens”) en el nuevo orden internacional, E.D., t. 147, p. 863, including citation of articles 27 and 53 of the Vienna Convention on the Law of Treaties of 1969 and rulings of the International Court of Justice in the same sense).

“The constitutional mandate of article 118, on the other hand, establishing a kind of universal jurisdiction for the prosecution of such crimes against international law and fully empowering the Argentine courts to carry out such trials, would not be coherent if at the same time a sort of deconstructed law were allowed to be applied to every case which implied restrictions or exceptions to the normative framework which would be applicable at the international level.”<sup>63</sup>

Leopoldo Schiffrin had already addressed this question previously in an

article entitled “The Primacy of International Law over Argentine Law”.<sup>64</sup> On this occasion he demonstrated that the vision of Bidart Campos, according to which an Argentine judge could concede extradition without passing judgment on a crime against humanity limited statutorily according to internal legislation, was unsatisfactory, because it could lead to logical inconsistencies. And he conjectured that “if Schwammberger, for example, had been born in Argentina, of Austrian parents – which in fact his mother and father were – and had returned to Austria to pursue his horrible path, he could not have been handed over to Germany nor judged by Argentine courts.”

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63 The Federal Court issued a similar ruling on 9 September 1999 in re Massera *s/* exceptions, Expediente 30514.

A specific application of the principles of international criminal law in our internal law can be observed in the warrants “Arancibia Clavel, Enrique Lautaro and others *s/* illicit association, public intimidation, bodily harm and aggravated homicide”, being processed by Secretariat No. 2 of the National Chamber of Federal Criminal and Correctional Matters in the charge of Judge María Romilda Servini de Cubría. The case involves investigation of the assassination on September 30 1974 in Buenos Aires of the former Commander in Chief of the Chilean Army, General Carlos Santiago Prats González and his wife, Sofía Cuthbert de Prats González.

At the same time, the National Chamber for Federal Criminal and Correctional Matters has made extensive references to international criminal law in its ruling of 4 May 2000 in case No. 16.071 entitled “Astiz, Alfredo *s/* nullity” which is being processed before Federal Court No. 12, Secretariat No. 24. Extremely interesting in this case is the criterion applied by the court in deciding the appeal lodged by the plaintiff with legal representation by Drs. Barcesat y María L. Jaime. Specifically, the Court maintained, that “underlying the complaint for offenses against property brought by the plaintiff is the forced disappearance of his father. And in this context, only by drawing on a thorough examination of international norms in this area can a just response be given to this kind of situation. In this context, it should be noted that the acts of the kind denounced in this case constitute crimes against humanity and are therefore not subject to statutory limitations.”

64 Leopoldo Schiffrin, “La primacía del derecho internacional sobre el derecho argentino”, in La aplicación de los tratados sobre derechos humanos por los tribunales locales, Compilers: Martín Abregú and Christian Courtis. CELS, Editores del Puerto s.r.l., Buenos Aires, 1997, p. 117.

## VII. Conclusion:

### *aut dedere aut judicare*

The conclusions of this evolution point in two directions. On one hand, in terms of legislative policy, the National Congress has still not legislated a harmonization of our internal laws with the international treaties ratified by our country, which establish the specific obligation to criminalize offences constituting war crimes or crimes against humanity under international criminal law.

This is important, although the thesis of this article agrees with those who maintain that the penal norms of international law are directly applicable at the internal level, whatever the reservations expressed by the Argentine government in ratifying the International Covenant on Civil and Political Rights, with respect to the formulation of the principle of legality.

The importance of the question lies nonetheless in the fact that such legislation is an obligation assumed internationally by the State in ratifying these treaties, an obligation which has yet to be fulfilled. But the question is additionally significant because the adoption of such legislation would contribute to clarifying problems which continue to seem open to debate for some persons, as this rapid review of recent Argentine jurisprudence and legal doctrine has shown.

In this respect, we would only recall

here the obligation to legislate on penal matters, established by Article V of the Convention on the Prevention and Punishment of the Crime of Genocide. This obligation is also clearly stated in article 49 of the First Geneva Convention of 12 August 1949, in article 50 of the Second Convention, in article 129 of the Third Convention, in and article 146 of the Fourth Convention. These articles refer to the obligation to inscribe as criminal offences in internal law the grave breaches foreseen in each of the four Conventions. For its part, article 84 of Additional Protocol I of 1977 foresees legal sanctions to guarantee application of the Protocol. All of these obligations to legislate remain unfulfilled on the part of the Argentine State.

With specific regard to national suppression of violations of international humanitarian law in armed conflicts, various systems exist for establishing legislation to guarantee such suppression in accordance with the systems of international law currently in force. The important point is to fulfill the mandate of the Conventions.

It is cause for concern that this question has still not been addressed in our country, as is also the case regarding criminalization of the forced disappearance of persons as a stand-alone offence qualified as a crime against humanity, in conformity with the Declaration on the Protection of All Persons from Enforced Disappearances adopted by the United Nations

General Assembly in its Resolution 47/133 of 18 December 1992, and with the Inter-American Convention on the Forced Disappearance of Persons, ratified by our country and accorded constitutional hierarchy.<sup>65</sup>

65 Among references that can be cited in comparative law is the suppression of crimes against international law sanctioned by the Spanish Penal Code, which is the basis for the actions brought by Judge Baltasar Garzón Real.

Similarly, the French Penal Code currently in force suppresses crimes against humanity. Article 211-1 classifies genocide as an offence and includes among the groups protected those mentioned in the United Nations Convention. But it also adds those "determined on the basis of any other arbitrary criteria". Article 212-1 suppresses other crimes against humanity: deportation, enslavement or the massive and systematic practice of summary executions, of the abduction of persons followed by their disappearance, of torture and other inhumane acts inspired by political, philosophical, racial or religious motives and organized in execution of a concerted plan against a group of the civilian population. Article 212-2 is a consequence of the jurisprudence of the High Court of Appeals (Cour de cassation) in the Klaus Barbie case. On this occasion, the Court of Appeals considered that crimes against humanity could also be committed against combatants in the Resistance. This question was decisive because war crimes attributable to the Nazi occupation authorities were subject to statutory limitations by the time of the final trial of Klaus Barbie and only crimes against humanity had been declared as not subject to statutory limitations by the law of 1964. The praetorian creation of the Court of Appeals passed into the aforementioned article 212-2 of the current Penal Code, which suppresses as crimes against humanity the acts covered in article 212-1 as cited above, committed in times of war, in the execution of a concerted plan against those who combat the ideological system in the name of which the crimes against humanity are perpetrated. Article 212-3 suppresses illicit association for the commission of all the aforementioned crimes.

Article 7 (3.71) of the Canadian Penal Code is restrictive in that it only suppresses war crimes or crimes against humanity committed outside the country. Nevertheless, both the definition of crimes against humanity and that of war crimes (article 7 (3.76) include transgressions of customary – and not just treaty-based – international law. With respect to crimes against humanity, the definition also includes acts which were criminal according to general principles of law recognized by the international community.

The author of the Draft Penal Code of Ethiopia adopted in 1957 and currently in force was a renowned Swiss expert in criminal law, Jean Graven, Professor of Law at the University of Geneva and President of the International Association of Penal Law. Graven elaborated the project at the request of the then Emperor of Ethiopia Haile Selassie I. The Penal Code of Ethiopia extensively incorporates breaches of international law through article 281 (genocide, crimes against humanity). The definition of genocide includes political groups among those groups protected, as did the United Nations Declaration on Genocide. In turn it should be understood that suppression of war crimes includes within the scope of its application those offenses committed in the course of armed internal conflicts and not merely international ones. Currently these norms in the Penal Code are being invoked by the Public Ministry in criminal trials for genocide and other offences being brought against numerous members of the previous regime of former dictator Mengistu Haile Mariam.

In the trial for criminal responsibility undertaken by the Public Ministry et al. against the former dictator Luis García Meza Tejada and his collaborators (Bolivia, 21 April 1993), the Supreme Court of Justice of the country established an historic precedent in the fight against impunity in the "Cono Sur" region, a precedent still insufficiently known in Argentina. One of the accusations included the charge of genocide (Group No. 3. Genocide in Harrington Street). Although the United Nations Convention was indeed cited in the case, it was the Bolivian Penal Code that was applied (article 138), involving a prison sentence of 20 years. Among others found guilty of genocide in the case were the former dictator García Meza and his Minister of the Interior, Migration and Justice, Luis Arce Gómez. The definition of genocide in the Bolivian Penal Code can be considered very insufficient from the legal-technical point of view.



Nor has there been ratification of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, among other relevant international conventions on this subject still awaiting ratification.

Furthermore, Argentina should play a particularly active role in the adoption of the United Nations Draft Convention on the Protection of All Persons from Forced Disappearance, currently before the United Nations Commission on Human Rights. The draft convention considers that the systematic or widespread practice of the forced disappearance of persons constitutes a crime against humanity (Article 3 (1)).

An Argentine jurisprudence consistent with the principles described above, which in large part have been accepted by our courts during the last decade, would have to respond to the request made by Judge Baltasar Garzón Real (see note 10), according to the principle of *aut dedere aut judicare*. That is to say, faced with requests formulated by foreign courts against Argentine citizens who there are firm grounds for believing have committed crimes under international law, Argentine courts should act according to the rule expressed in above-mentioned maxim.

The expression *aut dedere aut judicare* is commonly used to refer to the alternative duty either to extradite or to prosecute, an obligation contained in multilateral treaties designed to suppress offences

under international law or of international concern (see note 1).

An example of this duty is found in article 7 of the 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft. The formula used in this article stipulates that a State in which the supposed perpetrator of such an offence is encountered has the duty to extradite him to the State having jurisdiction in the case (for example the State in which the aircraft is registered) or alternatively, if it does not extradite the suspect, the State must itself submit the case to the competent authorities for trial of the accused. Treaties that incorporate this formula are said under international law to have adopted the principle of *aut dedere aut judicare*.

Such is the case of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (article 7) and also the Inter-American Convention to Prevent and Punish Torture (article 14).

Concerning the status of the principle of *aut dedere aut judicare* in customary international law (*derecho de gentes*), it has been affirmed that this derives from the interest of all States in prosecuting the presumed perpetrators of crimes under international law or crimes of international concern. It is a duty of the international community as a whole, understood as a "*civitas maxima*" according to the expression of Hugo Grocio cited by Bassiouni.

In this sense the argument has broader or more restricted forms, depending on the offences which it addresses. It seems easier to find a consensus for affirming that the principle applies to the most serious violations of fundamental human rights, committed in a systematic or massive form and which can be qualified as crimes against humanity and in certain cases even as genocide.

In this connection it has been maintained that:

“The principle is more than just an ordinary norm of international law. It is a pre-condition for the effective suppression of universally condemned offenses. In large part, the rules which prohibit these offenses constitute norms of *jus cogens*: they are norms of the greatest importance for the public world order and cannot be allowed to remain unimplemented nor be modified by a subsequent treaty. States, for example, cannot by means of a treaty permit piracy against the merchant ships of another State, or conduct war by methods which violate the laws of war, such as giving quarter to the enemy. They cannot legitimately

agree that they will permit genocide or other crimes against humanity. For this reason, insofar as it constitutes a rule of general international law, the principle *aut dedere aut judicare* is also, therefore, a principle of *jus cogens*”<sup>66</sup>.

Certainly the trial of the individuals sought by Judge Garzón Real for crimes committed in Argentina should in principle be carried out in our country, in accordance with the principle by which “Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes” (Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity).<sup>67</sup>

This would require of course to consider absolutely null and void, as if they had never existed, and not merely repealed, the so-called laws of “Full Stop” and “Due Obedience” and to consider equally irrelevant vis-à-vis customary international law both the

66 M. Cherif Bassiouni and Edward M. Wise, *Aut Dedere Aut Judicare. The Duty to Extradite or Prosecute in International Law*, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1995, p. 24.

67 Resolution 3074 (XXVIII) of the United Nations General Assembly, of 3 December 1973.

pardons accorded and any statutory limitations which could be brought in opposition to criminal action or punishment.<sup>68</sup>

A large part of what has been said in this article and in the jurisprudential and doctrinal references which it cites support a decision of this kind.

In the event that the aforementioned individuals are not put on trial here, it would only be fitting, according to the principle of *aut dedere aut judicare*, to accede to the requests of the Spanish court, which is exercising universal jurisdiction in cases qualified as crimes against international law in accordance with the Spanish Penal Code.

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68 See Law Projects: I - Derogation and Nullity of the Laws known as "Full Stop" (Law 23.492) and "Due Obedience" (Law 23.521). Diana B. Conti - Juan Pablo Cafiero - Alfredo Bravo - Jorge Rivas - Alfredo Villalba - Adriana Puigros. II - Reestablishment of the Application of Fundamental Human Rights. Oraldo N. Britos. - Bernardo P. Quinzio. Marcelo Ferreira. Algunos Argumentos en Pro de la Nulidad de las Leyes de Punto Final y Obediencia Debida (Some Arguments in Favor of the Nullity of the Laws of Punto Final and Due Obedience). Opinion of Dr. Leopoldo Schiffrin. Eduardo Barcesat, ¿Son válidas estas leyes?(Are these laws valid?). Rodolfo Mattarollo, "Impunidad y Derecho Internacional (Impunity and International Law)", in Algunos Fundamentos de la Nulidad de las Leyes de Punto Final y Obediencia Debida, Asociación de Ex Detenidos Desaparecidos / Liga Argentina por los Derechos del Hombre, Buenos Aires, no date.

# *Augusto Pinochet Ugarte before the Court of Chilean Justice*

*Alejandro Artucio*<sup>1</sup>

The Pinochet case is proving to be of major importance not only for Chile, but also for the entire world. It is unfortunately not a usual occurrence for a dictator who has seriously violated human rights and committed horrendous crimes against the people he governed to be brought before a court of justice and condemned for perpetrating such crimes. In the rare instances in which this happens, criminal law – which should be equal for everyone – not only exercises an educative function but also has a dissuasive impact on potential future violators of human rights.

The International Commission of Jurists (ICJ) has monitored the situation of human rights in Chile with keen interest since the coup d'état of 11 September 1973, including the changes that occurred following the return to democracy in March 1990. On the occasion of the arrest of Augusto Pinochet in London and the subsequent extradition procedure requested by Spain, the ICJ published a report in English and Spanish entitled "Crimes Against Humanity – Pinochet Faces Justice". The report

reviewed the different legal positions adopted in the case by the lawyers, prosecutors and judges in Spain and the United Kingdom and underlined the important implications and jurisprudential precedents emerging from the Pinochet case.

## **Background to the case**

The military coup d'état of 11 September 1973, which brought a halt to Chilean democracy and took the life of the duly elected President, Dr. Salvador Allende, was planned and directed by General Augusto Pinochet Ugarte. The authoritarian and despotic scheme of power which the coup imposed, and which produced innumerable human rights violations, was maintained until March 1990, when the Chilean people succeeded in restoring democracy with the election of President Aylwin.

More recently, the action of a courageous and committed judge in Spain led in October 1998 to the arrest of Augusto Pinochet in London, following a formal

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request for extradition issued by Spain on the basis of international law. In March 2000 the Home Secretary of the United Kingdom decided that for “humanitarian grounds” (we would say the reasons were political) Pinochet should not be extradited to Spain but rather released from preventive custody. He left for Chile the same day in a waiting aircraft supplied by the Chilean government.

In our opinion, everything that occurred in London during the 16 months of Pinochet’s detention there permitted the opening of the courts in Chile to consideration of the charges against him. Without the events in London, the subsequent removal of Pinochet’s parliamentary immunity, pronounced by the Supreme Court of Chile, might not have taken place.

The proceedings against Pinochet were initiated in Chile as the result of eight complaints (legal actions) brought against him, requesting his prosecution in a case already filed before the courts for criminal acts committed during the infamous “Caravan of Death”, a terrible event that had cost the lives of 72 victims in October 1973 at the hands of a Chilean Army commando. In a suit filed with the Examining Magistrate, Judge Juan Guzmán Tapia, who had started legal proceedings against six military officers in connection with the case, the plaintiffs requested that the indictments be submitted to the Court of Appeals in Santiago, deeming that sufficient indica-

tions and evidence existed pointing to the participation of the Senator-for-Life Augusto Pinochet Ugarte in the commission of the crimes, to justify removing his parliamentary immunity and bringing him to trial. Thus the case passed to the Court of Appeals in Santiago, which finally issued its ruling on June 5, 2000.

In its decision, the Court of Appeals ruled, by a vote of 13 judges to 9, that Pinochet’s parliamentary immunity should be lifted so that he could be brought before the Examining Magistrate in the case in order for the latter to investigate the facts and possibly initiate proceedings against him. The ruling had a major political impact in Chile. The defence lawyers for Pinochet appealed the decision on June 9 and the case passed to the highest judicial body in Chile, the Supreme Court of Justice, for consideration

In July 2000 a series of hearings were held before the Supreme Court in Santiago, for the purpose of deciding whether the parliamentary immunity which protected Augusto Pinochet in his capacity as Senator-for-Life should be lifted in order to allow criminal proceedings to be initiated against him. The author of the present article attended these hearings as an international observer.

The proceedings undertaken against Mr. Pinochet constituted an exceptional opportunity for revealing whether the country would opt for impunity or instead choose justice.

In the presence of 20 of the 21 Magistrates of the Supreme Court of Justice, the defence team for Pinochet and the eight lawyers representing the plaintiffs presented their arguments and conclusions. Counted among the plaintiffs – the family members of victims in the case – was the Defence Counsel of the State who, in representing the State of Chile as a party wronged by the offences committed, also asked that the parliamentary immunity of the Senator-for-Life be lifted and criminal proceedings be initiated against him.

### **What was the Caravan of Death?**

As noted above, it was these events that led to the prosecution of Pinochet. The “Caravan” involved a secret mission officially entrusted to a group of military officers made up of General Sergio Arellano Stark; Colonels Sergio Arredondo González, Marcelo Moren Brito and Patricio Díaz Araneda; Brigadier Pedro Espinoza Bravo; and Captain Armando Fernández Laríos. General Sergio Arellano Stark had received an order directly from the Commander-in-Chief of the Army and President of the Governing Junta – the latter a title Pinochet had usurped at the time of the coup d’état in September 1973 – to travel with a commando to the south and north of the country and, acting as the President’s “Official Representative”, invested with all of the powers held by General Pinochet, “to

carry out tasks of institutional co-ordination, internal government and judicial process”. Among the latter was included review and acceleration of the court-martial proceedings against detained political opponents.

This “co-ordination” and “acceleration of processes” carried out by the mission in October 1978 left 72 victims in its wake as a direct result of actions by the commando. Of these, 53 were executed illegally and in secret, without benefit of trial, and another 19 disappeared, with the authorities failing to this day to provide any information concerning their whereabouts or about what happened to them. Of the 19 disappeared persons, three were removed by the mission from the public jail at Cauquenes on October 4<sup>th</sup>; 3 others were taken from the jail at Copiapó between the 16<sup>th</sup> and 17<sup>th</sup> of October; and 13 were spirited from the public jail at Calama on October 19, 1973. That is to say, from official places of detention where they had been incarcerated on the orders of the perpetrators of the coup d’état.

The cases of the 19 victims were described by the presiding judge, Juan Guzmán Tapia, as “repeated qualified abductions” according to article 141, paragraphs 1 and 4 of the Penal Code, in the act of indictment issued against the six military officers who made up the official cortège. Despite an appeal lodged by the lawyers for the defence, the Court

of Appeals in Santiago upheld this decision, retaining the qualification used by the presiding judge. Challenged again via a writ of *habeas corpus*, the act of indictment was confirmed by the Supreme Court of Justice.

### **Why was the preliminary hearing on the lifting of immunity necessary?**

During the legal proceedings on the indictment in the trial against General Arellano Stark and the others, a number of elements emerged which pointed very clearly to the central participation of Pinochet in the crimes that were being investigated. But in his capacity as Senator-for-Life, Mr. Pinochet was protected by the immunity his parliamentary status afforded him, so that in order to introduce criminal proceedings against him the immunity had to be removed by suspending his status as Senator.

Parliamentary immunity is established in article 58, paragraph 2 of the Political Constitution of Chile, which states:

*No Deputy or Senator as of the date of his election or appointment or from the time of his incorporation into the respective Chamber may be tried or deprived of his freedom, except in the case of a flagrant crime, unless the Court of Appeals of the respective jurisdiction, in full court,*

*has previously authorised the accusation, declaring that the process of law has been accepted. This decision may be appealed before the Supreme Court.*

The immunity enjoyed by members of parliament – and thus by Pinochet in his capacity as Senator – implies that such persons cannot be tried by the courts or deprived of their freedom without the respective Court of Appeals – in this case the Court of Appeals in Santiago – having previously authorised the accusation. In other words, without first lifting the immunity which protects the person. Parliamentary immunity is a guarantee which the Constitution establishes in consideration of the function which members of parliament fulfil, so that they can carry out their high office with independence and protected from undue pressures. Such immunity is not a personal privilege granted to the individual who performs the function of legislator, but rather a guarantee intended to protect the function of legislator itself. Naturally this immunity does not signify that the bearer cannot be held responsible before the law for any crimes which he may commit; and this is precisely the purpose of the preliminary hearing concerning lifting of the immunity.

This constitutional norm is complemented by others from the Code of Criminal Procedure (arts. 612 and 616) which govern the procedures involved. In cases not involving a flagrant offence, the

Court of Appeals, whether at the request of an individual party or at the initiative of the magistrate charged with the case, can open the way for an accusation to be brought against the member of parliament, when there exist "facts that could suffice for ordering the detention of the accused".

The preliminary hearing on the lifting of immunity comes to a close with the determination of whether or not well-founded suspicions exist concerning the commission of an offence by the Member of Parliament. Other aspects, such as full proof of the acts of which the person is accused, possible grounds for acquittal, the degree of responsibility of the defendant, etc. , are determined in the criminal trial, properly speaking, and not in the preliminary hearing on the lifting of immunity.

### **Decision adopted by the Supreme Court**

The highest judicial body issued its decision on 8 August 2000, confirming the ruling of the Court of Appeals in Santiago and thus reaffirming the removal of Augusto Pinochet's immunity. This decision was adopted by a vote of 14 magistrates to 6. At the same time, and by the same number of votes, the Court rejected the nullity of the proceedings asked for by Pinochet's defence. Thus everything was ready for the eventuality of the presiding judge opening a

criminal case against Pinochet. Chile had opted for justice.

### **A political verdict to be rendered by the Chamber of Deputies and the Senate. The Caravan of Death had been "administrative acts".**

Mr. Pinochet's defence team maintained that in accordance with the Political Constitution, since the case involved the person who was Head of State at the time of the Caravan of Death, and because the acts of which he was accused had constituted "administrative acts", it was not via a preliminary court hearing that Mr. Pinochet's immunity could be lifted but only through accusation by the Chamber of Deputies and by a condemnatory decision of the Senate.

The argument was refuted by the lawyers representing the plaintiffs, who reminded the court that the Senate did not exist in September 1973, having been dissolved by a decree law following the military coup. They noted that subsequently a transitory provision of the Constitution of 1980 (No. 19) had established that constitutional accusations concerning acts committed by the military government could only be raised in relation to acts or omissions committed after March 1990 (date of the restoration of democracy). According to the subsequent decision of the Judges "it is not legitimate to invoke the absence of a political verdict against him in order to



extract him from the action of the courts" (Judgement, par. 48).

With respect to the qualification of the events in question as "administrative acts", in our opinion it is completely inadmissible to accept that assassinating defenceless prisoners, making them disappear definitively or torturing them, as well as ordering, organizing, authorising or tolerating the commission of any of these acts by one's subordinates, can be considered official functions of the State and therefore as "administrative acts or tasks" The acts mentioned are of such magnitude and gravity that they not only represent an attack on the victim and his or her family members but also offend and assail the conscience of humanity as whole, and for this reason are considered crimes against humanity. Such clearly criminal actions can never be included among the functions of a Head of State, nor of any state functionary, in order to be protected by immunity.

International law has ended up establishing with clarity that in cases of crimes against humanity, the official capacity of a person, be it a Head of State or Government, a member of Government or Parliament, an elected representative or a government official, will not serve to exempt the person from criminal responsibility nor constitute a reason for reducing the punishment. This has emerged from the Charter of the International Military Tribunal at Nuremberg, 1945; the Charter of the

International Military Tribunal at Tokyo, 1946; the Convention on the Prevention and Punishment of the Crime of Genocide, 1948.; the Statute of the International Criminal Tribunal for the former Yugoslavia, 1993; the Statute of the International Criminal Tribunal for Rwanda, 1994; the Statute of the International Criminal Court, 1998.

**The health of the person whose immunity was asked to be lifted. His "defencelessness".**

This argument was central in the plea by Pinochet's lawyers. Its objective was clear: to avoid the lifting of immunity and a criminal trial.

The defence maintained that Pinochet's state of health did not allow him to adequately defend himself from the accusations made against him; that he was not in a condition physically to discuss his defence with his lawyers, to give them instructions or to be informed of what was occurring in the proceedings. His lawyers stated that they had never spoken of "insanity or dementia" because this was not what was ailing their client.

The defence invoked international law, mentioning the International Covenant on Civil and Political Rights (1966) and the American Convention on Human Rights (1969), but only to

maintain that the "right to due process" and, as part of this, the right of the accused to defend himself personally, were not being respected. Rivadeneira reminded the Court that international treaties on human rights were incorporated in Chilean legislation by express Constitutional provision, and that these took precedence over the internal legislation.

In our opinion this invocation of international human rights law was very positive, although erroneous in this case as well as erroneous in the grounds on which it was based.

Various of the lawyers for the accusation referred to the meetings that Pinochet had been holding and the persons who had visited him lately, citing the reports that appeared in the Chilean press every few days indicating that Mr. Pinochet had met with his former comrades-in-arms; that he had received other Senators-for-Life; that he is visited regularly by his team of defence lawyers; that he himself reads the press. In short, that he must be fully informed about the trials that have been instituted against him and about the acts of which he has been accused. They further reminded the Court that he had been considered capable of occupying a seat in the Senate of the Republic and participating from there in decision-making effecting the entire population.

In its judgement, the Supreme Court limited itself to rejecting the arguments

of the defence by way of referring to the Code of Criminal Procedure (article 349). This text stipulates that the presiding judge must order a medical examination of the accused when the latter is charged with a crime which involves serious penalties and "when [the person] is a deaf-mute or more than seventy years of age" (in the latter case whatever the penalty associated with the crime). These medical examinations are to be undertaken by the Institute of Forensic Medicine.

In our opinion it is clear that Pinochet has access to numerous adequate means by which to ensure his legal defence and that he is assisted by a professional team of six well-known and very qualified lawyers. His situation is radically different than that of a "defenceless person"; very few people in Chile could count on such means for defending themselves against a criminal indictment. Furthermore, in gathering elements of proof for his defence, he has been able to count on the total and extensive co-operation of the high command of the Armed Forces.

In any case, it should be reiterated that under Chilean law problems of physical health do not allow a person to avoid a criminal trial. The law stipulates that only in cases of mental disturbance (insanity or dementia are the terms used) can a criminal action be suspended.

## **The penal classification of the acts of which he is accused**

### *Homicide and forced disappearance*

It can be stated that this was both the central and the most complex aspect of the legal analysis in the preliminary hearing.

The argument of the defence was that apart from there being no proof of Pinochet's participation in the crimes committed by the members of the Caravan of Death, what was involved in any case was murder (of the 72 victims) and not abductions. It did not deny that the crimes had been committed, it simply disputed the legal qualification of the acts involved.

This argumentation was based in two poles:

- a) The legal figure of homicide is a crime of instantaneous execution, and as such the facts of the case are covered by Amnesty Decree-Law No. 2191 of 19 April 1978, by which the military government issued a broad amnesty for all perpetrators of human rights violations committed between 11 September 1973 and March 10 1978. Among these were included, homicide, torture and deprivation of liberty.
- b) At any rate – affirmed the defence – given that the events occurred in October 1973 and that homicide is a crime of instantaneous execution,

these acts are covered by the statute of limitations on penal action. Even applying the longest term of limitation provided for in Chilean law, which is 15 years, the acts involved would have been prescribed years ago.

The defence argued that the 72 persons removed from the jails where they were detained had been executed and had died. The remains of 53 of these persons had been located. This was not the case for the 19 remaining victims (3 in Cauquenes, 3 in Copiapó, and 13 in Calama). But this did not imply that this was a case of qualified abduction as classified by the examining magistrate. Murder can be established by various means of proof even in the absence of the body of the victim (the example was cited of a murderer who disposes of the body of his victim by burning it or destroying it with acid; or the case of a bomb explosion on an aircraft, which then falls into the sea). On the basis of these arguments, the defence concluded that the immunity could not be removed for crimes which had been amnestied or were subject to statutory limitations.

Put more crudely, it is as if the defence were arguing: our client Mr. Pinochet is not a perpetrator of disappearances but only a murderer.

The lawyers for the plaintiffs supported the criminal classification made by the presiding judge and confirmed by the Court of Appeals, whereby in accordance

with Chilean criminal law the acts in question constituted repeated "qualified abductions" (article 121 of the Penal Code, an offence which is aggravated when the abduction is prolonged for more than 90 days). And that such acts constitute what in international law is termed "forced disappearance of persons".

The difference between the thesis of the defence and that of the accusation is radical. By qualifying abduction (or forced disappearance) as a crime of permanent or continuous execution, it is considered that the offence continues being committed as long as the fate or whereabouts of the disappeared person has not been established with certainty. Since in the 19 cases of disappearance perpetrated by the members of the Caravan of Death the authorities never clarified the fate or whereabouts of the victims, and these were never established by other means, neither amnesties nor statutory limitations are applicable to the crimes.

### **International human rights law**

Forced disappearance has been defined in international law as the deprivation of the freedom of a person, committed by agents of the State or by persons or groups acting with the authorisation, support or acquiescence of the State, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give infor-

mation on the fate or whereabouts of the disappeared person.

As this phenomenon involves the commission of aberrant and inhuman crimes – any one of which violates a large number of human rights – it has been firmly incorporated in international law with the purpose of prohibiting and combating such practices. Furthermore, under international law, the systematic or massive practice by a government of disappearance as a method of eliminating its opponents constitutes a *crime against humanity* (Resolution AG/Res. 666 (XVIII-0/83) of 18 November 1983 by the General Assembly of the Organization of American States; Preamble of the Declaration on the Protection of All Persons from Enforced Disappearances – United Nations, 1992; Preamble of the Inter-American Convention on the Forced Disappearance of Persons – OAS, 1994; Article 7, letter i) of the Rome Statute of the International Criminal Court, 1998).

Moreover, concerning a point of particular interest in this case, Article 17 of the UN Declaration on the Protection of All Persons from Enforced Disappearances and article III of the OAS Inter-American Convention on the Forced Disappearance of Persons express the same concept, using almost identical wording: "This offence shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined."

Similarly, with regard to amnesties and statutory limitations, both international normative texts contain clear and precise provisions. The UN Declaration on the Protection of All Persons from Enforced Disappearances establishes:

*Article 18 - 1. Persons who have or are alleged to have committed [acts of forced disappearance], shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction...*

For its part, the Inter-American Convention on the Forced Disappearance of Persons – of the OAS – stipulates:

*Article VII - Criminal prosecution for the forced disappearance of persons and the penalty judicially imposed on its perpetrator shall not be subject to statutes of limitations.*

It will be understood therefore that in the above-mentioned proceedings it was essential to determine whether the horrendous crimes committed by the members of the Caravan of Death against defenceless detainees constituted abductions or homicides. If the criminal classification is that of abduction – as international law has considered in similar cases – the guilty parties are not entitled to benefit from amnesties or statutory limitations. Moreover, as noted by the lawyers for the plaintiffs, the refusal of the authorities to recognize the depriva-

tion of freedom and their concealing of the destiny and whereabouts of the disappeared persons for 27 years, during which family members of the victims requested such information thousands of times, does not allow establishing with certainty on what date the detainees died – assuming they are dead – for example before or after the Amnesty Decree Law of 1978, nor from what date the statute of limitations should be applied.

### **Amnesties and statutory limitations are not applicable in cases of “grave breaches” of international law**

Several of the lawyers for the plaintiffs maintained the applicability of the Geneva Conventions of August 1949 on international humanitarian law. On the basis of these conventions they argued that neither amnesties nor statutory limitations were applicable in this case, since in ratifying these conventions the State of Chile had undertaken before the international community and before its own people: a) to investigate cases of torture and killing of prisoners; b) to prosecute the guilty parties, applying where appropriate penalties adequate to the gravity of the offence; and c) to make reparations for the damage caused to the victims and their families.

As mentioned above, in 1978 the military government had approved Decree Law 2191 which accorded a broad amnesty to all human rights violators

for crimes committed between 11 September 1973 and 10 March 1978.

The organized community of nations appropriately qualified this law as an "auto-amnesty", considering it a unilateral act of the Chilean military regime in violation of international human rights law. Statements to this effect were issued by the Human Rights Committee of the United Nations, the Inter-American Commission on Human Rights and the Commission on Human Rights of the United Nations.

Indeed, the international human rights law embodied in treaties imposes limitations on the ability of States to concede amnesties or any other kind of clemency measures if these would imply renouncing the duty to investigate and judge certain crimes, including several related to the case in question: homicide, abduction and torture .

The lawyers for the plaintiffs reminded the Court that Decree Law No. 5 of 12 September 1973, in interpreting article 418 of the Code of Military Justice had declared:

*"the state of siege decreed as the result of internal disorder, in the circumstances which the country is currently undergoing, should be understood as a 'state or time of war'"*

In the opinion of the author of this article, the invocation of norms relating

to international humanitarian law was perfectly legitimate given that Chile was living in a "state or time of war" declared by the authorities of the period, who considered themselves faced with an "armed internal conflict". And said norms constitute Chilean law since the State of Chile freely and legitimately ratified them in October 1950. This is the case of the (III) Geneva Convention relative to the Treatment of Prisoners and War and the (IV) Geneva Convention relative to the Protection of Civilian Persons in Time of War, both of August 1949.

These two Conventions established for the first time in international law the authority and obligation of States to exercise the so-called "*universal jurisdiction*". Subsequently other multilateral treaties also included this faculty, such as the International Covenant on Civil and Political Rights (1966); the American Convention on Human Rights (1969); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); the Inter-American Convention to Prevent and Punish Torture (1985). Chile ratified or adhered to all of these texts.

Universal jurisdiction is the application of the principle *aut dedere aut judicare* (*extradite or judge*). States undertake to exercise jurisdiction before their national courts over persons presumed guilty of having committed war crimes (or torture) who are found within their

territory, or if they prefer, or cannot exercise this duty in accordance with their internal legislation, to extradite the person to the State rightfully demanding him. A government cannot exempt itself from the aforementioned obligations by passing a law or issuing a decree. In either case this would constitute a unilateral act on the part of the State, which would not erase the obligations it had assumed. This implies that any clemency measure, whether in the form of an amnesty or some other substitute, could only be adopted once the obligations cited above had been fulfilled and thus could only be for the purpose of avoiding completion of a sentence already imposed.

The doctrine has likewise frequently been affirmed that the obligation of States to “*respect and ensure respect of*” the humanitarian law contained in Article 1 of the text common to the four Geneva Conventions does not derive only from the said Conventions of 1949, but also from the pre-existing general principles of humanitarian law, of which the Conventions themselves constitute a written expression. Thus these principles also form part of customary international law and are applicable *erga omnes*.

The III and IV Conventions contain almost identical articles dealing with these aspects. For instance, article 3 states:

*In the case of armed conflict not of an international character occur-*

*ring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum [...]*

*[the prohibition] at any time and in any place whatsoever with respect to the above-mentioned persons:*

a) *Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture [...];*

d) *[...]executions without previous judgement [...]*

And article 29:

*[...]Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts [...]*

It should also not be forgotten that the “executions without previous judgement” of prisoners or detainees carried out in October 1973 constituted what international human rights law has termed “extra-legal executions” (or summary or arbitrary executions). This is what occurred with the 53 detainees removed from official jails and executed forthwith, without any form of trial. Chilean criminal law classifies this offence as “*repeated homicide, with particular aggravation*”. Some of the plaintiffs demanded that Pinochet and the military officers who made up the Caravan of

Death should be judged for the other 53 cases of murder above and beyond the 19 persons abducted.

### **What did the Supreme Court decide regarding the criminal qualification and a possible application of the amnesty or statutory limitations?**

For the Supreme Court, the provisional classification of "qualified abductions", made by the examining magistrate, is correct, even if this is to be decided definitively during the trial as such. The Court affirmed that "both the offence of illegal detention as well as that of abduction are permanent, so that their consummation extends throughout the entire time that the deprivation of liberty is maintained". And even if it can be generally assumed that the 19 victims are dead, given the amount of time that has transpired, "it has not been proven through any legal ruling that they were executed immediately after having been removed illegally...", nor that "their death occurred prior to the date on which Decree Law No. 2191 concerning amnesty was issued".

With regard to statutory limitation of the legal action due to the passage of time, its application would also not be automatic. The responsibility of the accused must first be confirmed (art. 413 of the Code of Criminal Procedure) and examination made of whether the

prescription concerning him had been interrupted, for example through the commission of new offences (Judgement, par. 60).

At any rate, the Court considered that even the possible grounds for extinction of criminal responsibility should be decided during the course of the trial itself and not in the preliminary hearing on lifting the parliamentary immunity.

### **The presumed participation of Augusto Pinochet in the events being judged.**

For lifting the immunity of a Member of Parliament and instigating legal proceedings against him, Chilean law only requires a "well-founded suspicion" that the person has committed a crime. Now, the form of Pinochet's participation in the crimes committed under the Caravan of Death is what Chilean law defines as that of a "mediate author" (article 15, paragraph 2 of the Penal Code). Various of the plaintiffs also brought suit against him as "author of an illicit association" together with General Arellano and others in the execution of a criminal plan.

In describing the activities of the so-called Caravan of Death, we indicated that it involved a secret mission officially entrusted to a group of military officers by the Commander-in Chief of the Army and President of the Governing Junta, which consisted of travelling with a



commando to the South and North of the Country, acting as the President's "Official Representative" and in this capacity, and exercising all of the powers held by General Pinochet, "carrying out tasks of institutional co-ordination, internal government and judicial process". A form of "co-ordination" and "acceleration of processes" that as a direct confidence left 72 victims in its wake.

Rejecting the arguments of the defence, the Court stated that what was certain and proved was the fact that the victims had been "legitimately detained" under the custody of the military authorities and in official places of detention, and were removed from these sites by a military group.

A train of persons charged with the tasks described above, which included no lawyer, no expert in law, no military justice official, not even anyone very familiar with the law. Its members did include a select combat group with experience in repression gathered since the first days of the coup d'état, travelling heavily armed and in combat gear and moving from site to site by military helicopter. A curious composition and mode of operations for a group supposedly charged with the mission of improving judicial processes.

The participation of Pinochet as the instigating or mediate author of these crimes is unquestionable. The instigator is a person who dominates the will of another. One of the lawyers for the plaintiffs cited historical precedents such as

the case of Adolf Eichmann, judged in Israel for war crimes and crimes against humanity committed by the Nazi regime, or various judgements of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. In the internal sphere, he cited jurisprudence by the Supreme Court in the case against General Contreras and Brigadier Pedro Espinoza Bravo for the assassination in Washington of Orlando Letelier.

In its ruling, the Supreme Court stated it was convinced that "well-founded suspicions existed concerning the participation of the Senator-for-Life" in the crimes that were being judged. These suspicions were based in a series of proofs and clues. For example the declared objective of the mission in no way corresponded with its terrible results; the Court affirmed that the caravan "had hidden objectives very different from those stated in the instrument that specified its orders". That if Pinochet as Commander-in-Chief had not been in agreement with the actions of the caravan, he would have taken disciplinary measures against its members; instead of that, he promoted them in their military careers. In contrast, the officers at the sites visited who questioned the actions of the caravan were later sent into retirement, i.e. discharged from service.

## Conclusions

The family members of the victims of the so-called Caravan of Death – executed arbitrarily and made to disappear – have been calling for a justice that has never materialized over a period of 27 years.

The efforts of various lawyers and human rights organizations, joined with the legal proceedings undertaken by the Spanish judge Baltasar Garzon, which led to the arrest of Augusto Pinochet in London in October 1998 following a request by Spain for his extradition, created the conditions that allowed a criminal action to be initiated in Chile, which Magistrate Juan Guzmán Tapia is now taking forward, and the subsequent rulings by the Court of Appeals in Santiago and the Supreme Court of Justice. All of these developments have served to mark a triumph of justice.

The acts of which Pinochet is accused in this case constitute crimes against humanity and grave breaches of humanitarian law, and as such must be investigated and punished, both in the interests of justice but also in order to provide a form of reparation to the families of the victims. The investigation should lead not only to establishing responsibility but also to determining what happened to the disappeared and locating their

remains.

The legal proceedings undertaken so far represent a significant advance and mean that democratic Chile has clearly opted for justice over impunity. It has taken 27 years, including 10 years since the reestablishment of democracy, to arrive at a point where the hope can be entertained of achieving justice.

This opens the way to a future in which the cycle of impunity can be definitively and irrevocably broken, so that major violators of human rights and international humanitarian law will no longer be protected, whatever the public functions or offices they may have held.

Only the future can tell if the goals will be reached that are sighted today. The presiding judge will take the case in hand, will investigate the facts and determine criminal responsibilities. It is good to remember that in addition to this case concerning the Caravan of Death, 180 other criminal complaints against Pinochet have been presented before the courts in Chile and before other judges. What is achieved in these cases will allow us to conclude whether the objectives have been attained that are currently in sight and which have cost the Chilean people so much effort to secure.

Montevideo, December 2000



# *Background to the Elaboration of the Draft International Convention for the Protection of All Persons from Forced Disappearance*

Wilder Tayler<sup>1</sup>

This article summarizes some of the initiatives undertaken by the international community to define the phenomenon of the forced disappearance of persons and to elaborate international norms to prevent and combat this serious violation of human rights.

The first international reactions to the phenomenon of "disappearances" date from the middle of the 1970s, probably as the result of the work carried out by Latin American exiles in Europe and North America who had escaped during that period from the military dictatorships in the region. The protests voiced by the associations of the family members of victims in their struggle to establish the whereabouts of their loved ones were eventually to have repercussions far beyond Latin America. But the regional origins of the first organized efforts to combat forced disappearances should not be misleading: forced disappearance has been and continues to be a global phenomenon; the last 15 years have also seen thousands of cases of "disappearances" in Asia, Africa, Europe and the Middle East. In its annual report to the 56th ses-

sion of the UN Commission on Human Rights, the Working Group on Enforced or Involuntary Disappearances indicated that it had received information on 300 new cases that had taken place in 23 countries. Nineteen of these 23 countries were located outside of Latin America. During the previous period the Working Group had transmitted 1,015 new cases to 29 governments in all regions of the world.

The **Inter-American Commission on Human Rights** (IACHR) began denouncing the phenomenon of "disappearances" in 1974 in its regular reports to the **General Assembly of the Organization of American States** (OAS), both in general terms and in reference to specific cases which had occurred in Chile. In 1977 the Commission voiced the following in its report to the General Assembly concerning the specific character of this form of human rights violation: "*This procedure is cruel and inhuman. As experience shows, a 'disappearance' not only constitutes an arbitrary deprivation of freedom but also a serious danger to the personal integrity and*

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safety and to even the very life of the victim. It leaves the victim totally defenseless, violating the rights to a fair trial, to protection against arbitrary arrest, and to due process. It is, moreover, a true form of torture for the victim's family and friends, because of the uncertainty they experience as to the fate of the victim and because they feel powerless to provide legal, moral and material assistance." The Commission explained that "disappearance" is "furthermore, a demonstration of the government's inability to maintain public order and state security by legally authorized means and of its defiant attitude toward national and international agencies engaged in the protection of human rights." In 1979 the Commission visited Argentina where it confirmed the systematic commission of forced disappearances by the successive military juntas.

Public expressions of concern on the part of **United Nations** bodies regarding the practice of forced disappearance date from 1978, with a declaration of the General Assembly urging governments to devote resources to the search for "disappeared persons". In 1979 the **General Assembly** charged the **Commission on Human Rights** with the task of studying the phenomenon and formulating appropriate recommendations. Also in 1979 the then **Subcommission on the Prevention of Discrimination and Protection of Minorities** suggested that a group of experts be established to obtain information concerning specific cases of "disappearance" and to maintain contact

with family members and governments. Even more important, the Subcommittee also recommended the elaboration of some kind of international recourse based on the concept of *habeas corpus*. The creation of the **Working Group on Enforced or Involuntary Disappearances** by the Commission on Human Rights in 1980 constituted an important advance in that it established an instrument for intervening in the face of concrete cases or situations of forced disappearance. During the 1980s the Working Group also established principles and conceptual parameters to facilitate the drafting of new texts. In particular the Group made valuable contributions with regard to the need to combat the impunity enjoyed by the perpetrators of "disappearances" and to establish mechanisms of prevention in this area. Toward the middle of the decade the Group suggested that the Subcommittee on the Prevention of Discrimination and Protection of Minorities would be the appropriate body to study the need for preparing an international instrument to combat "disappearances" within the framework of the United Nations.

The **Human Rights Committee** of the International Covenant on Civil and Political Rights began adopting important recommendations concerning cases of "disappearance" at the beginning of the 1980s. The Committee called on State Parties to adopt measures to avoid repetition of cases of "disappearance", to

carry out appropriate investigations and bring the perpetrators of forced disappearance to trial, to inform the families of "disappeared persons" concerning the fate of the victims, and to indemnify the victims or, failing them, their family members.

At the beginning of the 1980s a process was also initiated to elaborate international legal norms to define, prevent and punish forced disappearance. This process, begun more than 20 years ago and yet to be completed, was plagued with difficulties of both a conceptual and political character, to such a point that the very concept of forced disappearance remained elusive for many years. It is not surprising that this was the case given the fact that forced disappearance is a complex phenomenon, conceived precisely to evade the legal framework of human rights protection. To capture its essence in a single concept in order to include it in a legal corpus aimed at its suppression is not an easy task.

For example, in what constituted the first international effort to promote an international convention against forced disappearance, the **Human Rights Institute of the Paris Bar Association** convened a colloquium in 1981 from which the following definition emerged: *"the expression forced or involuntary disappearance applies to any action or deed capable of undermining the physical, psychological or moral integrity or security of any person"*. The extensive breadth of

this description illustrates the difficulties involved at the time in assimilating and translating into legal terminology the horror of the crime of forced disappearance. The human dimension of this horror however was masterfully rendered in the introduction to the final report of the Paris colloquium (*Le Refus de l'oubli*) by the Argentine writer Julio Cortazar. The originality of this project was that it contained a provision by which State Parties undertook to presume that any person considered "disappeared" was still alive until all of the methods foreseen in the Convention for localizing such persons had been exhausted.

Following the Paris colloquium and until 1987, the impetus for the elaboration of norms specifically dealing with forced disappearances shifted to Latin America, generating intense activity at the regional NGO level and in the inter-American system. Nevertheless, the principle objective of these initiatives continued to be that of elaborating instruments of universal protection.

In 1982 the **Latin American Federation of Associations for Relatives of the Detained-Disappeared (FEDEFAM)** adopted a draft Convention at its annual congress in Peru. This draft project was inspired to a large extent by the model offered in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 and foresaw the future existence of an international criminal court that would

be able to judge specific cases of "disappearance". The court would be endowed with the power to invalidate national sentences relating to cases of forced disappearance if such sentences violated basic principles of due process or contravened fundamental legal principles.

In 1986, a draft declaration was adopted by the First Colloquium on Forced Disappearances in Colombia convened by the **José Alvear Restrepo Lawyers Collective** of Bogotá. The draft declaration was transmitted to the United Nations Working Group on Enforced and Involuntary Disappearances and to the Commission on Human Rights, since the drafters of the text already anticipated the need for an international convention as a more effective instrument for combating "disappearances", without however discounting the benefits that could be offered by regional initiatives. This draft declaration suggested in its first article the constituent elements of a definition of forced disappearance.

In 1988, **FEDEFAM** and the **Grupo de Iniciativa** (a consortium of Argentine NGOs) convened an international meeting in Buenos Aires from which a new draft Convention emerged. This text assembled and consolidated the various conceptual advances achieved until then, while the international meeting attempted to define new strategies to promote the elaboration of the convention within the framework of official international bodies.

All of these efforts were accompanied by an intense lobbying effort, both on the part of the organizations that had launched the initiatives as well as by certain international human rights NGOs. Toward the end of the decade these efforts began to yield results. In 1987 the General Assembly of the Organization of American States asked the Inter-American Commission on Human Rights (IACHR) to elaborate a draft Convention. In 1988 the IACHR presented its text, probably one of the most complete that has been prepared until now within an international organization.

Some of the inspiring concepts contained in this text stem from the precursory judgments of the **Inter-American Court of Human Rights** in the **Velázquez Rodríguez** and **Godínez Cruz** cases. Among other things the Court addressed questions related to proof and the legal consequences of the systematic practice of forced disappearance, but mainly it acted to delineate the responsibility of states faced with occurrences of this type of human rights violation.

At the same time, the then Subcommittee on Prevention of Discrimination and Protection of Minorities, through its Working Group on detention, initiated a debate (which was extended until 1989) concerning a draft Declaration presented by the French expert Louis Joinet. Previously, in 1984, the Subcommittee had prepared

a preliminary draft of an international Declaration against the unrecognized detention of persons, but this text received no follow-up on the part of other, higher-level bodies of the United Nations system; and in 1986 the General Assembly had recognized the utility of pursuing efforts already underway to single out those aspects requiring further international measures to develop the international legal framework of human rights protection.

While the draft **OAS** Convention stagnated until 1992 in the Organization's **Committee on Juridical and Political Affairs** (in the process losing many of its best elements), the **International Commission of Jurists (ICJ)** in Geneva led an effort by various NGOs to promote the new project of the Subcommittee. The ICJ convened a seminar involving experts from the Subcommittee, members of the Working Group on Enforced or Involuntary Disappearances, representatives of the families of "disappeared persons", and other NGOs for the purpose of improving the draft text. The revised version that emerged from the deliberations was introduced into the Subcommittee by the expert **Miguel Alfonso Martínez**, was adopted by that body and was then submitted to the Commission and to higher-level bodies of the United Nations for final adoption. The Commission established an **open intersessional Working Group** to continue elaborating the document. The

Group met in session in November 1999 and was the scene of various compromises and transactions between the participants which, while definitely weakening the text, nevertheless allowed the Governments to reach an important degree of consensus concerning the contents of the Declaration. The Declaration was finally adopted in 1992 by the United Nations General Assembly.

The process of adoption of the Declaration in the United Nations helped to extract the draft OAS Convention from the lethargy in which it was mired, although the text itself had been significantly weakened by the Organization's Committee on Juridical and Political Affairs. The new text for example allowed due obedience to a higher-ranking superior to be cited as grounds for acquittal in the defense of persons responsible for cases of forced disappearance. After much debate the political organs of the OAS agreed to some sort of intervention by a coalition of NGOs, which, together with the renewed efforts of a group of member States, led to a revitalization of the process, culminating in the adoption of the Convention in Belén de Pará, Brazil in 1994. Some of the problems affecting the text could not be resolved however, in particular the weakness of the Convention's protection mechanisms.

Precisely as the result of such problems, **Amnesty International (AI)** initiated a process of comparative



analysis of all the texts mentioned above (as well as some intermediary texts), with a view to facilitating the drafting of a United Nations convention, should such an initiative take shape among UN bodies. A seminar convened by AI and ICJ in June 1996 brought together a group of experts to work on the preliminary draft text that Mr. Joinet had presented to the Subcommission. Another meeting took place in November 1997 after the Working Group on the Administration of Justice of the Subcommission had already begun discussions aimed at preparing a draft international convention. In 1998 the Subcommission transmitted the draft convention to the Commission on Human Rights with a request for its examination, and in 1999 the Commission asked the UN Secretary General to solicit the views of States, international organizations and NGOs concerning the text. The Subcommission has also asked the Commission to give priority treatment to its study of the project and to establish an intersessional group for its consideration.

Three issues serve to illustrate the changes that can take place during processes as long as this one for elaborating international norms: the definition of forced disappearance, its character as a crime against humanity and the type of mechanism established to combat "disappearances".

***Crime against humanity.*** Practically all of the texts mentioned above charac-

terized forced disappearance as a crime against humanity. For example the Paris project in 1981 affirmed that "*the practice of forced or involuntary disappearance constitutes a crime against humanity*", and a year later the proposed text by FEDEFAM announced that "*the forced disappearance of persons constitutes a crime under international law and a crime against humanity*". The draft declaration elaborated in Bogotá stated that "*forced or involuntary disappearances of persons constitute crimes against humanity, which States must undertake to prevent and punish without exceptions of any kind.*" The texts also contain provisions listing the juridical consequences stemming from such declarations: the non-applicability of statutory limitations, the establishment of universal jurisdiction, etc.

At the intergovernmental level, the history of this approach dates back to 1983 when the General Assembly of the OAS declared that forced disappearance was "*an affront to the conscience of the Hemisphere and constitutes a crime against humanity*". In 1984 the Parliamentary Assembly of the Council of Europe issued a similar declaration. The emphatic declarations of these bodies do not distinguish between the different varieties of forced disappearance (for instance whether it involves a massive or systematic phenomenon) in establishing the category of crime against humanity. However, during the process of drafting these legal instruments on "disappearances", this principle was an

object of controversy on more than one occasion.

For example in 1992 an intermediate text of the OAS convention excluded the concept, even though the OAS General Assembly had declared continuously since 1990 that forced disappearance constitutes a crime against humanity. This caused reactions on the part of various member States as well as by the IACHR, who together were able to reincorporate the concept. The text finally adopted confirms that "*the systematic practice of the forced disappearance of persons constitutes a crime against humanity*", but it does so in the Preamble rather than placing this statement in the body of the treaty.

In the United Nations Declaration, the text was originally included by the Subcommission in the body of the draft document. This decision encountered fierce resistance on the part of certain States. The concept was then moved to the Preamble, where it was qualified by saying that the systematic practice of forced disappearance "*is of the nature of a crime against humanity*". The significance of the term "is of the nature of" is not clear in terms of its juridical implications, although it is certain that not all of the legal consequences stemming from a crime against humanity were included in the text of the Declaration. In particular, universal jurisdiction for the prosecution and judgment of forced disappearances is only provided for in its permissive form.

The **Draft Code of Crimes against the Peace and Security of Mankind** of the **International Law Commission** of 1996 incorporates the forced disappearance of persons as a crime against humanity.

Finally, the **Statute of the International Criminal Court** adopted in Rome in 1998 includes forced disappearance as a crime against humanity, thus possibly closing debate on this subject within the United Nations. The forced disappearance of persons will be considered a crime against humanity in accordance with the Statute "*when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack*".

*The definition* of forced disappearance has been one of the most debated issues. During the different drafting processes, prestigious authors such as Professor Sir Nigel Rodley pointed to the difficulties involved in arriving at a definition that includes all of the constitutive elements of forced disappearance and distinguishes it from other types of deprivation of liberty, including some of the most serious forms of prolonged arbitrary detention. Indeed, prolonged arbitrary detention, while definitely constituting a grave violation of human rights, does not reach the magnitude of forced disappearance. A complete definition of this crime, comprising a succession of criminal acts – the purpose of some of which is to conceal the phenomenon itself – is elusive.

Following the extremely broad definition adopted at the Paris Colloquium in 1981, the FEDEFAM text introduced for the first time into the definition the concept of "concealment of the whereabouts". This draft text also opted for a definition that limited the nature of the victims solely to political opponents.

The draft declaration elaborated in Bogotá did not offer a definition of "disappearance", but did enumerate the requirements that a definition would have to satisfy to be effective. The declaration called for the establishment of broad categories in the qualification of the victims, the methods employed and the intentions behind forced disappearances. A broad categorization was also foreseen concerning the perpetrators of the crime. In 1988 the draft text of the convention of Buenos Aires took up these ideas and proposed alternative and broad definitions of the concept of "disappearance", while retaining those elements that make forced disappearance a specific crime.

During the drafting processes both in the United Nations as well as in the OAS, on more than one occasion proposals were discussed for establishing a presumption of death of the "disappeared person", for determining the temporal limit of non-recognized detention (following which the deprivation of liberty would constitute "disappearance) or for incorporating the intentions of the perpetrators as an element of the crime, as

well as other formulas aimed at providing precision to the texts defining "disappearance".

The Governments that participated in drafting the Declaration of 1992 preferred to prepare a "working description" located in the Preamble, and the Working Group of the Commission made clear during the process of drafting this instrument that a definition was not indispensable for enabling the Group to fulfill its mandate. The description in the Preamble of the Declaration refers to forced disappearances as acts by which *"persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law"*.

The Inter-American Convention contains a definition close to the working description of the Declaration but adds a reference to the impossibility of the victim exercising legal and procedural guarantees: *"...forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the*

*authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees”*

The Rome Statute for its part takes up a formula close to that of the working description in the Declaration, but adds a temporal element to the intention of the perpetrators, i.e. that they must have the intention of removing the victim from the protection of the law “for a prolonged period of time”.

The definition in the Rome Statute says that forced disappearance means the “...*arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.*” This definition broadens the concept by incorporating members of political organizations as potential active subjects of the crime.

In any case, if, as we hope, the Commission on Human Rights resolves to go forward with the elaboration of a universal convention, the issue of the definition will be posed anew and it will be necessary to harmonize the current text

with the advances that have taken place in the framework of international law.

**The mechanisms.** This is a particularly important issue, given that the efficacy of these international instruments depends in large measure on the mandate and quality of the mechanisms charged with monitoring their implementation by States. In view of the particularities of the practice of forced disappearance, a series of functions have traditionally been ascribed to the mechanisms of control, namely: a quasi-jurisdictional function which would cover individual or interstate complaints, an investigative function concerning individual cases or specific situations involving forced disappearance and a prevention function in urgent cases requiring a procedure amounting to an international *habeas corpus*. Finally, also included in the mandate of the mechanisms have been the traditional functions of administrative control of the treaty through examination of the periodic reports of the States. Some of the initiatives also added the function of creation and maintenance of an international register of “disappeared persons”. In addition, a mechanism of control should have the power to visit those countries giving rise to the sharpest concern.

The draft convention elaborated by the Paris Bar Association in 1980 foresaw two bodies of control – a commission and a committee – charged respectively with examining the reports of the

individual countries and processing individual complaints. This same idea, which would allow a committee to exercise the recourse of *habeas corpus* in individual cases, and a commission to address the phenomenon of "disappearances" in general, was included in the preliminary draft text discussed at the colloquium in Buenos Aires, although the subsequent texts seem to have preferred the concentration of both functions in a single mechanism.

The draft text prepared by FEDEFAM, for its part, did not foresee the establishment of any bodies of control, but instead anticipated the existence of an international criminal court to fulfill the specific task of suppression of the crime of forced disappearance.

Unfortunately, the final text of the Inter-American Convention of 1994 did not incorporate the international protection mechanisms which the Inter-American Commission had foreseen in its original

text of 1988. Indeed, the Commission's draft project considered the possibility of involving the Inter-American Court of Human Rights in cases where Governments failed to collaborate, including the convocation of a consultative meeting of the Foreign Ministers of Member States if the Commission had evidence of a pattern of systematic and deliberate disappearances.

In the discussions connected with the United Nations system, efforts were made to coordinate the idea of a mechanism, essential for ensuring the efficacy of a convention, with the existence of the Working Group of the Commission, which performs primarily humanitarian functions and depends on invitations from States in order to carry out its investigative visits. In this case it would again be necessary to harmonize the current text and take into account the specific requirements of the fight against the forced disappearance of persons.

# *The Draft International Convention on the Protection of All Persons from Forced Disappearance*

Federico Andreu-Guzmán<sup>1</sup>

*"The phenomenon of forced disappearance [...] is the worst of all human rights violations. Indeed, it is a challenge to the very concept of such rights, the negation of the right of a human being to exist, to have an identity. Forced disappearance transforms the being into a non-being. It is the ultimate corruption, an abuse of power which allows the authorities to transform law and order into something derisive and to commit infamous crimes."*<sup>2</sup>

NIALL MAC DERMOT (R.I.P.)

These words, pronounced in 1981 by the Secretary General of the International Commission of Jurists at the first international colloquium on forced disappearances, continue to apply with great force and actuality today. Indeed, during the last 20 years great progress has been registered at both the regional and global levels in the effort to combat forced disappearance. In 1980, the United Nations Commission on Human Rights established the Working Group on Enforced or Involuntary

Disappearances.<sup>3</sup> The UN General Assembly in 1992 adopted the Declaration on the Protection of All Persons from Enforced Disappearances.<sup>4</sup> In 1994, the General Assembly of the Organization of American States adopted the Inter-American Convention on Forced Disappearance of Persons.<sup>5</sup> Certain progress has also been registered at the national level. In the decade of the 1990s, a number of States incorporated clauses in their political constitutions prohibiting the practice of forced

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2 *Le Refus de l'oubli - La politique de disparition forcée de personnes - Colloque de Paris, janvier - février 1981*, Editions Berger-Levrault, Paris 1981, p. 35 (original in French, free translation).

3 Resolution 20 (XXXVI) of 29 February 1980.

4 Resolution 47/133, of 18 December 1992, of the United Nations General Assembly.

5 The Convention entered into force on 28 March 1996, and by March 2001, 8 States were Parties to the Convention.

disappearance<sup>6</sup> or specifically making this crime an offence under their penal legislation.<sup>7</sup>

Despite these advances, the responses provided by international law to the serious phenomenon of forced disappearance continue to be broadly insufficient. Today, in order to help eradicate forced disappearance and the impunity with which it occurs – impunity being the principal factor encouraging the persistence of this practice – a legally binding instrument such as a convention is needed to address this scourge effectively and comprehensively.

## **I - Forced disappearance and international law**

### **A. The phenomenon of forced disappearance**

The forced disappearance of persons is a grave and complex phenomenon. As a violation of human rights it is a phenomenon *sui generis*, due as much to its

character as a multiple and continuing offence as to the number of its victims. But at the same time, forced disappearance constitutes a crime under international law. Unfortunately, as the reports of the Working Group on Enforced or Involuntary Disappearances make clear, forced disappearance is neither the exclusive patrimony of any single region of the world nor a practice of the past.

International law has determined that forced disappearance constitutes one of the most serious violations of the fundamental rights of the human being, as well as an “offence to human dignity”<sup>8</sup> and “a grave and abominable offense against the inherent dignity of the human being”.<sup>9</sup> The United Nations General Assembly has repeatedly affirmed that forced disappearance “constitutes an offence to human dignity, a grave and flagrant violation of human rights and fundamental freedoms [...] and a violation of the rules of international law”.<sup>10</sup> The jurisprudence issued by international bodies for the protection of human rights agree in describing forced disappearance as a

6 See for example, the Constitutions of Colombia (article 12), of Ecuador (article 23), of Paraguay (article 5) and of Venezuela (article 45). It should be noted that Argentina, by means of Law No. 24.820 of 30 April 1997, granted constitutional hierarchy to this Convention.

7 This is the case of Colombia, Guatemala, Paraguay, Peru and Venezuela. In Belgium, a law provides for suppression of the large-scale or systematic practice of forced disappearance, i.e. when such practice constitutes a crime against humanity. Even if the legal text does not use the term “forced disappearance” it specifies as criminal “serious deprivation of physical liberty in violation of the fundamental provisions of international law” (Law of 10 February 1999 relating to suppression of grave breaches of international humanitarian law, article 3).

8 Article 1 of the Declaration on the Protection of All Persons from Enforced Disappearances.

9 Inter-American Convention on Forced Disappearance of Persons, Preamble, par. 3.

10 Resolution 49/193 of the General Assembly, adopted 23 December 1994. In the same sense, see resolutions 51/94 of 12 December 1996 and 53/150 of 9 December 1998.

grave violation of human rights.<sup>11</sup> Indeed, Prof. Dalmo Abreu Dallari has indicated that forced disappearance is “one of the gravest crimes that can be committed against a human being”.<sup>12</sup>

Forced disappearance does not constitute a single violation of human rights. This practice violates numerous human rights, many of them non-derogable at any time, as recognized expressly in the Declaration on the Protection of All Persons from Enforced Disappearances and the Inter-American Convention on Forced Disappearance of Persons. The character of forced disappearance as a multiple violation of human rights has been recognized repeatedly by the Inter-American Court of Human Rights.<sup>13</sup> International jurisprudence and legal doctrine has repeatedly indicated that forced disappearance *per se* constitutes a violation of the right to security of the person; of the right to protection under

the law; of the right not to be deprived arbitrarily of one’s liberty; of the recognition of the legal personality of every human being; and of the right not to be subjected to torture or to other cruel, inhuman or degrading treatment or punishment.

One element that characterizes forced disappearance is that this practice removes the individual from the protection of the law.<sup>14</sup> This characteristic specific to forced disappearance – and the reality of events confirms this – has the effect of suspending enjoyment of all of the rights of the disappeared person and placing the victim in a situation of complete defencelessness. As Alejandro Artucio has well described it, “the disappeared person, whom the authorities deny having detained, can obviously neither exercise his rights nor invoke any recourse whatsoever”.<sup>15</sup> This becomes even more serious if we consider that forced

11 With respect to the Human Rights Committee, see for example, the decision of 29 March 1982, Communication No. 30/1978, case of *Bleier Lewhoff and Valiño de Bleier vs. Uruguay*; and the Concluding observations - Burundi, of 3 August 1994 (United Nations document CCPR/C/79/Add.41, par. 9). Reference might also be made – among other sources – to the Judgment of 14 March 2001 by the Inter-American Court of Human Rights in the *Barrios Altos case (Chumbipuma Aguirre et al. vs. Peru)*, par. 41.

12 *Le Refus de l’oubli*..., op. cit., p. 90 (original in French, free translation).

13 See, for example, Inter-American Court of Human Rights, *Velasquez Rodríguez* case, Judgment of 29 July 1988, par. 155; *Godínez Cruz* case, Judgment of 20 January 1989, par. 163; *Fairén Garbi and Solís Corrales* case, Judgment of 15 March 1989, par. 147; and *Blake* case, Judgment of 24 January 1998, par. 65.

14 See, for example, par. 3 of the Preamble, Declaration on the Protection of All Persons from Enforced Disappearances. In this same context, see article II of the Inter-American Convention on Forced Disappearance of Persons and article 7 (2) (i) of the Rome Statute of the International Criminal Court.

15 Alejandro Artucio, “La disparition instrument ou moyen pour d’autres violations des droits de l’homme”, in *Le Refus de l’oubli*..., op. cit., p. 106 (original in French, free translation).



disappearance itself is a violation of human rights and by nature a continuing or permanent crime.

But the disappeared person is not the only victim of forced disappearance. Based on its experience, the Working Group on Enforced or Involuntary Disappearances has concluded that the families of disappeared persons are also victims, since they are subjected to an anguished uncertainty, as are other relatives and dependents of the disappeared person, in such a way that there exists a wide circle of victims of a disappearance.<sup>16</sup> Similarly, the Inter-American Commission on Human Rights concluded that forced disappearance likewise affects the entire circle of family members and relatives, who wait months and sometimes years for news concerning the fate of the victim.<sup>17</sup> It should be remembered that frequently forced disappearance is associated not only with illegal forms of procedure by the public authorities, but also fundamentally with clandestine operations involving various methods of terror. The sense of insecurity which this practice generates, not only among the family members and relatives of the disappeared person, extends to the

communities and collectivities to which the disappeared person belongs and to the society at large. Indeed, the Working Group on Enforced or Involuntary Disappearances has concluded that forced disappearances also work devastating effects on the societies in which they are practiced.<sup>18</sup> This same observation was made by the XXIV International Conference of the Red Cross and Red Crescent, in recalling that forced disappearances cause great suffering not only to the family of the disappeared person but also to the society.<sup>19</sup> Thus forced disappearance can not be reduced to the sum of the human rights violated, since the practice – whether systematic or not, massive or not – creates a climate of terror both in the nuclear family of the disappeared person as well as in the communities and collectivities to which the person belongs.

Today it is clearly recognized that forced disappearance constitutes a form of torture for the relatives of the disappeared person. In 1978 the United Nations General Assembly expressed its shock at “the anguish and sorrow which such circumstances [forced disappearances] cause to the relatives of

16 United Nations document E/CN.4/1990/13, par. 339.

17 Annual Report of the Inter-American Commission on Human Rights - 1978, OEA/Ser.L/II.47, doc. 13 rev. 1, of 29 June 1979, p. 23. In the same context, see Annual Report of the Inter-American Commission on Human Rights, 1980 - 1981, OEA/Ser.G, CP/doc.1201/1981, of 20 October 1981, p. 113.

18 18 United Nations document E/CN.4/1985/15, par. 291.

19 XXIV International Conference of the Red Cross and Red Crescent, Manila, 1981, Resolution II “Forced or involuntary disappearances”.

disappeared persons, especially to spouses, children and parents".<sup>20</sup> Recognition of the anguish, pain and terrible suffering to which the families of disappeared persons are subjected by the act of forced disappearance, has been translated into the body of law. Thus, the Declaration on the Protection of All Persons from Enforced Disappearances expressly establishes that "[a]ny act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families".<sup>21</sup> This fact has been confirmed by the United Nations Human Rights Committee<sup>22</sup>, the European Court of Human Rights<sup>23</sup>, the Inter-

American Commission on Human Rights<sup>24</sup> and the Inter-American Court of Human Rights<sup>25</sup>.

Forced disappearance is not only a grave and multiple violation of fundamental rights, but also an international crime. In 1983, the General Assembly of the Organization of American States in a far-reaching resolution declared that the practice of forced disappearance constitutes a crime against humanity.<sup>26</sup> The General Assembly reiterated this declaration in subsequent resolutions.<sup>27</sup> Today, international law only qualifies forced disappearance as a crime against humanity when it is committed within the framework of a systematic or large-scale

20 Resolution 33/173 "Disappeared persons", adopted by the United Nations General Assembly, 20 December 1978. In the same line see, for example, Resolutions 43/159 of 1988, 44/160 of 1990, 46/125 of 1991 and 47/132 of 1992 of the United Nations General Assembly.

21 Article 1 (2) of the Declaration on the Protection of All Persons from Enforced Disappearances.

22 Human Rights Committee: decision of 21 July 1983, Communication 107/1981, *María del Carmen Almeida de Quinteros* case (Uruguay), par. 14; decision of 25 March 1996, communication 542/1993, *Katombe L. Tshishimbi* case (Zaire), CCPR/C/56/542/1993, par. 5.5; decision of 25 March 1996, communication 540/1996, *Ana Rosario Celis Laureano* case, (Peru), CCPR/C/56/540/1993, par. 8.5. In the same line see Concluding Observations - Algeria (CCPR/C/79/Add.95, of 18 August 1998 par. 10) and Concluding Observations - Uruguay (CCPR/C/79/Add.90).

23 See, European Court of Human Rights, Judgment of 25 May 1998, Case No. 15/1997/799/1002, *Kurt vs. Turkey*.

24 See, among others, Annual Report of the Inter-American Commission on Human Rights, 1977-1978, OEA/Ser.L/V/II.43, doc.21, corr.1, p. 24; and Report on the Situation of Human Rights in Argentina, 1980, OAS document OEA/Ser.L/V/II/49, doc. 19, p. 59.

25 See, among others, Inter-American Court of Human Rights, Judgment of 24 January 1998, *Blake vs. Guatemala* case, par. 116.

26 Resolution AG/RES. 666 (XIII-0/83), adopted on 18 November 1983, par. 4.

27 See Resolutions AG/RES. 742 (XIV-0/84), adopted on 17 November 1984, par. 4; AG/RES. 950 (XVIII-0/88), of 19 November 1988, par. 4; AG/RES. 1022 (XIX-0/89), of 10 November 1989, par. 7); and AG/RES. 1044 (XX-0/90), of 8 June 1990, par. 6.

practice.<sup>28</sup> Nevertheless, it is undeniable that forced disappearance is a crime under international law. Thus the United Nations General Assembly has described forced disappearance as a violation of international law and as a crime which must be punished by criminal law.<sup>29</sup> The Inter-American Convention on Forced Disappearance of Persons authorizes State parties to exercise criminal jurisdiction over any presumed perpetrator of a forced disappearance who is found in their territory, independent of his nationality, that of the victim or the place in which the crime was committed.<sup>30</sup> Likewise, the Declaration on the Protection of All Persons from Enforced Disappearances authorizes States to bring to trial any presumed perpetrator found under its jurisdiction. Today there is no doubt that forced disappearance is an international criminal offence, recognized as such by both customary and international treaty-based law.<sup>31</sup> It should be noted that the United Nations General Assembly, in adopting the

Declaration on the Protection of All Persons from Enforced Disappearances, drew attention to the importance of devising "an instrument which characterizes all acts of enforced disappearance of persons as very serious offences and sets forth standards designed to punish and prevent their commission".<sup>32</sup>

### **B. The insufficient responses of international law**

Despite the fact that forced disappearance is recognized as one of the most serious violations of fundamental rights and a crime under international law, and that its practice continues in various parts of the world, no international treaty of universal scope exists with which to address this grave phenomenon. Today the universal system of human rights protection does not have a treaty at its disposal containing a definition of the crime of forced disappearance and establishing obligations with regard to the

28 In this connection see Report of the International Law Commission on the work of its forty-eighth session - 6 May/26 July 1996, United Nations document, Supplement No. 10 (A/51/10), pp. 100 to 111; the Declaration on the Protection of All Persons from Enforced Disappearances (Preamble); the Inter-American Convention on Forced Disappearance of Persons (Preamble); and the Rome Statute of the International Criminal Court, article 7.

29 Resolution 49/193 of the General Assembly, adopted on 23 December 1994. In this same connection see Resolutions 51/94 of 12 December 1996 and 53/150 of 9 December 1998.

30 Article IV of the Inter-American Convention on Forced Disappearance of Persons.

31 See in this respect O. de Frouville, "Les disparitions forcées", in H. Ascensio, E. Decaux and A. Pellet, Droit international pénal, CEDIN - Paris X, Editions A Pedone, Paris 2000, pp. 377 ff; Nigel Rodley, The treatment of prisoners under international law, Clarendon Press - Oxford, Second Edition, 1999, pp. 266-269; Kai Ambos, Impunidad y derecho penal internacional, Ed. Ad Hoc, 2nd edition, Buenos Aires, 1999, pp. 113 ff; and La desaparición, crimen contra la humanidad, Ediciones APDH, Buenos Aires 1988.

32 Resolution 47/133 of 18 December 1992.

prevention, investigation and repression of this practice. Even if many of these obligations are already defined in the Declaration on the Protection of All Persons from Enforced Disappearances, it should be remembered that this instrument is not legally binding.

The International Covenant on Civil and Political Rights does of course protect the majority of the rights violated by forced disappearance. But the Covenant does not establish the specific obligations with regard to prevention, investigation, repression and international cooperation necessary for combatting this practice. Thus, for example, the Covenant does not stipulate the obligations of classifying forced disappearance as a crime under internal legislation; of exercising territorial and extra-territorial criminal jurisdiction with respect to presumed perpetrators of this crime; of maintaining registers of detained persons; or of preventing and suppressing the abduction of children born during the captivity of their disappeared mothers.

It is undeniable that in the future the Rome Statute will allow for prosecution of forced disappearance by an international tribunal. But it is also true that the International Criminal Court will only be able to suppress such activity "when committed as part of a widespread or systematic attack directed against any civilian population"<sup>33</sup>, i.e. when it constitutes a crime against humanity. By any reckon-

ing, the Rome Statute is insufficient for tackling the problem of forced disappearance. For one thing, the Rome Statute does not address the practice of forced disappearance when this does not constitute a crime against humanity, i.e. when it is perpetrated outside the framework of "a widespread or systematic attack against the civilian population". Experience has shown that a large number of forced disappearances occur outside the framework of a widespread or systematic practice. These forced disappearances will thus remain outside the competence of the future International Criminal Court. Moreover, the Rome Statute does not establish specific obligations for the prevention, investigation and suppression at the national level of forced disappearance. Thus, for example, with regard to suppression of forced disappearance at the national level, the Rome Statute contains no obligation to classify forced disappearance as an offense under national law.

One of the main gaps in international law is the absence of a response to the grave phenomenon of the abduction and/or adoption of children born during the captivity of their disappeared mother. This phenomenon is of unusual gravity, as noted by an Argentine court ruling: "At stake here are the rights and guarantees of the child, the right to a life of dignity, to ensure that someone defenceless not be stripped of his singularity as a person, the

33 Article 7 of the Rome Statute of the International Criminal Court.

inalienable right of every person to know the truth about his own history and to grow up among his own relatives; and the right of the latter to keep their defenceless descendents within the bosom of the family."<sup>34</sup> The problem is complex. Sometimes the adoptive families are unaware that the children were violently removed from their parents. In other cases, the families know of these circumstances or even are themselves the perpetrators of the forced disappearance of the parents.<sup>35</sup> This practice also has international dimensions, since sometimes the adoptive families come from other countries or, having participated in the abduction of the minor, subsequently move their residence abroad. Despite the fact that this practice is considered to be a grave violation of human rights,<sup>36</sup> there currently exists a major gap with regard to this issue, and no universal, legally binding instrument is available with which to address this scourge. Certain instruments exist, of course, such as the

Hague Convention on the Civil Aspects of International Child Abduction,<sup>37</sup> but these allow only a very partial response to some of the aspects of this serious problem. In the regional context, although the Inter-American Convention on Forced Disappearance of Persons addresses this serious phenomenon,<sup>38</sup> this treaty does not provide sufficient responses to all of the problems posed by this grave practice. The abduction and subsequent adoption of children born during the captivity of disappeared parents is neither a phenomenon of the past nor a practice limited to certain countries, and its persistence continues to be a source of concern to the international community.<sup>39</sup>

In this context, it is evident that the existing responses developed until now in international treaty-based law to address and combat the odious and criminal practice of forced disappearance are insufficient. Given the extreme gravity of forced disappearance and the gap that

34 Lower Court ruling by Federal Judge Juan M. Ramos Padilla, 19 January 1988, in Case No. 6681 (free translation).

35 The Inter-American Commission on Human Rights, at the request of the Organization of American States, carried out an extensive study concerning the use of this practice in Argentina during the period of the dictatorship. See in this connection "Study on the situation of children of disappeared persons separated from their parents and reclaimed by members of their legitimate families", in *Annual Report of the Inter-American Commission on Human Rights, 1987-1988*, Document OEA/Ser.L/V/II.74, Doc. 10 rev. 1, of 16 September 1988, pp.349 ff.

36 See, for example, "Study on the situation of children of disappeared persons ...", doc. cit, and the decision of the Human Rights Committee of 3 April 1995, *Monáco y Vicario* case (Argentina), Communication No. 400/1990.

37 Convention on the Civil Aspects of International Child Abduction, adopted in The Hague on 25 October 1980.

38 Article XII of the Inter-American Convention on Forced Disappearance of Persons.

39 See, for example, Resolutions 53/150 of 1998 (par. 14) and 51/94 of 1996 (par. 14) of the U.N. General Assembly.

exists in international treaty-based law, it is both urgent and imperative that the international community provide itself with an international convention against forced disappearances. This would allow forced disappearance to be addressed in all of its dimensions and in a comprehensive manner, indicating clearly and unequivocally the obligations of States with regard to prevention, investigation and suppression of forced disappearance, as well as international cooperation, and affording a response to the grave phenomenon of the abduction of children born during the captivity of the disappeared mother and given up for adoption. All in all, an international convention against forced disappearances would substantially increase the threshold of protection with respect to this practice.

## II - The Draft Convention

Since 1999, the United Nations Commission on Human Rights has been considering a draft convention on forced disappearances. The text under discussion is the "Draft International Convention on the Protection of All Persons from Forced Disappearance" (in short, the draft Convention), adopted in 1998 by the Sub-Commission for the Promotion and Protection of Human

Rights.<sup>40</sup> The draft text was elaborated by the Working Group on the Administration of Justice of this Sub-Commission following four years of work and various consultative meetings with experts from the United Nations and non-governmental organizations.<sup>41</sup>

The draft Convention consists of a preamble and three parts. Part I, articles 1 to 24, contains substantive provisions relating to the definition of forced disappearance and the obligations as regards prevention, investigation, suppression, international cooperation and reparation, as well as various safety clauses. Part II, articles 25 to 33, contains provisions relating to the monitoring mechanism and international procedures of supervision and protection. Finally, Part III, articles 34 to 39, refers to the final clauses. The draft Convention is principally based on the Declaration on the Protection of All Persons from Enforced Disappearances. But the Working Group on the Administration of Justice took into account the Inter-American Convention on Forced Disappearance of Persons, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and other international instruments such as the doctrine of the Working Group on Enforced or Involuntary Disappearances.<sup>42</sup>

40 United Nations document E/CN.4/Sub.2/1998/19, Annex.

41 See in this connection United Nations document E/CN.4/Sub.2/1998/19, paras. 10 to 15.

42 United Nations document E/CN.4/Sub.2/1996/16, paras. 38 and ff.

## A. Substantive provisions

### 1. Definition and characterization of forced disappearance

#### a) Definition of forced disappearance in the draft Convention

The draft Convention, in its article 1, establishes the following definition of forced disappearance:

“the deprivation of a person’s liberty, in whatever form or for whatever reason, brought about by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by an absence of information, or refusal to acknowledge the deprivation of liberty or information, or concealment of the fate or whereabouts of the disappeared person.”

The Working Group on the Administration of Justice, in proposing this wording, drew inspiration from the definitions contained in the Inter-American Convention on Forced Disappearance of Persons<sup>43</sup> and the Declaration on the Protection of All Persons from Enforced Disappearances<sup>44</sup> and from the criteria articulated by the Working Group on Enforced or Involuntary Disappearances.<sup>45</sup> The defi-

nition of the draft Convention addresses the complex character of the crime of forced disappearance, and incorporates its two characteristic elements: deprivation of liberty and the official refusal to acknowledge the detention through concealment of the fate or whereabouts of the disappeared person. The definition does not enter into a qualification of the legal, arbitrary or illegal nature of the deprivation of liberty. Thus the expression used: “in whatever form”. With respect to the second core element of this practice – the official refusal to acknowledge the detention – the definition alternately incorporates various types of actions, which can be both active as well as passive.

The draft Convention contains a definition of the perpetrator of forced disappearance, which includes both agents of the State as well as “indirect State agents”, i.e. private individuals who commit this crime with the authorization, acquiescence or complicity of State agents. The Working Group on the Administration of Justice did not include the issue of the responsibility of non-State agents having no link to the State. These were not incorporated into the definition due to difficulties as yet unresolved with regard to this issue in international law. The Working Group agreed

43 Article II of the Inter-American Convention on Forced Disappearance of Persons.

44 Paragraph 3 of the Preamble to the Declaration on the Protection of All Persons from Enforced Disappearances.

45 See United Nations document E/CN.4/1988/19, par. 17.

that this subject should be treated separately in another international instrument.<sup>46</sup> However, in adopting the draft Convention, the Sub-Commission decided to make a cross-reference to national law and other international instruments.<sup>47</sup>

With regard to the "motivation" or intention, the subjective element of the crime, the definition includes all hypotheses: political, racial, ethnic or religious motives; forced disappearances for reasons of "social cleansing"; and "abuse of power". Experience has shown that the motives of the perpetrators of this odious crime are various and diverse. In some countries, for example, forced disappearance has had for its victims beggars, petty thieves and street children, with a clear objective of "social cleansing". In others, cases of forced disappearance as a result of mistaken identity have been recorded. Hence the expression employed: "for whatever reason" is appropriate.

In this way, the definition proposed by the draft Convention addresses all types and methods of forced disappearance, as well as all the perpetrators and victims of the crime.

It is important to indicate that the definition proposed by the draft Convention did not include, as a constituent element of the crime, the reference contained in the Inter-American Convention on Forced Disappearance of Persons to the impossibility of exercising recourses and guarantees.<sup>48</sup> The omission of this element stems from the consideration that the legal defencelessness, the impossibility of exercising legal recourses, in which the victim of a forced disappearance finds himself is more an inherent consequence of the criminal action than an element of the action itself.

Finally, the draft Convention include various actions connected to the practice of disappearance. Thus article 2 criminalizes instigation, abetment, incitement, conspiracy, collusion and attempts to commit forced disappearance as well as concealment of the offence of forced disappearance. This provision follows the method of direct incrimination employed by the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>49</sup> Similarly, article 2 criminalizes non-fulfillment of the legal duty to act to prevent a forced disappearance, thus configuring the crime of "commission by omission" or "omissive crime".

46 See United Nations document E/CN.4/Sub.2/1996/16, par. 46 and E/CN.4/Sub.2/1998/19, par. 22.

47 See paragraph 2 of article 1 of the draft Convention.

48 This involves the final part of article II of the Inter-American Convention on Forced Disappearance of Persons which reads as follows: "thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees."

49 Article III of the Convention on the Prevention and Punishment of the Crime of Genocide.



This category is inspired primarily by the work of the International Law Commission of the United Nations as well as by the evolution of international criminal law with regard to the responsibility of chain of command.<sup>50</sup>

*b) The definition of the draft  
Convention and the Rome  
Statute*

The definition of the crime of forced disappearance in the draft Convention was elaborated and adopted<sup>51</sup> prior to adoption of the Rome Statute of the International Criminal Court, which likewise contains a definition of this crime.<sup>52</sup> While both definitions have in common the two characteristic elements of forced disappearance – deprivation of liberty followed by concealment of the fate and whereabouts of the disappeared person – they differ in that the Rome Statute incorporates two additional elements. Thus the definition in the Rome Statute additionally contains a subjective element – “with the intention of removing them from the protection of the law” –

and a temporal element – “for a prolonged period of time” –. The incorporation of these two elements in the definition of the Rome Statute responded to the need to provide two criteria with which to distinguish the crime of forced disappearance from other forms of deprivation of liberty which do not constitute forced disappearance, such as solitary confinement and forms of arbitrary detention. Indeed, the reference to removal from protection of the law in the Rome Statute is formulated differently than that contained in the Inter-American Convention on Forced Disappearance of Persons. While the Inter-American Convention incorporates this phrase as a material element of the crime,<sup>53</sup> the Rome Statute incorporates it as a subjective or intentional element.<sup>54</sup> The treatment given this element by the Rome Statute can be appropriate for differentiating forced disappearance from other actions involving a deprivation of liberty.

The second element retained in the definition in the Rome Statute, namely “for a prolonged period of time”, is

50 This principle has long been recognized. Among recent developments in this area should be cited the Statute of the International Criminal Tribunal for the former Yugoslavia (article 7, 3), the Statute of the International Criminal Tribunal for Rwanda (article 6,3) and the Rome Statute (article 28).

51 See United Nations documents E/CN.4/Sub.2/1996/16 par. 46 and E/CN.4/Sub.2/1998/19, par. 22.

52 See article 7.2(i) of the Rome Statute.

53 In accordance with article II of the Inter-American Convention on Forced Disappearance of Persons (“[...]thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees”).

54 In accordance with article 7 (2) (i) of the Rome Statute, the active subjects of the crime of disappearance act with “the intention of removing them [the victim of the crime] from the protection of the law”.

indeed vague. The notion of "prolonged period" can be looked at in relation to the period of time that is allowed to pass between the deprivation of the liberty of a person and his being placed at the disposal of a judge or other competent authority. This period of time is not defined specifically by international standards. The universal,<sup>55</sup> inter-American<sup>56</sup>, African<sup>57</sup> and European<sup>58</sup> human rights systems stipulate that any person deprived of liberty must be brought "promptly" before a judge or competent authority. The jurisprudence of international human rights organs is neither homogeneous nor precise in defining precisely what this term means.<sup>59</sup> The formula used by the Rome Statute is imprecise and unfortunate, and can have the direct impact of reducing the threshold of protection against the crime of forced disappearance. All in all, in the process of examining and adopting the draft Convention, an effort will be inevitable aimed at harmonizing the definitions in the draft Convention and the Rome Statute.

*c) Characterization of the crime of forced disappearance*

One of the aspects which retained the attention of the Sub-Commission, and which was the subject of some debate during the process of drawing up the draft Convention, was that relating to the characterization of forced disappearance as a crime against humanity.

Article 3 of the draft Convention differentiates between forced disappearance committed as part of a massive or systematic practice and that committed outside of such a context. Thus, if forced disappearance is indeed classified *per se* as being an international crime, it is only qualified as a crime against humanity when the actions involved are committed within the framework of a massive or systematic practice.

This differentiation is based in the characterization made both by the Declaration on the Protection of All Persons from Enforced Disappearances and by the Inter-American Convention on Forced Disappearance of Persons, as

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55 Article 9 (3) of International Covenant on Civil and Political Rights; principle 11 (1) of the Body of Principles for the Protection of All Persons under Any form of Detention or Imprisonment, and Article 10 (1) of the Declaration on the Protection of All Persons from Enforced Disappearances.

56 Article 7 (5) of the American Convention on Human Rights and Article 11 of the Inter-American Convention on Forced Disappearance of Persons.

57 Article 2 (C) of the Resolution on the right to due process and to a fair trial, of the African Commission on Human and Peoples' Rights.

58 Article 5 (3) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

59 In this context see, for example, Amnesty International, *Juicios Justos - Manual de Amnistía Internacional*, Ediciones EDAI, Madrid 1998, AI index: POL 30/02/98/s, p. 55.

well as in the development of international law. Both instruments, in their respective preambles, describe forced disappearance as a crime against humanity only when its practice is systematic. However, neither of the two instruments considers the specific character of massive or widespread practice. The work of the International Law Commission on the draft Code of Crimes against the Peace and Security of Mankind is of great utility in this area. In 1996, the International Law Commission defined crime against humanity as “the systematic or large-scale commission” of a series of acts, among which figured the forced disappearance of persons.<sup>60</sup> The Commission affirmed that the “systematic or large-scale condition” is one of the “the two general conditions which must be met for one of the prohibited acts to qualify as a crime against humanity”.<sup>61</sup> The Commission also concluded that this “systematic or large-scale condition [...] is formulated in terms of two alternative requirements [...] such that] an act could constitute a crime against humanity if either of these conditions is met”.<sup>62</sup>

This definition was also retained by the Rome Statute.<sup>63</sup> In agreement with the Statute, article 3 of the draft Convention proposes two alternative criteria for qualifying an instance of forced disappearance as a crime against humanity: one objective, the existence of a widespread practice, and the other subjective, the systematic character of said practice.

From this perspective, the draft Convention addresses forced disappearance on two dimensions: as an international crime and, when it is committed as part of a systematic or massive practice, as a crime against humanity, i.e. a “qualified international crime”. The fundamental significance of this double treatment lies in the legal consequences it has with regard to the non-applicability of statutory limitations. For, in conformity with international law, crimes against humanity and war crimes are not subject to statutory limitations *per se*. But the non-applicability of statutory limitations does not seem to be a characteristic inherent in other international crimes. In this latter area, however, an evolution is to be noted toward the non-applicability of

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60 Report of the International Law Commission on the work of its forty-eighth session 6 May-26 July 1996, United Nations document, Supplement N° 10 (A/51/10), p. 100.

61 *Ibid.*, p. 101.

62 *Ibid.*, pp. 101-102.

63 Article 7 (1) of the Rome Statute.

statutory limitations with regard to grave violations of human rights.<sup>64</sup>

## 2. *Repression of the crime of disappearance.*

Dalmo Abreu Dallari has noted very aptly that “experience teaches us that juridical norms of protection of the individual are much more effective when they are integrated into domestic law, and for this reason it is necessary to pass new protective legislation in the national legal sphere in order to give an adequate response to the different types of crimes that have emerged in the world”.<sup>65</sup> With regard to the crime of forced disappearance, the draft Convention establishes various obligations.

Firstly, the draft Convention establishes the obligation to define the forced disappearance as a crime in its own law, of continuous and permanent character, corresponding to the serious and continuous nature of forced disappearance.<sup>66</sup> This provision is of vital importance for insuring that national courts have an adequate national legal base at their disposal for punishing the crime of forced disappearance. This norm develops article 17 of the Declaration on the Protection of All Persons from Enforced Disappearances and is supported by the general commentary issued by the Working Group on Enforced or Involuntary Disappearances concerning the scope of this precept.<sup>67</sup> While it is stipulated that States shall impose “appropriate penalties which shall take

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64 Thus for example, the draft “Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law”, in the version revised by Prof. Cherif Bassiouni, United Nations Special Rapporteur on the Right to Reparation, establishes that statutory limitations should not be applied to “violations of international human rights and humanitarian law norms that constitute crimes under international law” (United Nations document E/CN.4/2000/62, Annex, Principle 7). At the national level, in the Latin American context can be cited: the Constitution of Ecuador, of 1998, which in its article 23 establishes that “The legal actions and penalties for genocide, torture, forced disappearance of persons, kidnapping and homicide for political reasons or reasons of conscience will not be subject to statutory limitations”; the Constitution of Paraguay, which in its article 5 establishes that “Genocide, torture, the use of force to make people disappear, kidnapping and homicide for political reasons are crimes that are not subject to terms of limitation”; the Constitution of the Bolivarian Republic of Venezuela, of 1999, which in its article 29 establishes the non-applicability of statutory limitations to legal action against “grave violations of human rights”, as well as “crimes against humanity” and war crimes, and the Constitution of Honduras (1982), which stipulates, concerning acts attributable to agents of the State, that “statutory limitations do not apply to cases in which by either fraudulent action or omission and for political motives the death is caused of one or more persons”.

65 Dalmo Abreu Dallari, “Le crime de disparition”, in *Le Refus de l’oubli ...*, op. cit., p. 106 (original in French, free translation).

66 Article 5 of the draft Convention.

67 See United Nations document E/CN.4/2001/68, pars. 25 to 32.

into account the extreme seriousness” of this crime, the draft Convention contains a safeguard prohibiting the use of the death penalty to punish those responsible for forced disappearances.

The draft Convention establishes norms concerning the competence of national tribunals to judge the crime of forced disappearance, whether through the exercise of territorial or extra-territorial jurisdiction, in application of the principle of *aut dedere aut judicare*.<sup>68</sup> Moreover it also establishes the possibility of judging these crimes by an international criminal court, thus incorporating the evolution of international law in the suppression of international crimes. The Working Group on Enforced or Involuntary Disappearances, in its commentaries on the draft Convention, considered that “the principle of universal jurisdiction [proposed in the draft Convention] is drafted in a much clearer manner than in comparable treaties, including the Convention against Torture”.<sup>69</sup>

Finally, the draft Convention contains provisions on the subject of extradition, international cooperation and reciprocal assistance in the area of investi-

gation and criminal proceedings to facilitate suppression of the crime of forced disappearance by national tribunals.<sup>70</sup> The proposed provisions reincorporate, with various modifications, the norms established in this matter by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>71</sup> and the Inter-American Convention on Forced Disappearance of Persons.<sup>72</sup> But the draft Convention also establishes the principle of international cooperation for humanitarian purposes, that is, in order to localize and rescue disappeared persons while they are still alive or, in case of their death, to obtain restitution of their remains. This disposition is without precedent and constitutes an element of singular importance.

### 3. Safeguards against impunity

Impunity has been repeatedly pointed to as one of the principle factors contributing to the persistence of forced disappearance. As Louis Joinet has indicated, “the problem of forced disappearance [...] is all the more serious since its perpetrators are virtually certain of not being punished”.<sup>73</sup> The draft

68 Article 6 of the draft Convention.

69 United Nations document E/CN.4/2001/68, Annex III, p. 34.

70 Articles 7, 8, 12 and 13 of the Draft Convention.

71 Articles 6 and 9 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

72 Articles V and VI of the Inter-American Convention on Forced Disappearance of Persons.

73 Louis Joinet, “Rapport général”, in *Le Refus de l’oubli ...*, op. cit., p. 295 (original in French, free translation).

Convention establishes various provisions aimed at combatting impunity and eradicating these practices and the factors which give rise to them.

The draft Convention prohibits granting amnesties and other such measures to those responsible for the crimes of forced disappearance before such persons have been convicted by a court.<sup>74</sup> This treatment of the issue is not novel: it represents a development of the stipulation in article 18 (1) of the Declaration on the Protection of All Persons from Enforced Disappearances and is consistent with the jurisprudence and legal doctrine of international human rights bodies.<sup>75</sup> It should be remembered that the Vienna Declaration and Program of Action, adopted by the World Conference on Human Rights in June 1993, contains a clause according to which "States should abrogate legislation

leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law."<sup>76</sup>

The draft convention fixes competence for investigating and judging presumed perpetrators of crimes of forced disappearance in the competent ordinary courts, with the exclusion of military tribunals. This provision develops the principles stipulated in the Declaration on the Protection of All Persons from Enforced Disappearances (article 16) and the Inter-American Convention on Forced Disappearance of Persons (article IX), as well as the jurisprudence of the United Nations Human Rights Committee.<sup>77</sup> It should be underlined that the Working Group on Enforced or Involuntary Disappearances concluded that "military tribunals should only try

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74 Article 17 of the Draft Convention.

75 With respect to the Human Rights Committee, see, among others, General Observation No. 20 (44) concerning article 7, as well as "Observations and recommendations" to Argentina (CCPR/C/79/Add.46; A/50/40, par. 144 and CCPR/CO/70/ARG, par. 9); to Chile (Document CCPR/C/79/Add.104, par. 7); to France (CCPR/C/79/Add.80, par. 13); to Lebanon (CCPR/C/79/Add.78, par. 12); to El Salvador (CCPR/C/79/Add.34, par. 7); to Haiti (A/50/40, pars. 224 - 241); to Peru (CCPR/C/79/Add.67, pars. 9 and 10; and CCPR/CO/70/PER, par 9); to Uruguay (CCPR/C/79/Add.19 pars. 7 and 11 and CCPR/C/79/Add.90) and to Yemen (A/50/40, pars. 242 - 265). At the level of the Inter-American system, emphasis should be given to the Judgment of 14 March 2001 of the Inter-American Court of Human Rights, in the *Barrios Altos case (Chumbipuma Aguirre et al. vs. Peru)*.

76 World Conference of Human Rights - Vienna Declaration and Program of Action, June 1993, United Nations document DPI/1394-48164-October 1993-/M, Section II, par. 60, p. 65.

77 See, among others, Observations and recommendations - Colombia, CCPR/C/79/Add.76; Observations and recommendations - Colombia, CCPR/C/79/Add.2; Observations and recommendations - Egypt, CCPR/C/79/Add.23; Observations and recommendations - Brazil, CCPR/C/79/Add.66; Observations and recommendations - Bolivia, CCPR/C/CCPR/C/79/Add.74; Observations and recommendations - Lebanon CCPR/C/79/Add.78; and Observations and recommendations - Chile, CCPR/C/79/Add. 104.

military-related crimes committed by members of the security forces, and that serious violations of human rights such as forced disappearances should be excluded expressly from this category of crimes".<sup>78</sup>

Article 14 of the draft Convention prohibits granting asylum or refuge to perpetrators or alleged perpetrators of forced disappearance. This provision develops article 15 of the Declaration on the Protection of All Persons from Enforced Disappearances and is in accordance with existing international instruments.<sup>79</sup> This safeguard against impunity must be interpreted in conjunction with articles 6, 7 and 12 of the draft Convention, which impose the obligation on third States to exercise their extra-territorial jurisdiction or to extradite any person suspected of having committed acts of forced disappearance and who is found in their territory, regardless of his nationality or that of the victim or of the territory in which the crime was committed.

In addition, the draft Convention establishes that the defense of due obedience cannot be invoked as grounds for exoneration of criminal responsibility or as justification for the acts committed.<sup>80</sup> This provision develops article 6 (1) of the Declaration on the Protection of All Persons from Enforced Disappearances. This long-established principle was reiterated, with regard to crimes against humanity and war crimes, by the Charters and Judgments of the Nuremberg and Tokyo Tribunals as well as by numerous judgments of Allied Tribunals, after the Second World War. Resolution 95 (I) of 1946 of the United Nations General Assembly confirmed the principles of international law recognized by the Charter of the Nuremberg Tribunal and in the judgment of that tribunal. The International Law Commission, in codifying these principles, stipulated that, in the case of an act constituting a crime under international law, "the fact that a person acted pursuant to an order of his Government or

78 United Nations document, E/CN.4/1992/18, par. 367. In the same line, see United Nations document E/CN.4/1993/25, par. 46.

79 The Universal Declaration of Human Rights (article 14 (2)), the Convention relating to the Status of Refugees (article 1 (f)), the Declaration on Territorial Asylum (article 1 (2)), the Statutes of the Office of the United Nations High Commissioner for Refugees (Article 7 (d)), the Organization of African Unity's Convention Governing the Specific Aspects of Refugee Problems in Africa (Article I (5)), and the Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity (Principle 7). Likewise, see Conclusion No. 17 (XXXI) "Problems of Extradition Affecting Refugees", adopted by the Executive Committee of the United Nations High Commissioner for Refugees (1980), and the Asylum and Recommendation Asylum and International Crimes of the Inter-American Commission on Human Rights, of 20 October 2000.

80 Article 9 of the draft convention.

of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him" (Principle IV). This principle has been reiterated by various international instruments both with regard to war crimes and crimes against humanity as well as in relation to grave violations of human rights.<sup>81</sup> It has likewise been reiterated in the jurisprudence of the International Tribunal for the former Yugoslavia. In the national sphere, legislation in various countries has expressly incorporated this prohibition<sup>82</sup> and various courts have rejected due obedience as grounds for exoneration of responsibility.<sup>83</sup> Even in the field of military criminal law, as Professor Sahir Erman has pointed out, "the duty of obedience is not absolute, [...] the principle of passive and blind obedience has lost all of its

validity [... and with regard to execution of orders which will obviously entail commission of a criminal offense ] the duty of obedience cedes its place to the duty of disobedience".<sup>84</sup>

The draft Convention also establishes the penal responsibility of the hierarchical superior for criminal negligence, in application of the principle of responsibility in the chain of command or responsible authority. The provisions consider another situation, different from that of the responsibility of the superior who gives the order to commit a forced disappearance, involving sanctions against officials who neglect their duty to prevent or halt the commission of forced disappearances. In this event the superior is neither the perpetrator nor a participant in the act of forced disappearance, but had knowledge of what was being

81 The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (article 2 (3)), the Code of Conduct for Law Enforcement Officials (article 5) and the Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions (Principle 19). Also, the Statute of the International Criminal Tribunal for the former Yugoslavia (article 7,4), the Statute of the International Criminal Tribunal for Rwanda (article 6,4) and the Rome Statute of the International Criminal Court (article 33).

82 In this area, in addition to the post-war European legislation, several recent developments should be highlighted: Law No. 22 of 1994 of Sri Lanka, which excludes due obedience as grounds for justification of the crime of torture; Law No. 589 of 2000 of Colombia, which excludes due obedience as the grounds for justification of crimes in cases of forced disappearance, genocide and torture (article 2); and the Belgium Law of 16 June 1993, relative to grave breaches of the International Geneva Conventions of 12 August 1949 and additional Protocols I and II of 8 June 1977 (article 5). Likewise, some countries have incorporated this prohibition at the constitutional level, such as for example the Constitutions of Bolivia (article 13), of Croatia (article 20) and of Venezuela (articles 25 and 45).

83 See for example the Judgment of 12 December 1973, of the Military Appeals Court in the My Lai (Vietnam) case, *United States v. William L. Calley Jr.*, United States of America.

84 Sahir Erman, "Rapport général: L'obéissance militaire au regard des droits pénaux internes et du droit de la guerre", in *V - Cinquième Congrès International, Dublin, 25 - 30 mai 1970. L'obéissance militaire au regard des droits pénaux internes et du droit de la guerre*, Recueils de la Société internationale de droit pénal militaire et de droit de la guerre, Volume 1, Strasbourg 1971, p. 357 (free translation).



committed or was going to be committed and, having the legal duty to prevent or halt the crime, failed to accomplish this duty. The penal responsibility inferred here is not general, as it is applied to the "exercise of the powers vested in them". Nor does it involve a form of "objective responsibility", since it is conditioned on their having been "in possession of information that enabled them to know that the crime was being or was about to be committed". Thus sanctions are applied against the criminal tolerance or negligence of superiors with regard to offenses committed by personnel under their command. The principle of the criminal responsibility of negligent commanders is recognized in numerous international instruments,<sup>85</sup> by international jurispru-

dence<sup>86</sup> as well as in various national legislations.<sup>87</sup>

Finally, the draft Convention addresses the problem of the statute of limitations of penal action and of punishment of the crime. In keeping with the double character attributed to forced disappearance – as a simple crime and as a crime against humanity – the draft text establishes a double regime in this area. Thus article 16 (1) of the draft text establishes the non-applicability of statutory limitations to criminal proceedings and to any punishment arising from forced disappearances when this involves acts committed within the framework of a systematic or massive practice. For the other cases of forced disappearance, which do not constitute a

85 The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (article 86, par. 2); the Statute of the International Criminal Tribunal for the former Yugoslavia (article 7, 3); the Statute of the International Criminal Tribunal for Rwanda (article 6,3); the Rome Statute of the International Criminal Court (article 28); the Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions (Principle 19); and the Code of Conduct for Law Enforcement Officials (article 5).

86 This principle has been recognized by jurisprudence since the Second World War. The Tribunal of Nuremberg did so in its Sentence of 11 October 1946, in the case of Frick, concerning euthanasia practiced in hospitals and other centers under his control. The principle was broadly developed by the Tokyo Tribunal in its Sentence of 12 November 1948, especially with regard to the responsibility of superior officers for crimes committed against prisoners of war. The principle was also applied in the sentences relating to the following cases: *Re Yamashita* (Supreme Court of the United States, 4 February 1946); *Homma v. United States* (1946); *Von Leeb - "German High Command Trial"* (United States Military Tribunal, Nuremberg, 28 October 1948); *Pohl et al.* (United States Military Tribunal, Nuremberg, 3 November 1947); and *List- "Hostage Trial"* (United States Military Tribunal, Nuremberg, 19 February 1948). Likewise the International Criminal Tribunal for the former Yugoslavia has reiterated this principle in its sentences of 16 November 1998, Case No. IT-96-21-T, *Prosecutor v. Z. Delalic and others*, par. 734; of 3 March 2000, Case No. *Prosecutor v. Blaskic - "Lasva Valley"*, pars. 289 ff.; of 20 July 2000, Case No. IT-96-21, *Prosecutor v. Delalic - "Celibici Camp"*; of 26 February 2001, Case No. IT-95-14/2, *Prosecutor V. Dario Kordic & Mario Cerkez - "Lasva Valley"*, pars. 366 to 371 and 401 ff. See, also, the work of the International Law Commission on the Draft Code of Crimes against the Peace and Security of Mankind, in United Nations documents Supplement No. 10 (A/46/10), p. 262, and Supplement No. 10 (A/51/10), pp. 22 to 30.

87 See, for example, the Belgium Law of 16 June 1993, relative to grave breaches of the International Geneva Conventions of 12 August 1949 and additional Protocols I and II of 8 June 1977 (article 4).

crime against humanity, the draft Convention establishes safeguards to prevent statutory limitation from being a factor contributing to impunity: the statute of limitation shall be equal to the longest period laid down in the law of each State Party; the limitation will be counted starting from the moment when the fate or whereabouts of the disappeared person are established with certainty; and the prescription shall be suspended as long as effective remedies do not exist in the domestic legal system. On this point the draft text builds on article 17 (2) of the Declaration on the Protection of All Persons from Enforced Disappearances.

#### 4. Prevention measures

The draft Convention establishes various clauses with regard to prevention of forced disappearance. The majority of these develop pertinent prescriptions of the Declaration on the Protection of All Persons from Enforced Disappearances and of various international standards on this subject<sup>88</sup>. They are inspired, moreover, by the experience of the Working Group on Enforced or Involuntary

Disappearances. These provision apply to:

- the obligation to hold persons deprived of liberty solely in an officially recognized place of detention controlled by a competent authority;<sup>89</sup>
- the obligation on the part of the authorities to maintain official and centralized registers of persons deprived of liberty;<sup>90</sup>
- the legality of the deprivation of liberty and its control by a judicial body or other competent authority;<sup>91</sup>
- the obligation to conduct a prompt, thorough and impartial investigation, with attribution of broad powers of investigation for the authority charged with these investigations;<sup>92</sup>
- the obligation to guarantee, at all times and under any circumstances, the right to a prompt, simple and effective judicial remedy as a means of determining the whereabouts of the disappeared person;<sup>93</sup> and
- the principle of *non refoulement*, which prohibits the expulsion, return or extradition of a person when there exist reasons to believe that he or she

88 Such as the Standard Minimum Rules for the Treatment of Prisoners and the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (in particular principles 2, 3, 5, 16, 18, 19 and 29).

89 Article 22 of the draft Convention

90 Ibid.

91 Article 21 of the draft Convention.

92 Article 11 of the draft Convention.

93 Article 20 of the draft Convention.

may be the victim of a forced disappearance or other grave violation of human rights.<sup>94</sup>

### 5. The victims and their rights

The draft Convention addresses the question of the victims of forced disappearance and their rights, taking into account the jurisprudential and doctrinal evolution of international bodies,<sup>95</sup> in particular that of the Human Rights Committee<sup>96</sup> and the Working Group on Enforced or Involuntary Disappearances.<sup>97</sup> In drawing up the draft Convention, the Working Group on the Administration of Justice drew its inspiration also from the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*<sup>98</sup> as well as from the work carried out by the

Expert on the right to reparation, of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities,<sup>99</sup> and the draft *Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law*.<sup>100</sup>

For the purposes of reparation, the draft Convention establishes a broad definition of the victim of forced disappearance which includes the "disappeared person", his or her close relatives and any dependent who has a direct relationship with the disappeared person. Additionally, this definition extends to any person who has suffered harm through intervening to prevent a forced disappearance or to shed light on the fate or whereabouts of the "disappeared person".<sup>101</sup>

94 Article 15 of the draft Convention.

95 Such as, for example, the work of the Inter-American Commission on Human Rights. See, among others, Annual Report of the Inter-American Commission on Human Rights - 1977, 1978, OEA/Ser.L/V/II.43, doc.21, corr.1, p. 24; Report on the situation of human rights in Argentina, 1980, OAS document OEA/Ser.L/V/III/49, doc. 19, p. 59; Annual Report of the Inter-American Commission on Human Rights, 1980 - 1981, OEA/Ser.G, CP/doc.1201/1981, of 20 October 1981, p. 113; Annual Report of the Inter-American Commission on Human Rights, 1985-1986, OEA/Ser.L/V/II.68, Doc. 8 rev 1, of 28 September 1986, p. 205. Also in the decisions of the European Court of Human Rights. See, for example, the Sentence of 25 May 1998, *In the Matter of Kurt vs. Turkey*, Case No. 15/19997/799/1002.

96 Human Rights Committee: decision of 21 July 1983, Communication 107/1981, *Maria del Carmen Almeida de Quinteros case* (Uruguay); decision of 25 March 1996, Communication 542/1993, *Katombe L. Tshishimbi case* (Zaire), CCPR/C/56/542/1993; and decision of 25 March 1996, communication 540/1996, *Ana Rosario Celis Laureano case*, (Peru), CCPR/C/56/540/1993.

97 See for example the Reports of the Working Group on Enforced or Involuntary Disappearances, E/CN.4/1990/13, par. 339 and E/CN.4/1985/15, par. 291.

98 In particular, principles 4, 5 and 6.

99 United Nations document, E/CN.4/Sub.2/1993/8, par. 14.

100 United Nations document E/CN.4/Sub.2/1997/Rev.1, Annex I, Principle 3.

101 Article 24 (3) of the draft Convention.

The draft Convention establishes the obligation to guarantee, in all circumstances, the right to reparation for the harm caused to the victims of forced disappearance, and provides for different forms of reparation, in accordance with the evolution of international law, namely: restitution, compensation, rehabilitation, satisfaction and the restoration of the honor and dignity of the victims of the crime of forced disappearance.<sup>102</sup>

In addition, article 11 (6) of the draft text establishes a safeguard of the right to the truth for the relatives of the disappeared. The draft Convention establishes the obligation on the part of the authorities to carry out a thorough and impartial investigation into cases of forced disappearance, at the request of the party or *ex officio*. The results of such investigations cannot be communicated, if to do so would hinder the institution of an ongoing criminal inquiry. Nevertheless the draft Convention establishes that “the competent authority shall communicate regularly and without delay to the relatives of the disappeared person the results of the inquiry into the fate and whereabouts of that person.”

Finally, the draft Convention establishes a clause safeguarding the right to justice of the victims, creating the obligation on the part of States to guarantee “a broad legal standing in the judicial process to any wronged party, or any person or national or international organization having a legitimate interest therein.” With this is created the possibility that, in addition to the victim and his or her relatives, other persons or NGOs can constitute themselves as plaintiffs in the criminal proceedings through various forms provided for this in national legislation.<sup>103</sup> Experience has shown that non-governmental human rights organizations not only have a legitimate interest in the criminal proceedings, but can also contribute to maintaining the momentum of the proceedings and the investigations. Often the relatives of “disappeared persons” feel themselves prevented – among other reasons by fear – from instituting legal proceedings. In view of this, and given the gravity of forced disappearance, it is very important that third parties with a legitimate interest, such as human rights NGOs, have a formal role within the judicial proceedings. In the case of grave offences, the legislations

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102 Article 24 of the draft Convention

103 In a large number of countries, already via legislation on criminal proceedings or by jurisprudential creation, third persons are authorized to intervene in criminal proceedings. A variety of procedural forms exist, such as private criminal action, popular criminal action (*acusación popular* o *acción popular*), complaint, joint complaint, civil plaintiff (*partie civile*) and intervening third party. The entitlement and powers accorded under each procedural form vary according to the law of each country

of a number of countries provide for various types of procedural mechanisms permitting third parties to institute proceedings, including non-governmental organizations.<sup>104</sup>

### *6. Abduction and adoption of children of disappeared parents*

The draft Convention addresses one of the most serious aspects of forced disappearance, namely, the abduction of children born during their mother's forced disappearance and their subsequent adoption. Although this issue is addressed by the Declaration on the Protection of All Persons from Enforced Disappearances<sup>105</sup> and the Inter-American Convention on Forced Disappearance of Persons<sup>106</sup>, there are no legally binding, universally applicable instruments available for attacking the

various components of this grave phenomenon.

The draft Convention further develops the provisions of these two international instruments. At the same time, the crux of the approach adopted by the draft Convention on this question is the principle of the best interests of the child, recognized in Article 12 of the Convention on the Rights of the Child. Thus the draft Convention establishes:

- the obligation to prevent and punish the abduction of children whose parents are the victims of forced disappearance and of children born during their mother's forced disappearance;
- the return of the child to the family of origin as a general norm, but keeping in mind the principle of the best interests of the child;

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104 Numerous national legislations, under diverse procedural forms, provide for the participation of non-governmental organizations in criminal proceedings. For example, in France, the Code of criminal procedure expressly provides for the possibility of non-profit associations, whose purpose is to secure prosecution of crimes against humanity, racism or sexual violence, among other things, constituting themselves as civil plaintiffs (*partie civile*) for this purpose in criminal proceedings relating to such practices. In Spain, the law of criminal procedure permits non-governmental organizations to constitute themselves as plaintiffs and participate in the popular accusation. In Guatemala, the Code of Criminal Procedure (Decree No. 51-92, article 116) provides that "any citizen or association of citizens" can be associated plaintiffs "against public officials or employees who have directly violated human rights". In Belgium, the law of 13 April 1995 (article 11,5), relating to sexual abuses against minors, authorizes non-profit associations to constitute themselves as civil plaintiffs in criminal proceedings. In Argentina, the jurisprudence has accepted that non-governmental organizations can constitute themselves as plaintiffs in criminal proceedings. In Portugal, Law No. 20/96, authorizes non-governmental human rights organizations to take part in criminal proceedings instigated for acts of racism, xenophobia or discrimination.

105 Article 21 of the Declaration.

106 Article XII of the Convention. Nevertheless, the Convention addresses the problem in a general fashion and in terms of reciprocal cooperation between States for the purposes of the search, identification and return of minors transferred to other States.

- the obligation of international cooperation and reciprocal assistance in the search, identification, location and return of these minors; and
- the obligation to guarantee in national legislation the possibility of reviewing and annulling any adoption which has arisen from a forced disappearance.

The Working Group on Enforced or Involuntary Disappearances, in commenting on the draft Convention, said that it “particularly welcomes the obligation of States parties [...] to prevent and punish the abduction of children whose parents are victims of enforced disappearance and of children born during their mother’s disappearance”.<sup>107</sup> The Working Group considered that “Together with the general rule of returning such children to their family of origin, the explicit possibility of annulling any adoption which has arisen from an enforced disappearance, and the principle of the best interest of the child taken from the Convention on the Rights of the Child, this obligation provides an appropriate remedy to one of the most serious phenomena occurring in the context of enforced disappearances”.<sup>108</sup>

## **B. Procedures and monitoring body in the draft Convention**

During the process of elaborating the draft Convention, the Working Group on the Administration of Justice extensively discussed the question of whether it was necessary to establish a monitoring mechanism and protection procedures for the future international instrument. After two years of debate, the Working Group arrived at an affirmative response. The Working Group considered that, given the particularly grave nature of forced disappearance and the specific obligations established in the Draft Convention, a supervision and control of the provisions and obligations of the treaty by an international body was required.

### *1. Monitoring and control procedures and functions*

The Working Group on the Administration of Justice opted for following the classic procedures established by the International Covenant on Civil and Political Rights and its Optional Protocol as well as by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. However, the Working Group introduced various innovations in the draft Convention. Thus, these classic

<sup>107</sup> United Nations document E/CN.4/2001/68, Annex III, p. 35.

<sup>108</sup> Ibid.

procedures were adapted in consideration of various criteria, namely: the specific nature of forced disappearance; the necessity of increasing the threshold of international protection; and the importance of introducing an element of flexibility in the "administrative control" activity (Reporting). Thus the draft Convention establishes various treaty control functions and procedures of international protection.

Firstly, the draft Convention establishes a system of reporting, by means of evaluations concerning the implementation and fulfillment on the part of States of the obligations contained in the instrument.<sup>109</sup> To this classic treaty-body function, the draft Convention incorporated two innovative elements responding to the criteria of increased protection and flexibility. On one hand, a flexible administrative supervision regime, through which the treaty monitoring body enjoys a margin of discretion in requesting reports from the State Parties with regard to the existence or gravity of the practice of forced disappearance. The classic system of "periodic evaluations" is replaced by a more flexible system of evaluation. On the other hand, the draft text confers on the monitoring body the power to effect visits to the territory of the State in question, upon the presentation of its initial report. This provision aims

at furnishing the monitoring body with a procedure which will allow it to make a more realistic "état des lieux" of the problem of forced disappearance in each country and of the difficulties and obstacles at the domestic level to implementing the treaty. This power to effect visits *in situ* is framed in optional terms, thereby giving the treaty-body a margin of appreciation for deciding whether to effect such a visit or not.

Secondly, the draft Convention establishes a function of investigation and reporting in situations involving a context of systematic or massive practice of forced disappearance.<sup>110</sup> The draft Convention basically adopts the procedure established under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, but without retaining the confidential character of this procedure.

Thirdly, the Draft Convention establishes the quasi-jurisdictional control function of the future international instrument, both with regard to inter-State complaints as well as communications from individuals.<sup>111</sup> Concerning individual communications, the draft Convention reincorporates the traditional elements of this system: exhaustion of internal remedies; the non-anonymous character of the communication; and the

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109 Article 27 of the draft Convention.

110 Article 28 of the draft Convention.

111 Articles 29 and 20 of the draft Convention.

non-duplication of international procedures. In accordance with the criterion of greater protection, the draft Convention introduces innovations. Thus the competence of the treaty-body to examine communications is automatic and does not require the express declaration of acceptance of competence by the State Party, as is required under other United Nations human rights treaties.<sup>112</sup> This system of automatic competence is inspired by the American Convention on Human Rights and provides a more effective system of international protection.

Likewise, the draft Convention establishes that the authors of the communications can be individuals, groups of individuals or non-governmental organizations. This provision, which has precedents in the inter-American system of human rights protection,<sup>113</sup> is of great importance given the particular gravity

of forced disappearance and the impact it has on the relatives of the disappeared person.

The draft Convention moreover incorporates the power, in cases of urgency, for the treaty-body to "request the State Party concerned to take whatever protective measures it may deem appropriate, when there is a need to avoid irreparable damage". The request for such protective measures and their adoption in no way prejudices the matter of the final decision. The inclusion of provisional measures in the treaty is of singular importance, since – as shown in the practice of the Human Rights Committee and the Committee against Torture – on some occasions States do not observe protective or provisional measures, based on the argument that such measures do not form part of the treaty but rather of the internal regulations of these instruments,<sup>114</sup> and

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112 As is the case with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (article 22), the International Convention on the Elimination of All Forms of Racial Discrimination (article 14) and the Optional Protocol to the International Covenant on Civil and Political Rights.

113 In particular, article 44 of the American Convention on Human Rights.

114 Article 86 of the Rules of Procedure of the Human Rights Committee and article 108 (9) of the Rules of Procedure of the Committee against Torture.



thus are not of a legally binding character.<sup>115</sup>

Finally, the draft Convention incorporates an innovative function of emergency protection for humanitarian purposes.<sup>116</sup> This involves an emergency procedure, not subject to the prior exhaustion of internal remedies and of an expeditious nature and neutral character, to seek and find persons who have “disappeared”. This function is independent of the quasi-jurisdictional control function. In a certain sense, it can be said that this procedure is a kind of *international habeus corpus*, hence its singular importance in terms of international protection.

In order to reinforce the observation, reporting and protection capacity of the treaty-body, the draft Convention stipulates that this mechanism is to be invested with the power to effect visits *in situ*.<sup>117</sup> The draft Convention establishes that, during these *in situ* visits, the members of the treaty-body may be accompanied by

interpreters, members of the secretariat and experts. Similarly, to protect the activity of the members of the treaty-body and of the personnel accompanying them, the draft Convention stipulates that all of them are to enjoy the powers, prerogatives and immunity pertaining to “experts on mission” and provided for by the Convention on the Privileges and Immunities of the United Nations.<sup>118</sup>

## 2. The treaty-body

In this area, the Working Group on the Administration of Justice studied various options, namely: the attribution of the task of monitoring the treaty to an existing treaty-body, such as the Human Rights Committee or the Committee against Torture; the attribution of the task of monitoring the treaty to an already existing extra-conventional mechanism, such as the Working Group on Enforced or Involuntary Disappearances; and the creation of a new treaty-body.

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115 It is worth noting that this latter argument has been contested by the Committee against Torture, since the Committee considers that a “State Party, in ratifying the Convention and voluntarily accepting the competence of the Committee under article 22, undertakes to cooperate in good faith with the same in application of this procedure. In this sense the fulfillment of the provisional measures solicited by the Committee, in cases which the latter considers reasonable, is indispensable in order to be able to avoid for the person who has been the object of irreparable harm, that, in addition, they could annul the final result of the procedure before the Committee.” (Decision of 10 November 1998, Communication N° 110/1998, *Cecilia Rosana Núñez Chipana* case (Venezuela), document CAT/C/21/D/110/1998, par. 8). In the inter-American sphere, this argument invoked in order not to observe the provisional measures, has likewise been contested by the Inter-American Commission on Human Rights (See, for example, Second Report on the Situation of Human Rights in Colombia, OAS document OEA/Ser.L/V/1.84).

116 Article 31 of the draft Convention.

117 Articles 28, 29, 30, 31 and 32 of the draft Convention.

118 Article 32 of the draft Convention.

*a) Existing treaty-bodies  
and mechanisms*

The attribution of the task of monitoring the treaty to an already existing treaty-bodies or extra-conventional mechanisms could present some advantages: not provoke the hostility of certain States to creating new treaty-bodies; less financial and administrative costs; and, in the case of a treaty-body, the accumulated experience with regard to administrative and quasi-jurisdictional control.

Nevertheless, the Working Group considered that this option presented various difficulties and negative aspects. One of the difficulties evoked by the Working Group was the current saturation of the working capacity of the existing treaty-bodies and extra-conventional mechanisms. With respect to the Human Rights Committee and the Committee against Torture, the study carried out by the expert Philip Alston concerning the performance of treaty system is very revealing.<sup>119</sup> Concerning the Working Group on Enforced or Involuntary Disappearances, the saturation of its working capacity has grown worse in recent years.<sup>120</sup> Added to this problem has been the substantial cutback in personnel of the Group and the allocation of

insufficient resources.<sup>121</sup> In this context, the attribution of the monitoring function for the future treaty on forced disappearance to one of these treaty-bodies or to the Working Group on Enforced or Involuntary Disappearances would necessarily imply increasing the number of its experts and the personnel of its secretariat. As a result, the argument concerning the low financial and administrative costs was very relative.

Another of the difficulties, and not the least of those encountered by the Working Group, was the origin of the nomination of members of the monitoring mechanism. The problem posed is different depending on whether the mechanism is a treaty-body or an extra-conventional mechanism. With regard to the hypothesis of an already existing treaty-body, this option raises a variety of serious problems. One of these relates to the disparity in the legal statutes of States vis-à-vis the Human Rights Committee and the Committee against Torture, since not all States recognize the competence for individual communications of both treaty-bodies. This could lead to a situation in which States who were not Parties to the International Covenant on Civil and Political Rights or to the

119 "Final report on enhancing the long-term effectiveness of the United Nations human rights treaty system", United Nations document E/CN.4/1997/74.

120 Thus, for example, in its report E/CN.4/2000/68 (par. 119), the Working Group on Enforced or Involuntary Disappearances recalled that of the 49,500 cases of forced disappearance handled since 1980, 46,000 cases were still pending.

121 United Nations document E/CN.4/2000/68, par. 126. It should be noted that currently the Working Group has a secretariat made up of only two part-time employees.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, but were however Parties to the Convention on disappearances, being subject to control by a body made up of experts in whose election they had not participated. Moreover, this option could seriously compromise the principle of automatic competence fixed by the draft Convention.

With regard to an organ such as the Working Group on Enforced or Involuntary Disappearances, this issue could raise even greater complications. The nomination outside the framework of the Convention of the members of the Working Group would generate a special situation for State Parties to the future treaty on forced disappearances. Thus, States who were Parties to the Convention but were not members of the Commission of Human Rights, would be subject to control by a body whose members they did not participate in electing. Moreover, this could also give rise to the nomination of experts for the control mechanism by States who were members of the Human Rights Committee but not party to the Convention on disappearance.

Another of the problematic aspects cited during the deliberations of the Working Group on the Administration of Justice was that of the parallelism of procedures. Thus the Working Group considered that assigning the treaty control function to an already existing treaty-

body, could generate a parallelism and asymmetry of procedures. The draft Convention establishes specific functions and procedures which, while building on procedures and functions of the Human Rights Committee and the Committee against Torture, do not coincide exactly with those foreseen by the International Covenant on Civil and Political Rights and its Optional Protocol or by the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. As noted above, the draft Convention does not only introduce various important innovations in the classic procedures, but also creates new functions, such as that pertaining to the *international habeas corpus*.

In case of attributing control of the treaty on forced disappearances to an already existing treaty-body, the Working Group reflected on whether the format of the new instrument should not be that of a Protocol, as for example a Third Optional Protocol to the International Covenant on Civil and Political Rights. However it was noted that in any case this aspect would not create particular difficulties. On one hand, a Protocol can incorporate substantive provisions. On the other hand, a Convention can make reference to control mechanisms provided for in other international instruments, as occurs with the Inter-American Convention on Forced Disappearance of Persons.

Faced with these difficulties and problems, the Working Group on the Administration of Justice arrived at the conclusion that the creation of a treaty-body for the Convention was the best solution. In addition to resolving the problems mentioned above, the existence of a specific and autonomous treaty-based mechanism concerning forced disappearance would be optimal for the system of international protection. In this way the specificity of the monitoring and protection procedures provided for in the draft Convention would be preserved. Moreover, this would enable the mechanism to maintain an adequate working capacity, inasmuch as it would not have any function other than monitoring the provisions of the Convention.

*b) The Committee against Forced Disappearance*

The draft Convention establishes a Committee against Forced Disappearance, composed of ten members.<sup>122</sup> This takes after the model established for the Committee against Torture. Nevertheless, the draft Convention introduces some innovations.

The draft Convention establishes a clause aimed at safeguarding the independence of the members of the Committee, which declares the incompatibility of the function of member of the Committee with "any post or function subject to the hierarchical structure of the executive authority of a State Party".<sup>123</sup> The wording of the provision thus leaves exempt from this incompatibility, among others, members of the judiciary, ombudspersons and state university professors. In addition, the draft Convention contains a clause promoting transparency in the nomination process for membership on the Committee, allowing intergovernmental and non-governmental organizations access to the names of the candidates.

Finally, the draft Convention devotes two safeguard clauses to the financial functioning of the Committee.<sup>124</sup> The United Nations will cover the costs of the Committee, and its members will receive emoluments for their activity. There are precedents for both of these clauses in other human rights treaties.<sup>125</sup>

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122 Articles 25 and 26 of the draft Convention.

123 Article 25 (1) of the draft Convention.

124 Articles 25 (7) and 26 (5) of the draft Convention.

125 See, for example, the Convention on the Elimination of All Forms of Discrimination against Women (article 17.8), the Convention on the Rights of the Child (article 43.12) and Resolutions Nos. 47/111 and 51/80 of the United Nations General Assembly.

### C. The final Clauses in the draft Convention

With the regard to reserves, entry into force and other related provisions, the draft Convention replicates the classic clauses in these areas. It establishes that the future treaty will enter into force after the tenth instrument of adhesion or ratification has been deposited.

Nevertheless, the draft Convention handles the issue of reserves in an innovation fashion.<sup>126</sup> In its initial version, the draft Convention excluded any possibility of reserves. This option is accepted by international law.<sup>127</sup> Nevertheless, the Working Group on the Administration of Justice considered it necessary to make this stipulation more flexible, while at the same time protecting the fundamental provisions of the draft Convention and the functional capacity of the Committee against Forced Disappearance.

The draft Convention prohibits the formulation of reserves to the first part of the treaty, i.e. with respect to its substantive provisions (articles 1 to 24). Likewise prohibited are any reserves concerning the procedure of *international habeas cor-*

*pus*. Moreover, the draft Convention prohibits the formulation of reserves “the effect of which inhibit the operation of any of the bodies established by this Convention”.<sup>128</sup> This provision has a precedent in article 20 (2) of the International Convention on the Elimination of All Forms of Racial Discrimination.

### III.- Latest developments

In its 57<sup>th</sup> Session, the Commission on Human Rights established two concrete mechanisms to initiate the process of examining the draft Convention.<sup>129</sup> Firstly, the Commission decided to name an independent expert charged with undertaking a study concerning the existing international criminal and human rights framework surrounding forced disappearance, and to identify existing gaps in order to ensure full protection against forced disappearances.<sup>130</sup> Secondly, the Commission of Human Rights decided to establish a Working Group with the mandate of elaborating “legally binding normative instrument for the protection

126 Article 36 (1) of the draft Convention.

127 Article 19 of the Vienna Convention on the Law of Treaties. There are a number of treaties which include clauses prohibiting any reserves to the instrument, such as, for example, Wipo Copyright Treaty (article 22), the Paris Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction of 1993 (article XXII) and the Rome Statute of the International Criminal Court (Art. 120).

128 Article 36 (1) of the draft Convention.

129 Resolution 2001/46, “Question of Enforced or Involuntary Disappearances”, of 23 April 2001.

130 Ibid, par. 11.

of all persons from enforced disappearance [...]for consideration and adoption by the General Assembly".<sup>131</sup> This Working Group, which will meet between the regular sessions of the Commission, will begin its work in 2002, on the basis, among other references, of the draft Convention and the study carried out by the expert. The composition of the Working Group will be open, allowing the participation not only of States and intergovernmental organizations but also individual experts and non-governmental organizations.

Three comments are in order with respect to the Resolution by the Commission on Human Rights. The establishment of the Working Group is a sound decision. A Working Group constitutes a natural space within which States, experts and both intergovernmental and non-governmental organizations can express their views and observations, and is an appropriate forum for negotiations aimed at achieving consensus on the adoption of a binding legal instrument. It should be remembered that the creation of such a Group had been requested by all Latin American and various European and African States, as well as by the Sub-Commission on the Promotion and Protection of Human Rights,<sup>132</sup> the Working Group on

Enforced or Involuntary Disappearances<sup>133</sup> and numerous non-governmental organizations.<sup>134</sup>

The phrase, "legally binding normative instrument", employed by the Commission on Human Rights in its Resolution, is appropriate at the current stage of the discussion. Some States, who have shown support in principle for the need for a binding instrument on forced disappearance, have expressed doubts about the necessity or the viability of a new treaty-body and would prefer that control of the future treaty-body be exercised by an already existing treaty-body. This option, as we have seen above, could entail – although not necessarily – a change in the "format" of the instrument. In this sense, the expression "legally binding normative instrument", which covers the formula both of a convention as well a protocol, could facilitate a frank and open debate on this matter.

Finally, the mechanism of an independent expert charged with making an "état des lieux", an inventory of the state of international law with regard to forced disappearance, could be beneficial for the activity of the Working Group. The study which the expert is charged with preparing could constitute a good "input" for the deliberations and, at the same time, contribute to improving their

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131 Ibid, par. 12.

132 Resolution 2000/18 of 17 August 2000.

133 United Nations document E/CN.4/2001/68, Annex III.

134 United Nations document E/CN.4/2001/69.

technical quality. Indeed, since the Sub-Commission on the Promotion and Protection of Human Rights adopted the draft Convention, various developments have occurred at both the international and regional levels on matters which, directly or indirectly, affect various aspects of forced disappearance. Among examples that could be cited are the Rome Statute, the evolution of universal jurisdiction exercised by third countries and the "Pinochet case". These should be taken into account and weighed carefully in the elaboration of a definitive text of

an international instrument on forced disappearances.

With its Resolution, the Commission on Human Rights, has taken an important step toward the adoption of a universal and legally binding instrument on forced disappearance. The "Draft International Convention on the Protection of All Persons from Forced Disappearance" issued by the Sub-Commission constitutes an excellent basis for initiating the process of discussion and adoption of this international instrument.

# *Basic Texts*

## *Draft International Convention on the Protection of All Persons from Forced Disappearance*

The Draft International Convention on the Protection of All Persons from Forced Disappearance was adopted on, 26 August 1998 by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, resolution 1998/25 (UN Document E/CN.4/Sub.2/1998/19, Annex, 19 August 1998)

### **Preamble**

The States Parties to this Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations and other international instruments, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind the obligation of States under the Charter, in particular Article 55, to promote universal respect for, and observance of, human rights and fundamental freedoms,

Taking into account that any act of forced disappearance of a person constitutes an offence to human dignity, is a denial of the purposes of the Charter and

is a gross and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights, and reaffirmed and developed in other international instruments in this field,

In view of the fact that any act of forced disappearance of a person constitutes a violation of the rules of international law guaranteeing the right to recognition as a person before the law, the right to liberty and security of the person, and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment,

Considering that forced disappearance undermines the deepest values of any society committed to the respect of the rule of law, human rights and fundamental freedoms, and that the systematic or widespread practice of such acts constitutes a crime against humanity,



Recognizing that forced disappearance violates the right to life or puts it in grave danger and denies individuals the protection of the law,

Taking into account the Declaration on the Protection of All Persons from Enforced Disappearance adopted by the General Assembly of the United Nations,

Recalling the protection afforded to victims of armed conflicts by the Geneva Conventions of 12 August 1949 and the Additional Protocols thereto of 1977,

Having regard in particular to the relevant articles of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which protect the right to life, the right to liberty and security of the person, the right not to be subjected to torture and the right to recognition as a person before the law,

Having regard also to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which provides that States Parties shall take effective measures to prevent and punish acts of torture,

Bearing in mind the Code of Conduct for Law Enforcement Officials, the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the Standard Minimum Rules for the Treatment of

Prisoners, and the Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity,

Affirming that, in order to prevent acts that contribute to forced disappearances it is necessary to ensure strict compliance with the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the General Assembly on 9 December 1988, and the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, endorsed by the General Assembly on 15 December 1989,

Taking into account also the Vienna Declaration and Programme of Action adopted by the World Conference on Human Rights on 25 June 1993,

Wishing to increase the effectiveness of the struggle against forced disappearances of persons throughout the world,

Have agreed as follows:

## **Part I**

### *Article 1*

1. For the purposes of this Convention, forced disappearance is considered to be the deprivation of a person's liberty, in whatever form or for whatever

reason, brought about by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by an absence of information, or refusal to acknowledge the deprivation of liberty or information, or concealment of the fate or whereabouts of the disappeared person.

2. This article is without prejudice to any international instrument or national legislation that does or may contain provisions of broader application, especially with regard to forced disappearances perpetrated by groups or individuals other than those referred to at paragraph 1 of this article.

### *Article 2*

1. The perpetrator of and other participants in the offence of forced disappearance or of any constituent element of the offence, as defined in article 1 of this Convention, shall be punished. The perpetrators or other participants in a constituent element of the offence as defined in article 1 of this Convention shall be punished for a forced disappearance where they knew or ought to have known that the offence was about to be or was in the process of being committed. The perpetrator of and other participants in the following acts shall also be punished:

(a) Instigation, incitement or encouragement of the commission of the offence of forced disappearance;

- (b) Conspiracy or collusion to commit an offence of forced disappearance;
- (c) Attempt to commit an offence of forced disappearance; and
- (d) Concealment of an offence of forced disappearance.

2. Non-fulfilment of the legal duty to act to prevent a forced disappearance shall also be punished.

### *Article 3*

1. The systematic or massive practice of forced disappearance constitutes a crime against humanity.

2. Where persons are suspected of having perpetrated or participated in an offence, as defined in articles 1 and 2 of this Convention, they should be charged with a crime against humanity where they knew or ought to have known that this act was part of a systematic or massive practice of forced disappearances, however limited the character of their participation.

### *Article 4*

1. The States Parties undertake:

- (a) Not to practise, permit or tolerate forced disappearance;
- (b) To investigate immediately and swiftly any complaint of forced disappearance and to inform the family of the disappeared person about his or her fate and whereabouts;

- (c) To impose sanctions, within their jurisdiction, on the offence of forced disappearance and the acts or omissions referred to in article 2 of this Convention;
- (d) To cooperate with each other and with the United Nations to contribute to the prevention, investigation, punishment and eradication of forced disappearance;
- (e) To provide prompt and appropriate reparation for the damage caused to the victims of a forced disappearance in the terms described in article 24 of this Convention.

2. No circumstance - whether internal political instability, threat of war, state of war, any state of emergency or suspension of individual guarantees - may be invoked in order not to comply with the obligations established in this Convention.

3. The States Parties undertake to adopt the necessary legislative, administrative, judicial or other measures to fulfil the commitments into which they have entered in this Convention.

#### *Article 5*

1. The States Parties undertake to adopt the necessary legislative measures to define the forced disappearance of persons as an independent offence, as defined in article 1 of this Convention, and to define a crime against humanity, as defined in article 3 of this Convention,

as separate offences, and to impose an appropriate punishment commensurate with their extreme gravity. The death penalty shall not be imposed in any circumstances. This offence is continuous and permanent as long as the fate or whereabouts of the disappeared person have not been determined with certainty.

2. The State Parties may establish mitigating circumstances for persons who, having been implicated in the acts referred to in article 2 of this Convention, effectively contribute to bringing the disappeared person forward alive, or voluntarily provide information that contributes to solving cases of forced disappearance or identifying those responsible for an offence of forced disappearance.

#### *Article 6*

1. Forced disappearance and the other acts referred to in article 2 of this Convention shall be considered as offences in every State Party. Consequently, each State Party shall take the necessary measures to establish jurisdiction in the following instances:

- (a) When the offence of forced disappearance was committed within any territory under its jurisdiction;
- (b) When the alleged perpetrator or the other alleged participants in the offence of forced disappearance or the other acts referred to in article 2 of

this Convention are in the territory of the State Party, irrespective of the nationality of the alleged perpetrator or the other alleged participants, or of the nationality of the disappeared person, or of the place or territory where the offence took place unless the State extradites them or transfers them to an international criminal tribunal.

2. This Convention does not exclude any jurisdiction exercised by an international criminal tribunal.

#### *Article 7*

1. Any State Party on whose territory a person suspected of having committed a forced disappearance or an act referred to in article 2 of this Convention is present shall, if after considering the information at its disposal it deems that the circumstances so warrant, take all necessary measures to ensure the continued presence of that person in the territory and if necessary take him or her into custody. Such detention and measures shall be exercised in conformity with the legislation of that State, and may be continued only for the period necessary to enable any criminal or extradition proceedings to be instituted.

2. Such State shall immediately make a preliminary investigation of the facts.

3. When a State, pursuant to this article, gathers evidence of a person's responsibility but does not exercise its jurisdiction over the matter, it shall immedi-

ately notify the State on whose territory the offence was committed, informing it of the circumstances justifying the presumption of responsibility, in order to allow that State to request extradition.

#### *Article 8*

1. States Parties shall afford one another the greatest measure of legal assistance in connection with any criminal investigation or proceedings relating to the offence of forced disappearance, including the supply of all the evidence at their disposal that is necessary for the proceedings.

2. States Parties shall cooperate with each other, and shall afford one another the greatest measure of legal assistance in the search for, location, release and rescue of disappeared persons or, in the event of death, in the return of their remains.

3. States Parties shall carry out their obligations under paragraphs 1 and 2 of this article, without prejudice to the obligations arising from any treaties on mutual legal assistance that may exist between them.

#### *Article 9*

1. No order or instruction of any public authority - civilian, military or other - may be invoked to justify a forced disappearance. Any person receiving such an order or instruction shall have the right and duty not to obey it. Each State shall prohibit orders or instructions

commanding, authorizing or encouraging a forced disappearance.

2. Law enforcement officials who have reason to believe that a forced disappearance has occurred or is about to occur shall communicate the matter to their superior authorities and, when necessary, to competent authorities or organs with reviewing or remedial power.

3. Forced disappearance committed by a subordinate shall not relieve his superiors of criminal responsibility if the latter failed to exercise the powers vested in them to prevent or halt the commission of the crime, if they were in possession of information that enabled them to know that the crime was being or was about to be committed.

#### *Article 10*

1. The alleged perpetrators of and other participants in the offence of forced disappearance or the other acts referred to in article 2 of this Convention shall be tried only in the courts of general jurisdiction of each State, to the exclusion of all courts of special jurisdiction, and particularly military courts.

2. No privileges, immunities or special exemptions shall be granted in such trials, subject to the provisions of the Vienna Convention on Diplomatic Relations.

3. The perpetrators of and other participants in the offence of forced disappearance or the other acts referred to in

article 2 of this Convention shall in no case be exempt from criminal responsibility including where such offences or acts were committed in the exercise of military or police duties or in the course of performing these functions.

4. The States Parties guarantee a broad legal standing in the judicial process to any wronged party, or any person or national or international organization having a legitimate interest therein.

#### *Article 11*

1. Each State Party shall ensure that any person who alleges that someone has been subjected to forced disappearance has the right to complain to a competent and independent State authority and to have that complaint immediately, thoroughly and impartially investigated by that authority.

2. Whenever there are grounds to believe that a forced disappearance has been committed, the State shall refer the matter to that authority without delay for such an investigation, even if there has been no formal complaint. No measure shall be taken to curtail or impede the investigation.

3. Each State Party shall ensure that the competent authority has the necessary powers and resources to conduct the investigation, including powers to compel attendance of the alleged perpetrators or other participants in the offence of forced disappearance or other acts

referred to in article 2 of this Convention, and of witnesses, and the production of relevant evidence. Each State shall allow immediate and direct access to all documents requested by the competent authority, without exception.

4. Each State Party shall ensure that the competent authority has access, without delay or prior notice, to any place, including those classified as being places of national security or of restricted access, where it is suspected that a victim of forced disappearance may be held.

5. Each State Party shall take steps to ensure that all persons involved in the investigation – including the complainant, the relatives of the disappeared person, legal counsel, witnesses and those conducting the investigation – are protected against ill-treatment and any acts of intimidation or reprisal as a result of the complaint or investigation. Anyone responsible for such acts shall be subject to criminal punishment.

6. The findings of a criminal investigation shall be made available upon request to all persons concerned, unless doing so would gravely hinder an ongoing investigation. However, the competent authority shall communicate regularly and without delay to the relatives of the disappeared person the results of the inquiry into the fate and whereabouts of that person.

7. It must be possible to conduct an investigation, in accordance with the procedures described above, for as long as

the fate or whereabouts of the disappeared person have not been established with certainty.

8. The alleged perpetrators of and other participants in the offence of forced disappearance or other acts referred to in article 2 of this Convention shall be suspended from any official duties during the investigation.

### *Article 12*

1. Forced disappearance shall not be considered a political offence for purposes of extradition.

2. Forced disappearance shall be deemed to be included among the extraditable offences in every extradition treaty entered into between States Parties.

3. States Parties undertake to include the offence of forced disappearance among the extraditable offences in every extradition treaty they conclude.

4. Should a State Party that makes extradition conditional on the existence of a treaty receive a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the necessary legal basis for extradition with respect to the offence of forced disappearance.

5. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the said offence as extraditable.

6. Extradition shall be subject to the procedures established in the law of the requested State.

### *Article 13*

When a State Party does not grant the extradition or is not requested to do so, it shall submit the case to its competent authorities as if the offence had been committed within its jurisdiction, for the purposes of investigation and, when appropriate, for criminal proceedings, in accordance with its national law. Any decision adopted by these authorities shall be communicated to the State requesting extradition.

### *Article 14*

Forced disappearance shall not be considered a political offence, nor related to a political offence, for purposes of asylum and refuge. States Parties to this Convention shall not grant diplomatic or territorial asylum or refugee status to any person if there are substantiated grounds for believing that he or she has taken part in a forced disappearance.

### *Article 15*

1. No State Party shall expel, return (refouler) or extradite a person to another State if there are grounds for believing that he or she would be in danger of being subjected to forced disappearance

or any other serious human rights violation in that other State.

2. For the purpose of determining whether such grounds exist, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State in question of situations indicating gross, systematic or widespread violations of human rights.

### *Article 16*

1. No statutory limitation shall apply to criminal proceedings and any punishment arising from forced disappearances, when the forced disappearance constitutes a crime against humanity, in accordance with article 3 of this Convention.

2. When the forced disappearance does not constitute a crime against humanity in accordance with article 3 of this Convention, the statute of limitation for the offence and the criminal proceedings shall be equal to the longest period laid down in the law of each State Party, starting from the moment when the fate or whereabouts of the disappeared person is established with certainty. When the remedies described in article 2 of the International Covenant on Civil and Political Rights are no longer effective, the prescription for the offence of forced disappearance shall be suspended until the efficacy of these remedies has been restored.

3. States Parties shall adopt any legislative or other measures necessary to bring their law into conformity with the provisions of the preceding paragraphs.

#### *Article 17*

1. The perpetrators or suspected perpetrators of and other participants in the offence of forced disappearance or the acts referred to in article 2 of this Convention shall not benefit from any amnesty measure or similar measures prior to their trial and, where applicable, conviction that would have the effect of exempting them from any criminal action or penalty.

2. The extreme seriousness of the offence of forced disappearance shall be taken into account in the granting of pardon.

#### *Article 18*

1. Without prejudice to articles 2 and 5 of this Convention, States Parties shall prevent and punish the abduction of children whose parents are victims of forced disappearance and of children born during their mother's forced disappearance, and shall search for and identify such children. As a general rule, the child will be returned to his or her family of origin. Here the best interests of the child must be taken into account and the views of the child shall be given due weight in accordance with the age and maturity of the child.

2. States Parties shall give each other assistance in the search for, identification, location and return of minors who have been removed to another State or held therein. For these purposes, States shall, as needed, conclude bilateral or multilateral agreements.

3. States Parties whose laws provide for a system of adoption shall establish through their national law the possibility of reviewing adoptions, and in particular the possibility of annulment of any adoption which has arisen from a forced disappearance. Such adoption may, however, continue in force if consent is given, at the time of the review, by the child's closest relatives. In any event, the best interests of the child should prevail and the views of the child should be given due weight in accordance with the age and maturity of the child.

4. States Parties shall impose penalties in their criminal law on the abduction of children whose parents are victims of forced disappearance or of children born during their mother's forced disappearance, and on the falsification or suppression of documents attesting to the child's true identity. The penalties shall take into account the extreme seriousness of these offences.

#### *Article 19*

States Parties shall ensure that the training of public law enforcement personnel and officials includes the



necessary education on the provisions of this Convention.

### *Article 20*

1. Without prejudice to any legal remedies for challenging the lawfulness of a deprivation of liberty, States Parties shall guarantee the right to a prompt, simple and effective judicial remedy as a means of determining the whereabouts or state of health of persons deprived of their liberty and/or identifying the authority that ordered the deprivation of liberty and the authority that carried it out. This remedy, as well as that of habeas corpus and similar remedies, may not be suspended or restricted, even in the circumstances described in article 4, paragraph 2, of this Convention.

2. In the framework of this remedy, and without prejudice to the powers of any judicial authority, judges acting in these cases shall enjoy the power to summon witnesses, to order the production of evidence, and to have unrestricted access to places where it may be presumed that a person deprived of liberty might be found.

3. Any delay to or obstruction of this remedy shall result in criminal penalties.

### *Article 21*

1. States Parties shall establish norms under their national law indicating those officials who are authorized to order the

deprivation of liberty, establishing the conditions under which such orders may be given, and stipulating the penalties for officials who do not or refuse to provide information on the deprivation of liberty of a person.

2. Each State Party shall likewise ensure strict supervision, in accordance with a clear chain of command, of all officials responsible for apprehensions, arrests, detentions, police custody, transfers and imprisonment, and of all other law enforcement officials.

3. Arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by the competent authorities or persons authorized for that purpose.

4. There shall be no restriction upon or derogation from any of the human rights of persons under any form of deprivation of liberty that are recognized, binding upon or in force in any State pursuant to law, conventions, regulations or custom on the pretext that this Convention does not recognize such rights or that it recognizes them to a lesser extent.

5. Any form of deprivation of liberty and all measures affecting the human rights of a person under any form of deprivation of liberty shall be ordered by, or be subject to the effective control of, a judicial or other competent authority.

6. Competent authorities shall have access to all places where there is reason

to believe that persons deprived of their liberty might be found.

### *Article 22*

1. States Parties guarantee that any person deprived of liberty shall be held solely in an officially recognized and controlled place of detention and be brought before a judge or other competent judicial authority without delay, who will also be informed of the place where the person is being deprived of liberty.

2. Accurate information on the deprivation of liberty of any person and on his or her whereabouts, including information on any transfer, the identity of those responsible for the deprivation of liberty, and the authority in whose hands the person has been placed, shall be made immediately available to the person's counsel or to any other persons having a legitimate interest in the information.

3. In every place where persons deprived of liberty are held, States Parties shall maintain an official up-to-date register of such persons. Additionally, they shall maintain similar centralized registers. The information contained in these registers shall be made available to the persons and authorities mentioned in the preceding paragraph.

4. States Parties shall identify who is the responsible person in national law for the integrity and accuracy of the custody record. Without prejudice to the provi-

sions of articles 1, 2 and 3 of this Convention, States Parties shall make it a criminal offence for the responsible person, as defined in national law, to fail to register the deprivation of liberty of any person or to record information which is or should be known to be inaccurate in the custody record.

5. States Parties shall periodically publish lists that name the places where persons are deprived of liberty. Such places must be visited regularly by qualified and experienced persons named by a competent authority, different from the authority directly in charge of the administration of the place.

### *Article 23*

States Parties guarantee that all persons deprived of liberty shall be released in a manner that allows reliable verification that they have actually been released and, further, have been released in conditions in which their physical integrity and their ability fully to exercise their rights are assured.

### *Article 24*

1. States Parties guarantee, in all circumstances, the right to reparation for the harm caused to the victims of forced disappearance.

2. For the purposes of this Convention, the right to reparation comprises restitution, compensation, rehabili-

tation, satisfaction, and the restoration of the honour and reputation of the victims of the offence of forced disappearance. The rehabilitation of victims of forced disappearance will be physical and psychological as well as professional and legal.

3. For the purposes of this Convention, the term "victim of the offence of forced disappearance" means the disappeared person, his or her relatives, any dependant who has a direct relationship with her or him, and anyone who has suffered harm through intervening in order to prevent the forced disappearance or to shed light on the whereabouts of the disappeared person.

4. In addition to such criminal penalties as are applicable, the acts referred to in articles 2 and 3 of this Convention shall render the State liable under civil law, and the State may bring an action against those responsible in order to recover what it has had to pay, without prejudice to the international responsibility of the State concerned in accordance with the principles of international law.

## **Part II**

### *Article 25*

1. There shall be established a Committee against Forced Disappearance (hereinafter referred to as the Committee) which shall carry out the functions hereinafter provided. The

Committee shall consist of 10 experts of high moral standing and recognized competence in the field of human rights, who shall serve in a personal and independent capacity. Membership of the Committee is incompatible with any post or function subject to the hierarchical structure of the executive authority of a State Party. The experts shall be elected by the States Parties, consideration being given to equitable geographical distribution and to the usefulness of the participation of some persons having legal experience.

2. The members of the Committee shall be elected by secret ballot from a list of persons nominated by States Parties. Each State Party may nominate not more than two persons from among its own nationals.

3. Elections of the members of the Committee shall be held at biennial meetings of States Parties convened by the Secretary-General of the United Nations. At those meetings, for which two thirds of the States Parties shall constitute a quorum, the persons elected to the Committee shall be those who obtain the largest number of votes and an absolute majority of the votes of the representatives of States Parties present and voting.

4. The initial election shall be held no later than six months after the date of the entry into force of this Convention. At least eight months before the date of each election, the Secretary-General of the

United Nations shall address a letter to the States Parties inviting them to submit their nominations within three months. The Secretary-General of the United Nations shall prepare a list in alphabetical order of all the persons thus nominated, indicating the States Parties which have nominated them, and shall submit it to the States Parties, the relevant inter-governmental organizations and the relevant non-governmental organizations that enjoy consultative status with the Economic and Social Council.

5. The members of the Committee shall be elected for a term of four years. They shall be eligible for re-election if renominated. However, the term of five of the members elected at the first election shall expire at the end of two years; immediately after the first election the names of these five members shall be chosen by lot by the chairman of the meeting referred to in paragraph 3 of this article.

6. If a member of the Committee dies or resigns or for any other cause can no longer perform his Committee duties, the State Party which nominated him shall appoint another expert from among its nationals to serve for the remainder of his term, subject to the approval of the majority of the States Parties. The approval shall be considered given unless half of the States Parties respond negatively within six weeks after having been informed by the Secretary-General of the United Nations of the proposed appointment.

7. The United Nations shall be responsible for the expenses incurred by the application of this Convention.

### *Article 26*

1. The Committee shall elect its officers for a term of two years. They may be re-elected.

2. The Committee shall establish its own rules of procedure, but these rules shall provide, *inter alia*, that:

- (a) Six members shall constitute a quorum;
- (b) Decisions of the Committee shall be made by a majority vote of the members present.

3. The Secretary-General of the United Nations shall provide the necessary staff and facilities for the effective performance of the functions of the Committee under this Convention.

4. The Secretary-General of the United Nations shall convene the initial meeting of the Committee. After its initial meeting, the Committee shall meet at such times as shall be provided in its rules of procedure.

5. With the approval of the General Assembly, the members of the Committee shall receive emoluments from United Nations resources on such terms and conditions as the Assembly may decide in the light of the importance of the functions of the Committee.

### *Article 27*

1. The States Parties shall submit to the Committee, through the Secretary-General of the United Nations, reports on the measures they have taken to give effect to their undertakings under this Convention, within one year after the entry into force of the Convention for the State Party concerned. In connection with the submission of the first report of each State Party concerned, the Committee may make a visit to the territory under the control of that State Party. The State Party concerned shall provide all the necessary facilities for such a visit including the entry into the country and access to such places and meeting with such persons as may be required for carrying out the mission of the visit. Thereafter the States Parties shall submit supplementary reports at the request of the Committee.

2. The Secretary-General of the United Nations shall transmit the reports to all States Parties.

3. Each report shall be considered by the Committee which may make such comments, observations and recommendations as it may consider appropriate and shall forward the said comments, observations and recommendations to the State Party concerned. That State Party may respond with any observations it chooses to the Committee.

4. The Committee may, at its discretion, decide to include any comments, observations and recommendations

made by it in accordance with paragraph 3 of this article, together with the observations thereon received from the State Party concerned, in its annual report made in accordance with article 33. If so requested by the State Party concerned, the Committee may also include a copy of the report submitted under paragraph 1 of this article.

### *Article 28*

1. If the Committee receives reliable information which appears to it to contain well-founded indications that forced disappearance is being systematically or widely practised in the territory under the control of a State Party, the Committee shall invite that State Party to cooperate in the examination of the information and to this end to submit observations with regard to the information concerned.

2. Taking into account any observations which may have been submitted by the State Party concerned, as well as any other relevant information available to it, the Committee may, if it decides that this is warranted, designate one or more of its members to make an inquiry and to report to the Committee urgently.

3. If an inquiry is made in accordance with paragraph 2 of this article, the Committee shall seek the cooperation of the State Party concerned. In agreement with that State Party, such an inquiry may include a visit to the territory under its control. At least one member of the

Committee, who may be accompanied if necessary by interpreters, secretaries and experts, shall be responsible for conducting the missions which include visits to the territory under the control of the State Party. No member of the delegation, with the exception of the interpreters, may be a national of the State to which the visit is to be made.

4. The Committee shall notify the Government of the State Party concerned in writing of its intention to organize a mission, indicating the composition of the delegation. During its mission the Committee may make such visits as it may consider necessary in order to fulfil its commitments. If one of the two parties so desires, the Committee and the State Party concerned may, before a mission is carried out, hold consultations in order to define the practical arrangements for the mission without delay. The consultations concerning the practical arrangements for the mission may not include

negotiations concerning the obligations for a State Party arising out of this Convention.

5. After examining the report submitted by its member or members in accordance with paragraph 2 of this article, the Committee shall transmit its report to the State Party concerned, together with its conclusions, observations and recommendations.

6. After the proceedings have been completed with regard to an inquiry made in accordance with paragraph 2,

the Committee may, after consultation with the State Party concerned, include the results of the proceedings together with the conclusions, observations and recommendations in its annual report made in accordance with article 33.

### *Article 29*

A State Party to this Convention may submit to the Committee communications to the effect that another State Party is not fulfilling its obligations under this Convention. Communications received under this article shall be dealt with in accordance with the following procedure:

- (a) If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may, by written communication, bring the matter to the attention of that State Party. Within three months after the receipt of the communication the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter, which should include, to the extent possible and pertinent, reference to domestic procedures and remedies taken, pending or available in the matter;
- (b) If the matter is not adjusted to the satisfaction of both States Parties concerned within six months after the receipt by the receiving State of the initial communication, either State shall have the right to refer the matter

to the Committee, by notice given to the Committee and to the other State;

- (c) The Committee shall deal with a matter referred to it under this article only after it has ascertained that all domestic remedies have been invoked and exhausted in the matter, in conformity with the generally recognized principles of international law. This shall not be the rule where the application of the remedies is unreasonably prolonged or is unlikely to bring effective relief to the person who is the victim of the violation of this Convention;
- (d) The Committee shall hold closed meetings when examining communications under this article;
- (e) Subject to the provisions of subparagraph (c), the Committee shall make available its good offices to the State Parties concerned with a view to a friendly solution of the matter on the basis of respect for the obligations provided for in this Convention. For this purpose, the Committee may, when appropriate, set up an ad hoc conciliation commission;
- (f) In any matter referred to it under this article, the Committee may call upon the States Parties concerned, referred to in subparagraph (b), to supply any relevant information;
- (g) The States Parties concerned, referred to in subparagraph (b), shall have the right to be represented when the matter is being considered by the

Committee and to make submissions orally and/or in writing;

- (h) The Committee shall, within 12 months after the date of receipt of notice under subparagraph (b), submit a report:
  - (i) If a solution within the terms of subparagraph (e) is reached, the Committee shall confine its report to a brief statement of the facts and of the solutions reached;
  - (ii) If a solution within the terms of subparagraph (e) is not reached, the Committee shall confine its report to a brief statement of the facts; the written submissions and record of the oral submissions made by the States Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the States Parties concerned.

### *Article 30*

1. Any person or group of persons under the jurisdiction of a State Party or any non-governmental organization may submit communications to the Committee concerning a violation of the provisions of this Convention by a State Party.

2. The Committee shall consider inadmissible any communication under this article which is anonymous or which it considers to be an abuse of the right of submission of such communications or

to be incompatible with the provisions of this Convention.

3. Subject to the provisions of paragraph 2, the Committee shall bring any communications submitted to it under this article to the attention of the State Party to this Convention which is alleged to be violating any provisions of the Convention. Within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and the remedy that may have been taken by that State.

4. The Committee shall consider communications received under this article in the light of all information made available to it by or on behalf of the author of the communication referred to in paragraph 1 and by the State Party concerned. The Committee may, if it deems it necessary, organize hearings and investigation missions. For these purposes the Committee shall be governed by paragraphs 3 and 4 of article 28.

5. The Committee shall not consider any communications from an individual under this article unless it has been ascertained that:

- (a) The same matter has not been, and is not being, examined under another procedure of international investigation or settlement;
- (b) The author of the communication has exhausted all domestic remedies. This shall not be the rule if, in the domestic legislation of the State

Party, there is no effective remedy to protect the right alleged to have been violated, if access to domestic remedies has been prevented, if the application of the remedies is unreasonably prolonged or if it is unlikely that application of the remedies would improve the situation of the person who is the victim of the violation.

6. The Committee shall hold closed meetings when examining communications under this article.

7. In urgent cases the Committee may request the State Party concerned to take whatever protective measures it may deem appropriate, when there is a need to avoid irreparable damage. When the Committee is carrying out its functions of considering communications submitted to it, the request to adopt such measures and their adoption shall not prejudice its final decision.

8. The Committee shall forward its views to the State Party concerned and to the individual.

### *Article 31*

1. The Committee may undertake any effective procedure to seek and find persons who have disappeared within the meaning of this Convention, either on its own initiative or at the request of a State Party, an individual, a group of individuals or a non-governmental organization.



2. The Committee shall consider inadmissible any request received under this article which is anonymous or which it considers to be an abuse of the right of submission of such requests or to be incompatible with the provisions of this Convention. In no case may the exhaustion of domestic remedies be required.

3. The Committee may, if it decides that this is warranted, appoint one or more of its members to undertake an investigation mission and to report to the Committee urgently. The Committee shall be governed by the provisions of paragraphs 3 and 4 of article 28 of this Convention.

4. The Committee shall discharge this function in a strictly neutral and humanitarian capacity.

### *Article 32*

The members of the Committee and persons accompanying them on mission in the territory of the States Parties referred to in articles 28, 29 and 31 shall be entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in the relevant sections of the Convention on the Privileges and Immunities of the United Nations.

### *Article 33*

1. The Committee shall submit an annual report on its activities under this

Convention to the States Parties and to the General Assembly of the United Nations.

2. To ensure that its observations and recommendations are followed up, the Committee shall include in the report referred to in paragraph 1 of this article the measures taken by the States Parties to guarantee effective compliance with the observations and recommendations made in accordance with articles 27, 28, 29, 30 and 31 of this Convention.

## **Part III**

### *Article 34*

1. This Convention is open for signature by all States.

2. This Convention is subject to ratification. Instruments of ratification shall be deposited with the Secretary-General of the United Nations.

### *Article 35*

This Convention is open to accession by all States. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

### *Article 36*

1. No State can, at the time of signature or ratification of this Convention or

accession thereto, make reservations concerning articles 1 to 24 and article 31 of this Convention, nor make a reservation the effect of which would inhibit the operation of any of the bodies established by this Convention.

2. Any State Party having made a reservation in accordance with paragraph 1 of this article may, at any time, withdraw this reservation by notification to the Secretary-General of the United Nations.

#### *Article 37*

1. This Convention shall enter into force on the thirtieth day following the date of deposit of the tenth instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the tenth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

#### *Article 38*

The Secretary-General of the United Nations shall inform all States Members of the United Nations and all States which have signed this Convention or acceded to it of the following:

- (a) Signatures, ratifications and accessions under articles 34 and 35;
- (b) The date of entry into force of this Convention under article 37.

#### *Article 39*

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. The Secretary-General of the United Nations shall transmit certified copies of this Convention to all States.



# *Documents*

## *Legal Brief Amicus Curiae*

### *Presented by the International Commission of Jurists Before The Inter-American Court of Human Rights in the Case of Efraín Bámaca Velásquez vs. Guatemala*

In June 2000, at the request of the Centre for Justice and International Law (CEJIL), the International Commission of Jurists submitted an Amicus Curiae legal brief for consideration by the Inter-American Court of Human Rights in the case of Efraín Bámaca Velásquez vs. Guatemala. The Inter-American Court of Human Rights issued its judgement on 25 November 2000.

Efraín Bámaca Velásquez, a combatant in the Guatemalan Revolutionary National Unity (URNG) and known as "Comandante Everardo", "disappeared" on 12 March 1992, following a clash between the army and guerrilla forces in the village of Montúfar, near Nuevo San Carlos, Retalhuleu, in the eastern part of Guatemala. According to the facts established by the Inter-American Commission on Human Rights, Efraín Bámaca Velásquez was captured by

members of the Guatemalan Army, secretly detained in military premises and tortured. Since then he is "disappeared". On 30 August 1996, the Inter-American Commission on Human Rights presented the case on his behalf before the Inter-American Court of Human Rights.

One of the key issues in the action brought by the Inter-American Commission on Human Rights involved the right to the truth owed to the relatives of disappeared persons and the obligation of the State to guarantee this right. The Amicus Curiae legal brief submitted by the International Commission of Jurists focuses primarily on this issue and draws on the jurisprudential and doctrinal evolution, both in the universal as well as regional spheres, of the right to the truth owed to the relatives of disappeared persons.



*Legal Brief Amicus Curiae*  
Presented by  
*the International Commission of Jurists*  
Before  
*The Inter-American Court of Human Rights*  
*in the Case of*  
*Efraín Bámaca Velásquez vs. Guatemala*

## **I. Introduction and Summary**

01. The International Commission of Jurists wishes to thank the Honorable Inter-American Court of Human Rights for the opportunity accorded it, within the framework of the proceedings surrounding the Case of Efraín Bámaca Velásquez versus Guatemala, to present a number of considerations regarding the right to the truth owed to the victims of human rights violations and their families, in particular to family members of persons who have been victims of forced disappearance.

02. The International Commission of Jurists is a non-governmental organization dedicated to promoting understanding and observance of the Rule of Law and protection of human rights throughout the world. The organization was created in 1952, with headquarters located in Geneva (Switzerland). The International Commission of Jurists is

composed of 45 eminent jurists, representing various different legal systems from around the world, and also maintains a network of some 90 national sections and affiliated legal organizations. The International Commission of Jurists enjoys consultative status with the Economic and Social Council of the United Nations, UNESCO, the Council of Europe and the Organization of African Unity. The organization also maintains cooperative relations with organs of the Organization of American States.

03. The International Commission of Jurists works for the full application of the rule of law as well as universal respect for human rights. In particular, the International Commission of Jurists supports the victims of human rights violations in their demand for the right to justice, the right to reparation and the right to the truth. Similarly, the organization has contributed to the elaboration of new international standards concerning the rights to truth and reparation. In

particular, the International Commission of Jurists has contributed to the elaboration of the draft *Set of principles for the protection and promotion of human rights through action to combat impunity* and the *Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law*, currently under consideration by the United Nations Commission on Human Rights. Thus the Honorable Court can understand the particular interest that the International Commission of Jurists takes in the case of Efrain Bámaca Velásquez versus Guatemala.

04. The International Commission of Jurists wishes, with the presentation of this *Amicus Curiae*, to address the right to the truth owed to the victims of human rights violations and their families, and in particular to the family members of persons who have been the victim of forced disappearance (Point II.). This right to the truth is closely related to other rights, such as: the right not to be subjected to torture or to other cruel, inhuman or degrading treatment or punishment (Point III), the right to obtain reparation (Point IV), the right to an effective remedy (Point V) and the right to information (Point VI). Similarly, the right to the truth is also related to the duty to guarantee (Point VII), and more specifically to the obligation to investigate (Point VIII). The International Commission of Jurists considers that the Honorable Inter-American Court of

Human Rights in reaching a decision concerning the fundamentals of this case should base its examination, via the details involved, on the right to the truth to which the family members of victims of forced disappearance are entitled and on the obligation of the State to guarantee this right .

## II. The Right to the Truth

05. The right to the truth owed to the victims of human rights violations and their families has taken on increasing importance in recent decades. A specific phenomenon corroborating this assertion is the creation in various countries of "truth commissions" and other similar mechanisms designed basically to gather evidence of human rights violations committed, to clarify questions concerning the fate suffered by the victims, to identify those responsible for the violations and, in some cases, to lay the groundwork for the judgment of the perpetrators.

06. The right to truth is not solely a contemporary demand. This right has been claimed throughout history by victims, their relatives and, in certain contexts, by society itself. In the famous and celebrated case of Captain Alfred Dreyfus, a century ago in France, which is considered one of the touchstones in the evolution of human rights in Europe,

the right to the truth proved to be the driving force that permitted the triumph of "human reason over the reasons of the State" and reparation of an injustice. "I appeal to the Senate to permit my right to the truth", wrote Captain Dreyfus in addressing himself to the French Senate to demand that an investigation be opened into the events for which he had been unjustly convicted<sup>1</sup>. With the same objective, and directing himself this time to the President of the French Republic, Captain Dreyfus wrote "I have not been stripped of all of my rights: I retain the right of every man to defend his honor and proclaim the truth"<sup>2</sup>. The rehabilitation of Captain Dreyfus at the dawn of the 20th Century, would signify the triumph of the right to the truth so often invoked by the French officer.

07. Truth and justice have been the guiding principles in action undertaken by the International Community in the face of crimes against humanity and war crimes committed in the last century. Truth, as an element necessary to the social process of constructing a collective memory and to prevent the perpetration of new crimes, was, together with justice, one of the *leitmotifs* in the creation of the International Military Tribunal at

Nuremberg. "The legal defense of the right to memory was one of the fundamental objectives of the authors of the Charter of the International Military Tribunal at Nuremberg", concluded the Expert on the impunity of perpetrators of violations of civil and political rights, of the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities<sup>3</sup>. The Commission of Experts concerning grave breaches of the Geneva Conventions and other breaches of international humanitarian law committed in the territory of the former Yugoslavia, established pursuant to resolution 780 (1992) of the United Nations Security Council, asserted in its final report "Thus, the conclusion is inescapable that peace in the future requires justice, and that justice starts with establishing the truth"<sup>4</sup>.

#### a - International humanitarian law

08. International humanitarian law applicable to armed conflicts has explicitly recognized the existence of the right to truth for relatives of the victims of forced disappearance. This has been the fruit of a long evolution. The fate and

1 Letter from Alfred Dreyfus to the Senate of the French Republic, published in *L'Echo* of Paris, edition of 14 March 1900, and reproduced in Denis Bredin, *L'affaire*, Ed. Julliard, Paris 1983, p. 560 (Free translation).

2 Letter from Alfred Dreyfus to President Waldeck-Rousseau, dated 26 December 1900, reproduced separately in *L'affaire*, op. cit., p. 571 (Free translation).

3 United Nations document, E/CN.4/Sub.2/1993/6, par. 85.

4 Final Report of the Commission of Experts Established pursuant to resolution 780 of the Security Council (1992), in United Nations document S/1994/674, of 27 May 1994, Annex, par. 320.



whereabouts of combatants who have disappeared in combat or at the hands of the enemy, as well as the anguish experienced by their relatives in seeking to know the destiny of their loved ones, were central concerns in the development of international humanitarian law. The International Conferences of Paris and Berlin, held in 1867 and 1869 respectively<sup>5</sup>, constituted the first advances in this area. The Geneva Conventions of 1949 incorporated various provisions<sup>6</sup>, which imposed obligations on the belligerent parties to respond to these problems and prescribed the establishment of a central search agency.

09. The emergence of new armed conflicts in the 1960s, such as wars of national liberation, or struggles against foreign occupation or against racist regimes, highlighted even more forcefully the fate suffered by the disappeared and the need to respond adequately to the anguish experienced by their families. It was thus that the XXII International Conference of the Red Cross and Red Crescent Societies, held in Teheran in 1973, unanimously adopted its Resolution V calling for parties in armed conflict to provide information and cooperate with the International

Committee of the Red Cross in order to establish the fate and whereabouts of the disappeared.

10. With the adoption in 1977 of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, known as Protocol I, there emerged the first conventional norm which explicitly recognized the existence of "the right of families to know the fate of their [disappeared] relatives" (article 32). This right was explicitly recognized as a "general principal" of international humanitarian law with regard to disappeared persons, a principle reiterated by the XXV International Conference of the Red Cross and the Red Crescent, held in 1986, in its Resolution XIII.

11. The concept of "disappearance" in international humanitarian law is certainly much broader than that of "forced disappearance" as formulated in international human rights law. In general, the notion of "disappearance" in international humanitarian law covers all those situations in which the fate or whereabouts of a person are unknown. In the same way, the concept of "the disappeared" covers a

5 François Bugnion, *Le Comité international de la Croix-Rouge et la protection des victimes de la guerre*, Ed. Comité International de la Croix-Rouge, Geneva 1994, p. 569 ff.

6 In particular Articles 16 and 17 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Convention I); article 122, and following, of the Geneva Convention relative to the Treatment of Prisoners of War (Convention III); and Article 136, and following, of the Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV).

variety of specific situations, namely: persons wounded or sick who are in the hands of the enemy and who have not been identified; prisoners of war or civilian internees whose names have not been registered or transmitted; "combatants who have disappeared in action"; civilians arrested, imprisoned or abducted without their families being informed, as well as victims of forced disappearance in the sense given this term in international human rights law. In all such cases, international humanitarian law recognizes the right of families to know the fate suffered by their disappeared relatives .

12. Even if the Geneva Conventions of 1949 and their additional Protocol I do not employ the term "forced disappearance", the notion of "disappearance" covers it. In the same way, international humanitarian law recognizes the right of families to know the fate suffered by their loved ones who are victims of forced disappearance. The XXIV International Conference of the Red Cross and Red Crescent, held in Manila in 1981, reaffirmed the existence of this right in its Resolution II concerning "forced or involuntary disappearances", indicating that:

"the families have the right to be informed about the whereabouts, health and well-being of their relatives, a right reiterated in various resolutions of the United Nations General Assembly".

13. The Additional Protocol I applies to situations of international armed conflict. Article 3 common to all of the Geneva Conventions, and the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II) do not contain any express provision concerning either disappearance or the right of family members to know the fate of the disappeared person, including in this category of victims of forced disappearance. Despite these omissions, the International Movement of the Red Cross and Red Crescent has reiterated that the right to know the truth about the fate suffered by victims of forced disappearance applies both to situations of international armed conflict as well as those of internal armed conflict. Thus the XXIV International Conference of the Red Cross and Red Crescent, in reiterating the existence of this right, did not distinguish in its resolution between international armed conflict and internal armed conflict.

14. Article 3 common to the Geneva Conventions and Article 4 of the Protocol II to these Conventions establishes the principle according to which persons not participating directly in the hostilities must be treated with humanity under all circumstances. Based on these two norms "[there can be] no doubt that the act of refusing to provide available information to families concerning disappeared or deceased persons constitutes a

form of moral torture which is incompatible with this obligation”<sup>7</sup>.

15. The doctrine<sup>8</sup> found support for the right to truth for families of victims of forced disappearances, both in times of war and times of peace, in article 32 of Protocol I and, in general, in international humanitarian law. One of the first international meetings, if not the first, convened on this subject, the Colloquium on the forced disappearance of persons, held in Paris in January/February 1981, addressed this problem. With reference to the family members of victims of forced disappearance, the rapporteur of the colloquium, the French magistrate Louis Joinet, stated in his final report that:

“Their right to protection originates in the fundamental right of families to know the fate suffered by their loved ones, as defined by the Geneva Conventions and Protocols. [...] It would be shocking at the humanitarian level – and legally paradoxical to say the least – to note that, *de facto*,

persons subjected to forced or involuntary disappearance do not benefit from the same guarantees recognized in positive law, and in particular in the Geneva Conventions, for persons who disappear during the course of, or on the occasion of, armed conflicts.”<sup>9</sup>

On this basis, the Paris colloquium recommended that:

“The protection, in times of peace, of disappeared persons and their families should be greater than – or *a fortiori* at least equal to – that recognized to persons who disappear in times of war.”<sup>10</sup>

16. This principle of equal or greater protection in times of peace in relation to the protection recognized in times of war was reiterated by the Meeting of experts on rights not subject to suspension in situations of emergency and exceptional circumstances, organized by the United Nations Special Rapporteur on human rights and states of emergency<sup>11</sup>. The meeting of experts concluded that given

7 François Bugnion, op. cit., p. 576 (Free translation).

8 See for example Rodolfo Mattarollo, “Impunidad, democracia y derechos humanos” in Por la Vida y la Paz de los Pueblos Centroamericanos, Cuadernos centro americanos de derechos humanos series, No. 2, Ed. Codehuca, San José, Costa Rica, 1991, p.7; and Eric David, Principes de droit des conflits armés, ed. Bruylant, Brussels, 1994, par. 3.35, p. 502.

9 Louis Joinet, “Rapport général”, in Le refus de l’oubli - La politique de disparition forcée de personnes - Colloque de Paris, Janvier/février 1981, Ed. Berger-Levrault, collection “Mondes en devenir”, Paris 1982, p. 302 (Free translation).

10 Ibid.

11 See “Report of the Meeting of experts on rights not subject to suspension in situations of emergency and exceptional circumstances, held in Geneva, 17 - 19 March 1995” reproduced in the report of the United Nations Special Rapporteur on human rights and states of emergency, United Nations document E/CN.4/Sub.2/1995/20, Annex I.

the concordance of jurisprudence with the opinions of the United Nations special rapporteurs, the right to truth constituted a norm of customary international law<sup>12</sup>.

17. International humanitarian law has been recognized as a source of law with regard to the right to the truth for the families of victims of forced disappearance. Thus the United Nations Working Group on Enforced or Involuntary Disappearances, in its first report to the Commission on Human Rights, recognized the existence of the right of families to know the fate of relatives who were victims of forced disappearance, based on Protocol I of 1977 to the four Geneva Conventions<sup>13</sup>. In the inter-American context, in 1988, the Inter-American Commission on Human Rights, addressing the fate of minors who had disappeared or were abducted from parents who disappeared during the military regime in Argentina, affirmed that the norms of international humanitarian law, and more specifically Protocol I of 1977 to the four Geneva Conventions, "establish the right of families to know the fate of their relatives"<sup>14</sup>. However,

intergovernmental human rights bodies and mechanisms found complementary bases for the right to truth in other juridical sources and instruments. Among these should be mentioned the right to protection of the family<sup>15</sup>, the right of the child not to be separated from its parents<sup>16</sup> and, in the inter-American context, the rights to protection under the law, to judicial guarantees, to judicial protection and to information.

#### **b. The Universal System of Human Rights Protection**

18. The Human Rights Committee of the United Nations has expressly recognized the existence of the right to the truth for families of victims of forced disappearance. In one case of forced disappearance, the Human Rights Committee concluded that "the author [of the communication to the Committee and mother of the disappeared person] has the right to know what has happened to her daughter"<sup>17</sup>.

19. The Human Rights Committee, without employing the term "right to the

12 Ibid, par. 40, p. 57.

13 United Nations document, E/CN.4/1435, of 22 January 1981, par. 187.

14 Annual Report of the Inter-American Commission on Human Rights, 1987-1988, OAS document, OEA/Ser.L/V/II.74, Doc. 10, rev. 1, p. 359.

15 Article 23 of the International Covenant on Civil and Political Rights, and Article 17 of the American Convention on Human Rights.

16 Article 9 of the Convention on the Rights of the Child.

17 Human Rights Committee, Decision of 21 July 1983, *María del Carmen Almeida de Quintero and Elena Quintero de Almeida case* (Uruguay) Communication No. 107/1981, par. 14.

truth” and without limiting itself to cases of forced disappearance, has urged State Parties to the *International Covenant on Civil and Political Rights* to guarantee that the victims of human rights violations know the truth with respect to the acts committed. In its Concluding Observations on the initial report of Guatemala, the Human Rights Committee exhorted the Guatemalan authorities to, *inter alia*, continue working to enable “the victims of human rights violations to find out the truth about those acts”<sup>18</sup>.

20. The right to the truth owed to the families of victims of forced disappearance has been recognized by the Working Group on Enforced or Involuntary Disappearances ever since its first report to the Commission on Human Rights<sup>19</sup>. In its second report, the Working Group concluded that, with respect to the relatives of the disappeared person:

“[u]nquestionably, their right to know can be neither denied nor ignored.”<sup>20</sup>

21. The Working Group on Enforced or Involuntary Disappearances found the basis<sup>21</sup> of the right to the truth for relatives of the victims of forced disappearance, both in Article 32 of Protocol I additional to the Geneva Conventions as well as in numerous resolutions of the United Nations General Assembly<sup>22</sup>. In 1984 the Working Group concluded that under any circumstances:

“[i]t has been clearly decided by the international community that the relatives of missing persons have a right to know their whereabouts or fate”<sup>23</sup>

22. The Working Group on Enforced or Involuntary Disappearances, in addressing the problem of children who had disappeared or were abducted from parents who disappeared, invoked international humanitarian law and reiterated the principle of equal or greater protection in times of peace than that recognized in times of war. The principles of protection for children in times of war should *a fortiori* be respected in times of peace<sup>24</sup>.

18 United Nations Human Rights Committee, *Observations and recommendations - Guatemala*, United Nations document, CCPR/C/79/Add.63, par. 25.

19 United Nations document, E/CN.4/1435, of 22 January 1981, par. 187.

20 United Nations document, E/CN.4/1492, of 31 December 1981, par. 5.

21 United Nations documents, E/CN.4/1435, of 22 January 1981, par 186; and E/CN.4/1983/14, par. 134.

22 Especially resolutions 34/179 and 35/188 concerning the situation of human rights in Chile.

23 United Nations document, E/CN.4/1984/21, par. 171.

24 United Nations document, E/CN.4/1984/21, par. 159.

23. The right to the truth owed to victims of human rights violations and their relatives, and in particular to the relatives of the victims of forced disappearance, has also been recognized by different mechanisms of the United Nations Commission on Human Rights as well as by its Sub-Commission. Thus in 1985, the Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, in his final report on amnesty laws and the role they play in the safeguard and promotion of human rights, arrived at the conclusion that with respect to the victims of involuntary or enforced disappearances, "the right to know" of the relatives is increasingly acknowledged<sup>25</sup>. The Meeting of experts on rights not subject to suspension in situations of emergency and exceptional circumstances, organized by the Special Rapporteur on human rights and states of emergency, concluded that the right to the truth constitutes "a norm of customary international law"<sup>26</sup>. The Special Rapporteur charged with the question of the independence of judges and lawyers, of the Commission on Human Rights, in his report concerning his mission to Peru, concluded that the Peruvian

amnesty laws deprive the victims of the right to know the truth<sup>27</sup>.

24. The Special Rapporteur on the question of the impunity of perpetrators of violations of civil and political rights, of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, has considered that the right to truth – or "right to know" according to the term which he employs – exists as such and is an "inalienable right"<sup>28</sup>. The study undertaken by the expert ended in the elaboration of a draft *Set of principles for the protection and promotion of human rights through action to combat impunity*<sup>29</sup>, today under consideration by the Commission on Human Rights. This project incorporates among its principles "the victims' right to know". More specifically, Principle 3 stipulates:

"Irrespective of any legal proceedings, victims, their families and relatives have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victim's fate."

25 "Study on amnesty laws and the role they play in the safeguard and promotion of human rights", United Nations document, E/CN.4/Sub.2/1985/16, p. 19.

26 United Nations document E/CN.4/Sub.2/1995/20, Annex I, par. 40, p. 57.

27 United Nations document, E/CN.4/1998/39/Add.1, par. 131.

28 United Nations document, E/CN.4/Sub.2/1993/6, par. 101.

29 United Nations document E/CN.4/Sub.2/1997/Rev.1, Annex I.

25. For the expert on the question of impunity "action to combat impunity has its origin in the necessity that justice be done, but it cannot be centered solely in this objective: to punish the guilty. It must respond to three imperatives: sanction those responsible, but also satisfy the right of the victims to know and to obtain reparation and, in addition, allow the authorities to discharge their mandate as the power which guarantees public order"<sup>30</sup>.

26. The Special Rapporteur on human rights and states of emergency, of the United Nations, has emphasized that the right of families to be informed concerning the whereabouts of their members also has a legal basis in the *Convention on the Rights of the Child*, and more specifically in its article 9 (4)<sup>31</sup>. This provision establishes, in the case of separation of the child from its parents as the result of a measure adopted by the State, the obligation of the State to provide basic information about the whereabouts of the absent family member or members, to the child, to the parents and even, in certain circumstances, to other relatives<sup>32</sup>.

### c. The Inter-American System of Human Rights Protection

27. The General Assembly of the Organization of American States, in various of its resolutions, and even if it has not used the term "right to the truth", has urged states to inform relatives concerning the fate of the victims of forced disappearance<sup>33</sup>. This exhortation was reiterated by the General Assembly in its momentous Resolution 666 (XIII-0/83)<sup>34</sup> – which declared that the practice of forced disappearance constitutes a crime against humanity – as well as in subsequent resolutions<sup>35</sup>.

28. The Inter-American Commission on Human Rights has long recognized the right to the truth, both generally for the victims of human rights violations and their relatives, as well as specifically with regard to forced disappearances. In its annual report for 1985-1986, the Inter-American Commission concluded that:

"[N]othing can prevent the relatives from knowing what happened to their loved ones"<sup>36</sup>.

30 Expert on the question of the impunity of perpetrators of violations of civil and political rights, United Nations document E/CN.4/Sub.2/1993/6, par. 16 (original in French, free translation).

31 United Nations document E/CN.4/Sub.2/1991/20, Annex I, p. 45.

32 United Nations document E/CN.4/Sub.2/1991/20, Annex I, p. 45.

33 Resolution AG/RES. 618 (XII-0/82), adopted on 20 November 1982, par. 7.

34 Resolution AG/RES. 666 (XIII-0/83), adopted on 18 November 1983 par. 5.

35 See, for example, Resolution AG/RES. 742 (XIV-0/84), adopted on 17 November 1984, par. 5.

36 Annual Report of the Inter-American Commission on Human Rights, 1985-1986, OEA/Ser. L/V/II.68, Doc. 8 rev 1, of 28 September 1986, p. 205 (original in Spanish, free translation).

29. In its Study on the situation of minor children of disappeared persons, who were separated from their parents and are claimed by members of their legitimate families, the Inter-American Commission on Human Rights recognized the existence of the right to truth, based in norms of international humanitarian law<sup>37</sup>. However, the doctrine established by the Inter-American Commission on Human Rights throughout the years has led it to also base the right to truth in the Inter-American system of human rights law. Thus in the case of Ignacio Ellacuría, the Inter-American Commission on Human Rights concluded that:

“The right to know the truth with respect to the facts that gave rise to the serious human rights violations that occurred in El Salvador, and the right to know the identity of those who took part in them, constitutes an obligation that the State must satisfy with respect to the victims’ relatives and society in general. This obligation arises essentially from the provisions of

Articles 1(1), 8(1), 25 and 13 of the American Convention.”<sup>38</sup>

30. The Inter-American Court of Human Rights, in its far-reaching judgment in the Velásquez Rodríguez case, recognized the existence of the right of relatives of the victims of forced disappearance to know the fate suffered by the disappeared person<sup>39</sup>. The Inter-American Court of Human Rights reiterated the existence of such a right in its judgment concerning the Godínez Cruz case<sup>40</sup>.

31. In its judgment concerning the Castillo Páez case, even if it does not employ the term “right to the truth”, the Inter-American Court of Human Rights recognized the existence of the “[right of] the victim’s family... to know what happened to him”<sup>41</sup>. Likewise in its judgment in the Blake case, the Inter-American Court of Human Rights affirmed that:

“ Article 8(1) of the American Convention recognizes the right of Mr. Nicholas Blake’s relatives to have his disappearance and death effectively investigated.”<sup>42</sup>

37 Annual Report of the Inter-American Commission on Human Rights, 1987-1988, OEA/Ser.L/V/II. 74, Doc. 10 rev 1, of 16 September 1988, p. 359.

38 Inter-American Commission on Human Rights, Report No. 136/99, of 22 December 1999, *Case of Ignacio Ellacuría et al*, par. 221 (original in Spanish, free translation).

39 Inter-American Court of Human Rights Velásquez Rodríguez case, Judgment of 29 July 1988, Series C: Decisions and Judgments, No. 4, par. 181, p. 75.

40 Inter-American Court of Human Rights, Godínez Cruz case, Judgment of 20 January 1989, Series C: Decisions and Judgments, No. 5, par. 191.

41 Inter-American Court of Human Rights, Judgment of 3 November 1997, Castillo Páez case, par. 90.

42 Inter-American Court of Human Rights, Judgment of 24 January 1998, Blake case, par. 97.



#### d. Entitlement to the right to the truth

32. The jurisprudence and doctrine described above is unanimous in considering that the relatives of the disappeared person indeed have a right to know the fate of the latter, in other words, a right to the truth. However, empirical observation by the Inter-American Commission on Human Rights as well as by the Working Group on Enforced or Involuntary Disappearances concerning the impact of the practice of forced disappearance has revealed that the group of persons affected by the absence of information concerning the fate or whereabouts of the displaced person extends beyond the concept of the family. Thus the Working Group on Enforced or Involuntary Disappearances has established that not only the family members of the disappeared person are subjected to an anxious uncertainty, but also other relatives and dependents of the victim, to such an extent that there exists a wide circle of victims of a

disappearance<sup>43</sup>. Similarly, the Inter-American Commission on Human Rights considered that it is not only family members that are affected by not knowing the fate of the disappeared person but also his or her friends and relatives. Thus the Inter-American Commission on Human Rights, in its annual report for 1977, indicated that forced disappearance is a veritable form of torture for the person's family and friends, due to the uncertainty they experience about his fate<sup>44</sup>. Similarly, in its annual report for 1978, the Inter-American Commission on Human Rights, concluded that the disappearance affects, likewise, the entire circle of family members and relatives, who wait months and sometimes years for some piece of news concerning the fate of the victim<sup>45</sup>.

33. The character of forced disappearance as a "grave and abominable offense against the inherent dignity of the human being"<sup>46</sup>, and an inhuman practice<sup>47</sup>, means that this multiple violation of human rights<sup>48</sup> affects the society at

43 United Nations document E/CN.4/1990/13, par. 339.

44 Annual Report of the Inter-American Commission on Human Rights - 1977-1978, OAS/Ser.L/V/II.43, doc.21, corr.1, p. 24. See also Report concerning the situation of human rights in Argentina, 1980, OAS document, OEA/Ser.L/V/II/49, doc. 19, p. 59.

45 Annual Report of the Inter-American Commission on Human Rights - 1978, OEA/Ser.L/II.47, doc. 13 rev. 1, of 29 June 1979, p. 23. In the same line, see Annual Report of the Inter-American Commission on Human Rights, 1980-1981, OEA/Ser.G, CP/doc.1201/1981, of 20 October 1981, p. 113.

46 Inter-American Convention on the Forced Disappearance of Persons, Preamble, par. 3.

47 Annual Report of the Inter-American Commission on Human Rights - 1982-1983, OEA/Ser.L/V/II.61, doc.22, rev.1, p. 35.

48 Inter-American Court of Human Rights, *Velásquez Rodríguez case*, Judgment of July 1988, par. 155; *Godínez Cruz case*, Judgment of 20 January 1989, par. 163; *Fairén Garbí y Solís Corrales case*, Judgment of 15 March 1989, par. 147; and *Bake case*, Judgment of 24 July 1998, par. 65.

large. It need not be pointed out that forced disappearance is associated with forms of procedure by the public authorities which are not only illegal but also fundamentally clandestine, and which are generally linked to methods for creating terror. The sense of insecurity which this practice generates, not only among the family members and relatives of the disappeared person, extends to the communities or collectivities to which the victim belongs and to the society as a whole. Quite correctly, the Working Group on Enforced Disappearances has recognized that forced disappearances not only have disastrous consequences for the families of the victims, but also work devastating effects on the societies in which they are practiced<sup>49</sup>. This same observation was made by the XXIV International Conference of the Red Cross and Red Crescent, held in 1981, in which it was recognized that forced or involuntary disappearances not only cause great suffering to the families of the disappeared "but also to the society"<sup>50</sup>. National contexts in which forced disappearance is practiced systematically or on a grand scale make particularly visible the climate of generalized insecurity that

forced disappearance creates in the society.<sup>51</sup> In the same sense, the wish to know the truth is a legitimate and necessary desire for the society.

34. The establishment in various countries, both in the western hemisphere as well as on other continents, of "truth commissions" and other similar mechanisms designed basically to gather evidence of human rights violations, respond to the need for the society to know the truth about what has taken place. The Mexico City Agreements, signed on 27 April 1991 between the Government of EL Salvador and the Farabundo Martí National Liberation Front, which established the creation of the *Truth Commission*, emphasized that "the society urgently demands public knowledge of the truth"<sup>52</sup> concerning the serious acts of violence that occurred since 1980. The Agreement signed between the Guatemalan Government and the Guatemalan National Revolutionary Unity on 23 June 1994, establishing the *Commission for the historical elucidation of the human rights violations and acts of violence that have caused suffering to the Guatemalan population*,

49 United Nations document E/CN.4/1985/15, par. 291.

50 XXIV International Conference of the Red Cross and Red Crescent, Manila, 1981, Resolution II "Forced and involuntary disappearances".

51 See, for example: Report on the situation of human rights in Argentina, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.49, doc.19, 11 April 1980, p. 147; and Third report on the situation of human rights in Guatemala, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.66, doc.16, 3 October 1980, p. 113.

52 Mexico City Agreements, Agreement No. IV "Truth Commission", in Acuerdos de El Salvador: en el camino de la Paz, United Nations, DPI/1208-92615-July 1992-7M, p. 17 (original in Spanish, free translation).

expressly recognized "the right of the people of Guatemala to know the whole truth"<sup>53</sup>.

35. The Inter-American Commission on Human Rights has progressively addressed this dimension. Thus the social impact of forced disappearance led the Inter-American Commission on Human Rights, in its report on the situation of human rights in Guatemala, to conclude that forced disappearances affect the people of Guatemala at the family, social, moral and legal levels<sup>54</sup>. In the same line, and as a general principle, the Inter-American Commission on Human Rights has considered that:

"Every society has the inalienable right to know the truth of what has occurred, as well as the reasons and circumstances in which aberrant crimes came to be committed, so that such events do not re-occur in the future."<sup>55</sup>

36. More recently, the Inter-American Commission on Human Rights has considered that:

"The right to know the truth is a collective right that ensures society access to information that is essential for the workings of democratic systems, and it is also a private right for relatives of the victims, which affords a form of compensation"<sup>56</sup>.

37. A similar perspective was adopted by the Expert on the impunity of perpetrators of violations of civil and political rights, in considering that the claim to the right to truth, or the right to know, is not exhausted in the victim and/or his family members and relatives. The society as such has a right to know the truth about the exactions committed by representatives of the state, about the fate suffered by the victims, about the treatment reserved for the authorities charged with overseeing and controlling public officials. The expert concluded that:

"The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future."<sup>57</sup>.

53 "Acuerdo sobre el establecimiento de la Comisión para el esclarecimiento histórico de las violaciones a los derechos humanos y los hechos de violencia que han causado sufrimiento a la población guatemalteca", preámbulo, par. 2, in *Los Acuerdos de Paz*, Ed. Presidencia de la República de Guatemala, Guatemala 1997, p. 33 (original in Spanish, free translation).

54 Third report on the situation of human rights in Guatemala, OEA/Ser.L/V/II.66. Doc. 16, of 3 October 1985, p. 28.

55 Annual Report of the Inter-American Commission on Human Rights, 1985-1986, OEA/Ser.L/V/II.68, Doc. 8 rev 1, of 28 September 1986, p. 205 (original in Spanish, free translation).

56 Inter-American Commission on Human Rights, Report No. 136/99, of 22 December 1999, Case 10.488 - *Ignacio Ellacuría et al.*, par. 224.

57 United Nations Expert on the question of the impunity of perpetrators of violations of civil and political rights, United Nations document E/CN.4/Sub.2/1997/20, par. 17.

38. The concept of collective victim is not alien to international law. The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the United Nations General Assembly<sup>58</sup>, defines victims as "persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering" (articles 1 and 18). The Expert on the right to reparation, of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, concluded that individuals, human groups and communities could all be victims of flagrant human rights violations<sup>59</sup>.

### **e. The content of the right to the truth**

39. The right to the truth owed to the families of victims of forced disappearance was initially interpreted strictly on the basis of its humanitarian aspect, namely: the right to know the fate suffered by the loved one. However, the evolution of international jurisprudence and doctrine has progressively extended the content of the right to the truth.

40. Today, for the jurisprudence of intergovernmental human rights bodies, the right to the truth is not limited to the phenomenon of forced disappearances but extends to all violations of human rights. Thus the Human Rights Committee has reiterated that the victims and their families have the right to know the truth about human rights violations<sup>60</sup>. Knowing the truth goes beyond the mere humanitarian aspect and implies also knowing the circumstances in which these violations were committed and who the perpetrators were. The Human Rights Committee, in a decision concerning a case of torture in Uruguay, concluded that an amnesty law which prevented the victim from knowing the circumstances under which he had been detained and tortured was incompatible with the *International Covenant on Civil and Political Rights*, by denying the person the right to an effective recourse. The duty to investigate, the Committee concluded, is not incumbent on the individual as a private citizen, but is an obligation of the State, which must identify the persons responsible for such acts<sup>61</sup>. In the case in question, the victim did not assert a right to the truth in its humanitarian

58 Resolution 40/34, of 29 November 1985.

59 United Nations document, E/CN.4/Sub.2/1993/8, par. 14.

60 Human Rights Committee of the United Nations, Observations and recommendations – Guatemala, United Nations document, CCPR/C/79/Add.63, par. 25.

61 Human Rights Committee, Decision of 19 July 1994, *Hugo Rodríguez case (Uruguay)*, Communication No. 322/1988, United Nations document CCPR/C/51/D/322/1988, pars. 12 (3) and 14.

aspect: the object was to obtain "appropriate redress in the form of investigation of the abuses allegedly committed by the military authorities."<sup>62</sup>

41. The work of the Expert on impunity and that of the Expert on the right to reparation, of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, as well as the draft principles which they have proposed, have expressed the same principle: the right to the truth extends to all violations of human rights. The draft *Set of principles for the protection and promotion of human rights through action to combat impunity* stipulates that the victims, their families and relatives have the right to know the truth "about the circumstances in which violations took place"<sup>63</sup>. The term "circumstances" extends beyond the humanitarian scope of the right to the truth and includes knowledge of how, when, why and by whom the violations were committed. The draft text establishes that "extrajudicial commissions of inquiry", as one of the mechanisms for guaranteeing the right to the truth, shall "establish the facts", "analyse and describe the State mechanisms of the vio-

lating system", "identify the victims and the administrations, agencies and private entities implicated by retracing their roles"<sup>64</sup>. In short, these tasks reveal the importance of the right to truth within the framework of extrajudicial commissions of inquiry. The draft *Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law*, in its latest version, establishes as a form of reparation, under the criterion of satisfaction, "verification of the facts and full and public disclosure of the truth"<sup>65</sup>. Although the draft text does not define the scope of the concept of "the full truth", it is obvious that this is not limited to humanitarian aspects.

42. The Inter-American Commission on Human Rights has progressively defined the extent and content of the right to the truth. Initially this was defined as the right to know the truth of what occurred as well as the reasons and circumstances in which these crimes came to be committed.<sup>66</sup> In recent decisions, the Inter-American Commission on Human Rights has more explicitly defined this content as implying the right "to know the full, complete, and public

62 Ibid, par. 3.

63 United Nations document E/CN.4/Sub.2/1997/Rev.1, Annex I, Principle 3.

64 Ibid, Principles 5, 7 and 8.

65 United Nations document, E/CN.4/2000/62, Annex, p. 11, Principle 25 (b).

66 Annual Report of the Inter-American Commission of Human Rights, 1985-1986, OEA/SER.L/V/II.68, Doc. 8, rev. 1, of 28 September 1986, p. 205 (original in Spanish, free translation).

truth as to the events transpired, their specific circumstances, and who participated in them<sup>67</sup>.

### III - Truth, Forced Disappearance and the Right not to be Tortured

43. The right to the truth owed to the relatives of the disappeared is closely linked to the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment, a right which these relatives also possess. The empiric observation made by the Inter-American Commission on Human Rights as well as by the Working Group on Enforced and Involuntary Disappearances, above and beyond any conceptual inquiry into the subject, is conclusive. This uncertainty and the deprivation of all contact with the victim [of forced disappearance] create severe disturbances in family members, and particularly in children, who in some cases have directly witnessed the abduction of their parents or relatives<sup>68</sup> indicated the Inter-American Commission on Human Rights in 1979.

44. In studying the problem of forced disappearance in Argentina, the Inter-American Commission of Human Rights observed that:

Many of these children [whose parents were disappeared] will never see their parents again, and will thus inherit a series of psychological disturbances through their memory of the circumstances of the disappearance. [...] Numerous men and women between 18 and 25 years of age are being affected by anxiety as a result of the time transpiring without any knowledge of the fate suffered by their parents or brothers and sisters. Men and women who have been violently separated from their spouses are living with serious emotional disturbances, accentuated by the diverse economic problems which their situation creates for them. There are many men and women who currently do not know whether they are widowed or still married. Many of them will never recover a sense of peace, harmony or security in themselves, due to the stress produced by trying to carry

67 Inter-American Commission of Human Rights, Report No. 37/00, of 13 April 2000, case 11.481 - *Monseñor Oscar Arnulfo Romero y Galdámez*, par. 148. See also Report No. 136/99, of 22 December 1999, Case 10.488 - *Ignacio Ellacuría S.J. et al.*, par. 221; and Report No. 1/99, of 27 January 1999, Case No. 10.480 - *Lucio Parada Cea et al.*, par. 147.

68 Annual Report of the Inter-American Commission on Human Rights - 1978, OEA/Ser.L/II.47, doc. 13 rev. 1, of 29 June 1979, p. 23 (original in Spanish, free translation).

forward a household where every day is felt the physical and moral absence of the father or mother.<sup>69</sup>

45. In 1978 the United Nations General Assembly expressed its consternation at "the anguish and sorrow which such circumstances [forced disappearances] cause to the relatives of disappeared persons, especially to spouses, children and parents"<sup>70</sup>. In subsequent resolutions the General Assembly reiterated this concern<sup>71</sup>. Recognition of the anxiety, pain and severe suffering to which the families of disappeared persons are subjected by the act of forced disappearance itself has also been expressed normatively. Thus, the *Declaration on the Protection of All Persons from Enforced Disappearances*, adopted by the United Nations General Assembly in 1992, expressly establishes that "Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families" (article 1.2). The wording employed by the Declaration is categorical: forced disappearance *per se* causes severe suffering to the families of disappeared persons.

## a. The Universal System of Human Rights Protection

46. The Human Rights Committee has considered that the prevention of contact between the disappeared person and members of his or her family *per se* constitutes a violation of the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment, a right protected by the International Covenant on Civil and Political Rights.<sup>72</sup> This was the opinion issued by the Human Rights Committee in the case of María del Carmen Almeida de Quintero and Elena Quintero de Almeida, establishing clearly the relation between the right to the truth and the right not to be subjected to torture or ill treatment. In said case the Committee arrived at the following conclusion:

"The Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what has happened to her daughter. In these respects, she too is a victim

69 Report on the situation of human rights in Argentina, OEA/Ser.L/II.49, doc. 19, of 11 April 1980, p. 148 (original in Spanish, free translation (original in Spanish, free translation)).

70 Resolution 33/173 "Disappeared persons", adopted by the General Assembly of the United Nations, on 20 December 1978.

71 Resolutions 43/159 of 1988, 44/160 of 1990, 46/125 of 1991 and 47/132 of 1992 of the United Nations General Assembly.

72 Human Rights Committee: decision of 25 March 1996, Communication 542/1993, *Katombe L. Tshishimbi case (Zaire)*, CCPR/C/56/542/1993, par. 5.5; and decision of 25 March 1996, Communication 540/1996, *Ana Rosario Celis Laureano case, (Peru)*, CCPR/C/56/540/1993, par. 8.5.

of the violations of the Covenant suffered by her daughter, in particular of article 7.<sup>73</sup>

In its decision, the Human Rights Committee took for granted that the profound suffering to which the mother of the disappeared person was subjected constituted *per se* a form of torture or cruel or inhuman treatment. The Human Rights Committee did not require proof of the existence of the suffering or anguish of the mother, limiting itself to noting the existence of the forced disappearance and the family connection.

47. The Human Rights Committee has reiterated this principle in its Concluding Observations to State Parties to the Covenant. In its Concluding Observations to the report presented by Algeria, the Committee concluded that forced disappearances about which the State provided no or insufficient information constituted violations of article 7 of the *International Covenant on Civil and Political rights* with respect to the family members of disappeared persons<sup>74</sup>. Similarly, in its Concluding Observations to the report presented by Uruguay, the Committee considered that in obstructing the effective possibility of investigating forced disappearances committed in the past, the "Expiry Law of the Punitive

Powers of the State" violated article 7 of the *International Covenant on Civil and Political rights* as this applies to the family members of disappeared persons<sup>75</sup>.

### **b. The European System of Human Rights Protection**

48. Only recently, the European Court of Human Rights issued a judgment concerning the different juridical dimensions of the forced disappearance of persons. In its judgment of 25 May 1998, in the matter of Kurt v. Turkey, the Court considered that for the mother of a disappeared person, forced disappearance constituted a violation of the right not to be subjected to torture or ill-treatment, a right protected by article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*<sup>76</sup>. The European Court of Human Rights considered implicitly that in the context of the passivity of the authorities in the face of her requests, the anxiety in which the mother of the disappeared person lived constituted *per se* a form of violation of the guarantee provided by article 3 of the European Convention. To arrive at this conclusion, the European Court did not require any corroborating element establishing the moral pain suffered by the

73 Human Rights Committee: decision of 21 July 1983, Communication 107/1981, *Maria del Carmen Almeida de Quinteros case (Uruguay)*, par. 14.

74 United Nations document, CCPR/C/79/Add.95, of 18 August 1998 par. 10.

75 United Nations document, CCPR/C/79/Add.90.

76 Judgment of 25 May 1998, *Matter of Kurt c. Turkey*, Case No. 15/19997/799/1002, par. 134.



mother of the disappeared person, other than her familial connection with the victim.

### c. The Inter-American System of Human Rights Protection

49. In its annual report for 1977 to the OAS General Assembly, the Inter-American Commission on Human Rights noted that forced disappearance is a veritable form of torture for the person's families and friends, due to the uncertainty they experience concerning his fate<sup>77</sup>. This consideration has been reiterated by the Commission in numerous of its subsequent annual reports. This suffering persists as long the situation (of the disappeared persons) is not responsibly and definitively elucidated concluded the Inter-American Commission on Human Rights in its report on Argentina.<sup>78</sup>

50. In its judgment in the Blake case, the Inter-American Court of Human Rights observed that the forced disappearance of Nicholas Blake had signified severe suffering and anxiety for the members of his family, to the detriment of their psychological and moral

integrity. The Inter-American Court concluded that such suffering constituted a violation of article 5 of the *American Convention on Human Rights*<sup>79</sup>.

### IV. The Right to Truth and the Right to Reparation

51. The work of the expert on the right to reparation, of the Sub-Commission for the Prevention of Discrimination and Protection of Minorities, which culminated in draft principles concerning this right, has recognized the existence of the right to truth. The expert addressed this problem from the point of view of the right to reparation, and more specifically considered that knowledge of the truth about what occurred with human rights violations constitutes a form of satisfaction.

52. In one of his first studies, the expert, Professor Theo van Boven, indicated that it should not be overlooked that the discovery of the truth following an official inquiry can constitute another important means of giving satisfaction to the victims<sup>80</sup>. The expert included the

77 Annual Report of the Inter-American Commission on Human Rights - 1977-1978, OEA/Ser.L/V/II.43, doc.21, corr.1, p. 24. See Report on the situation of human rights in Argentina, 1980, OAS document OEA/Ser.L/V/II/49, doc. 19, p. 59.

78 Inter-American Commission on Human Rights, Report on the situation of human rights in Argentina, 1980, OAS document, OEA/Ser.L/V/II.49, doc. 19, p. 147.

79 Inter-American Court of Human Rights, Judgment of 24 January 1998, *Blake case*, p. 116.

80 "Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms", United Nations document, E/CN.4/1990/10, par. 40.

right to truth, although without specifically using this term, as forming part of the right to reparation, under the criterion of satisfaction. The draft *Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights and humanitarian law*<sup>81</sup> establishes as a principle that one of the modalities of reparation, satisfaction, implies “verification of the facts and full and public disclosure of the truth”.

53. The Inter-American Commission on Human Rights has considered that the right to the truth is “also a private right for relatives of the victims, which affords a form of compensation”<sup>82</sup>. In a recent decision the Commission also concluded that:

“The right that all persons and society have to know the full, complete, and public truth as to the events transpired, their specific circumstances, and who participated in them is part of the right to reparation for human rights violations, with respect to satisfaction and guarantees of non-repetition.”<sup>83</sup>

## VI. Right to the Truth, Judicial Guarantees and the Right to an Effective Remedy

54. The right to the truth for families of the victims of forced disappearance is closely related to the right to judicial guarantees as well as the right to an effective remedy. In its judgment in the Blake case, the Inter-American Court of Human Rights clearly established this intrinsic relationship, noting that:

“Article 8(1) of the Convention also includes the rights of the victim’s relatives to judicial guarantees, whereby “[a]ny act of forced disappearance places the victim outside the protection of the law and causes grave suffering to him and to his family” [...] Consequently, Article 8(1) of the American Convention recognizes the right of Mr. Nicholas Blake’s relatives to have his disappearance and death effectively investigated”<sup>84</sup>.

55. The right to know the fate or whereabouts of the disappeared person is not satisfied by the investigative action of the family alone. The exercise of effective internal measures constitutes the method, by definition, through which the fate and/or whereabouts of the

81 United Nations document E/CN.4/2000/62, annex.

82 Inter-American Commission on Human Rights, Report No. 136/99, of 22 December 1999, *Ignacio Ellacuría et al.*, par. 224.

83 Inter-American Commission on Human Rights, Report No. 37/00, of 13 April 2000, Case 11.481, *Monseñor Oscar Arnulfo Romero y Galíndez - El Salvador*, par. 148.

84 Inter-American Court of Human Rights, Judgment of 24 January 1998, *Blake case*, par. 97.

disappeared person can be determined. This was reiterated by the Inter-American Court of Human Rights in its judgment in the Blake case, when it referred to article 25 of the American Convention on Human Rights:

“... the duty of the State to provide effective internal remedies, is an important means of determining the whereabouts of persons deprived of their liberty and of preventing forced disappearance in any circumstances”<sup>85</sup>.

56. In the same way, there exists an intrinsic relation between the right of the family members to know the fate or whereabouts of their disappeared loved one and the right to have recourse to the courts in order to determine the fate suffered by the disappeared person. This relation is set down in the *Declaration on the Protection of All Persons from Enforced Disappearances* (article 9) and the *Inter-American Convention on the Forced Disappearance of Persons* (article X). This relation has been established by the Inter-American Commission on Human Rights:

“The right to know the truth is also related to Article 25 of the American Convention, which establishes the right to simple

and prompt recourse for the protection of the rights enshrined therein”<sup>86</sup>.

## VI. Right to the Truth and Right to Information

57. The right to information is protected by the *American Convention on Human Rights* (article 13) as well as by the *International Covenant on Civil and Political Rights* (article 19). The *Declaration on the Protection of All Persons from Enforced Disappearances* establishes the right to know about any deprivation of liberty and where the detention is being carried out, and about the findings of investigations undertaken in cases of disappearance (articles 10 and 13). Likewise, the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, of the United Nations, establishes the right of family members to receive information about deprivation of liberty, the place of detention and the development and findings of the investigation concerning the death of their loved one (principles 6 and 16). Also, the draft *Basic principles and guidelines on the right to a remedy and reparation for victims of violations of international human rights*

85 Ibid, par. 103.

86 Inter-American Commission on Human Rights, Report No. 136/99, of 22 December 1999, Case 10.488 - *Ignacio Ellacuría S.J et al.*, par. 225.

and humanitarian law<sup>87</sup> establishes that the right of the victim (including the person's family) to file recourses includes "access to factual information concerning the violations" (Principle 11).

58. The relation between the right to the truth and the right to have access to and receive information is intrinsic. In general, the Inter-American Commission on Human Rights has repeatedly considered that "the right to know the truth with respect to the facts that gave rise to the serious human rights violations [...] and the right to know the identity of those who took part in them, constitutes an obligation that the State must satisfy with respect to the victims' relatives and society in general. This obligation arises essentially from the provisions of Articles 1(1), 8(1), 25 and 13 of the American Convention."<sup>88</sup> In this same line, the Inter-American Commission on Human Rights has concluded that:

"The American Convention protects the right to gain access to and obtain information, especially in cases of the disappeared, in regard to which the Court and the Commission have established that the State is obligated to determine the person's whereabouts."<sup>89</sup>

## VII. The Duty to Guarantee

59. International human rights law imposes two major classes of obligation on the State: one, the duty to abstain from infringing upon human rights, and the other a duty to guarantee respect of these rights. The former is composed of a set of specific obligations relating directly to the duty of the State to abstain from violating human rights – whether through action or omission – while the second refers to obligations incumbent on the State as guarantor of the rights of the individual, which involves investigation and punishment of human rights violations and reparation of damages caused. The State, then, is placed in the legal position of serving as guarantor of human rights, from which emerge essential obligations related to the protection and ensuring of such rights. It is on this basis that jurisprudence and legal doctrine has elaborated the concept of the Duty to Guarantee as a fundamental notion of the legal position of the State in the matter of human rights. The State thus serves as guarantor for the full enjoyment of the rights of the individual, and consequently must fulfill its international obligations in this area, both treaty-based law and customary law.

87 United Nations document E/CN.4/2000/62, annex.

88 Inter-American Commission on Human Rights, Report No. 136/99, of 22 December 1999, Case No. 10.488 - *Ignacio Ellacuría et al.*, par 221. See also: Report 37/00, of 13 April 2000, Case 10.481 *Monseñor Óscar Arnulfo Romero y Galdámez*, par. 142 and Report 1/99, of 27 January 1999, Case 10.480 - *Lucio Parada Cea et al.*, par. 147.

89 Inter-American Commission on Human Rights, Report 1/99, of 27 January 1999, Case 10.480, *Lucio Parada Cea et al.*, par. 151.

60. The Duty to Guarantee can be summarized as a set of "obligations to guarantee and protect human rights...[and] consisting of the duty to prevent conduct against the law and, should it occur, to investigate it, bring to justice and punish those responsible and indemnify the victims"<sup>90</sup>. The Duty to Guarantee is confirmed expressly in various human rights agreements, given the fact that, as noted by the Inter-American Court of Human Rights, "it is the purpose of human rights treaties to guarantee the enjoyment by individual human beings of those rights and freedoms rather than to establish reciprocal relations between States"<sup>91</sup>. The Duty to Guarantee is established in article 1(1) of the *American Convention on Human Rights*. In analyzing this article, the Inter-American Court of Human Rights established as jurisprudence that the State Parties had contracted the general obligation to protect, respect and guarantee all of the rights covered by the Convention. As a result of which the Court affirmed:

"States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if pos-

sible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation. [...and] The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation"<sup>92</sup>.

61. The responsibility of the State is compromised not only when it encroaches upon the rights of an individual through the active or omissive conduct of its agents, but also when the State neglects to exercise appropriate actions with regard to investigating the facts, prosecuting violations of human rights, providing reparation to the victims and protecting the rights of their families. Thus the transgression or non-observance by the State of this Duty to Guarantee compromises its international responsibility.

90 United Nations Observer Mission in El Salvador, ONUSAL, Report of 19 February 1992, United Nations document A/46/876 S/23580, paragraph 28, par. 28.

91 Inter-American Court of Human Rights, *Advisory Opinion OC-1/82 of September 24, 1982, Other Treaties Subject to the Advisory Jurisdiction of the Court*, in Series A: Judgments and Opinions - No. 1, par. 24.

92 Inter-American Court of Human Rights, *Judgment of 29 July 1988, Velázquez Rodríguez case, Series C: Decisions and Judgments, No 4*, pars. 166 and 174.

62. The obligations which constitute the Duty to Guarantee are by nature complementary and are not alternatives or substitutes. Thus, for example, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions has considered that: "governments are obliged under international law to carry out exhaustive and impartial investigations into allegations of violations of the right to life, to identify, bring to justice and punish their perpetrators, to grant compensation to the victims or their families, and to take effective measures to avoid future recurrence of such violations. The first two components of this fourfold obligation constitute in themselves the most effective deterrent for the prevention of human rights violations[...]the recognition of the right of victims or their families to receive adequate compensation is both a recognition of the State's responsibility for the acts of its organs and an expression of respect for the human being. Granting compensation presupposes compliance with the obligation to carry out an investigation into allegations of human rights abuses with a view to identifying and prosecuting their perpetrators. Financial or other compensation provided to the victims or their families before such investigations are initiated or concluded, however, does

not exempt Governments from this obligation"<sup>93</sup>.

63. The obligations that make up the Duty to Guarantee are certainly interdependent. Thus the obligation to prosecute and punish those responsible for human rights violations is closely related to that of investigating the facts. Nevertheless, "it is not possible for the State to choose which of these obligations it is required to fulfill"<sup>94</sup>. Even if they can be fulfilled separately one by one, this does not free the State from the duty of fulfilling each and every one of these obligations.

64. The right to the truth is intimately linked to the responsibility assumed by States to fulfill the obligations stipulated in treaties of protection of fundamental rights and liberties to which they have voluntarily adhered, as well as in those of customary international law. Unquestionably, the families of the victims have the right to expect that any investigation carried out be exhaustive in enabling them to learn the truth concerning the fate of their loved ones and the circumstances of their ordeal, as well as public divulgence of the identities of those persons directly responsible for the human rights violations that their relatives suffered.

93 United Nations, document E/CN.4/1994/7, pars. 688 and 711.

94 Méndez, Juan, "Derecho a la Verdad frente a las graves violaciones a los derechos humanos", in *La aplicación de los tratados sobre derechos humanos por tribunales locales*, Martín Abregú and Christian Courtes compilers, Ed. CELS, Buenos Aires, 1997, p. 526 (original in Spanish, free translation).

Likewise, the truth is indispensable for carrying out an adequate evaluation of the reparation commensurate with responsibility for such human rights. Nevertheless, the obligation of the State to guarantee this right to the truth is not a substitute or an alternative to the other duties incumbent upon it within the framework of the Duty to Guarantee, namely, those of investigating and imparting justice. This dual obligation exists and remains in force independent of the fulfillment or not of the other obligations.

### VIII. The Obligation to Investigate

65. One of the components of the Duty to Guarantee is the obligation that the State is charged with, to investigate when the rights of the individual have been violated in presumption or in fact. The States participating in the World Conference on Human Rights, held in Vienna in June 1993, reaffirmed this obligation as regards forced disappearances when they subscribed to the Vienna Declaration and Program of Action:

“The Conference reaffirms that it is the duty of all States, under any circumstances, to make investigations whenever there is reason to believe that an enforced disappearance has taken place on a territory under their jurisdiction and, if allegations are confirmed, to prosecute its perpetrators.”<sup>95</sup>

66. The United Nations Human Rights Committee has reiterated in numerous decisions concerning individual complaints that “the State party is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearances of persons and violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations. This duty applies *a fortiori* in cases in which the perpetrators of such violations have been identified.”<sup>96</sup>

67. For his part, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions has repeatedly reaffirmed the existence of the obligation to investigate as stipulated in international law. “It is the obligation of Governments to carry out exhaustive and

95 World Conference on Human Rights, Vienna Declaration and Program of Action, United Nations document, A/CONF.157/23, par 62.

96 Human Rights Committee, Decision of 27 October 1995, *Case of Nydia Erika Bautista (Colombia)*, Communication 563/1993, doc. CCPR/C/55/D/563/1993; and Decision of 29 July 1997, *Caso José Vicente and Amado Villafañe, Luis Napoleón and Angel María Torres Crespo and Antonio Hugues Chaparro (Colombia)*, Communication 612/1994, doc. CCPR/C/60/D/612/1995.

impartial investigations into allegations of violations of the right to life.”<sup>97</sup> This obligation constitutes “one of the main pillars of the effective protection of human rights”.<sup>98</sup> The United Nations Expert on the right to restitution, compensation and rehabilitation has likewise considered that “for the State parties to a human rights treaty there exists [...] the obligation to investigate the facts”.<sup>99</sup>

68. The duty to investigate is one of those obligations termed an obligation of conduct.<sup>100</sup> The authorities must investigate diligently and seriously any allegation of human rights violations given the fact that, as the Inter-American Court of Human Rights has indicated, the State is under the legal obligation to investigate seriously with the means at its disposal.<sup>101</sup> This means that the duty to investigate is fulfilled by deploying *motu proprio* whatever activities are necessary to elucidate the facts and circumstances surrounding such violations and to identify the perpetrators. It is a matter of legal obligation and not merely a question of individual interests, as has been pointed out by the

Inter-American Court of Human Rights.<sup>102</sup> The Human Rights Committee has ruled in the same vein.<sup>103</sup> This means that the investigations must be carried out automatically by the authorities, independent of whether any formal complaint or denunciation has been filed.

69. Various international instruments, several of them declarative in nature, detail the characteristics and criteria involved in the fulfillment by the authorities of the duty to investigate. Thus article 13 of the *Declaration on the Protection of All Persons from Enforced Disappearances* requires the authorities to undertake “a thorough and impartial investigation”. The *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions* establish the criteria for fulfillment of the duty to investigate and prescribe the need for “a thorough, prompt and impartial investigation”. The Special Rapporteur on extrajudicial, summary or arbitrary executions has repeatedly affirmed that the non-fulfillment of

97 United Nations document, E/CN.4/1997/60, par. 46.

98 United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, Report to the Commission on Human Rights, United Nations document, E/CN.4/1993/46, par. 686.

99 Expert on the right to restitution, compensation and rehabilitation, United Nations document, E/CN.4/Sub.2/1992/8, par. 5,2.

100 Méndez, Juan, “Accountability for Past Abuses”, in *Human Rights Quarterly*, Volume 19, N° 2, 1997, p. 264 ff.

101 Inter-American Court of Human Rights, Judgment of 29 July 1988, doc. cit., par. 174.

102 Ibid, par. 177.

103 Human Rights Committee, decision of 19 July 1994, Communication No. 322/1988, *Hugo Rodríguez case (Uruguay)*, United Nations document CCPR/C/51/D/322/1988, par. 12(3).



the norms declared in those principles constitutes an indication of governmental responsibility even if it can not be proven that governmental officials were directly implicated in the summary or arbitrary executions in question.<sup>104</sup>

70. In the case of forced disappearance, this obligation to investigate takes on a particular dimension due to the special character of this type of human rights violation, namely: the situation of total defenselessness in which the disappeared person is placed, and the nature of the crime as both a multiple violation of human rights and as a continuous or permanent violation. The Inter-American Court of Human Rights has indicated that States have the obligation to investigate rapidly and without delay any denunciation of forced disappearance, and to inform the families of disappeared persons concerning the fate and whereabouts of the person.<sup>105</sup> In the same respect, the United Nations Human Rights Committee stated in its General Comment 6 (16) relative to article 6 of the International Covenant on Civil and Political Rights, that States have the duty

to "establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life."<sup>106</sup> A similar recommendation was formulated by the Working Group on Enforced Disappearance in its report to the 46<sup>th</sup> session of the United Nations Commission on Human Rights.<sup>107</sup> The Commission on Human Rights has reiterated to States the need for the authorities to carry out prompt and impartial investigations when it is believed that the forced disappearance of a person may have occurred.<sup>108</sup>

71. Due to its character as a continuing violation of human rights, the obligation to investigate a forced disappearance remains in force as long as the circumstances in which the victim disappeared as well as his fate and whereabouts have not been elucidated. This criterion is retained by the *United Nations Declaration on the Protection of All Persons from Enforced Disappearances* in its article 13 (5).

104 United Nations documents, E/CN.4/1991/36, par. 591 and E/CN.4/1990/22, par 463.

105 Inter-American Court of Human Rights, Judgment of 29 July 1988, *Velázquez Rodríguez case*, Op. Cit. par.. 166, 174 and ff.

106 United Nations Human Rights Committee, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, doc. HRI/GEN/1/Rev.1.

107 Working Group on Enforced or Involuntary Disappearances, Report to the Commission on Human Rights, doc. E/CN.4/1990/13, par 35.

108 United Nations Commission on Human Rights, Resolutions 1993/35 (par. 13); 1994/39 (par. 14) and 1995/38 (par 12), entitled "Question of Forced Disappearances".

72. This principle has long been elaborated doctrinally by the Inter-American Commission on Human Rights. The Inter-American Court of Human Rights has reiterated the scope of the obligation to investigate in the following terms:

“The duty to investigate events of this type continues as long as there remains uncertainty about the ultimate fate of the disappeared person.”<sup>109</sup>

### **IX. The Right to the Truth and the American Convention on Human Rights**

73. While the American Convention on Human Rights contains no explicit provision concerning the right to the truth owed to families of victims of forced disappearance, and of other violations of fundamental rights, the Convention contains clear norms with regard to interpretation of its provisions. Its article 29 stipulates that:

“No provision of this Convention shall be interpreted as: [...]

“b. Restricting the enjoyment or exercise of any right or freedom recognized by virtue of [...] another convention to which one of the said states is a party;

“c. Precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government.”

74. The Inter-American Commission on Human Rights has interpreted that the right to the truth – understood as the right to know the fate suffered by the disappeared person, the circumstances in which the crime of disappearance was committed and the identity of the perpetrators and other participants – is based juridically in the obligations incumbent on the State by virtue of articles 1 (1), 8 (1), 25 and 13 of the American Convention on Human Rights.

75. Certainly the evolution of international human rights law has led to an explicit recognition of the right to the truth as a norm of customary law. The right to the truth is not the result of passing fancy or caprice. It constitutes an inherent right of the human being, so much so in fact, that it is one of those rights which even in the most extreme situations, such as armed conflicts, continues to command observance.

76. But the right to the truth is not only essential for the family members of the victims, but also for the society itself. As the draft *Set of principles for the protection and promotion of human rights*

109 Inter-American Court of Human Rights, Judgment of 29 July 1988, *Velasquez Rodríguez case*, op. cit. par. 181. In the same line, see also Inter-American Court of Human Rights, *Godínez Cruz case*, Judgment of 20 January 1989, Series C: Judgments and Opinions, No. 5, par. 191.

*through action to combat impunity* establishes, its “full and effective exercise [...] is essential to avoid any recurrence of violations in the future”<sup>110</sup>. It would be difficult to imagine a democratic form of government based on acceptance of official silence, ignorance concerning the fate of the disappeared and complicity and abetment of the perpetrators of human rights violations.

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110 United Nations document, E/CN.4/Sub.2/1997/20/rev.1, Annex II, p. 19, Principle 1.

## *Legal Brief on the Incompatibility of Chilean Decree law N° 2191 of 1978 with International Law*

In January 2001, the International Commission of Jurists and Amnesty International submitted a legal brief to Chilean examining magistrate Juan Guzmán Tapia on the incompatibility of Chilean Decree law N° 2191 of 1978, known as the amnesty law, with international law and the international obligations of the Chilean State. The legal brief was submitted as part of the criminal proceedings instituted by the Chilean justice system, Rol N° 2.182-98 "A", in connection with the criminal actions known as the "Caravan of Death". Various military officers including retired General Augusto Pinochet Ugarte are indicted in this case.

The "Caravan of Death" is the name given to a punitive expedition by a military Commission which, under the direct orders of General Augusto Pinochet Ugarte, traveled through the south and north of Chile during the months of September and October 1973. Invested with full powers, the Commission was charged with reviewing and accelerating cases of court martial against detained political opponents. The toll of the expe-

dition carried out by this military commission amounted to 72 persons. Of these 53 were executed illegally and in secret, without trial, and another 19 were "disappeared".<sup>1</sup>

In face of the amnesty promulgated by the regime of General Augusto Pinochet Ugarte, which afforded impunity to the perpetrators of gross human rights violations committed during the military regime, the International Commission of Jurists and Amnesty International decided to present a legal brief on the incompatibility of Chilean Decree law N° 2191 of 1978 with international law. The legal brief offers a systematic review of international jurisprudence and doctrine with regard to the international obligations of the State in the area of human rights; the obligation to bring to justice and punish the perpetrators of gross human rights violations; the incompatibility of amnesties for perpetrators of gross human rights violations; the principle of *pacta sunt servanda* and the non-application of the amnesty by national courts.

1 For more information see the article by Alejandro Artucio "Augusto Pinochet Ugarte before the Court of Chilean Justice" published in this edition of the Review of the International Commission of Jurists.



## *Legal Brief on the Incompatibility of Chilean Decree law N° 2191 of 1978 with International Law*

Amnesty International and the International Commission of Jurists submit for consideration the present legal brief on the incompatibility with international law of Decree Law N° 2191 of 1978. The legal brief addresses the international obligations of the State with regard to human rights (Point I), the obligation to judge and punish the perpetrators of human rights violations (Point II), the incompatibility with international law of amnesties for violators of human rights (Point III), the principle of *pacta sunt servanda* (Point IV) and the non-application of the amnesty by national tribunals (Point V).

Prior to entering into the subject, it need not be recalled that the Republic of Chile ratified the International Covenant on Civil and Political Rights<sup>1</sup> in 1972 and in 1990 the American Convention on Human Rights<sup>2</sup>. Additionally, in 1988 the Republic of Chile ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment as well as the Inter-American Convention to Prevent and Punish Torture.

### **I. The State's Duty to Guarantee**

International human rights law imposes two major classes of obligation on the State: one, the duty to abstain from infringing upon human rights, and the other a duty to guarantee respect of these rights. The former is composed of a set of specific obligations related directly to the duty of the State to abstain from violating human rights –whether through action or omission – which in itself implies ensuring the active enjoyment of such rights. The second refers to obligations incumbent on the State to prevent violations, to investigate them when they occur, to process and punish the perpetrators and to provide reparation for damages caused. Within this framework, the State is placed in the legal position of serving as guarantor of human rights, from which emerge essential obligations related to the protection and ensuring of such rights. It is on this basis that jurisprudence and legal doctrine has elaborated the concept of the Duty to Guarantee as a fundamental notion of the legal position of the State in the

1 The Covenant took effect for Chile on 23 March 1976. See United Nations document E/CN.4/2000/89.

2 See Documentos Básicos en materia de Derechos Humanos en el Sistema Interamericano. Organization of American States, San José, Costa Rica, 1997, pages 49 and following.

matter of human rights. In this juridical relation between the individual and the State, characteristic of international human rights law, the legal position of the State is basically that of a guarantor. The Duty to Guarantee can be summarized as a set of "obligations to guarantee and protect human rights...[and] consists of the duty to prevent conduct contravening legal norms and, if these occur, to investigate them, judge and punish the perpetrators and indemnify the victims"<sup>3</sup>.

This duty to guarantee is based juridically both in Customary International Law as well in international treaty-based law. The Duty to Guarantee is an element confirmed expressly in various human rights agreements: the American Convention on Human Rights (article 1,1); the Inter-American Convention on the Forced Disappearance of Persons (article 1); the Inter-American Convention to Prevent and Punish Torture (article 1); the International Covenant on Civil and Political Rights (article 2); and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, among others. Likewise, various declaratory texts reiterate this duty, such as the Declaration on the

Protection of All Persons from Enforced Disappearance and the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary or Summary Executions<sup>4</sup>.

In analyzing article 1(1) of the American Convention on Human Rights, the Inter-American Court of Human Rights recalled that State Parties had contracted the general obligation to protect, respect and guarantee all of the rights covered by the Convention, and as a result:

"States must prevent, investigate and punish any violation of the rights recognized by the Convention and, in addition, must secure wherever possible recovery of the violated right and, where appropriate, reparation of the damages produced by the violation of human rights...[and] The State is under the legal obligation to prevent, by reasonable measures, violations of human rights, and to investigate seriously with all the means at its disposal violations which have been committed within the scope of its jurisdiction, in order to identify those responsible, impose appro-

3 United Nations Observer Mission in El Salvador, Report of 19 February 1992, United Nations document A/46/876 S/23580, paragraph 28 (document used in Spanish, free translation).

4 General Assembly of the United Nations, Resolution 44/162 of 15 December 1989.

appropriate sanctions upon them and ensure the victim an adequate reparation”<sup>5</sup>.

The jurisprudence of international human rights tribunals as well as of quasi-jurisdictional human rights bodies, such as the Human Rights Committee of the United Nations and the Inter-American Commission on Human Rights, coincide in affirming that this duty to guarantee is composed of four main international obligations which it is the responsibility of the State to fulfill: the obligation to investigate; the obligation to bring to justice and punish those responsible; the obligation to provide fair and adequate reparation to the victims and their families; and the obligation to establish the truth of the facts.

These obligations, which constitute the Duty to Guarantee, are by nature complementary and are not alternatives or substitutes. Thus, for example, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions has explained:

“Governments are obliged under international law to carry out exhaustive and impartial investigations into allegations of violations of the right to life, to identify, bring to justice and punish their perpe-

trators, to grant compensation to the victims or their families, and to take effective measures to avoid future recurrence of such violations. The first two components of this fourfold obligation constitute in themselves the most effective deterrent for the prevention of human rights violations [...] the recognition of the right of victims or their families to receive adequate compensation is both a recognition of the State’s responsibility for the acts of its organs and an expression of respect for the human being. Granting compensation presupposes compliance with the obligation to carry out an investigation into allegations of human rights abuses with a view to identifying and prosecuting their perpetrators. Financial or other compensation provided to the victims or their families before such investigations are initiated or concluded, however, does not exempt Governments from this obligation.”<sup>6</sup>

The obligations that make up the Duty to Guarantee are certainly interdependent. Thus the obligation to bring to justice and punish those responsible for human rights violations is closely related to

5 Inter-American Court of Human Rights, Judgement of July 29, 1988, Velázquez Rodríguez Case, Series C: Decisions and Judgments, No 4, paragraphs 166 and 174 (Spanish version used, free translation).

6 United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, Report to the Commission on Human Rights, doc. E/CN.4/1994/7, paragraphs 688 and 711.



that of investigating the facts. Nevertheless, it is not possible for the State to choose which of these obligations it is required to fulfill<sup>7</sup>. Even if they can be fulfilled separately one by one, this does not free the State from the duty of fulfilling each and every one of these obligations. The Inter-American Commission on Human Rights has repeatedly affirmed that the measures of providing reparation to victims and their family members and establishing "Truth Commissions" in no way exonerates the State from its obligation to bring to justice those responsible for violations of human rights and to impose sanctions on such persons<sup>8</sup>. In the case of Chile, the Inter-American Commission on Human Rights expressly considered that:

"The Government's recognition of responsibility, its partial investigation of the facts and its subsequent payment of compensation are not enough, in themselves, to fulfill its obligations under the Convention. According to the provisions of Article 1.1, the State has the oblig-

ation to investigate all violations that have been committed within its jurisdiction, for the purpose of identifying the persons responsible, imposing appropriate punishment on them, and ensuring adequate reparations for the victims"<sup>9</sup>.

In the case of El Salvador, the Inter-American Commission on Human Rights recalled that despite the importance the Truth Commission had for establishing the facts related to the most serious violations and for promoting national reconciliation, this type of Commission:

"[cannot] be accepted as a substitute for the State's obligation, which cannot be delegated, to investigate violations committed within its jurisdiction, and to identify those responsible, punish them, and ensure adequate compensation for the victim (Article 1.1 of the American Convention), all within the overriding need to combat impunity."<sup>10</sup>

7 Méndez, Juan, "Derecho a la Verdad frente a las graves violaciones a los derechos humanos" in *La aplicación de los tratados de derechos humanos por los tribunales locales*, CELS, Editores del Puerto, Buenos Aires, 1997, p. 526.

8 Inter-American Commission on Human Rights, Report N° 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309, and 10.311 (Argentina), 2 October 1992, paragraph 52.

9 Inter-American Commission on Human Rights, Report N° 36/96, Case 10.843 (Chile), 15 October 1996, paragraph 77. See also Inter-American Commission on Human Rights, Report N° 34/96, Cases 11.228, 11.229, 11.231 and 11.282 (Chile), 15 October 1996, paragraph 76; and Report N° 25/98, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.657, 11.675 and 11.705 (Chile), 7 April 1998, paragraph 50.

10 Inter-American Commission on Human Rights, Report N° 136/99, Case 10.488 *Ignacio Ellacuría S.J. et al.* (El Salvador), 22 December 1999, paragraph 230.

## II. Obligation to bring to justice and punish

The obligation to bring to justice and punish the perpetrators of human rights violations, as an expression of the Duty to Guarantee, has its juridical basis in article 2 of the International Covenant on Civil and Political Rights as well as in article 1 of the American Convention on Human Rights.

The Inter-American Court of Human Rights has recalled that, in the light of its obligations under the American Convention on Human Rights:

“The State is under the legal obligation to prevent, by all reasonable measures, violations of human rights, and to seriously investigate with all the means at its disposal any such violations which have been committed within the scope of its jurisdiction, in order to identify those responsible, impose appropriate sanctions on them and ensure the victim an adequate reparation.”<sup>11</sup>

In various judgments the Inter-American Court of Human Rights has recalled that State parties to the American Convention on Human Rights have the international obligation to bring to justice and punish those responsible for violations of human rights<sup>12</sup>. This obligation is directly related to the right of every person to be heard by a competent, independent and impartial tribunal, for the determination of his rights, as well as the right to an effective recourse, as confirmed in articles 8 and 25 of the American Convention on Human Rights. As the Inter-American Court of Human Rights has recalled:

“The American Convention guarantees every person access to justice to assert his rights, it being the duty of the State parties to prevent and investigate human rights violations, and to identify and punish the intellectual perpetrators and abettors of such violations.[...] Article 8.1 of the American Convention bears a direct relation to article 25 in relation to article 1.1 of

11 Inter-American Court of Human Rights, *Velasquez Rodriguez Case*, Judgement of July 29 1988, Series C No. 4, par. 174 and *Godínez Cruz Case*, Judgement of January 20, 1989, Series C, No. 5, par. 184 (Spanish version used, free translation).

12 Inter-American Court of Human Rights, Series C: Decisions and Judgments: *Velasquez Rodriguez Case, Compensatory Damages*, Judgement of July 21, 1989, (Art. 63.1 American Convention on Human Rights), Series C, No. 7, pars. 32 and 34; *Godínez Cruz Case, Compensatory Damages* (Art. 63.1 American Convention on Human Rights), Judgement of July 21, 1989, Series C, No. 8, pars. 30 and 3; *Caballero Delgado y Santana Case*, Judgement of December 8, 1995, Series C, No. 22, par. 69 and decision point 5; *El Amparo Case, Reparations* (Artículo 63.1 Convención Americana sobre Derechos Humanos), Judgement of September 14, 1996, Series C, No. 28, par. 61 and decision point 4; *Castillo Páez Case*, Judgement of November 3, 1997, Series C, No. 34, par. 90; *Suárez Rosero Case*, Judgement of November 12, 1997, Series C, No. 35, par. 107 and decision point 6; and *Nicholas Blake Case*, Judgement of January 24, 1998, Series C, No. 36, par. 97.

the same Convention, which guarantees every person a rapid recourse for securing, among other results, that those responsible for human rights violations be judged.”<sup>13</sup>

The non-fulfillment of this obligation amounts in practice to a denial of justice and thus to impunity, the latter being understood as “the total lack of investigation, prosecution, capture, trial and conviction of those responsible for violations of the rights”<sup>14</sup>. For this reason, the Inter-American Court of Human Rights has recalled that:

“[...] the State has the obligation to use all the legal means at its disposal to combat that situation, since impunity fosters chronic recidivism of human rights violations, and total defenselessness of victims and their relatives.”<sup>15</sup>

And that:

“The State has the duty to avoid and combat impunity.”<sup>16</sup>

The International Covenant on Civil and Political Rights also points to this obligation to bring to justice and punish those responsible for human rights violations. Thus the Human Rights Committee has recalled that:

“...the State party is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearances of persons and violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations. This duty applies *a fortiori* in cases in which the perpetrators of such violations have been identified.”<sup>17</sup>

There undoubtedly exists an obligation to legally prosecute and punish the perpetrators of human rights violations. This obligation is regulated not only by the International Covenant on Civil and Political Rights and the American Convention on Human Rights, but also by other international instruments, including most importantly the United

13 Inter-American Court of Human Rights, *Series C: Decisions and Judgments, No. 48, Caso Blake, Reparaciones*, Judgement of January 22, 1999, pars. 61 and 63 (free translation).

14 Inter-American Court of Human Rights, *Series C: Decisions and Judgments, No. 37, Paniagua Morales et al. Case*, Judgement of March 8, 1998, par. 173.

15 Inter-American Court of Human Rights, *Series C: Decisions and Judgments, No. 37, Paniagua Morales et al. Case*, Judgement of March 8, 1998, par. 173.

16 Inter-American Court of Human Rights, *Series C: Decisions and Judgments, No. 48, Caso Blake, Reparaciones*, Judgement of January 22, 1999, par. 64 (free translation).

17 Decision in the case of *Nydia Erika Bautista*, Communication N° 563/1993 (Colombia), of November 13, 1995, United Nations document CCPR/C/55/D/563/1993, par. 8,6. See also the decision in the case of *José Vicente and Amado Villafañe Chaparro, Luis Napoleón Torres Crespo, Angel María Torres Arroyo and Antonio Hugues Chaparro Torres*, Communication N° 612/1995 (Colombia), United Nations document CCPR/C/60/D/612/1995, par. 8,8.

Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Inter-American Convention to Prevent and Punish Torture and the Inter-American Convention on the Forced Disappearance of Persons.

It is an obligation which is not only treaty-based. The Committee against Torture recognized this fact, in considering cases of torture that had occurred prior to the entry into force of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Committee against Torture recalled that the obligation to punish those responsible for acts of torture was already requirable in view of the fact that "there existed a general rule of international law which should oblige all States to take effective measures [...] to punish acts of torture"<sup>18</sup>. The Committee against Torture based its consideration in the "principles of the judgement by the Nuremberg International Tribunal" and the right not to be tortured contained in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

The inherent link between the right to a fair trial and the obligation to impart justice is obvious. The duty of the State

to impart justice is supported in treaty-based standards as well as by the fact that human rights are by their very nature capable of being the subject of action by the courts. Any right which, when violated, cannot be prosecuted by the courts is an imperfect right Human rights, on the contrary, are basic rights and it is therefore not possible for a legal system which is specifically based on such rights not to envisage that they be addressed by the courts. As the United Nations Expert on the right to restitution, indemnization and rehabilitation has expressed it:

"it is difficult to imagine a judicial system which protects the rights of the victims while at the same time remaining indifferent and inactive with regard to the flagrant offences of those who have violated such rights."<sup>19</sup>.

The responsibility of the State is compromised not only when it encroaches upon the rights of an individual through the active or omissive conduct of its agents, but also when the State neglects to exercise appropriate actions with regard to investigating the facts, prosecuting and punishing those responsible and providing reparation, or when it obstructs the workings of justice. Thus the transgression or non-observance by the State of this Duty to Guarantee

18 United Nations Committee against Torture, Decision relative to communications 1/1988, 2/1988 and 3/1988, of November 23, 1989, paragraph 7.2.

19 Expert on the right to restitution, indemnization and rehabilitation, United Nations document E/CN.4/Sub.2/1992/8, paragraph 5.5 (document in Spanish, free translation).

compromises its international responsibility. This principle was established early in international law, and one of the first jurisprudential precedents for this involved the arbitration decision pronounced on May 1, 1925 by Prof. Max Huber in the case of the British claims for damages caused to British subjects in the Spanish zone of Morocco<sup>20</sup>. In this arbitration decision, Prof. Huber recalled that according to international law:

“The responsibility of the State can be compromised [...] by a lack of vigilance in the prevention of the damageable acts, but also through lack of diligence in the criminal prosecution of the offenders [...] It is recognized that in general, repression of the offenses is not only a legal obligation of the competent authorities but also [...] an international duty of the State”<sup>21</sup>

Non-observance of this Duty to Guarantee is not limited then to aspects of prevention, as was noted by the United Nations Observer Mission in El Salvador (ONUSAL):

“the responsibility of the State can result not only from a lack of vigilance in prevention of the injurious acts, but also from a lack of diligence in the criminal prosecution of those responsible and in the application of the required civil sanctions”<sup>22</sup>.

In maintaining the impunity of human rights violations, the State violates its international obligations and compromises its international responsibilities. In this context the Inter-American Court of Human Rights has recalled that:

“If the apparatus of the State acts in such away that the violation remains unpunished and does not restore the victim, as far as possible, to the full enjoyment of his rights, it may be affirmed that the State has not fulfilled its duty to guarantee the free and full exercise of such rights by the persons subject to its jurisdiction.”<sup>23</sup>

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20 See United Nations document, Nations Unies, Recueil de sentences arbitrales, vol. II, pages 640 a 742.

21 Ibid, pp. 645 and 646 (original in French, free translation).

22 ONUSAL, doc. cit., par. 29 (original in Spanish, free translation).

23 Inter-American Court of Human Rights, Series C: Decisions and Judgments, No.4, Caso Velázquez Rodríguez, Judgement of July 29, 1988, par. 176 (Spanish version, free translation).

### III. The incompatibility of amnesties and the obligation to judge and punish

Amnesties and other similar measures which prevent the perpetrators of human rights violations from being brought to trial, judged and punished are incompatible with the obligations which international human rights law imposes on States. On one hand, such amnesties are incompatible with the obligation to investigate, judge and punish those responsible for human rights violations. At the same time, these amnesties are incompatible with the obligation of the State to guarantee every person an effective recourse and the right to be heard by an independent and impartial tribunal for the determination of his rights. International jurisprudence has been coherent and consistent in this matter.

The Human Rights Committee of the United Nations in its General Comment No. 20 (concerning article 7 of the International Covenant on Civil and Political Rights) concluded that:

“Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive

individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.”<sup>24</sup>

The Human Rights Committee has repeatedly reaffirmed this jurisprudence in examining amnesties adopted by State parties to the International Covenant on Civil and Political Rights. In its 1999 “Concluding Observations” on Chile, the Human Rights Committee considered that:

“The Amnesty Decree Law, under which persons who committed offences between 11 September 1973 and 10 March 1978 are granted amnesty, prevents the State party from complying with its obligation under article 2, paragraph 3, to ensure an effective remedy to anyone whose rights and freedoms under the Covenant have been violated. The Committee reiterates the view expressed in its General Comment 20, that amnesty laws covering human rights violations are generally incompatible with the duty of the State party to investigate human rights violations, to guarantee freedom from such violations within its jurisdiction and to ensure that similar violations do not occur in the future.”<sup>25</sup>

24 General Comment No.20 (44) on article 7, 44th session period of the Human Rights Committee (1992), in Official Documents of the General Assembly, forty-seventh session period, Supplement No. 40 (A/47/40), annex VI.A.

25 “Concluding Observations of the Human Rights Committee: Chile”, 30/03/99, United Nations document CCPR/C/79/Add.104, par. 7.

In 1995, in its "Concluding Observations" on Argentina, the Human Rights Committee concluded that by denying the right to an effective recourse to persons who were victims of human rights violations during the period of authoritarian government, Law No. 23521 (Law of Due Obedience) and Law No 23492 (Law of Punto Final) violated paragraphs 2 and 3 of article 2 and paragraph 5 of article 9 of the Covenant, whereby:

"the compromises made by the State party with respect to its authoritarian past, especially the Law of Due Obedience and Law of Punto Final and the presidential pardon of top military personnel, are inconsistent with the requirements of the Covenant."<sup>26</sup>

The Human Rights Committee, in its "Concluding Observations" of November 2000, reminded the Argentine State that:

"Gross violations of civil and political rights during military rule should be prosecutable for as long as necessary, with applicability

as far back in time as necessary, to bring to justice their perpetrators."<sup>27</sup>

In the case of the 1995 amnesty declared in Peru, the Human Rights Committee concluded that by impeding the investigation and appropriate punishment of the perpetrators of human rights violations committed in the past, the law constitutes a violation of the obligation contained in article 2 of the International Covenant on Civil and Political Rights.<sup>28</sup>

In the case of the amnesty granted to civil and military personnel for any violations of the human rights of civilians that may have been committed during the course of the civil war in Lebanon, the Committee of Human Rights recalled that:

"Such a sweeping amnesty may prevent the appropriate investigation and punishment of the perpetrators of past human rights violations, undermine efforts to establish respect for human rights, and constitute an impediment to efforts undertaken to consolidate democracy."<sup>29</sup>

26 "Concluding Observations of the Human Rights Committee: Argentina", 05/04/95, United Nations document CCPR/C/79/Add.46; A/50/40, par. 144.

27 Concluding Observations of the Human Rights Committee: Argentina", 03/11/2000, United Nations document CCPR/CO/70/ARG, par. 9.

28 United Nations document CCPR/C/79/Add.67, par 9. See also "Concluding Observations of the Human Rights Committee: Peru", in United Nations document CCPR/CO/70/PER, par. 9.

29 United Nations document CCPR/C/79/Add.78, par. 12.

In its "Concluding Observations" to France, in May 1997, the Human Rights Committee concluded that:

"the Amnesty Acts of November 1988 and January 1990 for New Caledonia are incompatible with the obligation of France to investigate alleged violations of human rights."<sup>30</sup>

The Human Rights Committee has issued similar pronouncements with respect to amnesty laws in El Salvador<sup>31</sup>, Haiti<sup>32</sup> and Uruguay<sup>33</sup>. The Committee has emphasized that these types of amnesties contribute to creating an atmosphere of impunity for the perpetrators of human rights violations and undermine efforts designed to reestablish respect for human rights and the rule of law, a state of affairs contrary to the obligations of States under the International Covenant on Civil and Political Rights.

Concerning the incompatibility of such amnesties with the American Convention on Human Rights, the Inter-American Commission on Human Rights has repeatedly concluded that:

"the application of amnesties renders ineffective and worthless the obligations that States Parties have assumed under Article 1.1 of the Convention, and thus constitutes a violation of that article and eliminates the most effective means for protecting such rights, which is to ensure the trial and punishment of the offenders."<sup>34</sup>

The Commission has likewise stated that:

"such laws remove the most effective measure for enforcing human rights, i.e., the prosecution and punishment of the violators."<sup>35</sup>

30 United Nations document CCPR/C/79/Add.80, par. 13.

31 United Nations document CCPR/C/79/Add.34, par. 7.

32 United Nations document A/50/40, paras. 224-241.

33 United Nations documents CCPR/C/79/Add.19 paras. 7 and 11; CCPR/C/79/Add.90, Part C. "Principal subjects of concern and recommendations"; and Opinion of 09/08/94, *Hugo Rodriguez Case* (Uruguay), Communication No. 322/1988, CCPR/C/51/D/322/1988, par. 12.4.

34 Inter-American Commission on Human Rights, Report N° 36/96, Case 10.843 (Chile), October 15, 1996, par. 50. See also: Report N° 34/96, Cases 11.228, 11.229, 11.231 and 11.282 (Chile), October 15, 1996, par. 50; Report N° 25/98, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.657, 11.675 and 11.705 (Chile), April 7, 1998, par. 42; Report N° 136/99, Case 10.488 *Ignacio Ellacuría S.J. et al.* (El Salvador), December 22, 1999, par. 200; Report N° 1/99, Case 10.480 *Lucio Parada Cea et al.* (El Salvador), January 27 1999, par. 107; Report N° 26/92, case 10.287 *Las Hojas massacre* (El Salvador), September 24, 1992, par. 6; Report N° 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311 (Argentina), October 2, 1992; and Report N° 29 (Uruguay), 1992.

35 Inter-American Commission on Human Rights, Report N° 136/99, Case 10.488 *Ignacio Ellacuría S.J. et al.* (El Salvador), December 22, 1999, par. 200.



In the case of Chilean Decree Law 2191 of 1978, the Inter-American Commission on Human Rights considered that the amnesty violates the right to justice pertaining to the families of the victims in seeking to identify the authors of those acts, to establish the corresponding responsibilities and penalties, and to obtain legal satisfaction from them. In addition, the Commission considered that the amnesty issued by the military regime constituted a violation of articles 1.1 and 2 of the American Convention on Human Rights, and that its application generates a denial of the right to justice, which violates articles 8 and 25 of the American Convention on Human Rights. The Inter-American Commission on Human Rights concluded in its Reports Nos. 34/96, 36/96 and 25/98 that:

“The action by which the military regime that had seized power in Chile issued the 1978 Decree-Law No. 2191 declaring amnesty for itself is incompatible with the provisions of the American Convention on Human Rights,

which was ratified by Chile on 21 August 1990.”<sup>36</sup>

In the case of the amnesty in El Salvador, the Inter-American Commission on Human Rights has repeatedly concluded that this law is incompatible with the obligations of the State under the American Convention on Human Rights<sup>37</sup>. In one of its opinions, the Commission concluded that

“These amnesty laws have deprived large segments of the population of the “right to justice in their just claims against those who committed excesses and acts of barbarity against them”. ”<sup>38</sup>

With regard to the case of the amnesty laws in Argentina and Uruguay, the Inter-American Commission on Human Rights concluded that these provisions were incompatible with article XVIII (Right to a fair trial) of the American Declaration of the Rights and Duties of Man and articles 1, 8 and 25 of the American Convention on Human Rights.”<sup>39</sup>

36 Inter-American Commission on Human Rights, Report N° 36/96, Case 10.843 (Chile), October 15, 1996, par. 105; Report N° 34/96, Cases 11.228, 11.229, 11.231 and 11282 (Chile), October 15, 1996, par. 104; Report N° 25/98, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.657, 11.675 and 11.705 (Chile), April 7, 1998, par. 101.

37 Inter-American Commission on Human Rights, Report N° 136/99, Case 10.488 *Ignacio Ellacuría S.J. et al.* (El Salvador), December 22, 1999; Report N° 37/00, Case 11.481, *Monseñor Oscar Arnulfo Romero y Galdámez* (El Salvador), April 13, 2000; Report N° 1/99, Case 10.480 *Lucio Parada Cea et al.* (El Salvador), January 27, 1999; Report N° 26/92, case 10.287 *Las Hojas massacre* (El Salvador) September 24, 1992, among others.

38 Inter-American Commission on Human Rights, Report N° 1/99, Case 10.480, *Lucio Parada Cea y otros* (El Salvador), January 27, 1999, par. 107.

39 Inter-American Commission on Human Rights, Report N° 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311 (Argentina), October 2, 1992; and Report N° 29/92 (Uruguay).

The incompatibility of such amnesty laws was recognized implicitly by the World Conference on Human Rights, convened under the auspices of the United Nations in June 1993 in Vienna. The Vienna Declaration and Program of Action adopted by the World Conference on Human Rights contains a clause according to which:

“States should abrogate legislation leading to impunity for those responsible for grave violations of human rights such as torture and prosecute such violations, thereby providing a firm basis for the rule of law”<sup>40</sup>.

#### IV. *Pacta sunt servanda*

It is a general principle of international law, and universally recognized, that states must execute in good faith the treaties they adhere to and the international obligations arising from them. This general principle of international

law has as a corollary that the authorities of a country cannot increase obstacles posed by internal law in order to avoid meeting their international engagements or to modify the terms of their fulfillment. This is a longstanding general principle of international law recognized by international jurisprudence<sup>41</sup>. Likewise, international jurisprudence has repeatedly affirmed that in accordance with this principle, the judgments issued by national tribunals cannot be used as an impediment to fulfillment of international obligations<sup>42</sup>.

This principle and its corollary have been clarified in articles 26 and 27 of the Vienna Convention on the Law of Treaties, ratified by the Republic of Chile.<sup>43</sup> It is unnecessary to emphasize that Chilean jurisprudence has expressly recognized the imperative character of the *pacta sunt servanda* principle. In its ruling of 26 October 1995, the Supreme Court of Justice of Chile affirmed that:

“it is a universally recognized principle that civilized Nations can not

40 World Conference on Human Rights, doc. cit., par. 60.

41 Permanent Court of International Court of Justice, Advisory Opinion of 4 February 1932, *Traitement des nationaux polonais et autres personnes d'origine ou de langue polonaise dans le territoire de Dantzig*, Series A/B, n° 44; Advisory Opinion of 31 June 1930, *Question des communautés greco-bulgares*, Series n° 17. International Court of Justice, Advisory Opinion of 26 April 1988, *Obligation to Arbitrate*; Judgement of 28 November 1958, *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands/Sweden)*; Judgement of 16 April 1955, *Nottebohm (2nd Phase) (Lichtenstein/Guatemala)*. Arbitration settlement S.A Bunch, *Montijo (Colombia/United States of America)*, 26 July 1875.

42 Permanent Court of International Justice, Judgement N° 7, of 25 May 1923, *Haute Silésie polonaise*, in Recueil des arrêts et ordonnances, série A, N° 7; and Judgement N° 13, *Usine de Chorow* (*Allemagne / Pologne*), of 13 September 1928, in Recueil des arrêts et ordonnances, série A, N° 17.

43 Chile signed the Convention on 23 May 1969 and ratified it on 9 April 1981.

invoke their internal law to elude international obligations and engagements under such treaties, which, if this happened, would certainly weaken the rule of law.”<sup>44</sup>

International human rights law is not inconsistent with this principle. The Inter-American Court of Human Rights has repeatedly affirmed this. In its Advisory Opinion concerning “International Responsibility for the Promulgation and Enforcement of Laws in violation of the Convention”, the Inter-American Court of Human Rights recalled that:

“Pursuant to international law, all obligations imposed by it must be fulfilled in good faith; domestic law may not be invoked to justify nonfulfillment. These rules may be deemed to be general principles of law and have been applied by the Permanent Court of International Justice and the International Court of Justice even in cases involving constitutional provisions...”<sup>45</sup>

Similarly, the Inter-American Court of Human Rights has indicated that:

“A State may violate an interna-

tional treaty and, specifically, the Convention, in many ways. It may do so in the latter case, for example, by failing to establish the norms required by Article 2 [of the American Convention on Human Rights]. Likewise, it may adopt provisions which do not conform to its obligations under the Convention. Whether those norms have been adopted in conformity with the internal juridical order makes no difference for these purposes.”<sup>46</sup>

If a law of a country violates rights protected by an international treaty and/or obligations arising from it, the State compromises its international responsibility. The Inter-American Court of Human Rights has reiterated this principle on various occasions, and in particular in its Advisory Opinion No. 14:

“the promulgation of a law that manifestly violates the obligations assumed by a state upon ratifying or acceding to the Convention constitutes a violation of that treaty and, if such violation affects the guaranteed rights and liberties of specific individuals, gives rise to

44 Judgement of 26 October 1995, *Barbara Uribe and Edwin van Yurick Case* (original in Spanish, free translation).

45 Inter-American Court of Human Rights, *International Responsibility for the Promulgation and Enforcement of Laws in violation of the Convention* (arts. 1 and 2, American Convention on Human Rights), Advisory Opinion OC-14/94 of December 1994, Series A No. 14, par. 35.

46 Inter-American Court of Human Rights, Advisory Opinion OC-13/93, of July 16, 1993, “*Certain Attributes of the Inter-American Commission On Human Rights (Arts. 41, 42, 44, 46, 47, 50 and 51 of the American Convention on Human Rights)*”, in Series A: Judgments and Opinions, No. 13, par. 26.

international responsibility for the state in question.”<sup>47</sup>

Addressing the issue of amnesty laws incompatible with the international obligations of States under the American Convention on Human Rights, the Inter-American Court of Human Rights has recalled that an amnesty law cannot serve as justification for not fulfilling the duty to investigate and to grant access to justice. The Court has stated:

“The States cannot, in order to not carry out their international obligations, invoke provisions of their internal law, as is, in this case, the Amnesty Law ... which in the view of this Court hinders the investigation and access to justice. For these reasons, the argument [...] that it is impossible for it to carry out that duty to investigate the events that led to this case must be rejected.”<sup>48</sup>

The Human Rights Committee made the same point in its concluding observations to Peru in 1996. In concluding that the amnesty law and the law interpreting the amnesty law adopted by the administration of President Fujimori were incompatible with Peru’s obligations under the International Covenant on

Civil and Political Rights, the Committee underlined that:

“national legislation cannot modify the international obligations contracted by a State party by virtue of the Covenant.”<sup>49</sup>

Similarly, the Inter-American Commission on Human Rights has reiterated this principle in concluding that the amnesty Decree Law No. 2191 is incompatible with the obligations of Chile under the American Convention on Human Rights:

“The Chilean State cannot under international law justify its failure to comply with the Convention by alleging that the self-amnesty was decreed by a previous government, or that the abstention and failure of the Legislative Power to revoke that Decree-Law, or the acts of the Judicial Power confirming its application, have nothing to do with the position and responsibility of the democratic Government, since the Vienna Convention on the Law of Treaties provides in Article 27 that a State Party cannot invoke the provisions of its domestic law as a justification for non-compliance with a treaty.”<sup>50</sup>

47 Advisory Opinion OC-14/94, doc. cit., par. 50.

48 *Loyaza Tamayo Case*, Reparations judgement, 27 November 1998, par. 168, cited in Inter-American Commission on Human Rights, Report N° 37/00, Case 11.481, *Monseñor Oscar Arnulfo Romero y Galdámez* (El Salvador), 13 April 2000.

49 United Nations document CCPR/C/79/Add.67, par. 10 (Spanish version used, free translation).

50 Inter-American Commission on Human Rights, Report N° 34/96, Cases 11.228, 11.229, 11.231 and 11282 (Chile), October 1996, par. 85.

## V. The non-application of the amnesty by national tribunals

The responsibility of the State is compromised from the moment that any one of its organs violates an internal obligation, whether by action or omission. This is a principle of Customary International Law<sup>51</sup>, recognized extensively by international jurisprudence. This principle is reflected in the Draft Articles on State Responsibility, which the International Law Commission of the United Nations has been elaborating since 1955 in fulfillment of the mandate conferred on it by the UN General Assembly to codify the principles of international law governing the responsibility of States<sup>52</sup>. Article 6 of this draft text reads as follows:

“The conduct of an organ of the State shall be considered as an act of that State under international law, whether that organ belongs to the constituent, legislative, executive, judicial or other power, whether its functions are of an international or an internal character, and

whether it holds a superior or a subordinate position in the organization of the State.”<sup>53</sup>

International human rights law is not inconsistent with this principle, which has been reaffirmed by the Inter-American Court of Human Rights<sup>54</sup>, the European Court of Human Rights<sup>55</sup> and the European Commission on Human Rights<sup>56</sup>. The Inter-American Commission on Human Rights, in one of its decision concerning the incompatibility with the American Convention on Human Rights of Decree Law No. 2191 of 1978, recalled that:

“While the Executive, Legislative and Judicial powers may indeed be distinct and independent internally, the three powers of the State represent a single and indivisible unit which is the State of Chile and which, at the international level, cannot be treated separately, and thus Chile must assume the international responsibility for the acts of its public authorities that violate

51 Roberto Ago, *Tercer informe sobre la responsabilidad de los Estados*, in Anuario de la Comisión de Derecho Internacional, 1971, Vol. II, 1st. Parte, pp. 253-254 (document used in Spanish, free translation).

52 Resolution 799 (VIII) of the United Nations General Assembly, of 7 December 1953,

53 Report of the International Law Commission on the work of its forty-eighth session, 6 May to 26 July 1996, United Nations document, Supplement N° 10 (A/51/10), p. 6.

54 See among others, Inter-American Court of Human Rights, Series C: Decisions and Judgments, N° 4, Velázquez Rodríguez Case, Judgement of July 29, 1988, par. 151.

55 See for example the judgments *Tomasi vs. France*, of 27 August 1992; and *Fr. Lombardo vs. Italy*, of 26 November 1992.

56 See for example, European Commission of Human Rights, *Case Ireland vs. United Kingdom*, in Annuaire de la Convention européenne des droits de l'homme, Vol. 11, 1st. Part, p. 11.

its international commitments deriving from international treaties.”<sup>57</sup>

In this juridical context, the courts must fulfill the international obligations of the State within the framework of the competence incumbent upon them. These include, with regard to the subject of the present legal brief: to administer justice in an independent and impartial manner, including observation of judicial guarantees; to investigate, to bring to justice and punish the perpetrators of human rights violations; and to guarantee the right to a fair trial and an effective recourse to the victims of human rights violations and their family members. Action by a court running contrary to these obligations, whether by act or omission, would constitute a denial of justice and a violation of the international obligations of the State, thus compromising the international responsibility of the latter.

The application by a national tribunal of an amnesty law incompatible with the international obligations of the State and violating internationally protected human rights constitutes a violation of the international obligations of the State. In the case of application of Decree Law

No. 2191 of 1978 by national tribunals in legal cases, the Inter-American Commission of Human Rights has concluded that:

“The judgment of the Supreme Court of Chile, rendered on 28 August 1990, and its confirmation on 28 September of that year, declaring that Decree-Law 2191 was constitutional and that its enforcement by the Judiciary was mandatory although the American Convention on Human Rights had already entered into force in Chile, violates the provisions of Articles 1.1 and 2 of that Convention.”<sup>58</sup>

“The judicial rulings of definitive dismissal issued in the criminal charges brought in connection with the detention and disappearance of the 70 persons in whose name the present case was initiated, not only aggravated the situation of impunity, but were also in clear violation of the right to justice pertaining to the families of the victims in seeking to identify the authors of those acts, to establish the corresponding responsibilities

57 Inter-American Commission on Human Rights, Report N° 36/96, Case 10.843 (Chile), 15 October 1996, par. 84.

58 Inter-American Commission on Human Rights, Report N° 36/96, Case 10.843 (Chile), 15 October 1996, par. 106; , Report N° 34/96, Cases 11.228, 11.229, 11.231 and 11.282 (Chile), 15 October 1996, par. 105; and Report N° 25/98, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.657, 11.675 and 11.705 (Chile), 7 April 1998, par. 102.

and penalties, and to obtain legal satisfaction from them.”<sup>59</sup>

The international obligation of the State to investigate, bring to justice and punish the perpetrators of human rights violations is carried out through judicial activity. Thus the courts have the duty to execute this obligation; otherwise they compromise the responsibility of the State. In this juridical context, a court not only must abstain from applying an amnesty law that is incompatible with the international obligations of the state and that violates internationally protected human rights, but at the same time must proceed to investigate, bring to justice and punish the perpetrators of human rights violations. In the case of the Chilean courts, this duty stems not only from international human rights law but also from the clear constitutional precept contained in article 5 of the

Constitution of the Republic of Chile, which stipulates:

“The exercise of sovereignty is acknowledged to be limited by respect for the fundamental rights that have their origin in human nature. It is the duty of the organs of State to respect and promote the rights guaranteed by this Constitution and by the international conventions ratified by Chile and currently in force.”<sup>60</sup>

In light of the above considerations, Amnesty International and the International Commission of Jurists consider that a court of justice of the Republic of Chile can not apply amnesty law No. 2191 of 1978, which violates internationally protected human rights, without violating the international obligations of the State and its own Constitution.

*London, United Kingdom, 15 December 2000*

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59 Inter-American Commission on Human Rights, Report N° 36/96, Case 10.843 (Chile), 15 October 1996, par. 107. In this same sense, see Report N° 34/96, Cases 11.228, 11.229, 11.231 and 11.282 (Chile), 15 October 1996, par. 106, and Report N° 25/98, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.657, 11.675 and 11.705 (Chile), 7 April 1998, par. 103.

60 Original in Spanish, translation as cited in UN document CCPR/C/95/Add.11, par. 15.

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