RECENT DEVELOPMENTS IN INTERNATIONAL LAW TO COMBAT ENFORCED DISAPPEARANCES

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"Não há ninguém na Terra que consiga descrever a dor de quem viu um ente querido desaparecer atrás das grades da cadeia, sem mesmo poder adivinhar o que lhe aconteceu.
O 'desaparecido' transforma-se numa sombra que ao escurecer-se vai encobrindo a última luminosidade da existência terrena".

(Dom Paulo Evaristo Arns, *Brasil:Nunca Mais*, 1985)

ABSTRACT: The text brings a reflection on the forced disappearance, one of the major crimes against the person, the family and society. It analyzes the international law, specially the International Convention for the Protection of all Persons from Enforced Disappearance, as well as the entities fighting the crime, as the Coalition Against Enforced Disappearances. It also comments the importance of the development of case law, which has defined the human rights offended by the crime, applying the inversion of the burden of proof, and recognizing the mandatory obligation to criminalize and fight the misconduct. At last, it comments the Brazilian case, specially referring to the military dictatorship period.

Keywords: Forced disappearance. Human rights. Mandatory character

RESUMO: O texto traz uma reflexão sobre o desaparecimento forçado, um dos principais crimes contra a pessoa, a família e a sociedade. Faz uma análise da legislação internacional, com destaque para a Convenção Internacional de Proteção contra o Desaparecimento Forçado, e dos organismos que lutam para combater esse crime, como a Coalização contra o Desaparecimento Forçado. Também versa o texto sobre a

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importância da jurisprudência no combate ao crime, definindo os direitos humanos ofendidos, aplicando a inversão do ônus da prova e reconhecendo o caráter cogente da obrigação de criminalizar e reprimir essa prática. Por fim, comenta-se o caso brasileiro, especialmente no que se refere ao período da ditadura militar.

Palavras-chave: desaparecimento forçado – direitos humanos – caráter cogente

1. The Phenomenon of Enforced Disappearance: Dimension and Scope

Enforced disappearance is one of the most serious human rights violations which affects a number of human rights, in particular the right not to be arbitrarily deprived of liberty, the right not to be subjected to torture or to other inhumane, cruel or degrading treatment, the right to security, the right to protection under the law. In many cases, depending on the circumstances, it might also be a violation of the right to life and of the rights of the family and the child, of freedom of thought, expression, religion and association and of the general prohibition of discrimination on any grounds.

Enforced disappearance is an autonomous offence, having a continuing character, that does not only affect the material victim. His family is also subjected to inhumane and degrading treatment. The society as a whole is deprived of the right to know the truth and, when the offence is widespread, is thrown into a general state of terror.

The first instance of a systematic practice of enforced disappearance occurred during the World War II, when thousands of people were secretly transferred to Germany from the occupied territories in Europe under the decree known as *Nacht und Nebel* ("Night and Fog"), issued on 7 December 1941 by the German Führer and Supreme Commander of the Armed Forces, Adolf Hitler[3].

In the second half of the 20th century, enforced disappearances developed as a systematic practice in Latin America, and especially in Guatemala between 1963 and 1966 within the context of a 36-year long internal armed conflict. During the Seventies and the Eighties the practice spread to other Latin American countries, such as El Salvador, Chile, Uruguay, Argentina, Brazil[4], Colombia, Peru, Paraguay, Honduras, Bolivia, Haiti and Mexico. All these countries were characterized by more or less persistent situations of internal armed conflicts, dictatorships, tensions, guerrilla or troubles in general.

Today, as stated on 3 October 2006 by the Chairperson of the U.N. Working Group on Enforced or Involuntary Disappearances[5], while presenting the 2005 Report of the Working Group to the Human Rights Council:

"Enforced disappearance had become a global problem not restricted to a specific region. Once largely the product of military dictatorships, disappearances were now perpetrated in complex situations of internal conflict, in regimes undergoing radical political changes and as a means of political repression of opponents. Potential underreporting of disappearances, particularly in Africa, could result in the submission of large numbers of reports in coming years. While its mandate was limited to violations involving State actors, the Working Group condemned such acts, irrespective of the perpetrators. […]

The Working Group's Report highlighted four main areas of concern. The first was disappearances of children and persons with disabilities […]. The second area was the harassment of human rights defenders, relatives of victims, witnesses and legal counsels. […] Thirdly, concern had arisen over the use by States of counter-terrorist activities as an excuse for

[3] For a broader analysis see CITRONI and SCOVAZZI, The Struggle against Enforced Disappearance and the 2007 United Nations Convention, Leiden, 2007.

[4] *Infra*, para. 5.

[5] On this body see ANDREU GUZMAN, Le Groupe de travail sur les disparitions forcées des Nations Unies, in International Review of the Red Cross, 2002, pp. 803-818.

breaching their obligations. […] Lastly, in some post-conflict situations, truth and reconciliation mechanisms could give rise to the enactment of amnesty laws that resulted in impunity" [6].

Indeed, resort by State authorities to enforced disappearances serves different purposes, depending on the circumstances. The most common kind of enforced disappearance has usually been carried out, in complete violation of the domestic legislation, by State agents in the context of a State policy to fight members of insurgent movements or, more generally, political opponents and their supporters. If those who exercise power want to keep it at any cost, for their own benefit and the benefit of their allies, the most direct way to pursue such a purpose is to make their opponents disappear.

During the Eighties, throughout almost all the Latin American region, many of the people who disappeared were representatives of political parties, trade unionists, teachers and students, leaders of cultural groups or members of minorities. Under the "national security doctrine", people who were labelled as "internal enemies, opponents, terrorists or subversive elements" were considered targets to eliminate. The means to free the region from this "threat" to national security was enforced disappearance.

Such practice was also carried out to achieve a second and equally important aim, that is to spread terror (an instance of the so-called "State terrorism"). Society as a whole was forced to live in a climate of psychological submission to the benefit of those who, while violating the most basic laws of human coexistence, enjoyed a condition of total impunity. The practice was, at the same time, illegal and notorious. Everybody knew that people disappeared and could easily imagine who were responsible for it. But it was difficult to react, because of the lack of information on the specific cases and the increasingly widespread climate of terror. In fact some State authorities used the concept of national security and the pretext of the terrorism of others to pursue their own terrorist purposes.

Within the most common pattern of the practice, there is also a variation: the enforced disappearance of children, either born during the captivity of their disappeared mothers or abducted separately. After their disappearance, several of these children were illegally adopted. In this case, the rights to life and to the personal integrity of the child are not violated. Nonetheless, it is easy to find other human rights violations, relating to the prohibition of inhumane treatment (that is a form of psychological torture for the children as well as of the surviving members of their family), the right to privacy and family life, the right to dignity and honour, the right to a name, the right not to be subjected to the trafficking of human beings and, in general, the right to know the truth[7].

In certain countries, enforced disappearances are today carried out mainly by paramilitary groups, acting with the support or tolerance of the State. To new offenders correspond new victims. Besides the usual victims, such as guerrillas and political opponents, paramilitary groups also target farmers and peasants, to pursue the private aim of taking possession of their land, and, more generally, the most vulnerable people, to achieve a sort of social cleansing[8].

Finally, in recent years, there has been a further variation in the phenomenon of enforced disappearance. In the context of the global "War on Terror", enforced disappearances operated at

[6] U.N., Human Rights Council, Summary Records of the 3rd Meeting, doc. A/HRC/2/SR.3 of 3 October 2006, paras. 3 and 5.

[7] Several cases of wrongful removal of children and subsequent illegal adoptions are reported to have happened during the civil war in Spain: see, inter alia, RODRIGUEZ ARIAS, El caso de los niños perdidos del franquismo, Valencia, 2008 Audiencia Nacional de Madrid, Sumario No. 53/2008, Auto, 18 November 2008. Some Latin American countries experienced a widespread practice of disappearance of children: see, inter alia, CUCAGNA, Cuestiones sobre la Historia - Desaparición de Niños, in Cuentas Pendientes, No. 10, 1999, Buenos Aires, p. 22; Asociación Pro-Búsqueda de Niños y Niñas Desaparecidos, El día más esperado: buscando a los niños desaparecidos de El Salvador, San Salvador, 2001; Arzobispado de Guatemala, Oficina de Derechos Humanos, Hasta encontrarte - Niñez desaparecida por el conflicto armado interno en Guatemala, Ciudad de Guatemala, 2002; Amnesty International, Informe El Salvador: ¿Dónde están las niñas y los niños de los desaparecidos?, doc. AMR 29/004/2003/S of 30 July 2003.

[8] See U.N., Working Group on Enforced or Involuntary Disappearances, Report of the UNGWEID – Mission to Colombia, doc. E/CN.4/2006/56/Add.1 of 17 January 2006, paras. 12-13. Often, where paramilitary groups, such as death squads, acting with the support, tolerance, acquiesce of

the transnational level have become a means by which information relevant for security purposes can be extracted through torture from people abducted from one country and forcibly transported to another (so-called "extraordinary renditions"). Contrary to what happens in the traditional practice of enforced disappearance, here the fate and the whereabouts of some of the victims may be disclosed after a certain period of time. However, until that moment, the victims can be qualified as disappeared people[9].

2. The Existing Legal Framework

The first international body that reacted and publicly denounced the existence of the practice of enforced disappearance was the Interamerican Commission on Human Rights in its Report on the human rights situation in Chile, released in 1974[10].

The U.N. General Assembly took into consideration the practice of enforced disappearances in Resolution 33/173 of 20 December 1978, referring to the situation of disappeared people in Chile and Cyprus. It expressed a deep concern for the increasing number of reports it was receiving from various parts of the world relating to enforced disappearances of people as a result of excesses on the part of law enforcement or security authorities or similar organizations. It stressed to be deeply moved by the anguish and sorrow which the mentioned circumstances caused to the relatives of the disappeared people. It called upon governments to ensure that law enforcement and security authorities are fully accountable and legally responsible for unjustifiable excesses.

In 1980 the Commission on Human Rights established by Resolution 20/XXXVI the Working Group on Enforced and Involuntary Disappearances. Among other tasks, the Working Group has the humanitarian mandate to establish a channel of communication between the families and the governments concerned in order to ensure that individual cases brought to its attention are investigated with the objective of clarifying the whereabouts of the disappeared person. Since then, the mandate of the Working Group has been enlarged and renewed on a three-yearly basis[11].

By Resolution 666 of 18 November 1983, the General Assembly of the Organization of the American States declared that "the practice of enforced disappearance in the Americas is an affront to the conscience of the Hemisphere and constitutes a crime against humanity".

On 26 September 1984, the Parliamentary Assembly of the Council of Europe adopted Resolution 828/1984, where enforced disappearance was defined as crime against humanity "incompatible with the ideals of any humane society" and a "flagrant violation of a whole range of human rights recognised in the international instruments on the protection of human rights". The Parliamentary Assembly called on all member States to consider enforced disappearances an imprescriptible crime, which cannot be covered by amnesty laws. It also stressed that member States should adapt their legal systems to the mentioned principles with a view to giving them binding force.

On 18 December 1992 the U.N. General Assembly adopted without vote Resolution 47/133 containing the Declaration on the Protection of All Persons from Enforced Disappearance[12]. Among other things, the Declaration sets forth

State agents, carry out operations of "social cleansing", the victims are forcibly made to disappear and their dead bodies are found some days or months later. On this practice and possible actions to report it, see U.N., Working Group on Enforced or Involuntary Disappearance,Annual Report for 2007, doc. A/HRC/7/2 of 10 January 2008, para. 26.

[9] See Council of Europe, Parliamentary Assembly, Alleged Secret Detentions in Council of Europe Member States, Information Memorandum II, Rapporteur Mr. Dick Marty, doc. AS/Jur (2006) 03 Rev of 22 January 2006; Council of Europe, Parliamentary Assembly, Alleged Secret Detentions and Unlawful Inter-State Transfers Involving Council of Europe Member States, Draft Report – Part II (Explanatory Memorandum), Rapporteur Mr. Dick Marty, doc. AS/Jur (2006) 16, Part II, of 7 June 2006. See also SCOVAZZI, Tortura e formalismi giuridici di basso profile, in Rivista di Diritto Internazionale, 2006, pp. 905-947.

[10] Interamerican Commission on Human Rights, Report on the Human Rights Situation in Chile, doc. OEA/Ser.L/V/II.34 doc.21 of 25 October 1974.

[11] The last resolution to renew the mandate of the Working Group was adopted by Human Rights Council in 2008 (doc. A/HRC/7/12).

the autonomous nature of the crime of enforced disappearance and calls upon all States to make all acts of enforced disappearance offences under criminal law (Art. 4). It explicitly excludes the competence of military tribunals or special courts to try people accused of enforced disappearances (Art. 14), who shall not benefit from any special amnesty law or similar measures (Art. 18). Several provisions of the Declaration have binding effects indirectly, as they reproduce customary rules of international law. Since 1993 the U.N. Working Group on Enforced or Involuntary Disappearances has annually reported on the implementation of the Declaration by States and the obstacles encountered therein.

On 6 February 1994 the General Assembly of the Organization of the American States approved the Interamerican Convention on Forced Disappearance of Persons[13], which entered into force on 28 March 1996. The 1994 Convention represents a significant step forward in international human rights law. In particular, it recognizes that enforced disappearance is an ongoing offence and imposes on States the obligation to codify it as an autonomous offence in their criminal codes (Art. III). It also excludes the competence of military tribunals and special courts to judge persons accused of enforced disappearance and the possibility to grant them privileges or special immunities (Art. IX).

The Rome Statute for the Establishment of an International Criminal Court, adopted on 17 July 1998[14], includes enforced disappearance of persons among the crimes against humanity (Art. 7, para. 1, *i*) "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack". However, the competence of the International Criminal Court, established by the 1998 Rome Statute, is limited to the determination of individual responsibility.

The last achievement in international law to combat enforced disappearances, that is the International Convention for the Protection of All Persons from Enforced Disappearance (Paris, 2007) will be the subject of a more detailed analysis[15].

3. A Schematic Overview of the Interamerican Case Law

While the international legal framework on enforced disappearances was developing, international courts or bodies for the protection of human rights, namely the African Commission on Human and Peoples' Rights, the European Court of Human Rights, the Interamerican Commission and Court of Human Rights, the Human Rights Committee and the Human Rights Chamber for Bosnia and Herzegovina, have established a significant case law on enforced disappearances. The jurisprudence of these bodies has been of crucial importance, in particular before the adoption of the 1992 Declaration and the 1994 Convention, for the establishment of normative principles relating to the subject (*e.g.* the reversal of the burden of proof, the continuing nature of the offence, the lack of competence of military tribunals to try people accused of enforced disappearance, the prohibition to apply amnesty laws to them and the need to grant articulated forms of reparation to relatives of disappeared people).

The competent bodies made the attempt to seize the concept of enforced disappearance through its various components and to sanction such serious human rights violation even though it is not specifically codified as such under most of the applicable international legal instruments (with the notable exception of the Interamerican system after 1994). This may explain some discrepancies existing in international jurisprudence in the finding of the human rights violated (*e.g.* the right to life, the right not to be subjected to torture, inhumane and degrading treatment, the right to juridical personality, the

[12] Hereinafter: the 1992 Declaration.
[13] Hereinafter: the 1994 Convention.
[14] Hereinafter: the 1998 Rome Statute.
[15] Infra, para. 4

right to fair trial and to judicial guarantees and the right to identity[16]), in the application of the reversal of the burden of proof, in the recognition of the competence of international tribunals or quasi-judicial bodies in the light of the continuing nature of the crime, in the recognition of relatives of disappeared people as victims of inhumane and degrading treatment and in the measures of reparation awarded to relatives of disappeared people.

Despite some drawbacks and contradictions, international jurisprudence has provided an important contribution towards the progressive development of international rules to fight enforced disappearance. Reference will be made hereunder only to some selected cases, confining the analysis to the case law of the Interamerican Court of Human Rights, due to its major contribution in this field.

Since 1988, in one of its first judgments rendered on the issue of enforced disappearance (*Velásquez Rodríguez* v. *Honduras*), the Court stressed the complex character of the offence of enforced disappearance.

"El fenómeno de las desapariciones constituye una forma compleja de violación de los derechos humanos que debe ser comprendida y encarada de una manera integral.

La desaparición forzada de seres humanos constituye una violación múltiple y continuada de numerosos derechos reconocidos en la Convención y que los Estados Partes están obligados a respetar y garantizar"[17].

The Court recognized the continuing nature of the offence[18], as long as the fate or whereabouts of the victim have not been determined, maintaining a constant case law on this matter over the years. Another fundamental question addressed by the Court in the *Velásquez Rodríguez* judgment relates to the burden of the proof with regard to enforced disappearances. As the American Convention on Human Rights (San José, 1969)[19] does not specifically deal with such a question, the Court adopted a liberal, but fully justified, interpretation, which makes it possible for the victims and their relatives to face the serious problem of collecting evidence and substantially reverses the burden of proof if a general practice of enforced disappearances can be demonstrated:

"Si se puede demostrar que existió una práctica gubernamental de desapariciones en Honduras llevada a cabo por el Gobierno o al menos tolerada por él, y si la desaparición de Manfredo Velásquez se puede vincular con ella, las denuncias hechas por la Comisión habrían sido probadas ante la Corte, siempre y cuando los elementos de prueba aducidos en ambos puntos cumplan con los criterios de valoración requeridos en casos de este tipo.

Para un tribunal internacional, los criterios de valoración de la prueba son menos formales que en los sistemas legales internos. En cuanto al requerimiento de prueba, esos mismos sistemas reconocen gradaciones diferentes que dependen de la naturaleza, carácter y gravedad del litigio.

La prueba indiciaria o presuntiva resulta de especial importancia cuando se trata de denuncias sobre la desaparición, ya que esta forma de represión se caracteriza por procurar la supresión de todo elemento que permita comprobar el secuestro, el paradero y la suerte de las víctimas"[20].

The Court found that the enforced disappearance of Mr. Velásquez was attributable to Honduras, which was declared internationally responsible for the violation of Arts. 4 (right to

[17] Interamerican Court of Human Rights (hereinafter: IACHR), Case Velásquez Rodríguez v. Honduras, judgment of 29 July 1988 (merits), paras. 150 and 155. Dealing with the preliminary objection of non exhaustion of domestic remedies raised by Honduras, the Court clarified that, to consider admissible such an objection, a remedy: "[…] debe ser, además, eficaz, es decir, capaz de producir el resultado para el que ha sido concebido. El de exhibición personal puede volverse ineficaz si se le subordina a exigencias procesales que lo hagan inaplicable, si, de hecho, carece de virtualidad para obligar a las autoridades, resulta peligroso para los interesados intentarlo o no se aplica imparcialmente" (ibid., para. 66).

[18] The continuing nature of the offence of enforced disappearance, recognized by the Interamerican Court since 1988, results also from Art. III of the 1994 Convention: "[…] This offence shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined. […]".

[19] Hereinafter: the American Convention.

[20] Case Velásquez Rodríguez, supranote 15, paras. 126, 128 and 131.

life), 5 (right to humane treatment) and 7 (right to personal liberty) of the American Convention. The Court also found that the three above mentioned provisions had been violated in conjunction with Art. 1, para. 1, of the Convention, which provides for the general obligation of States Parties to respect rights. Even if the Interamerican Commission had not expressly invoked this provision, the Court recalled the *iura novit curia* principle, stating that Art. 1 is the real fundament of the whole American system of protection of human rights, and adding that:

"La práctica de desapariciones, a más de violar directamente numerosas disposiciones de la Convención, como las señaladas, significa una ruptura radical de este tratado, en cuanto implica el craso abandono de los valores que emanan de la dignidad humana y de los principios que más profundamente fundamentan el sistema interamericano y la misma Convención. La existencia de esa práctica, además, supone el desconocimiento del deber de organizar el aparato del Estado de modo que se garanticen los derechos reconocidos en la Convención, como se expone a continuación.

[…] Como consecuencia de esta obligación los Estados deben prevenir, investigar y sancionar toda violación de los derechos reconocidos por la Convención y procurar, además, el restablecimiento, si es posible, del derecho conculcado y, en su caso, la reparación de los daños producidos por la violación de los derechos humanos"[21].

In subsequent judgments on enforced disappearance, the Court also found the violation of Arts. 8 (right to a fair trial) and 25 (right to judicial protection), both in conjunction with Art. 1, of the American Convention. Since 1997, the Court has been recognizing that enforced disappearance violates the right to know the truth of relatives of victims, as well as of the society as a whole. Although the right to know the truth is not codified as such in the American Convention, its violation can be inferred from the combination of the guarantees set forth by Arts. 1, 8 and 25 of this treaty:

"[…] el derecho a la verdad se encuentra subsumido en el derecho de la víctima o sus familiares a obtener de los órganos competentes del Estado el esclarecimiento de los hechos violatorios y las responsabilidades correspondientes, a través de la investigación y el juzgamiento que previenen los artículos 8 y 25 de la Convención"[22].

In the judgment rendered in 1998 on the case *Blake* v. *Guatemala*, the Court declared for the first time that the relatives of victims of enforced disappearance are themselves victims of inhumane and degrading treatment, which amounts to a violation of Art. 5 of the American Convention:

"[…] la violación de la integridad psíquica y moral de dichos familiares, es una consecuencia directa de su desaparición forzada. Las circunstancias de dicha desaparición generan sufrimiento y angustia, además de un sentimiento de inseguridad, frustración e impotencia ante la abstención de las autoridades públicas de investigar los hechos.

Además, la incineración de los restos mortales del señor Nicholas Blake, para destruir todo rastro que pudiera revelar su paradero, atenta contra los valores culturales, prevalecientes en la sociedad guatemalteca, transmitidos de generación a generación, en cuanto al respeto debido a los muertos. La incineración de los restos mortales de la víctima, efectuada por los patrulleros civiles por orden de un integrante del Ejército guatemalteco, intensificó el sufrimiento de los familiares del señor Nicholas Blake.

Por lo tanto, la Corte estima que tal sufrimiento, en detrimento de la integridad psíquica y moral de los familiares del señor Nicholas Blake, constituye una violación, por parte del Estado, del artículo 5 de la Convención en relación con el artículo 1.1 de la misma"[23].

Since then the Court has always presumed that the relatives of disappeared people are *ipso*

[21] *Ibid.*, paras. 158 and 166.
[22] IACHR, Case Bámaca Velásquez v. Guatemala, judgment of 25 November 2000, para. 201.

facto victims of inhumane and degrading treatment, without a need to impose on them any burden of proof:

"[…] la Corte considera que no se necesita prueba para demostrar las graves afectaciones a la integridad psíquica y emocional de los familiares de las víctimas […]"[24].

When determining the people who can be considered as victims of inhumane and degrading treatment for the enforced disappearance of a loved one and the subsequent lack of information by the authorities on his fate and whereabouts, the Court follows a wide concept of "relatives",:

"[…] este Tribunal considera como familiares inmediatos a aquellas personas debidamente identificados que sean descendientes o ascendientes directos de la presunta víctima, a saber, madres, padres, hijas e hijos, así como hermanas o hermanos, cónyuges o compañeros permanentes, o aquellos determinados por la Corte con motivo de las particularidades del caso y la existencia de algún vínculo especial entre el familiar y la víctima o los hechos del caso. […]"[25]

The criteria to evaluate the involvement of the relatives are also broad:

"[…] la proximidad del vínculo familiar, las circunstancias particulares de la relación con la víctima, el grado en el cual el familiar fue testigo de los eventos relacionados con la desaparición, la forma en que el familiar se involucró respecto a los intentos de obtener información sobre la desaparición de la víctima y la respuesta ofrecida por el Estado a las gestiones incoadas"[26].

The Court, aware of the crucial importance of granting to relatives of disappeared people access to justice and of avoiding the application of measures which may contribute to impunity, has repeatedly affirmed that amnesty legislation, provisions on prescription or similar measures that have the effect of preventing the investigation and punishment of those accused of enforced disappearance are inadmissible:

"Esta Corte considera que son inadmisibles las disposiciones de amnistía, las disposiciones de prescripción y el establecimiento de excluyentes de responsabilidad que pretendan impedir la investigación y sanción de los responsables de las violaciones graves de los derechos humanos tales como la tortura, las ejecuciones sumarias, extralegales o arbitrarias y las desapariciones forzadas, todas ellas prohibidas por contravenir derechos inderogables reconocidos por el Derecho Internacional de los Derechos Humanos"[27].

The Court stressed that, in cases involving gross human rights violations as enforced disappearances, States cannot invoke mechanisms such as the secret of State, the confidentiality of intelligence information or reasons of public interest or national security, to deny access to information which may contribute to the establishment of the truth on the facts and to identify and sanction those responsible:

"[…] el Estado garantizará que las autoridades encargadas de la investigación cuenten con los recursos logísticos y científicos necesarios para la recaudación y procesamiento de pruebas y, en particular, tengan las facultades para acceder a la documentación e información pertinente para investigar los hechos denunciados y puedan obtener indicios o evidencias de la ubicación de las víctimas. En este sentido, cabe reiterar que en caso de violaciones de derechos humanos, las autoridades estatales no se pueden amparar en mecanismos como el secreto de Estado o la confidencialidad de la información, o en razones de interés público o seguridad nacional, para dejar de aportar la información requerida por las autoridades judiciales o administrativas encargadas de la investigación o proceso pendientes"[28].

[23] IACHR, Case Blakev. Guatemala, judgment of 24 January 1998, paras. 114-116.
[24] IACHR, Case Masacre de Mapiripán v.
Colombia, judgment of 15 September 2005, para. 146.
[25] IACHR, Case *Masacres de Ituango* v. *Colombia*, judgment of 1 July 2006, para. 264.
[26] IACHR, Case Bámaca Velásquez, supranote 20, para. 163.
[27] IACHR, Case Chumbipuma Aguirre and others (Barrios Altos)v. Peru, judgment of 14 March 2001, para. 41.

According to the Court, military tribunals are not competent in cases of enforced disappearance, as their jurisdiction must have a restrictive and exceptional application and must be confined to the protection of those special judicial interests that are linked with the functions that the law attributes to military forces:

"De manera particular, este Tribunal ha establecido que el procesamiento de graves violaciones de derechos humanos corresponde a la justicia ordinaria. […]

[…] la jurisdicción penal militar tiene un alcance restrictivo y excepcional ligado a la función militar […]"[29].

In its rich jurisprudence on the subject, the Court has also pointed out several times the obligation of States to introduce in their criminal codes the autonomous offence of enforced disappearance, considering that the codification of this offence is an indispensable means to eradicate impunity:

"En el caso de la desaparición forzada de personas, la tipificación de este delito autónomo y la definición expresa de las conductas punibles que lo componen tienen carácter primordial para la efectiva erradicación de esta práctica. En atención al carácter particularmente grave de la desaparición forzada de personas, no es suficiente la protección que pueda dar la normativa penal existente relativa a plagio o secuestro, tortura u homicidio, entre otras. La desaparición forzada de personas es un fenómeno diferenciado, caracterizado por la violación múltiple y continua de varios derechos protegidos en la Convención.

Por otro lado, la Corte observa que la falta de tipificación del delito autónomo de desaparición forzada de personas ha obstaculizado el desarrollo efectivo de un proceso penal que abarque los elementos que constituyen la desaparición forzada de personas, lo cual permite que se perpetúe la impunidad […]"[30].

Recently, the Court has clarified that, given the continuing nature of the offence of enforced disappearance, even if a State codifies it after the commission of a specific disappearance, the codification will be applicable to the case in question, as long as the fate and whereabouts of the disappeared person have not been established with certainty, an impartial investigation on the facts has not been carried out and those responsible have not been judged and sentenced:

"Por tratarse de un delito de ejecución permanente, es decir, cuya consumación se prolonga en el tiempo, al entrar en vigor la tipificación del delito de desaparición forzada de personas en el derecho penal interno, si se mantiene la conducta delictiva, la nueva ley resulta aplicable […]"[31]

In a judgment rendered in 2006 on four cases of enforced disappearance committed in the context of the "*Operación Cóndor*", the Court declared that the rule prohibiting enforced disappearance has a non-derogable character (*jus cogens*):

"[…] la prohibición de la desaparición forzada de personas y el correlativo deber de investigarla y, en su caso, sancionar a los responsables tienen carácter de *jus cogens*"[32].

In the view of the Court, the *Operación Cóndor* can be defined as a systematic practice of State terrorism, corresponding to a crime against humanity:

"[…] La responsabilidad internacional del Estado se ve agravada cuando la desaparición forma parte de un patrón sistemático o práctica aplicada o tolerada por el Estado. Se trata, en suma, de un delito de lesa humanidad que im-

[28] IACHR, Case Tiu Tojín v. Guatemala, judgment of 26 November 2008, para. 77.

[29] *Ibid.*, paras. 119 and 120. Art. IX of the 1994 Convention expressly provides for the incompetence of military tribunals orspecial courts in cases of enforced disappearances.

[30] IACHR, Case Heliodoro Portugal v. Panama, judgment of 12 August 2008, paras. 181 and 183. In a number of cases, the Court has also analyzed the compatibility with international standards of some codifications of the offence of enforced disappearance, providing guidance on the requirements to be in line with the Interamerican system of protection of human rights. In this sense, see, inter alia, IACHR, Case Trujillo Oroza c. Bolivia, judgment of 27 February 2002; Case Gómez Palomino v. Peru, judgment of 22 November 2005; Case Blanco Romero and others v. Venezuela, judgment of 28 November 2005; Case Goiburú and others v. Paraguay, judgment of 22 September 2006.

[31] IACHR, Case Tiu Tojín, supra note 26, para. 87.

[32] IACHR, Case Goiburú and others, supranote 28, para. 84. See also, Case Tiu Tojín, supra note 26, para. 91.

plica un craso abandono de los principios esenciales en que se fundamenta el sistema interamericano. […]"[33].

Taking into account the transboundary nature of the enforced disappearances perpetrated within the *Operación Cóndor* and the fact that two of the people accused of being responsible for them were not residing in Paraguay (but in Brazil[34] and Honduras), the Court called upon States parties to the American Convention either to judge the accused or to grant their extradition (*aut dedere aut judicare*):

"[…] ante la naturaleza y gravedad de los hechos, más aún tratándose de un contexto de violación sistemática de derechos humanos, la necesidad de erradicar la impunidad se presenta ante la comunidad internacional como un deber de cooperación inter-estatal para estos efectos. La impunidad no será erradicada sin la consecuente determinación de las responsabilidades generales – del Estado – y particulares – penales de sus agentes o particulares –, complementarias entre sí. El acceso a la justicia constituye una norma imperativa de Derecho Internacional y, como tal, genera obligaciones *erga omnes* para los Estados de adoptar las medidas que sean necesarias para no dejar en la impunidad esas violaciones, ya sea ejerciendo su jurisdicción para aplicar su derecho interno y el derecho internacional para juzgar y, en su caso, sancionar a los responsables, o colaborando con otros Estados que lo hagan o procuren hacerlo.

En tales términos, la extradición se presenta como un importante instrumento para estos fines por lo que la Corte considera pertinente declarar que los Estados Partes en la Convención deben colaborar entre sí para erradicar la impunidad de las violaciones cometidas en este caso, mediante el juzgamiento y, en su caso, sanción de sus responsables. Además, en virtud de los principios mencionados, un Estado no puede otorgar protección directa o indirecta a los procesados por crímenes contra los derechos humanos mediante la aplicación indebida de figuras legales que atenten contra las obligaciones internacionales pertinentes. En consecuencia, el mecanismo de garantía colectiva establecido bajo la Convención Americana, en conjunto con las obligaciones internacionales regionales y universales en la materia, vinculan a los Estados de la región a colaborar de buena fe en ese sentido, ya sea mediante la extradición o el juzgamiento en su territorio de los responsables de los hechos del presente caso"[35].

The Court has constantly held that enforced disappearance cannot be regarded, for any reason and under any circumstance, as a political offence or as an offence connected with a political offence:

"[…] la desaparición forzada de personas no puede ser considerada como delito político o conexo a delitos políticos bajo ninguna circunstancia, a efectos de impedir la persecución penal de este tipo de crímenes o suprimir los efectos de una sentencia condenatoria […]"[36].

On several occasions the Court declared the international responsibility of the State where enforced disappearances had been perpetrated by members of paramilitary groups (or also by so-called groups of "self-defence", created by

[33] IACHR, Case Goiburú and others, supra note 28, para. 82.

[34] In its final report of 28 August 2008, the Truth and Justice Commission of Paraguay found that "tienen igualmente responsabilidad directa algunos gobiernos brasileños que dieron históricamente su apoyo al gobierno dictatorial de Alfredo Stroessner en su política general, y especialmente las dictaduras, por el apoyo mutuo entre los gobiernos militares del Cono Sur y al Operativo Cóndor de represión brutal a la izquierda latinoamericana" (concl. 230). Accordingly, the Truth and Justice Commission expressed its will that "los gobiernos de Brasil, Argentina, Uruguay y Chile hagan un reconocimiento de su responsabilidad de manera pública y soliciten excusas, disculpas o perdón a la sociedad paraguaya por la lamentable política seguida por los gobiernos mencionados […]" (concl. 231). It recommended to "exhortar a los gobiernos de otros Estados que apoyaron al régimen estronista que ofrezcan disculpas al pueblo paraguayo y acepten su responsabilidad por las violaciones de derechos humanos expuestas en este Informe" (rec. 28); to "insistir desde el Estado en la extradición y castigo de los victimarios identificados que se encuentran en el extranjero, disponiendo para ello de todos los medios judiciales y diplomáticos, y rindiendo cuentas al Congreso de las actuaciones que se lleven a cabo para tal finalidad […]" (rec. 47); to "solicitar a los gobiernos de los Estados extranjeros donde residan bajo cualquier condición jurídica paraguayos responsables de violaciones de los derechos humanos, que lo notifiquen al Estado paraguayo con el propósito de recurrir a la figura de la extradición y poder juzgar a esos presuntos responsables o que de lo contrario los juzguen bajo el principio de la jurisdicción universal" (rec. 48); and to "firmar convenios, a través del Ministerio de Relaciones Exteriores, con Argentina, Uruguay y Brasil para que se establezcan en las ciudades donde el exilio paraguayo fue mayor, Museos de la Memoria del Exilio paraguayo" (rec. 52).

[35] IACHR, Case Goiburú and others, supra note 28, paras. 131 and 132. On this subject, see also Arts. IV, V and VI of the 1994 Convention and Arts. 9, 11, 13 and 14 of the 2007 Convention.

[36] IACHR, Case Tiu Tojín, supra note 26, para. 91. On this subject, see also Art. V of the 1994 Convention and Art. 13 of the 2007 Convention.

peasants and armed and trained by the army), acting with the tolerance, acquiescence or direct support of the State[37].

Finally, there has been an ongoing development over the years as regards the measures of reparation awarded by the Court to relatives of disappeared people. To date, the case law of the Court is definitely the most advanced and complete one on the subject. The measures aim at granting integral reparation to the victims of such a gross human rights violation, ranging from pecuniary compensation, to rehabilitation, satisfaction, restoration of honour and guarantees of non repetition. In cases of enforced disappearance, besides pecuniary compensation to the victims and their relatives, the Court has ordered to States to take all necessary measures to locate and identify the mortal remains of the victims and to deliver them to the relatives[38]; to investigate the facts leading to the enforced disappearance of the victims and prosecute and punish the authors, accomplices, accessories and all those who may have had some part in the events[39]; to commemorate the names of the victims by giving them to streets, schools or public buildings[40]; to adopt all necessary measures for the education and training of all members of armed forces and security agencies on principles and rules on human rights protection and the limits to which the use of weapons by law enforcement officials is subject, even in a state of emergency[41]; to provide the relatives of the disappeared person with free medical and psychological treatment[42]; to introduce the autonomous offence of enforced disappearance in the criminal code or to modify the existing codification in case it is not in line with international standards on the subject[43]; to publish abstracts of the judgments of the Court in national official journals and newspapers[44]; to build monuments to honour the memory of the victims[45]; to hold a ceremony publicly recognizing the international responsibility of the State for the disappearance of the victims and issuing an apology to their relatives[46]; to establish an expedite procedure to allow statement of "absence for enforced disappearance" for purposes of parentage, inheritance and reparation as well as other related civil effects[47]; to establish a genetic information system to enable clarification of parentage of disappeared children and their identification[48]; to offer special programmes of education to the relatives of the victims who were forced to leave their studies[49]; to guarantee the preservation of intelligence and military archives that may contain useful information on the fate and whereabouts of the victims as well as on the identity of those responsible and to guarantee the access to such archives to people having a legitimate interest[50]; and, in cases where the extradition of those accused of enforced disappearance is needed, to remove all the obstacles, *de facto* and *de jure*, that maintain impunity[51].

[37] See, inter alia, IACHR, Case Bámaca Velásquez, supranote 20; Case Masacre de Mapiripán, supra note 22; Case La Cantuta v. Peru, judgment of 29 November 2006.

[38] See, inter alia, IACHR, Case Tiu Tojín, supra note 26, paras. 101-105; Case Masacre de Pueblo Bello v. Colombia, judgment of 31 January 2006, paras. 270-273 (this decision is of particular interest for the indication of the international standards which States shall respect in carrying out exhumations in cases of enforced disappearances or extra-judiciary executions).

[39] See, inter alia, IACHR, Case Tiu Tojín, supra note 26, paras. 68-100.

[40] See, *inter alia*, IACHR, Case *Benavides Cevallos*v.*Ecuador*, judgment of 19 June1998.

[41] See, inter alia, IACHR, Case El Caracazo v. Venezuela, judgment of 26 November 2002. On the obligation of States to train law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of persons deprived of liberty, providing them with the necessary education and information on international human rights law, international humanitarian law and international standards on the issue of enforced disappearance, see also Art. VIII of the 1994 Convention and Art. 23 of the 2007 Convention (infra, para. 4).

[42] See, inter alia, IACHR, Case 19 Comerciantes v. Colombia, judgment of 5 July 2004.

[43] See, inter alia, IACHR, Case Heliodoro Portugal,supra note 28.

[44] *Ibidem.*

[45] See, inter alia, IACHR, Case 19 Comerciantes, supra note 40.

[46] See, inter alia, IACHR, Case Molina Theissen v. Guatemala, judgment 3 July 2004.

[47] *Ibidem*.

[48] Ibidem.

[49] See, inter alia, IACHR, Case Gómez Palomino, supranote 28.

[50] See, *inter alia*, IACHR, Case *Goiburú and others, supra* note 28.

[51] See, inter alia, IACHR, Case La Cantuta, supra note 35.

4. The International Convention for the Protection of All Persons from Enforced Disappearance

The first effort to promote the adoption of an international treaty against enforced disappearance was undertaken in 1981 by the Human Rights Institute of the Paris Bar Association (*Ordre des Avocats de Paris*) which convened a conference on the subject of enforced disappearances[52].

In 1982 the Latin American Federation of Associations of Relatives of the Detained-Disappeared (FEDEFAM) adopted a draft Convention at its annual meeting in Peru. In fact, organizations of relatives of disappeared people have been the real engine of the whole process of the drafting, the negotiation and the adoption of an international treaty against enforced disappearance, keeping such project on the international agenda over the years and re-proposing it every time it was apparently "struck out the list" or postponed.

In the subsequent years, the 1992 Declaration, the 1994 Interamerican Convention, as well as the 1998 Rome Statute were adopted[53]. Notwithstanding, a universally legally binding instrument against enforced disappearances was still lacking while the phenomenon was on the increase worldwide.

In 1998, after four years of work and various consultative meetings with experts from the United Nations and non governmental organizations, the U.N. Sub-Commission for the Promotion and Protection of Human Rights adopted a "Draft International Convention for the Protection of All Persons from Enforced Disappearance"[54]. Composed of a preamble and 39 provisions, it was drafted by the Working Group on the Administration of Justice of the Sub-Commission, chaired by Mr. Louis Joinet.

In the meantime, the independent expert appointed by the U.N. Commission on Human Rights to study the existing legal framework on the phenomenon of enforced disappearance, Mr. Manfred Nowak, reached the conclusion that:

"There do exist plenty of gaps and ambiguities in the present legal framework which clearly underscore the urgent need for a binding universal instrument in order to prevent the widespread practice of enforced disappearances, one of the most serious human rights violations which is directed at the core of the dignity of both the disappeared person and his or her family. […]

The most important gap is the lack of a binding obligation to make sure that enforced disappearance is a crime under domestic law with appropriate penalties, and that the principle of universal jurisdiction applies to the crime.

It is important that Art. 7 of the Rome Statute of the International Criminal Court (ICC) recognizes enforced disappearance as a crime against humanity but perpetrators will only in very exceptional circumstances of a widespread and systematic practice be held accountable before the ICC. Effective domestic criminal justice must, therefore, be regarded as the most important mechanism in order to deter and prevent disappearances […][55].

By Decision 2001/221, the U.N. Economic and Social Council endorsed the decision of the Commission on Human Rights to create an Intersessional Open-ended Working Group with the mandate to prepare a draft legally binding normative instrument for the protection of all persons from enforced disappearance. The 1998 Draft Convention became the basis of discussion for the negotiations within the Working Group.

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[52] See TAYLER, Background to the Elaboration of the Draft International Convention on the Protection of All Persons from Enforced Disappearance, in Review of the International Commission of Jurists, Special issue on "Impunity, Crimes against Humanity and Forced Disappearance", 2001, pp. 63-73.

[53] *Supra*, para. 2.

[54] U. N., Economic and Social Council, doc. E/CN.4/Sub.2/1998/19, Annex, of 19 August 1998.

[55] U.N. High Commissioner for Human Rights, Oral Presentation of the Report submitted by Mr. Manfred Nowak, Independent Expert, on the international legal framework for the protection of persons from enforced disappearance, pursuant to para. 11 of Commission Resolution 2001/46, 26 March 2002.

The Working Group, chaired by Ambassador Bernard Kessedjian, met for the first time in Geneva in January 2003 and afterwards held two sessions a year, concluding its works on 23 September 2005 with the adoption of the final project of the International Convention for the Protection of All Persons from Enforced Disappearance[56]. On 20 December 2006 the Convention was adopted by Resolution 61/177 of the U.N. General Assembly and on 6 February 2007 it was opened for signature in Paris. It will enter into force on the 30th day after the deposit with the U.N. Secretary General of the 20th instrument of ratification or accession. By the end of December 2008, the Convention has been signed by 80 States and ratified by 7[57].

In 2007, in order to achieve the prompt entry into force and the full implementation of the 2007 Convention, associations of relatives of disappeared people from all over the world[58] and international non governmental organizations working on human rights joined in the International Coalition against Enforced Disappearance[59]. The struggle begun more than 27 years ago in Latin America has now become global, in order to stop this shameful practice and to build a world free from disappearances.

One of the most notable developments introduced by the 2007 Convention is the recognition of an autonomous right of every person not to be subjected to enforced disappearance (Art. 1). Such right is non-derogable and no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for enforced disappearance. No order or instruction from any public authority, civilian, military or other may be invoked to justify an offence of enforced disappearance (Arts. 6, para. 2, 23, para. 2, and 23, para.3).

The 2007 Convention defines enforced disappearance as "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law" (Art. 2). Accordingly, the concept of enforced disappearance has three constitutive elements: first, the deprivation of liberty; second, the fact that it is carried out by State agents or by people or groups of people acting with the acquiescence, authorization or support of the State; third, the fact that it is followed by refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person. The placement of the victim outside the protection of the law is an inherent consequence of an act of enforced disappearance and not a constitutive element of it[60]. The 2007 Convention appropriately leaves out all reference to the ambiguous element of the "intention of the author to place the disappeared person outside the protection of the law for a prolonged period of time", which appears in the definition of enforced disappearance provided by the 1998 Rome Statute.

The 2007 Convention recognizes that acts of the same nature of enforced disappearances may be committed by persons or groups of

[56] On the Convention, see: FEDEFAM, Contra la impunidad y por la aprobación de la Convención de protección a todas laspersonas contra las desapariciones forzadas- No más indiferencia, Bogotá, 2004; CITRONI, El proceso de adopción de la Convención Internacional para la Protección de todas las Personas contra las Desapariciones Forzadas, in Revista de la Comisión de Derechos Humanos del Distrito Federal, No. 10, October 2005, pp. 52-56; DE FROUVILLE, La Convention des Nations Unies pour la protection de toutes les personnes contre les disparitions forcées: les enjeux juridiques d'une négociation exemplaire. Première partie: les dispositions substantielles, in Droits Fondamentaux, No. 6, 2006; McCRORY, The International Convention for the Protection of all Persons from Enforced Disappearances, in Human Rights Law Review, 2007, pp. 545-566.

[57] As at January 2009, Albania, Argentina, Bolivia, France, Honduras, Mexico and Senegal have deposited their instrument of ratification. Kazakhstan and Uruguay have approved the ratification of the Convention, but have not yet deposited the relevant instrument.

[58] Organizations of relatives of disappeared people exist all over the world. The main regional federations of such associations, besides the already mentioned FEDEFAM, are the Asian Federation against Involuntary Disappearances (AFAD), which has members in India, Indonesia, Nepal, Pakistan, the Philippines and Thailand, and the Euro Mediterranean Federation against Enforced Disappearance (FEMED), which has members in Algeria, Morocco, Lebanon and Turkey.

[59] See http://www.icaed.org/.

[60] In this sense see U.N., United Nations Working Group on Enforced or Involuntary Disappearances, Annual Report for 2007, supra note 6, para. 26.

persons acting without the authorization, support or acquiescence of the State. In these cases, States shall take all appropriate measures to investigate such acts and to bring those responsible to justice (Art. 3).

Enforced disappearance is defined as an ongoing offence. States which apply a statute of limitation in respect of such offence must ensure that it is of long duration and proportionate to the extreme seriousness of the crime and that it commences from the date when the fate and whereabouts of the disappeared person have been established with certainty (Art. 8). The widespread or systematic practice of enforced disappearance constitutes a crime against humanity (Art. 5) and, as such, is imprescriptible. States shall make enforced disappearance an autonomous offence under their criminal law, punishing it by appropriate penalties (Arts. 4 and 7).

As regards the crucial issue of jurisdiction, the 2007 Convention mirrors the developments of international law on the matter and provides for a quasi-universal jurisdiction. A State shall take all necessary measures to exercise jurisdiction over the offence of enforced disappearance when the offence is committed in any territory under its jurisdiction or on board of a ship or aircraft registered in that State, when the alleged offender is one of its nationals, and when the disappeared person is one of its nationals and the State considers it appropriate (Art. 9, para. 1). Likewise, a State shall take such measures as may be necessary to establish its competence to exercise jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized (Arts. 9, para. 2, and 11, para. 1).

The 2007 Convention provides for significant guarantees to ensure the right of any individual who alleges that a person has been subjected to enforced disappearance to report the fact to the competent authorities, that shall examine promptly and impartially the allegation and undertake without delay a thorough and effective investigation. States must also prevent and sanction acts that hinder the conduct of an investigation and ensure that persons suspected of having committed an offence of enforced disappearance are not in a position to influence the progress of an investigation by means of pressure or acts of intimidation or reprisal aimed at the complainant, witnesses, relatives of the disappeared person or their defence counsel or at persons participating in the investigation (Art. 12).

The 2007 Convention provides that no one shall be held in secret detention and that States shall compile and maintain one or more updated official registers and records of persons deprived of their liberty (Art. 17). It also provides for a minimum of information concerning persons deprived of liberty, to which States must guarantee access to any person with a legitimate interest, such as relatives of the person deprived of liberty, their representatives or their counsel (Arts. 17 and 18). These requirements are of fundamental importance for the prevention of enforced disappearance.

According to Art. 24, para. 1, victim of enforced disappearance means the disappeared person and any individual (such as, for instance, relatives) who has suffered harm as the direct result of an enforced disappearance. This definition is in line with the international case law on the subject[61].

The 2007 Convention recognizes the right of any victim to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation, as well as and the fate of the disappeared person (Art. 24, para. 2). The recognition of an autonomous and non-derogable right to know the truth can be considered one of the most significant developments of international human rights law promoted by the 2007 Convention[62].

[61] *Supra*, para. 3.

States must take all appropriate measures to search for, locate and release disappeared people and, in the event of death, to locate, respect and return their remains (Art. 24, para. 3). One of the most common features in cases of enforced disappearance, once the material victim has been killed, is the further violation of his or her mortal remains and the impossibility for relatives to bury or to mourn the corpse according to their customs and beliefs. Also this provision of the 2007 Convention can be considered an important innovation, as rules on the treatment and respect of mortal remains could be found before only at the domestic level or in instruments of international humanitarian law.

States must ensure in their legal systems that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation. The right to obtain reparation covers material and moral damages, as well as restitution, rehabilitation, satisfaction, including restoration of dignity and reputation and guarantees of non-repetition (Art. 24, para. 5). This seems in line with the most advanced case law of the Interamerican Court of Human Rights[63].

The 2007 Convention provides for a comprehensive regulation of the heinous phenomenon of enforced disappearance of children, taking into account the wrongful removal of children who are subjected to enforced disappearance, of children whose father, mother or legal guardian is subjected to enforced disappearance or of children born during the captivity of a mother subjected to enforced disappearance. States must take the necessary measures to prevent and punish under their criminal law such conducts, as well as the falsification, concealment or destruction of documents attesting to the true identity of the children (Art. 25, para. 1). Taking into account the need to protect the best interests of the child, States which recognize a system of adoption or of other form of placement of children, must have legal procedures in place to review adoption or placements and, where appropriate, to annul any adoption or placement that originated from an enforced disappearance (Art. 25, para. 4)[64].

Finally, the 2007 Convention provides for the establishment of a Committee on Enforced Disappearances, consisting of ten experts and entrusted with the mandate to monitor the implementation of the treaty by States Parties and with a number of tasks and functions (Arts. 26 to 36)[65]. In particular, the Committee will:

- receive and consider reports from the States Parties on the measures taken to give effect to the Convention (Art. 29);

- receive requests by relatives of the disappeared persons or their legal representatives, their counsel or any person authorized by them, as well as by any other person having a legitimate interest, that a disappeared person should be sought and found, as a matter of urgency (Art. 30);

[62] Until the adoption of the 2007 Convention, the right to know the truth had not been recognized or guaranteed under any binding instrument of international human rights law. The only treaty somehow addressing the subject was the First Additional Protocol of 1977 to the Four Geneva Conventions of 1949, which however applies only in times of war. Under Art. 32 of the Protocol, "in the implementation of this Section, the activities of the High Contracting Parties, of the Parties to the conflict and of the international humanitarian organizations mentioned in the Conventions and in this Protocol shall be prompted mainly by the right of families to know the fate of their relatives". For a comprehensive study, see U.N., Commission on Human Rights, Study on the Right to Truth, doc. E/CN.4/2006/91 of 8 February 2006. See also the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, recommended by Resolution 2005/81 of the Commission on Human Rights of 21 April 2005, doc. E/CN.4/2005/102/Add.1 of 8 February 2005 (in particular Principles 2 to 5).

[63] Supra, para. 3. In this sense, see also the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted by General Assembly Resolution 60/147 of 16 December 2005 (in particular, Principles 19 to 23).

[64] Art. 25 of the 2007 Convention represents a development of international human rights law on the subject, in particular if compared to the regime set forth in the 1992 Declaration (Art. 20) and the 1994 Convention (Art. XII). The latter merely established that "the States Parties shall give each other mutual assistance in the search for, identification, location and return of minors who have been removed to another State or detained therein as a consequence of the forced disappearance of their parents or guardians".

[65] The 1994 Convention only provided for a limited set of functions of the Interamerican Commission on Human Rights, which is entitled, in case it receives a petition or a communication regarding an alleged forced disappearance, to urgently and confidentially address the State concerned and to request to it to provide as soon as possible information as to the whereabouts of the allegedly disappeared person (Art. XIV). Several judgments of the Interamerican Court of Human Rights on cases of enforced disappearance that took place in States Parties to the 1994 Convention refer to violations of provisions of this instrument (see supra, para. 3).

- receive and consider communications from or on behalf of individuals claiming to be victims of violations of provisions of the Convention by States Parties that have expressly declared to recognize such a competence of the Committee (Art. 31), as well as receive and consider communications in which a State Party claims that another State Party (both having previously declared to recognize such competence of the Committee) is not fulfilling its obligations under the Convention (Art. 32)[66];

- undertake, after consultation with the State Party in question, a visit to a State which, according to reliable information, is seriously violating the provisions of the Convention (Art. 33);

- in case it receives information which appears to contain well-founded indications that enforced disappearance is being practised on a widespread or systematic basis in the territory under the jurisdiction of a State Party and after having sought with the concerned State all relevant information on the situation, urgently bring the matter to the attention of the U.N. General Assembly, through the Secretary General (Art. 34).

5. Brazil and Enforced Disappearances

> "[...] em toda parte, pelo mundo afora, são as trevas novamente, a guerra contra o povo, a prepotência. Mas, [...] é sempre possível plantar uma semente, acender uma esperança".
> (Jorge Amado, *Farda, fardão, camisola de dormir*, 1979)

In 1985, after more than five years of secret work carried out by a small group of human rights specialists, the Archdioceses of São Paulo released a report known as "*Brasil: Nunca Mais*" [67]. It contains detailed accounts, proofs and testimonies of thousands of gross human rights violations committed by the military regime between 1964 and 1985. A whole section of the report related to the practice of enforced disappearance and described the phenomenon as follows:

"O fenômeno da detenção arbitrária ou seqüestro, seguido do desaparecimento da vitima, se propagou rapidamente na América Latina durante as últimas décadas, em que a maioria dos países foi governada sob a Doutrina de Segurança Nacional.

A condição de desaparecido corresponde ao estágio maior do grau de repressão política em um dado pais. Isso porque impede, desde logo, a aplicação dos dispositivos legais estabelecidos em defesa da liberdade pessoal, da integridade física, da dignidade e da própria vida humana, o que constitui um confortável recurso, cada vez mais utilizado pela repressão. [...]

Isso representa vantagem para os órgãos de repressão, que passam a exercer total poder sobre o preso, para torturá-lo e para exterminá-lo, quando lhes aprouver.

Quando se obtém a certeza da prisão, os organismos de segurança já eliminaram a vítima e já destruíram todos os vestígios que pudessem levar ao seu paradeiro.

A perpetuação do sofrimento, pela incerteza sobre o destino do ente querido, é uma prática de tortura muito mais cruel do que o mais criativo dos engenhos humanos de suplício.

No Brasil, alguns desaparecidos foram vistos em dependências oficiais ou clandestinas por outros presos que tiveram melhor sorte. Seus testemunhos constam nos processos analisados pelo Projeto BNM. E sobre os desaparecidos, propriamente ditos, o que emanou de resultado prático na pesquisa realizada, é a certeza de que eram pessoas procuradas pelos órgãos de repressão. Dificilmente os processos contêm algum tipo de informação que possa levar à descoberta de seus paradeiros. Isto porque esta forma de

[66] As at January 2009, out of the 7 States that have ratified the Convention, only Albania, Argentina and France have declared that they accept the competence of the Committee to receive and examine individual and interstate complaints.

[67] The Brasil Nunca Maisproject studied the repression carried out by the military regime through the very documents produced by the authorities performing the controversial task. This was done by bringing together the official legal proceedings of practically all political cases tried in Brazilian military courts between April 1964 and March 1979, especially those that reached the Supreme Military Court.

repressão pretende, de um lado, insinuar que as autoridades governamentais não seriam responsáveis por esses fatos criminosos, e, por outro, permitir aos serviços de inteligência maior mobilidade e desenvoltura, sem provocar nenhuma intervenção, quer do Judiciário, quer da imprensa, quer das famílias e dos advogados.

O único fato que se sabe sobre um desaparecido é que foi detido por organismos de segurança. O mais se baseia em hipóteses. A vitima quase certamente foi objeto de assassinato impune, sendo enterrada em cemitério clandestino, sob nome falso, geralmente à noite e na qualidade de indigente. [...]

Desde tempos imemoriais o respeito aos mortos é costume sagrado dos povos. Nas leis bárbaras, a profanação ou a subtração do cadáver era punida com a privação da paz. [...]

Justo é pedir a localização dos filhos, irmãos, pais e esposos que, notoriamente, foram presos pelos órgãos de segurança e encontraram a morte pelo 'desaparecimento' para dar-lhes sepultura digna.

Justo é pedir a localização dos corpos, para que sejam trasladados, se for o caso, e endereçados à sepultura próxima de parentes, em uma atitude de respeito aos vivos, a quem assiste o direito de velar seus mortos. [...]

Justo é pedir a localização dos corpos para responder, enfim, à indagação de Alceu Amoroso Lima:

'Até quando haverá, no Brasil, mulheres que não sabem se são viúvas; filhos que não sabem se são órfãos; criaturas humanas que batem em vão em portas implacavelmente trancadas, de um Brasil que julgávamos ingenuamente isento de tais insanas crueldades?"[68].

The report contains an annex that documents 125 cases of enforced disappearance. However, the real figure of the total number of disappeared people in Brazil cannot be established due to the very nature of the crime. According to data provided by Brazilian associations of relatives of disappeared people, from 1964 to 1985 between 140 and 380 people were victims of enforced disappearance[69]. Over the years, 63 cases of enforced disappearance have been reported to the U.N. Working Group on Enforced or Involuntary Disappearances. The majority of such cases occurred between 1969 and 1975, in particular during the period of guerrilla warfare in the Aerugo region[70].

The Working Group declared clarified the majority of such cases as a consequence of Law No. 9.149/95, adopted on 4 December 1995 and known as "Law of Disappeared People", whereby persons who disappeared by reason of their political activities in the period 1961-1979 were considered to have died. Relatives of the victims were legally entitled either to decline such legal provision or to exercise the right to request death certificates. Recognition of the victim's death entailed the automatic entitlement to compensation by the State[71].

However, it may be remarked that, under international present international human rights law, the fact that the Working Group considers the cases clarified and the issuing of a death certificate do not prejudice the right of the relatives to know the truth on the circumstances of the enforced disappearance, as well as on the progress and results of the relevant criminal investigation. Nor is the State relieved from its obligation to search for, locate, respect and return

[68] Brasil Nunca Mais, São Paulo, 1985, Chapter 18. Alceu Amoroso Lima (1893-1983) was a Brazilian journalist, writer human rights activist.

[69] See http://www.desaparecidospoliticos.org.br/ and http://www.torturanuncamais-rj.org.br/

[70] U.N., Working Group on Enforced or Involuntary Disappearance, Annual Report for 2005, doc. E/CN.4/2006/56 of 27 December 2005, paras. 111-114. In recent years, the Working Group has received complaints about cases of disappearance reportedly relating to land workers living in the districts of Caetano and Cohab, in the State of Pernambuco, who disappeared on 31 May 2004, after having been arrested by police officers in the context of a police operation. In its Annual Report for 2008, the Working Group mentions the existence of 13 outstanding cases of enforced disappearance which remain to be clarified. All cases were retransmitted to the government for clarification, but no response was received (U.N., Working Group on Enforced or Involuntary Disappearance, Annual Report for 2008, doc. A/HRC/10/9 of 15 December 2008, para. 81).

[71] The Working Group on Enforced or Involuntary Disappearance has declared that the fact that relatives, in order to obtain reparation, must apply for a certificate of presumption of death and then for a death certificate, "re-victimizes families by making them go through the process of having a death certificate, although neither the fate nor the whereabouts of the disappeared person are known". Further, "the fact that a disappearance is treated as a direct death does not take into account the continuous nature of the crime, the right to truth for the families of the disappeared and the obligation of the State to continue the investigation" (U.N., Working Group on Enforced or Involuntary Disappearance, Annual Report for 2008, supram note 68, paras. 113 and 114.

the moral remains of victims of enforced disappearance.

As a consequence of Law No. 9.149/95, 136 persons who were victims of enforced disappearance between 2 September 1961 and 15 August 1979 were officially recognized as dead[72]. The Law also provided for the establishment of a Special Commission (*Comissão Especial*) composed of seven members[73]. It was in charge of verifying the identity of people reported as victim of enforced disappearance, as well as of undertaking the necessary measures to locate and identify their mortal remains[74]. The Commission was also mandated to express its opinion on the award of pecuniary compensation to the relatives of the victims[75].

In order to collect information about the victims of human rights violations during the military regime, the archives of the police departments of certain States (Rio de Janeiro, São Paulo, Minas Gerais, Bahia, Paraná and Goiás) were opened[76]. However, the archives of the army, the navy, the air force and the federal police have not been made public nor opened[77]. Law No. 11.111, adopted on 5 May 2005, introduced significant obstacles in the disclosure of documents which may be relevant for the investigation and the determination of the fate and whereabouts of disappeared people, as it allowed to prevent access to certain documents for an indefinite period of time ("[…] [*Comissão de Averiguação e Análise de Informações Sigilosas*] *poderá manter a permanência da ressalva ao acesso do documento pelo tempo que estipular*", as provided by Art. 6, para. 2). After having delivered a report about its first eleven years of activities, the Special Commission is still functioning as regards the localization and identification of mortal remains[78].

Regrettably, the investigation and sanction of those responsible for enforced disappearance has been hindered by the application of Law No. 6.683 of 28 August 1979, known as *Lei de anistia*, which provides as follows:

"É concedida anistia a todos quantos, no período compreendido entre 2 de setembro de 1961 e 15 de agosto de 1979, cometeram crimes políticos ou conexo com estes, crimes eleitorais, aos que tiveram seus direitos políticos suspensos e aos servidores da Administração Direta e Indireta, de fundações vinculadas ao poder público, aos Servidores dos Poderes Legislativo e Judiciário, aos Militares e aos dirigentes e representantes sindicais, punidos com fundamento em Atos Institucionais e Complementares.

[72] In its report of 2007, the Commission raised to 138 the total number of people declared dead as a consequence of enforced disappearances perpetrated by State agents.

[73] Including representatives of associations of relatives of disappeared people, of the Human Rights Commission of the Federal Chamber, of the Federal Public Ministry, of the Ministry of the Defence, of the Ministry of Foreign Affairs and of the army. Some amendments to Law No. 9.149/95 were introduced by Temporary Measure (Medida Provisória) No. 176 of 24 March 2004, which was converted in Law No. 10.875 on 1 June 2004. Among other things, the mandate of the Commission was extended in order to investigate cases of extra-judiciary killings and enforced disappearance occurred until 5 October 1988.

[74] On the exhumations carried out by the Special Commission see Comissão Especial sobre Mortos e Desaparecidos políticos, Direito à Memória e à Verdade, Brasília, 2007 (Annex I) and Equipo Argentino de Antropologia Forense, Informesm of 8 May 1996 and 2 August 2001. Exhumations have also been carried out at the expenses and on the initiative of relatives of the disappeared people. In particular, in Perus (São Paulo), Ricardo de Albuquerque (Rio de Janeiro) and Xambioá (Tocantins).

[75] The compensation could not be less than 100.000,00 reais and it was intended to amount to 3.000,00 reais for each year of expected life of the disappeared person, having regard to his or her age at the material time of disappearance (Art. 11 of Law No. 9.149/95). In fact, the average of compensations awarded was between 115.000,00 and 140.000,00 reais. The first presidential decree ordering compensation was issued on 13 May 1996. In the same year, two decrees ordered the compensation in favour of the relatives of 57 and 76 disappeared people respectively. In 1997, three decrees ordered the compensation in favour of 132 relatives of disappeared people. On the subject of compensation, see also Law 10.559 of 13 November 2002. As regards other forms of reparation, in the State of Recife a monument to honour the victims of the military regime has been built. Similar projects have been adopted in other States, but on the initiative of associations of victims of human rights violations and their relatives together with local authorities. No medical or psychological assistance has been provided by the State to victims and their relatives. In Rio de Janeiro, the association Grupo Tortura Nunca Mais runs a project of juridical and psychological assistance to political detainees and to relatives of victims of the regime.

[76] See Lei No. 8159 (Lei dos Arquivos) of 8 January 1991, Decree No. 4.553 of 27 December 2002 and Lei No. 11.111 of 5 May 2005, which provides that: "O acesso aos documentos públicos de interesse particular ou de interesse coletivo ou geral será ressalvado exclusivamente nas hipóteses em que o sigilo seja ou permaneça imprescindível à segurança da sociedade e do Estado [...]" (Art. 2).

[77] On the obligations of States to preserve and make archives accessible, see the United Nations Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, supra note 60, Principles 14-18, and the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, supranote 61, Principles 11, c, and 24.

[78] In September 2006 the Federal government undertook the project of the establishment of a genetic system of identification.

1. Consideram-se conexos, para efeito deste artigo, os crimes de qualquer natureza relacionados com crimes político ou praticados por motivação política.

2. Excetuam-se dos benefícios da anistia os que foram condenados pela prática de crimes de terrorismo, assalto, seqüestro e atentado pessoal. […]" (Art. 1)[79].

However, according to international legal standards[80], as well as to international jurisprudence[81], enforced disappearance cannot be regarded as a political offence or as an offence connected with a political offence. Nor can those accused of an act of enforced disappearance benefit from any special amnesty legislation or similar measures that might have the effect of exempting them from criminal proceedings or sanction[82].

Another difficulty for ensuring the judgment and sanctioning of those responsible of gross human rights violations, is that, under Brazilian criminal code, enforced disappearance is not codified as an autonomous offence[83].

As regards the participation to international treaties[84] relating to enforced disappearance, while it has signed on 10 June 1994 the 1994 Convention and on 6 February 2007 the 2007 Convention, Brazil has not ratified them yet[85]. On 9 July 1992 Brazil ratified the American Convention on Human Rights[86] and on 24 January 1992 it acceded to the International Covenant on Civil and Political Rights, without however ratifying the Optional Protocol to such instrument[87]. On 20 June 2002 Brazil ratified the 1998 Rome Statute.

In order to clarify the situation of hundreds of cases of enforced disappearance occurred more than 30 years ago, some complaints against Brazil have been filed at the international level[88].

On 6 March 2001, the Interamerican Commission on Human Rights declared admissible a complaint filed in 1995 on the case known as *Guerrilla del Araguaia (Julia Gomes Lund and others)*[89], relating to the enforced disappearance and alleged extrajudicial killing of 61 people between 1972 and 1975. The Interamerican Commission rejected the preliminary objection of non exhaustion of domestic remedies. Given the continuing nature of the offence of enforced disappearance, it declared to have jurisdiction over the alleged violations of the American Declaration of Rights and Duties of Man and of the American Convention on Human Rights.

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[79] Art. 107 of the Brazilian Criminal Code provides that "extingue-se a punibilidade: [...] II - pela anistia, graça ou indulto. [...]".

[80] *Supra*, paras. 2 and 3.

[81] Supra,para. 3.

[82] See Art. 18 of the 1992 Declaration; U.N., Working Group on Enforced or Involuntary Disappearances, doc. E/CN.4/2006/56, supra note 68, para. 49, containing the General Comment on Art. 18 of the Declaration; U.N., Working Group on Enforced or Involuntary Disappearances, doc. E/CN.4/2005/65 of 23 December 2004, Annual Report for 2004, paras. 375 and 377; United Nations Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, supra note 60, Principle 24.

[83] The Brazilian criminal code provides for the following offences: "seqüestro e cárcere privado" (Art. 148), which is sanctioned with the deprivation of liberty from 1 to 3 years, with possible aggravating circumstances that may determine a penalty of imprisonment from 5 to 8 years; "homicídio" (Art. 121), which is sanctioned with the deprivation of liberty from 6 to 20 years with possible aggravating circumstances that may determine a penalty of imprisonment from 10 to 30 years; "lesão corporal" (Art. 129), which is sanctioned with the deprivation of liberty from 3 month to 1 years, with possible aggravating circumstances that may determine a penalty of imprisonment from 4 to 12 years; "Destruição, subtração ou ocultação de cadáver" (Art. 211), which is sanctioned with the deprivation of liberty from 1 to 3 years and a pecuniary sanction. None of these offences meets the real nature of the complex phenomenon of enforced disappearance, nor the prescribed penalties seem always adequate to take into account the extreme seriousness of the crime.

[84] Art. 5.2 of the Brazilian Constitution provides that: "[...] as normas definidoras dos direitos e garantias fundamentais têm aplicação imediata. Os direitos e garantias expressos nesta Constituição não excluem outros decorrentes do regime e dos princípios por ela adotados, ou dos tratados internacionais em que a República Federativa do Brasil seja parte".

[85] According to Art. 18 of the Vienna Convention on the Law of the Treaties, a State that has signed a treaty is obliged to refrain from acts which would defeat the object and purpose of the treaty.

[86] On 10 December 1998 Brazil deposited a recognition of the adjudicatory competence of the Interamerican Court of Human Rights with the following declaration: "The Government of the Federative Republic of Brazil declares its recognition as binding, for an indefinite period of time, ipso jure, of the jurisdiction of the Inter-American Court of Human Rights on all matters relating to the interpretation or application of the American Convention on Human Rights, according to Article 62 of that Convention, on the condition of reciprocity, and for matters arising after the time of this declaration".

[87] It therefore would not be possible to submit to the Human Rights Committee individual complaints about cases of enforced disappearance relating to Brazil.

[88] See MAC DOWELL SANTOS, Ativismo jurídico transnacional e o Estado: reflexões sobre os casos apresentados contra o Brasil na Comissão Interamericana de Direitos Humanos", in SUR Revista Internacional de Direitos Humanos, 2007, pp. 27-59.

In June 2003, while the procedure at the international level was still pending, federal judge Solange Salgado issued a decision on the case of the Araguaia guerilla, condemning Brazil to take all necessary measures to find the bodies of the petitioners' relatives who had disappeared, to provide the relatives with all the necessary information to issue a death certificate and on the circumstances of the death and disappearance of the victims, as well as to exhume, identify and allow a dignified burial of them. In November 2004, deciding on the appeal submitted by Brazil, the Federal Regional Tribunal (*Tribunal Regional Federal*) upheld the decision by the federal judge. On 26 June 2007 the Superior Tribunal of Justice (*Superior Tribunal de Justiça*) confirmed the decision. By Decree No. 4.850/03 of 2 October 2003, the government established an Inter-Ministerial Commission, in charge of locating the bodies of the victims of enforced disappearance in the massacre of the Araguaia guerrilla. In March 2007, the Commission issued a final report, stating, among other things, that Brazilian army officials continue to claim that all documents relating to the Araguaia guerrilla movement have been destroyed[90].

On 28 November 2008, the Interamerican Commission issued the report on the merits of the case, stating that:

"[…] conforme as conclusões sobre os fatos, o que aconteceu no Araguaia foi uma política de extermínio de dissidentes políticos, segundo a qual, à exceção de alguns raros casos de prisão e tortura sem que os presos fossem desaparecidos nas incursões militares iniciais, em geral, a ordem era não fazer prisioneiros e desaparecer a todos os membros da Guerrilha do Araguaia. [...] 'a Presidência da República, encabeçada pelo General Médici, assumiu diretamente o controle sobre as operações repressivas. A ordem era não fazer prisioneiros'. Em conseqüência, a CIDH determina a responsabilidade agravada do Estado pelas violações dos artigos I, XXV e XXVI da Declaração Americana, bem como dos artigos 4, 5 e 7, em relação com o artigo 1.1, todos da Convenção Americana, em detrimento das vítimas desaparecidas da Guerrilha do Araguaia" (para. 153).

The Commission found a violation of Art. I (right to life, liberty and personal security) of the American Declaration and of Art. 5 (right to humane treatment) in conjunction with Art. 1, para. 1 (obligation to respect rights) of the American Convention, as regards the relatives of disappeared people for the inhumane treatment inflicted to them by Brazil in denying the access to information on the fate and whereabouts of their loved ones. Analyzing the domestic provisions dealing with secret of State and the access to archives, the Commission noted that:

"A esse respeito, tais decretos e a Lei 11.111 têm efetivamente evitado o acesso a documentos relacionados com as operações militares contra a Guerrilha do Araguaia. Especificamente em relação à Lei 11.111, o Relatório Final da CEMDP indica que, esta contém 'brechas que possibilitam renovação de sigilo indefinidamente'" (para. 136).

"[...] O Estado não fundamentou de maneira razoável a necessidade de manter em sigilo os documentos relativos à Guerrilha do Araguaia, apenas argumentou de maneira vaga que o anterior se deve a 'questões de segurança nacional', e inclusive reconheceu que o esclarecimento destes desaparecimentos 'requer o recolhimento de mais informações, muitas das quais podem estar em poder de órgãos do próprio Estado'" (para. 195).

"Em conclusão, passados mais de 30 anos do extermínio da Guerrilha do Araguaia, a Comissão não encontra justificativas para as restrições impostas pelo Estado, no marco de um regime democrático, através das referidas medidas legislativas relacionadas com o sigilo de informação oficial sobre a ditadura brasileira. [...]" (para. 196).

Accordingly, the Commission declared that Brazil, by unduly restricting the access to

[89] Petition No. 11.552, Report on Admissibility No. 33/01, 6 March 2001, Guerrilla del Araguaia (Julia Gomes Lund and others) v. Brazil.
[90] See the final report of the Inter-ministerial Commission established by Decree No. 4.850 of 8 March 2007.

information of the relatives of the victims, violated Art. 13 (freedom of thought and expression) in conjunction with Art. 2 (domestic legal effects) of the American Convention.
As regards the amnesty legislation, the Commission found that:

"[…] as autoridades brasileiras, especialmente as autoridades judiciais, têm o dever de não aplicar a anistia, a prescrição, ou qualquer norma excludente de punibilidade às graves violações de direitos humanos que constituam crimes contra a humanidade – como os desaparecimentos forçados do presente caso – visto que tais crimes são insuscetíveis de anistia e imprescritíveis, independentemente da data em que tenham sido perpetrados" (para. 176).

"A CIDH ressalta, conseqüentemente, que esta norma não deve continuar impedindo a investigação dos fatos relativos a este caso nem a identificação e o castigo dos responsáveis. Assim sendo, o Estado brasileiro, através das autoridades competentes, não pode se eximir do dever de investigar, processar e sancionar os responsáveis por graves violações de direitos humanos – como o desaparecimento forçado das vítimas – aplicando leis de anistia ou outro tipo de norma interna. [...]" (para. 181).

Accordingly, the Commission declared the violation by Brazil of Art. XVIII (right to a fair trial) of the American Declaration and Arts. 8, para.1 (right to a fair trial), 25 (right to judicial protection) in conjunction with art. 1, para. 1, and 2 (domestic legal effects) of the American Convention as regards both the disappeared people and their relatives. These provisions were declared as violated also for the lack of effectiveness of non criminal-remedies available to relatives of disappeared people.

The Commission also found a violation of Art. XVII (right to recognition of juridical personality and civil rights) of the American Declaration and Art. 3 (right to juridical personality) in conjunction with Art. 1, para.1, of the American Convention as regards the disappeared people:

"No presente caso, o objetivo daqueles que perpetraram os desaparecimentos forçados das vítimas consistiu em agir à margem da lei, ocultar todas as provas de seus delitos e escapar de qualquer sanção. A Comissão entende que durante o tempo dos desaparecimentos, os perpetradores quiseram criar um 'limbo jurídico', através da negativa estatal de reconhecer que as vítimas estavam sob sua custódia, ou dando informação contraditória sobre seu paradeiro, provocando deliberadamente a impossibilidade da vítima exercer seus direitos e mantendo seus familiares num vazio informativo sobre seu paradeiro ou situação. Para os membros do PcdoB [Partido comunista do Brasil] e os camponeses desaparecidos no contexto da Guerrilha do Araguaia, a conseqüência do desaparecimento foi a denegação de qualquer direito inerente ao ser humano, ao privá-los da devida proteção da lei através da negativa de reconhecê-los como pessoas perante a lei" (para. 209).

The Interamerican Commission recommended Brazil to take several measures, namely:

"1. Adotar todas as medidas que sejam necessárias, a fim de garantir que a Lei Nº 6.683/79 (Lei de Anistia) não continue representando um obstáculo para a persecução penal de graves violações de direitos humanos que constituam crimes contra a humanidade.

2. Determinar, através da jurisdição de direito comum, a responsabilidade penal pelos desaparecimentos forçados das vítimas da Guerrilha do Araguaia, mediante uma investigação judicial completa e imparcial dos fatos com observância ao devido processo legal, a fim de identificar os responsáveis por tais violações e sancioná-los penalmente; e publicar os resultados dessa investigação. No cumprimento desta recomendação, o Estado deverá levar em conta que tais crimes contra a humanidade são insuscetíveis de anistia e imprescritíveis.

3. Realizar todas as ações e modificações legais necessárias a fim de sistematizar e publicar todos os documentos relacionados com as operações militares contra a Guerrilha do Araguaia.

4. Fortalecer com recursos financeiros e logísticos os esforços já empreendidos na busca e sepultura das vítimas desaparecidas cujos res-

tos mortais ainda não hajam sido encontrados e/ou identificados.

5. Outorgar uma reparação aos familiares das vítimas, que inclua o tratamento físico e psicológico, assim como a celebração de atos de importância simbólica que garantam a não repetição dos delitos cometidos no presente caso e o reconhecimento da responsabilidade do Estado pelo desaparecimento das vítimas e o sofrimento de seus familiares.

6. Implementar, dentro de um prazo razoável, programas de educação em direitos humanos permanentes dentro das Forças Armadas brasileiras, em todos os níveis hierárquicos, e incluir especial menção no currículo de tais programas de treinamento ao presente caso e aos instrumentos internacionais de direitos humanos, especificamente os relacionados com o desaparecimento forçado de pessoas e a tortura

7. Tipificar no seu ordenamento interno o crime de desaparecimento forçado, conforme os elementos constitutivos do mesmo estabelecidos nos instrumentos internacionais respectivos".

The report of the Commission represents a significant precedent and opens the way for further developments in the struggle for justice, truth, memory and integral reparation for all the cases of enforced disappearance occurred in Brazil. The Commission asked Brazil to inform it within 60 days of the measures adopted to implement the recommendations. If the Commission is not satisfied that the measures have been fully implemented, it may consider submitting the case to the Interamerican Court of Human Rights for judgment.

Conclusions

"[…] Je vous demande de faire de ce grand espoir d'hier, une réalité pour demain".

(Bernard Kessedjian, presentation of the 2007 Convention at the Human Rights Council, Geneva, 27 June 2006)

Enforced disappearance challenges the very concept of human rights. It amounts to the denial of the right of persons to exist and to have an identity. It turns a human being into a non-being. It is the ultimate corruption, the abuse of power that allows the perpetrators, while committing abominable crimes, to reduce law to something insignificant.

Since 1974, the international community has been trying to elaborate and provide effective legal and judicial tools to tackle this heinous phenomenon. Significant progress has been achieved, including the recognition of the mandatory character (*jus cogens*) of the prohibition to commit enforced disappearances and the establishment of the obligation to investigate and punish those found to be responsible[91]. The 2007 Convention[92] represents not only the achievement of the efforts deployed for over more than 25 years by associations of relatives of disappeared people, other non governmental organizations, some governments and international organizations, but also a useful tool in the struggle against this scourge, for both its contents and the procedural mechanism set forth.

The fact remains that international legal instruments cannot change all of a sudden a reality that is the product of the moral vileness of those who are ready to resort to enforced disappearance. Governments are today called to give a decisive response and to send out an undisputed message that this practice will no longer be tolerated and will be effectively suppressed.

Relatives of thousands of disappeared people all over the world are entitled to know the truth about the circumstances of the disappearance, the fate and whereabouts of their loved ones. They are also entitled to know where their mortal remains are and to be able to bury and to mourn them. To build a different future, it is also necessary to fully understand and face the legacy of the past. Truth must be accompanied by the preservation of the memory of the disappeared,

[91] *Supra*, paras. 2 and 3.
[92] *Supra*, para. 4.

the restoration of their honour and dignity, the granting of integral reparation to their relatives and, above all, by justice. This is the only way to try to relieve the tremendous suffering and anguish of thousands of women and men all over the world and to restore the human dignity of the victims of a disgraceful attempt to throw people into oblivion and into the "shadow". This is the only way to prevent this tragedy from happening again. *Nunca mais*.