

# Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction

A Practitioners Guide



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International Commission of Jurists  
P.O. Box 91  
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# **Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction**

Practitioners Guide No. 9

This present Guide was written by Federico Andreu-Guzmán, Representative of the ICJ in South America, under the supervision of Wilder Tayler, Secretary-General of the ICJ. The Guide was written in Spanish and the translation to English was made by Katharine Hazel West and revised by Jill Heine, Senior Legal Adviser of the ICJ.

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## TABLE OF CONTENTS

<b>Chapter I: Enforced Disappearance .....</b>	<b>5</b>
1. General considerations.....	5
2. Definition and constituent components of enforced disappearance .....	9
a. International Jurisprudence and Doctrine.....	10
b. International Instruments.....	12
c. The Issue of the Rome Statute .....	16
d. National Jurisprudence .....	21
3. Characterization of enforced disappearance .....	24
a. Grave and Multiple Violations of Human Rights. 24	
b. Crime under International Law .....	35
c. Permanent Crime and Violation of Human Rights.....	38
4. Multiple Victims.....	43
5. Enforced disappearance, abduction and appropriation of children .....	48
a. Enforced disappearance of Minors.....	49
b. The children of disappeared mother or father... 50	
c. Abduction and/or appropriation of minors .....	51
 <b>Chapter II: Extrajudicial Execution .....</b>	 <b>57</b>
1. Right to life and arbitrary deprivation of life.....	57
2. Methods of arbitrary deprivation of the right to life. ....	63
a. Extrajudicial execution .....	66
b. Arbitrary execution .....	70
c. Summary Execution .....	79
3. Characterization of extrajudicial execution.....	80
a. Grave violation of human rights .....	81
b. Crime under International Law .....	82
 <b>Chapter III: Enforced Disappearance, Extrajudicial Execution and Other Crimes .....</b>	 <b>87</b>
1. General considerations .....	87
2. Enforced disappearance and abduction .....	88
3. Enforced disappearance and extrajudicial execution.....	93
4. Enforced disappearance and torture .....	96
5. Crime against humanity .....	97
a. About crimes against humanity .....	97

- b. Crime against humanity and extrajudicial execution ..... 102
    - c. Crimes against humanity and enforced disappearance ..... 103
  - 6. Genocide..... 107
    - a. The Crime of Genocide ..... 107
    - b. Genocide and extrajudicial executions ..... 109
    - c. Genocide and enforced disappearance ..... 111
  - 7. War Crimes ..... 112
    - a. The definition of war crime ..... 112
    - b. Extrajudicial execution as a war crime..... 113
    - c. Enforced disappearance as a war crime ..... 114

**Chapter IV: Investigation ..... 117**

- 1. General considerations..... 117
- 2. Nature of the obligation to investigate ..... 119
- 3. Dimensions and content of the obligation to investigate ..... 123
- 4. Characteristics of investigations ..... 127
  - a. Due diligence and good faith ..... 129
  - b. Duty to investigate ex officio..... 131
  - c. Impartial and independent investigation ..... 134
  - d. Thorough and effective investigations ..... 139
  - e. Prompt investigations without delays ..... 145
  - f. Framework and adequate legal powers for investigations ..... 148
  - g. Safety and protection of victims, their families and those involved in investigation ..... 152
  - h. Suspension and/or reassignment of officers to new locations and functions..... 156
  - i. Sanctions for those who hinder investigations . 158
- 5. Family members and investigation ..... 158

**Chapter V: Judicial Repression of the Crimes of Enforced Disappearance and/or Extrajudicial Execution ..... 163**

- 1. Basis, nature and scope of the duty to prosecute and punish..... 163
- 2. Obligation to criminalize..... 168
- 3. Competent jurisdiction and criminal proceedings ..... 181
  - a. Independent, impartial and competent courts..... 181
  - b. Legal safeguards for the accused..... 186

c. The rights of victims' family members during court proceedings.....	188
4. Types of criminal responsibility .....	191
a. Criminal responsibility of hierarchical superiors.....	192
b. Perpetration-by-means through control over an organized apparatus of power .....	203
5. Guarantees against impunity .....	208
a. Amnesties and similar measures.....	208
b. Exclusion of classic exemption from criminal liability and justification clauses .....	211
c. Statute of limitation .....	214
d. Fraudulent res judicata .....	218
e. Proportionality of penalties and derisory sanctions .....	223
6. Extraterritorial jurisdiction and international cooperation .....	228
<b>Chapter VI: The role of forensic sciences .....</b>	<b>231</b>
1. Introduction .....	231
2. General considerations.....	235
3. Experts: independence and impartiality .....	239
4. Exhumations, autopsies and analysis of skeletal remains .....	242
5. Forensic Genetics .....	246
6. Chain of custody and forensic evidence .....	251
Annex 1: Declaration on the Protection of All Persons from Enforced Disappearance .....	253
Annex 2: International Convention for the Protection of All Persons from Enforced Disappearance .....	262
Annex 3: Inter-American Convention on Forced Disappearance of Persons.....	276
Annex 4: Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary	

Executions ..... 282

Annex 5:

Manual on the Effective Prevention and  
Investigation of Extra-legal, Arbitrary and Summary  
Executions ..... 287

Annex 6:

International consensus on principles and minimum  
standards for psychosocial work in search processes  
and forensic investigations in cases of enforced  
disappearances, arbitrary or  
extrajudicial executions ..... 317



## CHAPTER I: ENFORCED DISAPPEARANCE

“The phenomenon of enforced disappearances [...] is the worst of all violations of human rights. It is certainly a challenge to the very concept of human rights, denial of the right for humans to have an existence, an identity. Enforced disappearance transforms humans into non-beings. It is the ultimate corruption, abuse of power that allows those responsible to transform law and order into something ridiculous and to commit heinous crimes.”

Niall MacDermot, Secretary General of the International Commission of Jurists (1970-1990)<sup>1</sup>

### 1. GENERAL CONSIDERATIONS

The enforced disappearance of people is one of the most odious violations of human rights. The disappeared are stripped of all their rights and placed, defenseless, at the mercy of their victimizers, with no legal protection. Its practice causes profound suffering to the family members and friends of the disappeared: the never-ending wait for their return and the total uncertainty of what really happened to them and their location constantly torments their parents, partners and children. It is considered a crime under international law, and, therefore, state authorities have the duty to investigate, prosecute and punish the perpetrators and other participants.

From the middle of the 1960s, the Inter-American Commission on Human Rights started to issue warnings regarding this serious practice in a number of countries in the region<sup>2</sup>. In 1976, the

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<sup>1</sup> *Le Refus de l'oubli - La politique de disparition forcée de personnes - Colloque de Paris, janvier - février 1981*, Ed. Berger-Levrault, Paris 1981, p. 35 (original in French, free translation).

<sup>2</sup> See *inter alia*: *Report of the IACHR on its Activities in Dominican Republic*, OAS/Ser.L/V/II.13, doc. 14 Revs. 15 October 1965; *Report of the IACHR on its Activities in la Dominican Republic*, OAS/Ser.L/V/II.15, doc. 6 Revs. 28 October 1966; *Report on the Situation of Human Rights in Haiti*, OAS/Ser.L/V/II.21 doc. 6 Revs. 21 May 1969; *Annual Report of the Inter-American Commission on Human Rights 1971*, OAS/Ser.L/V/II.27, Doc. 11 Revs. 6 March 1972; *Annual Report of the Inter-American Commission on Human Rights 1972*, OAS/Ser.L/V/II.29, Doc. 41 Revs. 2, 13 March 1973; *Annual Report of the Inter-American Commission on Human Rights 1974*, OAS/Ser.L/V/II.34, doc. 31 rev.1 30 December 1974; *Report on the Situation of Human Rights in Chile*, OAS/Ser.L/V/II.34 doc. 21 25 October 1974; *Second Report on the Situation of Human Rights in Chile*, OAS/Ser.L/V/II.37 doc. 19 corr. 1 28 June 1976; *Inter-American Commission on Human Rights Report 1976*, OAS/Ser.L/VII.40, doc. 5 corr.1 10 March 1977; *Report on the Situation of Human Rights in Paraguay*,

Commission stated that “[t]here have already been many cases recorded of ‘missing persons’, that is, persons who according to witnesses and other evidence have been detained by military or police authorities but whose detention is denied and whose location is unknown. Added to the illegal deprivation of freedom in these instances is the anguish of relatives and friends who do not know whether the missing persons are dead or alive and who are unable to avail themselves of the remedies established under law or to lend them material and moral assistance. [...] The status of ‘missing’ seems to be a comfortable expedient to avoid application of the legal provisions established for the defense of personal freedom, physical security, dignity and human life itself. In practice this procedure nullifies the legal standards established in recent years in some countries to avoid illegal detentions and the use of physical and psychological duress against persons detained.”<sup>3</sup>

The Commission stated that “[t]his procedure is cruel and inhuman. As experience shows, a ‘disappearance’ not only constitutes an arbitrary deprivation of freedom but also represents serious danger to the personal integrity, safety and life of the victim. It is, moreover, a true form of torture for family and friends, owing to the uncertainty about their fate and the impossibility of providing them with legal, moral and material assistance.”<sup>4</sup>

The Inter-American Court of Human Rights has considered that the practice of enforced disappearance constitutes “a blatant rejection of the essential principles that underlie the inter-American system”<sup>5</sup>. From its very first judgment concerning a case of

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OAS/Ser.L/V/II.43, Doc. 13 corr. 1 31 January 1978; *Report on the Situation of Human Rights in El Salvador*, OAS/Ser.L/V/II.46, doc.23 Revs. 1 17 November 1978: and *Report on the Situation of Human Rights in Argentina*, OAS/Ser.L/V/II.49, doc. 19, 11 April de 1980

<sup>3</sup> *Annual Report of the Inter-American Commission on Human Rights 1976*, OAS/Ser.L/VII.40, doc. 5 corr.1, 10 March 1977(only available in Spanish, free translation)

<sup>4</sup> *Annual Report of the Inter-American Commission on Human Rights 1977*, OAS/Ser.L/V/II.43, Doc. 21 corr. 1, 20 April 1978.

<sup>5</sup> Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, para. 112. In the same regard, see: Judgment of 19 July 1988, *Case of Velásquez Rodríguez v. Honduras*, Series C No. 4, para. 158; Judgment of 29 November 2006, *La Cantuta v. Peru*, Series C No. 162, para. 115; Judgment of 24 November 2010, *Case of Gomes Lund and others (“guerrilha do Araguaia”) v. Brazil*, Series C No. 219, para. 105; Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Serie C No. 202, para. 59; Judgment of 25 May 2010, *Case of Case of Chitay Nech and others v. Guatemala*, Series C No. 212, para. 86; Judgment of 1 September 2010, *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*, Series C No. 217,

enforced disappearance, the Inter-American Court of Human Rights has stated that “[t]he practice of disappearances, in addition to directly violating many provisions of the Convention, [...] constitutes a radical breach of the treaty in that it shows a crass abandonment of the values which emanate from the concept of human dignity and of the most basic principles of the inter-American system and the Convention. The existence of this practice, more over, evinces a disregard of the duty to organize the State in such a manner as to guarantee the rights recognized in the Convention [...]”<sup>6</sup>.

“[E]nforced or involuntary disappearances constitute the most comprehensive denial of human rights in our time, bringing boundless agony to the victims, ruinous consequences to the families, both socially and psychologically, and moral havoc to the societies in which they occur”.

Working Group on Enforced or Involuntary Disappearances<sup>7</sup>

From 1978, when it adopted its first resolution on enforced disappearances<sup>8</sup>, the General Assembly of the United Nations has characterized the practice of enforced disappearance as a grave violation of numerous human rights. Since the 1990s, the General Assembly has reaffirmed that “any act of enforced disappearance is an offence to human dignity and a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights, and reaffirmed and developed in other international instruments in this field”<sup>9</sup>.

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para. 61; Judgment of 27 February 2012, *Case of Narciso González Medina and Family Members v. Dominican Republic*, Series C No. 240, para. 130; Judgment of 31 August 2011, *Case of Contreras and others v. El Salvador*, Serie C No 232, para. 83; and Judgment of 29 November 2012, *Case of García and Family Members v. Guatemala*, Series C No. 258, para. 96.

<sup>6</sup> Judgment of 19 July 1988, *Case of Velásquez Rodríguez v. Honduras*, Series C No. 4, para. 158.

<sup>7</sup> *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. E/CN.4/1985/15, 25 January 1985, para. 291.

<sup>8</sup> Resolution No. 33/173 of 20 December 1978. See Resolutions Nos. 35/193, 15 December 1980; 36/163, 16 December 1981; 37/180, 17 December 1982; 38/94, 16 December 1983; 39/111, 14 December 1984; 40/147, 13 December 1985; 41/145, 4 December 1986; 42/142, 7 December 1987; 43/159, 8 December 1988; 44/160, 15 December 1989; 45/165, 18 December 1990; 46/125 17 December 1991; 47/132, 18 December 1992; 49/193 23 December 1994; 51/94 12 December 1996; 53/150, 9 December 1998.

<sup>9</sup> Resolution No. 49/19 of 23 December 1994, operative paragraphs 1 and 2.

Since 1983 in the America's region, the General Assembly of the Organization of American States (OAS) declared "the practice of forced disappearance of persons in the Americas is an affront to the conscience of the hemisphere"<sup>10</sup>. In its first resolutions concerning enforced disappearance, the General Assembly qualified the practice as "cruel and inhuman, mocks the rule of law"<sup>11</sup>.

The General Assembly of the OAS: "REAFFIRMING that forced disappearance is a multiple and continuous violation of several human rights, the widespread or systematic practice of which constitutes a crime against humanity as defined in applicable international law and that, therefore, it cannot be practiced, permitted, or tolerated, even in states of emergency or exception or of suspension of guarantees."<sup>12</sup>

In 1984, the Parliamentary Assembly of the Council of Europe qualified enforced disappearances as "incompatible with the ideals of any humane society" and "a flagrant violation of a whole range of human rights recognized in the international instruments on the protection of human rights"<sup>13</sup>.

Despite this practice being qualified as a grave violation of human rights and an international crime, as much in international jurisprudence as in inter-governmental political organs, it was only with the adoption of the *International Convention for the Protection of All Persons from Enforced Disappearance* in 2006, that an international instrument enshrined the human right not to be "subjected to enforced disappearance"<sup>14</sup>. Notwithstanding, it is worth underlining that this right and/or the prohibition of enforced disappearance had already been included in the constitutions of several countries<sup>15</sup>.

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<sup>10</sup> Resolution AG/RES. 666 (XIII-0/83) of 18 November 1983. See, likewise, Resolutions AG/RES. 742 (XIV-0/84), 17 November 1984; AG/RES. 950 (XVIII-0/88), 19 November 1988; AG/RES. 1022 (XIX-0/89), 10 November 1989; and AG/RES. 1044 (XX-0/90), 8 June 1990.

<sup>11</sup> AG/RES. 742 (XIV-0/84) of 17 November 1984

<sup>12</sup> Resolution AG/RES. 2794 (XLIII-O/13), 5 June 2013.

<sup>13</sup> Resolution No. 828 of 1984, paragraphs 2 and 4. Two years previously, the Parliamentary Assembly had adopted Resolution 774 (1982) on Europe and Latin America - the challenge of human rights in which the practice of enforced disappearance was condemned.

<sup>14</sup> Article 1 of the *International Convention for the Protection of All Persons from Enforced Disappearance*.

<sup>15</sup> See, for example, the Political Constitutions of Colombia (1991, art. 12), Paraguay (1992, art. 5), Ecuador (1998, art. 23,2) and Venezuela (1999, arts. 29 and 45).

Other States have subsequently incorporated the right not to be subject to enforced disappearance or the prohibition of enforced disappearance into their constitutions<sup>16</sup>.

## 2. DEFINITION OF ENFORCED DISAPPEARANCE

Since the first international pronouncements, enforced disappearance has been characterized as the deprivation of a person's liberty by state authorities, followed by the absence of or refusal to give information on the fate and whereabouts of that person or the refusal to acknowledge that deprivation of freedom<sup>17</sup>. The elaboration of the definition of enforced disappearance has been a long process, in which the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities<sup>18</sup>, the UN *Ad Hoc* Committee on the Situation of Human Rights in Chile<sup>19</sup> and the UN Working Group on Enforced or Involuntary Disappearances and the Inter-American Commission on Human Rights all played pioneering roles. Likewise, throughout this process, associations of families of victims have played a pivotal role<sup>20</sup>, as well as NGOs and

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<sup>16</sup> See, for example, the Political Constitution of the State of Bolivia (2009, art. 15, IV) and the Constitution of the Republic of Ecuador (2008, arts. 66.3,c and 80).

<sup>17</sup> See, for example, Resolution No. 33/173, "Disappeared persons", of the General Assembly of the United Nations, 20 December 1978 (Para.s 2 and 3 of the Considerations); *Report of the IACHR on its Activities in Dominican Republic*, OAS/Ser.L/V/II.13, doc. 14. 15 October 1965, Chapter IV, "Cases of disappeared persons"; *Annual Report of the Inter-American Commission on Human Rights 1971*, OAS/Ser.L/V/II.27, Doc. 11 rev., 6 March 1972, Part III "Petitions and Claims", Petition No. 1701, Argentina; and United Nations Human Rights Committee, Views of 29 March 1982, Communication No. 30/1978, *Eduardo Bleier v. Uruguay* and Views of 21 July 1983, Communication No. 107/1981, *Elena Quinteros and M.C. Almeida de Quinteros v. Uruguay*.

<sup>18</sup> Since the 1970s, the Sub-Commission has dealt with the matter of enforced disappearances, especially in relation to Argentina, Chile and Uruguay; in 1979, it proposed the creation of a working group on the matter (Resolution No. 5 B (XXXII), 5 September). In 1984, the Sub-Commission elaborated the first draft of an international instrument on enforced disappearance – the *Declaration against Unacknowledged Detention of Persons, Whatever Their Condition*, which was never examined by the UN Commission on Human Rights.

<sup>19</sup> This committee was established by the ECOSOC due to the *coup d'état* carried out by General Augusto Pinochet.

<sup>20</sup> Especially the *Federación Latinoamericana de Familiares de Detenidos-Desaparecidos* (the Latin American Federation of Associations for Relatives of the Detained-Disappeared, or FEDEFAM for its initials in Spanish), that adopted a draft of a Convention regarding enforced disappearance which contemplated the creation of an international criminal court to prosecute this crime at its annual congress in 1982 (Peru).

independent experts<sup>21</sup>.

Diverse international instruments as well as international jurisprudence and doctrine are uniform in defining enforced disappearance and its constituent elements. Enforced disappearance, considered both as a criminal offense as well as a serious violation of human rights, is a complex crime, which involves the cumulative presence of two behaviors: the deprivation of liberty by state agents or individuals acting with the authorization, support or acquiescence of the state; and the refusal to acknowledge the deprivation of liberty or the concealment of the fate or whereabouts of the disappeared person.

### **a. International Jurisprudence and Doctrine**

The Working Group on Enforced or Involuntary Disappearances (henceforth the "WGEID") has deliberated on the elements that characterize enforced disappearance. In this regard, in 1988, the WGEID adopted a descriptive and operative definition of enforced disappearance: "a typical example of enforced or involuntary disappearance can be broadly described as follows: a clearly identified person is detained against his or her will by officials of any branch or level of government or by organized groups or private individuals allegedly acting on behalf of or with the support, permission or acquiescence of the Government. These forces then conceal the whereabouts of that person or refuse to disclose his fate or acknowledge that the person was detained"<sup>22</sup>. The WGEID has identified the elements which characterize enforced disappearance and that should be contained in the definition of the crime of enforced disappearance: "Deprivation of liberty against the will of the person concerned, b) Involvement of governmental officials, at least indirectly by acquiescence; c) Refusal to disclose

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<sup>21</sup> See, *inter alia*: *Le Refus de l'oubli - La politique de disparition forcée de personnes - Colloque de Paris, janvier - février 1981*, Ediciones Berger-Levrault, Paris, 1981; Amnesty International, *'Disappearances' a workbook*, New York, 1981; Groupe de travail de la Commission sur les Disparus, *Disparus - Rapport a la Commission indépendante sur les questions humanitaires internationales*, Ediciones Berger-Levrault, Paris, 1986; Grupo de iniciativa por una convención internacional sobre la enforced disappearance de personas, *La desaparición - Crimen de Lesa Humanidad*, Ed. Asamblea Permanente por los Derechos Humanos, Buenos Aires, 1987; Grupo de iniciativa, *La desaparición como Crimen de Lesa Humanidad, El "Nunca Más" and la comunidad internacional*, Buenos Aires, 1989; and Amnesty International, *Disappearances and Political Killings: - Human Rights Crisis of the 1990s: A Manual for Action*, 1994.

<sup>22</sup> *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. E/CN.4/1988/19, para. 17.

the fate and whereabouts of the person concerned”<sup>23</sup>. Likewise, the WGEID has stated that “the criminal offence in question [enforced disappearance] starts with an arrest, detention or abduction against the will of the victim, which means that the enforced disappearance may be initiated by an illegal detention or by an initially legal arrest or detention. That is to say, the protection of a victim from enforced disappearance must be effective upon the act of deprivation of liberty, whatever form such deprivation of liberty takes, and not be limited to cases of illegitimate deprivations of liberty.”<sup>24</sup>

The United Nations Human Rights Committee has coincided in pointing out that the two elements that characterize enforced disappearance, both as a crime and as a serious human rights violation, are “the [...] acts of arrest, detention or abduction, as well as the refusal to give information about the deprivation of freedom”<sup>25</sup>.

The Inter-American Commission on Human Rights, during the drafting process of the *Inter-American Convention on Forced Disappearance of Persons*, emphasized that “forced or involuntary disappearance can be defined as the detention of a person by agents of the State or with the acquiescence of the State, without the order of a competent authority, where the detention is denied, without there being any information available on the destination or whereabouts of the detainee”<sup>26</sup>.

The Inter-American Court of Human Rights has reiterated that, in the light of developments in international law, the following are “concurrent and constituent elements of enforced disappearance: (a) the deprivation of liberty; (b) the direct intervention of State agents or their acquiescence, and (c) the refusal to acknowledge the detention and to reveal the fate or the whereabouts of the person

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<sup>23</sup> “General Comments on the Declaration on the Protection of All Persons from Enforced Disappearance of 15 January 1996”, in *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. E/CN. 4/1996/38, para. 55.

<sup>24</sup> “General Comment on the definition on Enforced Disappearances”, para. 7, in *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/7/2 2007, 10 January 2008.

<sup>25</sup> Views of 2 November 2005, *Norma Yurich v Chile*, Communication No. 1078/2002, para. 6.3.

<sup>26</sup> *Annual Report of the Inter-American Commission on Human Rights, 1986-1987, Doc. Cit.*, Chapter V, “II, Inter-American Convention on Forced Disappearance of Persons”.

concerned”<sup>27</sup>. The Court has stressed that it emphasized that “This characterization is consistent with other definitions contained in different international instrument, the case law of the European human rights system, decisions of the Human Rights Committee of the International Covenant on Civil and Political Rights, and decisions of domestic high courts”<sup>28</sup>. Likewise, the Court has stressed that, in addition to the deprivation of freedom, “[f]orced disappearance is characterized by refusal to acknowledge the deprivation of liberty or to provide information about the fate or whereabouts of detained persons and by leaving no trace or evidence. This element must be present in the statutory definition of the crime in order to distinguish it from others, to which it is usually related, such as man-stealing or abduction and murder”<sup>29</sup>. Thus, the Court has pointed out that in cases of enforced disappearance “the denial to know the truth of the facts is the common characteristics to all the stages”<sup>30</sup>.

## **b. International Instruments**

Various international instruments have established definitions for the crime of enforced disappearance, or like the *Declaration on the Protection of All Persons from Enforced Disappearance*, they have provided an operational description. These have relied on international case law and doctrine, and are based on elements of the definition and characterization of enforced disappearance stipulated by the WGEID<sup>31</sup>, the Inter-American Commission on

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<sup>27</sup> Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, para. 113.

<sup>28</sup> *Ibid.*

<sup>29</sup> Judgment of 22 November 2005, *Case of Gómez Palomino v. Peru*, Series C No. 136, para. 103.

<sup>30</sup> Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 63.

<sup>31</sup> *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. E/CN.4/1988/19, para. 17. Both in its 1990 Report as well as in the framework of the draft of the *Declaration on the Protection of All Persons from Enforced Disappearance*, the WGEID set out the elements which constitute the definition of enforced disappearance and underlined the importance of an international instrument which makes this act criminal (UN. Doc. E/CN.4/1990/13, para. 31). In its “General Comment on Article 4 of the Declaration on the Protection of All Persons from Enforced Disappearance”, the WGEID re-stated the constituent elements of the crime of enforced disappearance (UN Doc. E/CN.4/1996/38, para. 55). In its Report of 2000, the WGEID re-stated that enforced disappearance is an international crime (UN Doc. E/CN.4/2000/64, para. 137).



Human Rights<sup>32</sup> and the Inter-American Court of Human Rights<sup>33</sup>, as well as the Human Rights Committee<sup>34</sup>.

Definitions of this crime in the *Declaration on the Protection of All Persons from Enforced Disappearance* (henceforth the "DED"), the *Inter-American Convention on Forced Disappearance of Persons* (henceforth the "IACFDP"), the *Rome Statute of the International Criminal Court* and the *International Convention for the Protection of All Persons from Enforced Disappearance* (henceforth the "ICPED") all show differences in their wording. The definitions provided in these instruments, however, with some nuances, match - in terms of two characteristic behaviors of enforced disappearance: deprivation of liberty followed by concealment of the fate and whereabouts of the person concerned. Definitions provided in these instruments match, albeit with some nuances, in terms of two characteristic behaviors of enforced disappearance: deprivation of liberty followed by concealment of the fate and whereabouts of the person concerned-

Even though the DED does not include a definition of enforced disappearance within its articles, its preamble reiterates the constituent components of the crime of enforced disappearance in the following terms by characterizing a situation of enforced disappearance as: "[...] persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of

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<sup>32</sup> The Inter-American Commission, in the context of work on the draft of the *Inter-American Convention on Forced Disappearance of Persons*, set out several criteria in order to establish a definition of the crime of enforced disappearance (CDG/3360-E).

<sup>33</sup> Since its judgment in the case of *Velásquez Rodríguez v. Honduras*, Doc. Cit., the Court has been developing, with greater precision, the elements which define and characterize the enforced disappearance of persons.

<sup>34</sup> See, *inter alia*: Views of 29 March 1982, Communication No. 30/1978, *Eduardo Bleier v. Uruguay*; Views of 21 July 1983, Communication No. 107/1981, *Elena Quinteros and M.C. Almeida de Quinteros v. Uruguay*; Views of 3 November 1989, Communication No. 181/1984, *Sanjuán Arévalo v. Colombia*; Views of 23 March 1994, Communication No. 440/1990, *El Megreisi v. Libyan Arab Jamahiriya*; Views of 24 July 1994, Communication No. 458/1991, *Mukong v. Cameroon*; Views of 15 July de 1994 Communication No. 449/1991, *Rafael Mojica v. Dominican Republic*; Views of 27 October 1995, Communication No. 563/1993, *Nydia Erika Bautista de Arellana v. Colombia*; Views of 25 March 1996, Communication No. 540/1993, *Besilio Laureano Atachahua v. Peru*; Views of 29 July 1997, Communication No. 612/1995, *José Vicente and Amado Villafañe Chaparro and others v. Colombia*; Views of 2 November 2005, Communication No. 1078/2002, *Norma Yurich v. Chile*; Views of 30 March 2006, Communication No. 992/2001, *Louisa Bousroual v Algeria*; Views of 16 July 2003 Communication No. 950/2000, *Jegatheeswara Sarma v. Sri Lanka*; and Views of 30 March 2006, Communication No. 1196/2003, *Boucher v. Algeria*.

different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law”<sup>35</sup>.

While the IACFDP contains a definition which incorporates the same elements, it does so in the following terms: “[...] forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees”<sup>36</sup>.

ICPED establishes a definition of the crime of enforced disappearance that includes the same elements. The International Convention defines the crime of 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”<sup>37</sup>.

It is important to indicate that during the process of negotiation and drafting of the ICPED, the issue of “place[s] a person outside the protection of the law” was subject to debate<sup>38</sup>. The formula used by the Rome Statute to address this issue as an additional element of intent (special intent) was rejected. Several

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<sup>35</sup> The 3rd paragraph of the Preamble.

<sup>36</sup> Article II.

<sup>37</sup> Article 2.

<sup>38</sup> *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*, UN Doc. E/CN.4/2004/59 23 February 2004, para. 24 et seq; *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*, UN Doc. E/CN.4/2005/56 10 March 2005, para. 23 et seq; *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*, UN Doc. E/CN.4/2006/57, 2 February 2006, para. 91 and et seq.

government delegations stated that addressing the issue of removal from protection of the law as an additional element of intent was not consistent with the definitions provided by the DED and the IACFDP or, indeed with the development of jurisprudence and international doctrine on the constituent components crime of enforced disappearance. Likewise, they underlined that including special intent in the definition could make it difficult to prove the commission of the offense and that “their domestic criminal law always provided for general intent (*dol general*) is always foreseen [...] [and that] it should not be considered an additional element of intent (*dolus specialis* [special intent]).”<sup>39</sup>. In this regard, it should be noted that during the drafting of the Convention, Manfred Nowak, the independent expert in charge of examining the existing international framework on criminal matters and human rights for the protection of persons from enforced or involuntary disappearances, stated that in light of jurisprudence and international instruments: “any act of enforced disappearance contains at least the following three constitutive elements: a) Deprivation of liberty against the will of the person concerned; b) Involvement of government officials, at least indirectly by acquiescence; c) Refusal to acknowledge the detention and to disclose the fate and whereabouts of the person concerned”<sup>40</sup>.

Notwithstanding, “[a] discussion ensued as to whether removal from the protection of the law should be regarded as a consequence of enforced disappearance or as part of the definition in its own right<sup>41</sup>.” Several governmental delegations considered that, given the definition of the IACFDP, this could be considered a material element of the definition, while others said that it was an inherent consequence of the disappearance<sup>42</sup>. In the text that was finally adopted, Article 2 of the ICPED did not resolve the debate. Thus, the Chairman-Rapporteur of the Working Group that drafted the Convention, the French Ambassador Bernard Kessedjian said that

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<sup>39</sup> *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*, UN Doc. E/CN.4/2005/66, 10 March 2005, para. 25.

<sup>40</sup> *Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances*, UN Doc. E/CN.4/2002/71 8 January 2002, Para. 70.

<sup>41</sup> *Ibid.*, para. 23.

<sup>42</sup> *Ibid.*, para. 25 and *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*, UN Doc. E/CN.4/2006/57, 2 February 2006, para. 91.

the wording of Article 2 established a “constructive ambiguity”, giving “legislators the option of interpreting the reference to a person being placed outside the protection of the law as an integral part of the definition or not.”<sup>43</sup>.

In this regard, it is important to emphasize that the Committee on Enforced Disappearance, an organ established by the ICPED, has considered that the “plac[ement of] a person outside the protection of the law” must be considered as a consequence of the commission of the offense enforced disappearance<sup>44</sup>. The WGEID has likewise pronounced in this regard<sup>45</sup>. Likewise, the Inter-American Court of Human Rights has considered that the “plac[ement of] a person outside the protection of the law” is “the consequence of the refusal to acknowledge the deprivation of liberty or whereabouts”<sup>46</sup>. In this context, and based on WGEID doctrine as well as the IACFPD and the ICPED, the Inter-American Court of Human Rights has established that the deprivation of liberty; the direct or indirect involvement of state agents; and the refusal to recognize such deprivation and to disclose the fate and whereabouts of the person concerned are the elements which characterize enforced disappearance, both as a crime as well as a grave violation of human rights<sup>47</sup>.

### **c. The Issue of the Rome Statute**

The *Rome Statute of the International Criminal Court* establishes, for the purposes of its jurisdiction, a definition of enforced disappearance as a crime against humanity is when it is part of a “widespread or systematic attack directed against any civilian population.” In this regard, Article 7 (2)(i) of the Rome Statute stipulates that “Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the

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<sup>43</sup> *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*, UN Doc. E/CN.4/2006/57 2 February 2006, para. 93.

<sup>44</sup> Committee on Enforced Disappearances: *Concluding observations on the report submitted by Paraguay under article 29, para. 1, of the Convention*, CED/C/PRY/CO/1, 24 September 2014, para. 14.

<sup>45</sup> *Report of the Working Group on Enforced or Involuntary Disappearances – Addendum: Best practices on enforced disappearances in domestic criminal legislation*, UN Doc. A/HRC/16/48/Add.3, 28 December 2010, para. 32.

<sup>46</sup> Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, para. 170.

<sup>47</sup> See *inter alia*, Judgment of 22 November 2005, *Case of Gómez Palomino. v. Peru*, Series C No. 136, para. 97; and Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, para. 113.

authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.”<sup>48</sup>

While the definitions provided by the IACFDP and the ICPED coincide with those of the Rome Statute regarding the two characteristic behaviors of enforced disappearance, i.e. the deprivation of liberty followed by concealment of the fate or whereabouts of the person concerned, they differ from those contained in the Rome Statute in two respects. Indeed, the Rome Statute incorporated two additional elements: a subjective element (“with the intention of removing them from the protection of the law”) as well as a temporal element (“for a prolonged period of time”). The addition of these two elements, which were not present in the *Draft Code of Crimes against Peace and Security of Mankind*, that was prepared by the International Law Commission and formed the basis for the development of the Rome Statute, was promoted mainly by the United Kingdom and the United States, with the argument that the provision of these two criteria would distinguish the crime of enforced disappearance from other forms of deprivation of liberty that do not constitute enforced disappearance, such as solitary confinement and forms of arbitrary detention.

Indeed, the reference to the removal from the protection of the law in the Rome Statute is regulated in terms that are distinct from its regulation in both the IACFDP and the ICPED. Indeed, both Conventions incorporate this issue as a material element or a consequence of the crime<sup>49</sup>. The Rome Statute, meanwhile, incorporates it as a subjective or intentional element (or as specific intent)<sup>50</sup>. This certainly complicates the definition of the crime and imposes an additional burden of proof, as not only is it necessary to prove the general intent but also that the perpetrators of the crime acted with the specific intention of removing the victim from the

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<sup>48</sup> Article 7 of the *Rome Statute of the International Criminal Court*.

<sup>49</sup> Per Article II of the *Inter-American Convention on Forced Disappearance of Persons* (“[...] thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees”) and Article 2 of the *International Convention for the Protection of All Persons from Enforced Disappearance* (“[...] which place such a person outside the protection of the law”).

<sup>50</sup> Per Article 7 (2) (i) of the Rome Statute, the perpetrators of the crime of disappearance act with “the intention of removing them [the disappeared persons] from the protection of the law [...]”.

protection of the law, which is an issue that is very difficult to demonstrate in practice.

The second element retained in the definition of the Rome Statute – “an extended period” – is certainly vague. The notion of “an extended period” should be viewed in relation to the period of time that must elapse between the deprivation of liberty of a person and their having access to a judicial or other competent authority. This time period is not defined in terms of specific deadlines by international standards. The universal<sup>51</sup>, Inter-American<sup>52</sup>, European<sup>53</sup> and African<sup>54</sup> human rights systems require that all persons deprived of liberty must be brought “promptly” before a judge or a competent authority. The jurisprudence of international human rights bodies is not homogeneous, nor is it accurate, when it comes to defining these phrases in terms of periods of time<sup>55</sup>. The formula used by the Rome Statute is inaccurate and unfortunate, and may directly affect lowering the threshold of protection against the crime of enforced disappearance.

Needless to say that, in its work of preparing the *Draft Code of Crimes against Peace and Security of Mankind*, the International Law Commission of the United Nations incorporated enforced disappearance in the catalog of acts constituting crimes against humanity<sup>56</sup>. Although it did not establish a definition of enforced disappearance, the Commission stated that “the term 'enforced disappearance of persons' [incorporated in the Draft Code] is used as a specialized technical term to refer to the type of criminal behavior that is addressed by the Declaration [DED] and the

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<sup>51</sup> Article 9 (3) of the *International Convention of Civil and Political Rights*; principle 11 (1) of the *Body of Principles for the Protection of All Persons under Any Form of Detention*; and Article 10 (1) of the *Declaration on the Protection of All Persons from Enforced Disappearance*.

<sup>52</sup> Article 7 (5) of the *American Convention on Human Rights* and Article 11 of the *Inter-American Convention on Forced Disappearance of Persons*.

<sup>53</sup> Article 5 (3) of the *European Convention on Human Rights*.

<sup>54</sup> Article 2 (C) of the *Resolution on the Right to Recourse and Fair Trial* of the African Commission on Human and Peoples' Rights.

<sup>55</sup> In this regard see, for example, International Commission of Jurists, *Trial Observation Manual for Criminal Proceedings – A Practitioner's Guide No. 5*, Ed. ICJ, Geneva, 2009, Chapter V (7) p. 65, and Amnesty International, *Fair Trial Manual*, 2<sup>nd</sup> edition, Amnesty International Publications, AI Index: POL 30/002/2014, section 5.1.2 p. 59.

<sup>56</sup> Article 18 (i) of the *Draft Code of Offences against the Peace and Security of Mankind*, in Report of the International Law Commission on the work of its forty-eighth session – 6 May to 26 July 1996, UN Doc. A/51/10, p. 101.

Convention [IACFDP].”<sup>57</sup> In other words, the International Law Commission did not include subjective and temporal elements that are included in the Rome Statute.

The definition of the Rome Statute came under criticism during the process of drafting the ICPEP. Thus, the independent expert Manfred Nowak said the Rome Statute “seems to define enforced disappearances in a very narrow manner which can only be applied in truly exceptional circumstances. Apart from the general requirement of crimes against humanity, which only covers acts committed as part of a widespread or systematic attack against a civilian population, perpetrators can only be convicted if the prosecutor establishes that they ‘intended to remove the victims from the protection of the law for a prolonged period of time’. This is a subjective element in the definition, which in practice will be difficult to prove. The perpetrators usually only intend to abduct the victim without leaving any trace in order to bring him (her) to a secret place for the purpose of interrogation, intimidation, torture or instant but secret assassination. Often many perpetrators are involved in the abduction and not everybody knows what the final fate of the victim will be. In any case, if criminal law is to provide an effective instrument of deterrence, the definition of enforced disappearance in domestic criminal law, as required by a future international instrument, has to be broader than that included in the Statute of the International Criminal Court”<sup>58</sup>.

These considerations, among others, meant that the Intergovernmental Working Group of the United Nations in charge of drafting the ICPEP did not retain these additional elements of the Rome Statute to define the crime of enforced disappearance.

The unfortunate wording of Article 7 (2)(i) of the Rome Statute has opened the possibility of leading to the opposite effect from that officially proclaimed, i.e. “ending to impunity”<sup>59</sup> and has had the direct impact of lowering the threshold of protection against the

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<sup>57</sup> *Ibid.*, para. 15 of Comment on Article 18.

<sup>58</sup> *Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of Commission resolution 2001/46*, UN Doc. E/CN.4/2002/71, 8 January 2002, para. 74. In this regard, see the critique by the International Commission of Jurists, in “The Draft International Convention on the Protection of All Persons from Forced Disappearance”, in International Commission of Jurists, *The Review*, Nos. 62 – 63, Geneva, July 2001.

<sup>59</sup> Para. 5 of the Preamble of the *Rome Statute of the International Criminal Court*.

crime of enforced disappearance. In this regard, the WGEID has recommended that “the definition of enforced disappearance provided for by the Rome Statute be interpreted by the national authorities in line with the more adequate definition provided for in article 2 of the International Convention for the Protection of All Persons from Enforced Disappearance.”<sup>60</sup>

Notwithstanding, it must be clarified that the definition of enforced disappearance contained in the Rome Statute is only binding on the International Criminal Court. Furthermore, as the Rome Statute stipulates in Article 10: “[n]othing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute [...]”. Likewise, Article 22 (3) provides that “[t]his article shall not affect the characterization of any conduct as criminal under international law independently of this Statute”.

Thus, the States Parties of the IACFDP and/or the ICPED have a legal obligation to stamp out the crime of enforced disappearance, as it is defined in both treaties. It must be remembered that enforced disappearance constitutes a crime under customary international law<sup>61</sup>. Accordingly, each State is required to suppress enforced disappearance, since, as has been repeatedly stated by the Inter-American Court of Human Rights, the obligation both to investigate this crime and to prosecute and punish the perpetrators and other participants is binding under International Law (*jus cogens*)<sup>62</sup>.

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<sup>60</sup> *Report of the Working Group on Enforced or Involuntary Disappearances – Addendum: Best practices on enforced disappearances in domestic criminal legislation*, UN Doc. A/HRC/16/48/Add.3, 28 December 2010, para. 15.

<sup>61</sup> See, *inter alia*: O. de Frouville, “Les disparitions forcées”, in H. Ascensio, E. Decaux et A. Pellet, *Droit international pénal*, CEDIN - Paris X, Editions A Pedone, Paris 2000, p. 377 and et seq.; Brian Finucane, “Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War”, in *Yale Journal of International Law*, No. 35, 2010, p. 186 and ss; Kai Ambos, *Impunidad y derecho penal internacional*, Ed. Ad Hoc, 2 edición, Buenos Aires, 1999, p. 113 and et seq.; Antonio Cassese, *International Criminal Law*, Oxford/New York/Auckland, 2008, 2 Edition, p. 12 and following; and *La desaparición, crimen contra la humanidad*, Ediciones APDH, Buenos Aires 1988.

<sup>62</sup> See, *inter alia*: Judgment of 29 November 2006, *La Cantuta v. Peru*, Series C, No. 162, para. 157; Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 59; Judgment of 26 November 2013, *Case of Osorio Rivera and Family v Peru*, Series C No. 274, para. 112; Judgment of 22 September 2006, *Case of Goiburú et al. v. Paraguay*, Series C No. 153, para. 84; Judgment of 25 May 2010, *Case of Chitay Nech and others v. Guatemala*, Series C No. 212, para. 86; Judgment of 1 September 2010, *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*,



#### **d. National Jurisprudence**

The enforced disappearance of persons has also been processed by national courts. Regardless of whether or not enforced disappearance is a crime under national criminal law<sup>63</sup>, national courts and other authorities have defined and identified the constituent components of this practice, mainly based on case law and international instruments.

The Constitutional Tribunal of Peru has characterized the enforced disappearances as “cruel, atrocious deeds, [...] [which] constitute serious violations of human rights, therefore, they must not go unpunished; in other words, the perpetrators and accomplices of conduct constituting a violation of human rights, must not evade the legal consequences of their acts”<sup>64</sup>. In connection with a specific case committed prior to the entry into force of the IACFDP and characterization of this crime in the Penal Code, the Court noted that enforced disappearance was a “criminal act,” which was characterized by the deprivation of liberty “followed by an absence of information or refusal to acknowledge said deprivation of liberty or to give information on the whereabouts of the person”<sup>65</sup>.

Meanwhile, the Supreme Court of Justice of Peru has stated, “the crime of enforced disappearance of persons has the characteristic features of a complex structure and modus operandi. It involves not only the deprivation of liberty of the person, who is the victim of the crime, by agents of the state in the limited conception of our legislator, but it also involves the systematic concealment of such an apprehension so that the whereabouts of the victim remains unknown, allowing it to be classified as a continuing and a result crime, and it is essentially a special crime. It assumes a refusal to disclose the whereabouts of the victim, which creates and maintains a state of uncertainty about his or her fate, in such a manner that the missing person is removed from the protection of the law as well

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Series C No. 217, para. 61; Judgment of 24 February 2011, *Case of Gelman v. Uruguay*, Series C No. 221, para. 75; and Judgment of 24 November 2010, *Case of Gomes Lund and others (Guerrilha do Araguaia) v. Brasil*, Series C No. 219, para. 105.

<sup>63</sup> In several countries in which enforced disappearance is not an offense under the Penal Code, the courts have resorted to reliance on the crimes of abduction and/or aggravated abduction to punish enforced disappearances, noting the constituent components of the enforced disappearance based on international standards and jurisprudence.

<sup>64</sup> The Constitutional Tribunal of Peru, Judgment of 18 March 2004, Exp. No. 2488-2002-HC/TC, Piura, *Case of Genaro Villegas Namuche*.

<sup>65</sup> *Ibid.*

as the possibility of judicial protection<sup>66</sup>.

The Peruvian Truth and Reconciliation Commission “understands enforced disappearance of persons to be the disappearance and deprivation of liberty of one or more persons committed by state agents or by persons acting with the authorization, support or tolerance of said state agents, as well as that carried out by individuals or members of subversive organizations. This act is followed by the lack of information or the refusal to acknowledge the deprivation of liberty or to give information on the whereabouts of the person. Such an absence of information or the refusal to provide it prevents the exercise of legal remedies and the relevant procedural mechanisms. The definition includes victims whose whereabouts remain unknown, those whose remains have been found and those who have regained their freedom.”<sup>67</sup>

In Argentina, the Attorney General's Office characterized this violation of human rights with the accepted elements contained in international instruments and jurisprudence. In the words of the Attorney General, “[...] the deprivation of liberty of one or more persons, whatever may be the manner, perpetrated by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the state, followed by lack of information or the refusal to acknowledge the deprivation of liberty or to give information on the whereabouts of the person”<sup>68</sup>. The Supreme Court accepted this characterization.

In Chile, the Supreme Court ruled that enforced disappearance constitutes a violation of *jus cogens*<sup>69</sup>. Meanwhile, based on the DED and the IACFDP, the Santiago Court of Appeals has described enforced disappearance as “one of the most egregious forms of violation of human rights, [that] for a long time, has constituted a very serious offense against the inherent dignity of the human being, which is non-derogable<sup>70</sup>.” By punishing cases of enforced disappearance under the crime of kidnapping, the Santiago Appeals Court has referred to the definition provided by the IACFDP to

<sup>66</sup> Supreme Court ruling RN N1598-2007.

<sup>67</sup> National Truth and Reconciliation Commission, *Final Report*, Lima, 2003, p. 58.

<sup>68</sup> Supreme Court of the Nation (Argentina), Decision by the Attorney General of the Nation, Nicolás Becerra, in Trial S. 1767. XXXVIII “Simón, Julio and others false imprisonment –Trial No. 17768-”, Judgment of 14 June 2005.

<sup>69</sup> Judgment of 25 May 2009, Rol N 696-08, *Case against Pollaco Gallardo and others*.

<sup>70</sup> Judgment of 5 January 2004, Rol No. 11.821-2003, *Case of appeals brought by Fernando Laureani Maturana and Miguel Krassnoff Marchenko*.

characterize the elements that constitute the crime of enforced disappearance<sup>71</sup>.

The Supreme Court of Costa Rica has described enforced disappearance as a "serious offense against the inherent dignity of the human being and is in contradiction with the principles and purposes enshrined in the Charter of the Organization of American States"<sup>72</sup>. The Court considered that the definition and constituent components of the crime of enforced disappearance established by the IACFDP should be the basis of the definition of the criminal offense to be adopted by Costa Rica.

The Constitutional Court of Colombia has asserted that "[it is] improbable that one can find behavior more harmful to fundamental rights and constitutional values than the enforced disappearance of persons, as affects legal interests, not only those of the victim but also those of their family, including human dignity, individual autonomy, bodily integrity and free development of the personality."<sup>73</sup> In another judgment, the Court stressed that "the fundamental guarantees that are derived from humanitarian principles, which in many cases have the status of being rules of *jus cogens*, are mainly the following: "[...] (xi) the prohibition of enforced disappearances"<sup>74</sup>. Likewise, the Court considered that "the definition of Article 2 [of the IACFDP] establishes a minimum that must be protected by the States Parties, subject to these broader definitions adopted in their domestic legal systems"<sup>75</sup>. The Court ruled in a similar manner regarding the definition of the ICPED<sup>76</sup>.

In El Salvador, the Supreme Court of Justice has defined enforced

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<sup>71</sup> See, *inter alia*, Santiago Appeals Court: Judgment of 4 August 2008, Rol No. 2.182-98, *episodio denominado "Miguel Heredia Vásquez" ("Tejas Seeded")*; Judgment of 27 May 2010, Rol No. 2.182-98, *Episodio "José Flores Araya and Rodolfo González Pérez"*; Judgment of 13 July 12, Rol No. 2182-98 *"Villa Grimaldi"*, *Episodio "Carlos Guerrero Gutiérrez" - Crime: Aggravated Abduction*; and Judgment of 27 July 12, Rol No. 2.182-98, *"Villa Grimaldi"*, *episodio "Claudio Enrique Contreras Hernández" - Crime: Aggravated Abduction*.

<sup>72</sup> Supreme Court of Justice, Constitutional Chamber, Resolution of 12 January 1996, Exp. 6543-S-95 Voto N.0230-96.

<sup>73</sup> Judgment C-400/03 of 20 May 2003, Exp. D-4326, *Lawsuit of unconstitutionality against Article 10, par. 1 and 2, of the Ley 589 2000*.

<sup>74</sup> Judgment C-291/07 of 25 April 2007, Exp. D-6476, *Lawsuit of unconstitutionality against Articles 135, 156 and 157 (partial) of Law 599 of 2000, and 174, 175, 178 and 179 of law 522 of 1999*.

<sup>75</sup> Judgment C-580/02 of 3 July 2002, Exp. L.A.T.-218.

<sup>76</sup> Judgment C-620/11 of 18 August 2011, Exp. LAT-363.

disappearances as the “arbitrary deprivation of freedom, whatever its form, which is usually carried out without any judicial, administrative, etc. order or motivation, by state agents, by persons or groups of persons acting with the approval thereof; that deprivation of liberty is followed by misinformation or the refusal to provide data concerning the location of the person deprived of his freedom by those accused of being responsible [for it] or by those who should provide such information, in order to keep the whereabouts of the affected person secret and prevent that the perpetrators be brought before the authorities responsible for punishing those responsible”<sup>77</sup>.

In Venezuela, the Constitutional Chamber of the Supreme Court of Justice has defined enforced disappearance as “the arrest, detention or abduction against the will of the persons concerned, or the deprivation of liberty in any form, by officials of different branches or levels, by organized groups or private individuals acting on behalf of the government or with its direct or indirect support, or with their authorization or consent; and they then refuse to disclose the fate or whereabouts of those persons or to acknowledge the deprivation of liberty, thus removing [said persons] from the protection of the law”<sup>78</sup>.

### **3. CHARACTERIZATION OF ENFORCED DISAPPEARANCE**

#### **a. Grave and Multiple Violation of Human Rights**

Under International Law enforced disappearance is considered as one of the most serious violations of fundamental human rights, as well as an “affront to human dignity”<sup>79</sup> and a “grave and abominable offense against the inherent dignity of the human being”<sup>80</sup>.

International instruments expressly prohibit the practice of enforced disappearance in all circumstances<sup>81</sup>. Therefore, as stipulated by the ICPED, “[n]o exceptional circumstances whatsoever, whether a

<sup>77</sup> Supreme Court of Justice, Constitutional Chamber, Judgment 20 March 2002, Exp. No. 379-2000.

<sup>78</sup> Judgment 10 August 2007, Exp. No. 06-1656, *Case of Application for Review - Marco Antonio Monasterios Pérez - Casimiro José Yáñez*, Reporting Judge: Carmen Zuleta de Merchán.

<sup>79</sup> Article 1 of the *Declaration on the Protection of All Persons from Enforced Disappearance*.

<sup>80</sup> *Inter-American Convention on Forced Disappearance of Persons*, Preamble, Para. 3.

<sup>81</sup> *Declaration on the Protection of All Persons from Enforced Disappearance* (Art. 2, 6 and 7), *Inter-American Convention on Forced Disappearance of Persons* (arts. I.a, VIII and X) and *International Convention for the Protection of All Persons from Enforced Disappearance* (Arts. 1.2, 6.2 and 23.2).

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.”<sup>82</sup> It is also worth highlighting that the International Committee of the Red Cross (ICRC) has concluded that the absolute prohibition of the practice of enforced disappearance is a rule of Customary International Law applicable to both international armed conflicts and internal armed conflicts<sup>83</sup>.

“There are explicit norms in both Common Article 3 and Article 4.2 of Additional Protocol II that prohibit acts that lead to the disappearance of a person. Common Article 3 also prohibits threats to life and the person, in particular homicide of all kinds, mutilations, cruel treatment and torture. Depriving a person of the guarantees of law and order or performing deliberate actions seeking his disappearance involves a serious violation of international humanitarian law that the State must punish.”

Constitutional Tribunal of Peru<sup>84</sup>

While the ICPED established the absolute and non-derogable human right to not “be subjected to enforced disappearance”,<sup>85</sup> this practice violates numerous human rights, many of which are non-derogable at all times. In this regard, the IACFDP stresses that “forced disappearance of persons violates numerous non-derogable and essential human rights enshrined in the American Convention on Human Rights, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights”<sup>86</sup>.

International jurisprudence and doctrine have repeatedly pointed out that enforced disappearance constitutes *per se* a violation of the rights to security of the person, to the protection of the law, to not be arbitrarily deprived of liberty; to legal personality of every human being; and to not be subjected to torture or other cruel, inhuman or degrading treatment as well as posing a grave threat to the right to life. This multiple violation of human rights has been expressly codified in Article 1 (2) of the DED. In this regard, the Inter-American Court of Human Rights has stated that owing to “the nature of enforced disappearance, the victim is in an aggravated

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<sup>82</sup> Article 1.2.

<sup>83</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, Ed. ICRC, Buenos Aires, 2007. Rule 98 p. 340.

<sup>84</sup> Constitutional Tribunal of Peru, First Chamber, Judgment of 9 December 2004, Exp. No. 2798-04-HC/TC, Lima, *Gabriel Orlando Seea Navarrete Case*.

<sup>85</sup> Article 1.

<sup>86</sup> Paragraph 4 of the Preamble.

situation of vulnerability, which gives rise to the risk that several different rights may be violated, including the right to life.”<sup>87</sup>

The fact that enforced disappearance consists of multiple crimes was recognized from an early date by the Inter-American Court of Human Rights. In this regard, the Court stated that “[f]orced disappearance of persons is a distinct phenomenon characterized by constant and multiple violations of several rights enshrined in the Convention insofar as it not only involves the arbitrary deprivation of liberty, but also violates the detained person’s integrity and security, threatens his life, leaving him completely defenseless, and involves other related crimes as well.”<sup>88</sup> In the *Velásquez Rodríguez v Honduras* case the Court referred to enforced disappearance in the following terms: “[f]orced disappearance of human beings is a multiple and continuous violation of many rights under the [American] Convention that the States Parties are obligated to respect and guarantee. The kidnapping of a person is an arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest, all in violation of Article 7 of the Convention which recognizes the right to personal liberty [...]”<sup>89</sup>.

Repeatedly, the Inter-American Court of Human Rights has highlighted the multiple nature of the violations of human rights which lead to enforced disappearance.<sup>90</sup> Indeed, the Court stated “[t]he need to deal integrally with forced disappearance as a complex form of human rights violation leads the Court to examine Articles 4, 5 and 7 of the [American] Convention, in relation to

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<sup>87</sup> Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, para. 169. See also, Judgment of 27 February 2012, *Case of Narciso González Medina and Family v. Dominican Republic*, Series C No. 240, para. 185

<sup>88</sup> Judgment of 22 November 2005, *Case of Gómez Palomino v. Peru*, Series C No. 136, Para. 92.

<sup>89</sup> *Case of Velásquez Rodríguez v. Honduras*, Doc. Cit., para. 155.

<sup>90</sup> See, *inter alia*: Judgment of 22 November 2005, *Case of Gómez Palomino v. Peru*, Series C No. 136, para. 92; Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, para. 170; Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, paras 90-91; Judgment of 22 September 2006, *Case of Goiburú and Others v. Paraguay*, Series C No. 153, para. 81; Judgment of 4 September 2012, *Case of Masacres of Río Negro v. Guatemala*, Series C No. 250, para. 118; Judgment of 24 February 2001, *Case of Gelman v. Uruguay*, Series C No. 221, para 74; and Judgment of 24 November 2010, *Case of Gomes Lund and others (“guerrilha do Araguaia”) v. Brazil*, Series C No. 219, para 104.

Article 1(1) thereof [...]”<sup>91</sup>. The Inter-American Court of Human Rights has stated that “[...] in its constant case law on cases of forced disappearance of persons, the Court has reiterated that this constitutes an illegal act that gives rise to a multiple and continuing violation of several rights protected by the American Convention and places the victim in a state of complete defenselessness, giving rise to other related crimes.”<sup>92</sup> Likewise, the Court has stated that “in cases of forced disappearance, based on the complexity and multiple nature of this gross violation of human rights, its implementation involves the specific violation of the right to juridical personality, because the result of the refusal to acknowledge the deprivation of liberty or the whereabouts of the person is, in conjunction with the other elements of the disappearance, the “removal of the protection of the law” or the violation of the individual’s personal and legal security, which directly prevents recognition of juridical personality.”<sup>93</sup>

“The need to integrally consider the phenomenon of forced disappearance as an autonomous and continuous or permanent crime, with their multiple aspects intricately interrelated and related violations, can be deduced not only from the typical definition of Article III of the I[A]CFDP, the *travaux préparatoires* for this instrument, its preamble and set of rules, but from other definitions contained in different international instruments [...]”.

The Inter American Court of Human Rights<sup>94</sup>

To summarize, the Inter-American Court of Human Rights has

<sup>91</sup> *Case of Goiburú et al. v. Paraguay*, Doc. Cit., para. 81.

<sup>92</sup> *Ibid.*, Para. 82. See also Para. 84 of the judgment: “the Court finds that, as may be deduced from the preamble to the aforesaid Inter-American Convention, faced with the particular gravity of such offenses and the nature of the rights harmed, the prohibition of the forced disappearance of persons and the corresponding obligation to investigate and punish those responsible has attained the status of *jus cogens*.” See also Inter-American Court of Human Rights: *Case of Velásquez Rodríguez v. Honduras*, Doc. Cit., para. 155; *Case of Godínez Cruz v. Honduras*, Doc. Cit., para. 163; Judgment of 15 March 1989, *Case of Fairén Garbi and Solís Corrales v. Honduras*, Series C No. 6, para. 147; and Judgment of 24 January 1998, *Case of Blake v. Guatemala*, Series C No. 36, para. 65.

<sup>93</sup> Judgment of 29 November 2012, *Case of García and Family Members v. Guatemala*, Series C No. 258, para. 108; Judgment of 20 November 2012, *Case of Gudiel Álvarez and others (“Diario Militar”) v. Guatemala*, Series C No. 253, para. 208. See also: Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, para. 170 and Judgment of 22 September 2009, *Case of Anzualdo Castro v Peru*, Series C No. 202, para. 91 -101.

<sup>94</sup> Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, Para. 60.

characterized enforced disappearance as a violation of the rights to personal liberty, personal integrity, life and legal personality.

The Inter-American Commission on Human Rights has emphasized that enforced disappearance is a “perverse phenomenon” and a “flagrant violation of basic rights” that violates multiple norms<sup>95</sup>. The Commission has described this practice as “cruel and inhumane, and [one] that [...] not only constitutes an arbitrary deprivation of liberty, but also a very severe threat to the personal integrity, security, and the very life of the victim.”<sup>96</sup> The Commission has specified that “forced disappearance implies a flagrant violation of basic rights and freedoms guaranteed internationally, such as the right to personal liberty and security (Article 7 of the American Convention on Human Rights); the right not to be arbitrarily arrested (*idem*); the right to a fair trial in criminal cases (Article 8 of the Convention and concordant articles); the right to humane treatment in detention and the right not to be subjected to torture or to cruel, inhuman or degrading treatment (Article 5) and in general, the right to life (Article 4) [...]”<sup>97</sup>. The Commission has highlighted that “[f]orced or involuntary disappearance constitutes a multiple and continuing violation of several of the rights enshrined in the Convention, because not only does it produce an arbitrary deprivation of liberty, but it also jeopardizes the humane treatment, personal safety and the life of the person detained.”<sup>98</sup>

The Human Rights Committee has repeatedly emphasized the nature of enforced disappearance as involving multiple violations. The Committee has stated in several decisions that “[a]ny act of such disappearance constitutes a violation of many of the rights enshrined in the Covenant, including the right to liberty and security of the person (art. 9), the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7), and the right of all persons deprived of their liberty to be treated with

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<sup>95</sup> *Annual report of the Inter-American Commission on Human Rights, 1986-1987*, Doc. Cit., Chapter V, “II. Inter-American Convention on Forced Disappearance of Persons”.

<sup>96</sup> *Ibid.*

<sup>97</sup> *Ibid.*

<sup>98</sup> Cited in Inter-American Court of Human Rights, Judgment of 31 January 2006, Case of *Masacre de Pueblo Bello v. Colombia*, Series C No. 140, para. 97(c). In the same regard, see Inter-American Commission on Human Rights: Report No. 91/06, 21 April 2006, Petition 12.343, Case of *Edgar Fernando García v. Guatemala*, para. 33; Report No. 82/03, 22 October 2003, Petition 12.330, Case of *Marcelino Gómez Paredes and Cristian Ariel Núñez v. Paraguay*, para. 28; and Report No. 55/96, 6 December 1996, Petition 8076, Case of *Axel Raúl Lemus García v. Guatemala*, para. 24.



humanity and with respect for the inherent dignity of the human person (art. 10)."<sup>99</sup>

"[I]n cases of enforced disappearance, the deprivation of liberty followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate of the disappeared person places him or her outside the protection of the law and places his or her life at serious and constant risk, for which the State is accountable".

Human Rights Committee<sup>100</sup>

Likewise, the Committee has considered several times that the forced disappearances of persons "amounts to a violation of her rights under the Covenant [ICCPR], notably article 7 [regarding the prohibition of torture and other cruel, inhumane and degrading treatment]"<sup>101</sup>. Indeed, the Committee has recognized "the degree of suffering involved in being held indefinitely without contact with the outside world"<sup>102</sup>. The Committee also has concluded that enforced disappearance violates the right to legal recognition as a person before the law<sup>103</sup>.

The WGEID has considered that the enforced disappearance violates the rights to liberty and security of person; not to be arbitrarily detained; to a fair trial by an independent court; not to be subjected to torture and ill-treatment; and family life and, in many situations,

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<sup>99</sup> Views of 30 March 2006, Communication No. 992/2001, *Louisa Bousroual v. Algeria*, para. 9.2; Views of 16 July 2003, Communication No. 950/2000, *Jegatheeswara Sarma v. Sri Lanka*, para. 9.3; and Views of 30 March 2006 Communication No. 1196/2003, *Boucherf v. Algeria*, para. 9.2.

<sup>100</sup> Views of 19 July 2013, Communication No. 1865/2009, *Case of Mukunda Sedhai v. Nepal*, para. 8.2.

<sup>101</sup> Views of 2 November 2005, *Norma Yurich v. Chile*, Communication No. 1078/2002, para. 6.5; Views of 15 July 1994, Communication No. 449/1991, *Rafael Mojica v. Dominican Republic*, para. 5.7; Views of 16 July 2003, Communication No. 950/2000, *Jegatheeswara Sarma v. Sri Lanka*, para. 9.3; and Views of 23 March 1994, Communication No. 440/1990, *El Megreisi v. Libyan Arab Jamahiriya*.

<sup>102</sup> Views of 16 July 2003, Communication No. 950/2000, *Jegatheeswara Sarma v. Sri Lanka*, Doc. Cit., para. 9.3; Views of 23 March 1994, Communication No. 440/1990, *El Megreisi v. Libyan Arab Jamahiriya*; Views of 25 March 1996, Communication No. 540/1993, *Celis Laureano v. Peru*, para. 8.5; Views of 24 July de 1994, Communication No. 458/1991, *Mukong v. Cameroon*, para. 9.4; Views of 30 March 2006, Communication No. 992/2001, *Louisa Bousroual v. Algeria*, para. 9.8; Views of 30 March 2006, Communication No. 1196/2003, *Boucherf v. Algeria*, para. 9.6; and Views of 14 July 2006, Communication No. 1297/2004, *Ali Medjnoune v. Algeria*, para. 8.4.

<sup>103</sup> *Human Rights Committee: Concluding Observations: Kuwait*, CCPR/CO/69/KWT, 27 July 2000, para. 11 and *Concluding Observations: Algeria*, CCPR/C/79/Add.95, 18 August 1998, para. 10.

the right to life<sup>104</sup>. The WGEID has likewise stated that making a person disappear amounts to “infringing upon a variety of human rights [...], the right to life, the right to liberty and security of the person and the right not to be subjected to torture”<sup>105</sup>. The WGEID has also highlighted how the practice violates the right to recognition of legal personality of every human being<sup>106</sup>. Notwithstanding, the WGEID has stated that “[e]ven though the conduct violates several rights, including the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment and also violates or constitutes a grave threat to the right to life, [...] an enforced disappearance is a unique and consolidated act, and not a combination of acts.”<sup>107</sup>

An element that characterizes enforced disappearance is that this practice removes the individual from the protection of the law, as stipulated by international instruments<sup>108</sup>. This specific nature of enforced disappearance, and as the reality of it demonstrates, results in the suspension of the missing person’s enjoyment of all rights and places the victim in a situation of total defenselessness. This element is also directly related to the right to legal personality, one of the most essential rights of human beings and a prerequisite for the effective enjoyment of other rights and freedoms<sup>109</sup>. Manfred Nowak, in his Commentary on the *International Covenant on Civil and Political Rights*, has stated that the right to recognition of legal personality should be integrated into the systematic interpretation

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<sup>104</sup> UN Docs E/CN.4/1435, 13 March 1981, para. 185 and et seq., and E/CN.4/1492, 31 December 1981 Para. 164 and et seq.

<sup>105</sup> UN Doc E/CN.4/1994/26, 22 December 1993, para. 532. See also the “Comment on article 17 of the Declaration on the Protection of All Persons from Enforced Disappearance”, adopted by the Group in 2000, UN Doc. E/CN.4/2001/68, 18 December 2000, Para. 31.

<sup>106</sup> UN Docs E/CN.4/1435 13 March 1981, para. 185 and et seq.; E/CN.4/1492, 31 December 1981 Para. 164 and et seq.; E/CN.4/1996/38, para. 43; and “Comment on article 17 of the Declaration on the Protection of All Persons from Enforced Disappearance”, Doc. Cit., para. 31.

<sup>107</sup> “General Comment on Enforced Disappearance as a Continuous Crime”, in *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/16/48, 26 January 2011, para. 39.

<sup>108</sup> Paragraph 3 of the Preamble of the *Declaration on the Protection of All Persons from Enforced Disappearance*; Article II of the *Inter-American Convention on Forced Disappearance of Persons*; and Article 2 of the *International Convention on the Protection of All Persons from Enforced Disappearances*.

<sup>109</sup> Manfred Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary*, N.P. Engel Publisher, Kehl – Strasbourg – Arlington, p. 282.

of any provision of the Covenant<sup>110</sup>.

"The disappeared, who the authorities deny having arrested, logically cannot exercise their rights, nor invoke any remedy."

Alejandro Artucio<sup>111</sup>

The right to recognition everywhere as a person before the law is expressly covered by the numerous international legal instruments<sup>112</sup>, and is enshrined as a non-derogable right<sup>113</sup>. Although the right to recognition of legal personality has seen little jurisprudential development at the international level, the International Court of Justice stressed the transcendental character of this right<sup>114</sup>. This concept is at the very core of the notion of subject of law, which determines its "actual existence" before both society and the State and it permits the individual to have rights and obligations, exercise his or her rights and have the "capacity to act". In a way, the right to juridical personality is the right to have rights. The *travaux préparatoires* of the Universal Declaration of Human Rights are revealing about the scope of this right. Thus, they state that this right guarantees that "every human being has the right to enjoy and exercise his or her rights, assume contractual obligations and be represented in legal proceedings"<sup>115</sup>. During the process of the adoption of the Universal Declaration of Human Rights one of the commentators stated that this right "covers the fundamental rights relating to the legal capacity of a person, which are not explicitly mentioned in subsequent articles of the Declaration"<sup>116</sup>. Professor Richard B. Lillich stressed that this right "was intended to be as important as the rights that safeguard the physical integrity of the individual"<sup>117</sup>, bringing to mind slavery,

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<sup>110</sup> *Ibid*, p. 286.

<sup>111</sup> Alejandro Artucio, "la disparition instrument ou moyen pour d'autres violations des droits de l'homme", in *Le Refus de l'oubli*, Doc. Cit., p. 106 (original in French, free translation).

<sup>112</sup> See *inter alia*: *Universal Declaration of Human Rights* (Art. 6); *International Covenant on Civil and Political Rights* (Art. 16); *American Declaration of the Rights and Duties of Man* (Art. XVII); and *American Convention on Human Rights* (Art. 3).

<sup>113</sup> *American Convention on Human Rights* (Art. 27.2) and *International Covenant on Civil and Political Rights* (Art. 4.2).

<sup>114</sup> Advisory Opinion of 11 April 1949, *Reparation for Injuries Suffered in the Service of the United Nations*, in *Receuil* 1949 p. 178.

<sup>115</sup> Richard B. Lillich, "Civil Rights", in Theodor Meron, *Human Rights in International Law: Legal and Policy Issues*, Clarendon Press, Oxford, 1988, p. 131.

<sup>116</sup> *Ibid*.

<sup>117</sup> *Ibid*

servitude and the actions of the Nazi regime that denied human status to several categories of individuals as well as Apartheid.

The right to the recognition of legal personality, in the process of drafting the *American Convention on Human Rights*, does not appear to have been the subject of further discussion. However, it is important to note that the Inter-American Commission on Human Rights considered that, in the draft American Convention on Human Rights, it was a “substantive human right” of great importance<sup>118</sup>. The Inter-American Court of Human Rights has stated that “the intrinsic content of the right to recognition of juridical personality is, precisely, that the individual is recognized, anywhere, as a subject of rights and obligations, and that he or she may enjoy the fundamental civil rights, which entails the capacity to be the possessor of rights (capacity and enjoyment) and of obligations. The violation of that recognition supposes that the possibility of being the possessor of civil and fundamental rights and obligations is categorically denied”<sup>119</sup>.

“Over and above the fact that the disappeared person cannot continue enjoying and exercising others and, eventually, all the rights to which he is entitled, his disappearance seeks not only one of the most serious forms of removing a person from the whole sphere of the law, but also to deny his very existence, leaving him in a sort of legal limbo or indeterminate legal situation before society and the State.”

Inter-American Court of Human Rights<sup>120</sup>

In this vein, enforced disappearance means that the victim is removed from the protection of the law and his or her right to the recognition of legal personality as a human being is violated, which, in fact, undermines the effective enjoyment of all internationally protected rights pertaining to all human beings. From its founding, the WGEID has pointed out this serious situation. Thus, in 1981, the WGEID noted that while the principle rights violated by the practice of enforced disappearance may be identified, “a reading of

<sup>118</sup> *Inter-American Yearbook on Human Rights – 1968*, OAS, 1973, p. 96.

<sup>119</sup> Judgment of 20 November 12, *Case of Gudiel Álvarez and others (“Diario Militar”) v. Guatemala*, Series C No. 253, para. 209. In the same regard, see: Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, para. 170 and Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, paras. 91-101.

<sup>120</sup> Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, para. 170.

the Universal Declaration and the International Covenants on Human Rights shows that to a greater or lesser degree practically all basic human rights of such a person are infringed."<sup>121</sup> In its 2010 study on *Best practices on enforced disappearances in domestic criminal legislation*, the WGEID stated that "[a]ll definitions of enforced disappearance in international law indicate that the victim is placed outside the protection of the law. This peculiarity of enforced disappearance entails the suspension of the enjoyment of all other human rights and freedoms of the victim and places him or her in a situation of complete defenselessness. This is strictly related to the right of everyone to be recognized as a person before the law, which is a prerequisite to enjoy all other human rights."<sup>122</sup>

The different legal systems of the world that have had to deal with cases of enforced disappearances have also recognized the multiple offenses inherent in the nature of the crime of enforced disappearance.

"[E]nforced disappearance of persons is a multi-offensive crime as it affects physical liberty, due process, the right to personal integrity, recognition of legal personality and, as already noted, the right to effective judicial protection. The validity of these rights is absolute, so their protection is regulated in the international human rights law and international humanitarian law."

The Constitutional Tribunal of Peru<sup>123</sup>

The Constitutional Tribunal of Peru has concluded that "[t]he practice of enforced disappearance is an attack on various fundamental rights. In addition to violating freedom of movement, it hinders access to the legal remedies designed to protect the violated rights, breaching the right to appear before a court in order to decide, as soon as possible, on the legality of detention, (the International Covenant on Civil and Political Rights, article 9.4 and the American Convention on Human Rights, article 7.6)."<sup>124</sup> In another judgment, the Constitutional Tribunal ruled that "[t]he

<sup>121</sup> UN Docs E/CN.4/1435, 13 March 1981, para. 186, and E/CN.4/1492, 31 December 1981, para. 167.

<sup>122</sup> *Report of the Working Group on Enforced or Involuntary Disappearances – Addendum: Best practices on enforced disappearances in domestic criminal legislation*, A/HRC/16/48/Add.3, 28 December 2010, para. 29.

<sup>123</sup> Judgment of 12 August 2005, Exp. No. 4677-2005-PHC/TC, Lima, *Case of Juan Nolberto Riseo Lazo*.

<sup>124</sup> The Constitutional Tribunal of Peru, Judgment of 18 March 2004, Exp. No. 2488-2002-HC/TC, Piura, *Case of Genaro Villegas Namuche*.

enforced disappearance of persons is a multi-offensive crime as it affects physical liberty, due process, the right to personal integrity, recognition of legal personality and, as already noted, the right to effective judicial protection. The validity of these rights is absolute, so their protection is regulated in the international human rights law and international humanitarian law. [...] Therefore, international law recognizes the enforced disappearance as one of the most serious forms of violations of human rights."<sup>125</sup>

As for the National Criminal Chamber of Peru, it has stated that the "expression of 'enforced disappearance' is only the *nomen iuris* for the systematic violation of multiple human rights"<sup>126</sup> and that this practice not only produces the arbitrary deprivation of freedom but endangers personal integrity, security and the very life of the detainee.

In a case of enforced disappearance brought before the Supreme Court of Argentina, the Attorney General's Office referred to the multitude of human rights violations that are involved in a disappearance: "[...]the term 'enforced disappearance of persons' is none other than the *nomen iuris* for the systematic violation of multiple human rights, whose protection the Argentine State has been committed to internationally since the beginning of the development of these rights in the international community itself, once World War II ended (The United Nations Charter of 26 June 1945, the Charter of the Organization of American States 30 April 1948, and the adoption of the Universal Declaration of Human Rights of 10 December 1948, and the American Declaration of the Rights and Duties of Man of 2 May 1948)."<sup>127</sup>

The Human Rights Chamber for Bosnia and Herzegovina, a tribunal established under the Dayton Peace Agreement that ended the Bosnian war in 1995<sup>128</sup>, has also recognized the pluri-offense nature of enforced disappearance. In the *Avdo and Esma Palic v Republika Srpska* case, which related to the disappearance of Col.

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<sup>125</sup> The Constitutional Tribunal of Peru, First Chamber, Judgment of 9 December 2004, Exp. No. 2798-04-HC/TC, Lima, *Gabriel Orlando Seea Navarrete Case*.

<sup>126</sup> Judgment of 20 March 2006, Exp. No. 111-04, *Case of Ernesto Rafael Castillo Páez*.

<sup>127</sup> Supreme Court of the Nation (Argentina), Decision by the Attorney General of the Nation, Nicolás Becerra, in Trial S. 1767. XXXVIII "Simón, Julio and others false imprisonment - Trial No. 17768-", Judgment of 14 June 2005.

<sup>128</sup> The Chamber is mandated to determine the final and binding way the alleged or apparent violations of the *European Convention on Human Rights* and the alleged or manifested discrimination in the enjoyment of any of the human rights enumerated in 15 international and European treaties ([www.hrc.ba](http://www.hrc.ba)).

Palic, the Chamber considered that the enforced disappearance of the officer had violated his rights to life, freedom from torture and and the rights to liberty and security of the person (articles 2, 3 and 5 of *European Convention for the Protection of Human Rights and Fundamental Freedoms*)<sup>129</sup>.

In Colombia, the Constitutional Court has classified the crime of enforced disappearance as a “multiple attack on fundamental rights of human beings in that [it] involves the denial of countless legal and social acts, from the simplest and most personal to that of recognizing [the victim’s] death”<sup>130</sup>. Likewise, the Constitutional Court has stated that “the definition of enforced disappearance seeks the protection of a multiplicity of legal rights, such as the right to life, liberty and security of the person, the prohibition of cruel, inhuman or degrading acts, the right not to be subjected to arbitrary arrest, detention or exile, the right to a fair trial and due process, the right to recognition of legal personality before the law and the right to humane treatment in detention, among others.”<sup>131</sup>

The Supreme Court of Justice of Venezuela has stated that the “crime [of enforced disappearance] is multi-offensive as it undermines several fundamental legal rights, among which are personal liberty, security of persons, human dignity and it gravely endangers the right to life as is stated literally in Article 2 of the Declaration on the Protection of All Persons from Enforced Disappearance”<sup>132</sup>.

## **b. Crime under International Law**

International instruments reaffirm the illegal nature of enforced disappearance under international law. In effect, they require that enforced disappearance be classified as a crime under national criminal law;<sup>133</sup> they stipulate that States must exercise their criminal jurisdiction, both territorially and extraterritorially,

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<sup>129</sup> Decision on admissibility and merits of 11 January 2001, *Case of Avdo and Esma Palic v. Republika Srpska*, Communication No. CH/99/3196.

<sup>130</sup> Judgment C-317/02 of 2 May 2002, Exp. D-3744, *Lawsuit of unconstitutionality against Article 165 (partial) of Law 599 2000 “Whereby the Penal Code is enacted.”*

<sup>131</sup> *Ibid.*

<sup>132</sup> Judgment of 10 August 2007, Exp. No. 06-1656, *Case of Application for Review - Marco Antonio Monasterios Pérez - Casimiro José Yáñez*, Reporting Judge: Carmen Zuleta de Merchán.

<sup>133</sup> Article 4 of the *International Convention for the Protection of All Persons from Enforced Disappearance*, Article III of the *Inter-American Convention on Forced Disappearance of Persons* and Article 4 of the *Declaration on the Protection of All Persons from Enforced Disappearance*.

regarding the alleged perpetrators of this international wrongful act;<sup>134</sup> and they reaffirm the application of the *aut dedere aut judicare* principle with respect to this crime<sup>135</sup>.

"Extrajudicial execution, enforced disappearance or torture are cruel, heinous acts, and serious violations of human rights, so they cannot go unpunished; in other words, the perpetrators and accomplices of conducts that constitute the violation of human rights, must not evade the legal consequences of their actions."

The Constitutional Tribunal of Peru<sup>136</sup>

The WGEID has repeatedly stated that enforced disappearance is an international crime<sup>137</sup>. The WGEID has stated that "[o]wing to the seriousness of acts of enforced disappearance a number of irrevocable rights are infringed by this form of human rights violation, with obvious consequences in criminal law. Recent developments in international law require clear priority to be given to action against the serious forms of violations of human rights in order to ensure that justice is done and that those responsible are punished."<sup>138</sup>

The International Criminal Tribunal for the former Yugoslavia has reiterated that enforced disappearance constitutes an international crime, as it is a cruel and inhuman act that is absolutely prohibited, and when committed massively or systematically, it constitutes a crime against humanity<sup>139</sup>.

Since 1988, the Inter-American Court of Human Rights has reiterated on several occasions that the enforced disappearance

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<sup>134</sup> Article 9 of the *International Convention for the Protection of All Persons from Enforced Disappearance*, Article IV of the *Inter-American Convention on Forced Disappearance of Persons* and Article 14 of the *Declaration on the Protection of All Persons from Enforced Disappearance*.

<sup>135</sup> Articles 9 - 11 of the *International Convention for the Protection of All Persons from Enforced Disappearance*, Articles V and VI of the *Inter-American Convention on Forced Disappearance of Persons* and Article 14 of the *Declaration on the Protection of All Persons from Enforced Disappearance*.

<sup>136</sup> Judgment of 18 March 2004, Exp. No. 2488-2002-HC/TC, Piura, *Case of Gerardo Villegas Namuche*, Legal Basis 3, para. 5.

<sup>137</sup> UN Docs E/CN.4/1999/62, 28 December 1998, para. 333; E/CN.4/2000/64, 21 December de 1999, para. 137; and E/CN.4/2002/79, 18 January 2002, executive summary.

<sup>138</sup> "General Comment on Article 17 of the Declaration", in *Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/2001/68, 18 December 2000, para. 31.

<sup>139</sup> Judgment of 14 January 2000, *Prosecutor v. Zoran Kupreskic and others*, Case No, IT-95-16-A, para. 566.



constitutes a crime under international law<sup>140</sup>. The Inter-American Court has stated that, given the particular gravity of this internationally recognized wrongful act, the prohibition of enforced disappearance and the obligation to punish those responsible for this crime are norms that “have attained the status of *jus cogens*.”<sup>141</sup>

“The list of behaviors considered international crimes whose sanction is considered of interest to the international community, has been expanded to include behaviors such as forced disappearances and summary executions, and through the recognition of universal jurisdiction for prosecution and punishment, whether have been committed wholly or partly in the territory of a State, his trial outside the jurisdiction of that State has been accepted as respectful of international law, even if the judgment comes from other States or International Tribunals.”

The Constitutional Court of Colombia<sup>142</sup>

Meanwhile, the Human Rights Committee has stated that it “considers that the State party is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearances of persons and violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations. This duty applies a fortiori in cases in which the

<sup>140</sup> Judgment of 22 November 2005, Case of *Gómez Palomino v. Peru*, Series C No. 136, para. 92; Judgment of 29 November 2006, *La Cantuta v. Peru*, Series C No. 162, para. 157; Judgment of 22 September 2006, Case of *Goiburú et al. v. Paraguay*, Series C No. 153, para. 82; Judgment of 23 November 2004, Case of *Hermanas Serrano Cruz v. El Salvador*, Series C No. 118, paras. 100 to 106; Judgment of 5 July 2004, Case of the 19 *Merchants v. Colombia*, Series C No. 109, para. 142; Judgment of 20 January 1989, Case of *Godínez Cruz v. Honduras*, Series C No. 5, paras. 163 - 167; and Judgment of 29 July 1988, Case of *Velásquez Rodríguez v. Honduras*, Serie C No. 4, para. 153.

<sup>141</sup> See, *inter alia*: Judgment of 29 November 2006, *La Cantuta v. Peru*, Series C No. 162, Para. 157; Judgment of 22 September 2009, Case of *Anzualdo Castro v. Peru*, Series C No. 202, para. 59; Judgment of 26 November 2013, Case of *Osorio Rivera and Family v. Peru*, Series C No. 274, para. 112; Judgment of 22 September 2006, Case of *Goiburú et al. v. Paraguay*, Series C No. 153, para. 84; Judgment of 25 May 2010, Case of *Chitay Nech and others v. Guatemala*, Series C No. 212, para. 86; Judgment of 1 September 2010, Case of *Ibsen Cárdenas and Ibsen Peña v. Bolivia*, Series C No. 217, para. 61; Judgment of 24 February 2011, Case of *Gelman v Uruguay*, Series C No. 221, para. 75; and Judgment of 24 November 2010, Case of *Gomes Lund and others (Guerrilha do Araguaia) v. Brazil*, Series C No. 219, para. 105.

<sup>142</sup> Judgment C-578/02 of 20 July 2002, Exp. LAT-223 *Revision of Law 742 of 5 June 2002 "Whereby the Rome Statute of the International Criminal Court is ratified, undertaken in Rome on the seventeenth (17) July of one thousand nine hundred and ninety-eight (1998)"*.

perpetrators of such violations have been identified<sup>143</sup>.” Likewise, the Committee has underlined the importance that States classify the crime of enforced disappearance in national criminal legislation<sup>144</sup>.

### **c. Permanent Crime and Violation of Human Rights**

International instruments<sup>145</sup> stipulate that enforced disappearance is a crime of a permanent nature. Article III of the IACFDP states that the crime of enforced disappearance “shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined”. In the preparatory work for the Convention, and following the analysis of a series of documents and records, it was stressed that this crime should be considered to be extended for the entire period in which the victim of the offense is missing: “‘continuing or permanent’ crime ‘as long as the fate or the whereabouts of the victim has not been determined’ ”<sup>146</sup>. For purposes of the statute of limitations, the ICPED emphasizes its “continuous nature”<sup>147</sup>. Likewise, its Article 24 (6) states that State Parties have the “obligation to continue the investigation until the fate of the disappeared person has been clarified,” underlining the permanent or continuous nature of the crime of enforced disappearance. In the preparatory work for the ICPED, based on universal and regional backgrounds and the severity of the crime, the independent expert Manfred Nowak concluded that enforced disappearance should be considered permanent and the crime unsolved where the victim’s whereabouts remain unknown “[..] given the particularly serious nature of the crime of enforced disappearance, [..] the relevant recommendations of the Working Group on Enforced or Involuntary Disappearances and the

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<sup>143</sup> Views of 13 November 1995, Communication No. 563/1993, Case of *Nydia Erika Bautista v. Colombia*, para. 8,6. Likewise, see Views of 29 July 1997, Communication No. 612/1995, *José Vicente and Amado Villafañe Chaparro, and others v Colombia*, para. 8,8.

<sup>144</sup> *Concluding Observations of the Human Rights Committee: Honduras*, UN Doc. CCPR/C/HND/CO/1, 13 December 2006, para. 5.

<sup>145</sup> *Declaration on the Protection of All Persons from Enforced Disappearance* (Art. 17,1), *Inter-American Convention on Forced Disappearance of Persons* (Art. III) and *International Convention for the Protection of All Persons from Enforced Disappearance* (Arts. 8 and 24).

<sup>146</sup> OAS/CP-CAJP, *Report of the Chairman of the Working Group Entrusted with Analyzing the Draft Inter-American Convention on Forced Disappearance of Persons*, OAS Doc. OAS/Ser.G/CP/CAJP-925/93 rev.1, de 25.01.1994, p. 10. Text quoted by the Inter-American Commission on Human Rights in its Annual report 1987-1988 and by the Inter-American Court of Human Rights in the Case of *Blake v. Guatemala*, Doc. Cit.

<sup>147</sup> Article 8.

provisions of the Declaration of the United Nations, the Inter-American Convention on Forced Disappearance of Persons and the draft Convention [..].”<sup>148</sup>

Likewise, the Inter-American Court<sup>149</sup> and Inter-American Commission on Human Rights<sup>150</sup>, the Human Rights Committee<sup>151</sup>, the European Commission of Human Rights<sup>152</sup>, the European Court of Human Rights<sup>153</sup> and the WGEID<sup>154</sup> have all characterized enforced disappearance as a permanent or continuous violation of human rights and crime.

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<sup>148</sup> *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*, UN Doc. E/CN.4/2003/71, 12 February 2003, Para. 82. Likewise, see *Report submitted by Mr. Manfred Nowak, independent expert charged with examining the existing international criminal and human rights framework for the protection of persons from enforced or involuntary disappearances, pursuant to paragraph 11 of Commission resolution 2001/46*, UN Doc. E/CN.4/2002/71, 8 January 2002, para 50 .

<sup>149</sup> See *inter alia*: Judgment of 26 November 2013, Case of *Osorio Rivera and Family v Peru*, Series C No. 274, para. 31; Judgment of 22 September 2009, Case of *Anzualdo Castro v Peru*, Series C No. 202, para. 59; Case of *Goiburú et al. v Paraguay*, Doc. Cit., Para. 83 and 85; Judgment of 2 July 1996, Case of *Blake v Guatemala (Preliminary Objections)*, Series C No. 27, para. 39; Case of the 19 *Merchants v Colombia*, Doc. Cit., para. 142; Case of *Hermanas Serrano Cruz v El Salvador (Preliminary Objections)*, Doc. Cit., par. 100 a 106; Judgment of 29 July 1988, Case of *Velásquez Rodríguez v Honduras*, Series C No. 4, para. 155, and Judgment of 19 August 2013, Case of *Gudiel Álvarez and others v. Guatemala*, Series C No. 262, para. 64.

<sup>150</sup> See, among others,: Report No. 7/00 of 24 February 2000, Case No. 10.337, *Amparo Tordecilla Trujillo v. Colombia*; Report No. 60/01 of 4 April 2001, Case No. 9111, *Ileana Del Rosario Solares Castillo and others v. Guatemala*; Report No. 58/01, 4 April 2001, Petition No. 9207, *Oscar Manuel Gramajo López v. Guatemala*; Report No. 30/96, 16 October 1996, Petition No. 10.897, Case of *Cruz Soza v. Guatemala*; Report No. 22/93, of 12 October 1993, Petition No. 9477, Case of *Familia Riseea v. Colombia*; Report No. 2/06 of 28 February 2006, Petition No. 12.130, Case of *Miguel Orlando Muñoz Guzmán v. Mexico*; Report No. 34/06, of 14 March 2006, Petition No. 875-03, Case of *Rita Irene Wald Jaramillo and others v. Panama*.

<sup>151</sup> Views of 2 November 2005, *Norma Yurich v. Chile*, Doc. Cit., para. 6.4.

<sup>152</sup> Decisions on Communication Nos. 7202/75, 7379/76, 8007/77, 7742/76, 6852/74, 8560/79 and 8613/79, 8701/79, 8317/78, 8206/78, 9348/81, 9360/81, 9816/82, 10448/83, 9991/82, 9833/82, 9310/81, 10537/83, 10454/83, 11381/85, 9303/81, 11192/84, 11844/85, 12015/86, and 11600/85, among others.

<sup>153</sup> See *inter alia*, Judgment of 10 May 2001, *Cyprus v. Turkey*, Application No. 25781/94, paras. 136, 150 and 158, and Judgment of 18 December 1996, *Loizidou v. Turkey*, Application No. 15318/89, para. 41.

<sup>154</sup> See *inter alia*: “General Comment on Article 17 of the Declaration”, Doc. Cit., Para. 28 and et seq.; and “General Comment on enforced disappearance as a continuous crime” in *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/16/48, 26 January 2011, para. 39 and et seq.

“In its consistent case law since 1988, the Court has established the continuing or permanent nature of the forced disappearance of persons, which has repeatedly been recognized by international human rights law. [...] This Court’s case law has been in the vanguard of the consolidation of a comprehensive perspective of the multiple offenses against the rights affected and the permanent or continuing nature of the offense of forced disappearance of persons in which the act of disappearance and its execution begin with the deprivation of liberty of the person and the subsequent absence of information on their whereabouts, and remain while the whereabouts of the disappeared person is not known or until their remains are identified with certainty [...]. The Court developed this characterization of forced disappearance even before the definition included in the Inter-American Convention on Forced Disappearance of Persons”

Inter-American Court of Human Rights<sup>155</sup>

The Inter-American Court has stated that, in accordance with its case law, the enforced disappearance of persons “constitutes an illegal act that gives rise to a multiple and continuing violation of several rights protected by the American Convention and places the victim in a state of complete defenselessness, giving rise to other related crimes”.<sup>156</sup> Likewise, the Court has considered that, due to this continuous nature, it is a crime that continues to exist until the whereabouts or fate of the missing person is established<sup>157</sup>. The Court has established “the perpetration of the disappearance begins with the deprivation of the person’s liberty and the ensuing lack of information on his fate, and remains until the whereabouts of the disappeared person are known and the facts have been clarified, [...] the relevant factor for the conclusion of an enforced disappearance is the establishment of the person’s whereabouts or the identification of his remains, and not the presumption of his decease.”<sup>158</sup>

The WGEID has stated that “[e]nforced disappearances are prototypical continuous acts. The act begins at the time of the abduction and extends for the whole period of time that the crime is not complete, that is to say until the State acknowledges the

<sup>155</sup> Judgment of 27 February 12, Case of *González Medina and Family Members v. Dominican Republic*, Series C No. 240, pPara. 50.

<sup>156</sup> Case of *Goiburú et al v Paraguay*, Doc. Cit., para. 82.

<sup>157</sup> Case of *Velásquez Rodríguez v. Honduras*, Doc. Cit., par. 155 and 181.

<sup>158</sup> Judgment of 26 November 2013, Case of *Osorio Rivera and Family v. Peru*, Series C No. 274, para. 31. In the same regard, see: Judgment of 1 September 2010, Case of *Ibsen Cárdenas and Ibsen Peña v. Bolivia*, Series C No. 217, para. 59; Judgment of 20 November 12, *Gudiel Álvarez et al. (“Diario Militar”) v. Guatemala*, Series C No. 253, para. 195.

detention or releases information pertaining to the fate or whereabouts of the individual.”<sup>159</sup>

The continuing nature of the offense of enforced disappearance has been equally recognized in national criminal law that criminalizes enforced disappearance<sup>160</sup> as well as in the jurisprudence of national tribunals of Peru<sup>161</sup>, Argentina<sup>162</sup>, Bolivia<sup>163</sup>, Chile<sup>164</sup>, Colombia<sup>165</sup>, Mexico<sup>166</sup>, Uruguay<sup>167</sup> and Venezuela<sup>168</sup>.

Permanent crimes are well recognized by contemporary criminal law. These are crimes whose consummation is prolonged in time, unlike the instantaneous crimes that are refined and consummated in a moment. As Jescheck states in the doctrine: “[t]he permanent offenses [...] are crimes whose effectiveness extends over time. The maintenance of the unlawful state created by the criminal action in permanent crimes depends on the will of the author in such a way that the act is constantly renewed.”<sup>169</sup> Italian academic Giuseppe Maggiore states that “[t]he permanent or continuous crime or

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<sup>159</sup> “General Comment on enforced disappearance as a continuous crime,” Doc. Cit., para. 39 and et seq.

<sup>160</sup> See, for example: Article 181-A of the Penal Code of the Bolivarian Republic of Venezuela; Article 201-Ter of the Penal Code of Guatemala; and Article 21 of Uruguay’s Law No. 18.026 of 25 September 2006, related to enforced disappearance in Uruguay.

<sup>161</sup> See The Constitutional Tribunal of Peru, Judgment of 18 March 2004, Exp. No. 2488-2002-HC, Case of *Genaro Villegas Namuche*; Judgment of 9 December 2004, Exp. No. 2798-04-HC/TC, *Gabriel Orlando Seea Navarrete Case*; and Judgment of 18 March 2004, Case of *Castillo Páez*. See likewise: National Criminal Court, Judgment of 20 March 2006, Exp. No. 111-04, *Case of Ernesto Rafael Castillo Páez*.

<sup>162</sup> Supreme Court of the Nation (Argentina), Judgment of 24 August 2004, Trial A.533.XXXVIII “Arancibia Clavel, Enrique Lautaro and others s/ aggravated homicide and asociación ilícita -Trial no. 259-”; and Judgment of 14 June 2005, Trial S. 1767. XXXVIII “Simón, Julio and others s/ false imprisonment – Trial No. 17768—”.

<sup>163</sup> Constitutional Court, Judgment of 12 November 2001, *Case of José Carlos Trujillo*.

<sup>164</sup> Supreme Court, Criminal Chamber, Judgment of 20 July de 1999, *Case of Caravana de la death*; Supreme Court, Full Chamber, Judgment of 8 August del 2000, *Case of de desafuero de Pinochet*; Santiago Appeals Court, Judgment of 4 January 2004, *Case of Sandoval*; Santiago Appeals Court, Fifth Chamber, Judgment of 5 January 2004, Rol No. 11.821-2003, *recursos de casación en la forma interpuestos por los procesados Fernando Laureani Maturana, a fs. 1604*; and *Miguel Krassnoff Marchenko, a fs. 1611*.

<sup>165</sup> Constitutional Court, Judgment C-580/02, 3 July 2002.

<sup>166</sup> Supreme Court of Justice, Thesis: P./J. 87/2004.

<sup>167</sup> Supreme Court of Justice Judgment of 18 October 2002, *Case of Juan Carlos Blanco*, and Judgment of 17 April 2002, *Case of Gavasso*.

<sup>168</sup> Supreme Court of Justice, Judgment of 10 August 2007, Exp. No. 06-1656, *Case of Application for Review - Marco Antonio Monasterios Pérez - Casimiro José Yáñez*.

<sup>169</sup> Hans-Heinrich Jescheck, *Tratado de Derecho Penal - Parte General*, Ed. Bosch, Barcelona, 1981, p. 237.

ongoing maintenance involves a typical situation of a certain duration in accordance with the will of the perpetrator during which the crime continues to be consummated until the illegal situation ceases. What is meant by the permanent consummation of the crime is in reference to the action and not its effects. Therefore, these definitions include 'it is in the power of the agent to either continue or stop the illegal situation; but while it remains, the crime itself is reproduced constantly in every instant'.<sup>170</sup> Likewise, Sebastian Soler states that the "particularity [of permanent crimes] is that the perpetration does not end once the offense is concluded, rather it lasts over time, so that 'every moment it endures can be considered to be the consummation of the same'.<sup>171</sup>

The character of a crime as a continuous offense has several consequences. Thus, as the crime is prolonged in time, at any time a writ of *habeas corpus* or other similar action can be initiated. In this regard, the Constitutional Tribunal of Peru has considered that in cases of enforced disappearance, a writ of Habeas Corpus can proceed at any time, as "the commission of the offense of enforced disappearance, which constitutes a crime of permanent nature until the fate or whereabouts of the victim has been established, the petition is upheld as we are not aware of the whereabouts of the victim despite the elapsed time, and, therefore, the right to the truth has been violated."<sup>172</sup> Likewise, with regard to individual criminal responsibility, as has been pointed out by the National Criminal Chamber of Peru, "for its duration, all those involved in the crime will be considered co-perpetrators or accomplices, because even with the cessation of the actual offense, its consummation endures"<sup>173</sup>. Similarly, the character of permanent crime has concrete consequences for its investigation (See Chapter IV "Investigation") and for the extinguishment of the criminal action (See Chapter VI "Extinguishment of Criminal Action"). In this regard, an Argentine court noted that "enforced disappearance of persons is understood as binary, consisting of, firstly, the

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<sup>170</sup> Giuseppe Maggiore *Derecho penal*, Free translation into English based on the Spanish translation by Ortega Torres, Volumen 1, Bogotá, 1956, p. 295; *op. cit.* in Decision by the Attorney General of the Nation in Trial "Simón, Julio and others false imprisonment -Trial No. 17768-", Judgment of 14 June 2005 of the Supreme Court Argentina.

<sup>171</sup> Sebastián Soler, *Derecho Penal Argentino*, Ed. TEA, volume II, Buenos Aires, 1963, p. 160.

<sup>172</sup> Judgment of 2 July 2004, Exp. No. 2529-2003-HC/TC, Lima, *Case of Peter Cruz Chávez*.

<sup>173</sup> Judgment of 20 March 2006, Exp. No. 111-04, *Case of Ernesto Rafael Castillo Páez*.

'imprisonment of one or more persons' [...] and secondly, the 'lack of information or refusal' to recognize it, therefore, this lack of information regarding the whereabouts of the missing person, means that the consummation of the offense continues uninterrupted until [the victim] appears and, thus, the consummation of the same is maintained."<sup>174</sup>

#### **4. MULTIPLE VICTIMS**

From the subjective perspective, international instruments and international jurisprudence have considered that family members are victims of the crime in addition to the actual disappeared persons. Thus, International Law establishes a broad concept of a victim for the crime of enforced disappearance. Indeed, enforced disappearance causes great suffering to the missing person's family due to the uncertainty regarding his or her fate or whereabouts. This reality was recognized by the General Assembly of the United Nations from its first Resolution on disappearances in 1978, when it expressed it was deeply moved by "the anguish and regret that these [disappearances] cause to the relatives of missing persons, especially spouses, children and parents"<sup>175</sup>.

The recognition of the anguish, pain and severe suffering of the relatives of the disappeared due to enforced disappearances has been translated into legal instruments. Thus, the DED specifically states that "any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families"<sup>176</sup>.

Meanwhile, the ICPED stipulates that for the purposes of this Convention, "victim" means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance"<sup>177</sup>. Certainly, this clause is broader than that of the Declaration. In this regard, it should be noted that during the drafting process of this instrument, many States stressed that "the concept of victim could not simply be that of missing persons" and must encompass relatives, including spouses, children, parents and siblings of the disappeared, as "people for whom the disappearance

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<sup>174</sup> Oral Trial in Federal Criminal Court No. 6 of the Federal Capital, Judgment of 30 April 2009, Trial no. 1278, "REI, Víctor Enrique abduction of 10 year old minor".

<sup>175</sup> Resolution No. 33/173, "Disappeared persons", 20 December 1978. In this regard see, for example, Resolutions 43/159 1988, 44/160 of 1990, 46/125 of 1991 and 47/132 of 1992 of the General Assembly.

<sup>176</sup> Article 1 (2).

<sup>177</sup> Article 24 (1).

had harmful consequences.”<sup>178</sup> Thus, the Convention expanded the concept of what it means to be a victim of enforced disappearance, in accordance with developments in international law<sup>179</sup>.

International case law is unanimous in considering that the anguish and suffering caused to the family by the disappearance of their loved one and by the continuing uncertainty concerning his or her fate and whereabouts are a form of torture or other cruel and inhuman treatment. This has been stated on several occasions by the Human Rights Committee<sup>180</sup>, the European Court of Human Rights<sup>181</sup>, the Inter-American Commission on Human Rights<sup>182</sup>, the

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<sup>178</sup> *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance Reporting Chairman: Bernard Kessedjian (Francia)*, UN Doc. E/CN.4/2003/71, 12 February 2003, para. 83.

<sup>179</sup> Indeed, the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* stipulate that “victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term “victim” also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.” (Article 8).

<sup>180</sup> See *inter alia*: Views of 21 July 1983, Communication No.107/1981, *María del Carmen Almeida de Quinteros v. Uruguay*, para. 14; Views of 25 March 1996, Communication No. 542/1993, *Katombe L. Tshishimbi v. Zaire*, para. 5.5; Views of 25 March 1996, Communication No. 540/1996, *Ana Rosario Celis Laureano v. Peru*, para. 8.5; Views of 16 July 2003, Communication No. 950/2000, *Jegatheeswara Sarma v. Sri Lanka*, para. 9.5; Views of 30 March 2006, Communication No. 992/2001, *Louisa Bousroual v. Algeria*, para. 9.8; Views of 10 August 1994, Communication No. 449/1991, *Mójica v. Dominican Republic*, para. 5.7; Views of 30 March 2006, Communication No.1196/2003, *Boucherf v. Algeria*, para. 9.6; and Views of 19 July 2013, Communication No. 1865/2009, *Mukunda Sedhai v. Nepal*, para. 8.4.

<sup>181</sup> See *inter alia*, Judgment of 25 May, Case No, 15/1997/799/1002, *Kurt v. Turkey*, paras. 130-134.

<sup>182</sup> See, among others, *Annual report of the Inter-American Commission on Human Rights, 1977*, OAS/Ser.L/V/II.43, doc.21, corr.1, 20 April 1978; *Annual report of the Inter-American Commission on Human Rights, 1978*, OAS/Ser.L/II.47, doc. 13 rev., 29 June 1979; *Report on the Situation of Human Rights in Argentina, 1980*, OAS/Ser.L/V/II/49, doc. 19, p. 59; *Annual report of the Inter-American Commission on Human Rights, 1980-1981*, OAS/Ser.L/V/II.54, doc.9 rev.1 de 16 October 1981; *Annual report of the Inter-American Commission on Human Rights 1985-1986*, OAS/Ser.L/V/II.68, Doc. 8 rev 1, 6, p. 205, 26 September de 1986.



Inter-American Court of Human Rights<sup>183</sup> and the WGEID<sup>184</sup>.

The Inter-American Court of Human Rights has stated in this regard that “[i]n cases involving the forced disappearance of persons, [...] the violation of the mental and moral integrity of the next of kin is, precisely, a direct consequence of such forced disappearance, which inflicts upon them great suffering, compounded by the constant refusal of State authorities to provide information about the victim’s whereabouts or to conduct an effective investigation into the facts of the case.”<sup>185</sup> The Court has established that “this allows it to be presumed that the mental and moral integrity of the family members is harmed. [...] this presumption is established *juris tantum* as regards mothers and fathers, children, spouses, and permanent companions, provided that this is in keeping with the specific circumstances of the case. [...] this presumption is also applicable to the siblings of the disappeared victims, unless the specific circumstances of the case reveal otherwise.”<sup>186</sup>

Likewise, the Court has stated that “it is considered that the relatives of the disappeared victims are victims of the phenomena of forced disappearance, by which they are entitled to have the facts investigated and the responsible prosecuted and punished.”<sup>187</sup>

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<sup>183</sup> See *inter alia*: Case of *Goiburú et al. v. Paraguay*, Doc. Cit., para. 97; Case of *Blake v. Guatemala*, Doc. Cit., para. 114 and Case of *Gómez Palomino v. Peru*, Doc. Cit., para. 61.

<sup>184</sup> See *inter alia*: Reports of the Working Group: UN Docs. E/CN.4/1984/21, para. 172; E/CN.4/1985/15, para. 291; E/CN.4/1990/13, para. 339; and “General Comment on Article 19 of the Declaration on the Protection of All Persons from Enforced Disappearance”, UN Doc. E/CN.4/1998/43, para. 72.

<sup>185</sup> Judgment in Case of *Gómez-Palomino v. Peru*, Doc. Cit., para. 61. See also, among others: Judgment of 26 November 2013, *Case of Osorio Rivera and Family v Peru*, Series C No. 274, para. 227; Judgment of 29 November 2006, *La Cantuta v. Peru*, Series C, No. 162 para. 58; Judgment of 30 May 1999, *Case of Castillo Petruzzi and others v. Peru*, Series C No. 57, para. 207; Judgment of 22 September 2002, *Case of Goiburú et al. v. Paraguay*, Series C No. 153, para. 97; Judgment of 5 July 2004, *Case of the 19 Merchants v. Colombia*, Series C No. 109, para. 211; Judgment of 25 November 2000, *Case of Bámaca Velásquez v. Guatemala*, Series C No. 70, para. 160; Judgment of 24 January 1998, *Case of Blake v. Guatemala*, Series C No. 36, para. 114; and Judgment of 25 May 2010, *Case of Chitay Nech and others v. Guatemala*, Series C no. 212, para. 220.

<sup>186</sup> Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Serie C No. 274, para. 227.

<sup>187</sup> Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 118.

"[T]he continued deprivation of the truth regarding the fate of a disappeared person constitutes cruel, inhumane and degrading treatment against close next of kin. It is clear, for this Tribunal, the connection of the next of kin's suffering with the violation of the right to truth [...], which enlightened the complexity of the forced disappearance and the multiple effects it produced."

Inter-American Court of Human Rights<sup>188</sup>

The Inter-American Commission on Human Rights concluded that enforced disappearance "also affects the entire circle of family and friends who wait months and sometimes years for some news of the victim's fate."<sup>189</sup> The Commission has also stated that "[b]ecause of the nature of this practice, the victims are not only the persons that have disappeared, but also their parents, spouses, children and other family members, who are placed in a situation of uncertainty and anguish that goes on for many years."<sup>190</sup>

From its early reports, the WGEID has considered that enforced disappearance presupposed the violation of numerous rights of the families of the missing, including their right to family life as well as other economic and social rights<sup>191</sup>. Thus, the WGEID has concluded that the relatives of the disappeared are also victims of the crime of enforced disappearance, as they are subject to an "agonizing uncertainty" as well as other relatives and dependents of the deceased, in such a way that there is a "widening circle of victims of a disappearance"<sup>192</sup>. In this regard, the WGEID has stated that anguish and sorrow caused by the enforced disappearance to the family constitutes "a suffering that reaches the threshold of torture, [...] [therefore] the State cannot restrict the right to know the truth about the fate and the whereabouts of the disappeared as such restriction only adds to, and prolongs, the continuous torture inflicted upon the relatives."<sup>193</sup> Likewise, the WGEID has stated that it "does not differentiate between direct and indirect victims,

<sup>188</sup> *Ibid.*, para. 113.

<sup>189</sup> *Annual report of the Inter-American Commission on Human Rights - 1978*, OAS/Ser.L/II.47, doc. 13 Revs. 1, 29 June 1979, Part II, p. 23.

<sup>190</sup> *Annual report of the Inter-American Commission on Human Rights, 1986-1987*, Doc. Cit., Chapter V, "II. Inter-American Convention on Forced Disappearance of Persons".

<sup>191</sup> *Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/1492, 31 December 1981, par. 165 and et seq.

<sup>192</sup> UN DOC. E/CN.4/1990/13, para. 339.

<sup>193</sup> "General Comment on the Right to the Truth in relation to enforced disappearance", para. 4, in *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/16/48, 26 January 2011, para. 39.

but rather considers that both the disappeared person and those who have suffered harm as a result of the disappearance are to be considered victims of the enforced disappearance and are therefore entitled to obtain reparation. [...] [Likewise,] the term 'victim' also includes the immediate family or dependents of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization."<sup>194</sup>

"Family members' victimization becomes even greater when men, who mainly suffer the fate of enforced disappearances, were the head of household. Here, enforced disappearance of men results in entire families becoming victims of enforced disappearances. As the family structure is disrupted, women are negatively affected economically, socially and psychologically. The emotional upheaval is thus exacerbated by material deprivation, made more acute by the costs incurred should they decide to undertake a search for their love[d] ones. Furthermore, they do not know when—if ever—their loved one is going to return, which makes it difficult for them to adapt to the new situation. [...] Therefore, economic and social marginalization is frequently the result of an enforced disappearance. In such circumstances, several economic, social and cultural rights enshrined in the Universal Declaration of Human Rights and in other instruments, such as the rights to health, education, social security, property and family life are violated."

Working Group on Enforced or Involuntary Disappearances<sup>195</sup>

The feeling of insecurity generated by this practice not only affects families and relatives of the disappeared, but also causes an impact on the communities or groups to which the disappeared persons belong, affecting society itself. Rightly, the WGEID has concluded that enforced disappearances also have devastating effects on the societies in which it is practiced<sup>196</sup>. This same observation was made by the 24<sup>th</sup> International Conference of the Red Cross and Red Crescent, recalling that enforced disappearances caused not only great suffering to the families of the disappeared "but also to society".<sup>197</sup> Thus, the practice of enforced disappearance is characterized by the creation of a climate of terror that profoundly

<sup>194</sup> *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/22/45, 28 January 2013, paras. 51 and 52.

<sup>195</sup> *General comment on women affected by enforced disappearances adopted by the Working Group on Enforced or Involuntary Disappearances at its ninety-eighth session (31 October – 9 November 2012)*, A/HRC/WGEID/98/2, 14 February 2013, para. 12.

<sup>196</sup> UN Doc E/CN.4/1985/15, para. 291.

<sup>197</sup> 24th International Conference of the Red Cross and the Red Crescent, Manila, 1981, Resolution II "Forced or involuntary disappearances".

affects the communities of the disappeared and that of his or her family as well as the families of the disappeared themselves.

The status of the families of persons forcibly disappeared as victims *per se* has also been reaffirmed by national jurisprudence. Thus, the Constitutional Tribunal of Peru has reiterated that “the enforced disappearance of persons involves generating a cruel sense of uncertainty for both the disappeared person and their family, and the latter become direct victims of this serious incident.”<sup>198</sup> Whereas, the Colombian Constitutional Court has considered that, in accordance with international law, “[t]he next of kin of victims of human rights violations such as the crime of enforced disappearance have the right to be considered victims for all legal, constitutional and conventional effects.”<sup>199</sup> Likewise, in accordance with the evolution of international law, the Colombian Court has stated that family members of forcibly disappeared persons are direct victims of the crime of enforced disappearance and have “rights to truth, justice and reparation, which are also recognized by national and international law, as well as by *jus cogens*”.<sup>200</sup>

## **5. ENFORCED DISAPPEARANCE, ABDUCTION AND APPROPRIATION OF CHILDREN**

Based on its experience, the WGEID has identified “three particular situations in which children become victims of enforced disappearance. The first involves children who are themselves subjected to enforced disappearance [...]. A second particular situation occurs when children are born during the captivity of a mother subjected to enforced disappearance. In this case, children are born in secret detention centers and, most of the time, documents attesting to their true identity are suppressed or altered. Finally, children are victimized by the fact that their mother, father, legal guardian or other relative is subjected to enforced disappearance. An enforced disappearance creates a network of

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<sup>198</sup> Judgment of 9 April 2004, Exp. No. 2798-04-HC/TC, Lima, *Gabriel Orlando Seea Navarrete Case* and Judgment 12 August 2005, Exp. No. 4677-2005-PHC/TC, Lima, *Case of Juan Nolberto Riseo Lazo*.

<sup>199</sup> Judgment C-370/06 of 18 May 2006, *Exp. D-6032 Lawsuit of unconstitutionality against Articles 2, 3, 5, 9, 10, 11.5, 13, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 31, 34, 37 numerals 5 and 7, 46, 47, 48, 54, 55, 58, 62, 69, 70 and 71 of Law 975 2005*, para. 6.2.4.2.8.

<sup>200</sup> Judgment C-620/11 of 18 August 2011, LAT-363, *Lawsuit of Constitutionality of Law 1418 issued on 1 December 2010, whereby the “International Convention for the Protection of All Persons from Enforced disappearance” is adopted, in New York, 20 December 2006*.

victims that extends far beyond the individuals that are directly subjected to this human rights violation."<sup>201</sup>

### **a. Enforced disappearance of children**

The first situation evoked by the WGEID, that of the forced disappearance of children was identified early by the Inter-American Commission on Human Rights<sup>202</sup> as well as by the Working Group<sup>203</sup>. In the Argentinean context, the Inter-American Commission noted that this practice means that "children are direct victims and specific 'targets' of the repressive action, even though their kidnapping and theft is meant primarily to punish their parents or grandparents."<sup>204</sup>

"In addition to these three situations of enforced disappearance, the Working Group is aware of other situations in which children may become victims of enforced disappearance. If State agents are involved with or support private groups, directly or indirectly, or consent or acquiesce to the activities of criminal organizations in the abduction or kidnapping of child migrants or in child trafficking, notably for the purpose of child labor, sexual exploitation or transfer of organs of the child, this may be considered, in certain circumstances, an enforced disappearance. Children living and/or working on the street and children placed in care institutions may also be in a particularly vulnerable situation, potentially becoming victims of enforced disappearance. The forced recruitment of child soldiers also places them in a potential situation of enforced disappearance, especially when they are recruited by armed groups distinct from the regular armed forces of a State but operating with the support, consent or acquiescence of the State."

Working Group on Enforced or Involuntary Disappearances<sup>205</sup>

<sup>201</sup> *General Comment on children and enforced disappearances adopted by the Working Group on Enforced or Involuntary Disappearances at its ninety-eighth session (31 October – 9 November 2012)*, A/HRC/WGEID/98/1, 14 February 2013, para. 2.

<sup>202</sup> See, for example: *Annual report of the Inter-American Commission on Human Rights*, OAS/Ser.L/V/II.47, doc. 13 rev.1 of 29 June 1979; *Report on the Situation of Human Rights in Argentina*, OAS/Ser.L/V/II.49, doc. 19 of 11 April 1980.

<sup>203</sup> See for example, the *First Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/1435, 22 January 1981, paras. 170 to 172.

<sup>204</sup> "A study about the situation of minor children of disappeared persons who were separated from their parents and who are claimed by members of their legitimate families", in *Annual Report of the Inter-American Commission on Human Rights, 1987-1988*, OAS/Ser.L/V/II.74, Doc. 10, rev. 16 September 1988.

<sup>205</sup> *General comment on children and enforced disappearances*, Doc. Cit., para. 3.

The Human Rights Committee has considered that, in addition to the rights that are violated with each enforced disappearance, when the victim is a minor their right as a child to “special protection measures”, enshrined in Article 24 of the *International Covenant on Civil and Political Rights*, is implicated.<sup>206</sup>

This situation falls within the definition of the crime of enforced disappearance. Moreover, the ICPED stipulates that the status of a minor as victim of the crime of disappearance should be considered by States as an aggravating circumstance of the crime.<sup>207</sup> Likewise, the WGEID has stated that “States need to consider as an aggravating factor that the person who disappeared was a child, taking into consideration that enforced disappearances of children are an extreme form of violence against children.”<sup>208</sup>

### **b. The children of disappeared mother or father**

The WGEID evokes another situation, when a minor is a victim due to the forced disappearance of his or her parents, guardians or relatives, which is directly related to the multi-offensive nature of the crime of enforced disappearance, in which family members of the disappeared are also victims. Notwithstanding, given its specific condition, the damage inflicted on children by the disappearance of their parents or relatives is particularly serious.

In this regard, the WGEID has stated that these situations harm “in particularly grave ways the mental, physical and moral integrity of children. [Children] experience feelings of loss, abandonment, intense fear, uncertainty, anguish, and pain, all of which could vary or intensify depending on the age and the specific circumstances of the child. [...] [The separation of children from their families has specific and especially serious effects on their personal integrity that have a lasting impact, and causes great physical and mental harm. [...] In the case of enforced disappearances of the children’s parents, many of the child rights, including economic, social and cultural ones, are affected. In many occasions, children are prevented from exercising their rights due to the legal uncertainty created by the absence of the disappeared parent. This uncertainty has many legal consequences, including effects on: the right to identity, the guardianship of underage children, the right to social allowances

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<sup>206</sup> Views of 26 March 1996, Communication No. 540/1993, *Celis Laureano v. Peru*, para. 8.7.

<sup>207</sup> Article 7 (2)(b).

<sup>208</sup> *General Comment on children and enforced disappearances*, Doc. Cit., para. 9.

and management of property of the disappeared person. In those circumstances, many obstacles are created to children with regard to the enjoyment of their rights, including their right to education, health, social security and property. A number of children who are relatives of disappeared persons are also stigmatized for their association with someone who is considered a "subversive" or "terrorist". Retaliation and social stigmatization are particularly grave given the special situation of children, while increasing their psychological and emotional trauma."<sup>209</sup>

"Experience shows that children are often particularly affected by the crime of enforced disappearance. They suffer most if their mother, father or even both parents disappear, and they may live all their childhood in a constant situation of uncertainty, between hope and despair."

Manfred Nowak<sup>210</sup>

Meanwhile, in the case of a girl whose father has been forcibly disappeared, the Inter-American Court of Human Rights stated that "the Court notes that the events have had consequences for the development of Mr. García's daughter Alexandra, who was in her infancy at the time of the disappearance and, therefore, had to grow up in an environment dedicated to the search for justice, and of suffering and uncertainty owing to the failure to determine her father's whereabouts."<sup>211</sup>

### **c. Abduction and/or appropriation of minors**

One of the particularly serious criminal phenomena is the "abduction" of a child born during the captivity of a disappeared mother or a child disappeared along with his parents and then was "appropriated" or given away for "adoption" under another identity. The problem is complex: sometimes, foster families are unaware of the fact that the children have been violently stolen from their parents, at other times, these families know the circumstances or even may be the actual perpetrators of the forced disappearance of parents; often, foster families come from other countries or, they move abroad following their participation in the abduction of the

<sup>209</sup> *Ibid.*, paras. 6 and 9.

<sup>210</sup> *Report submitted by Mr. Manfred Nowak (...), Doc. Cit.*, para. 92.

<sup>211</sup> Judgment of 29 November 2012, *Case of García and Family Members v. Guatemala*, Series C No. 258, para. 166.

child<sup>212</sup>.

This practice has been associated with the military regimes in the Southern Cone during the 1970s and 1980. Notwithstanding this criminal phenomenon has been recorded in different contexts, in other countries of the hemisphere <sup>213</sup> as well as in other regions of the world, and its persistence continues to be of concern to the international community.<sup>214</sup>

The Inter-American Commission on Human Rights has consistently characterized this practice as a "violation of fundamental norms of international law. [It] violates the right of direct victims—in this case the children—to their identity and to their name (Article 18 of the American Convention on Human Rights [...] and to be recognized legally as persons (Art. 3 Convention, Art. XVII of the American Declaration of the Rights and Duties of Man [...])). Likewise, it violates the right of children and pregnant women to enjoy special measures of protection, attention and assistance (Art. 19 Convention and Art. VII Declaration). Furthermore, these actions constitute an abuse of the international law standards protecting the family (Arts. 11 and 17 Convention and Arts. V and VI Declaration). Neither these rights nor those specifically devoted to the child in other international instruments are subject to suspension in situations of emergency threatening the independence or security of the State (Art. 27 (2), Convention)."<sup>215</sup> Meanwhile, the Human Rights Committee has considered that this practice violates the

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<sup>212</sup> In this regard, see, among others: Working Group on Enforced or Involuntary Disappearances, Reports E/CN.4/1435, 22 January 1981 (para. 170 and 171); E/CN.4/1492, 31 December 1981; and *General comment on children and enforced disappearances*, Doc. Cit.; Inter-American Commission on Human Rights, "A Study about the situation of minor children of disappeared persons who were separated from their parents and who are claimed by members of their legitimate families" ", Doc. Cit., p. 349 and et seq.; *Report submitted by Mr. Manfred Nowak (...)*, Doc. Cit.; Ramón Torres Molina, "La problemática específica of the niños desaparecidos", in *La desaparición - Crimen de Lesa Humanidad, Asamblea Permanente por los Derechos Humanos, Buenos Aires, 1987*, p. 137-148; *Grupo de iniciativa, La desaparición como Crimen de Lesa Humanidad, El "Nunca Más" and la comunidad internacional*, Buenos Aires, 1989; Julio E. Nosiglia, *Botín de guerra*, Ed. Abuelas de Plaza May /Cooperativa Tierra Fértil, Buenos Aires, 1985.

<sup>213</sup> As in, for example, El Salvador and Colombia.

<sup>214</sup> See, for example, UN General Assembly Resolutions 51/94 1996 (para. 14), 53/150 1998 (Para. 14), 55/103 2000 (Para. 13), 57/215 2002 (para. 15), and 59/200 2004 (para. 15). See also, Human Rights Council Resolution 7/12, (2008).

<sup>215</sup> "A study about the situation of minor children of disappeared persons who were separated from their parents and who are claimed by members of their legitimate families", in *Annual report of the Inter-American Commission on Human Rights, 1987-1988*, OAS/Ser.L/V/II.74, Doc. 10, rev.1, 16 September 1988, Section I(2)(e)(3).



rights to privacy, to the protection of family and to special protection and to identity of the child, articles 17, 23 (1) and 24 of the *International Covenant on Civil and Political Rights*<sup>216</sup>.

The Inter-American Court of Human Rights has characterized this practice as a violation of the rights to legal personality, life, family, identity and name, to special measures of protection for children, the personal integrity and protection of honor and dignity of the child<sup>217</sup>. Likewise, the Court has stated that “the abduction of children by State agents in order for them to be illegitimately delivered and raised by another family, modifying their identity and without informing their biological family about their whereabouts [...] constitutes a complex act that involves a series of illegal actions and violations of rights to conceal the facts and impede the restoration of the relationship of the minors of age and their family members.”<sup>218</sup> Likewise, in a case in which the mother, who was forcibly disappeared and was extrajudicially executed after giving birth, the Court also noted that the facts of the case “reveal a particular conception of women that threatens freedoms entailed in maternity, that which forms an essential part of the free development of the female personhood. [...] [and] can be classified as one of the most serious and reprehensible forms of violence against women [...] caused damage to her physical and psychological suffering, and contributed to her feelings of serious anguish, desperation, and fear she experienced by living with her daughter in a clandestine detention center, where one normally could hear the torture inflicted on the other prisoners [...] and not knowing the fate of her daughter when they were separated, as well as being unable to foresee her final fate. All this constitutes an affectation of such magnitude that it should be qualified as the most serious form of violation of her psychological integrity.”<sup>219</sup> The Court also considered that with respect to other family members, this practice represented a “serious interference by the State in the family” and a violation of the rights to the mental integrity and protection of the family<sup>220</sup>.

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<sup>216</sup> Views of 3 April 1995, Communication 400/1990, *Mónaco de Gallicchio v. Argentina*, Para. 10.4.

<sup>217</sup> Judgment of 24 February 2001, *Case of Gelman v. Uruguay*, Series C No. 221.

<sup>218</sup> *Ibid.*, para. 120.

<sup>219</sup> *Ibid.*, par. 97 and 98

<sup>220</sup> *Ibid.*, par. 133 to 136.

For many years, the response in International Law to this serious criminal phenomenon was quite deficient. In international instruments, the issue of children born during the captivity of their mother who was subjected to enforced disappearance, and who were generally “stolen,” “appropriated” or “given” in adoption was focused around the perspective of child abduction and international cooperation for the identification, location and return of these minors<sup>221</sup>. Since the 1980s, given the specificity of both the crime and its victims, not to mention the human rights it violates, the Inter-American Commission on Human Rights noted the need to criminalize the abduction and appropriation of children born during the captivity of their forcibly disappeared mothers and to criminalize the removal or alteration of civil status of these children<sup>222</sup>. Thus, in its draft Inter-American Convention against Enforced Disappearance in 1988, the Commission included a clause in this regard<sup>223</sup>. Notwithstanding, the proposed provision was not retained and the IACFDP was limited to deal with the problem as part of international cooperation 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”<sup>224</sup>.

The DED addressed the issue by requiring that “[I] States shall prevent and suppress the abduction of children of parents subjected

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<sup>221</sup> Such as, for example, the *Convention on the Civil Aspects of International Child Abduction* declared the transfer of children from one country to another and the holding of children abroad to be a violation of right of custody (Art. 3). This issue was dealt with in similar terms by the *Inter-American Convention on the International Return of Children*. The *Convention on the Rights of the Child*, states that “States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form” (art. 35). Similar treatment of the issue is provided by the *Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally* (Art. 19) and the *African Charter on the Rights and Welfare of the Child* (Art. 29). The *Inter-American Convention on Forced Disappearance of Persons* handles the matter under the sole optic of international cooperation in the search for the children (Art. XII).

<sup>222</sup> “A study about the situation of minor children of disappeared persons who were separated from their parents and who are claimed by members of their legitimate families”, Doc. Cit.

<sup>223</sup> Article 19 of the draft of the Convention stipulated that “The States Parties shall combine their efforts to prevent and sanction the appropriation of children of disappeared parents or children born during their mother’s clandestine captivity and their release to other families for irregular adoption. To that end, they shall punish, in their domestic law, crimes involving the alteration of or the suppression of proof of the civil status of any person and the abduction of minors.”

<sup>224</sup> Article XII.

to enforced disappearance and of children born during their mother's enforced disappearance [... and that the] abduction of children of parents subjected to enforced disappearance or of children born during their mother's enforced disappearance, and the act of altering or suppressing documents attesting to their true identity, shall constitute an extremely serious offence, which shall be punished as such."<sup>225</sup>

However, the ICPED dealt with the matter in greater detail. Article 25 (1) of the Convention states that "[e]ach State Party shall take the necessary measures to prevent and punish under its criminal law: a ) The wrongful removal of children who are subjected to enforced disappearance, children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance; b ) The falsification, concealment or destruction of documents attesting to the true identity of the children referred to in subparagraph ( a ) above." During the process of negotiating this treaty, governmental delegations underlined the need to define these acts as criminal<sup>226</sup> and the WGEID, when it commented on the Draft Convention welcomed the obligation assumed by States Parties "to prevent and punish the abduction of children whose parents are victims of enforced disappearance and of children born during their mother's disappearance"<sup>227</sup>.

The region has developed important case law concerning the matter, especially in Argentina<sup>228</sup>. Thus, an Argentinean court ruled that with this practice, "what is at stake here are the rights and guarantees of children, the right to life with dignity, to prevent

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<sup>225</sup> Article 20 (1 and 3).

<sup>226</sup> *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance Reporting-Chairman: Sr. Bernard Kessedjian (France)*, E/CN.4/2003/71, 12 February 2003, para. 89.

<sup>227</sup> UN Doc. E/CN.4/2001/68, Annex III, p. 35.

<sup>228</sup> See *inter alia*: Oral Trial in Federal Criminal Court No. 6 of the Federal Capital, Judgment of 30 April 2009, Trial no. 127, "REI, Víctor Enrique abduction of 10 year old minor"; Oral Federal Criminal Court No. 6 of the Federal Capital, Judgment of 17 September 12, Trials N 1351, 1499, 1584, 1604, 1730 and 1772 ; Federal Criminal and Correctional Court, Chamber II, Judgment of 9 November de 2001, Trial no. 17.890 "Del Cerro, J. A. complaint ", Federal Court No.4, Sec. NO. 7, Reg. N 19.191; Federal criminal and correctional court No. 1, Secretary 2, San Isidro, Decision of July 1998, Trial no. 1284/85, "Videla, Jorge Rafael and others allegeded infraction of arts. 146, 293 and 139, inc. 2. Of the Penal Code"; Oral Trial in Federal Criminal Court No. 5 Buenos Aires, Judgment of 16 September 2014, Trial Pablo Gaona Miranda;

someone helpless from being stripped of his or her uniqueness as a person, the inalienable right of any individual to know the truth about his or her own history and to grow up with his or her family; not to mention the rights of family members to have their defenseless children with them."<sup>229</sup>

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<sup>229</sup> Judgment First Instance of Federal Judge Juan M. Ramos Padilla, 19 January 1988, in Trial no. 6681.

## CHAPTER II: EXTRAJUDICIAL EXECUTION

“The rights to life, liberty and personal security, are the very lifeblood and foundation of all human rights; for this reason, their validity must be respected unreservedly, without it being morally acceptable to stipulate exceptions or justify their conditioning or limitation. Their respect and guarantees for their free and full exercise are a responsibility that falls to the State. In the case that the legal system does not have an explicit legal norm to guarantee them, such legislative or other measures necessary to implement them should be adopted, in accordance with constitutional processes and the provisions of the American Convention, in order to make them effective.”

The Constitutional Tribunal of Peru<sup>230</sup>

### 1. RIGHT TO LIFE AND ARBITRARY DEPRIVATION OF LIFE

The right not to be arbitrarily deprived of life is enshrined universally<sup>231</sup>. Clearly, this right is fundamental and the touchstone for the exercise of all other rights. Hence, this right is enshrined as a non-derogable right<sup>232</sup>. The fundamental nature of this right has been widely reiterated by international jurisprudence. Therefore, the Human Rights Committee has concluded that the right not to be arbitrarily deprived of life “is the supreme law of human beings. It follows that the deprivation of life by state authorities is a very serious matter”<sup>233</sup>. Meanwhile, the Inter-American Court of Human Rights has repeatedly held that “the right to life is a fundamental human right, whose full enjoyment is a prerequisite for the

<sup>230</sup> Judgment of 18 March 2004, Exp. No. 2488-2002-HC/TC, Piura, *Case of Genaro Villegas Namuche*, para. 10 of the legal fundaments.

<sup>231</sup> *Universal Declaration of Human Rights* (art. 3); *International Covenant on Civil and Political Rights* (art. 6); *Convention on the Rights of the Child* (art. 6); *International Convention on the Protection of the Rights of All Migrant Workers* (art. 9); *Convention on the Rights of Persons with Disabilities* (art. 10); *Declaration on the Elimination of Violence against Women* (art. 3); *United Nations Declaration on the Rights of Indigenous Peoples* (art. 7); *Declaration on the Human Rights of Individuals Who are not Nationals of the Country in which They Live* (art. 5(1)(a)); *American Declaration of the Rights and Duties of Man* (art. 1); *American Convention on Human Rights* (art. 4); *African Charter on Human and Peoples’ Rights* (art. 4); *European Convention on Human Rights* (Art. 2); and the *Arab Charter on Human Rights* (art. 6).

<sup>232</sup> Article 27 (2) of the *American Convention on Human Rights* and Article 4 (2) and the *International Covenant on Civil and Political Rights*.

<sup>233</sup> Views of 31 March 1982, Communication No 45/1979, *Case of Suárez Guerrero v. Colombia*, para. 13.1.

enjoyment of all other human rights. Any restrictive approach to the said right is therefore inadmissible.”<sup>234</sup> Likewise, the Court has stated that “[i]f the right to life is not respected, all other rights are meaningless.”<sup>235</sup>

“However, unnecessary as it may seem to reiterate, the right to life may never be suspended. Governments may not use, under any circumstances illegal or summary execution to restore public order. This type of measure is proscribed by the constitutions of the states and the international instruments that protect the fundamental rights of persons [...] States cannot employ state terrorism to combat subversive terrorism. The rule of law must be the guide which orients the conduct of those in power. An independent judiciary, with sufficient resources and power to punish abuses by the authorities and by private individuals, should be one of the fundamental elements to restore the lost value of the right to life. The Commission has also considered cases of deaths occurring on a smaller scale, in other countries such as Bolivia and Uruguay, under irregular circumstances, such as at the moment of detention, or when the detained persons were in jail. These cases are of concern to the Commission not only because they involve death or summary execution, but also because of the lack of investigation and punishment of those responsible.”

Inter-American Commission on Human Rights<sup>236</sup>

The Inter-American Commission on Human Rights has stated that “[t]he right to life is of paramount importance because it is the essential premise for the other rights. The right to life is fundamental within the Convention’s system of guarantees; therefore, its provisions must be strictly interpreted.”<sup>237</sup> Likewise, the Commission has stated that “[t]he right to life is widely-recognized as the supreme right of the human being, and the *conditio sine qua non* to the enjoyment of all other rights.”<sup>238</sup> It has also concluded that “the right to life understood as a fundamental

<sup>234</sup> Judgment of 4 July 2007, Case of *Zambrano Vélez et al. v. Ecuador*, Series C No. 166, para. 78. See also: Judgment of 19 November 1999, Case of the *Street Children (Villagrán Morales et al.) v. Guatemala*, Series C No. 63, para. 144; Judgment of 25 November 2006, Case of *Miguel Castro Castro Prison v. Peru*, Series C No. 160, para. 237; and Judgment of 31 January 2006, Case of *Pueblo Bello Masacre v. Colombia*, Series C No. 140, para. 119.

<sup>235</sup> Judgment of 3 March 2005, *Huilca Tecse v. Peru*, Series C No. 121, para. 65.

<sup>236</sup> *Annual Report of the Inter-American Commission on Human Rights, 1980 -1981*, OAS/Ser.L/V/II.54, doc. 9 rev.1, 16 October 1981, p. 112.

<sup>237</sup> Report No. 32/99, Case No. 10.759 (Guatemala), para. 122.

<sup>238</sup> Report No. 62/02, Case No. 12.285, *Michael Dominguez (United States)*, 22 October 2002, para. 38.

right of the human person set forth in the American Convention on Human Rights and in several international instruments, both regional and international, is *jus cogens*. In other words, it is a peremptory norm of international law, and is therefore non-derogable."<sup>239</sup>

The Inter-American Court has emphasized that, given the inalienable nature of this right, "States have both the obligation to guarantee the creation of the necessary conditions to ensure that violations of this inalienable right do not occur, as well as the duty to prevent the infringement of the said right by its officials or private individuals"<sup>240</sup>. The Court has been emphatic in underlining that this right "not only requires that a person not be arbitrarily deprived of his or her life (negative obligation) but also that the States adopt all the appropriate measures to protect and preserve the right to life (positive obligation) as part of their duty to ensure full and free exercise of the rights of all persons under their jurisdiction"<sup>241</sup>. The Human Rights Committee has stated that "States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. [...]. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities"<sup>242</sup>. Meanwhile, the Inter-American Commission on Human Rights has stated that "[Protection of this right has two dimensions: on the one hand, it presupposes that no one may be arbitrarily deprived of life; on the other hand, it requires that States take the measures necessary to guarantee life. [...]The State's duty must be to guarantee the inviolability of the life of all persons subject to its jurisdiction and the right not to be arbitrarily deprived of life. This implies reasonable prevention of situations that could lead to the suppression of that right. Due diligence makes reasonable prevention the duty of States in those situations that could, even by omission, lead to the suppression of this right. [...]The duties that

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<sup>239</sup> Report No. 52/97, Case No. 11.218, *Arges Sequeira Manga (Nicaragua)*, para. 145.

<sup>240</sup> Judgment of 4 July 2007, Case of *Zambrano Vélez et al. v. Ecuador*, Series C No. 166, para. 79.

<sup>241</sup> Judgment of 3 April 2009, Case of *Kawas Fernández v. Honduras*, Series C No. 196, para. 74; and Judgment of 25 November 2006, *Case of Miguel Castro-Castro Prison v. Peru*, Series C No. 160, para. 237.

<sup>242</sup> *General Comment No. 6, Right to Life (Article 6)*, para. 3.

the right to life creates for the State are both preventive and corrective in nature."<sup>243</sup>

Due to its essential character, International Law strictly and restrictively regulates the principles, criteria, circumstances and conditions in which a person may be legitimately, and not arbitrarily, deprived of their right to life. Thus, International Law strictly regulates the imposition of the death penalty<sup>244</sup>, and the use of force and firearms<sup>245</sup>. In the case of the use of force and firearms, these principles have been codified in several international instruments, and particularly in the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* and the *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions*. Referring to those principles, the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, Mr. Amos Wako (1982-1991), considered that "[a]ny Government's practice that fails to reach the standards set out in the principles may be regarded as an indication of the Government's responsibility, even if no government officials are found to be directly involved in the acts of summary or arbitrary execution."<sup>246</sup> International case law has both developed and these criteria and conditions and made them explicit when assessing whether the deprivation of life was legitimate or whether the deprivation of life was arbitrary<sup>247</sup>.

<sup>243</sup> Report No. 32/99, Case No. 11.677 (Guatemala), par. 122 a 124.

<sup>244</sup> *International Covenant on Civil and Political Rights* (Art. 6(4)); *Safeguards guaranteeing protection of the rights of those facing the death penalty* (Art. 7); *Convention on the Rights of the Child* (Art. 37(a)); *American Convention on Human Rights* (Art. 4(6)); *American Declaration of the Rights and Duties of Man* (Art. 4); and *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (Principle V).

<sup>245</sup> These rules have been codified, in particular: the *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions*, recommended by the Economic and Social Council of the United Nations in its Resolution 1989/65, 24 May 1989; the *Code of Conduct for Law Enforcement Officials*, adopted by General Assembly in its Resolution 34/169, 17 December 1979; and the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment offenders, Havana, 27 August-7 September 1990.

<sup>246</sup> UN Doc. E/CN.4/1990/22, para. 463. See also UN Doc. E/CN.4/1991/36, para. 591.

<sup>247</sup> See *inter alia*: Inter-American Court of Human Rights: Judgment of 4 July 2007, Case of *Zambrano Vélez et al. v. Ecuador*, Series C No. 166; Judgment of 19 November 1999, Case of the *Street Children (Villagrán Morales et al.) v. Guatemala*, Series C No. 63; Judgment of 25 November 2006, Case of *Miguel Castro-Castro Prison v. Peru*, Series C No. 160; Judgment of 31 January 2006, Case of *Pueblo Bello Massacre v. Colombia*, Series C No. 140; and Judgment of 19 January 1995, Case of



The right not to be arbitrarily deprived of life is also protected by international humanitarian law<sup>248</sup>. In this regard, the Inter-American Commission on Human Rights has stated that "the contours of the right to life may change in the context of an armed conflict, but that the prohibition on arbitrary deprivation of life remains absolute. The Convention clearly establishes that the right to life may not be suspended under any circumstances, including armed conflicts and legitimate states of emergency."<sup>249</sup> Likewise, the Inter-American Commission has clarified that "international humanitarian law does not prohibit the targeting or killing of enemy combatants who have not laid down their arms or been placed *hors de combat*, and accordingly that the death of a combatant under these circumstances does not constitute a violation of the right to life. At the same time, international humanitarian law does protect to a certain extent the lives of combatants or the manner in which they may lawfully be deprived of their lives by restricting the means and methods of war that parties to an armed conflict may use to wage war. This includes, for example, restrictions on the use of or the prohibition of certain weapons that cause unnecessary sufferings, such as poisonous gas or bacteriological weapons. [...] The rules governing the means and methods of warfare under international humanitarian law also protect the lives of civilians and combatants who have surrendered or who are placed *hors de combat* by wounding, sickness, detention or any other cause, by prohibiting attacks on these categories of persons."<sup>250</sup>

The International Committee of the Red Cross (ICRC) has concluded that the prohibition of murder is a rule of customary international humanitarian law, applicable to both international armed conflicts

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*Neira Alegría et al. v. Peru*, Series C No. 20). European Court of Human Rights, Judgment of 4 May 2001, *McKerr v. United Kingdom*, Application No. 00028883/95; Judgment of 19 February 1998, *Kaya v. Turkey*; and Judgment of 5 September 1995, *McCann et al. v. United Kingdom*. Human Rights Committee: Views of 31 March 1982, Communication No. 45/1979, *Guerrero v. Colombia*; Views of 24 October 2002, *Gustavo Coronel Navarro et al. v Colombia*, Communication No. 778/1997; Views of 29 July 1997), *Villafañe Chaparro et al. v. Colombia*, Communication No. 612/1995. Inter-American Commission on Human Rights: *Report on Terrorism and Human Rights*, OAS/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002.

<sup>248</sup> See *inter alia*: Common Article 3 of the Geneva Conventions; III Geneva Convention (arts. 100 to 107); IV Geneva Convention (arts. 68, 74 and 75); Protocol I (arts. 75.2,a, 76.3, 77.5 and 85.3) and Protocol II (arts. 4.2(a) and 6.4).

<sup>249</sup> *Report on Terrorism and Human Rights*, OAS/Ser.L/V/II.116 Doc. 5 revs. 1 corr., 22 October 2002, para. 86.

<sup>250</sup> *Ibid.*, paras. 100 and 101.

and internal armed conflicts<sup>251</sup>. This prohibition applies to civilians, combatants placed *hors de combat*, prisoners of war as well as certain categories of individuals protected by international humanitarian law, provided they do not take part in hostilities or commit acts harmful to the enemy<sup>252</sup>. For example, the deliberate and intentional killing of civilians or combatants who are considered *hors de combat*, war with out quarter or the imposition of the death penalty on prisoners of war without the observance of basic due process guarantees constitute war crimes<sup>253</sup>.

In this line of thought, the Constitutional Court of Colombia has observed that “the fundamental rights deriving from humanitarian principles, which in many cases they, themselves, have the status rules of *jus cogens* are mainly the following: [...] (ii) the prohibition of murder”<sup>254</sup>. Likewise, the Constitutional Court of Colombia has stated that “the prohibition of murder in the context of non-international armed conflicts, like most other fundamental guarantees, covers noncombatants, that is to say, civilians and persons *hors de combat*, who do not take part in the hostilities [...] [and] is a *jus cogens* rule in and of itself. In this regard it should be remembered that the prohibition of international humanitarian law applicable to a non-derogable guarantee of international human rights law – the right to life [...], is a proof of the imperative or peremptory nature of the same. Likewise, in the context of internal conflict, the deprivation of the right to life of the civilians or persons *hors de combat* is the equivalent of the violation of mandatory prohibitions, such as the principle of distinction, the prohibition of attacking the civilians or the prohibition of indiscriminate attacks

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<sup>251</sup> Rule 89, “Murder is prohibited”, in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, Ed. ICRC, 2007, p. 335.

<sup>252</sup> Such as for example, health, religious, medical and humanitarian personnel and staff of peacekeeping missions of the United Nations or other inter-governmental organizations, and journalists.

<sup>253</sup> See: I Geneva Convention (art. 50); II Geneva Convention (art. 51); III Geneva Convention (art. 130); IV Geneva Convention (art. 147); Protocol I of the Geneva Conventions (arts. 75.2 and 85.3); Protocol II of the Geneva Conventions (art. 4.2); *Rome Statute of the International Criminal Court* (art. 8); *Statute of the International Criminal Tribunal for Rwanda* (art. 2); *Statute of the International Criminal Tribunal for the former Yugoslavia* (art. 2); and the *Statute of the Special Court for Sierra Leone* (art. 3).

<sup>254</sup> Judgment C-291/07 of 25 April 2007, Exp. D-6476, *Lawsuit of unconstitutionality against Articles 135, 156 and 157 of Law 599 of 2000, and 174, 175, 178 and 179 of Law 522 of 1999*, Consideration 5.4.2.

and indiscriminate weapons.”<sup>255</sup>

## 2. METHODS OF ARBITRARY DEPRIVATION OF THE RIGHT TO LIFE

Violations of the right not to be arbitrarily deprived of life cover a broad spectrum of phenomena and practices. Thus, for example, the following are considered to constitute a violation of this right: the imposition of the death penalty in conditions prohibited by international law; the deaths of persons deprived of their liberty as a result of abandonment, excessive use of force and/or detention conditions that endanger the personal integrity of detainees; deaths due to excessive use and/or unlawful use of lethal force by law enforcement officials; deaths resulting from attacks by State security forces, paramilitary groups, death squads or other groups of individuals acting with the authorization, tolerance or acquiescence of the state; and the deliberate and intentional killings of civilians, combatants *hors de combat* and ‘protected persons’ under international humanitarian law.

“[The] Commission notes that common article 3 of the 1949 Geneva Conventions contains minimum rules governing the conduct of hostilities, and that these are as mandatory for state armed forces as well as for dissident armed groups in any internal armed conflict, including Peru’s. [...] [D]uring such conflicts the non derogable norms of the American Convention continue to apply simultaneously with the provisions of common Article 3. Specifically, both Article 4 of the American Convention and common Article 3 prohibit, inter alia, arbitrary deprivations of life. [...] The standards of international customary law that govern armed conflicts, as well as common article 3 of the Geneva Conventions, prohibit attacks by combatants against civilians and against the civilian population in general. In this respect, the only circumstance in any armed conflict where a civilian loses the immunity from direct individualized attack is when that civilian directly participates in hostilities, which, practically speaking, means assuming the role of a combatant, either individually or as a member of a group. Though journalists or reporters in combat zones implicitly assume a risk of death or injury either incidentally or as a collateral effect of attacks on legitimate military targets, the circumstances surrounding the attacks on Hugo Bustíos and Alejandro Arce clearly indicate that they were not accidental, but intentional.”

Inter-American Commission on Human Rights<sup>256</sup>

<sup>255</sup> *Ibid.*

<sup>256</sup> Report No. 38/97, Case No. 10.548, *Hugo Bustíos Saavedra (Peru)*, 16 October 1997, paras. 58 to 61.

Meanwhile, the Inter-American Court of Human Rights has stated that, given the fundamental and inalienable nature of the right to life, "States have [...] the duty to prevent its officials, or private individuals, from violating it".<sup>257</sup>

Likewise, the Court has established that "States must adopt the necessary measures, not only at a legislative, administrative and judicial level, by the enactment of criminal laws and the establishment of a justice system to prevent, eliminate and punish the deprivation of life as a result of criminal acts, but also to prevent and protect the individual from the criminal acts of other individuals and to investigate these situations effectively."<sup>258</sup>

In the case of violations of the right not to be arbitrarily deprived of life, which may be attributed to State agents - either *de jure* or *de facto*, International Law refers to extrajudicial, arbitrary or summary executions. While there is no treaty defining these categories, international jurisprudence and doctrine have clarified the content and scope of each one. Initially, the United Nations described them as "summary or arbitrary executions" and "extra-legal executions"<sup>259</sup>. Based on the work of the former Sub-Commission on the Prevention of Discrimination and Protection of Minorities<sup>260</sup> as well as on resolutions of the former Commission on Human Rights<sup>261</sup>, not to mention the Economic and Social Council (ECOSOC)<sup>262</sup>, these violations were classified as "summary or arbitrary executions".

The work of the office of the Special Rapporteur on Extrajudicial,

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<sup>257</sup> Judgment of 6 April 2006, *Case of Baldeón García v. Peru*, Series C No. 147, para. 83. In the same regard, see, *inter alia*: Judgment of 3 March 2005, *Case of Huilca Tecse v. Peru*, Series C No. 121, para. 65; and Judgment of 1 July 2006, *Case of the Ituango Massacres v. Colombia*, Series C No. 148, para. 129.

<sup>258</sup> Judgment of 25 October 12, *Case of The Massacres of El Mozote and nearby places v. El Salvador*, Series C No. 252, paras. 146 and 156. In the same regard, see *inter alia*: Judgment of 6 April 2006, *Case of Baldeón García v. Peru*, Series C No. 147, para. 85 and Judgment of 1 July 2006, *Case of the Ituango Massacres v. Colombia*, Series C No. 148, para. 130.

<sup>259</sup> See for example the first Resolution of the General Assembly adopted in this regard (Resolution No. 35/172 of 1980) and Resolution No. 5 "Extrajudicial execution" adopted by the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, UN Doc A/CONF.87/14/Rev.1 (1980) p 8-9.

<sup>260</sup> Although it should be noted that the Subcommittee used concepts such as "summary Executions," "extra-legal executions," and "extrajudicial executions".

<sup>261</sup> Resolution No. 1982/29 of 11 March 1982.

<sup>262</sup> Resolution No. 1982/35 of 7 May 1982.

Summary or Arbitrary Executions<sup>263</sup>, established in 1982, has clarified the scope of the terms of arbitrary execution and summary execution. In 1983, the Special Rapporteur defined arbitrary execution as the arbitrary deprivation of life by homicide committed due to a governmental order, or with its complicity, tolerance or acquiescence, in the absence of a judicial or legal process<sup>264</sup>. Likewise, in 1992, it defined summary execution as the arbitrary deprivation of life by virtue of a judgment handed down in a summary procedure or in the course of which the minimum guarantees of Article 14 of the *International Covenant on Civil and Political Rights* were restricted, distorted or simply ignored<sup>265</sup>.

Notwithstanding, the definition of arbitrary execution applied by the Special Rapporteur provoked strong reactions and criticism. While the definition covered the typical crime committed by States, it left out killings carried out by state agents acting without orders from the government and deaths resulting from an excessive or arbitrary use of force. Debates on modifying the mandate of the Special Rapporteur concluded in 1992, with the incorporation of the category of "extrajudicial execution". Notwithstanding, it is noteworthy that since 1987, the General Assembly of the United Nations had already used the term "extrajudicial execution"<sup>266</sup>.

"[T]he right to life is the foundation and cornerstone of all other human rights. For that reason, it can never be suspended by any State, and under no circumstances can persons be executed to restore public order. Moreover, it is necessary to create all the circumstances required for this basic right to be fully observed."

Inter-American Commission on Human Rights<sup>267</sup>

In the Americas, the Inter-American Commission on Human Rights initially referred to "judicial executions" and "illegal or extrajudicial

<sup>263</sup> The mandate, under the title of the "Special Rapporteur on summary or arbitrary executions", was established in 1982 by the Resolution No. 1982/35 of the Economic and Social Council. In 1992, pursuant to Resolution No. 1992/72 of the Commission on Human Rights, the mandate was expanded to include *Extra-legal, Arbitrary and Summary Executions*, (See: *Extra-legal, Arbitrary and Summary Executions - Report of the Secretary-General*, A/CONF.121/21 of 29 May 1985, para. 1).

<sup>264</sup> UN Doc. E/CN.4/1983/16, para. 66. See also UN Doc. E/CN.4/1992/CRP.1, 12 February 1992, para. 606 (b).

<sup>265</sup> UN Doc. E/CN.4/1992/CRP.1, 12 February 1992, para. 606 (a).

<sup>266</sup> See, *inter alia*, Resolution No. 42/141 of 7 December 1987.

<sup>267</sup> *Annual Report of the Inter-American Commission on Human Rights, 1986-1987*, OAS/Ser.L/V/II.71, Doc. 9 rev. 1, 22 September 1987, Chapter V.

executions<sup>268</sup>. In this latter category, the Commission included the “deaths occurring [...] under irregular circumstances, such as at the moment of detention or when the detained persons were in jail”<sup>269</sup> as well as “extrajudicial executions” themselves. The latter were characterized as those “committed directly by the security forces acting with impunity outside the law, as well as by paramilitary groups which operate with the acquiescence or tacit consent of governments”<sup>270</sup>. Subsequently, the Commission has referred to extrajudicial executions, arbitrary killings and summary executions. Notwithstanding, frequently the Commission uses these terms as synonyms<sup>271</sup>.

Meanwhile, the United Nations Office of the High Commissioner for Human Rights established a working definition of extrajudicial, summary or arbitrary executions in the following terms: “[D]eprivation of life without full judicial and legal process, and with the involvement, complicity, tolerance or acquiescence of the Government or its agents. Includes death through the excessive use of force by police or security forces.”<sup>272</sup>

As may be seen, International Law distinguishes three forms of arbitrary deprivation of the right to life, namely, “extrajudicial execution”, “summary execution” and “arbitrary execution”<sup>273</sup>.

### **a. Extrajudicial execution**

“Extrajudicial execution” refers to what the criminal law called

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<sup>268</sup> *Annual Report of the Inter-American Commission on Human Rights, 1980 -1981*, OAS/Ser.L/V/II.54, doc. 9 rev. 1, 16 October 1981, p. 112; and *Annual Report of the Inter-American Commission on Human Rights, 1986-1987*, OAS/Ser.L/V/II.71, Doc. 9 rev. 1, 22 September 1987, Chapter V.

<sup>269</sup> *Annual Report of the Inter-American Commission on Human Rights, 1980 -1981*, OAS/Ser.L/V/II.54, doc. 9 rev. 1, 16 October 1981, p. 112.

<sup>270</sup> *Ibid.*

<sup>271</sup> See for example, Report No. 101/01, Case Nos. 10.247 et al., *Extrajudicial executions and Forced Disappearances (Peru)*, 11 October 2001; and Report No. 59/01, Case Nos. 10.626 et al., *Remigio Domingo Morales et al. v. Guatemala*, 7 April 2001.

<sup>272</sup> *Human Rights and Law Enforcement - A Manual for Human Rights Training for the Police*, Professional Training Series No. 5/Add.2, 2004, Index HR/P/PT/5/Add.2, p. 15.

<sup>273</sup> See, *inter alia*: Resolution No. 42/141 of the General Assembly of the United Nations of 7 December 1987; Resolution No. 1992/72 of the former Commission on Human Rights of the United Nations; *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions*, UN Doc. E/CN.4/1992/CRP.1, 12 February 1992, Para. 606; Office of the High Commissioner on Human Rights– Center of Human Rights, *Professional Training Series No. 5, Human Rights and Law Enforcement*, Ed. United Nations, New York – Geneva, 1997, p. 31; and Nigel Rodley, *The Treatment of Prisoners under International Law*, Clarendon Press – Oxford, 1999, Second Edition.

“murder” or “homicide” and, therefore, includes extrajudicial executions, deaths caused intentionally by the attacks or killings by State security forces or paramilitary groups, death squads or other private forces cooperating with the State or tolerated by it. Extrajudicial executions also constitute the deliberate and intentional killings of civilians or combatants considered *hors de combat* as well as what are the result of a “merciless war”, i.e. those resulting from orders to leave no survivors<sup>274</sup>.

“[E]xtrajudicial executions, of wounded or captured combatants are grave violations of Common Article 3. [...] Common Article 3 of the Geneva Conventions obliges the parties to internal armed conflicts to afford humane treatment to those persons who do not take part or who no longer take active part in the hostilities. This guarantee applies equally to civilians and members of armed forces who surrender or are *hors de combat*.”

Inter-American Commission on Human Rights<sup>275</sup>

The Inter-American Commission on Human Rights has held that in cases where death occurs to “individuals who no longer present a threat as described above, such as individuals who have been apprehended by authorities, have surrendered, or who are wounded and abstain from hostile acts. The use of lethal force in such a manner would constitute extra-judicial killings in flagrant violation of Article 4 of the Convention and Article I of the Declaration.”<sup>276</sup> Thus, in several cases, the Commission has considered that the deaths of people who had surrendered, or were captured or wounded after participating in attacks on military barracks or armed confrontations with security forces constitute violations of the right not to be deprived arbitrarily of life and should be characterized as extrajudicial executions<sup>277</sup>.

While extrajudicial executions constitute a serious violation of the human rights law and their prohibition is a rule of *jus cogens*, international jurisprudence has emphasized that when this practice

<sup>274</sup> In this regard see *Customary International Humanitarian Law, Volume I: Rules*, Op. Cit., (Prohibition of ordering no quarter will be given) p. 161 to 163 and 594.

<sup>275</sup> Report No. 26/97, Case No. 11.142, *Arturo Ribón Avila (Colombia)*, 30 September 1997, par. 140 and 147.

<sup>276</sup> *Report on Terrorism and Human Rights*, Doc. Cit., Para. 91.

<sup>277</sup> See, *inter alia*, Report No. 55/97, Case No. 11.137, *Juan Carlos Abella (Argentina)*, 18 November 1997; Report No. 26/97, Case No. 11.142, *Arturo Ribón Avila (Colombia)*, 30 September 1997; Report No. 61/00, Case No. 11.519, *José Félix Fuentes Guerrero et al. (Colombia)*, 13 April 1999; and Report No. 34/00, Case No. 11.291, *Carandirú (Brazil)*, 13 April 2000.

is committed in certain contexts or against certain people, it acquires particular dimensions due to its particular nature, as has been expressed by the Inter-American Court of Human Rights in cases concerning extrajudicial executions of minors, pregnant women, trade unionists, political opponents, human rights defenders and judicial officers, among other victimized people.

"[W]hen there is a pattern of human rights violations, including extralegal executions fostered or tolerated by the State, contrary to the *jus cogens*, this generates a climate that is incompatible with effective protection of the right to life."

Inter-American Court of Human Rights<sup>278</sup>

In cases of extrajudicial executions of minors, the Court has stated that the State's obligation to respect the right to life "has special modes regarding to minors, taking into account the rules on protection of children set forth in the American Convention and in the Convention on the Rights of the Child. As guarantor of this right, the State is under the obligation to forestall situations that might lead, by action or omission, to abridge it."<sup>279</sup> The Court has stated that "cases in which the victims of human rights are children are especially grave, as their rights are reflected not only in the American Convention, but also in numerous international instruments, broadly accepted by the international community - notably in the United Nations' Convention on the Rights of the Child - that 'establish the duty of the State to adopt special protection and assistance measures in favor of children under their jurisdiction'."<sup>280</sup>

The Inter-American Court stated that the execution of two union leaders in Peru "had an intimidating effect on the workers of the Peruvian mining trade union movement. In a context such as that of the instant case, executions like these not only restricted the freedom of association of an individual, but also the right and the freedom of a specific group to associate freely without fear; in other words, the freedom of the mining workers to exercise this right was affected. [citations omitted] In addition, this intimidating effect was

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<sup>278</sup> Judgment of 8 July 2004, *Gomez Paquiyauri Brothers v. Peru*, Series C No. 110, para. 128.

<sup>279</sup> *Ibid*, para. 124. In the same regard, see: Judgment of 18 September 2003, *Case of Bulacio v. Argentina*, Series C No. 100, para. 138; Judgment of 19 November 1999, *Case of the Street Children (Villagrán Morales et al.) v. Guatemala*, Series C No. 63, para. 146; Judgment of 25 October 12, *Case of The Massacres of El Mozote and nearby places v. El Salvador*, Series C No. 252, para. 150

<sup>280</sup> *Ibid*, para. 162.



accentuated and made more severe by the context of impunity that surrounds the case."<sup>281</sup>

Likewise, in the case of a political opposition leader killed by Colombian military and paramilitary forces, the Court noted that "extrajudicial execution of an opponent for political reasons not only entails the violation of several human rights, but also breaches the principles upon which the rule of law is based, and directly violates the democratic system, inasmuch as it results from a failure to ensure that the different authorities abide by their obligation to protect nationally and internationally recognized human rights. [...] [Such an extrajudicial execution has] had threatening and intimidating effects for the collectivity of individuals who were members of his political party or who sympathized with his ideas."<sup>282</sup>

Similarly, in cases of extrajudicial killings of human rights activists, the Court considered that "the threats and attempts on the safety and life of human rights defenders and the impunity of those responsible for such actions are particularly grave because they have an impact that is not only individual, but also collective. When such things happen, society is prevented from learning the truth about whether the rights of persons are being respected or violated under the jurisdiction of a given State."<sup>283</sup>

In a case of judicial officers, who were investigating a series of killings and enforced disappearances and were killed by members of the military and paramilitaries, the Court noted that these extrajudicial executions "are particularly serious, as they were designed to thwart the investigation and punishment of gross violations of human rights, and in which the execution of the judicial officers was committed in the most inhuman manner. In addition, the Rochela Massacre had the grave consequence of intimidating the

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<sup>281</sup> Judgment 10 July 2007, *Case of Cantoral-Huamani y García-Santa Cruz v. Peru*, Series C No. 167, para. 148. In the same regard, see: Judgment of 3 March 2005, *Case of Huilca Tecse v. Peru*, Series C No. 121, par. 67 et seq.

<sup>282</sup> Judgment of 36 May 2010, *Case of Manuel Cepeda Vargas v. Colombia*, Series C No. 213, par. 177 - 178.

<sup>283</sup> Judgment of 28 November 2006, *Case Nogueira de Carvalho et al. v. Brazil*, Series C No. 161, para. 76. See also: Judgment of 27 November 2008, *Case of Valle Jaramillo et al. v. Colombia*, Series C No. 192, para. 96.

members of the Judiciary with regard to the investigation into this and other cases.”<sup>284</sup>

### **b. Arbitrary execution**

The notion of “arbitrary execution” refers to the deaths caused by the excessive, disproportionate and illegitimate force by law enforcement officers<sup>285</sup>.

Several international instruments stipulate the principles, criteria and conditions under which the use of force and firearms is legitimate<sup>286</sup>. The Inter-American Court of Human Rights has stated that while it “acknowledges the existence of the power and even the obligation of the State to guarantee security and maintain public order, especially within the prisons, using force if necessary [...] it has also established that by reducing the alterations to public order the State must do so in accordance with and in application of domestic legislation in seeking the satisfaction of public order, as long as this legislation and the actions taken when applying it adjust, at the same time, to the norms for the protection of human rights applicable to the subject.”<sup>287</sup>

“Given the connotation of the right to life, the international community addresses States’ obligations in order not only to generate and achieve better conditions for the real and effective enjoyment of this particular right, but also to [establish] limitations and prohibitions for their actions. [...] [The arbitrary deprivation of life occurs when an officer or an agent of the State, in the exercise of his functions, or a third party either by the instigation or consent of the state, deprives a person or a group of people of life, by act or omission, albeit: intentionally, by negligence or by the disproportionate and excessive use of force.”

National Criminal Court of Peru<sup>288</sup>

<sup>284</sup> Judgment of 11 May 2007, *Case of the Rochela Massacre v. Colombia*, Series C No. 163, para. 103.

<sup>285</sup> UN Docs. E/CN.4/1983/16, para. 66 and E/CN.4/1992/CRP.1, para. 606 (b).

<sup>286</sup> *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions; Code of Conduct for Law Enforcement Officials; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; Standard Minimum Rules for the Treatment of Prisoners; Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; and Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas.*

<sup>287</sup> Judgment of 25 November 2006, *Case of Miguel Castro-Castro Prison v. Peru*, Series C No. 160, para. 240.

<sup>288</sup> Judgment of 10 October 2011, Exp. No. 4606.

Likewise, the Human Rights Committee has stated that “[t]he requirements that the right shall be protected by law and that no one shall be arbitrarily deprived of his life mean that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of a State.”<sup>289</sup>

The *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* state that “[l]aw enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.”<sup>290</sup>

Likewise, when the use of force and firearms is unavoidable, the Principles provide that the officials responsible for law enforcement shall:

“a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;

“b) Minimize damage and injury, and respect and preserve human life;

“c) Ensure that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment;

“d) Ensure that relatives or close friends of the injured or affected person are notified at the earliest possible moment.”<sup>291</sup>

“Effectively, the United Nations Code of Conduct for Law Enforcement Officials and the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials both prohibit the use of firearms, “except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender” and “except in self defense or defense of others [...] to arrest a person presenting [imminent threat of death or serious injury] and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives.”

Inter-American Court of Human Rights<sup>292</sup>

<sup>289</sup> Views of 31 March 1982, Communication 45/1979, *Case of Suárez Guerrero v Colombia*, para. 13.1.

<sup>290</sup> Principle 4.

<sup>291</sup> Principle 5.

<sup>292</sup> See, inter alia, Judgment of 4 July 2007, *Case of Zambrano Vélez et al. v. Ecuador*, Series C No. 166, paras. 82-89.

By systematizing all international instruments, and in particular *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*, the Inter-American Court of Human Rights has stated that the following principles should govern the use of lethal weapons by State agents<sup>293</sup>:

- *The Principle of Exceptionality*. The use of deadly force should be exceptional and should only be used as a last resort, that is to say it should only be used when all other means of control have been exhausted and have failed.
- *The Principle of Legality*. The use of lethal force must be strictly regulated by law and be exceptional and restrictive.
- *The Principle of Legitimacy*. The use of lethal force must only proceed when it is absolutely necessary for a legitimate purpose, such as the protection of the rights to life and personal integrity.
- *The Principle of Necessity and Proportionality*. The use of lethal force should only proceed when absolutely necessary and inevitable to meet or repel a force or threat, and it must be proportionate to the immediate dangers or threats.
- *The Principle of Humanity*. Injuries and damages from the use of firearms should be minimized; likewise, those injured or affected should be attended to.
- *The Principle of Accountability*. Domestic law should establish mechanisms and procedures for the independent control of the legality of the use of lethal force.

Deaths caused as a result of lethal force that occur in violation of international standards on the use of force and firearms constitute arbitrary executions. In that regard, the Inter-American Court of Human Rights has stated that the “excessive or disproportionate use of force by law enforcement officials that results in loss of life may amount to arbitrary deprivation of life”<sup>294</sup>. It should be noted that arbitrary executions are not limited to actions attributable to the

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<sup>293</sup> Judgment of 25 November 2006, *Case of Miguel Castro-Castro Prison v. Peru*, Series C No. 160, par. 234 et seq.; Judgment of 24 November 2011, *Case of Barrios Family v. Venezuela*, Series C No. 237, para. 49; Judgment of 4 July 2007, *Case of Zambrano Vélez et al. v. Ecuador*, Series C No. 166, par. 81 et seq.; and Judgment of 5 July 2006, *Case of Montero Aranguren et al. (Retén de Catia) v. Venezuela*, Series C No. 150, par. 66 et seq.

<sup>294</sup> Judgment of 24 November 2011, *Case of Barrios Family v. Venezuela*, Series C No. 237, para. 49. In the same regard, see: Judgment of 5 July 2006, *Case of Montero Aranguren et al. (Retén de Catia) v. Bolivarian Republic of Venezuela*, Series C No. 150, paras. 67 - 68.

officials responsible for law enforcement, and include deaths caused by individuals acting under direct or indirect State orders.

The Inter-American Commission of Human Rights has stated that “in situations where a state’s population is threatened by violence, the state has the right and obligation to protect the population against such threats and in so doing may use lethal force in certain situations. This includes, for example, the use of lethal force by law enforcement officials where strictly unavoidable to protect themselves or other persons from imminent threat of death or serious injury, or to otherwise maintain law and order where strictly necessary and proportionate. [...] Unless such exigencies exist, however, the use of lethal force may constitute an arbitrary deprivation of life or a summary execution; that is to say, the use of lethal force must be necessary as having been justified by a state’s right to protect the security of all.”<sup>295</sup>

“[T]he ‘criminal’, ‘subversive’ or ‘terrorist’ threat invoked by the State as a justification for the actions carried out can certainly constitute a legitimate reason to use state security forces in specific cases. However, States’ fight against criminality must take place within the limits and in accordance with the proceedings which allow for the preservation of both public security and the full respect of human rights of the individuals under their jurisdiction. The country’s circumstances, no matter how difficult they are, do not release State Parties to the American Convention of their obligations established therein; these obligations remains especially in cases such as the one presently before the Court. It is necessary to stress that no matter the circumstances in any State, there exist an absolute prohibition of torture, forced disappearances of individuals and summary and extrajudicial executions; and that such prohibition constitutes a mandatory rule of International Law not subject to derogation.”

Inter-American Court of Human Rights<sup>296</sup>

The category of arbitrary executions covers different situations in which deaths are caused in violation of international standards governing the use of force. Therefore, the following can be considered to be arbitrary executions: deaths caused by the use of weapons in demonstrations, protests and riots; those that occur during police, preventive or administrative detention; deaths as a result of torture or other ill-treatment; and deaths in police or law

<sup>295</sup> *Report on Terrorism and Human Rights*, Doc. Cit., paras. 87 and 88.

<sup>296</sup> Judgment of 4 July 2007, *Case of Zambrano Vélez et al. v. Ecuador*, Series C No. 166, para. 96.

enforcement operations<sup>297</sup> or during the maintenance of discipline in penitentiaries and prisons<sup>298</sup>. Likewise, international jurisprudence has considered that the deaths of detainees in “conditions of imprisonment involving death threats” or that endanger life may also constitute arbitrary deprivations of the right to life<sup>299</sup>. Similarly, in the context of armed conflict, certain deaths caused by the use of methods and/or prohibited weapons or, indeed, the disregard of the fundamental principles of international humanitarian law may be described as arbitrary executions.

“The General Assembly of the United Nations ‘Urges all States: [...] a) To take all necessary and possible measures, in conformity with international human rights law and international humanitarian law, to prevent loss of life, in particular that of children, during public demonstrations, internal and communal violence, civil unrest, public emergencies or armed conflicts, and to ensure that the police, law enforcement agents, armed forces and other agents acting on behalf of or with the consent or acquiescence of the State act with restraint and in conformity with international human rights law and international humanitarian law, including the principles of proportionality and necessity, and in this regard to ensure that police and law enforcement officials are guided by the Code of Conduct for Law Enforcement Officials and the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials’.”<sup>300</sup>

The issue of arbitrary executions of detainees has been highlighted by international case law. Indeed, the use of force against persons deprived of liberty is subject to special regulations<sup>301</sup>, particularly

<sup>297</sup> In this regard see commentary c) for Article 3 of *The Code of Conduct for Law Enforcement Officials* that stipulates “[t]he use of firearms is considered an extreme measure. Every effort should be made to exclude the use of firearms, especially against children. In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardizes the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender.” See also: Inter-American Commission on Human Rights, *Report on Citizen Security and Human Rights*, OAS/Ser.L/V/II. Doc. 57 of 31 December 2009.

<sup>298</sup> See, for example, Principle XXIII, “2. Criteria for the use of force and weapons” of the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*.

<sup>299</sup> See, *inter alia*, *Report of the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions*, A/51/457, 7 October 1996, para. 13.

<sup>300</sup> Resolution No. 63/182, “Extrajudicial, summary or arbitrary executions”, 18 December 2008.

<sup>301</sup> See *inter alia*: *Standard Minimum Rules for the Treatment of Prisoners* (Rules 27 to 34); *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principles 6, 7, 21 and 30); *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (Rules 63 to 71); *United Nations Rules for the*

given that “the State is in a special position as guarantor when it comes to persons deprived of liberty”.<sup>302</sup> The Inter-American Court of Human Rights has stated that “the State, being responsible for detention centers, is the guarantor of these rights of the detainees, which involves, among other things, the obligation to explain what happens to persons who are under its custody. State authorities exercise total control over persons under their custody. The way a detainee is treated must be subject to the closest scrutiny, taking into account the detainee’s vulnerability [...]”.<sup>303</sup> Likewise, the Court has stated that “every person deprived of her or his liberty has the right to live in detention conditions compatible with her or his personal dignity, and the State must guarantee to that person the right to life and to humane treatment. Consequently, since the State is the institution responsible for detention establishments, it is the guarantor of these rights of the prisoners.”<sup>304</sup> This special position of the State as the guarantor for detainees’ rights means, among other things, that it has the obligation to investigate *ex officio* and automatically compensate in cases of detainees’ deaths or disappearance or, indeed, for any other acts of violence committed against them<sup>305</sup>.

Certainly, State authorities have an obligation to maintain control, internal security, order and discipline in prisons and detention facilities, as well as to guarantee the rights to life and personal integrity of the detainees. However, as noted by the Inter-American Court of Human Rights, “regardless of the seriousness of certain actions and the culpability of the perpetrators of certain crimes, the

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*Treatment of Women Prisoners and Non-custodial Measures for Women Offenders*, “Bangkok Rules” (Rules 7, 19, 20, 22, 24 and 25); and *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (Principles I, XXII y XXIII). See likewise also, the Inter-American Commission on Human Rights, *Report on the Human Rights of Persons Deprived of their Liberty in the Americas*, OAS/Ser.L/V/II. Doc. 64, 31 December 2011.

<sup>302</sup> Principle I of the *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*.

<sup>303</sup> Judgment of 18 September 2003, *Case of Bulacio v. Argentina*, Series C No. 100, para. 126.

<sup>304</sup> Judgment of 16 August 2000, *Case of Durand and Ugarte v. Peru*, Series C No. 68, para. 78. In the same regard, see: Judgment of 6 April 2006, *Case of Baldeón García v. Peru*, Series C No. 147, para. 120; Judgment of 18 August 2000, *Case of Cantoral Benavides v. Peru*, Series C No. 69, para. 87; and Judgment of 30 May 1999, *Case of Castillo Petruzzi et al. v Peru*, Series C No. 52, para. 195.

<sup>305</sup> *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principle 34); *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (Rule 57); and *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (Principle XXIII, 3).

power of the State is not unlimited, nor may the State resort to any means to attain its ends. The State is subject to law and morality. Disrespect for human dignity cannot serve as the basis for any State action."<sup>306</sup>

*Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas*

Principle XXIII, 2. Criteria for the use of force and weapons:

"The personnel of places of deprivation of liberty shall not use force and other coercive means, save exceptionally and proportionally, in serious, urgent and necessary cases as a last resort after having previously exhausted all other options, and for the time and to the extent strictly necessary in order to ensure security, internal order, the protection of the fundamental rights of persons deprived of liberty, the personnel, or the visitors.

The personnel shall be forbidden to use firearms or other lethal weapons inside places of deprivation of liberty, except when strictly unavoidable in order to protect the lives of persons.

In all circumstances, the use of force and of firearms, or any other means used to counteract violence or emergencies, shall be subject to the supervision of the competent authority."

Thus, the principles on the use of lethal force and firearms, outlined above, should be scrupulously observed by the authorities by ensuring they take measures to implement them in prisons and detention facilities. In this regard the Inter-American Commission on Human Rights has stressed that subduing a riot "must be suppressed through such strategies and actions as are needed to bring it under control with minimal harm to the life and physical integrity of the inmates and minimal risk to law enforcement officials."<sup>307</sup> Likewise, the Commission has considered that "law enforcement officers in penitentiaries may only use lethal force when strictly necessary to protect a life. In cases of flight or escape of persons deprived of their liberty, the State must employ all non-lethal means at its disposal to recapture the offenders and may only use lethal force in cases of imminent danger in which prisoners

<sup>306</sup> Judgment of 19 January 1995, *Case of Neira Alegría et al. v. Peru*, Series C No. 20, para. 75.

<sup>307</sup> *Report on the Human Rights of Persons Deprived of Liberty in the Americas*, OAS/Ser.L/V/II. Doc. 64, 31 December 2011, para. 232.



attempting to escape react against prison guards or third parties with violent means that threaten their lives. Therefore, there is no ethical or legal justification for a so-called 'escape law' legitimizing or empowering prison guards to automatically fire on prisoners attempting to escape."<sup>308</sup>

The deaths of persons deprived of liberty by the use of force in contravention of the rules established by international instruments constitute arbitrary executions. Notwithstanding, what may initially appear to be an arbitrary execution may well actually be an extrajudicial execution, if the use of lethal force was intended to suppress the life of the victim and there were no circumstances which justify the use of firearms. For example, in the case of the Miguel Castro Castro Prison, it was termed a "massacre" by the Inter-American Court of Human Rights since it found that "[w]hen the first act of the 'operative' there was no riot of the inmates, or any other cause that could determine the legitimate use of force by state agents", and that from the start there was an "an attack executed to endanger the life and integrity of the inmates", that had been planned in advance.<sup>309</sup>

Another issue is related to the use of force in the protests and demonstrations. The *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* prescribe that during "the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force or, where that is not practicable, shall restrict such force to the minimum extent necessary."<sup>310</sup> Likewise, the Principles establish that in "the dispersal of violent assemblies, law enforcement officials may use firearms only when less dangerous means are not practicable and only to the minimum extent necessary. Law enforcement officials shall not use firearms in such cases,"<sup>311</sup> except "in self-defense or defense of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape,

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<sup>308</sup> *Ibid*, para. 237.

<sup>309</sup> Judgment of 25 November 2006, *Case of Miguel Castro-Castro Prison v. Peru*, Series C No. 160, para. 234.

<sup>310</sup> Principle 13.

<sup>311</sup> Principle 14.

and only when less extreme means are insufficient to achieve these objectives.”<sup>312</sup>

In this regard, a report by the Special Rapporteur on extrajudicial, summary or arbitrary executions, Prof. Christof Heyns, has clarified that the “guiding principle in respect of the lethal use of force or firearms is defense of one’s own life or that of others. The only circumstances warranting the use of firearms, including during demonstrations, is the imminent threat of death or serious injury, and such use shall be subject to the requirements of necessity and proportionality. [...] In principle shooting indiscriminately into a crowd is not allowed and may only be targeted at the person or persons constituting the threat of death or serious injury. The use of firearms cannot be justified merely because a particular gathering is illegal and has to be dispersed, or to protect property. [...] In terms of the Code and the Basic Principles, the norm in respect of the intentional use of lethal force is the same under all circumstances, whether in self-defense, arrest, quelling a riot or any other circumstances, namely, protection of life.”<sup>313</sup>

Although the right of assembly may be limited during states of emergency, under certain conditions prescribed by international law<sup>314</sup>, this in no way authorizes the arbitrary use of lethal force or the lack of observance of the principles governing the use of firearms. Thus, the Special Rapporteur recalled that “while freedom of peaceful assembly may legitimately be curtailed during states of emergency, the other non-derogable rights of the demonstrators, such as the right to life, remain in place and have to be respected.”<sup>315</sup> In this regard, Inter-American Court of Human Rights “deems absolutely necessary to emphasize the extreme care which States must observe when they decide to use their Armed Forces as a mean for controlling social protests, domestic disturbances, internal violence, public emergencies and common crime. [...] States must restrict to the maximum extent the use of armed forces to control domestic disturbances, since they are

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<sup>312</sup> Principle 9.

<sup>313</sup> *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions Christof Heyns, A/HRC/17/28, 23 May 2011, paras. 60-62.*

<sup>314</sup> *International Covenant on Civil and Political Rights* (art. 4) and *American Convention on Human Rights* (art. 27).

<sup>315</sup> *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions Christof Heyns, A/HRC/17/28, 23 May 2011, para. 70.*

trained to fight against enemies and not to protect and control civilians, a task that is typical of police forces.”<sup>316</sup>

### c. Summary Execution

“Summary execution” refers to situations when the death penalty is imposed as the result of a “trial” that does not comply with the standards prescribed under International Law for a fair trial (due process) and/or which present a lack of judicial guarantees;<sup>317</sup> or for crimes that are not considered as “the most serious” offenses;<sup>318</sup> or political or related crimes;<sup>319</sup> or with regard to people who should not be subject to the death penalty<sup>320</sup>.

The Human Rights Committee has concluded that the mandatory

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<sup>316</sup> Judgment of 4 July 2007, Case of *Zambrano Vélez et al. v. Ecuador*, Series C No. 166, para. 51.

<sup>317</sup> Articles 6(4) and 14 of the *International Covenant on Civil and Political Rights*; *Safeguards guaranteeing protection of the rights of those facing the death penalty*; and Articles 4(6) and 8 of the *American Convention on Human Rights*.

<sup>318</sup> Article 6(2) of the *International Covenant on Civil and Political Rights*; Article 4(2) of the *American Convention on Human Rights*; *Safeguards guaranteeing protection of the rights of those facing the death penalty*; Article 6 of the *Arab Charter on Human Rights*; Principle N (9)(b) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*. Based on international case law, the Special Rapporteur on extrajudicial, summary or arbitrary executions, Prof. Philip Alston, has drafted an illustrative list of the criminal offenses that do not comply with the concept of the “most serious offenses,” and, as such, it is forbidden to impose the death penalty for the same. Report of the *Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, UN Doc. A/HRC/4/20*, 29 January 2007, paras. 40 and 51).

<sup>319</sup> *American Convention on Human Rights* (art. 4.4).

<sup>320</sup> In this regard, it is forbidden to impose the death penalty on: a minor, or a person convicted of a crime when he or she was a minor (art. 6.5 of the *International Covenant on Civil and Political Rights*; art. 37(a) of the *Convention on the Rights of the Child*; art. 3 of the *Safeguards guaranteeing protection of the rights of those facing the death penalty*; Rule 17.2 of the *Beijing Rules*; art. 4.5 of the *American Convention on Human Rights*; art. 7 of the *Arab Charter on Human Rights*; art. 77(5) of *Additional Protocol I* and art. 6(4) of *Additional Protocol II to the Geneva Conventions of 1949*; Principle N (9)(c), of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*); likewise in cases in which the person convicted was over seventy years old when he or she committed the offense (art. 4.5 of the *American Convention on Human Rights*); the mentally challenged (art. 3 of the *Safeguards guaranteeing protection of the rights of those facing the death penalty*); pregnant women (art. 6.5 of the *International Covenant on Civil and Political Rights*; art. 4.5 of the *American Convention on Human Rights*; art. 7 of the *Arab Charter on Human Rights*; Principle N (9)(c) of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*; art. 76.3 of *Additional Protocol I* and art. 6(4) of *Additional Protocol II to the Geneva Conventions of 1949*; art. 3 of the *Safeguards guaranteeing protection of the rights of those facing the death penalty*); as well as women who have recently given birth (art. 3 of the *Safeguards guaranteeing protection of the rights of those facing the death penalty*).

imposition of the death penalty based solely upon the category of crime means that the judge has no margin to assess the personal circumstances of the accused or those in which the crime was actually committed, thus depriving the person of the benefit of the most fundamental right, the right to life, without an opportunity to assess whether this exceptional form of punishment is appropriate in the circumstances of the accused's case.<sup>321</sup> The Special Rapporteur on extrajudicial, summary or arbitrary executions has come to the same conclusion.<sup>322</sup>

"States that still have the death penalty must, without exception, exercise the most rigorous control for observance of judicial guarantees in these cases. It is obvious that the obligation to observe the right to information becomes all the more imperative here, given the exceptionally grave and irreparable nature of the penalty that one sentenced to death could receive."

Inter-American Court of Human Rights<sup>323</sup>

### 3. CHARACTERIZATION OF EXTRAJUDICIAL EXECUTION

Under international law, extrajudicial executions are both a serious violation of human rights as well as a criminal offense. The prohibition on extrajudicial executions is a *jus cogens* norm.<sup>324</sup>

<sup>321</sup> Views of 31 October 1995, Communication No. 390/1990, *Lubuto v. Zambia*, para. 7.2; Views of 18 October 2005, Communication No. 1132/2002, *Webby Chisanga v. Zambia*, para. 7.4; Views of 18 October 2000, Communication No. 806/1998, *Lesley Thompson v. Saint Vincent and the Grenadines*, para. 8.2. In the same regard, see Inter-American Court of Human Rights, Judgment of 21 June 2002, *Hilaire, Constantine and Benjamin et al. v. Trinidad and Tobago*, Series C No. 94, paras. 103, 104, 105 and 108.

<sup>322</sup> See, *inter alia*, Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, UN Doc. A/HRC/4/20, 29 January 2007, paras. 54 to 62.

<sup>323</sup> Advisory Opinion OC-16/99, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, 1 October 1999, Series A No. 16, Para. 135

<sup>324</sup> See, among others: Sixth Congress of the United Nations on the Prevention of Crime and the Treatment of Offenders, (1980), Resolution No. 5 concerning Extrajudicial executions, par. 2 and 5, A/CONF.87/14/Rev.1 (1981); Inter-American Court of Human Rights, Judgment of 14 March 2001, *Case of Barrios Altos v. Peru*, Series C No. 75, Judgment of 11 May 2007, *Case of the Rochela Massacre v. Colombia*, Series C No. 163, Judgment of 26 September 2006, *Case of Almonacid Arellano et al. v. Chile*, Series C No. 154, and Judgment of 25 October 2012, *Case of The Massacres of El Mozote and nearby places v. El Salvador*, Series C No. 252; and Inter-American Commission on Human Rights, *Recommendation on Asylum and International Crimes*, 20 October 2000, OAS/Ser./L/V/II.111, doc. 20 revs. 16.

### a. Grave violation of human rights

The UN General Assembly has repeatedly condemned the practice of extrajudicial, arbitrary and summary executions<sup>325</sup> and has described them as a “gross violation of the most fundamental human right, the right to life”<sup>326</sup>, an “abhorrent practice”<sup>327</sup> a “flagrant violation of the fundamental right to life”<sup>328</sup>. The General Assembly repeatedly has stated that extrajudicial executions are serious human rights violations<sup>329</sup>. However, the General Assembly has also indicated that extrajudicial, summary or arbitrary executions “adversely affect the exercise”<sup>330</sup> of human rights. Likewise, General Assembly has repeatedly stated that “impunity continues to be a major cause of the perpetration of violations of human rights, including extrajudicial, summary or arbitrary executions.”<sup>331</sup>

“Extrajudicial executions imply a particular violation of the right to life, as they frequently entail a level of injury to other fundamental rights, such as the right to individual and sexual freedom, the right to personal integrity (not being tortured) and the right to legal protection.”

Ombudsman Office of Peru<sup>332</sup>

The jurisprudence of international organs for the protection of human rights is consistent on the matter. The Human Rights

<sup>325</sup> See Resolutions Nos. 35/175 of 15 December 1980; 36/175 of 9 November 1981; 37/182 of 17 December 1982; 38/96 of 16 December 1983; 39/110 of 14 December 1984; 40/143 of 13 December 1985; 41/144 of 4 December 1986; 42/141 of 7 December 1987; 43/151 of 8 December 1988; 44/159 of 15 December 1989; 45/169 of 18 December 1989; 45/162 of 18 December 1990; 47/136 of 1 March 1993; 49/191 of 9 March 1995; 51/92 of 12 December 1996; 53/147 of 9 December 1998; 55/111 of 4 December 2000; 57/214 of 18 December 2002; 59/197 of 20 December 2004; 61/173 of 19 December 2006; 63/182 of 18 December 2008; 65/208 of 21 December 2010; and 67/168 of 20 December 2012.

<sup>326</sup> Resolution No. 39/110 of 14 December 1984.

<sup>327</sup> Resolution No. 43/151 of 8 December 1988.

<sup>328</sup> Resolution No. 53/147 of 9 December 1998.

<sup>329</sup> See for example, Resolutions on Extrajudicial, summary or arbitrary executions, Nos. 53/147 December 1998, 55/111 of 4 December 2001 63/182 of 18 December 2008, 65/208 of 21 December 2010, and 67/168 of 20 December 2012.

<sup>330</sup> Resolution No. 65/208 of 21 December 2010.

<sup>331</sup> Resolution No. 55/111 of 4 December 2000, para 2. See also Resolutions Nos. 53/147 9 December 1998, 57/214 of 18 December 2002, 59/197 of 20 December 2004, 61/173 of 19 December 2006, 63/182 of 18 December 2008; 65/208 of 21 December 2010 and 67/168 of 20 December 2012.

<sup>332</sup> *Informe Defensorial No. 97, A dos años de la Comisión de la Verdad y Reconciliación*, Lima, September 2005, p. 98 (Original in Spanish, free translation).

Committee has repeatedly characterised extrajudicial execution as a grave violation of human rights<sup>333</sup>. This position was repeated by Prof. Theo van Boven, the Special Rapporteur of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities during the elaboration of the draft of the Principles on Reparation<sup>334</sup>.

"The General Assembly: [...] Notes that impunity continues to be a major cause of the perpetuation of violations of human rights, including extrajudicial, summary or arbitrary executions; [...] Reiterates the obligation of all Governments to conduct exhaustive and impartial investigations into all suspected cases of extrajudicial, summary or arbitrary executions, to identify and bring to justice those responsible, while ensuring the right of every person to a fair and public hearing by a competent, independent and impartial tribunal established by law, to grant adequate compensation to the victims or their families and to adopt all necessary measures, including legal and judicial measures, in order to bring an end to impunity, to prevent the recurrence of such executions; [...] Stresses the importance for States to take effective measures to end impunity with regard to extrajudicial, summary or arbitrary executions, *inter alia*, through the adoption of preventive measures, and calls upon Governments to ensure that such measures are included in post conflict peace building efforts."<sup>335</sup>

Meanwhile, the Inter-American Court of Human Rights has described extrajudicial executions as serious violations of human rights, and noted that they are "prohibited because they violate non-derogable rights recognized by international human rights law"<sup>336</sup>.

## **b. Crime under International Law**

The Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders was held in 1980; it characterised

<sup>333</sup> See, for example, Views of 29 March 1982, Communication No. 30/1978, Case of *Bleier Lewhoff and Valiño de Bleier v. Uruguay*; Views of 31 March 1982, Communication No. 45/1979, Case of *Pedro Pablo Camargo v. Colombia*; *General Comment No. 31, Nature of the legal obligation on States parties to the Covenant*; Views of 27 October 1995, Communication No. 563/1993, Case of *Nydia Erika Bautista v. Colombia*; and Views of 29 July 1997, Communication No. 612/1995, Case of *José Vicente and Amado Villafañe Chaparro et al. v. Colombia*.

<sup>334</sup> See UN Docs. E/CN.4/1997/104, E/CN.4/Sub.2/1996/17 and E/CN.4/Sub.2/1993/8.

<sup>335</sup> Resolution No. 55/111, "Extrajudicial, summary or arbitrary executions", 4 December 2000, paras. 2, 6 and 9.

<sup>336</sup> Judgment of 14 March 2001, *Case of Barrios Altos (Chumbipuma Aguirre et al. v Peru)*, Series C No. 75, para. 41. In the same regard, see, *inter alia*: Judgment of 29 November 2006, *La Cantuta v Peru*, Series C No. 162, para. 152; and Judgment of 24 February 2011, *Case of Gelman v. Uruguay*, Series C No. 221, para. 225.

extrajudicial executions as a “particularly abhorrent crime”, the eradication of which is of “high international priority”.<sup>337</sup> Inter-governmental organs<sup>338</sup>, international case law<sup>339</sup> and legal doctrine<sup>340</sup> have repeatedly qualified extrajudicial executions as a crime under International Law. The Inter-American Court of Human Rights has stated that the absolute prohibition of extrajudicial executions and the corresponding obligation to investigate and prosecute and punish the perpetrators is a peremptory norm of International Law (*jus cogens*)<sup>341</sup>.

“[I]n cases of extrajudicial executions, it is essential that the States conduct an effective investigation into a deprivation of life case and punish the perpetrators, especially when state officials are involved; otherwise they would be creating, in a climate of impunity, the conditions that will allow these events to continue, which is contrary to the duty to respect and guarantee the right to life.”

Inter-American Court of Human Rights<sup>342</sup>

International standards expressly reaffirm that Extrajudicial executions are a crime. In this regard, the *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions*<sup>343</sup> prescribe that “[g]overnments shall

<sup>337</sup> Resolution No. 5, “Extrajudicial execution”, para 2, adopted by the Sixth United Nations Congress for the Prevention of Crime and the Treatment of Offenders 1980, in A/CONF.87/14/Rev.1 (1981) pp 8-9.

<sup>338</sup> See *inter alia*: Sixth Congress of the United Nations for the Prevention of Crime and the Treatment of Offenders 1980, Resolution No. 5 “Extrajudicial executions”.

<sup>339</sup> See *inter alia*: Inter-American Court of Human Rights, Judgment of 14 March de 2001, *Case of Barrios Altos (Chumbipuma Aguirre et al. v. Peru)*, Series C No. 75, para. 41, Judgment of 8 July 2004, *Gomez Paquiyauri Brothers v. Peru*, Serie C No. 110, par. 76 and 128, Judgment of 24 November 2010, *Case of Gomes Lund et al. (Guerrilha do Araguaia) v. Brazil*, Series C No. 219, para. 172; Inter-American Commission on Human Rights, *Recommendation on asylum and its relations with international crimes*, 20 October 2000.

<sup>340</sup> See *inter alia*: Nigel Rodley, *The Treatment of Prisoners under International Law*, Clarendon Press – Oxford, 1999, Second Edition, page 192.

<sup>341</sup> See *inter alia*: Judgment of 14 March 2001, *Case of Barrios Altos (Chumbipuma Aguirre et al.) v. Peru*, Series C No. 75, para. 41; Judgment of 8 July 2004, *Gomez Paquiyauri Brothers v. Peru*, Series C No. 110, paras. 76 and 128; Judgment of 3 March 2005, *Case of Huilca Tecse v. Peru*, Series C No. 121, paras. 65 and 66; Judgment of 25 November 2006, *Case of Miguel Castro-Castro Prison v Peru*, Series C No. 160, para. 144; and Judgment of 4 July 2007, *Case of Zambrano Vélez et al. v. Ecuador*, Series C No. 166, para. 96.

<sup>342</sup> Judgment of 6 April 2006, *Case of Baldeón-García v. Peru*, Series C No. 147, para. 91.

<sup>343</sup> Recommended by the Economic and Social Council in its Resolution 1989/65, 24 May 1989, and by the General Assembly of the United Nations in several resolutions.

prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences<sup>344</sup>. Likewise, they also prescribe that “[g]overnments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the offence was committed.”<sup>345</sup> As Sir Nigel Rodley has stated, the Principles reaffirm the nature of extrajudicial executions as an offense under international law.<sup>346</sup>

Meanwhile, the *Set of Principles for the protection and promotion of human rights through action to combat impunity* stipulate that extrajudicial executions constitute a “serious crime under international law”.<sup>347</sup>

The General Assembly of the United Nations has repeated that, under International Law, States have the obligation to prevent, investigate and bring to justice those responsible for extrajudicial executions through the exercise of their criminal jurisdiction<sup>348</sup>. The General Assembly has “Reiterate[d] the obligation of all States under international law to conduct thorough, prompt and impartial investigations into all suspected cases of extrajudicial, summary or arbitrary executions, to identify and bring to justice those responsible, while ensuring the right of every person to a fair hearing by a competent, independent and impartial tribunal established by law, to grant adequate compensation within a reasonable time to the victims or their families and to adopt all necessary measures, including legal and judicial measure to put an end to impunity and to prevent the further occurrence of such executions, [...]”<sup>349</sup>.

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<sup>344</sup> Principle 1.

<sup>345</sup> Principle 18.

<sup>346</sup> Nigel Rodley, Doc. Cit., p. 198.

<sup>347</sup> Definition B “Serious crimes under international law”.

<sup>348</sup> See, for example, Resolution No. 61/173, “Extrajudicial, summary or arbitrary executions”, 19 December 2006, para. 3.

<sup>349</sup> Resolution No. 67/168, 20 December 2012, para. 3.



The Human Rights Committee has stated that with regard to cases of extrajudicial executions "States Parties must ensure that those responsible are brought to justice"<sup>350</sup>.

The Human Rights Committee has also stated that under the *International Covenant on Civil and Political Rights*, the "State party is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearances of persons and violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations. This duty applies *a fortiori* in cases in which the perpetrators of such violations have been identified."<sup>351</sup> Likewise, the Committee has repeatedly reminded states of their obligation to investigate extrajudicial executions and to bring those responsible to justice in ordinary criminal courts<sup>352</sup>.

The Inter-American Court of Human Rights has stated that States Parties to the American Convention have the international obligation to prosecute and punish those responsible for extrajudicial executions<sup>353</sup>. Likewise, the Court has established that when "faced with the gravity of certain offenses, the norms of international customary and treaty based law establish the obligation to prosecute those responsible"<sup>354</sup>.

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<sup>350</sup> *General Comment No. 31: Nature of the legal obligation on States parties to the Covenant*, 29 March 2004, para. 18.

<sup>351</sup> Views of 27 October 1995, Communication No. 563/1993, *Nydia Erika Bautista v. Colombia*, para. 8.6.

<sup>352</sup> See, *inter alia*, *Concluding Observations of the Human Rights Committee on: Peru* (CCPR/C/PER/CO/5, 29 April 2013), *Argentina* (UN Doc. CCPR/CO/70/ARG, 3 November 2000), *Brazil* (CCPR/C/BRA/CO/2, 1 December 2005), *Colombia* (CCPR/C/COL/CO/6, 6 August 2010); *Iran* (CCPR/C/79/Add.25, 3 August 1993), *Guatemala* (CCPR/CO/72/GTM, 27 August 2001), *Guyana* (CCPR/C/79/Add.121, 25 April 2000), *Honduras* (CCPR/C/HND/CO/1), *Kenya* (CCPR/C/KEN/CO/3, 31 August 2012), *Mexico* (CCPR/C/79/Add.32, 18 April 1994), *Nigeria* (CCPR/C/79/Add.65, 24 June 1996), *Niger* (CCPR/C/79/Add.17 - A/48/40, 29 April 1993), *Panama* (CCPR/C/PAN/CO/3, 17 April 2008) and *Surinam* (CCPR/CO/80/SUR, 4 May 2004).

<sup>353</sup> See, *inter alia*: Judgment of 10 July 2007, *Case of Cantoral-Huamani and García-Santa Cruz v. Peru*, Series C No. 167; Judgment of 8 July 2004, *Case of Gómez Paquiyauri Brothers v. Peru*, Series C No. 110; Judgment of 6 April 2006, *Case of Baldeón García v. Peru*, Series C No. 147; Judgment of 25 November 2006, *Case of Miguel Castro-Castro Prison v. Peru*, Series C No. 160; Judgment of 29 November 2006, *La Cantuta v Peru*, Series C, No. 162; Judgment of 11 May 2007, *Case of the Rochela Massacre v. Colombia*, Series C No. 163; and Judgment of 25 October 2012, *Case of The Massacres of El Mozote and nearby places v. El Salvador*, Series C No. 252.

<sup>354</sup> Judgment of 22 September 2006, *Case of Goiburú et al. v. Paraguay*, Series C No. 153, para. 128.

The Inter-American Commission on Human Rights has likewise classified extrajudicial execution as a crime under international law<sup>355</sup>. In this regard, the Commission has re-affirmed that “in the case of an extrajudicial execution, the State has the duty to investigate the way in which the killing occurred, identify the agents responsible, punish the guilty, and indemnify the family of the victim.”<sup>356</sup>

Today, it is clear that extrajudicial killings are a grave human rights violation and a crime under international law.

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<sup>355</sup> See, *inter alia*, Recommendation “Asylum and its relation with International Crimes”, 20 October 2000.

<sup>356</sup> Report No. 43/97, Case No. 10.562, *Héctor Pérez Salazar (Perú)*, para. 39.

### CHAPTER III: ENFORCED DISAPPEARANCE, EXTRAJUDICIAL EXECUTION AND OTHER CRIMES

“For years, the police forgot that that *order* has the person as its supreme goal and they adopted a strategy of massive abuse of the rights of Peruvians, including the right to life. Extrajudicial executions, disappearances, torture, massacres, sexual violence against women and other equally condemnable crimes comprise, for their recurring character and widespread nature, a pattern of human rights violations that the Peruvian State and its agents must recognize in order to compensate for it.”

Truth and Reconciliation Commission of Peru<sup>357</sup>

#### 1. GENERAL CONSIDERATIONS

Experience teaches us that very often the fate of the disappeared is death and that the disappeared are at the mercy of their victimizers during their captivity and are subjected to torture. Notwithstanding, in many cases, investigating and judicial authorities only consider the extrajudicial execution of the victim, forgetting that the victim was also a victim of enforced disappearance and/or torture. In other situations, disappearances are investigated, but only as a form of abduction/kidnapping, though the crime of abduction/kidnapping is only the means used to disappear victims. These practices have been characterized as a form of *de facto* impunity.

Although in themselves they both constitute crimes under international law, depending on the circumstances of their commission, both extrajudicial execution and enforced disappearance also may be categorized as one of the most serious crimes under international law: crimes against humanity, genocide or war crimes. This has both legal and evidentiary consequences. For example, under international law, extrajudicial execution and enforced disappearance are not *per se* imprescriptible. But when, due to the circumstances in which these offenses were committed, they also acquire the status of a crime against humanity, war crime, or genocide, they, as a rule become imprescriptible. (see Chapter V: "Judicial Repression of the Crimes of Enforced Disappearance and/or Extrajudicial Execution"). Likewise, certain additional elements must be proven for extrajudicial execution or enforced disappearance to be qualified as crimes against humanity, genocide or war crimes.

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<sup>357</sup> *Final Report*, Lima, 2003, p. 15 (original in Spanish, free translation).

## 2. ENFORCED DISAPPEARANCE AND ABDUCTION

The crime of enforced disappearance has some elements in common with abduction. In fact, in several countries where it has not been proscribed as a distinct offense under criminal law, the courts have resorted to qualifying it as abduction in order to punish enforced disappearance<sup>358</sup>. Notwithstanding, enforced disappearance and abduction are two very different crimes, not only from the point of view of criminal conduct but also from the rights that are affected.

In this regard, the Inter-American Court of Human Rights has stated that with regard to “forced disappearance of persons, the definition of this autonomous offense and the specific description of the punishable conducts that constitute the offense are essential for its effective eradication. Considering the particularly grave nature of forced disappearance of persons, the protection offered by criminal laws on offenses such as abduction or kidnapping, torture and homicide is insufficient. Forced disappearance of persons is a different offense, distinguished by the multiple and continuing violation of various rights protected by the Convention.”<sup>359</sup> Likewise, the Court has established “[f]orced disappearance is characterized by refusal to acknowledge the deprivation of liberty or to provide information about the fate or whereabouts of detained persons and by leaving no trace or evidence. This element must be present in the statutory definition of the crime in order to distinguish it from others, to which it is usually related, such as manstealing or abduction and murder, so that appropriate standards of proof may be applied and punishment according to the seriousness of the offense may be imposed on all persons involved in the crime.”<sup>360</sup>

Meanwhile, the Working Group on Enforced or Involuntary Disappearances (WGEID) has stated that “[a] number of States admit that they have not yet incorporated the crime of enforced disappearance into their domestic legislation, but argue that their legislation provides for safeguards from various offences that are

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<sup>358</sup> For example in Chile and Argentina, the courts have punished perpetrators of enforced disappearance under laws criminalizing abduction, but not without specifying that the crime of enforced disappearance would be punished as the crime of abduction. The crime of enforced disappearance was proscribed in the legislation in Argentina as a distinct crime in 2011 (Law 26.679, *Crimes against freedom*, 5 May 2011).

<sup>359</sup> Judgment of 12 August 2008, *Case of Heliodoro Portugal v. Panama*, Series C No. 186, para. 181.

<sup>360</sup> Judgment of 22 November 2005, *Case of Gómez Palomino. v. Peru*, Series C No. 136, para. 103.

linked with enforced disappearance or are closely related to it, such as abduction, kidnapping, unlawful detention, illegal deprivation of liberty, trafficking, illegal constraint and abuse of power. However, a plurality of fragmented offences does not mirror the complexity and the particularly serious nature of enforced disappearance. While the mentioned offences may form part of a type of enforced disappearance, none of them are sufficient to cover all the elements of enforced disappearance, and often they do not provide for sanctions that would take into account the particular gravity of the crime, therefore falling short for guaranteeing a comprehensive protection.”<sup>361</sup> The Committee on Enforced Disappearances has taken a similar stance<sup>362</sup>.

“Thus the definition of the crime in domestic law should cover all the varieties of situations covered by the generic term of ‘deprivation of liberty’. For instance, using the term ‘kidnapping’ alone is inappropriate, as it refers only to a certain type of illegal abduction.”  
Working Group on Enforced or Involuntary Disappearances<sup>363</sup>

While abduction is a “simple” crime from the perspective of the typical criminal conduct (illegal deprivation of liberty), by its very nature enforced disappearance is a “complex” crime which, as noted above in Chapter I, involves two cumulative behaviors: i) deprivation of liberty; and ii) the refusal to acknowledge said deprivation of liberty or give information regarding the fate or whereabouts of the disappeared. Moreover, as indicated by international instruments<sup>364</sup> and case law, abduction is one of the ways to undertake the first part of the offense (the deprivation of liberty). Notwithstanding, in order for the crime of enforced disappearance to occur, it is not enough to merely register the abduction, rather other concurrent elements of the crime must also

<sup>361</sup> *Report of the Working Group on Enforced or Involuntary Disappearances – Addendum: Best practices on enforced disappearances in domestic criminal legislation*, A/HRC/16/48/Add.3, 28 December 2010, Para. 11.

<sup>362</sup> See: Committee on Enforced Disappearances *Concluding Observations on: Germany*, CED/C/DEU/CO/1, 10 April 2014, para. 7; and *Spain*, CED/C/ESP/CO/1 12 December 2013, para. 9.

<sup>363</sup> *Report of the Working Group on Enforced or Involuntary Disappearances – Addendum: Best practices on enforced disappearances in domestic criminal legislation*, A/HRC/16/48/Add.3, 28 December 2010, Para. 23.

<sup>364</sup> *Inter-American Convention on Forced Disappearance of Persons* (art. II); *International Convention for the Protection of All Persons from Enforced Disappearance* (art. 2); *Rome Statute of the International Criminal Court* (art. 7, 2, i); and *Declaration on the Protection of All Persons from Enforced Disappearance* (Para. 3 of the Preamble).

occur: the refusal to acknowledge the deprivation of liberty or give information on the fate or whereabouts of the disappeared. In other words, the abduction is subsumed into the greater offense of enforced disappearance, which requires the existence of other elements of the offense in order for it to exist (refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the victim).

Peruvian and Colombian jurisprudence is illustrative in this area. It should be noted that while the crime of enforced disappearance in Peru requires the perpetrator to be a public official, anyone can be a perpetrator of the crime of enforced disappearance under Colombian criminal legislation.

In Peru, the Superior Court of Lima has ruled that “the elements (of the crime of aggravated abduction) have already been included in the (crime of enforced disappearance)”<sup>365</sup>. The Permanent Criminal Chamber has stated that “[t]he crime of enforced disappearance of persons has, as characteristic features, a complex structure and *modus operandi*. It involves not only the deprivation of liberty of a person who experiences the criminal conduct at the hands of State agents, in the limited conception of our legislature, but also the systematic concealment of such apprehension so that the whereabouts of the victim remains unknown, allowing it to be termed a continuing offense, a result crime and, essentially, special unto itself. For this, the agent refuses to disclose the whereabouts of the victim, which creates and maintains a state of uncertainty about his or her fate, so that the missing person is removed from the protection of the law as well as the possibility of judicial protection. [...] [T]he complexity of the crime is that it legally consists of *several acts* or a *plurality of acts*.”

“[T]he crime of enforced disappearance is a crime of breach of duty, notwithstanding this duty is not constrained to the specific function of any charge, but the duty of the public official to safeguard the rights of citizens.”

National Criminal Court of Peru<sup>366</sup>

There are two actions that comprise it: the deprivation of liberty of a person, and the subsequent disappearance of the same, which is

<sup>365</sup> High Court of Justice of Lima, First Special Criminal Chamber, Judgment of 8 April 2008, Exp. 03-2003-1 SPE/CSJLI, *trial v. Julio Rolando Salazar and others/ Aggravated homicide, Aggravated abduction and enforced disappearance*.

<sup>366</sup> Judgment of 13 October 2009, Exp. No. 16-06, *DD Bendezu Gómez*.

expressed in various ways under the common denominator of not giving information about the illegally detained person, hiding his/her status, giving no information about his/her subsequent release, removing him/her from the protection of the legal system."<sup>367</sup>

Thus, Peruvian case law has characterized enforced disappearance as a "breach of duty" of public officials, different from abduction. Thus, the National Criminal Court has held that the "breach of duty is not limited to the physical apprehension of the person and depriving him or her of their liberty (or giving orders to do so), which only constitute the actual crime of abduction, but it also extends to subsequent acts derived from denying or concealing information about the whereabouts of the individual, denying the right to request legal remedies, and generally depriving the individual of the free exercise of his or her fundamental rights, thereby affecting the individual's dignity. [...] [T]he breach of duty has to be understood on a level that is akin to a sense of justice, related to legally protected rights, the basic duty of *neminem laedere* (do no harm) that makes greater demands on members of the Armed Forces and Police Forces due to their role under the Constitution of the State. They have a duty to protect citizens. Therefore it is not expected that they would violate that duty and remove a person from his or her environment, the bosom of his or her family and social milieu and prevent the free exercise of the individual's fundamental rights, but it is expected that they safeguard them, [as public servants] they have a role as guarantors."<sup>368</sup>

The Constitutional Court in Colombia has stated that "abduction is committed by the person who snatches, removes, withholds or conceals a person for the purposes defined in criminal law, [while] the commission of enforced disappearance consists of two acts: the deprivation liberty of a person which may even have been legal, legitimate *ab initio*, followed by their concealment, and also the refusal to acknowledge that deprivation or to give information about the person's whereabouts which place him or her beyond legal protection."<sup>369</sup> The Court has also pointed out that acts of

<sup>367</sup> Judgment of 24 September 2007, R. N. No. 1598 – 2007.

<sup>368</sup> Judgment of 13 October 2009, Exp. No. 16-06, *DD Bendezu Gómez*.

<sup>369</sup> Judgment C-317/02 of 2 May 2002, Exp. D-3744, Lawsuit of unconstitutionality against Article 165 (partial) of Law 599 2000 "*Whereby the Penal Code is enacted*". In the same regard, see: Judgment C-394/07 of 23 May 2007, Exp. D-6470, *Lawsuit of unconstitutionality of Articles 2 and 15, section 3, of Law 986 2005 "Whereby protection measures for abduction victims and their families are adopted, and other*

“abduction, hostage-taking and enforced disappearance are three different crimes, which require proof of equally diverse elements to occur. Indeed, abduction requires the act of snatching, removing, retaining or hiding a person temporarily, either, as in the case of abduction for ransom, for an action to be performed or omitted, for purposes of propaganda or for political reasons; or for another reason, when it comes to simple abduction. [...] [F]or the crime of hostage-taking to occur, the following elements must exist: (i) on one hand, the deprivation of liberty, (ii) conditioning this or the security of the hostage on the satisfaction of the demands made to the other party, and, finally, (iii) the act takes place in the context of an armed conflict. Likewise, the enforced disappearance of people takes place in different circumstances. Note that this occurs when a person is subjected to deprivation of liberty, but not temporarily, rather with the intention to hide them and not to provide information concerning their whereabouts.”<sup>370</sup>

Peruvian case law has characterized the crime of abduction as an offense against the right to personal liberty,<sup>371</sup> while the crime of enforced disappearance affects a wide range of legal rights.<sup>372</sup> The Supreme Court of Justice has considered that enforced disappearance is a “particularly serious [...] complex crime that can be committed in many different ways, that occurs in the context of the abusive exercise of state power, and that compromises respect for the fundamental rights of the person, affecting the very idea of dignity and the inherent content of the most significant human rights”.<sup>373</sup>

Meanwhile, the Constitutional Court of Colombia has stated that “the definition of the crime of enforced disappearance seeks the

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*provisions*”; and Judgment C-400/03 of 20 May 2003, Exp. D-4326, *Lawsuit of unconstitutionality of Article 10, par. 1 and 2, of Law 589 of 2000*.

<sup>370</sup> Judgment C-394/07 of 23 May 2007, Exp. D-6470, *Lawsuit of unconstitutionality against Articles 2 and 15, para. 3, of Law 986 2005* “Whereby protection measures for abduction victims and their families are adopted, and other provisions”.

<sup>371</sup> See, *inter alia*, Supreme Judicial Court, Special Criminal Chamber, Judgment of 7 April 2009, Exp. No. A.V. 19 – 2001, *Alberto Fujimori*, para. 680; and Superior Court of Justice of Lima, First Special Criminal Chamber, Judgment of 1 October 2010, Exp. 28-2001, *case of Barrios Altos*.

<sup>372</sup> National Criminal Chamber, Judgment of 13 October 2009, Exp. No. 16-06, *DD Bendezu Gómez*; Superior Court of Justice of Lima, First Special Criminal Chamber, Judgment of 8 April 2008, Exp. 03-2003-1° SPE/CSJLI, *case against Julio Rolando Salazar and others /aggravated homicide, aggravated abduction and enforced disappearance*; Permanent Criminal Chamber, Judgment of 24 September 2007, R. N. No. 1598 – 2007.

<sup>373</sup> Plenary Accord No. 09-2009/CJ-116, para. 7.



protection of a multiplicity of legal rights such as the right to life, liberty and security of person, prohibition of cruel, inhuman or degrading treatment, freedom from arbitrary arrest, detention or exile, the right to a fair trial and due process, the right to recognition of legal personality before the law and the right to humane treatment in detention, among others, abduction only protects the legal right to liberty and personal autonomy.”<sup>374</sup> Likewise, the Court has held that “[w]ithout denying that the conditions of the disappeared or the abducted are equally outrageous, it cannot be denied that the disappeared are in a condition of helplessness that is much more marked than that of hostages. [...] It is unlikely to find conduct that more harmfully affects fundamental rights and constitutional values than the enforced disappearance of persons, as it compromises not only the victim’s legal interests but also those of their family, including human dignity, individual autonomy, physical integrity and the free development of personality. [...] That enforced disappearance constitutes a more serious aggression to the dignity of human beings and their fundamental right to liberty than the aggression posed by the crime of abduction, is an assertion that is corroborated by the punishment fixed for such offenses.”<sup>375</sup>

### **3. ENFORCED DISAPPEARANCE AND EXTRAJUDICIAL EXECUTION**

As the Inter-American Court of Human Rights has stated, “the practice of disappearances often involves secret execution without trial, followed by concealment of the body to eliminate any material evidence of the crime and to ensure the impunity of those responsible”<sup>376</sup>.

Notwithstanding this reality and the fact that enforced disappearance in itself seriously undermines the right not to be arbitrarily deprived of life,<sup>377</sup> as has been reiterated in international and national jurisprudence (See Chapter I: “Enforced Disappearance”), the fate of the disappeared person is not inevitably death. Indeed, in some countries, some victims of

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<sup>374</sup> Judgment C-317/02 of 2 May 2002, Exp. D-3744, Lawsuit of unconstitutionality of Article 165 (partial) of Law 599 2000 “*Whereby the Penal Code is enacted*”.

<sup>375</sup> Judgment C-400/03 of 20 May 2003, Exp. D-4326, *Lawsuit of unconstitutionality of Article 10, par. 1 and 2, of Law 589 2000*.

<sup>376</sup> Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 85.

<sup>377</sup> Article 1 (2) of the *Declaration on the Protection of All Persons from Enforced Disappearance*.

enforced disappeared have been rescued alive.<sup>378</sup>

"As to the fate of the disappeared persons, relatives seem to fear that some of them died as victims of summary executions or torture in detention centres. In fact, many relatives search for their loved ones in the clandestine mass graves discovered in the area. [...] The plight of families of persons who have disappeared is particularly serious. In the hope of finding arrested relatives, many of them wander from prison to prison and from barracks to barracks covering many kilometres on foot, carrying their children, whom they have no means of feeding. They try to obtain information on their loved ones by questioning anyone, in particular persons whom they know to have been arrested and released. Often they try to make their way to places where mass graves are known to exist, but they are not always successful, since the military authorities have prohibited all access to such places and there is a risk that they themselves will be arrested. Some have been able to identify the bodies of missing relatives, following legal action to obtain court orders for the exhumation of bodies buried in mass graves. Others have found unburied bodies in various places."

Working Group on Enforced or Involuntary Disappearances  
(Mission to Peru in 1985)<sup>379</sup>

Enforced disappearance and extrajudicial execution are autonomous crimes with distinct characteristics, both from the standpoint of the criminal acts they involve and the legal rights each violates. When both illegal acts concur, in other words when the victim of enforced disappearance is killed during his captivity, two crimes have been committed: enforced disappearance and homicide, often aggravated. In these cases, enforced disappearance is not subsumed under the crime of homicide, nor is homicide an integral part of the complex crime of enforced disappearance. In this regard, due to the complex nature of the offense and that it "is a distinct

<sup>378</sup> For example, at the end of the dictatorship in Argentina, several missing people were found alive and released in the installation of the School of Mechanics of the Navy, in Buenos Aires; in Morocco, more than a hundred persons disappeared in the 1970s and were held in clandestine detention centers in Tazmamart and Laayoune, some for several years; they were released in the beginning of the 1990s by order of King Hassan II (See: *Report of the Working Group on Enforced or Involuntary Disappearances - Addendum: Mission to Morocco*, A/HRC/13/31/Add.1 of 9 February 2010, paras. 18 and 19); in Colombia, a person was found alive and rescued from a military installation by a special commission of the Inspector General of the Nation (*Procurador General de la Nación*), after he was missing for more than three months (Disciplinary File No. 022/73.048).

<sup>379</sup> *Report on the visit to Peru by two members of the Working Group on Enforced or Involuntary Disappearances (17 to 22 June 1985)*, E/CN.4/1986/18/Add.1, 8 January 1985, paras. 50 and 99.

phenomenon characterized by constant and multiple violations of several rights enshrined in the Convention"<sup>380</sup>, the Inter-American Court of Human Rights has understood that the crime of homicide does not offer the protection required by the crime of enforced disappearance. In these cases we are faced with a phenomenon of concurrent offenses. This position has been reaffirmed by various courts in Latin America. For example, the Superior Court of Lima has stated that "the fact that the death of the victims [of enforced disappearance] occurs means that there are concurrent offenses, due to the autonomous action of this offense in respect of the other".<sup>381</sup>

This means that both crimes should be investigated and that the perpetrators of both must be prosecuted and punished. Failure to investigate crimes generates serious consequences, particularly for the clarification of the facts, as well as for the investigation and identification of the alleged perpetrators and their degree of participation in relation to the crimes of enforced disappearance and extrajudicial execution. This is even more serious as, very often in these types of criminal acts, several people participate in a compartmentalized manner, operating clandestinely. When the authorities do not investigate all criminal acts and/or prosecute those responsible for all the crimes committed, this is considered to amount to *de facto* impunity.

While often the bodies of missing people who have been executed while in captivity are hidden, secretly buried or destroyed, the practice of enforced disappearance should not be confused with "secret" extrajudicial executions or those who have been buried in clandestine graves. In the latter cases, the authorities did not deny having been in possession of the person or having caused death, but they refuse to disclose the date, place and/or the circumstances of execution and/or the exact place of the burial of loved ones.<sup>382</sup> These cases do not represent the offense of enforced

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<sup>380</sup> Judgment of 22 November 2005, *Case of Gómez Palomino v. Peru*, Series C No. 136, para. 92. See also: Judgment of 12 August 2008, *Case of Heliodoro Portugal v. Panama*, Series C No. 186, para. 181.

<sup>381</sup> Judgment of 8 April 2008, Exp. 03-2003-1 SPE/CSJLI, *case against Julio Rolando Salazar and others /Aggravated homicide, Aggravated abduction and enforced disappearance*, para. 135, p. 111.

<sup>382</sup> The Human Rights Committee has been confronted with this practice in several countries and has issued statements in this regard in some individual cases. (See, for example, Views of 26 March 2006, *Case of Sankara and others v. Burkina Faso*, Communication No. 1159/2003).

disappearance, even if the relatives of the victim are unaware of the place of burial of their victimized loved one. Notwithstanding, as noted by Office of the High Commissioner for Human Rights, in cases of “enforced disappearance, secret executions and the hiding [of] the burial place of the victim, the right to truth also has a special aspect: knowledge of the fate and whereabouts of the victims”.<sup>383</sup>

#### 4. ENFORCED DISAPPEARANCE AND TORTURE

Enforced disappearance inherently involves a form of torture for the disappeared. As stated in the *Declaration on the Protection of All Persons from Enforced Disappearance* “[a]ny act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families [...] constitutes a violation of the rules of international law [...] the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment.”<sup>384</sup> International case law is unanimous in this regard (See Chapter I: Enforced Disappearance). Indeed, the aggravated condition of vulnerability of the disappeared, their situation of complete defenselessness with regard to their victimizers and the absolute uncertainty about the fate awaiting them, is, itself, a form of torture or other cruel or inhuman treatment.

“Extrajudicial execution, enforced disappearance or torture, are cruel, heinous acts, and serious violations of human rights, for this reason they must not go unpunished, in other words, the perpetrators and accomplices of these crimes that constitute a violation of human rights cannot evade the legal consequences of their actions.”

The Constitutional Tribunal of Peru<sup>385</sup>

As the Inter-American Court pointed out at an early stage, the “prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person”.<sup>386</sup> In other words, torture, caused by the intense mental suffering of the disappeared, is inherent in the crime of enforced disappearance. Thus, from the

<sup>383</sup> *Study on the Right to the Truth, Report of the Office of the High Commissioner for Human Rights of the United Nations*, E/CN.4/2006/91, 9 January 2006, para. 59.

<sup>384</sup> Article 1 (2).

<sup>385</sup> Judgment 18 March 2004, Exp. No. 2448-21002-HC/TC, Piura, *Case of Genaro Villegas Namuche*, para. 5 of the legal basis.

<sup>386</sup> *Case of Velásquez Rodríguez v. Honduras*, Doc. Cit., para. 156.

perspective of criminal law, the crime of torture is subsumed into that of enforced disappearance.

Notwithstanding, a different situation arises when the missing reappears, albeit dead or alive, and his body shows evidence of torture and physical injuries. It also occurs in situations where the forcibly disappeared person remains in captivity, but there is evidence, testimony or victimizers' confessions etc., which show that the victim was tortured. In such cases, it is considered that there have been two autonomous and independent crimes committed: torture and enforced disappearance. Consequently both crimes must be investigated and those responsible must be tried and punished for both offenses. When both crimes are not investigated in these cases and the perpetrators are not prosecuted for both crimes, or if only one of these crimes is investigated, this constitutes a form of impunity.

## **5. CRIME AGAINST HUMANITY**

### **a. About crimes against humanity**

Both enforced disappearance and extrajudicial execution, as well as being *per se* crimes under international law, can constitute a crime against humanity. Since the adoption of the Statute of the International Military Tribunal at Nuremberg and the subsequent adoption of various international instruments,<sup>387</sup> the concept of

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<sup>387</sup> See among others: *Statute of the Military Court of the Far East* (art. 5); *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*, adopted by the International Law Commission of the United Nations, (Principle VI); *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity* (art. 1, b); *Statute of the International Criminal Court for the former Yugoslavia* (art. 5); *Statute of the International Criminal Tribunal for Rwanda* (art. 3); *Draft Code of Offences against the Peace and Security of Mankind* (1996); *Regulation No. 2000/15 adopted by the United Nations Transitional Administration in East Timor on Special Panels for Serious Crimes*, (UNTAET/REG/2000/15, 6 June 2000) (section 5); *Law on Establishing Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea* (art. 5); *Rome Statute of the International Criminal Court* (art. 7); "Elements of Crimes", "Article 7 Crimes against Humanity, Introduction", (*Assembly of the States Parties in the Rome Statute of the International Criminal Court First Regular Session, New York, 3 to 10 September 2002, Official Documents*, Document ICC-ASP/1/3, p. 120); and *Statute of the Special Court for Sierra Leone* (art. 2). In relation to enforced disappearance, see also: *Declaration on the Protection of All Persons from Enforced Disappearance* (Para. 4 of the Preamble); *Inter-American Convention on Forced Disappearance of Persons* (Para. 6 of the Preamble); and *International Convention for the Protection of All Persons from Enforced Disappearance* (art. 5).

crimes against humanity has been developed.

"Crimes against humanity are serious acts of violence which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health, and or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim which essentially characterises crimes against humanity."  
International Criminal Tribunal for the former Yugoslavia<sup>388</sup>

The prohibition against committing a crime against humanity is a norm of customary international law<sup>389</sup> and, as has been repeatedly stated in international jurisprudence, it is part of the scope of the rules of *jus cogens*<sup>390</sup>. The Inter-American Court of Human Rights has stated that the "prohibition to commit crimes against humanity is a *jus cogens* rule, and the punishment of such crimes is obligatory pursuant to the general principles of international law"<sup>391</sup>.

While initially, crimes against humanity were considered to be committed in the context of an armed conflict<sup>392</sup>, this determinant

<sup>388</sup> Judgment of 29 November 1996, *Prosecutor v. Endemovic*, Case No. IT-96-22-T.

<sup>389</sup> See among others: Declaration of France, United Kingdom and Russia, 24 May 1915, on the killings of Armenians in Turkey conducted by the Ottoman Empire; the Treaty of Sevres, 10 August 1920; the report presented to the Preliminary Peace Conference of 1919 by the Commission on the Responsibility of the Authors of the War and on Enforcement of Sanctions; Article 6(c) of the *Charter of the International Military Tribunal of Nuremberg*, 1945; *Law No. 10 of the Allied Control Council*, 1946; Article 6.c of the *Statute of the International Military Tribunal for the Far East*, 1946; Article 2 (10) of the *Draft Code of Offences against the Peace and Security of Mankind*, 1954; Article 5 of the *Statute of the International Criminal Tribunal for the former Yugoslavia*, 1993; Article 18 of the *Draft Code of Offences against the Peace and Security of Mankind*, 1996.

<sup>390</sup> See *inter alia*: International Criminal Tribunal for the former Yugoslavia, Judgment 14 January 2000, *Prosecutor v. Kupreskic and others*, Trial IT-95-16, para. 520; and Inter-American Court of Human Rights, Judgment of 26 September 2006, *Case of Almonacid Arellano et al. v. Chile*, Series C No. 154, para. 94 et seq.; and European Court of Human Rights, Decision of inadmissibility 17 January 2006, *Kolk and Kislyiy v. Estonia*, Applications Nos. 23052/04 and 24018/04, and Judgment of 17 May 2010, *Kononov v. Latvia*, Application No. 36376/04.

<sup>391</sup> Judgment of 26 September 2006, *Case of Almonacid Arellano et al. v. Chile*, Series C No. 154, para. 99

<sup>392</sup> As stipulated in Article 6 of the *Charter of the International Military Tribunal of Nuremberg* and Article 5 of the *Statute of the International Military Tribunal of the Far East*.

has been definitively removed and today International Law does not require it in order for a crime against humanity to be committed<sup>393</sup>; they can now be committed both during peacetime and states of emergency as well as in times of international armed conflict or internal armed conflict<sup>394</sup>.

“The absence of a nexus between crimes against humanity and armed conflict is an established rule in customary international law.”

International Criminal Tribunal for the former Yugoslavia<sup>395</sup>

Crimes against humanity have two basic elements: i) the widespread scale, or massive commission or the systematic practice of certain acts;<sup>396</sup> and ii) the acts themselves.

With regard to the first element, various international instruments

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<sup>393</sup> See among others: *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity* (art. I, b); *Convention on the Prevention and Punishment of the Crime of Genocide* (art. I); *Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity (Principle 1)*; *Statute of the International Criminal Tribunal for Rwanda* (art. 3); *Draft Code of Offences against the Peace and Security of Mankind* (1996) (art. 18); *Rome Statute of the International Criminal Court* (art. 7); “Elements of crimes”, “Article 7 Crimes against Humanity, an Introduction”, Para. 3; and *Statute of the Special Court for Sierra Leone* (art. 2).

<sup>394</sup> See, *inter alia*, *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity* (art. 1.b).

<sup>395</sup> Judgment of 2 October 1995, *Prosecutor v Tadić*, (“Prijedor”), Case No. IT-94-1-T, para. 141.

<sup>396</sup> See, *inter alia*: *Report of the International Law Commission on the work of its 48th session – 6 May to 26 July 1996*, A/51/10, pp. 47-48; *Draft Code of Offences against the Peace and Security of Mankind* (art. 18); *International Convention for the Protection of All Persons from Enforced Disappearance* (art. 5); *Statute of the International Criminal Tribunal for Rwanda* (art. 3); *Rome Statute of the International Criminal Court* (art. 7); *Statute of the Special Court for Sierra Leone* (art. 2); *Law on Establishing Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea* (art.5); and *Regulation No. 2000/15 adopted by the United Nations Transitional Administration in East Timor on Special Panels for Serious Crimes* (section 5). It should be stated that the *Declaration on the Protection of All Persons from Enforced Disappearance* (Para. 4 of the Preamble) and the *Inter-American Convention on Forced Disappearance of Persons* (Para. 6 of the Preamble) are limited to the “systematic practice”. See also, International Criminal Tribunal for the Former Yugoslavia: Judgment of 7 May 1997, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-T; Judgment of 14 January 2000, *Prosecutor v. Kupreskic and others*, Case No. IT-95-16-T; Judgment of 3 March 2000, *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T; and Judgment of 26 February 2001, *Prosecutor v Kordic and Cerkez*, Case No. IT-95-14/2-T.

use different terms.<sup>397</sup> International human rights jurisprudence has referred either to the massive, widespread or systematic practice; massive attacks on a large-scale, widespread or systematic; and systematic or generalized patterns<sup>398</sup>. These phrases point to the same phenomenon: they are not isolated or sporadic events<sup>399</sup>. These acts are either widespread or committed on a large scale or massively or committed as part of a policy, a plan or systematically<sup>400</sup>. As noted by the International Criminal Court, “the term ‘widespread’ “refers to the large-scale nature of the attack as well as to the number of victims, whereas the term ‘systematic’ pertains to the organized nature of the acts of violence and to the improbability of their random occurrence”<sup>401</sup>.

With regard to the “systematic” element, international jurisprudence has clarified that: i) it does not require the existence of a written plan and it can be inferred, for example, from a series of events and modalities and common patterns of the acts as well as statements and the behavior of the alleged perpetrators<sup>402</sup>; and ii) it does not

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<sup>397</sup> “Widespread or systematic practice”; “Systematic or large-scale commission”; or “widespread or systematic attack against a civilian population”.

<sup>398</sup> Inter-American Court of Human Rights, Judgment of 26 September 2006, *Case of Almonacid Arellano et al. v. Chile*, Series C No. 154; Judgment of 29 November 2006, *La Cantuta v. Peru*, Series C, No. 162; Judgment of 22 September 2009, *Case of Anzaldo Castro v. Peru*, Series C No. 202; Judgment of 24 November 2010, *Case of Gomes Lund and others (Guerrilha do Araguaia) v. Brazil*, Series C No. 220; Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274; and Judgment of 20 November 12, *Case of Gudiel Álvarez and others (“Diario Militar”) v. Guatemala*, Series C No. 253. See also, Human Rights Committee, *General Comment 31*, Doc. Cit..

<sup>399</sup> *Report of the International Law Commission on the work in its 48th session – 6 May to 26 July 1996*, A/51/10, p. 101 and 102.

<sup>400</sup> See *inter alia*: *Report of the International Law Commission on the work in its 48th session – 6 May to 26 July 1996*, A/51/10, p. 101 and 102; International Criminal Tribunal for Rwanda, Judgment of 21 May 1999, *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, para. 122; International Criminal Tribunal for the Former Yugoslavia, Judgment of 7 May 1997, *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, Judgment of 14 January 2000, *Prosecutor v. Kupreskic and others*, Case No. IT-95-16-T, Judgment of 3 March 2000, *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T, Judgment of 26 February 2001, *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-T, and Judgment of 15 March 2002, *Prosecutor v. Milorad Krnojelac*, Case No, IT-97-25-T, para. 53; and Inter-American Court of Human Rights, Judgment of 29 November 2006, *La Cantuta v. Peru*, Series C, No. 162, para. 82.

<sup>401</sup> Decision of the Pre-Trial Chamber, 4 March 2009, *Prosecutor v Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, para. 81. In the same regard, see, *inter alia*, International Criminal Tribunal for Rwanda, Judgment of 21 May 1999, *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, para. 123.

<sup>402</sup> See, *inter alia*: International Criminal Tribunal for the Former Yugoslavia, Judgment of 3 March 2000, *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T, para. 204; and



necessarily require a plurality of acts, and it is sufficient that a single act be committed as part of a plan, a systematic practice or policy for the crime against humanity to be committed<sup>403</sup>.

"Starting at the beginning of the 1980s and up until the end of 2000, Peru endured a conflict between armed groups and members of the military and police forces. In previous cases, this Court has recognized that this conflict intensified amid a systematic practice of human rights violations, including extrajudicial executions and the enforced disappearance of persons suspected of belonging to illegal armed groups, such as the Peruvian Communist Party, *Sendero Luminoso* (hereinafter "Shining Path") and the Túpac Amaru Revolutionary Movement (hereinafter "MRTA"), acts carried out by State agents on the orders of leaders of the military and police forces."

Inter-American Court of Human Rights<sup>404</sup>

Although some international instruments use the phrase "attack on the civilian population," this should not be understood as requiring the existence of an armed conflict, but rather as requiring behavior that involves violence<sup>405</sup>. Likewise, the phrase does not exclude members of the parties to an armed conflict from being considered victims<sup>406</sup>.

The International Law Commission has stated that the "systematic or large-scale commission" is a condition consisting of "two

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International Criminal Court, Pre-Trial Chamber, Decision of 4 March 2009, *Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, para. 85.

<sup>403</sup> See, *inter alia*: International Criminal Tribunal Penal for the Former Yugoslavia, Judgment of 7 May 1997, *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-T, Judgment of 14 January 2000, *Prosecutor v. Kupreskic and others*, Case No. IT-95-16-T, and Judgment of 26 February 2001, *Case of Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-T; *Report of the International Law Commission on the work in its 48th session – 6 May to 26 July 1996*, A/51/10, p. 47; and Inter-American Court of Human Rights, Judgment of 26 September 2006, *Case of Almonacid Arellano et al. v. Chile*, Series C No. 154, para. 96.

<sup>404</sup> Judgment of 26 November 2013, *Case of Osorio Rivera and Family Members v. Peru*, Series C No. 274, para. 53.

<sup>405</sup> See, *inter alia*: "Elements of Crimes", "Article 7 Crimes against humanity, an Introduction", para. 2; International Criminal Tribunal Penal for the Former Yugoslavia, Judgment of 15 March 2002, *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, para. 54; International Criminal Court, Judgment of 15 June 2009, *Prosecutor v. Jean-Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, para. 75.

<sup>406</sup> International Criminal Tribunal for the Former Yugoslavia: Judgment of 7 May 1997, *Case of Prosecutor v. Tadić*, IT-94-1-T "Prijedor", para. 640. In this regard: Judgment of 13 April 1996, *Case of Prosecutor v. Mile Mskic, Miroslav Radic and Veselin Slivjančanin*, (Case of "Hospital of Vukovar"), Case No. IT-95-13-R61, paras. 20 and 32.

alternative requirements<sup>407</sup>. The jurisprudence of international criminal tribunals is the same in this regard<sup>408</sup>. The International Criminal Tribunal for the former Yugoslavia has stated that the attack must be widespread or systematic or, "in other words, we are in the presence of an alternative and not a double condition"<sup>409</sup>.

With regard to the second element, the acts themselves, the list of acts whose large scale or systematic commission constitute a crime against humanity, has evolved with the development of international law. In light of current developments, both in customary and treaty-based international law, the systematic or widescale practice of murder and enforced disappearance, among other acts, constitute crimes against humanity<sup>410</sup>.

### **b. Crime against humanity and extrajudicial execution**

Since the Charter of the International Military Tribunal at Nuremberg, all international instruments have included murder in the list of acts that constitute crimes against humanity when they are committed in a massive or systematic practice or as part of a large-scale or systematic attack<sup>411</sup>.

In this regard, the General Assembly of the United Nations has repeatedly pointed out that "extrajudicial, summary or arbitrary executions may under certain circumstances amount [...] crimes

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<sup>407</sup> *Report of the International Law Commission on the work in its 48th session – 6 May to 26 July 1996*, A/51/10, p. 47.

<sup>408</sup> See *inter alia*: International Criminal Tribunal for Rwanda, Judgment of 21 May de 1999, *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, para. 123; International Criminal Tribunal for the Former Yugoslavia, Judgment of 3 March 2000, *Prosecutor v. Tihomir Blaskic*, Case No. IT-95-14-T, para. 19 and Judgment of 15 March 2002, *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-T, para. 57.

<sup>409</sup> Judgment of 12 June 2002, *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case Nos. IT-96-23 and IT-96-23/1-A, para. 97.

<sup>410</sup> In this regard see *Report of the International Law Commission on the work in its 48th session – 6 May to 26 July 1996*, Official Documents of the General Assembly, Fifty-first period of sessions, Supplement No. 10 (A/51/10), p. 47 et seq.; and Amnesty International, *International Criminal Court - Making the Right Choices, Part I*, January 1997, Index AI: IOR 40/01/97.

<sup>411</sup> See, *inter alia*: *Statute of the International Military Tribunal at Nuremberg* (art. 6,c); *Statute of the Military Court of the Far East*(art. 5); *Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal*, adopted by the Commission of International Law of the United Nations (Principle VI, c); *Statute of the International Criminal Court for the former Yugoslavia* (art. 5,a); *Statute of the International Criminal Tribunal for Rwanda* (art. 3,a); *Rome Statute of the International Criminal Court* (art. 7,1,a); and *Statute of the Special Court for Sierra Leone* (art. 2,a).

against humanity [...], under international law, including the Rome Statute of the International Criminal Court [...]"<sup>412</sup>

"[S]ummary and arbitrary killing... and enforced disappearance... When committed as part of a widespread or systematic attack on a civilian population, these violations of the Covenant are crimes against humanity."

Human Rights Committee<sup>413</sup>

### c. Crimes against humanity and enforced disappearance

In the 1990s the first international instruments were adopted qualifying the widespread or systematic practice of enforced disappearance as a crime against humanity. The *Declaration on the Protection of All Persons from Enforced Disappearance* in 1992 and the *Inter-American Convention on Forced Disappearance of Persons* in 1994 qualify the systematic practice of enforced disappearance as a crime against humanity<sup>414</sup>. However, neither instrument considers the character of mass practice. For its part, in its *Draft Code of Offences against the Peace and Security of Mankind* of 1996, the International Law Commission included enforced disappearance in the list of acts that constitute crimes against humanity. Although the *Statute of the International Criminal Tribunal for the former Yugoslavia* did not specifically include enforced disappearance in the list of acts that could constitute a crime against humanity, the Court found that the massive and systematic practice of enforced disappearance to be 'inhumane acts'<sup>415</sup>. In 1998, the *Rome Statute of the International Criminal Court* included enforced disappearance in the list of acts that, when committed as part of a widespread or systematic attack, constitute a crime against humanity<sup>416</sup>. Finally, in 2006, the *International Convention for the Protection of All Persons from Enforced Disappearance* provided that "[t]he widespread or systematic

<sup>412</sup> Resolution No. 63/182, "Extrajudicial, summary or arbitrary executions", 18 December 2008. See also, Resolution No. 65/208 of 21 December 2010.

<sup>413</sup> *General Comment 31: Nature of the General Legal Obligation on States Parties to the Covenant*, Doc. Cit., para. 18.

<sup>414</sup> Paragraph 4 of the Preamble of the *Declaration on the Protection of All Persons from Enforced Disappearance* and paragraph 6 of the Preamble of the *Inter-American Convention on Forced Disappearance of Persons*.

<sup>415</sup> International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Zoran Kupreskic and others*, doc. cit., para. 566.

<sup>416</sup> Article 7(1)(i).

practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law".<sup>417</sup>

Nevertheless, it is noteworthy that, before the adoption of these international instruments, pronouncements of both judicial and political organs of inter-governmental organizations were calling enforced disappearance a crime against humanity. Since 1983, in the Americas, the General Assembly of the Organization of American States adopted several resolutions calling enforced disappearance a crime against humanity, without including the elements of widespread or systematic practice in the definition<sup>418</sup>. In 1983, in its first Resolution on this matter, the OAS General Assembly declared "the practice of forced disappearance of persons in the Americas is an affront to the conscience of the hemisphere and constitutes a crime against humanity"<sup>419</sup>. Likewise, in 1984, the Parliamentary Assembly of the Council of Europe called enforced disappearance a crime against humanity<sup>420</sup>. Some countries have criminalized disappearance as a crime against humanity without including the elements of widespread nature or systematicity, as is the case in Peru<sup>421</sup>.

Meanwhile, from its first judgment in a case of enforced disappearance, the Inter-American Court of Human Rights has called enforced disappearance a crime against humanity<sup>422</sup>. The Court has subsequently, and in application of developments in international law, described the widespread or systematic practice of enforced disappearance as a crime against humanity<sup>423</sup>. Since the 1980s, the Inter-American Commission on Human Rights has made the same qualification<sup>424</sup>.

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<sup>417</sup> Article 5.

<sup>418</sup> Resolutions Nos. AG/Res.666 (XIII-0/83) 1983, AG/Res.742 (XIV-0/84) 1984, AG/Res.950 (XVIII-0/88) 1988, AG/Res.1022 (XIX-0/89) 1989, and AG/Res.1044 (XX-0/90) 1990

<sup>419</sup> Resolution No. AG/RES. 666 (XII-0/83) of 18 November 1983.

<sup>420</sup> Resolution No. 828 (1984) of the Parliamentary Assembly of the Council of Europe, para 12.

<sup>421</sup> Article 320, in Title XIV-A "Crimes against Humanity", of the Penal Code.

<sup>422</sup> Judgment of 29 July 1988, Case of *Velásquez Rodríguez v. Honduras*, Series C No. 4, para. 153.

<sup>423</sup> See, *inter alia*, Judgment of 22 September 2006, *Case of Goiburú et al. v. Paraguay*, Series C No. 153, para. 82.

<sup>424</sup> See Inter-American Commission on Human Rights: Annual report 1983-1984, Chapter IV, Para.s 8, 9 and 12 and Chapter V, I.3, OAS/Ser.L/V/II.63 doc. 10 28

"[A]n isolated act of enforced disappearance nonetheless remains an international crime and a gross violation of human rights, which determines the criminal responsibility of the perpetrators, as required by several international human rights treaties. It follows that States cannot limit the criminalization of enforced disappearance only to those instances which would amount to crimes against humanity..."  
 Working Group on Enforced or Involuntary Disappearances<sup>425</sup>

In any case, in the light of current developments in international law, it is incontestable that the widespread or systematic practice of enforced disappearance constitutes a crime against humanity. While there is a broad international consensus on the classification of enforced disappearance as an international crime, this is not an obstacle for qualifications and definitions of enforced disappearance at the regional or national level that provide broader protection to victims. As clearly stated by the International Criminal Tribunal for the former Yugoslavia, "insofar as other international instruments or national laws give the individual broader protection, he or she shall be entitled to benefit from it"<sup>426</sup>.

Likewise, the Inter-American Court of Human Rights has stated that "[i]nternational law establishes a minimum standard with regard to the correct definition of this type of conduct and the minimum elements that this must observe, in the understanding that criminal prosecution is a fundamental way of preventing future human rights violations. In other words, the States may adopt stricter standards in relation to a specific type of offense to expand its criminal prosecution, if they consider that this will provide greater or better safeguard of the protected rights, on condition that, when doing so, such standards do not violate other norms that

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September 1984; Annual report of 1986-1987, Chapter V.II, OAS/Ser.L/V/II.71 Doc. 9 Rev. 1, of 22 September 1987; Annual report of 1987-1988, Chapter IV, OAS/Ser.L/V/II.74 Doc. 10 Rev. 1 of 16 September 1988; Annual report 1990-1991, Chapter V, OAS/Ser.L/V/II.79, Doc. 12 Rev. 1 of 22 February 1991; and Annual report of 1991, Chapter IV, OAS/Ser.L/V/II.81 Doc. 6 Rev. 1, of 14 February 1992.

<sup>425</sup> *Report of the Working Group on Enforced or Involuntary Disappearances – Addendum: Best practices on enforced disappearances in domestic criminal legislation*, A/HRC/16/48/Add.3, 28 December 2010, para. 18.

<sup>426</sup> Judgment of 22 February 2001, *Prosecutor v. Kunarac and others*, Case Nos. IT-96-22 and IT-96-23/1, para. 473 et seq. (Original in French, free translation).

they are obliged to protect."<sup>427</sup> This very criteria has been reaffirmed by national courts<sup>428</sup>.

In many countries, forced disappearance has been expressly included in the list of acts constituting a crime against humanity in regulatory provisions<sup>429</sup>. The following countries in the Americas have included it in their legislation: Argentina<sup>430</sup>, Canada<sup>431</sup>, Chile<sup>432</sup>, Costa Rica<sup>433</sup>, Panama<sup>434</sup>, Trinidad and Tobago<sup>435</sup> and

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<sup>427</sup> Judgment of 22 September 2006, *Case of Goiburú et al. v. Paraguay*, Series C No. 153, para. 92.

<sup>428</sup> See for example Constitutional Court of Colombia: Judgment C-317/02 of 2 May 2002, and Judgment C-580/02 of 3 July 2002.

<sup>429</sup> Germany (art.7.1.7 of Code of Crimes against International Law); Australia (art. 268.21 of the Penal Code, 1995 and anexo 1 of Law on la International Criminal Court, 2002); Azerbaijan (art. 110 of the Penal Code); Belgium (art. 136 *ter* of the Penal Code); Bosnia and Herzegovina (art. 172 of the Penal Code); Burkina Faso (art. 314 of the Penal Code); Burundi (art. 196 and 197 of the Penal Code and art. 3 of Law No. 001/2004 of 8 May 2004, *on the repression of the crime of genocide, crimes against humanity and war crimes*); Cyprus (art. 4 of Law NO. 23(III)/2006 28 July 2006); Congo (arts. 6.k and 8 of Law No. 8, 31 October 1998); Croatia (art. 157-A of the Penal Code); Slovenia (art. 101 of the Penal Code); Spain (art. 607 *bis* of the Penal Code); Philippines (art. 6 of Law No. 9851, whereby crimes against international humanitarian law, genocide and crimes against humanity are defined and punished, jurisdiction is organized, special courts designated and related provisions are adopted, 11 December 2009); Finland (chapter 11 of the Penal Code); France (art. 212.1 of the Penal Code); Indonesia (art. 9 of Law NO. 26 2000 whereby the Special Chamber of Human Rights is established); Iraq (art. 12 of Law on The Supreme Criminal Court of Iraq, 18 October 2005); Ireland (art. 6 and 10 of Law on the International Criminal Court, 2006); Kenya (art. 6 of Law on international crimes, 2008); Lithuania (art. 100 of the Penal Code); Macedonia (art. 403 of the Penal Code); Mali (art. 29 of the Penal Code); Malta (art. 54-C of the Penal Code); Montenegro (art. 427 of the Penal Code); Norway (art. 102 of the Penal Code); New Zealand (art. 10 of Law on international crimes and the International Criminal Court, 2000); the Netherlands (art. 4 of Law on international crimes, 2003); Portugal (art. 9 of Law No. 31 of 22 July 2004); The United Kingdom (art. 50 of Law on the International Criminal Court, 2001); the Czech Republic (art. 401 of the Penal Code); the Republic of Korea (art. 9 of Law on the sanction of the crimes pertaining to the jurisdiction of the International Criminal Court, 2007); Romania (art. 175 of the Penal Code); Rwanda (art. 5 of Law No. 33bis/2003 of 6 September 2003, *on the repression of the crime of genocide, crimes against humanity and war crimes*); Samoa (art. 6 of Law on the International Criminal Court, 2007); Senegal (art. 431-2 of the Penal Code); Serbia (art. 371 of the Penal Code); South Africa (Law on the application of the Rome Statute of the International Criminal Court, 2002); Switzerland (art. 264a of the Penal Code and 109-e of the Military Penal Code); and Timor-Leste (art. 124 of the Penal Code)

<sup>430</sup> Law No. 26.200, 5 January 2007 (art. 9).

<sup>431</sup> *Law on crimes against humanity and war crimes*, 2000, (art. 4 and annex).

<sup>432</sup> Law No. 20.357 de 12 June 2009, *The definition of crimes against humanity and genocide, and war crimes*, (art. 21).

<sup>433</sup> Penal Code (art. 379). The Law of 25 April 2002, *Penal Repression as a punishment for war crimes and crimes against humanity*, Article 2 which reforms the Penal Code,

Uruguay<sup>436</sup>. In other countries, such as Colombia, this inclusion has been via case law.

## 6. The Crime of Genocide

### a. The crime of Genocide

Genocide was defined as a specific and autonomous offense in the Convention on the Prevention and Punishment of the Crime of Genocide of 1948.<sup>437</sup> This definition was adopted in the subsequent international instruments<sup>438</sup>.

However, in 1946, the General Assembly of the United Nations declared genocide to be a crime under international law.<sup>439</sup> The recognition of genocide as a crime under Customary International Law was reaffirmed by the International Court of Justice, which described it as "a crime under international law"<sup>440</sup>, as well as in both national and international case law.<sup>441</sup> The very nature of

remitting to acts that have been prescribed in international treaties to which the State is a party and in the Rome Statute.

<sup>434</sup> Penal Code (art. 432).

<sup>435</sup> Law on the International Criminal Court, 2006 (art. 6).

<sup>436</sup> Article 16 of Law No. 18.026 of 25 September 2006.

<sup>437</sup> Article II stipulates that: "genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group".

<sup>438</sup> *Draft Code of Offences against the Peace and Security of Mankind* (1996); *Statute of the International Criminal Tribunal for the Former Yugoslavia* (art. 4); *Statute of the International Criminal Tribunal for Rwanda* (art. 2); *Rome Statute of the International Criminal Court* (art. 6); *Law on Establishing Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of the Democratic Kampuchea* (art. 4); and *Regulation No. 2000/15 adopted by the United Nations Transitional Administration in East Timor on Special Panels for Serious Crimes* (Section 4).

<sup>439</sup> Resolution 96 (I), "The crime of genocide", 11 December 1946.

<sup>440</sup> Advisory Opinion of the International Court of Justice, 28 May 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.

<sup>441</sup> See, among others: Advisory Opinion of the International Court of Justice, 28 May 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*; International Criminal Tribunal for Rwanda, Judgment of 2 October 1998, *Prosecutor v Jean Paul Akayesu*, Case No. ICTR-96-4-T, para. 495 and Judgment of 21 May 1999, *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No. ICTR-95-1-T, para. 88; International Criminal Tribunal for the Former Yugoslavia, Judgment of 2 August 2001, *Prosecutor v. Radislav Krstic* (Case of "Srebrenica"), Case No. IT-98-33, para. 541; Supreme Court of Israel, Judgment of 29 May 1962, *Trial Attorney General of Israel v. Eichmann*, reproduced in *International Law Reports*, Vol. No. 36;

genocide as crime against International Law implies that all States have an obligation to prevent and suppress this crime, "even without any conventional obligation"<sup>442</sup>. It should be noted that genocide is a crime that can be committed both in peacetime, and in times of emergency or armed conflict.<sup>443</sup>

The crime of genocide is composed of two elements: i) a subjective one (intent): the intent to wholly or partially destroy a group; and ii) a material one, that is, the undertaking of prohibited acts with this intent.

"Genocide is a type of crime against humanity. Genocide, however, is different from other crimes against humanity. The essential difference is that genocide requires the aforementioned specific intent to exterminate a protected group (in whole or in part) while crimes against humanity require the civilian population be taken as be targeted as part of a widespread or systematic attack."

International Criminal Tribunal for Rwanda<sup>444</sup>

The subjective element, or specific intent, is what characterizes the crime of genocide and what distinguishes it from other crimes against humanity.<sup>445</sup> In this regard, the International Criminal Tribunal for Rwanda stated that "genocide is different from other crimes inasmuch as it embodies a special intent, or *dolus specialis*. ... [T]he special intent of a crime of genocide lies in 'the precise intention to destroy, in whole or part, a national, ethnical, racial or religious group as such'."<sup>446</sup>

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National High Court of Spain, Criminal Chamber, Writ 4 November 1998, Appeal no. 84/98 - Third Chamber- Expedited 19/97 "Genocide and terrorism", and Writ 5 November 1998, Appeal no. 173/98- First Chamber - Expedited 1/98.

<sup>442</sup> Advisory Opinion of the International Court of Justice, 28 May 1951, *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*.

<sup>443</sup> Article I of the *Convention on the Prevention and Punishment of the Crime of Genocide* and Article I of the *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*.

<sup>444</sup> Trial Chamber II of the International Criminal Tribunal for Rwanda, Judgment of 21 May 1999, *Prosecutor v Clément Kayishema and Obed Ruzindana*, Case No, ICTR-95-1-T, para. 89

<sup>445</sup> See, among others: Ripollés, Antonio, *Tratado de Derecho Penal Internacional e Internacional Penal*, "Francisco de Vitoria" Institute, Madrid, 1955, Volume I p. 627; *Fourth Report by Special Rapporteur on Draft Code of Offences against the Peace and Security of Mankind*, Mr. Doudou Thiam, of the International Law Commission of the United Nations, in UN Doc. A/CN.4/398, 11 March 1986, p. 10 et seq; and International Criminal Tribunal for Rwanda, Judgment of 21 May 1999, *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No, ICTR-95-1-T, para. 89.

<sup>446</sup> Judgment of 2 October 1998, *Prosecutor v. Jean Paul Akayesu*, Case No. ICTR-96-4-T, para. 498. In this regard, see International Criminal Tribunal for the Former



Although international instruments that typify genocide did not include political groups as among the victims of the crime or, indeed, acts committed on political grounds, the General Assembly of the United Nations included them in its first Resolution on genocide<sup>447</sup>. Several countries have adopted definitions of genocide that incorporate political reasons within the grounds for the commission of the offense or include political groups as victims of the crime.<sup>448</sup> Likewise, national courts have opened trials for political genocide or have recognized it against political groups or when committed on political grounds<sup>449</sup>.

### **b. Genocide and extrajudicial executions**

With regard to material element of prohibited acts, while extrajudicial executions are within in the list of acts that constitute genocide, although not nominally as such, but as "killing members of the group". In this regard, the General Assembly of the United Nations has stated that "extrajudicial, summary or arbitrary executions may under certain circumstances amount to genocide [...] as defined in international law [...]"<sup>450</sup>.

The concept of "killing" usually refers to a massacre: that is, collective homicide or a plurality of extrajudicial executions. The

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Yugoslavia, Judgment of 14 December 1999, *Prosecutor v. Jelešić*, Case No. IT-95-01-T, para. 67 et seq.

<sup>447</sup> Resolution 96 (I) 11 December 1946. The General Assembly expressly referred to "crimes of genocide [that] have occurred when ... political groups [...] have been destroyed entirely or in part" and to genocide committed "on [...] political [...] grounds [...]".

<sup>448</sup> See, for example: Angola (Art. 164 of the Penal Code 2002); Bangladesh (International Crimes Act 1973 - Act No. XIX of 1973); Colombia ("Whereby genocide, forced disappearance, and torture are defined, and other provisions," 24 July 2000); Ivory Coast (Art. 137 of the Penal Code 1981); Costa Rica (Penal Code, art. 375); Ethiopia (Art. 281 of the Penal Code of 1957 and Art. 257 of the Penal Code 2004); Nicaragua (Art. 484 of the Penal Code); Poland (Art. 118 of the Penal Code of 1997); and Uruguay (Art. 16 of Law 18.026 2006).

<sup>449</sup> See, for example: Argentina (Oral Trial in Federal Criminal Court of the Plata, Judgment of 19 September 2006, *Case of "Circuito Camps" and others (Miguel Osvaldo Etchecolatz - Trial no. 2251/06)* Colombia (Constitutional Court, Judgment C-177/01 of 14 February 2001, and Judgment C-148/05, 22 February 2005); Spain (National High Court, Criminal Chamber, Writ 4 November 1998, Appeal no. No. 84/98 - Third Chamber- Expedited No. 19/97 - Central Court of Investigation No. 5); and Mexico (Supreme Court of Justice, Judgment of 10 June 2003, *Appeal for Constitutional Remedy filed by Ricardo Miguel Cavallo - Appeal for Constitutional Remedy 140/2002*).

<sup>450</sup> Resolution No. 63/182, "Extrajudicial, summary or arbitrary executions", 18 December 2008. See also, Resolution No. 65/208 of 21 December 2010.

work of the International Law Commission<sup>451</sup>, the jurisprudence of the international criminal courts<sup>452</sup> and doctrine<sup>453</sup> consider that the intention is to destroy a "whole" or "part" of the victimized group as such. In this regard, the Committee of Experts on the crimes committed in the former Yugoslavia noted that the action of elimination directed against the group's leaders, regardless of the actual numbers killed, can, in itself, be a strong indication of genocide<sup>454</sup>. In this way, the Criminal Tribunal for the former Yugoslavia has stated that genocidal intent can be expressed in two ways: i) it may include the intention to exterminate a large number of the group's members, this is the will of mass destruction of the group; or ii) "it may also consist of the desired destruction of a more limited number of persons selected for the impact that their disappearance would have upon the survival of the group as such."<sup>455</sup>

In this regard, the "Elements of Crimes" of the *Rome Statute of the International Criminal Court* have specified that the criminal liability of the perpetrator attaches when he "has killed one or more persons"<sup>456</sup>. Cherif Bassiouni said that "[a]lthough genocide is commonly considered an attack against a large number of people, even the murder of one individual could constitute the crime of genocide if committed with the requisite intent. [...] In other words, the material element of the offense (*actus reus*) may be limited to a single victim, but the subjective element (*mens rea*) must be

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<sup>451</sup> *Report of the International Law Commission on the work in its 48th session – 6 May to 26 July 1996*, A/51/10, p. 45.

<sup>452</sup> See, *inter alia*, International Criminal Tribunal for Rwanda, Judgment 21 May 1999, *Prosecutor v. Clément Kayishema and Obed Ruzindana*, Case No, ICTR-95-1-T, and International Criminal Tribunal for the Former Yugoslavia, Judgment, 14 December 1999, *Prosecutor v. Jelicic*, Case No, IT-95-01-T.

<sup>453</sup> See, *inter alia*, Raphael Lemkin, "Le crime de genocide", *Revue de Droit International, de Sciences Diplomatiques et Politiques*, No. 24, October-December, 1946, and Communication to the Senate of the United States of America, in *Executive Sessions of the Senate Foreign Relations Committee, Historical Series*, 1976, p. 370; and William A, Shabas, *Genocide in International Law*, Ed. Cambridge University Press, United Kingdom, 2000.

<sup>454</sup> *Final Report of the Commission of Experts established pursuant to the Security Council Resolution 780 (1992) 1994/674*, 27 May 1994, Para. 94.

<sup>455</sup> Judgment of 14 December 1999, *Prosecutor v. Jelicic*, Case No, IT-95-01-T, Para. 82 (original in French, free translation).

<sup>456</sup> "Elements of Crimes", "Article 6(a) Genocide by killing", (*Assembly of the States Parties in the Rome Statute of the International Criminal Court First Regular Session, New York, 3 to 10 September 2002 Official Documents*, Document ICC-ASP/1/3, p. 113).

directed against the life of the group."<sup>457</sup>

"The Special Rapporteur continued to observe a great reluctance in the international community to use the term "genocide", even when reference is made to situations of grave violations of the right to life which seem to match clearly the criteria contained in article II of the Convention on the Prevention and Punishment of the Crime of Genocide."

Special Rapporteur on extrajudicial, summary or arbitrary executions<sup>458</sup>

### c. Genocide and enforced disappearance

The definition of genocide established by international instruments does not expressly include enforced disappearance in the list of acts that constitute the international crime. However, the enforced disappearance may be implicitly incorporated into "causing serious bodily or mental harm to the members of the group." In this regard, it should be noted that the "Elements of Crimes" of the Rome Statute state that "[t]his conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment"<sup>459</sup>. In that vein, it is important to recall that enforced disappearance has been characterised as torture for the disappeared and as an inhuman act. It should be noted that some countries, such as Uruguay<sup>460</sup>, have expressly included in their legislation enforced disappearance in the list of prohibited acts that comprise genocide; other countries, such as Argentina, have done so through case law<sup>461</sup>.

<sup>457</sup> Cherif Bassiouni, *Derecho Penal Internacional - Proyecto de Penal Code Internacional*, Ed. Técno, Madrid, 1983, p. 128.

<sup>458</sup> *Report by the Special Rapporteur Especial, Mr. Bacre Waly Ndiaye, submitted pursuant to Resolution 1996/74 of the Commission on Human Rights*, UN Doc. E/CN.4/1997/60, 24 December 1996, para. 42.

<sup>459</sup> "Elements of Crimes", "Article 6(b) Genocide by causing serious bodily or mental harm", (*Assembly of the States Parties in the Rome Statute of the International Criminal Court First Regular Session, New York, 3 to 10 September 2002 Official Documents*, Document ICC-ASP/1/3, p. 117).

<sup>460</sup> Article 16 of Law No. 18.026 of 25 September 2006.

<sup>461</sup> Oral Trial in Federal Criminal Court of the Plata, Judgment of 19 September 2006, *Case of "Circuito Camps" and others (Miguel Osvaldo Etchecolatz - Trial no. 2251/06.*

## WAR CRIMES

### THE DEFINITION OF WAR CRIME

War crimes are serious violations of International Humanitarian Law (IHL) and "laws and customs of war" committed in international and internal armed conflict<sup>462</sup>, by the parties to the conflict. Initially violations of international humanitarian law committed in internal armed conflicts were not considered "grave breaches", however, by analyzing the evolution of both International Law and national practices, the International Criminal Tribunal for the former Yugoslavia considered that "customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife. [...] The idea that serious violations of international humanitarian law governing internal armed conflicts entail individual criminal responsibility is also fully warranted from the point of view of substantive justice and equity"<sup>463</sup>. That violations of international humanitarian law committed in internal armed conflicts are war crimes has been reiterated by the *Rome Statute of the International Criminal Court*, by defining as war crimes serious violations of Common Article 3 of the Geneva Conventions and "the laws and customs of war"<sup>464</sup>. Likewise, the International Committee of the Red Cross (ICRC) has concluded that it is a rule of Customary International Humanitarian Law, applicable to both international and internal armed conflicts

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<sup>462</sup> See, inter alia: Common Article 3 of the four Geneva Conventions of 12 August 1949; *Additional Protocol to the Geneva Conventions 12 August 1949 relating to the Protection of Victims of International Armed Conflicts* (Protocol II); Article 8 of the *Rome Statute of the International Criminal Court*; Articles 2 and 3 of the *Statute of the International Criminal Tribunal for the Former Yugoslavia*; Article 4 of the *Statute of the International Criminal Tribunal for Rwanda*; and Articles 3 and 4 of the *Statute of the Special Court for Sierra Leone*.

<sup>463</sup> Decision of the Appeals Chamber on Defence motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, *Prosecutor v. Tadić* (Case of "Prijedor"), Case No, IT-94-1, paras. 134 and 135. In this regard, see: Appeals Chamber, Judgment of 20 February 2001, *Prosecutor v. Mucic and others* (Case of "Campo de Celebici"), Case No, IT-96-21.

<sup>464</sup> Article 8, para. 2, (c), (d), (e) and (f) of the *Rome Statute of the International Criminal Court*.

that "serious violations of international humanitarian law constitute war crimes"<sup>465</sup>.

"[C]ustomary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife."

International Criminal Tribunal for the former Yugoslavia<sup>466</sup>

## **b. Extrajudicial execution as a war crime**

The catalog of war crimes is extensive<sup>467</sup>. The wilful killing of protected persons, "killing or wounding a combatant adversary who has surrendered or is otherwise *hors de combat*, killing or wounding an adversary by resort to perfidy, deaths caused by attacks intentionally directed against civilians, among others, all constitute war crimes. The ICRC stressed that the prohibition of murder is a rule of Customary International Law applicable in both international and internal armed conflicts<sup>468</sup>.

Certainly, not every death is a war crime. Deaths in combat or of "legitimate targets" that are lawful under IHL do not constitute war crimes<sup>469</sup>. As the Inter-American Commission on Human Rights has stated, "international humanitarian law does not prohibit the targeting or killing of enemy combatants who have not laid down their arms or been placed *hors de combat*, and accordingly that the death of a combatant under these circumstances does not constitute a violation of the right to life. At the same time, international humanitarian law does protect to a certain extent the lives of combatants or the manner in which they may lawfully be deprived of their lives by restricting the means and methods of war that

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<sup>465</sup> Rule No. 156, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol. I: Rules*, Ed. ICRC, p. 568

<sup>466</sup> Decision of the Appeals Chamber on Defence motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, *Prosecutor v. Dusko Tadic*, Case No, IT-94-1-T, para. 134.

<sup>467</sup> See, inter alia, Article 8 of the *Rome Statute of the International Criminal Court* and Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol. I: Rules*, Ed. ICRC, p. 568 et seq.

<sup>468</sup> Rule No. 87, in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Vol. I: Rules*, Doc. Cit., p. 311.

<sup>469</sup> Notwithstanding, it should be noted that if these deaths are caused by weapons or methods of warfare prohibited by international humanitarian law then they constitute war crimes.

parties to an armed conflict may use to wage war."<sup>470</sup> However, the deliberate killing of civilians, combatants placed *hors de combat*, prisoners of war and wilful killing of certain categories of individuals protected by international humanitarian law and who are not engaged in hostilities or commission of acts harmful to the enemy<sup>471</sup> all constitute war crimes<sup>472</sup>.

Thus, the extrajudicial execution of civilians, combatants placed *hors de combat* or persons protected by international humanitarian law by the parties to the conflict constitutes a war crime. In this regard, the General Assembly of the United Nations has repeatedly stated that "extrajudicial, summary or arbitrary executions may under certain circumstances amount [...] to war crimes under international law, including the Rome Statute of the International Criminal Court [...]."<sup>473</sup>

### **c. Enforced disappearance as a war crime**

Enforced disappearance is not expressly mentioned in any international instruments that define war crimes. In fact, neither the Geneva Conventions and its two Protocols nor the various statutes of international criminal tribunals expressly include enforced disappearance as a war crime. However, it should be recalled that the practice of enforced disappearance is prohibited even in time of war or armed conflict, as has expressly stated in international instruments<sup>474</sup>. The ICRC has stated that the absolute prohibition of the practice of enforced disappearance is a norm of Customary International Law applicable to both international armed conflicts and internal armed conflicts<sup>475</sup>.

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<sup>470</sup> *Report on Terrorism and Human Rights*, OAS/Ser.L/V/II.116, Doc. 5 Rev. 1 corr., 22 October 2002, Para. 100.

<sup>471</sup> For example, health, religious, medical and humanitarian personnel and staff of the missions of maintenance of the peace of the United Nations or other intergovernmental systems, and journalists.

<sup>472</sup> See, inter alia, Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Vol I Rules, Rule 89*, Doc. Cit., p. 11 et seq. and Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS/Ser.L/V/II.116, Doc. 5 Revs. 1 corr., de 22 October 2002.

<sup>473</sup> Resolution No. 63/182, "Extrajudicial, summary or arbitrary executions", 18 December 2008. likewise see Resolution No. 65/208 of 21 December 2010

<sup>474</sup> *International Convention for the Protection of All Persons from Enforced Disappearance* (art. 1,2), *Inter-American Convention on Forced Disappearance of Persons* (arts. I and X) and *Declaration on the Protection of All Persons from Enforced Disappearance* (art. 7).

<sup>475</sup> Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law...*, Doc. Cit., Rule 98, Summary p. 340 .

The ICRC has stated that although IHL treaties do not mention the explicit term of "enforced disappearance" as such, the practice still violates several international humanitarian law prohibitions such as that of torture and other cruel and inhuman treatment, which do, indeed, constitute war crimes<sup>476</sup>. Thus, the ICRC has found that there certain conduct is not expressly listed as unlawful in IHL treaties "is nevertheless criminal because it consists of a combination of a number of war crimes. These so-called composite war crimes are, in particular, enforced disappearances [...]. Enforced disappearance amounts, in practice, to depriving a person of a fair trial and, often also, to murder."<sup>477</sup> One might add, that enforced disappearance itself constitutes a form of torture or inhuman treatment of the disappeared, which constitutes a war crime in and of itself.

The high courts of the region have ruled in a similar fashion. For example, the Constitutional Tribunal of Peru has stated that the prohibition of enforced disappearance can be inferred from Common Article 3 of the Geneva Conventions and from article 4(2) of Protocol II, and that this practice "implies [...] a grave breach of international humanitarian law".<sup>478</sup> Likewise, Chilean courts have developed extensive case law. By prosecuting cases of enforced disappearance committed during military rule under the crime of abduction, owing to the absence of an autonomous crime of enforced disappearance, courts have held that these illegal behaviors occurred when Chile was in a "state of war" in accordance with the regulations promulgated by the military regime<sup>479</sup>. As Chile was party to the Geneva Conventions not to mention that Article 5 of the Constitution recognizes the supremacy of treaties in domestic law, the courts found that acts of enforced disappearance constituted serious violations of Common Article 3 of the Geneva Conventions or in other words, that they are war crimes<sup>480</sup>.

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<sup>476</sup> *Ibid.*, p. 340 et seq.

<sup>477</sup> *Ibid.*, Rule 156, Composite War Crimes, p 603.

<sup>478</sup> The Constitutional Tribunal of Peru, the First Chamber, Judgment of 9 December 2004, Exp. No. 2798-04-HC/TC, *Case of Gabriel Orlando Vera Navarrete*.

<sup>479</sup> During the State of Exception decreed by the *Military Junta* (Decree Law No. 3, 11 September 1973), the military regime declared a "state of war" (Decree Law No. 5, 12 September 1973), concerning the effects of the application of a Article 418 of the Military Justice Code.

<sup>480</sup> See *inter alia*: Supreme Court of Justice, Judgment of 9 September 1998, Rol No. 469-98, *Case of Pedro Enrique Poblete Córdova*; Judgment of 17 November 2004, Rol No.517-2004, *Case of Miguel Ángel Sandoval Rodríguez*; Judgment of 25 May 2009, Rol No. 696-08, and Judgment of 22 June 2011, Rol No. 5436-10, *Case of Jaime*





## CHAPTER IV: INVESTIGATION

“[T]he duty to investigate and eventually conduct trials and impose sanctions, becomes particularly compelling and important in view of the seriousness of the crimes committed and the nature of the rights wronged; all the more since the prohibition against the forced disappearance of people and the corresponding duty to investigate and punish those responsible has become *jus cogens*. [...] [T]he investigations and prosecutions conducted on account of the events [...] warrant the use of all available legal means and must aim to determine the whole truth and to prosecute and eventually capture, try and punish all perpetrators and instigators of the acts.”

Inter-American Court of Human Rights<sup>481</sup>

### 1. GENERAL CONSIDERATIONS

Under international law, states have the obligation to investigate enforced disappearances and extrajudicial executions. Several international instruments explicitly establish this obligation<sup>482</sup>. Although the American Convention on Human Rights and the International Covenant on Civil and Political Rights do not have an express clause in this regard, the jurisprudence of the Inter-American organs and the Human Rights Committee have repeatedly stated that the obligation to investigate arises from States’ general

<sup>481</sup> Judgment of 29 November 2006, *La Cantuta v. Peru*, Series C, No. 162, para. 157.

<sup>482</sup> See: *International Convention for the Protection of All Persons from Enforced Disappearance* (art. 12); *Inter-American Convention on Forced Disappearance of Persons* (arts. I and IV); *Declaration on the Protection of All Persons from Enforced Disappearance* (Art. 13); *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions*; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principle 34); *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (Rule 57); *Guidelines on the Role of Prosecutors*; *Code of Conduct for Law Enforcement Officials* (Art. 8); *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*; *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Principle 1); *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (Art. 3.b); *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (Principle 19); *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* (Art. 9,5); *Declaration on the Elimination of Violence against Women* (Art. 4); and *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (Principle XXIII, 3).

obligations (duty of the State to guarantee) and the general principles of law<sup>483</sup>.

Thus, the Inter-American Court of Human Rights has stated that “the obligation to investigate cases of the violation of these rights arises from the general obligation to guarantee the rights to life, personal integrity and personal liberty [...]”<sup>484</sup>. Likewise, the Court has established that “[t]he obligation to investigate human rights violations is one of the positive measures that the State must adopt to ensure the rights recognized in the Convention.”<sup>485</sup> In the same regard, the Special Rapporteur on extrajudicial, summary and arbitrary executions (the Special Rapporteur on Executions) has stated that this obligation is “one of the main pillars of the effective protection of human rights”<sup>486</sup>.

For its part, the Human Rights Committee has stated that the obligation to investigate arises from the general obligation to respect and guarantee human rights, enshrined in Article 2(1) of the *International Covenant on Civil and Political Rights*. The Committee has stated that the Covenant imposes on States Parties the “general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies”<sup>487</sup>.

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<sup>483</sup> See, *inter alia*: Judgment of 3 November 1997, *Case of Castillo Páez v. Peru*, Series C No. 34; Judgment of 21 July 1989, *Case of Velásquez Rodríguez v. Honduras*, Series C No. 7; Judgment of 21 July 1989, *Case of Godínez Cruz v. Honduras*, Series C No. 8; Judgment of 8 December 1995, *Case of Caballero Delgado and Santana v. Colombia*, Series C No. 22; Judgment of 14 September 1996, *Case of El Amparo v. Venezuela*, Series C No. 28; Judgment of 12 November 1997, *Case of Suárez Rosero v. Ecuador*, Series C No. 35; and Judgment of 24 January 1998, *Case of Nicholas Bloque v. Guatemala*, Series C No. 36.

<sup>484</sup> Judgment of 16 November 2009, *Case of González et al. (“Cotton Field”) v. Mexico*, Series C No. 2005, para. 287. See also, among others: Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 62; Judgment of 12 August 2008, *Case of Heliodoro Portugal v. Panama*, Series C No. 186, para. 115; Judgment of 24 November 2010, *Case of Gomes Lund and others (“guerrilha do Araguaia”) v. Brazil*, Series C No. 219, para. 140; Judgment of 26 September 2006, *Case of Almonacid Arellano and others v. Chile*, Series C No. 154, para. 110; Judgment of 26 May 2010, *Case of Manuel Cepeda Vargas v. Colombia*, Series C No. 213, para. 116; Judgment of 27 February 2012, *Case of Narciso González Medina and Family v. Dominican Republic*, Series C No. 240, para. 127.

<sup>485</sup> Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, para. 177.

<sup>486</sup> UN Doc. E/CN.4/1993/46, para. 686.

<sup>487</sup> *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, para. 15.

Failure, in whole or in part, to comply with the obligation to investigate engages the international responsibility of the State. As stated by the Human Rights Committee: “the failure by a State Party to investigate allegations of violations could in and of itself give rise to a separate breach of the Covenant”<sup>488</sup>. In this regard, the *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity (Principles against Impunity)* stipulate that “impunity is a violation of the obligations of States to investigate violations”<sup>489</sup>.

## 2. NATURE OF THE OBLIGATION TO INVESTIGATE

The investigation of enforced disappearances and extrajudicial executions is an international obligation, under both treaties and Customary International Law. The General Assembly<sup>490</sup>, the former UN Commission on Human Rights<sup>491</sup> and the Human Rights Council<sup>492</sup> ALL have repeatedly highlighted the obligation of States under International Law to carry out prompt, impartial and independent investigations into all enforced disappearances and extrajudicial executions.

The Special Rapporteur on Executions and the Working Group on Enforced or Involuntary Disappearances (WGEID)<sup>493</sup> and other UN

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<sup>488</sup> *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, Para. 16.

<sup>489</sup> Principle 1.

<sup>490</sup> See, *inter alia*, Resolution Nos. 63/182, “Extrajudicial, summary and arbitrary executions”, 18 December 2008; 61/175, “Situation of Human Rights in Belarus”, 19 December 2006; 55/103, “Question of enforced or involuntary disappearances”, 4 December 2000; 55/111, “Extrajudicial, summary and arbitrary executions”, 4 December 2000; and 55/111, “Question of enforced or involuntary disappearances”.

<sup>491</sup> See, among others, Resolutions Nos. 2003/53, “extrajudicial, summary and arbitrary executions”, 24 April 2003; 2003/72, “Impunity”, 25 April 2003; 2002/45, “Question of extrajudicial, summary and arbitrary executions”, 23 April 2002; and Resolutions Nos. 1993/35, 1994/39 and 1995/38, “Question of enforced disappearances”.

<sup>492</sup> See, for example, Resolution No. 21/4 “Forced or involuntary disappearances”, 27 September 2012.

<sup>493</sup> See, *inter alia*, the *Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/2003/70, 21 January 2003, para. 27; “General Comment on Article 18 of the Declaration”, in *Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/2006/56, of 27 February 2005; and “General Comment on the Right to the Truth in Relation to Enforced Disappearances”, in *Report of the Working Group on Enforced or Involuntary Disappearances*, A/HRC/16/48, of 26 January 2011.

special procedures<sup>494</sup> have reiterated this obligation.

"[T]he obligation to investigate the facts and punish those responsible for a crime which constitutes a violation of human rights is a commitment that arises from the American Convention, whether or not the parties in a case reach an agreement on this point. It is not the will of the parties, but the provisions of the American Convention that require the States Parties to investigate the facts, prosecute those responsible and eventually, if appropriate, convict those guilty and implement the penalties."

Inter-American Court of Human Rights<sup>495</sup>

The Inter-American Court of Human Rights has repeatedly held that with respect to enforced disappearance and extrajudicial execution, among other serious violations of human rights, the obligation to investigate has attained the status of *jus cogens*<sup>496</sup>. In this context, the Inter-American Commission on Human Rights has reiterated that the obligation to investigate serious violations of human rights and crimes under international law, such as enforced disappearance and extrajudicial execution is "an international obligation that the

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<sup>494</sup> See, *inter alia*: Report of the Special Rapporteur on the independence of judges and lawyers, Mission to Peru, E/CN.4/1998/39/Add.1, 19 February 1998, para. 131; Report of the Special Rapporteur on the independence of judges and lawyers, Mission to Guatemala, E/CN.4/2002/72/Add.2, 21 December 2001, recommendation a); Report of the Special Rapporteur on the independence of judges and lawyers, Mission to Mexico, E/CN.4/2002/72/Add.1, 24 January 2002, recommendations b), j), k), p); and Report of the Special Rapporteur on violence against women related to cultural practices of the family that are violent towards women, E/CN.4/2002/83, 31 January 2002, para. 124.

<sup>495</sup> Judgment of 3 March 2005, *Case of Huilca Tecse v. Peru*, Series C No. 121, para. 105.

<sup>496</sup> See, *inter alia*: Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 59; Judgment of 23 November 2009, *Case of Radilla Pacheco Vs. Mexico*, Series C No. 209, para. 139; Judgment of 24 November 2010, *Case of Gomes Lund and others ("guerrilha do Araguaia") v. Brazil*, Series C No. 219, para. 137; Judgment of 25 May 2010, *Case of Chitay Nech and others v. Guatemala*, para. 193; Judgment of 26 September 2006, *Case of Almonacid Arellano and others v. Chile*, Series C No. 154, para. 99; Judgment of 1 September 2010, *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*, Series C No. 217, para. 197; Judgment of 22 September 2006, *Case of Goiburú et al. v. Paraguay*, Series C No. 153, para. 84; Judgment of 24 November 2009, *Case of Massacre of the Dos Erres v. Guatemala*, Series C No. 148, para. 140; and Judgment of 24 February 2011, *Case of Gelman v. Uruguay*, Series C No. 221, para. 75.

State cannot waive<sup>497</sup>, and that its compliance is part of “the overriding need to combat impunity”<sup>498</sup>.

Given the obligation to investigate enforced disappearances and extrajudicial executions is a norm of *jus cogens*, *a fortiori this obligation is stronger* when these acts are qualified as crimes against humanity owing to the manner in which they were committed. In this regard, the Security Council of the United Nations recalled the obligation under International Law of all States: “to thoroughly investigate and prosecute persons responsible for war crimes, genocide, crimes against humanity or other serious violations of international humanitarian law”<sup>499</sup>. In this regard, the Inter-American Court of Human Rights has stated that this “duty to investigate becomes particularly [...] intense and significant in cases of crimes against humanity”<sup>500</sup>.

“[T]he State party is under a duty to investigate thoroughly alleged violations of human rights, and in particular forced disappearances of persons and violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations.”

Human Rights Committee<sup>501</sup>

It must be remembered that in certain circumstances, extrajudicial executions and enforced disappearances may amount to war crimes (see Chapter III: “Enforced Disappearance, Extrajudicial Execution and Other Crimes”). In this regard, the International Committee of the Red Cross (ICRC) has stated that the obligation of States to investigate war crimes, whether committed by their nationals or armed forces or on their territory, or within their competence over which they have jurisdiction under the principle of universal jurisdiction, constitutes a rule of Customary International Law applicable to both international armed conflicts and internal armed

<sup>497</sup> *Second Report on the Situation of Human Rights in Peru*, OAS/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, para. 230.

<sup>498</sup> Report No. 136/99, Case No. 10.488 *Ignacio Ellacuría S.J. and others* (El Salvador), 22 December 1999, para. 230.

<sup>499</sup> *Statement by the President of the Security Council, “The promotion and strengthening the rule of law in the maintenance of peace and international security”*, S/PRST/2010/11, 29 June 2010.

<sup>500</sup> Judgment of 29 November 2006, *La Cantuta v. Peru*, Series C, No. 162, para. 110.

<sup>501</sup> Views of 13 November 1995, *Nydia Erika Bautista v. Colombia*, Communication No. 563/1993, para. 8.6.

conflicts<sup>502</sup>.

The obligation to investigate has been characterized by International Law as an obligation of means and not of results<sup>503</sup>. In this regard, the Inter-American Commission on Human Rights has also clarified that “the fact that no one has been convicted in the case or that, despite the efforts made, it was impossible to establish the facts does not constitute a failure to fulfill the obligation to investigate.”<sup>504</sup>

Notwithstanding, as the Inter-American Court of Human Rights has clarified, this obligation “must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof”<sup>505</sup>. Likewise, the Court has clarified in this regard that “[e]ach act of the State that forms part of the investigative process, as well as the investigation as a whole, should have a specific purpose: the determination of the truth, and the investigation, pursuit, capture, prosecution and, if applicable, punishment of those responsible for the facts.”<sup>506</sup>

Thus, even though it is an obligation of means, the authorities must diligently investigate any allegation of violation of enforced disappearance and/or extrajudicial execution. Similarly, the Inter-American Commission on Human Rights has stated that “in order to establish in a convincing and credible manner that this result was not the product of a mechanical implementation of certain procedural formalities without the State genuinely seeking the truth,

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<sup>502</sup> Rule No. 158, in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law – Volume I: Rules*, Ed. ICRC, p. 607 et seq..

<sup>503</sup> Inter-American Court of Human Rights: Judgment of 29 July 1988, *Velásquez Rodríguez v. Honduras*, Series C No. 4, para. 166 and 174; Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 123; Judgment of 16 November 2009, *Case of González et al. (“Cotton Field”) v. Mexico*, Series C No. 205, para. 289; and Judgment of 23 September 2009, *Case of Garibaldi v. Brazil*, Series C No. 203, para. 113.

<sup>504</sup> Report No. 55/97, 18 November 1997, Case No. 11.137, *Juan Carlos Abella and others (Argentina)*, para. 412.

<sup>505</sup> Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 123.

<sup>506</sup> Judgment of 10 July 2007, *Case of Cantoral-Huamani and Garcia-Santa Cruz v. Peru*, Series C No. 167, para 131.

the State must show that it carried out an immediate, exhaustive and impartial investigation”<sup>507</sup>.

### **3. DIMENSIONS AND CONTENT OF THE OBLIGATION TO INVESTIGATE**

The investigation should be oriented toward establishing the crime; the conditions and circumstances in which it was committed, including the preparation and subsequent acts of concealment; the reasons for the wrongful act; and the identity and degree of participation of those involved in the events. Indeed, the investigation is closely linked to the State's obligation to prosecute and punish those responsible for enforced disappearances and extrajudicial executions. Thus, the Inter-American Court of Human Rights has ruled “the investigation must be conducted using all available legal means and it must be aimed at discovering the truth and at the pursuit, capture, prosecution and eventual punishment of all the masterminds and perpetrators of the facts, especially when State agents are or could be involved.”<sup>508</sup> For its part, the Human Rights Committee has stated that investigations are intended to ensure that gross violations do not go unpunished as well the effective prosecution of suspected perpetrators.<sup>509</sup>

Since the investigations of enforced disappearances and extrajudicial executions are intended to establish the circumstances in which these crimes were committed as well as the identity and degree of involvement of those responsible with the intention bringing them to justice, they are usually of a criminal nature. Thus, their purpose is to obtain a criminal prosecution, the capture, trial

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<sup>507</sup> Report No. 55/97, 18 November 1997, Case No. 11.137, *Juan Carlos Abella and others (Argentina)*, para. 412.

<sup>508</sup> Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, para. 178. In the same regard, see, *inter alia*: Judgment of 1 September 2010, *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*, Series C No. 217, para. 155; Judgment of 26 August 2011, *Case of Torres Millacura and others v. Argentina*, Series C No. 229, para. 115; Judgment of 31 January 2006, *Case of the Massacre de Pueblo Bello v. Colombia*, Series C No. 140, para. 143; Judgment of 24 November 2011, *Case of Barrios Family v. Venezuela*, Series C No. 237, para. 178; and Judgment of 27, February 2012, *Case of Narciso González Medina and Family v. Dominican Republic*, Series C No. 240, para. 204.

<sup>509</sup> See, *inter alia*: *Concluding Observations of the Human Rights Committee: Peru*, CCPR/CO/70/PER of 15 November 2000, para. 8; *Chile*, CCPR/C/CHL/CO/5, 17 April 2007, para. 9; *Brazil*, CCPR/C/BRA/CO/2 1 December 2005, para. 12; *Guatemala*, CCPR/C/79/Add.63, 3 April 1996, para. 26 and CCPR/CO/72/GTM of 27 August 2001, para. 13; *Guyana*, CCPR/C/79/Add.121 25 April 2000, para. 10; *Paraguay*, CCPR/C/PRY/CO/2 24 April 2006, para. 11 and CCPR/C/PRY/CO/3 of 29 April 2013, para. 8; and *Surinam*, CCPR/CO/80/SUR 4 May 2004, para. 7.

and eventual punishment of all the masterminds and perpetrators of the acts. In this regard, the Human Rights Committee considered that investigations must be criminal in nature in cases of extrajudicial executions and enforced disappearances and they must be oriented to the prosecution of those responsible<sup>510</sup>.

"The obligation to investigate includes the investigation, identification, processing, trial, and punishment, as appropriate, of those responsible. Although this is an obligation of means, this does not signify that the person convicted does not have to serve his sentence in the terms in which it is decreed."

Inter-American Court of Human Rights<sup>511</sup>

In this regard, international jurisprudence has affirmed that truth commissions in no way exonerate the State from its obligation to initiate criminal investigations to determine the facts and the corresponding responsibilities of those responsible for enforced disappearances and extrajudicial executions with the intention of bringing the same to justice and impose the appropriate sanctions<sup>512</sup>. In this regard, in the case of the Truth and Reconciliation Commission of Peru, the Inter-American Court of Human Rights has stated that "that the work undertaken by said Commission constitutes a major effort and has contributed to the search for and establishment of truth for a period of Peru's history. However, and without failing to recognize the foregoing, the Court deems it appropriate to specify that the 'historical truth' contained

<sup>510</sup> Views of 24 October 2002, *José Antonio Coronel and others v. Colombia*, Communication No. 778/1997, Views of 8 July 2008, *Sathasivam v. Sri Lanka*, Communication No. 1436/2005, and Views of 2 April 2009, *Abubakar Amirov and others v. The Russian Federation*, Communication No. 1447/2006.

<sup>511</sup> Judgment of 14 November 2014, *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, Series C No. 287, para. 460.

<sup>512</sup> See, *inter alia*: Inter-American Court of Human Rights (Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 180; Judgment of 31 August 2011, *Case of Contreras and others v. El Salvador*, Series C No. 232, para. 135; Judgment of 24 November 2010, *Case of Gomes Lund and others (Guerrilha do Araguaia) v. Brazil*, Series C No. 219, para. 297; Judgment of 26 September 2006, *Case of Almonacid Arellano and others v. Chile*, Series C No. 154, para. 150; Judgment of 25 May 2010, *Case of Chitay Nech and others v. Guatemala*, Series C No. 212, para. 234; Judgment of 1 September 2010, *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*, Series C No. 217, para. 158; Judgment of 23 November 2009, *Case of Radilla Pacheco v. Mexico*, Series C No. 209, para. 179; and Judgment of 24 November 2009, *Case of the Massacre of the Dos Erres v. Guatemala*, Series C No. 211, para. 232); Inter-American Commission on Human Rights (Report No. 136/99, Case No. 10.488 *Ignacio Ellacuría S.J. and others* (El Salvador), 22 December 1999, para. 230, and Report No. 28/92, Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311 (Argentina), 2 October 1992, para. 52).



in said report does not complete or substitute the State's obligation to also establish the truth through court proceedings"<sup>513</sup>.

Notwithstanding, with respect to enforced disappearances and "secret" executions or clandestine burials, the obligation to investigate has another dimension: to establish the fate or whereabouts of the victim.<sup>514</sup> This particular dimension of the duty to investigate is closely linked to the right to an effective remedy and to the rights of the victim's relatives. Indeed, the UN Office of the High Commissioner for Human Rights has stated that the families of the victims have the right to know "the fate and whereabouts of the victims"<sup>515</sup>, thus, the state is obliged to guarantee this right.

"All efforts must be carried out in order to look for victims of enforced disappearance and extrajudicial and arbitrary executions until they are found, to clarify the events regardless of when they occurred or whether prior formal denunciation on the part of the relatives has taken place, avoiding by all possible means any obstacles for the search processes. Moreover, all efforts must be carried out to look and find persons who have disappeared as a consequence of hostilities, combat, armed actions or other acts related to armed conflicts and other situations of violence, on the basis of the relevant IHL and IHRL standards."

Standard 1 "The search for persons who have been the victims of enforced disappearance, extrajudicial and arbitrary executions" of the World Congress on Psychosocial Work in Exhumation Processes, Forced Disappearance, Justice and Truth

In this regard, the Inter-American Court of Human Rights has stated that in cases of enforced disappearance "the investigation must also take all the necessary steps to determine the fate of the victim and his or her whereabouts". Meanwhile, the WGEID has stated that "[t]here is an absolute obligation to take all the necessary steps to find the person, but there is no absolute obligation of result. Indeed, in certain cases, clarification is difficult

<sup>513</sup> Judgment of 29 November 2006, *La Cantuta v. Peru*, Series C, No. 162, para. 224

<sup>514</sup> See, *inter alia*: *Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (art. 22(c)); *UN Guiding Principles on Internal Displacement* (Principle 16); Rule No. 117, *Customary International Humanitarian Law, Volume I: Rules*, Jean-Marie Henckaerts and Louise Doswald-Beck, Ed. ICRC, p. 421 et seq.

<sup>515</sup> *Study on Right to the Truth, Report of the Office of the High Commissioner for Human Rights of the United Nations*, E/CN.4/2006/91, 9 January 2006, para. 59.

or impossible to attain, for instance when the body, for various reasons, cannot be found. A person may have been summarily executed, but the remains cannot be found because the person who buried the body is no longer alive, and nobody else has information on the person's fate. The State still has an obligation to investigate until it can determine by presumption the fate or whereabouts of the person."<sup>516</sup>

This dimension of the obligation also exists in cases of "secret" executions or clandestine burials. In this regard, in a case of extrajudicial "secret" execution followed by clandestine burial of the victim, the Human Rights Committee noted that the State concerned is "required to provide [family members] an effective and enforceable remedy in the form, inter alia, of official recognition of the place where [the victim] is buried, and compensation for the anguish suffered by the family."<sup>517</sup>

Given the continuing or permanent nature of the crime of enforced disappearance, "the obligation to investigate facts of this nature subsists while the uncertainty of the final fate of the disappeared person remains, because the right of the victim's next of kin to know his or her fate and, if applicable, the whereabouts of his or her remains, is a fair expectation that the State must satisfy by all available means"<sup>518</sup>. In this regard, the *International Convention for the Protection of All Persons from Enforced Disappearance* expressly affirms: "the obligation to continue the investigation until the fate of the disappeared person has been clarified"<sup>519</sup>. The WGEID has stated that "t]he obligation to continue the investigation for as long as the fate and the whereabouts of the disappeared remains clarified is a consequence of the continuing nature of enforced disappearances".<sup>520</sup>

The Inter-American Court of Human Rights has stated that this obligation to investigate the fate and the whereabouts of the victim

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<sup>516</sup> "General Comment on the Right to the Truth in Relation to Enforced Disappearances", Doc. Cit., para. 5.

<sup>517</sup> Views of 26 March 2006, *Sankara and others v. Burkina Faso*, Communication No. 1159/2003, para. 14.

<sup>518</sup> Judgment of 14 November 2014, *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, Series C No. 287, para. 439.

<sup>519</sup> Article 24 (6). It should be noted that, likewise, the *Declaration on the Protection of All Persons from Enforced Disappearance* also enshrines "the obligation to continue the investigation until the fate of the disappeared person has been clarified" (Art. 13,6).

<sup>520</sup> "General Comment on the Right to the Truth in Relation to Enforced Disappearances", Doc. Cit., para. 4.

must be undertaken through “the appropriate judicial and administrative mechanisms, during which it makes every effort to discover the whereabouts of [the victim] as soon as possible. The search should be carried out systematically and rigorously, with the appropriate and adequate human, technical and scientific resources.”<sup>521</sup>

“[I]t is of paramount importance to the family members to receive the body of a person who has been forcibly disappeared, because it allows them to bury this [body] according to their beliefs, as well as to close the grieving process they have been experiencing over the years. In addition, the Court recalls that it has considered that the State authorities’ constant refusal to provide information on the whereabouts of victims or to open an effective investigation to clarify what happened increases the suffering of the next of kin”

Inter-American Court of Human Rights<sup>522</sup>

In several countries, non-judicial institutions have functions or mandates to investigate the fate or whereabouts of victims of enforced disappearance, extrajudicial executions, secret executions and clandestine burials. Various ombudsmen from countries in the Americas region have such mandates, such as the Human Rights Ombudsman of Guatemala. Other countries have established specialized agencies to coordinate searches, such as *the National Commission for the Search for Disappeared Persons* in Colombia. Likewise, several truth commissions have had that role within their mandates, such as the Truth and Reconciliation Commission of Peru and the National Commission for Truth and Reconciliation in Chile.

However, it should be noted that in such situations, the State has a duty to conduct investigations in both non-judicial and judicial spheres. Actions to search and locate the victims do not excuse the state from its obligation to investigate the crime in order to bring the perpetrators to the justice.

#### **4. CHARACTERISTICS OF INVESTIGATIONS**

International Law prescribes requirements for investigations of

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<sup>521</sup> Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, para. 251. In the same regard, see: Judgment of 14 November 2014, *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, Series C No. 287, para. 480; and Judgment of 20 November 12, *Case of Gudiel Álvarez and others (Diario Militar) v. Guatemala*, Series C No. 253, para. 200.

<sup>522</sup> Judgment of 29 November 2012, *Case of García and Family Members v. Guatemala*, Series C No. 258, para. 164.

forced disappearances and extrajudicial executions. Investigations must be carried out with due diligence and without delay, and be thorough, effective, impartial and independent and make use of the legal means available and involve all relevant state institutions. In this regard, the Inter-American Court of Human Rights has stated that “[i]n the absence of these requirements, the State cannot subsequently exercise effectively and efficiently its authority to bring charges and the courts cannot conduct the judicial proceedings that this type of violation calls for.”<sup>523</sup>

Although, in general, they are the same as those laid down for any serious violation of human rights, various international instruments and jurisprudence on human rights establish certain requirements for investigations of enforced disappearance and extrajudicial execution, due to their specificities. Thus, the following international instruments prescribe characteristics required of any investigation into enforced disappearances and extrajudicial executions:

- The *International Convention for the Protection of All Persons from Enforced Disappearance* (Arts. 11, 12, 18 and 24);
- The *Declaration on the Protection of All Persons from Enforced Disappearance* (Art. 13);
- The *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions (Principles)*;
- The *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (Principles 22 to 26);
- The *Guidelines on the Role of Prosecutors* (Principles 11 to 16, 20 and 24); and,
- The *Code of Conduct for Law Enforcement Officials* (Arts. 4, 5 and 8).

In addition, in cases of disappearance or death of persons deprived of liberty, the following international instruments are relevant:

- The *Set of Principles for the protection and promotion of human rights through action to combat impunity* (Principle 34);
- The *Rules for Protection of Juveniles Deprived of Their Liberty* (Rule 57); and,
- The *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (Principle XXIII, 3).

In addition to the above, owing to the forensic dimensions of

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<sup>523</sup> Judgment of 10 July 2007, Case of *Cantoral-Huamani and Garcia-Santa Cruz v Peru*, Series C No. 167, para 133.

enforced disappearances and extrajudicial executions, other international instruments and standards contain relevant provisions<sup>524</sup> (See Chapter VI: “The Role of Forensic Science”). The great importance of these instruments and forensic sciences in general, has been highlighted by the General Assembly, the former UN Commission on Human Rights and the UN Human Rights Council<sup>525</sup> as well as by the General Assembly of the OAS<sup>526</sup>.

Thus, the obligation to investigate must be fulfilled according to the norms set out in international standards and jurisprudence. In accordance with international law, such investigations must have the following characteristics:

### **a. Due diligence and good faith**

The obligation to investigate must be fulfilled in good faith and with due diligence, and the intention of the investigation must be to prevent impunity. In this regard, the Inter-American Court of Human Rights has stated that “The State’s obligation to investigate must be fulfilled diligently to avoid impunity and the repetition of this type of act.”<sup>527</sup> Likewise the Court has established that, in compliance with its obligation to investigate serious violations of human rights “the State must remove all the obstacles, *de facto* and *de jure*, that maintain impunity”<sup>528</sup> and that “it is not possible to allege internal obstacles such as lack of infrastructure or staff to conduct the investigation process in order to escape the

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<sup>524</sup> Especially: *Manual on the Effective Prevention and Investigation of extralegal, arbitrary and summary executions* (Minnesota Protocol) which includes protocol models for investigation, autopsy, exhumation and analysis of skeletal remains research; and the *International Consensus on principles and minimum standards for psychosocial work in search processes and forensic investigations in cases of enforced disappearances, arbitrary or extrajudicial executions*. Likewise, as very often the victims of enforced disappearance or extrajudicial execution are subject to torture, of great importance are the *Principles on the Effective Investigation and Documentation of the Torture and Other Cruel, Inhuman or Degrading Punishment* and the *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment* (Istanbul Protocol).

<sup>525</sup> See, for example: Resolution No. 68/165 of the General Assembly, of 18 December 2013; Resolution Nos. 2003/33 of 23 April 2003 and 2005/26 of 19 April 2005 of the former UN Commission on Human Rights; and Resolution Nos. 10/26, of 27 March 2009, and 15/5, 29 September 2010 of the UN Human Rights Council.

<sup>526</sup> Resolution 2717 (XLII-O/12) of 4 June 12.

<sup>527</sup> Judgment of 27 February 2012, *Case of Narciso González Medina and Family v. Dominican Republic*, Series C No. 240, para. 203.

<sup>528</sup> Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, para. 178.

international obligation [to investigate]<sup>529</sup>. Likewise, the Court has stated “no law or provision of domestic legislation may prevent a State from complying with the obligation to investigate and punish those responsible for human rights violations. A State cannot grant direct or indirect protection to those prosecuted for crimes that involve serious human rights by unduly applying legal mechanisms that undermine the pertinent international obligations.”<sup>530</sup>

“The Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance.”

Inter-American Court of Human Rights<sup>531</sup>

For its part, the Committee on Enforced Disappearances has underscored the requirements that “all disappearances are investigated thoroughly and impartially, regardless of the time that has elapsed since they took place and even if there has been no formal complaint; the necessary legislative or judicial measures are adopted to remove any legal impediments to such investigations in domestic law, notably the interpretation given to the Amnesty Act”<sup>532</sup>.

Due diligence means that the investigation must be undertaken using all available legal means and taking into account all the facts, the complexity of the crimes, the contexts in which they were committed and the various participants in the crimes. In that vein, the Human Rights Committee has stated that “perfunctory and unproductive investigations whose genuineness is doubtful” did not meet the standard of the obligation to undertake investigations with due diligence<sup>533</sup>.

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<sup>529</sup> Judgment of 23 September 2009, *Case of Garibaldi v. Brazil*, Series C No. 203, para. 137.

<sup>530</sup> Judgment of 26 May 2010, *Case of Manuel Cepeda Vargas v. Colombia*, Series C No. 213, para. 166.

<sup>531</sup> Judgment of 14 March 2001, *Case of Barrios Altos v. Peru*, Series C No. 75, para. 41.

<sup>532</sup> *Concluding Observations of the Committee on Enforced Disappearances on the Report submitted by Spain under article 29, para. 1, of the Convention*, CED/C/ESP/CO/1, 12 December 2013, Para. 12.

<sup>533</sup> See, *inter alia*, Views of 2 April 2009, *Abubakar Amirov and others v. The Russian Federation*, Communication No. 1447/2006, par. 11.4 et seq.

“[D]ue diligence in the investigations involved taking into account the patterns of action of the complex structure of the individuals who perpetrated the extrajudicial execution, because the structure remains after a crime has been committed; and, precisely to ensure its impunity, it uses threats to instill fear in those who investigate the crime and in those who could be witnesses or have an interest in the search for the truth, as in the case of the victim’s next of kin. The State should have adopted sufficient measures of protection and investigation to prevent that type of intimidation and threat.”

Inter-American Court of Human Rights<sup>534</sup>

In cases of disappeared persons who have been executed, the Inter-American Court of Human Rights has stated that “the obligation of due diligence in the investigation of these events included the correct processing of the crime scene and examination, identification, and removal of the corpses in order to clarify what happened. The Court has established that the effective establishment of the truth in the context of the obligation to investigate a possible death must be apparent in the meticulous nature of the initial measures taken.”<sup>535</sup>

In cases of enforced disappearance, extrajudicial executions, secret executions or clandestine burials, due diligence also means undertaking essential and appropriate actions promptly to clarify the fate or whereabouts of the victims and locate them<sup>536</sup>.

### **b. Duty to investigate ex officio**

Investigations into enforced disappearance and/or extrajudicial execution should be initiated *ex officio*, regardless of whether or not there is a formal complaint<sup>537</sup>. This obligation is founded on the

<sup>534</sup> Judgment of 26 May 2010, *Case of Manuel Cepeda Vargas v. Colombia*, Series C No. 213, para. 149.

<sup>535</sup> Judgment of 14 November 2014, *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, Series C No. 287, para. 489.

<sup>536</sup> See, *inter alia*, Inter-American Court of Human Rights, Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 135 and Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, para. 182

<sup>537</sup> *International Convention for the Protection of All Persons from Enforced Disappearance* (Art. 12(2)); *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions* (Principle 9); *Declaration on the Protection of All Persons from Enforced Disappearance* (Art. 13(1)); *Body of Principles for the Protection of All Persons under Any Form of Detention* (Principle 34); and *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (Rule 57).

nature of serious human rights violations and crimes under international law, which include enforced disappearance and extrajudicial execution, and which represent behaviors that violate rights protected by international law.

This also means that authorities are required to investigate, at their own initiative, in order to clarify the facts and circumstances surrounding the acts and identify those responsible. In this regard, the Inter-American Court of Human Rights has stated that the “investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government”<sup>538</sup>.

“[W]henever there is a reason to believe that a person has been subjected to forced disappearance, an investigation must be conducted. This obligation is independent from the filing of a complaint, since in cases of forced disappearance, International Law and the general duty to guarantee, to which Peru is bound, imposes upon States the obligation to investigate the case *ex officio*, without delay and in a serious, impartial and effective way.”

Inter-American Court of Human Rights<sup>539</sup>

Moreover, officials with knowledge of the commission of a disappearance and/or extrajudicial execution, or reason to believe that one of these crimes occurred must inform their superiors and/or supervisory or investigative authorities<sup>540</sup>. In certain circumstances, a public official’s failure to act may constitute a form of participation in the acts or acquiescence<sup>541</sup>, and therefore engage individual criminal responsibility.

International standards use different terms to describe the circumstances in which the duty of the State to undertake *ex officio* an investigation of enforced disappearance or extrajudicial execution arises. The *International Convention for the Protection of All*

<sup>538</sup> Judgment of 29 July 1988, *Case of Velásquez Rodríguez v. Honduras*, Series C No. 4, para. 177.

<sup>539</sup> Judgment of 22 September 2009, *Case of Anzaldo Castro v. Peru*, Series C No. 202, para. 65.

<sup>540</sup> See, *inter alia*: *International Convention for the Protection of All Persons from Enforced Disappearance* (Art. 23,3); *Code of Conduct for Law Enforcement Officials* (Art. 8); and *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (Principles 24 and 25).

<sup>541</sup> See, *inter alia*, Committee against Torture, Decision of 21 November 2002, *Hajrizi Dzemajl and others v. Yugoslavia*, Communication No. 161/2000, para. 9.2.



*Persons from Enforced Disappearance* refers to “reasonable grounds”<sup>542</sup> while the *Declaration on the Protection of All Persons from Enforced Disappearance* uses “reason to believe”<sup>543</sup>. Meanwhile, the *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions* refers to “suspicion”<sup>544</sup>. International jurisprudence is unanimous in considering that under international law the standard is “reasonable grounds”. However, the Human Rights Committee has stated that in cases of death by firearms an effective investigation is required at least into the possible involvement of members of a State security body<sup>545</sup>. The Committee has recommended that “[i]n all cases of brutality or excessive use of force by a law enforcement officer in which the victim does not file a complaint, the State party should systematically ensure an investigation *ex officio* .”<sup>546</sup> In this regard, the Inter-American Court of Human Rights has stated that “in investigations of a violent death [...], as soon as the State authorities are aware of [it], they should initiate *ex officio* and without delay a genuine, impartial and effective investigation.”<sup>547</sup>

In cases of the death or enforced disappearance of detainees, there is an automatic obligation to investigate *ex officio* even if there are no reasonable grounds or suspicion<sup>548</sup>. This automatic requirement is due to the particular special position of the State as guarantor of rights of persons deprived of their liberty in accordance with the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas<sup>549</sup>. In these situations, as the Inter-American Court of Human Rights has highlighted, “the State is responsible, in its capacity as guarantor of the rights enshrined in the Convention, for the observance of the right to humane

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<sup>542</sup> Article 12,2.

<sup>543</sup> Article 13,1.

<sup>544</sup> Principle 9.

<sup>545</sup> Views of 2 April 2009, *Abubakar Amirov and others v. The Russian Federation*, Communication No. 1447/2006, para. 11.4.

<sup>546</sup> *Concluding Observations of the Human Rights Committee: Dominican Republic*, CCPR/C/DOM/CO/5, 19 April 2014, para. 14.

<sup>547</sup> Judgment of 23 September 2009, *Case of Garibaldi v. Brazil*, Series C No. 203, para. 114.

<sup>548</sup> *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (Principle 34); *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (Rule 57); and *Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas* (Principle XXIII, 3).

<sup>549</sup> Principle I.

treatment of every individual who is in its custody.”<sup>550</sup>

“[W]henver there are reasonable grounds to suspect that a person has been subjected to enforced disappearance, a criminal investigation must be opened. This obligation is independent of whether a complaint is filed because, in cases of enforced disappearance, international law and the general obligation to ensure rights impose the obligation to investigate the case *ex officio*, without delay, and in a serious, impartial and effective manner; thus, it does not depend on the procedural initiative of the victim or his next of kin or on the provision of evidence by private individuals. In any case, any State authority, public official or individual who becomes aware of acts aimed at the enforced disappearance of persons, must report this immediately.”  
Inter-American Court of Human Rights<sup>551</sup>

### c. Impartial and independent investigation

International standards require that investigations into enforced disappearances and extrajudicial executions be independent and impartial<sup>552</sup>. These elements are fundamental and involve the obligation of the State to adapt its system and procedures to ensure that the investigations are independent and impartial. Therefore, the Inter-American Court of Human Rights has stated that “[t]he investigations must be conducted in line with the rules of due process of law, which implies that the bodies of administration of justice must be organized in a manner so that its independence and impartiality is guaranteed and the prosecution of grave human rights violations is made before regular courts in order to avoid impunity and search for the truth.”<sup>553</sup> Likewise, the Court has established that “[a]ll these requirements, together with criteria of independence and impartiality also extend to the non-judicial bodies responsible for the investigation prior to the judicial proceedings,

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<sup>550</sup> Judgment of 6 April 2006, *Case of Baldeón García v. Peru*, Series C No. 147, para. 120.

<sup>551</sup> Judgment of 14 November 2014, *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, Series C No. 287, para. 475.

<sup>552</sup> *International Convention for the Protection of All Persons from Enforced Disappearance* (Art. 12,1); *Declaration on the Protection of All Persons from Enforced Disappearance* (Art. 13,1); and *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions* (Principle 9).

<sup>553</sup> Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 125.

conducted to determine the circumstances of a death and the existence of sufficient evidence”<sup>554</sup>.

The requirement of an independent investigation means that the investigating body and the investigators are not suspected of being involved in the crime] and are independent of the suspected perpetrators and the institutions or agencies to which they belong. An independent investigation also requires that the investigating body and the investigators not have ties of subordination or hierarchical or functional dependency on the alleged perpetrators or agency they belong to. The independence of the investigation may be compromised if investigations of crimes allegedly committed by members of the armed forces are undertaken by members of the armed forces themselves. In this regard, the Human Rights Committee<sup>555</sup>, the Committee on Enforced Disappearances<sup>556</sup>, the WGEID<sup>557</sup>, the Special Rapporteur on Executions<sup>558</sup>, the Inter-American Commission on Human Rights<sup>559</sup> and the Inter-American

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<sup>554</sup> Judgment 10 July 2000, Case of *Cantoral Huamani and Garia Santa Cruz v Peru*, Series C No. 167 para 133.

<sup>555</sup> See, *inter alia* the *Concluding Observations of the Human Rights Committee: Peru*, CCPR/C/79/Add.67, 25 July 1996, para. 22; *Colombia*, CCPR/C/79/Add.76, 5 May 1997, paras. 19 and 23 and CCPR/CO/80/COL, 26 May 2004, para. 9; *Bolivia*, CCPR/C/79/Add.74, 1 May 1997, para. 34; *Venezuela*, CCPR/CO/71/VEN, 26 April 2001, para. 8; *Kyrgyz Republic*, CCPR/CO/69/KGZ, 24 July 2000, para. 7; *Chile*, CCPR/C/79/Add.104, 30 March 1999, para. 10; *Belarus*, CCPR/C/79/add.86, 19 November 1997, para. 9; *Former Yugoslav Republic of Macedonia*, CCPR/C/79/Add.96, 18 August 1998, para. 10; *Cameroon*, CCPR/C/79/Add.116, 4 November 1999, para. 20; *Sudan*, CCPR/C/79/Add.85, 19 November 1997, para. 12; *Mauritius*, CCPR/C/79/Add.60, 4 June 1996, literal E; *Brazil*, CCPR/C/79/Add.66, 24 July 1996, para. 22; *Germany*, CCPR/C/79/Add.73, 18 November 1996, para. 11; *Bolivia*, CCPR/C/79/Add.74, 1 May 1997, para. 28; *Kuwait*, CCPR/CO/KWT, 27 July 2000, para. 13; *Sri Lanka*, CCPR/C/79/Add.56, 23 July 1995, para. 30; *Yemen*, A/50/40, 3 October 1995; *Guyana*, CCPR/C/79/Add.121, 25 April 2000, para. 10; and *Algeria*, CCPR/C/79/Add.95, 18 August 1998, paras. 6, 7 and 9.

<sup>556</sup> *Concluding Observations of the Committee on Enforced Disappearances on the Report submitted by France under article 29, para. 1, of the Convention, approved by the Committee in its fourth period of sessions (8 to 19 April 2013)*, CED/C/FRA/CO/1 8 May 2013, paras. 24 and 25.

<sup>557</sup> See, among others, UN Docs E/CN.4/1994/26, para. 86; E/CN.4/1990/13, para. 22; and E/CN.4/1992/18, para. 367.

<sup>558</sup> UN Doc.t E/CN.4/1995/111, paras. 86 and 119.

<sup>559</sup> See, *inter alia*: *First Report on the Situation of Human Rights in Peru*, OAS/Ser.L/V/II.83, Doc. 31, 12 March 1993, para. 24; *Report on the Situation of Human Rights in Brazil*, OAS/Ser.L/V/II.97 Doc. 29 rev.1, 29 September 1997, para. 86; *Second Report on the Situation of Human Rights in Peru*, OAS/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, paras. 100, 238 and 244; *Report on the Situation of Human Rights in Mexico*, OAS/Ser.L/V/II.100, Doc. 7 Rev. 1, 24 September 1998, para. 35 and 339; *Fifth Report on the Situation of Human Rights in Guatemala*,

Court of Human Rights<sup>560</sup> have been unanimous in concluding that the investigations of serious violations of human rights such as enforced disappearance and extrajudicial execution attributed to members of the armed forces or the police cannot be investigated by the military courts or military or police, but rather by civilian bodies attached to the ordinary courts or under the direction or supervision of criminal judges of ordinary courts.

On several occasions, the Human Rights Committee has emphasized the fact that violations and abuses of human rights attributed to members of the police that have not been investigated by an independent body contribute to a climate of impunity<sup>561</sup>.

"The Committee urges the State party to take effective measures to investigate allegations of summary executions, disappearances, cases of torture and ill-treatment, and arbitrary arrest and detention, to bring the perpetrators to justice, to punish them and to compensate victims. If allegations of such crimes have been made against members of the security forces, whether military or civilian, the investigations should be carried out by an impartial body that does not belong to the organization of the security forces themselves."

Human Rights Committee<sup>562</sup>

Meanwhile, the Committee on Enforced Disappearances has recommended that States adopt legislation and mechanisms to ensure "persons suspected of having committed the offence of enforced disappearance are not in a position to influence or hinder the course of an investigation, directly or indirectly. It likewise recommends that the State party should adopt a legal provision specifically establishing a mechanism that will act as a guarantee that law enforcement officials suspected of having committed enforced disappearances do not participate in the investigation of those disappearances and that it should take all the necessary

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OAS/Ser.L/V/II.111, Doc. 21 rev., 6 April 2001, paras. 33 and 63; and *Second Report on the Situation of Human Rights in Colombia*, OAS/Ser.L/V/II.84, Doc. 39 rev., 14 October 1993, Chapter III "political and legal system of Colombia," (F): ("States of Emergency under the existing legal system").

<sup>560</sup> See, *inter alia*, Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, par. 189 and 190; Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 125 et seq.; and Judgment of 29 November 2006, *La Cantuta v. Peru*, Series C, No. 162, para. 141 et seq.

<sup>561</sup> *Concluding Observations of the Human Rights Committee: Sri Lanka*, CCPR/C/79/Add.56, 23 July 1995, para. 15; and *Belarus*, CCPR/C/79/add.86, 19 November 1997, para. 9.

<sup>562</sup> *Concluding Observations of the Human Rights Committee: Peru*, CCPR/C/79/Add.67, 25 July 1996, para. 22.

measures to ensure that the guarantee is respected in all investigations."<sup>563</sup>

The Inter-American Court of Human Rights has emphasized that "for a death investigation to be effective, it is essential that the persons in charge of such investigation be independent, *de jure and de facto*, of the ones involved in the case. This requires not only hierarchical or institutional independence, but also actual independence."<sup>564</sup> Likewise, the Court has considered that the practice of investigative actions by personnel involved or suspected of having committed an enforced disappearance is totally unacceptable and constitutes "a lack of due diligence in [...] evidence collection."<sup>565</sup>

The *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions* provide that if investigative procedures are not adequate, including due to lack of impartiality, "governments shall pursue investigations through an independent commission of inquiry or similar procedure. Members of such a commission shall be chosen for their recognized impartiality, competence and independence as individuals. In particular, they shall be independent of any institution, agency or person that may be the subject of the inquiry."<sup>566</sup> When these type of commissions do not meet these characteristics and, on the contrary, they are composed of "members of state security entities to which individuals belonged who, among others, who should have been investigated"<sup>567</sup>, the Inter-American Court of Human Rights found that, given the links of subordination and reporting lines between those investigating the enforced disappearance and those who should be investigated, the investigation was vitiated and may limit or undermine subsequent judicial investigations<sup>568</sup>.

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<sup>563</sup> *Concluding Observations on the Report submitted by Argentina under article 29, para. 1, of the Convention*, CED/C/ARG/CO/1, 12 December 2013, para. 23.

<sup>564</sup> Judgment of 6 April 2006, *Case of Baldeón García v. Peru*, Series C No. 147, para. 95.

<sup>565</sup> Judgment of 21 August 2011, *Case of Torres Millacura and others v. Argentina*, Series C No. 229, para. 121.

<sup>566</sup> Principle 11. Likewise, the *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* stipulate that "investigators, who shall be independent of the suspected perpetrators and the agency they serve, shall be competent and impartial." (Principle 2).

<sup>567</sup> Judgment of 27 February 2012, *Case of Narciso González Medina and Family v. Dominican Republic*, Series C No. 240, para. 215.

<sup>568</sup> *Ibid.*, para. 219.

The requirement of the impartiality of the investigation presupposes the absence of preconceptions and prejudices on the part of those running and/or carrying it out. Likewise, it implies that the people in charge of the investigation do not have an interest in the particular case and must not act in ways that promote the interests of the parties involved in the matter under investigation. It is obvious that impartiality necessarily implies that those who participated in either the acts themselves or in covering them up cannot be associated with the investigation. In this regard, the Committee on Enforced Disappearances has recommended the establishment of “a mechanism that ensures that law enforcement or security forces, whether civilian or military, whose members are suspected of having committed an offence of enforced disappearance do not take part in the investigation”<sup>569</sup>.

Prosecutors play a crucial role in the investigation and, as highlighted by the *Special Rapporteur on the independence of judges and lawyers*, have “a fundamental role in protecting society against the culture of impunity and they are the gateway to the criminal justice.”<sup>570</sup> In this regard, the *Guidelines on the Role of Prosecutors*<sup>571</sup> state that prosecutors must perform their “duties impartially and avoid all political, social, religious, racial, cultural, sexual or other discrimination”<sup>572</sup> and that “in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights”<sup>573</sup>.

The proper exercise of a prosecutor's role requires autonomy and independence from the other branches of government<sup>574</sup>. In contrast with judges, International Law does not specify particular

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<sup>569</sup> *Concluding Observations on the Report submitted by Paraguay under article 29, para. 1, of the Convention*, CED/C/PRY/CO/1, 24 September 2014, para. 16. See also: *Concluding Observations on the Report submitted by France under article 29, para. 1, of the Convention, approved by the Committee in its fourth period of sessions (8 to 19 April 2013)*, CED/C/FRA/CO/1, 8 May 2013, para. 25.

<sup>570</sup> *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul*, A/HRC/20/19, 7 June 2012, para. 35.

<sup>571</sup> Adopted by the Eighth Congress of the United Nations on the Prevention of Crime and Treatment of Offenders, held in Havana (Cuba) from 27 August to 7 September 1990, United Nations document A/CONF.144/28/Revs. 1.

<sup>572</sup> Guideline 13 (a).

<sup>573</sup> Guideline 12.

<sup>574</sup> Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Mexico*, OAS/Ser.L/V/II.100, Doc. 7 Revs. 1, paras. 372 and 381; *Report of the Special Rapporteur on the independence of judges and lawyers*, A/HRC/20/19, 7 June 2012, para. 26; and European Court of Human Rights, Judgment of 1 December 2008, *Medvedyev and others v. France*, Application No. 3394/03, para. 61.

standards that safeguard the institutional independence of prosecutors. This is due to the fact that, in some jurisdictions, prosecutors are appointed by the Executive Branch or are, to some degree, dependent on the Executive, such as the obligation to comply with certain orders given by the government. However, as stressed by the *Special Rapporteur on the independence of judges and lawyers*, "States have an obligation to provide the necessary safeguards to enable prosecutors to perform their important role and function in an objective, autonomous, independent and impartial manner."<sup>575</sup>

"[T]he principle of legality ruling the acts performed by public officials, which governs the activities of Public Attorneys, imposes on them the obligation to carry out their duties acting on the basis of the regulations defined in Constitution and statute. That way, prosecutors must watch for the law to be correctly applied and seek the truth of the facts as they are, acting professionally, loyally and in good faith"

Inter American Court of Human Rights<sup>576</sup>

#### **d. Thorough and effective investigations**

Investigations must be thorough and effective;<sup>577</sup> in other words, they must take all necessary measures in order to establish the conditions and circumstances under which the crime was committed, including its cover-up, and the identity, degree of involvement and motivation of all those who are implicated in the events (intellectual and material authors, participants, chain of command, accessories, etc.).

With regard to extrajudicial executions *the Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions*, also known as the *Minnesota Protocol*, provide clear indications of what is required. Inter-American human rights bodies have repeatedly pointed out that compliance with these standards and procedures in investigations is of paramount importance and failure to do so leads to investigations that are not

<sup>575</sup> *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul*, A/HRC/20/19, 7 June 2012, para. 95.

<sup>576</sup> Judgment of 27 January 2009, *Case of Tristán Donoso v. Panama*, Series C No. 193, para. 165.

<sup>577</sup> *International Convention for the Protection of All Persons from Enforced Disappearance* (Art. 12(1)); *Declaration on the Protection of All Persons from Enforced Disappearance* (Art. 13(1)); and *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions* (Principle 9).

thorough and generally to impunity. The Special Rapporteur on Executions has considered that: “[a]ny Government’s practice that fails to reach the standards set out in the [P]rinciples may be regarded as an indication of the Government’s responsibility, even if no it government officials are found to be directly involved in the acts of summary or arbitrary execution.”<sup>578</sup>

“The Court has also asserted that, during the processing of the crime scene and of the corpses of the victims, basic essential procedures should be performed in order to conserve the evidence and any indications that may contribute to the success of the investigation, such as the removal of the corpse and the autopsy.”  
Inter American Court of Human Rights<sup>579</sup>

In this context, the Inter-American Court<sup>580</sup> and Inter-American Commission on Human Rights<sup>581</sup> have stated that the state authorities’ investigations should aim at a minimum, to, *inter alia*:

- Identify the victim;
- Recover and preserve evidence related to the death, in order to aid in any potential prosecution of those responsible;
- Identify possible witnesses and obtain their statements in relation to the death under investigation;
- Determine the cause, manner, place and time of death, and any pattern or practice which may have caused the death; and
- Distinguish between natural death, accidental death, suicide and homicide.

In this regard, the Court has stated that “[a]ny deficiency or fault in the investigation affecting the ability to determine the cause of death or to identify the actual perpetrators or masterminds of the crime will constitute failure to comply with the obligation to protect

<sup>578</sup> UN Doc. E/CN.4/1990/22, para. 463. See also UN Doc. E/CN.4/1991/36, para. 591.

<sup>579</sup> Judgment of 14 November 2014, *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, Series C No. 287, para. 489.

<sup>580</sup> Judgment of 6 April 2006, *Case of Baldeón García v. Peru*, Series C No. 147, para. 96; Judgment of 23 September 2009, *Case of Garibaldi v. Brazil*, Series C No. 203, para. 155; Judgment of 7 June 2003, *Case of Juan Humberto Sánchez v. Honduras*, Series C No. 99, para. 128; Judgment of 31 January 2006, *Case of the Pueblo Bello Massacre v. Colombia*, Series C No. 140, para. 177; Judgment of 31 August 2010, *Case of Rosendo Cantú and Other v. Mexico*, Series C No. 216, para. 178; and Judgment of 16 November 2009, *Case of González et al. (“Cotton Field”) v. Mexico*, Series C No. 205, para. 300.

<sup>581</sup> Report No. 55/97, 18 November 1997, Case No. 11.137, *Juan Carlos Abella and others (Argentina)*, para. 413.



the right to life.”<sup>582</sup> The Court has also stressed that “it is necessary that a thorough investigation of the crime scene be conducted and rigorous autopsies and analyses of human remains be performed by competent professionals, using the best available procedures.”<sup>583</sup> In that sense, the Court has warned that “[t]he lack of the due investigation and punishment of reported irregularities encourages investigators to continue using such methods. This affects the ability of the judicial authorities to identify and prosecute those responsible and to impose the corresponding punishment, which makes access to justice ineffective. [...] a State may be responsible when ‘evidence that could have been very important for the due clarification of the [violations is] not ordered, practiced or evaluated’.”<sup>584</sup>

In cases of enforced disappearance, the duty to investigate has an importance due to the particular nature of the crime. Indeed, enforced disappearance is by definition a complex crime involving the cumulative effect of various behaviors (deprivation of liberty, followed by a refusal to acknowledge that deprivation and/or a concealment of the fate and whereabouts of the person concerned) and additionally, because of its continuing nature, this is a crime whose consummation is prolonged in time (see Chapter I: “Enforced Disappearance”). Likewise, from a factual perspective, enforced disappearance is a complex crime. Indeed, the reality shows that each of the individual acts that make up enforced disappearance (deprivation of liberty and refusal to acknowledge that deprivation and/or the concealment of the fate and whereabouts of the person concerned) may be performed in turn by different criminal acts. In the case of deprivation of liberty, this may initially be a “legal” detention followed by arbitrary detention and, later on, an abduction. Criminal acts that may take place in the course of the concealment of the fate or whereabouts can take various forms, such as the alteration or falsification of records of detention, and/or

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<sup>582</sup> Judgment of 6 April 2006, *Case of Baldeón García v. Peru*, Series C No. 147, para. 97.

<sup>583</sup> Judgment of 6 April 2006, *Case of Baldeón García v. Peru*, Series C No. 147, para. 96; Judgment of 23 September 2009, *Case of Garibaldi v. Brazil*, Series C No. 203, para. 155. See also: Judgment of 7 June 2003, *Case of Juan Humberto Sánchez v. Honduras*, Series C No. 99, para. 128; Judgment of 31 January 2006, *Case of the Pueblo Bello Masacre v. Colombia*, Series C No. 140, para. 177; and Judgment of 16 November 2009, *Case of González et al. (“Cotton Field”) v. Mexico*, Series C No. 205, para. 300.

<sup>584</sup> Judgment of 16 November 2009, *Case of González et al. (“Cotton Field”) v. Mexico*, Series C No. 205, paras. 346 and 349.

the destruction or incineration of these records or documents that establish the deprivation of liberty or the fate and whereabouts of the person concerned. Each of the above acts, taken in isolation may be, as appropriate, a criminal offense. However, these crimes are actually a means to commit a more serious offense, that of enforced disappearance, and therefore must be addressed, not as isolated and independent acts, but rather as constituent components of a serious crime. All these acts or behavior are integrated or subsumed as part of the greater complex crime that is enforced disappearance. Treating this set of behaviors or crimes in isolation and independently of each other leads to a denial of their *ratio essendi*, namely the commission of the crime of enforced disappearance. The consequence would be that the crime of enforced disappearance is not investigated as such and that the perpetrators and accomplices are not investigated and tried for this crime, but rather for more minor offenses, which, however, in reality, are nothing more than acts committed for the purpose of perpetrating an enforced disappearance. This is what the doctrine, particularly the International Law Commission of the United Nations, has called the "fraudulent administration of justice"; it constitutes a serious form of impunity.

Thus, the thorough and effective nature of investigation must be strengthened in order to investigate enforced disappearance in its entirety, as a complex crime, and not as a mere sum of the individual acts. The investigation should cover all acts and behaviors (active or passive) that make up enforced disappearance, so that both the crime as a whole as well as the different actors and accomplices involved in it are investigated. The fragmentation of the investigative action, in other words, the investigation of all of the individual acts that comprise the crime of enforced disappearance in isolation and as acts that are disconnected from each other, means that the crime itself is not investigated. Because the investigation is into a multiplicity of acts, some of which, taken separately, may not fall within the scope of penal law, perpetuates impunity for this serious crime. In this regard, the Inter-American Court of Human Rights has stated that "the analysis of a possible forced disappearance should not be approached in an isolated, divided and segmented way, based only on the detention or possible torture or risk to lose one's life, but on the set of facts"<sup>585</sup>. Thus, the Court has established that the State must undertake "an investigation of

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<sup>585</sup> Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 67.

forced disappearance in all its dimensions with due diligence, rather than analyzing its constituent elements piecemeal<sup>586</sup>.

"[T]he failure to make an adequate use of norms or practices that guarantee an effective investigation taking into account the complexity and extreme gravity of forced disappearance entailed non compliance with the obligation established in Article 2 of the American Convention to adopt the domestic provisions required to guarantee the rights protected in Articles 7, 5(1), 5(2), 4(1) and 3 of the Convention by the investigation of the forced disappearance [...] and the identification, prosecution and, as appropriate, punishment of those responsible."

Inter-American Court of Human Rights<sup>587</sup>

Extrajudicial executions and, *a fortiori*, enforced disappearances are often committed by a complex and compartmentalized organization and clandestine methods. Thus, they involve an intricate network of participants, clandestine methods, structures or compartmentalized groups and different levels of degrees of responsibility. In this type of crime there is a real "division of labor", in which some decide and others plan, while others gather information to commit the crime, and others execute it and others conceal. In this criminal chain different actors play different roles, for example, State intelligence services, paramilitary groups and hired assassins. Likewise, those crimes are accompanied by acts of intimidation, harassment and even the elimination of relatives of victims and witnesses along with the destruction, alteration or concealment of evidence.

In these cases, the Inter-American Court of Human Rights has pointed out that "[t]he obligation to investigate includes the duty to direct the efforts of the apparatus of the State to clarify the structures that allowed these violations, the reasons for them, the causes, the beneficiaries and the consequences, and not merely to discover, prosecute and, if applicable, punish the direct perpetrators. In other words, the protection of human rights should be one of the central purposes that determine how the State acts in any type of investigation. [...] State authorities must determine, by due process of law, the patterns of collaborative action and all the individuals who took part in the said violations in different ways, together with their corresponding responsibilities. It is not sufficient

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<sup>586</sup> Judgment of 27 February 2012, *Case of Narciso González Medina and Family v. Dominican Republic*, Series C No. 240, para. 244.

<sup>587</sup> *Ibid.*, para. 246.

to be aware of the scene and material circumstances of the crime; rather it is essential to analyze the awareness of the power structures that allowed, designed and executed it, both intellectually and directly, as well as the interested persons or groups and those who benefited from the crime (beneficiaries). This, in turn, can lead to the generation of theories and lines of investigation, the examination of classified or confidential documents and of the scene of the crime, witnesses, and other probative elements, but without trusting entirely in the effectiveness of technical mechanisms such as these to dismantle the complexity of the crime, since they may not be sufficient. Hence, it is not a question of examining the crime in isolation, but rather of inserting it in a context that will provide the necessary elements to understand its operational structure.<sup>588</sup>

"The particular severity of these incidents unveils the existence of a whole structure of organized power and encoded procedures ruling the practice of extra legal execution and forced disappearance. By no means were these incidents isolated or sporadic instances, but they constituted a pattern of conduct prevailing over the time these events took place as a method for the elimination of members of, and individuals suspected of cooperating with, subversive organizations, used systematically and in a generalized fashion by state actors — mostly by members of the Armed Forces."

Inter-American Court of Human Rights<sup>589</sup>

Likewise, in these cases, and particularly when there are no direct witnesses (or they have been intimidated or eliminated) and/or when the evidence has been destroyed or altered, circumstantial evidence and indications are of great significance in the investigation. In this regard, referring to cases of enforced disappearance, the Inter-American Court of Human Rights has reiterated that "it is of vital importance that the authorities in charge of the investigation pay special attention to the circumstantial evidence, indications and presumptions [...], thus avoiding omissions in gathering evidence and following up on logical lines of investigation"<sup>590</sup>. Thus, the Court has established that "[i]t is neither logical nor reasonable to investigate a forced

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<sup>588</sup> Judgment of 24 May 2010, *Case of Manuel Cepeda Vargas v. Colombia*, Series C No. 213, par. 118 and 119. In the same regard, see: *Case of the "Massacre de Mapiripán" v. Colombia*. Doc. Cit., para. 219; *Case of "Cotton Field"*, Doc. Cit., para. 454, and *Case of Valle Jaramillo and others v. Colombia*, Doc. Cit., para. 101.

<sup>589</sup> Judgment of 29 November 2006, *La Cantuta v. Peru*, Series C, No. 162, para. 82.

<sup>590</sup> Judgment of 27 February 2012, *Case of Narciso González Medina and Family v. Dominican Republic*, Series C No. 240, para. 232.

disappearance and subordinate its clarification to the acceptance or confession of the possible authors or authorities involved, or to the similarity or agreement of their testimony with that of witnesses who state that they were aware of the victim's presence in State facilities."<sup>591</sup>

When the enforced disappearance and/or extrajudicial execution are committed as part of a systematic, large-scale or mass operation, the effectiveness of the investigation (and the principle of due diligence) requires that "the complexity of the facts, the context in which they occurred, and the patterns that explain why the events occurred, ensuring that there were no omissions in gathering evidence or in the development of logical lines of investigation"<sup>592</sup>. Thus, the acts should not be investigated in isolation from other crimes that serve the same pattern or practice. In such cases, it is quite likely that a crime against humanity and not an isolated case of an enforced disappearance or extrajudicial execution has been committed. The investigation should, therefore, be strengthened in order to investigate the crime against humanity. In that sense, the Inter-American Court of Human Rights has pointed out "certain lines of inquiry, which fail to analyze the systematic patterns surrounding a specific type of violations of human rights, can render the investigations ineffective"<sup>593</sup>.

"[I]t is essential the adoption of all the measures necessary to view the systematic patterns that allowed the commission of serious human rights violations as well as the mechanisms and structures through which impunity was ensured."

Inter-American Court of Human Rights<sup>594</sup>

### **e. Prompt investigations without delays**

Investigations should be undertaken promptly and without delay.<sup>595</sup>

<sup>591</sup> Judgment of 27 February 2012, *Case of Narciso González Medina v. Dominican Republic*, Series C No. 240, para. 161.

<sup>592</sup> Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 154.

<sup>593</sup> Judgment of 16 November 2009, *Case of "Cotton Field"*, Doc. Cit., para. 366. See, also: Judgment of 11 May 2007, *Case of the Massacre of the Rochela v. Colombia*, Series C No. 163, paras. 156, 158 and 164.

<sup>594</sup> Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 154.

<sup>595</sup> *International Convention for the Protection of All Persons from Enforced Disappearances* (Art. 12(1)); *Declaration on the Protection of All Persons from*

Therefore, as soon as a complaint of enforced disappearance or extrajudicial execution has been made, or, indeed, even in the absence of the same, once the authorities are aware of the facts or have reasonable grounds to believe that the events occurred, they must undertake the respective investigations immediately.

This required aspect of an investigation is doubly important. Firstly, prompt and timely action ensures that evidence does not disappear or is not destroyed or altered. In cases of enforced disappearance, this element is crucial, as has been noted by the Inter-American Court of Human Rights, “because this type of repression is characterized by an attempt to suppress all information about the abduction, the whereabouts and fate of the victim.”<sup>596</sup> Likewise, the Court has stated that “the passage of time bears a directly proportionate relationship to the limitation – and in some case, the impossibility – of obtaining evidence and/or testimony, making it difficult and even useless or ineffective, to carry out probative measures in order to clarify the facts that are being investigated, to identify the possible authors and participants, and to establish the eventual criminal responsibilities, as well as to clarify the fate of the victim and to identify those responsible for his disappearance.”<sup>597</sup>

Secondly, as has been mentioned in section 3 of this chapter, in cases of enforced disappearance, investigations are also intended to establish the whereabouts or fate of the victim and/or the place where he or she is held captive. In other words, the investigation should be geared toward ending enforced disappearance. In this regard, the Inter-American Court of Human Rights has emphasized that it is essential that the prosecution and judicial authorities take prompt and immediate action, and that timely and necessary measures are addressed to determine the whereabouts of the victim

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*Enforced Disappearance* (Art.13(1)); and *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions* (Principle 9).

<sup>596</sup> Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 38.

<sup>597</sup> Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, para. 185. See also: Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 134; Judgment of 26 August 2011, *Case of Torres Millacura and others v. Argentina*, Series C No. 229, para. 122; Judgment of 12 August 2008, *Case of Heliodoro Portugal v. Panama*, Series C No. 186, para. 150; Judgment of 27 February 2012, *Case of Narciso González Medina and Family v. Dominican Republic*, Series C No. 240, para. 218; and Judgment of 29 November 2012, *Case of García and Family Members v. Guatemala*, Series C No. 257, para. 135.

or the place where he or she could be found alive.<sup>598</sup> Likewise, the Court has established that “even in the hypothesis of the death of these [missing] persons, the State had and has the obligation to take all pertinent measures to clarify and determine their whereabouts. [...] [T]his obligation is independent of whether the disappearance of the person is the result of the wrongful act of forced disappearance, or of other circumstances such as their death in the operation to retake the Palace of Justice, errors in the return of their remains, or other reasons.”<sup>599</sup>

This implies that the investigating authorities have broad powers and means “to carry out all measures and investigations necessary to shed light on the fate of the victims and identify the responsible for the forced disappearance”<sup>600</sup>. In this regard, the Inter-American Court of Human Rights stated that for this “the State will guarantee that the authorities in charge of the investigation have the logistic and scientific resources necessary to collect and process evidence, and more specifically, the power to access to the documents and information relevant to the investigation of the facts denounced and that they be able to obtain evidence of the locations of the victims. Furthermore, it is fundamental that the investigating authorities have unrestricted access to detention centers, regarding the documentation as well as the people.”<sup>601</sup>

In this regard, it should be highlighted that the *International Convention for the Protection of All Persons from Enforced Disappearance* requires that States guarantee investigative authorities “[h]ave the necessary powers and resources to conduct the investigation effectively, including access to the documentation and other information relevant to their investigation; [and] [h]ave access, if necessary with the prior authorization of a judicial authority, which shall rule promptly on the matter, to any place of detention or any other place where there are reasonable grounds to

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<sup>598</sup> Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 134. See in same regard, inter alia: Judgment of 29 November 12, *Case of García and Family Members v. Guatemala*, Series C No. 257, para. 138; and Judgment of 27 February 2012, *Case of Narciso González Medina and Family v. Dominican Republic*, Series C No. 240, paras. 204, 209 and 218.

<sup>599</sup> Judgment of 14 November 2014, *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, Series C No. 287, para. 478.

<sup>600</sup> Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 135.

<sup>601</sup> *Ibid.*, para. 135.

believe that the disappeared person may be present<sup>602</sup>. While the *Declaration on the Protection of All Persons from Enforced Disappearance* stipulates that “[e]ach State shall ensure that the competent authority shall have the necessary powers and resources to conduct the investigation effectively, including powers to compel attendance of witnesses and production of relevant documents and to make immediate on-site visits.”<sup>603</sup> Likewise, the *Inter-American Convention on Forced Disappearance of Persons* provides that, even in exceptional circumstances, “the right to expeditious and effective judicial procedures and recourse shall be retained as a means of determining the whereabouts or state of health of a person who has been deprived of freedom, or of identifying the official who ordered or carried out such deprivation of freedom. In pursuing such procedures or recourse, and in keeping with applicable domestic law, the competent judicial authorities shall have free and immediate access to all detention centers and to each of their units, and to all places where there is reason to believe the disappeared person might be found including places that are subject to military jurisdiction.”<sup>604</sup>

#### **f. Framework and adequate legal powers for investigations**

In order for investigations to be effective and fulfill their purpose, the officials in charge of them should be vested with the powers necessary to carry them out, to obtain all of the information, including having access to places and documents subject to legal privilege or restrictions/confidentiality on ground of national security restrictions, and to compel the attendance of witnesses and possible perpetrators and accomplices.<sup>605</sup>

This implies that the State must adopt a legal framework enabling authorities to exercise their investigative functions. In that sense, the Inter-American Court of Human Rights has stated that “it is essential that the entities responsible for the investigations are provided, both formally and substantively, with the appropriate and

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<sup>602</sup> Article 12 (3).

<sup>603</sup> Article 13 (2).

<sup>604</sup> Article X.

<sup>605</sup> *International Convention for the Protection of All Persons from Enforced Disappearance* (Art. 12(3)); *Declaration on the Protection of All Persons from Enforced Disappearance* (Art. 13, 2); *Inter-American Convention on Forced Disappearance of Persons* (Art. X); and *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions* (Principles 10 and 11).



necessary powers and guarantees”<sup>606</sup> in order to carry out the investigations. Likewise, the State must provide the investigating authorities with “the logistic and scientific resources necessary to collect and process evidence, and more specifically, the power to access to the documents and information relevant to the investigation of the facts denounced”<sup>607</sup>. Notwithstanding, the Inter-American Court of Human Rights has also stated that “these resources and elements contribute to the effective investigation, but the lack of them does not exonerate state authorities from making the necessary efforts to comply with this obligation”.<sup>608</sup>

In investigations of enforced disappearances and extrajudicial executions the issue of unrestricted access to documents subject to legal privilege or restrictions/confidentiality on grounds of the national security or public order is particularly relevant.<sup>609</sup> In this regard, the WGEID has concluded that “[t]he right to the truth implies that the State has an obligation to give full access to information available allowing the tracing of disappeared persons; that the powers of the investigating authorities] should include full access to the archives of the State [; and that] [a]fter the end of the investigations, the files of [the] said authority should be preserved and made fully accessible to the public”<sup>610</sup>.

Meanwhile, the Inter-American Court of Human Rights has stated that “[p]ublic authorities cannot shield themselves behind the protective cloak of official secret to avoid or obstruct the investigation of illegal acts ascribed to the members of its own bodies. In cases of human rights violations, when the judicial bodies are attempting to elucidate the facts and to try and to punish those responsible for said violations, resorting to official secret with respect to submission of the information required by the judiciary

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<sup>606</sup> Judgment of 20 November 12, *Case of Gudiel Álvarez and others (Diario Militar) v. Guatemala*, Series C No. 253, para. 251.

<sup>607</sup> Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 135.

<sup>608</sup> *Ibid.*

<sup>609</sup> See *inter alia*: Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 135; Judgment of 25 November 2003, *Case of Myrna Mack Chang v. Guatemala*, Series C No. 101, paras. 180 and 181; Judgment of 26 November 2008, *Case of Tiu Tojín v. Guatemala*, Series C No. 190, para. 77; Judgment of 29 November 2006, *La Cantuta v. Peru*, Series C, No. 162, para. 111; and Judgment of 20 November 2012, *Case of Gudiel Álvarez and others (Diario Militar) v. Guatemala*, Series C No. 253, para. 251.

<sup>610</sup> “General Comment on the Right to the Truth in Relation to Enforced Disappearances”, Doc. Cit.

may be considered an attempt to privilege the 'clandestinity of the Executive branch' and to perpetuate impunity."<sup>611</sup>

The Inter-American Commission on Human Rights has ruled in a similar fashion noting that "in cases of human rights violations, State authorities cannot legitimately resort to mechanisms like official secrecy or confidentiality of information, or assert claims like the public interest or national security as reasons for refusing to supply the information required by the judicial or administrative authorities in charge of the ongoing investigation or proceedings"<sup>612</sup>. For its part, the Human Rights Committee has rejected the use of state secrecy or privilege as a justification to restrict access to information to serious violations of human rights<sup>613</sup>.

"[T]he obligation to investigate, prosecute and punish, as appropriate, those responsible is an obligation that corresponds to the State as a whole, and this means that all the State authorities must cooperate, support and assist, within their sphere of competence, the proper investigation of the facts, in keeping with the obligations derived from Articles 8(1) and 25(1) of the American Convention, in relation to Article 1(1) of this instrument."

Inter-American Court of Human Rights<sup>614</sup>

Often, the military and other state security bodies deny the existence of such documents to prevent the authorities responsible for the investigation from gaining access to them. In this regard, the Inter-American Court of Human Rights has stated that "the State cannot seek protection in arguing the lack of existence of the requested documents; rather, to the contrary, it must establish the reason for denying the provision of said information, demonstrating that it has adopted all the measures within its power to prove that, in effect, the information sought did not exist"<sup>615</sup>. For its part, the Inter-American Commission on Human Rights has stated that the

<sup>611</sup> Judgment of 25 November 2003, Case of *Myrna Mack Chang v. Guatemala*, Series C No. 101, para. 181. In this regard, see Case of *Goiburú et al v. Paraguay*, Doc. Cit., para. 117.

<sup>612</sup> *Right to the Truth in the Americas*, OAS/Ser.L/V/II.152, Doc. 2, 13 August 2014, para. 113.

<sup>613</sup> See *inter alia*: *Concluding Observations of the Human Rights Committee: United States of America*, CCPR/C/USA/CO/3/Rev.1, para. 16; and *Brazil*, CCPR/C/BRA/CO/2, Para. 18.

<sup>614</sup> Judgment of 20 November 2012, *Case of Gudiel Álvarez and others (Diario Militar) v. Guatemala*, Series C No. 253, Para. 252.

<sup>615</sup> Judgment of 24 November 2010, *Case of Gomes Lund and others ("guerrilha do Araguaia") v. Brazil*, Series C No. 219, para. 211.

final decision on the existence of the documents requested by the investigating authorities cannot rely on the discretion of the State body, to which the alleged perpetrators of the crime under investigation belong<sup>616</sup>.

In this context the preservation of records and documents is a particularly important obligation as they may constitute evidence during investigations. Thus, the *Principles against Impunity* stipulate that “[T]echnical measures and penalties should be applied to prevent any removal, destruction, concealment or falsification of archives, especially for the purpose of ensuring the impunity of perpetrators of violations of human rights and/or humanitarian law”<sup>617</sup>. At the regional level, the General Assembly of the OAS reiterated that “states, within the framework of their own internal legal systems, should preserve records and other evidence concerning gross violations of human rights and serious violations of international humanitarian law, in order to facilitate knowledge of such violations, investigate allegations, and provide victims with access to an effective remedy in accordance with international law, in order to prevent these violations from occurring again in the future, among other reasons”<sup>618</sup>. Meanwhile the Inter-American Commission on Human Rights has stated that “the State has the obligation to produce, recover, reconstruct or capture the information it needs in order to comply with its duties under international, constitutional or legal norms. In this regard, for example, if information that it should safeguard was destroyed or illegally removed and such information was necessary to clarify human rights violations, the State should, in good faith, make every effort within its reach to recover or reconstruct that information.”<sup>619</sup>

An essential aspect of the legal framework that States must adopt is related to the chain of custody and preservation of evidence. This is a central element that allows investigations to fulfill their purpose and have an impact on judicial and administrative proceedings (in the case of search inquiries), ensuring the preservation of the evidence and that it is not destroyed or altered during the investigation. The maintenance of the chain of custody determines

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<sup>616</sup> *Right to the Truth in the Americas*, Doc. Cit., para. 114.

<sup>617</sup> Principle 14.

<sup>618</sup> Resolution AG/RES. 2267 (XXXVII-O/07), “Right to the Truth”. See, likewise, Resolutions “Right to the Truth”: AG/RES. 2406 (XXXVIII-O/08), AG/RES. 2509 (XXXIX-O/09), and AG/RES. 2595 (XL-O/10).

<sup>619</sup> *Right to the Truth in the Americas*, Doc. Cit., para. 116.

the validity or legality of the evidence. Several international instruments establish clear standards for chain of custody and preservation of evidence, particularly in forensics<sup>620</sup>(see Chapter VI, "The role of forensic science"). In this regard, the Inter-American Court of Human Rights has stated that "due diligence in the legal and medical investigation of a death requires maintaining the chain of custody of each item of forensic evidence. This consists in keeping a precise written record, complemented, as applicable, by photographs and other graphic elements, to document the history of the item of evidence as it passes through the hands of the different investigators responsible for the case. The chain of custody can extend beyond the trial, sentencing and conviction of the accused; given that old evidence, duly preserved, could help exonerate someone who has been convicted erroneously. The exception to the foregoing is the positively identified remains of victims, which can be returned to their families for burial, on condition that they cannot be cremated and may be exhumed for new autopsies."<sup>621</sup>

### **g. Safety and protection of victims, their families and those involved in investigation**

During the investigations, the authorities must take measures to protect those who are involved in investigations from any act or threat of violence, intimidation, abuse and reprisals<sup>622</sup>. This includes complainants, victims, relatives of the victim, the victim's lawyers, witnesses and any other relevant people, such as specialists and experts, as well as non-governmental organizations involved in the

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<sup>620</sup> See *inter alia*: *Minnesota Protocol*, *Istanbul Protocol* and *World Congress on Psychosocial Work in Search and Exhumation Processes related to Forced Disappearance, Justice and Truth*.

<sup>621</sup> Judgment of 16 November 2009, *Case of Gonzalez et al ( "Cotton Field") v Mexico*, Doc. Cit., para. 305.

<sup>622</sup> *International Convention for the Protection of All Persons from Enforced Disappearance* (Arts. 12,1 and 18,2); *Declaration on the Protection of All Persons from Enforced Disappearance* (Art. 13,3); *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions* (Principle 15); *Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (Principle 10); *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* (Art. 12); *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (Art. 12,b); *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime* (Arts. 32 et seq.); and *World Congress on Psychosocial Work in Search and Exhumation Processes related to Forced Disappearance, Justice and Truth* (Standard 7).

investigation.

The obligation to provide protection should extend to all those officials involved in the investigation.

“With regard to victims and witnesses, prosecutors shall take their interests into account and take measures, where necessary, to protect their security and privacy.”

Special Rapporteur on the independence of judges and lawyers<sup>623</sup>

In that sense, the Inter-American Court has emphasized that “States must provide all necessary means to protect agents of justice, investigators, witnesses, and next of kin of victims from harassment and threats aimed at obstructing the proceedings and avoiding the elucidation of the facts, and concealing the perpetrators, because, to the contrary, this would have an intimidating effect on those who could be witnesses, seriously impairing the effectiveness of the investigation.”<sup>624</sup>

This obligation is twofold: to protect the lives and safety of people; and to guarantee the effectiveness of the investigation. Thus, in a case of the murder of magistrates and judicial investigators who were investigating a series of crimes committed by military and paramilitary officers, the Inter-American Court of Human Rights noted that “due diligence in the investigations implies taking into account the patterns of operation of the complex structure of individuals who executed the massacre because this structure remained in place after the massacre had been committed, and because, precisely to ensure its impunity, it operates by using threats to instill fear in investigators and in possible witnesses, or in those who have an interest in seeking the truth, as in the case of the victims’ next of kin.”<sup>625</sup> In this case, the Court concluded that the “pattern of violence and threats that occurred in this case against judicial officials, the next of kin of the victims and witnesses

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<sup>623</sup> *Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, A/HRC/20/19, 7 June 2012, para. 48.*

<sup>624</sup> Judgment of 20 November 2013, *Case of the Afro-descendant Communities displaced from the Cacarica River Basin (Operation Genesis) v. Colombia*, Series C No. 270, para. 376. See also: Judgment of 3 April 2009, *Case of Kawas Fernández v. Honduras*, Series C No. 196, para. 106; Judgment of 25 November 2003, *Case of Myrna Mack Chang v. Guatemala*, Series C No.101, para. 199; and Judgment of 11 May 2007, *Case of the Rochela Massacre of the Rochela v. Colombia*, Series C No. 163, para. 171.

<sup>625</sup> Judgment of 11 May 2007, *Case of the Rochela Massacre v. Colombia*, Series C No. 163, para. 165

had the effect of intimidating and frightening them so that they would not collaborate in the search for the truth. As a result, the progress of the proceedings was hindered. This situation was aggravated because safety measures were not adopted to protect some of the threatened officials, the next of kin of the victims and the witnesses."<sup>626</sup>

"[T]he failure to provide protection to witnesses can severely affect fundamental rights, such as the right to justice and the right to the truth. [...] The lack of such protection amounts to a violation of victims' rights to an 'effective remedy'."

Office of the High Commissioner for Human Rights<sup>627</sup>

In the same regard, the Special Rapporteur on Executions has stated that systems and protective measures are "necessary for breaking the cycle of impunity".<sup>628</sup> Likewise, the Rapporteur has stated that the "[successful prosecution of those responsible for extrajudicial executions is difficult, if not impossible, in the absence of effective witness protection programmes. [...] If witnesses can be easily intimidated, if they and their families remain vulnerable, or if they sense that the protections offered to them cannot be relied upon, they are unlikely to testify.[...] Ending impunity for killings thus requires institutionalizing measures to reduce the risks faced by witnesses who testify."<sup>629</sup>

Protective measures are not only reactive, they should also be preventive. Measures should be taken not only once the attacks and threats have been registered. In many cases, given the seriousness of the acts, their significance, the people and structures involved in the crime and/or the risks and dangers linked to the investigation, the need for such measures may be logically inferred and anticipated, even when there has not been an actual act of intimidation or reprisal.

The nature of the protection measures depends on each case; they must take into account the nature and gravity of the offense, the alleged perpetrators of the offense, the vulnerability of the families of the victim and witnesses as well as the situation of the

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<sup>626</sup> *Ibid.*, para. 170.

<sup>627</sup> *Right to the truth - Report of the Office of the High Commissioner for Human Rights of the United Nations*, A/HRC/12/19, 21 August 2009, paras. 32 and 34.

<sup>628</sup> *Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions, Philip Alston, submitted in accordance with Resolution 61/173 of the General Assembly*, A/63/313, 20 August 2008, para. 14.

<sup>629</sup> *Ibid.*, 20 August 2008, para. 12.

investigating authorities or others involved in the investigation. The measures should not be limited to aspects of “physical protection” (such as escort services, armored vehicles, etc.) or relocation of persons; they should also include investigating the attacks and/or threats as, undertaking an investigation of the facts that gave rise the protective measures, may lead to the identification of those responsible and their punishment.<sup>630</sup> This last point is a guarantee aimed at ending such attacks and eliminating risk factors.

The Office of the High Commissioner for Human Rights<sup>631</sup>, the WGEID<sup>632</sup> and the Special Rapporteur on Executions<sup>633</sup> have recommended that witness protection mechanisms should not be linked to government agencies such as the police, security agencies and the military against which the witness will testify.

“[I]n order to comply with the obligation to investigate within the framework of the guarantees of due process, the State must take all necessary measures to protect judicial officers, investigators, witnesses and the victims’ next of kin from harassment and threats which are designed to obstruct the proceedings, prevent a clarification of the events of the case, and prevent the identification of those responsible for such events.”

Inter-American Court of Human Rights<sup>634</sup>

Protection measures, including those aimed at investigators and judicial officers, should be consistent with the State’s other international obligations<sup>635</sup>. For example, the use of “anonymous” or “faceless” prosecutors, investigators and witnesses, in addition to the doubts concerning the effectiveness of their protection, is not compatible with the State’s other international obligations, in particular those relating to due process, as international bodies for

<sup>630</sup> Resolution of the Inter-American Court of Human Rights, *Expansion of provisional measures requested by the Inter-American Commission on Human Rights in respect of the Republic of Colombia – Case of Alvarez and others*, 10 August 2000, para. 8.

<sup>631</sup> *Right to the truth - Report of the Office of the High Commissioner for Human Rights*, A/HRC/12/19, 21 August 2009, para. 69

<sup>632</sup> *Report of the Working Group on Enforced or Involuntary Disappearances – Addendum: Mission to Argentina*, A/HRC/10/9/Add.1, 5 January 2009, para. 74.

<sup>633</sup> *Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions*, A/63/313, 20 August 2008, par. 33 et seq..

<sup>634</sup> Judgment of 11 May 2007, *Case of the Rochela Massacre v. Colombia*, Series C No. 163, para. 171.

<sup>635</sup> *Report of the Special Rapporteur on the independence of the judges and lawyers, Mr. Param Cumaraswamy – Addendum: Report on the mission to Peru*, E/CN.4/1998/39/Add.1, 19 February 1998, para. 74.

the protection of human rights have repeatedly stated<sup>636</sup>. Experience shows that these practices give rise to frame-ups by the state security services involved in the crimes who misdirect investigations by making false statements<sup>637</sup>. However, in exceptional circumstances and under judicial supervision, the authorities in charge of the investigation or the prosecution may refuse to disclose the identity of the victim, their families or witnesses during the criminal investigation. Notwithstanding, in any case, the identity of victims and witnesses must be disclosed to the parties with sufficient time prior to the start of criminal proceedings in order to ensure a fair trial.

The obligation to provide protection does not end at the conclusion of the investigation. If the risks remain, protective measures should be extended beyond the investigation, and even after the criminal proceedings<sup>638</sup>. In that regard, the Inter-American Court of Human Rights has stated that “the assessment that the risk has ceased, so that it is no longer necessary to continue the measures adopted, requires a careful analysis of the reasons that led to and justified their adoption, as well as the circumstances at the time their conclusion and lifting are evaluated.”<sup>639</sup>

#### **h. Suspension and/or reassignment of officers to new locations and functions**

Several international norms and standards stipulate that the State

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<sup>636</sup> See, *inter alia*: Human Rights Committee, *Concluding observations: Canada*, CCPR/C/CAN/CO/5, 20 April 2006, para. 13, and *United States of America*, CCPR/C/USA/CO/3/Rev.1, 18 December 2006, para. 18; Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights in Peru*, OAS/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, paras. 103, 104 and 110, and *Third Report on the Situation of Human Rights in Colombia*, OAS/Ser.L/V/II.102, Doc. 9 Revs. 1, 26 February 1999, paras. 121-124, and *Report on Terrorism and Human Rights*, OAS/Ser.L/V/II.116 Doc. 5 Revs. 1 corr. 22 October 2002, para. 233; Reports of the Special Rapporteur on the Independence of Judges and Lawyers on the missions to Peru (E/CN.4/1998/39/Add.1, 19 February 1998) and Colombia (E/CN.4/1998/39/Add.2, 30 March 1998); and *Report of the Working Group on Enforced or Involuntary Disappearances – Addendum: Mission to Argentina*, A/HRC/10/9/Add.1 de 5 January 2009, para. 77.

<sup>637</sup> On the use of false statements, see, for example: Inter-American Commission on Human Rights, *Third Report on the Situation of Human Rights in Colombia*, OAS/Ser.L/V/II.102, Doc. 9 Revs. 1, 26 February 1999, para. 126.

<sup>638</sup> Article 12 (b) the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*.

<sup>639</sup> Judgment of 14 November 2014, *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, Series C No. 287, para. 526.



has the obligation to punish those who hinder the development of investigations<sup>640</sup>, or to place suspects in a situation where they are unable to influence the course of investigations<sup>641</sup> or remove them from (direct or indirect) positions and functions of control over complainants, witnesses and their families, as well as those involved in the investigations<sup>642</sup>.

The Human Rights Committee<sup>643</sup>, the Committee on Enforced Disappearances<sup>644</sup>, the WGEID<sup>645</sup> and the Special Rapporteur on Executions<sup>646</sup> have recommended that States suspend state agents implicated in cases of enforced disappearance or extrajudicial execution from their official functions during investigations of these crimes.

These measures are preventive in nature and have a dual purpose: i) to preserve the integrity and effectiveness of the investigation; and ii) to ensure the integrity and security of the personnel involved in the investigations, as these measures are directly related to the obligation to provide protection to witnesses and others involved in the investigation<sup>647</sup>. These measures do not replace criminal and/or disciplinary proceedings and actions against the officials implicated in enforced disappearances and extrajudicial executions, as they do

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<sup>640</sup> Article 16 (1) of the *Declaration on the Protection of All Persons from Enforced Disappearance* and Principle 36 (a) of *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity*.

<sup>641</sup> Article 12 (4) *International Convention for the Protection of All Persons from Enforced Disappearance*.

<sup>642</sup> Article 12 (4) *International Convention for the Protection of All Persons from Enforced Disappearance* and Principle 15 of the *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions*.

<sup>643</sup> See, *inter alia*, *Concluding Observations of the Human Rights Committee: Brazil*, CCPR/C/79/Add.66, 24 July 1996, para. 20; *Colombia*, CCPR/C/79/Add.76, 5 May 1997, para. 32; and *Serbia and Montenegro*, CCPR/CO/81/SEMO, 12 August 2004, para. 9.

<sup>644</sup> *Concluding Observations on: Argentina*, CED/C/ARG/CO/1, 12 December 2013, para. 23; *Spain*, CED/C/ESP/CO/1, 12 December 2013, para. 18; *Uruguay*, CED/C/URY/CO/1, 8 May 2013, para. 20; and *the Netherlands*, CED/C/NLD/CO/1, 10 April 2014, para. 19.

<sup>645</sup> See, *inter alia*, *Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/2005/65, 23 December 2004, para. 68.

<sup>646</sup> See, *inter alia*, *Report of the Special Rapporteur on extrajudicial, summary and arbitrary executions, Philip Alston - Addendum: Mission to Colombia*, A/HRC/14/24/Add.2, 31 March 2010, para. 93.

<sup>647</sup> *Report of the Working Group on Enforced or Involuntary Disappearances - Addendum: Mission to Argentina*, A/HRC/10/9/Add.1, 5 January 2009, para. 75; and *Report of the Special Rapporteur of the Human Rights Council on extrajudicial, summary and arbitrary executions, Philip Alston*, A/63/313, 20 August 2008, para. 17.

not have a punitive, disciplinary or penal nature nor do they preclude individual responsibility.

International human rights bodies<sup>648</sup> have recommended that officials be reassigned to other locations or assigned to other duties during the investigation as an alternative to suspension, especially if there is a risk that the investigation might be obstructed. Notwithstanding, these measures of reassignment to other locations or to new functions must be performed in such a manner that the official concerned is unable to interfere or impede, either directly or indirectly, in the course of investigations. These measures must not include the promotion of the officials concerned.

### **i. Sanctions for those who hinder investigations**

Several international norms and standards stipulate that the State has the obligation to punish those who hinder investigations<sup>649</sup>. In this regard, the Inter-American Court of Human Rights has stated that “[p]ublic officials and private citizens who hamper, divert or unduly delay investigations tending to clarify the truth of the facts must be punished, rigorously applying, in this regard, provisions of domestic legislation.”<sup>650</sup>

“Due diligence in the investigation means that all the relevant State authorities are obliged to collaborate in gathering evidence, so that they must provide the judge, prosecutor other judicial authorities with all the information required and abstain from actions that obstruct the progress of the investigations.”

Inter-American Court of Human Rights<sup>651</sup>

Notwithstanding, when these activities are part of the obstructive practices aimed at concealing the fate and whereabouts of the person concerned or constitute a form of concealment of the crime of enforced disappearance, the perpetrators of such behavior should

<sup>648</sup> See, for example, *Concluding Observations of the Human Rights Committee: Brazil*, CCPR/C/BRA/CO/2, 1 December 2005, para. 12; and *Conclusions and recommendations of the Committee against Torture: El Salvador*, CAT/C/SLV/CO/2, 9 December 2009, para. 12 and *Conclusions and recommendations of the Committee against Torture: Honduras*, CAT/C/HND/CO/1, 23 June 2009, para. 20.

<sup>649</sup> See, *inter alia*: Articles 12 (4), 22 and 25 (1)(b) of the *International Convention for the Protection of All Persons from Forced Disappearance*; and Article 13 (5) of the *Declaration on the Protection of All Persons from Enforced Disappearance*.

<sup>650</sup> Judgment of 29 August 2002, *Case of Caracazo v. Venezuela*, Series C No. 95, para. 119.

<sup>651</sup> Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, para. 244.

be investigated and prosecuted for the latter crime. Indeed, the International Convention for the Protection of All Persons from Enforced Disappearance reiterates this rule.<sup>652</sup> The same should apply in cases of "secret" executions and clandestine burials.

## 5. FAMILY MEMBERS AND INVESTIGATION

Relatives of victims of enforced disappearance and/or extrajudicial execution have the right to have the facts effectively investigated<sup>653</sup>. The right to an investigation is closely related to the right to truth.

The right to an investigation includes the rights of access to information relevant to the investigation, the right to present evidence and require expert opinions and forensic examination, as well as the right to be informed of the progress, evolution and results of the investigation. The Inter-American Court of Human Rights has stated that the victims and/or their relatives must have full access to and capacity to act at all stages and levels of the investigation, to formulate their claims and to present evidence, with regards to both clarifying the facts and punishment of those responsible and with regard to ensuring fair reparation<sup>654</sup>.

The results of the investigations should be public.<sup>655</sup> However, the publication of some aspects of investigation - such as the identity of witnesses or sources of information - could compromise the prosecution and punishment of perpetrators of violations and therefore this information should not be revealed publically lest it

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<sup>652</sup> Article 21 (1) and 22.

<sup>653</sup> *International Convention for the Protection of All Persons from Enforced Disappearance* (Art. 24(2)); *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions* (Principle 16); *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (Arts. 11(c) and 12); and *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime* (Art. 20).

<sup>654</sup> See, *inter alia*: Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 118; Judgment of 4 July 2006, *Case of Ximenes Lopes v. Brazil*, Series C No. 149, para. 193; Judgment of 1 July 2006, *Case of the Ituango Massacres v. Colombia*, Series C No. 48, para. 296; Judgment of 7 June 2003, *Case of Juan Humberto Sánchez v. Honduras*, Series C No. 99, para. 186; and Judgment of 29 August 2002, *Case of the Caracazo v. Venezuela. (Reparation)*, Series C No. 95, para. 118.

<sup>655</sup> See, *inter alia*: Principle 17 of the *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions*; and Inter-American Court of Human Rights, Judgment of 7 June 2003, *Case of Juan Humberto Sánchez v. Honduras*, Series C No. 99, para. 186.

hamper an ongoing investigation<sup>656</sup>. However, the possibility of the withholding information from the public must not be construed to deny the rights of the victim and his family their basic rights during the investigation. In this regard, the WGEID has stated that this possibility “should be interpreted narrowly. Indeed, the relatives of the victims should be closely associated with an investigation into a case of enforced disappearance. The refusal to provide information is a limitation on the right to the truth.”<sup>657</sup> Thus, in all cases and circumstances:

- The relatives of victims of enforced disappearance or extrajudicial executions or secret executions and burials have the right to be informed about the progress and results of the investigation into the fate and whereabouts of their loved ones,<sup>658</sup>
- The families of the victims and their legal representatives have the right to request and submit and challenge evidence;
- The families of the victims and their legal representatives shall be informed of the results of the investigation, the decision on whether or not to prosecute the alleged perpetrators and and have the right to legally challenge such a decision.

During the investigation:

- The families of the victims should be treated with humanity and respect for their dignity and human rights, and the authorities must take appropriate measures to ensure their physical and

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<sup>656</sup> See, *inter alia*: Article 13 (4) of the *Declaration on the Protection of All Persons from Enforced Disappearance*; Principle 17 of the *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions*; and Principle 34 of the *Body of Principles for the Protection of All Persons under Any Form of Detention*.

<sup>657</sup> WGEID, “General Comment on the Right to the Truth in Relation to Enforced Disappearances”, Doc. Cit., Para. 3.

<sup>658</sup> Article 24 (2) of the *International Convention on the Protection of All Persons from Enforced Disappearance* and Principle 4 of the *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity*.

- psychological well-being and privacy.<sup>659</sup>
- The investigating authorities should take into account the cultural, ethnic, linguistic, gender and sexual orientation of the victims and their families and adopt working methods and a differentiated approach according to these specificities.<sup>660</sup>
  - The families of victims are entitled to legal advice, social, medical, psychological and psychosocial assistance and counselling including from social workers and mental health professionals, and to the reimbursement of expenses - as well as legal aid and translation services where necessary.
  - In cases of extrajudicial execution, relatives of the victim have the right to have a doctor or other qualified representative be present at the autopsy.<sup>661</sup>
  - The families have a right to have the body or skeletal remains of their murdered loved one be delivered to them.
  - In cases of enforced disappearance, the authorities should take the necessary measures to safeguard the rights of the disappeared person and his or her family, in particular regarding the legal status of the disappeared person and their relatives, in matters such as social protection, financial matters, family law and property rights.<sup>662</sup> However, the WGEID has stated that such types of measures should not have the effect of

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**<sup>659</sup> SEE, INTER ALÍA: PRINCIPLE 10 OF THE BASIC PRINCIPLES AND GUIDELINES ON THE RIGHT TO A REMEDY AND REPARATION FOR VICTIMS OF GROSS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW; THE GUIDELINES ON JUSTICE IN MATTERS INVOLVING CHILD VICTIMS AND WITNESSES OF CRIME; ARTICLES 4, 6, 14, 15, 16 AND 17 OF THE DECLARATION OF BASIC PRINCIPLES OF JUSTICE FOR VICTIMS OF CRIME AND ABUSE OF POWER; ARTICLE 24 (6) OF THE INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE; AND PRINCIPLE 10 OF THE UPDATED SET OF PRINCIPLES FOR THE PROTECTION AND PROMOTION OF HUMAN RIGHTS THROUGH ACTION TO COMBAT IMPUNITY.**

<sup>660</sup> See: *World Congress on Psychosocial Work in Search and Exhumation Processes related to Forced Disappearance, Justice and Truth*; and *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*.

<sup>661</sup> Principle 16 of the *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions*.

<sup>662</sup> Article 24 (6) of the *International Convention for the Protection of All Persons from Enforced Disappearance*; and WGEID, "General Comment on the right to recognition as a person before the law in the context of enforced disappearances", A/HRC/19/58/Rev.1, 2 March 2012, para. 42.

interrupting or suspending investigations and they do not relieve the State of its obligation to further investigate the case to establish the fate and whereabouts of the person concerned, or to prosecute and punish the perpetrators.<sup>663</sup>

- Investigating authorities should take appropriate measures so that the investigatory activities involving the families of the victims (such as testimonies, statements, lawyers and forensic practices) do not cause new trauma for them or result in revictimization.

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<sup>663</sup> WGEID, "General Comment on the right to recognition as a person before the law in the context of enforced disappearances", Doc. Cit.

## CHAPTER V: JUDICIAL REPRESION OF THE CRIMES OF ENFORCED DISAPPEARANCE AND EXTRAJUDICIAL EXECUTION

“Impunity’ means the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account [...] since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties [...].”

*Updated Set of Principles for the protection and promotion of human rights through action to combat impunity*<sup>664</sup>

### 1. Basis, nature and scope of the duty to prosecute and punish

The prosecution and punishment of those responsible for crimes of enforced disappearance and / or extrajudicial execution is an international obligation of the State. This obligation has been widely and repeatedly reaffirmed by international human rights case law. Failure, in whole or in part, to comply with this obligation results in impunity. In this regard, the Inter-American Court of Human Rights has defined impunity as “the complete absence of the investigation, pursuit, capture, prosecution and sentencing of those responsible for the Violations of the rights protected by the American Convention”.<sup>665</sup>

The obligation to prosecute and punish the perpetrators of enforced disappearance and / or extrajudicial execution has its legal basis both in treaty provisions that expressly set out such an obligation or provisions that enshrine the general obligation arising from the State’s duty to guarantee human rights, as well as from general principles of International Law and the *jus cogens* character of these crimes.

The obligation of the courts to bring to justice those responsible for the crime of enforced disappearance is expressly prescribed by the *Inter-American Convention on Forced Disappearance of Persons*<sup>666</sup>

<sup>664</sup> Definition A “Impunity”.

<sup>665</sup> Judgment of 26 November 2013, *Case of Osorio Rivera and Family v Peru*, Series C No. 274, para. 178. See likewise: Judgment of 8 March 1998, *Case of the “White Van” (Paniagua Morales and others) v. Guatemala*, Series C No. 37, para. 173; and Judgment of 26 September 2006, *Case of Almonacid Arellano and others v. Chile*, Series C No. 154, para. 111.

<sup>666</sup> Articles I and IV.

(henceforth "IACFDP") and the *International Convention for the Protection of All Persons from Enforced Disappearance*<sup>667</sup> (henceforth "ICPED"). It should be noted that this obligation is also reaffirmed in the *Declaration on the Protection of All Persons from Enforced Disappearance* (henceforth "the DED")<sup>668</sup>.

The duty of the State to bring to justice and punish those responsible for extrajudicial execution is not expressly addressed in any treaty. However, international instruments reaffirm this obligation, including the *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions* (henceforth "Principles on Executions")<sup>669</sup> and the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*<sup>670</sup>.

The *International Covenant on Civil and Political Rights* and the *American Convention on Human Rights* do not contain explicit provisions on the obligation to prosecute and punish those responsible for crimes of enforced disappearance and / or extrajudicial execution. However, international jurisprudence has concluded that this obligation is inherent in these treaties, emanating from the duty to guarantee the human rights both within these treaties and in general principles of law.

"The State party [of Peru] should redouble its efforts to ensure that the serious human rights violations perpetrated during the armed conflict between 1980 and 2000, including those involving sexual violence, do not go unpunished. The State party should take appropriate measures to expedite the judicial investigations and the process of exhuming, identifying and returning remains to the next of kin of the victims."

Human Rights Committee<sup>671</sup>

The Human Rights Committee has concluded that this obligation has its legal basis in Article 2 of the *International Covenant on Civil and Political Rights*<sup>672</sup>. Thus, the Committee noted that "[...] the State party is under a duty to investigate thoroughly alleged

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<sup>667</sup> Articles 3, 4, 5, 6 and 7.

<sup>668</sup> Article 4.

<sup>669</sup> Principles 1, 18 and 19.

<sup>670</sup> Principles 7, 23 and 26.

<sup>671</sup> *Concluding observations on the fifth periodic report of Peru*, CCPR/C/PER/CO/5 29 April 2013, para. 11.

<sup>672</sup> See, *inter alia*, *General Comment No. 31* (...) Doc, Cit.; Views of 27 October 1995, Communication No. 563/1993, *Nydia Erika Bautista v. Colombia*; Views of 29 July 1997, Communication No. 612/1995, *José Vicente and Amado Villafañe Chaparro and others v. Colombia*.



violations of human rights, and in particular forced disappearances of persons and violations of the right to life, and to prosecute criminally, try and punish those held responsible for such violations. This duty applies *a fortiori* in cases in which the perpetrators of such violations have been identified<sup>673</sup>. In its Concluding Observations on countries, the Committee has reiterated the obligation of the State to prosecute and punish those responsible for enforced disappearance and / or extrajudicial execution and other serious human rights violations<sup>674</sup>. In its Concluding Observations on Peru in 1996, the Committee urged the Peruvian authorities to take "effective measures to investigate allegations of summary executions, disappearances [...], to bring the perpetrators to justice, to punish them and to compensate victims."<sup>675</sup> The failure to bring to justice the perpetrators of enforced disappearance, extrajudicial execution or other serious violations of human rights constitutes a violation of the obligations imposed on states by the *International Covenant on Civil and Political Rights*.<sup>676</sup>

Inter-American jurisprudence has pointed out that the duty to prosecute and punish the perpetrators of enforced disappearance and / or extrajudicial execution has its legal basis in the duty to guarantee rights, enshrined in Article 1 of the *American Convention on Human Rights*<sup>677</sup>.

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<sup>673</sup> Views of 27 October 1995, Communication No. 563/1993, *Nydia Erika Bautista v. Colombia*, para. 8.6.

<sup>674</sup> See, *inter alia*, *Concluding Observations of the Human Rights Committee: Peru*, CCPR/CO/70/PER, 15 November 2000, para. 9; *Uruguay*, CCPR/C/79/Add.19, 5 May 1993, para. 7; *Chile*, CCPR/C/79/Add.104, 30 March 1999, para. 7; *Lebanon*, CCPR/C/79/Add.78, 1 April 1997, para. 12; *El Salvador*, CCPR/C/79/Add.34, 18 April 1994, para. 7; *Haiti*, A/50/40, 3 October 1995, para. 230; *France*, CCPR/C/79/Add.80, 4 August 1997, para. 13; *Argentina*, CCPR/C/79/Add.46, 5 April 1995, para. 146 and CCPR/CO/70/ARG, 3 November 2000, para. 9; *Croatia*, CCPR/CO/71/HRV, 4 April 2001, para. 11; *Guatemala*, CCPR/CO/72/GTM, 27 August 2001, para. 12; *Brazil*, CCPR/C/BRA/CO/2, 1 December 2005, para. 12; *Honduras*, CCPR/C/HND/CO/1, 13 December 2006, para. 5; *Paraguay*, CCPR/C/PRY/CO/2, 24 April 2006, para. 12 and CCPR/C/PRY/CO/3, 29 April 2013, para. 9; and *Surinam*, CCPR/CO/80/SUR, 4 May 2004, para. 7.

<sup>675</sup> *Preliminary Observations of the Committee of Human Rights: Peru*, CCPR/C/79/Add.67, 25 July 1996, para. 22.

<sup>676</sup> Human Rights Committee, *General Comment 31 (...)*, Doc. Cit., para. 18.

<sup>677</sup> See, *inter alia*: Judgment of 21 July 1989, *Case of Velásquez Rodríguez v. Honduras*, Series C No. 7; Judgment of 21 July 1989, *Case of Godínez Cruz v. Honduras*, Series C No. 8; Judgment of 8 December 1995, *Case of Caballero Delgado and Santana v. Colombia*, Series C No. 22; Judgment of 14 September 1996, *Case of El Amparo Vs. Venezuela*, Series C No. 28; Judgment of 3 November 1997, *Case of Castillo Páez Vs. Peru*, Series C No. 34; Judgment of 12 November 1997, *Case of*

“Access to justice constitutes a peremptory norm of International Law and, as such, it gives rise to the States’ *erga omnes* obligation to adopt all such measures as are necessary to prevent such violations from going unpunished, whether exercising their judicial power to apply their domestic law and International Law to judge and eventually punish those responsible for such events, or collaborating with other States aiming in that direction.”

Inter-American Court of Human Rights<sup>678</sup>

The Inter-American Court of Human Rights has held that, in light of obligations under the *American Convention*, “[t]he State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.”<sup>679</sup> The Court has reiterated that the States Parties to the Convention have an international obligation to prosecute and punish those responsible for forced disappearances and / or extrajudicial executions<sup>680</sup> as well as for crimes against humanity<sup>681</sup> and war crimes<sup>682</sup>.

The Inter-American Commission on Human Rights has stated that in virtue of the obligation enshrined in Article 1(1) of the *American Convention on Human Rights*, “[t]he State, in the face of alleged cases of extrajudicial execution and forced disappearance of

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*Suárez Rosero v. Ecuador*, Series C No. 35; and Judgment of 24 January 1998, *Case of Nicholas Blake v. Guatemala*, Series C No. 36.

<sup>678</sup> Judgment of 29 November 2006, *La Cantuta v. Peru*, Series C, No. 162, para. 160.

<sup>679</sup> Judgment 29 July 1988, *Case of Velásquez Rodríguez v Honduras*, Series C No. 4, para. 174.

<sup>680</sup> See, *inter alia*: Judgment of 3 November 1997, *Case of Castillo Páez v. Peru*, Series C No. 34; Judgment of 16 August 2000, *Case of Durand and Ugarte v. Peru*, Series C No. 68; Judgment of 8 July 2004, *Case of Gómez Paquiyauri Brothers v. Peru*, Series C No. 110; Judgment of 22 November 2005, *Case of Gómez Palomino v. Peru*, Series C No. 136; Judgment of 6 April 2006, *Case of Baldeón García v. Peru*, Series C No. 147; Judgment of 29 November 2006, *La Cantuta v. Peru*, Series C, No. 162; Judgment of 10 July 2007, *Case of Cantoral Huamaní and Consuelo Trinidad García Santa Cruz v. Peru*, Series C No. 167; Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202; and Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274

<sup>681</sup> See, *inter alia*: Judgment of 29 November 2006, *La Cantuta v. Peru*, Series C, No. 162; Judgment of 25 November 2006, *Case of Miguel Castro-Castro Prison v. Peru*, Series C No. 160, para. 402; Judgment of 22 September 2006, *Case of Goiburú et al. v. Paraguay*, Series C No. 153, para. 128; and Judgment of 26 September 2006, *Case of Almonacid Arellano and others v. Chile*, Series C No. 154.

<sup>682</sup> See, *inter alia*: Judgment of 25 October 12, *Case of the Massacres of El Mozote and nearby places v. El Salvador*, Series C No. 252 and Judgment of 20 November 12, *Case of Santo Domingo v. Colombia*, Series C No. 259.

persons, has the duty to clarify the facts, and to identify and punish the persons responsible.”<sup>683</sup> Likewise, the Commission has stated that the obligation to prosecute and punish the perpetrators of enforced disappearances, extrajudicial executions and other serious violations of human rights cannot be delegated or waived.<sup>684</sup>

“In the case of an extrajudicial execution, the State has the duty to investigate the way in which the killing occurred, identify the agents responsible, punish the guilty, and indemnify the family of the victim.”

Inter-American Commission on Human Rights<sup>685</sup>

The duty to prosecute and punish those responsible for serious violations of human rights not only emanates from obligations under international treaties. Indeed, the duty to prosecute and punish those responsible for forced disappearances and / or extrajudicial executions also has its foundation in customary international law. This obligation has been reiterated by the United Nations General Assembly<sup>686</sup> as well as in international jurisprudence. For example, the Human Rights Committee<sup>687</sup> and the WGEID<sup>688</sup> have reiterated that enforced disappearance constitutes a crime under International Law which imposes an obligation on the State to prosecute and punish those responsible for these crimes. For its part, the Inter-American Court of Human Rights has repeatedly stated that the prohibition of enforced disappearance and extrajudicial execution

<sup>683</sup> Report No. 101/01, Case No. 10.247 *et al*, *Extrajudicial executions and forced disappearances (Peru)*, 11 October 2001, para. 247.

<sup>684</sup> *Second Report on the Situation of Human Rights in Peru*, OAS/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, para. 230.

<sup>685</sup> Report No. 43/97, Case No. 10.562, *Héctor Pérez Salazar (Peru)*, 19 February 1998, para. 39.

<sup>686</sup> See, *inter alia*, Resolution Nos. 49/193, 23 December 1994 (enforced disappearance); 51/94 12 December 1996 (enforced disappearance); 53/150, 9 December 1998 (enforced disappearance); 55/111, 4 December 2001 (extrajudicial execution); and 67/168 of 20 December 2012 (extrajudicial executions).

<sup>687</sup> *General Comment No. 31*, Doc. Cit.; Views of 13 November 1995, *Nydia Erika Bautista v. Colombia*, Doc. Cit.; Views of 29 July 1997, *José Vicente and Amado Villafañe Chaparro and others v. Colombia*, Doc. Cit.; Views of 2 November 2005, *Norma Yurich v. Chile*, Communication No. 1078/2002; Views of 16 July 2003, Communication No. 950/2000, *Jegatheeswara Sarma v. Sri Lanka*; Views of 30 March 2006, Communication No. 992/2001, *Louisa Bousroual v. Algeria*; and Views of 30 March 2006 Communication No. 1196/2003, *Boucherf v. Algeria*.

<sup>688</sup> UN Docs E/CN.4/1999/62, 28 December 1998, para. 333; E/CN.4/2000/64, 21 December 1999, para. 137; and E/CN.4/2002/79, 18 January 2002, Executive Summary.

and the corresponding obligation to investigate and punish those responsible have the character of *jus cogens*.<sup>689</sup>

“[T]he phrase ‘serious crimes under international law’ encompasses grave breaches of the Geneva Conventions of 12 August 1949 and of Additional Protocol I thereto of 1977 and other violations of international humanitarian law that are crimes under international law, genocide, crimes against humanity, and other violations of internationally protected human rights that are crimes under international law and/or which international law requires States to penalize, such as torture, enforced disappearance, extrajudicial execution, and slavery.”

*Updated Set of principles for the protection and promotion of human rights through action to combat impunity*<sup>690</sup>

As such, the Court has stated that in the case of an extrajudicial execution, “the State has the obligation to not leave these crimes unpunished and therefore it must use the national and international means, instruments, and mechanisms for the effective prosecution of said behaviors and the punishment of their perpetrators, in order to prevent them and avoid that they remain unpunished.”<sup>691</sup>

## 2. Obligation to criminalize

The duty to prosecute and punish the perpetrators of enforced disappearance and / or extrajudicial execution involves criminalizing these behaviors as criminal offenses under national criminal law. Criminalization in domestic law for crimes under International Law is essential for the effective enforcement of the obligation to prosecute

<sup>689</sup> See, *inter alia*: Judgment of 22 September 2006, *Case of Goiburú et al. v. Paraguay*, Series C No. 153, para. 84; Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 59; Judgment of 29 November 2006, *La Cantuta v. Peru*, Series C No. 162, para. 115; Judgment of 8 July 2004, *Case of the Hermanos Gómez Paquiyauri v. Peru*, Series C No. 110, para. 76; Judgment of 23 November 2009, *Case of Radilla Pacheco v. Mexico*, Series C No. 209, para. 139; Judgment of 24 November 2010, *Case of Gomes Lund and others (“Guerrilha do Araguaia”) v. Brazil*, Series C No. 219, para. 137; Judgment of 25 May 2010, *Case of Chitay Nech and others v. Guatemala*, para. 193; Judgment of 26 September 2006, *Case of Almonacid Arellano and others v. Chile*, Series C No. 154, para. 99; Judgment of 1 September 2010, *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*, Series C No. 217, para. 197; Judgment of 24 November 2009, *Case of the Las Dos Erres Massacre v. Guatemala*, Series C No. 211, para. 140; Judgment of 12 August 2008, *Case of Heliodoro Portugal v. Panama*, Series C No. 186, para. 118; and Judgment of 24 February 2011, *Case of Gelman v. Uruguay*, Series C No. 221, para. 75.

<sup>690</sup> Definition B “Serious crimes under international law”.

<sup>691</sup> Judgment of 25 November 2006, *Case of Miguel Castro-Castro Prison v. Peru*, Series C No. 160, para. 404.

and punish. With regard to enforced disappearance, the IACFPD<sup>692</sup>, the ICPED<sup>693</sup> and the DED<sup>694</sup> expressly impose this obligation, while the *Principles on Executions* do so with respect to extrajudicial execution.<sup>695</sup>

The obligation to define serious human rights violations as crimes under domestic law does not arise solely from obligations under the treaties. This obligation also arises from States' duty to guarantee rights and their obligation to prosecute and punish serious violations of human rights.

[T]he general obligation of the States to adapt their domestic laws to the American Convention [...] is also applicable in the case of the signature of the Inter-American Convention on Forced Disappearance of Persons, because it is derived from the customary norm according to which a State that has acceded to an international treaty must amend its domestic law as necessary in order to ensure the execution of the obligations assumed. [...] The above means that States must define enforced disappearance as an autonomous offense and also define the wrongful conducts of which it is composed."

Inter-American Court of Human Rights<sup>696</sup>

The fulfillment of this obligation is not left to the discretion of the State. By criminalizing serious human rights violations and other crimes under International Law as crimes under domestic criminal laws, States must scrupulously observe two aspects: the principle of legality of criminal offenses and the definitions under International Law of the unlawful conduct.

The principle of the legality of criminal offenses (*nullum crimen sine lege*), universally recognized as one of the basic principles of criminal law<sup>697</sup> and human rights treaties,<sup>698</sup> requires that the legal definitions of criminal offenses should be precise and devoid of any

<sup>692</sup> Article III.

<sup>693</sup> Articles 7 and 25.

<sup>694</sup> Article 4.

<sup>695</sup> Principle 1.

<sup>696</sup> Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, paras. 204 - 205.

<sup>697</sup> *International Covenant on Civil and Political Rights* (Art. 15); *American Convention on Human Rights* (Art. 9); *European Convention on Human Rights* (Art. 7); and *African Charter on Human and Peoples' Rights* (Art. 7). See also: III Geneva Convention (Art. 99), IV Geneva Convention (Art. 67) and II Protocol (Art. 6,2.c).

<sup>698</sup> *International Covenant on Civil and Political Rights* (Art. 15); *American Convention on Human Rights* (Art. 9); *European Convention on Human Rights* (Art. 7); and *African Charter on Human and Peoples' Rights* (Art. 7). See likewise: III Geneva Convention (Art. 99), IV Geneva Convention (Art. 67) and II Protocol (Art. 6,2.c).

ambiguity.<sup>699</sup> As noted by the Special Rapporteur on the Independence of Judges and Lawyers, vague or nebulous definitions of criminal offenses are contrary to both international human rights law as well as the “general conditions provided by international law”<sup>700</sup>.

In defining serious violations of human rights and international crimes as criminal offenses in their domestic criminal law, States must observe the definitions of crimes as defined under international law. The State may adopt more extensive definitions of criminal offenses that provide a higher threshold of protection for victims. However, the offense should reflect the minimum elements which characterize the definition of the offense prescribed by international law. Thus, the national criminal definition of a serious human rights violation should, at a minimum, criminalize all acts and motives prohibited by the international law<sup>701</sup>.

In this regard, the Inter-American Court has clarified that: “International law establishes a minimum standard with regard to the correct definition of this type of conduct and the minimum elements that this must observe, in the understanding that criminal prosecution is a fundamental way of preventing future human rights violations. In other words, the States may adopt stricter standards in relation to a specific type of offense to expand its criminal prosecution, if they consider that this will provide greater or better safeguard of the protected rights, on condition that, when doing so, such standards do not violate other norms that they are obliged to protect. Also, if elements considered non-derogable in the prosecution formula established at the international level are eliminated, or mechanisms are introduced that detract from meaning or effectiveness, this may lead to the impunity of conducts

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<sup>699</sup> See, for example, *Concluding Observations of the Human Rights Committee: Algeria*, CCPR/C/79/Add.95, of 18 August 1998, para. 11; *Portugal (Macao)*, CCPR/C/79/Add.115, of 4 November 1999, para. 12; and *Democratic People’s Republic of Korea*, CCPR/CO/72/PRK, 27 August 2001, para. 14. See also, European Court of Human Rights, Judgment of 25 May 1993, *Kokkinakis v. Greece*, Application No. 14307/88), para. 52.

<sup>700</sup> *Report of the Special Rapporteur on the independence of judges and lawyers*, E/CN.4/1998/39/Add.1, para. 129.

<sup>701</sup> See, *inter alia*, Committee against Torture: *General Comment No. 2: Implementation of article 2 by States Parties*, CAT/C/GC/2 of 24 January 2008, paras. 8-10; and *Concluding Observations on Peru*, CAT/C/PER/CO/5-6, 21 January 2013, para. 7; *Senegal*, CAT/C/SEN/CO/3, 17 January 2013, para. 8; *Guatemala*, CAT/C/GTM/CO/5-6, 24 June 2013, para. 8; *Chile*, CAT/C/CHL/CO/5, 23 June 2009, para. 10; *The Russian Federation*, CAT/C/RUS/CO/5, 11 December 2012, para. 7; and *Colombia*, CAT/C/COL/CO/4, 4 May 2010, para. 10.

that the States are obliged to prevent, eliminate and punish under international law.”<sup>702</sup> It is also noteworthy that the Constitutional Court of Colombia has held that “the definition of Article 2 [of IACFDP] establishes a minimum that must be protected by States Parties, without prejudice to their adopting broader definitions within their national laws”<sup>703</sup>. The Court ruled in a similar manner on the Colombian definition of the crime of genocide, which included political groups among the potential victims: “the regulation contained in international treaties and covenants establishes a minimum standard of protection, in such a way that nothing hinders States from establishing a greater level of protection in their domestic legislation.”<sup>704</sup>

The crime of extrajudicial execution is defined in all countries by means of the criminal offense of murder. For example, in 1996, the UN International Law Commission stated that “[m]urder is a crime that is clearly understood and and well defined in the national law of every State.”<sup>705</sup> A few countries, such as Guatemala<sup>706</sup> and Uruguay<sup>707</sup>, have included extrajudicial execution as a separate and distinct offense to homicide in their criminal laws. However, the problems of suppression of the crime of extrajudicial execution are not typically related to deficits in the definition of this act under criminal law but rather are related to legal mechanisms of impunity, as grounds for exemption from criminal responsibility.

“[T]he Committee considers that reference to a range of existing offences is not enough to meet this obligation as the offence of enforced disappearance is not a series of different crimes, but rather a complex and single offence, committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State through several criminal modalities, that violates various rights.”

Committee on Enforced Disappearance<sup>708</sup>

<sup>702</sup> Judgment of 22 September 2006, *Case of Goiburú et al. v. Paraguay*, Series C No. 153, para. 92.

<sup>703</sup> Judgment C-580/02 of 3 July 2002.

<sup>704</sup> Judgment C-177/01 of 14 February 2001, file D-3120.

<sup>705</sup> *Report of the International Law Commission on the work of its 48th session – 6 May to 26 July 1996*, A/51/10, (Para 7 of the Commentary to Article 18) p. 48.

<sup>706</sup> Article 132-Bis “Extrajudicial execution” of the Penal Code, introduced by means of Article 1 of Decree No. 48-1995, 14 July 1995.

<sup>707</sup> Under “Political Homicide”, Article 20 of Law No. 18.026, 2006.

<sup>708</sup> Committee on Disappearances: *Concluding Observations on the Report submitted by Germany* under Article 29, Para. 1, of the Convention, CED/C/DEU/CO/1, 10 April 2014, para. 7.

Regarding the definition of enforced disappearance in domestic criminal law, the Committee on Enforced Disappearance, the WGEID and the Inter-American Court of Human Rights have clarified the content and scope of this obligation, based on ICPED, the DED and IACFDP, which converge upon a definition of the crime of enforced disappearance and the identification of its constituent components (see Chapter I: "Enforced Disappearance").

The Committee on Enforced Disappearance has repeatedly stated that the crime of enforced disappearance should be punishable under domestic criminal law as an autonomous offense<sup>709</sup>. The Committee has stated that it is not enough that the criminal acts that correspond to the definition of enforced disappearance are criminalized under domestic legislation and considered that "reference to a range of existing offences is not necessarily enough to meet this obligation"<sup>710</sup>. The Committee has repeatedly stated that it is necessary to have "a definition of enforced disappearance as a separate offence that was in accordance with the definition in article 2 [of ICPED, that] distinguished it from other offences [...], which ] makes it possible to correctly encompass the many legal rights affected by enforced disappearances".<sup>711</sup>

In this regard, the Committee has stated that the crime of enforced disappearance must include at least all the constituent components of the definition of the crime set forth in Article 2 of the ICPED. For example, in the case of the crime of enforced disappearance adopted by the Netherlands, the Committee stated that "the definition does not include the 'concealment of the fate or whereabouts of the disappeared person' as a possible element and does not mention that the crime should be committed by 'agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State' but by or with the authorization, support or acquiescence of a 'State or political organization'."<sup>712</sup> Accordingly, the Committee recommended

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<sup>709</sup> *Concluding Observations on: Spain*, CED/C/ESP/CO/1, 12 December 2013, paras. 9 and 10; *France*, CED/C/FRA/CO/1, 8 May 2013, paras. 13-14; *Germany*, CED/C/DEU/CO/1, 10 April 2014, para. 7-9; and *Belgium*, CED/C/BEL/CO/1, 24 September 2014, paras. 11-12.

<sup>710</sup> *Concluding Observations on: Spain*, CED/C/ESP/CO/1, 12 December 2013, para. 9. Likewise, *Concluding Observations on: Belgium*, CED/C/BEL/CO/1, 24 September 2014, para. 11; and *Germany* on, CED/C/DEU/CO/1, 10 April 2014, Para. 7.

<sup>711</sup> *Ibid.*

<sup>712</sup> *Concluding Observations on the Report submitted by the Netherlands under Article 29, Para. 1, of the Convention*, CED/C/NLD/CO/1, 10 April 2014, para. 14.



amendment of the definition of the offence in the Dutch criminal law so as to be “fully compliant with article 2 of the Convention.”<sup>713</sup>

The Committee has also indicated that when defining the criminal offense of enforced disappearance, States must “avoid vague expressions” not established in the ICPED definition of the crime in Article 2, and which may be interpreted in the sense that the consequence -- that the disappeared person is kept “in conditions that place such a person outside the protection of the law” -- constitutes an additional element of intent (specific intent).<sup>714</sup> The Committee has stated that to criminalize enforced disappearance, States must ensure that “the phrase ‘placing them outside the protection of the law’ that appears in article 236, paragraph 1, of the Penal Code be considered a consequence of the commission of the offence of enforced disappearance rather than an intentional element (animus) that would have to be present in order for the act to constitute criminal conduct.”<sup>715</sup>

In addition to the autonomous nature of the crime, the Committee has indicated that in order to criminalize enforced disappearance States should:

- Clearly establish the mitigating and aggravating circumstances of the offense, as laid down in Article 7 of the ICPED;
- Adjust the statute of limitations in accordance with that established by the ICPED;
- Ensure punishment is appropriate and proportionate to the extreme gravity of the crime; and,
- Punish attempts to commit the crime of enforced disappearance.

The Working Group on Enforced or Involuntary Disappearances (WGEID) has stated that, pursuant to article 4 of the DED, States must criminalize enforced disappearance as a separate and independent offense<sup>716</sup>. With regard to the crucial importance of criminalizing enforced disappearance as an autonomous offense, the WGEID has stated that “[a] number of States admit that they have

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<sup>713</sup> *Ibid.*, Para. 15

<sup>714</sup> *Concluding Observations on the Report submitted by France under article 29, Para. 1, of the Convention*, CED/C/FRA/CO/1, 8 May 2013, para. 13.

<sup>715</sup> *Concluding Observations on the report submitted by Paraguay under article 29, para. 1, of the Convention*, CED/C/PRY/CO/1, 24 September 2014, para. 14.

<sup>716</sup> *Report of the Working Group on Enforced or Involuntary Disappearances – Addendum: Best practices on enforced disappearances in domestic criminal legislation*, A/HRC/16/48/Add.3, 28 December 2010, para 9. See, likewise, Report of the WGEID: E/CN.4/1996/38, para. 54; and A/HRC/7/2, para. 26 (Para. 3 of the “General Comment on the definition of enforced disappearance”).

not yet incorporated the crime of enforced disappearance into their domestic legislation, but argue that their legislation provides for safeguards from various offences that are linked with enforced disappearance or are closely related to it, such as abduction, kidnapping, unlawful detention, illegal deprivation of liberty, trafficking, illegal constraint and abuse of power. However, a plurality of fragmented offences does not mirror the complexity and the particularly serious nature of enforced disappearance. While the mentioned offences may form part of a type of enforced disappearance, none of them are sufficient to cover all the elements of enforced disappearance, and often they do not provide for sanctions that would take into account the particular gravity of the crime, therefore falling short for guaranteeing a comprehensive protection.”<sup>717</sup>

“Even if the absence of an autonomous crime does not excuse States from investigating and punishing acts of enforced disappearances, the obligation to criminalize enforced disappearance under national legislation as a separate offence is a powerful mechanism for overcoming impunity.”

Working Group on Enforced or Involuntary Disappearances<sup>718</sup>

The WGEID has affirmed that “States are not bound to strictly follow the definition of the offence as contained in the Declaration, ensuring however “that the act of enforced disappearance is defined in a way which clearly distinguishes it from related offences such as enforced deprivation of liberty, abduction, kidnapping, incommunicado detention, etc.”<sup>719</sup>. The WGEID has concluded that for the crime of enforced disappearance the “following three cumulative minimum elements should be contained in any definition: (a) Deprivation of liberty against the will of the person concerned; (b) Involvement of government officials, at least indirectly by acquiescence; (c) Refusal to disclose the fate and whereabouts of the person concerned.”<sup>720</sup> In this regard, the WGEID has stated:

- The first element should include all forms, of “deprivation of liberty” legal or illegal, of “deprivation of liberty”. Thus, the offense cannot be limited to one or another method of

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<sup>717</sup> *Ibid.*, para. 11

<sup>718</sup> *Report of the Working Group on Enforced or Involuntary Disappearances – Addendum: Best practices on enforced disappearances in domestic criminal legislation*, A/HRC/16/48/Add.3, 28 December 2010, para. 10.

<sup>719</sup> *Ibid.*, para. 21.

<sup>720</sup> *Ibid.*

deprivation of liberty.

- The definition of the crime in law must indispensably include the refusal to acknowledge the deprivation of liberty of the victim or concealment of the fate or whereabouts of the disappeared person as this “element in fact distinguishes enforced disappearance from other offences, such as arbitrary detention”<sup>721</sup>.
- As for “placing them outside the protection of the law”, this is “a *consequence* of the other constitutive elements, in conformity with the Declaration [Article 1, Section 2]”<sup>722</sup>.

With regard to the perpetrators of the crime of enforced disappearance, the WGEID has affirmed that national criminal definitions must include as perpetrators “State actors or [...] private individuals or organized groups (e.g. paramilitary groups) acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government”<sup>723</sup>. Thus, the WGEID has considered that “where domestic criminal legislation did not include acts committed by individuals acting on behalf of the Government or with its direct or indirect support, without necessarily having received orders or instructions from Government agents to commit the offence, the Working Group found that the definition was partial and, as such, needed to be amended.”<sup>724</sup>

Notwithstanding, in light of the ICPED<sup>725</sup> and the Rome Statute, the WGEID has considered it to be good practice for the definition of the autonomous crime to foresee its perpetration by any person. However, the WGEID has warned that “such broad definitions shall not be construed to dilute the responsibility of the State and should take into account the specificity of the offence of enforced disappearance that result from the other constitutive elements, and in particular the fact that such a crime results in placing the victim outside the protection of the law.”<sup>726</sup>

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<sup>721</sup> *Ibid.*, para. 28.

<sup>722</sup> *Ibid.*, para. 32.

<sup>723</sup> *Ibid.*, para. 25.

<sup>724</sup> *Ibid.*

<sup>725</sup> Article 3 imposes an obligation on the State to investigate and prosecute perpetrators of acts “comparable to enforced disappearances committed by persons or groups of persons acting without the authorization, support or acquiescence of the State”.

<sup>726</sup> *Report of the Working Group on Enforced or Involuntary Disappearances – Addendum: Best practices on enforced disappearances in domestic criminal legislation*, A/HRC/16/48/Add.3, 28 December 2010, para. 26.

“The general obligation imposed upon States to adapt domestic laws to the provisions of the American Convention in order to guarantee the rights enshrined therein includes the adoption of laws and the development of practices leading to the effective enforcement of said rights and freedoms, as well as the adoption of the necessary measures to abolish any laws and practices that entail a violation of the guarantees embodied in the Convention.. [...] In relation to the forced disappearance of persons, the duty to adapt domestic law to the provisions of the American Convention, pursuant to Article 2, is of paramount importance in order to effectively eradicate this practice. Considering how particularly serious forced disappearance of persons is, the protection afforded by existing criminal laws regarding manstealing or abduction, torture, and murder, among others, is not sufficient. Forced disappearance of persons is a distinct phenomenon characterized by constant and multiple violations of several rights enshrined in the Convention insofar as it not only involves the arbitrary deprivation of liberty, but also violates the detained person’s integrity and security, threatens his life, leaving him completely defenseless, and involves other related crimes as well.”

Inter-American Court of Human Rights<sup>727</sup>

The Inter-American Court of Human Rights has repeatedly stated that States have an obligation to criminalize enforced disappearance as an autonomous crime in their domestic legislation.<sup>728</sup> In a case in which the state did not have laws criminalizing enforced disappearance as a specific autonomous crime, even though the criminal conduct had been investigated and prosecuted as other crimes (such as “abduction, deprivation of liberty, homicide and criminal association”), the Court concluded that “the judicial authorities did not take into account the elements that constitute forced disappearance of persons or their extreme gravity, which warrants appropriate punishment [...] [and thus] committed the grave omission of failing to adopt the necessary measures to reveal the different elements that make up this grave human rights violation.”<sup>729</sup>

<sup>727</sup> Judgment of 22 November 2005, *Case of Gómez Palomino v. Peru*, Series C No. 136, paras. 91 and 92.

<sup>728</sup> See, *inter alia*: Judgment of 26 November 2013, *Case of Osorio Rivera and Family. Peru*, Series C No. 274; Judgment of 22 September 2006, *Case of Goiburú et al. v. Paraguay*, Series C No. 153; Judgment of 12 August 2008, *Case of Heliodoro Portugal v. Panama*, Series C No. 186; Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202; and Judgment of 27 February 2012, *Case of Narciso González Medina and Family v. Dominican Republic*, Series C No. 240.

<sup>729</sup> Judgment of 27 February 12, *Case of Narciso González Medina and Family v. Dominican Republic*, Series C No. 240, para. 245.

The Court has stated that “[t]he above means that States must define enforced disappearance as an autonomous offense and also define the wrongful conducts of which it is composed. This legal definition must be made taking into consideration Article II of the said Convention [the Inter-American Convention on Forced Disappearance of Persons], which outlines the elements that the definition of this offense in domestic law should contain.”<sup>730</sup> Likewise, the Court has stated that “[s]aid classification must include the minimum elements established in specific international instruments, universal as well as Inter-American, for the protection of persons against forced disappearances”<sup>731</sup>.

Thus, in cases in which the domestic criminal definitions of enforced disappearance do not contain the constituent components of this international crime or do not contain all the forms of the criminal involvement under international standards, the Court has concluded that the State has not effectively complied with its obligation to define this international crime<sup>732</sup>. In this regard, the Court has established “[i]nternational law establishes a minimum standard with regard to the correct definition of this type of conduct and the minimum elements that this must observe, in the understanding that criminal prosecution is a fundamental way of preventing future human rights violations. In other words, the States may adopt stricter standards in relation to a specific type of offense to expand its criminal prosecution, if they consider that this will provide greater or better safeguard of the protected rights, on condition that, when doing so, such standards do not violate other norms that they are obliged to protect. Also, if elements considered non-derogable in the prosecution formula established at the international level are eliminated, or mechanisms are introduced that detract from meaning or effectiveness, this may lead to the impunity of

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<sup>730</sup> Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, para. 205. See, likewise: Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, paras. 66 and 165; and Judgment of 12 August 2008, *Case of Heliodoro Portugal v. Panama*, Series C No. 186, para. 181.

<sup>731</sup> Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 66.

<sup>732</sup> Judgment of 22 November 2005, *Case of Gómez Palomino v. Peru*, Series C No. 136, para. 102 et seq.; and Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274.

conducts that the States are obliged to prevent, eliminate and punish under international law.”<sup>733</sup>

Ruling on cases of enforced disappearance in Peru<sup>734</sup>, Paraguay<sup>735</sup>, Panama<sup>736</sup> and Venezuela<sup>737</sup> the Inter-American Court of Human Rights has considered the compatibility of criminal offenses with the provisions of IACFDP and other international norms and standards.

“[F]orced disappearance is characterized by its clandestine nature, which requires the State to comply with its international obligations in good faith and to provide all necessary information insofar as it is the State which has control over the mechanisms to investigate incidents that took place within its territory. Consequently, any attempt to shift the burden of proof to the victims or their next of kin is contrary to the obligation imposed upon the State by Article 2 of the American Convention and Articles I(b) and II of the Inter-American Convention on Forced Disappearance.”

Inter-American Court of Human Rights<sup>738</sup>

The Court has noted several incompatibilities between the definition of the crime in the national laws of Peru<sup>739</sup> and the requirements of the definition of the crime of enforced disappearance in the IACFDP and other international instruments<sup>740</sup>. In its judgment on the *Case Osorio Rivera and Family members*, the Court summarized the inadequacy of the Peruvian national law with international standards in the following terms: “a) article 320 of the Peruvian Penal Code restricted the authorship of enforced disappearance to ‘public

<sup>733</sup> Judgment of 22 September 2006, *Case of Goiburú et al. v. Paraguay*, Series C No. 153, para. 92.

<sup>734</sup> Judgment of 22 November 2005, *Case of Gómez Palomino v. Peru*, Series C No. 136 and Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274.

<sup>735</sup> Judgment of 22 September 2006, *Case of Goiburú et al. v. Paraguay*, Series C No. 153.

<sup>736</sup> Judgment of 12 August 2008, *Case of Heliodoro Portugal v. Panama*, Series C No. 186.

<sup>737</sup> Judgment of 28 November 2005, *Case of Blanco Romero and others v. Venezuela*, Series C No. 138.

<sup>738</sup> Judgment of 22 November 2005, *Case of Gómez Palomino v. Peru*, Series C No. 136, para. 106.

<sup>739</sup> Article 320 of the Penal Code defines the crime of enforced disappearance in the following terms “An official or public servant who deprives a person of liberty, orders or engages in conduct which results in the individual’s duly proven disappearance, shall be punished with imprisonment for not less than 15 years and disqualification [from his or her public function] pursuant to Article 36 (1) and (2) ” (Original in Spanish, free translation).

<sup>740</sup> Judgment of 22 November 2005, *Case of Gómez Palomino v. Peru*, Series C No. 136, para. 100 et seq.

officials or servants'. This definition does not contain all the forms of criminal participation that are included in Article II of the Inter-American Convention on Forced Disappearance of Persons, and thus is incomplete; (b) the refusal to acknowledge the deprivation of liberty and to provide information on the fate or whereabouts of the person in order not [to] leave traces or evidence should be included in the definition of the offense, because this allows it to be distinguished from other offenses, with which it is usually related; however, article 320 of the Peruvian Penal Code does not include this; (c) the wording of article 320 of the Penal Code indicates that the disappearance must be 'duly proven,' and this gives rise to serious difficulties in its interpretation. First, it is not possible to know whether it should be duly proved before the offense is reported and, second, it is not clear who should execute the verification. The latter 'does not allow the State to comply fully with its international obligations'.<sup>741</sup>

"The added condition is that the disappearance is 'duly established' which has no precedent in International Law, lacks a reasonable criminal policy basis. This condition does not impose on the complainant a prior burden that is absolutely absurd given the clandestine nature of the practice itself, but only the exhaustion of police and administrative procedures commonly used for the location of any missing person. It should not be understood as a creating a procedural burden to prove criminality because that would facilitate impunity"

Ombudsman of Peru<sup>742</sup>

For the definition of this crime in Paraguay<sup>743</sup>, the Court found that although "the definition of the offenses of torture and 'forced disappearance' in force in the Paraguay Penal Code would allow certain conducts that constitute acts of this nature to be punished,

<sup>741</sup> Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, para. 206.

<sup>742</sup> Defensoría del Pueblo, *Informe No. 55: La desaparición forzada de personas en el Perú (1980-1996)*, Serie Informes Defensoriales, Lima, January 2002, p. 39 (Original in Spanish, free translation).

<sup>743</sup> The crime of "forced disappearance" was typified in the Article 236 of the Penal Code (Law No. 1,160 / 97), in the following terms: "1 He who, for political purposes, carries out the offenses mentioned in the Articles 105 [intentional homicide], 111, 3rd para. [qualified injury], 112 [serious injury], 120 [coercion] and 124, subsection 2 [deprivation of liberty] in order to terrorize the population shall be punished with imprisonment of no less than five years. 2. The official who hides or does not provide information on the whereabouts of a person or a corpse shall be punished with imprisonment of up to five years or a fine. This applies even if his status as an official lacks legal validity."

their analysis reveals that the State has defined them less comprehensively than the applicable international norms."<sup>744</sup> Consequently, the Court ordered Paraguay to bring the crime of enforced disappearance in line with "the relevant provisions of International Human Rights Law"<sup>745</sup>.

With regard to the Panamanian definition of the offense of enforced disappearance<sup>746</sup>, the Court considered that "limiting the deprivation of liberty in this context to those situations in which this is unlawful, thus excluding legitimate forms of deprivation of liberty, the definition of the offense deviates from the minimum requirements of the Convention."<sup>747</sup> Likewise, the Court stated that this definition of the criminal offense "establishes that this offense occurs in one of the following two cases, but not in both: (1) when someone is deprived of their personal liberty unlawfully, or (2) when there is a refusal to provide information on the whereabouts of persons detained unlawfully"<sup>748</sup>. The Court concluded that "[t]his disjunction creates confusion, since the first hypothesis can correspond to the general prohibition on unlawful deprivation of liberty. Moreover, the international norms require the presence of both elements: both the deprivation of liberty, in whatever way, and also the refusal to provide information in that regard."<sup>749</sup> Likewise, Court also found that the Panamanian offense only included the refusal to provide information about the whereabouts of the person deprived of liberty, which means that it "does not allow for a situation in which it is not known for certain whether a disappeared person is or was detained"<sup>750</sup>. In this regard, the Court concluded that by not including "this element as required by the Convention, the State has failed to comply with its obligation to define the

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<sup>744</sup> Judgment of 22 September 2006, *Case of Goiburú et al. v. Paraguay*, Series C No. 153, para. 92.

<sup>745</sup> *Ibid.*, para. 179.

<sup>746</sup> Article 150, "Enforced disappearance", of the Penal Code states "The public servant who, abusing his or her authority or in violation of the legal formalities, deprives any person or more persons in any form of their physical freedom, or knowing their whereabouts refuses to provide this information when so required, shall be punished by imprisonment of three to five years. The same penalty shall be applied to individuals who act with the authorization or support of the public servants. If the period of enforced disappearance is greater than one year, the penalty shall be ten to fifteen years in prison."

<sup>747</sup> Judgment of 12 August 2008, *Case of Heliodoro Portugal v. Panama*, Series C No. 186, para. 192.

<sup>748</sup> *Ibid.*, para. 196.

<sup>749</sup> *Ibid.*, para. 196.

<sup>750</sup> *Ibid.*, para. 199.



offense of forced disappearance pursuant to its international obligations.”<sup>751</sup>

In the case of Venezuela<sup>752</sup>, the Court found that definition of the crime of enforced disappearance in domestic law did not reflect the constituent components of the Inter-American definition<sup>753</sup>. Firstly, the custodial element is limited to illegal deprivation of liberty. Furthermore, the definition of the offense does not include persons or groups of persons acting with “the authorization, support or acquiescence of the State”, as stipulated by the IACFPD.

### **3. Competent Jurisdiction and criminal proceedings**

The duty to prosecute and punish the perpetrators of enforced disappearance and / or extrajudicial execution must be accomplished in accordance with the rules laid down by international law. These include: i) an independent, impartial and competent tribunal; ii) the basic guarantees of due process (or fair trial) for the defendants; and, iii) the right to justice and an effective remedy for the families of victims.

#### **a. Independent, impartial and competent courts**

The obligation to prosecute and punish must be implemented by independent, impartial and competent courts. The right to be tried by an independent and impartial court is universally recognized by many international treaties and human rights instruments<sup>754</sup> and

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<sup>751</sup> *Ibid.*, para. 200.

<sup>752</sup> The crime enforced disappearance was defined in the following terms: “The public authority, whether civilian or military, or any person in the service of the State unlawfully deprives a person of their liberty, and refuses to acknowledge the detention or to give information regarding the fate or the situation of the missing person, preventing the exercise of their rights and constitutional and legal guarantees, shall be punished by fifteen to twenty five years in prison. Members or members of groups or associations with terrorist, insurgent or subversive purposes, , acting as members or collaborators of such groups or organizations, who forcibly disappear a person, through kidnapping or abduction will be punished with the same sentence. Whoever acts as accomplice or abettor of the crime will be punished by twelve to eighteen years in prison. The offense established in this Article shall be deemed to be continuing as long as the fate or location of the victim remains unknown. [...]” (art. 180-A of Penal Code 2005) (original in Spanish, free translation).

<sup>753</sup> Judgment of 28 November 2005, *Case of Blanco Romero and others v. Venezuela*, Series C No. 138, para. 105.

<sup>754</sup> See, *inter alia*: *Universal Declaration of Human Rights* (Art. 10); *International Covenant on Civil and Political Rights* (Art. 14.1); *Basic Principles on the Independence of the Judiciary*; *Guidelines on the Role of Prosecutors*; *Basic Principles on the Role of Lawyers*; *American Declaration of the Rights and Duties of Man* (Art. XXVI); and *American Convention on Human Rights* (Art. 8.1).

international humanitarian law<sup>755</sup>. The Human Rights Committee has stated that even in times of war or state of emergency, “[o]nly a court of law may try and convict a person for a crime”<sup>756</sup> and that the right to be tried by an independent and fair court “is an absolute right that can not be subject to any exception”<sup>757</sup>. The Inter-American Commission on Human Rights<sup>758</sup> and the International Committee of the Red Cross (ICRC) have assumed similar positions. The ICRC has affirmed that International Humanitarian Law has established minimum guarantees, which must be scrupulously observed during armed conflict, and these include the right to trial by an independent, impartial, competent and regularly constituted court<sup>759</sup>.

“In a constitutional and democratic state based on the rule of law, in which the separation of powers is respected, all punishments set forth in law must be imposed by the judiciary after the person’s guilt has been established with all due guarantees at a fair trial. The existence of a state of emergency does not authorize the state to ignore the presumption of innocence, nor does it empower the security forces to exert an arbitrary and uncontrolled *ius puniendi*.”

Inter-American Commission on Human Rights<sup>760</sup>

The courts should be autonomous and independent of other branches of government; they should be free of influence, threats or interference from any source or for any reason and have other characteristics necessary for ensuring the proper and independent

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<sup>755</sup> For example, Article 84 of the III Geneva Convention; Articles 54, 64 to 74 and 117 to 126 of the IV Geneva Convention; Article 75 of the *Additional Protocol to the Geneva Conventions, 12 August 1949, relating to the Protection of Victims of International Armed Conflicts* (Protocol I); and Article 6 of the *Additional Protocol to the Geneva Conventions, 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II).

<sup>756</sup> *General comment No. 29: Derogations during a state of emergency (Art. 4)*, para. 16.

<sup>757</sup> *General comment No. 32, Article 14: the right to equality before courts and tribunals and to a fair trial*, para. 19; and Views of 28 October 1992, Communication No. 263/1987, *M. González del Río v. Peru*, para. 5.2.

<sup>758</sup> *Report on Terrorism and Human Rights*, OAS/Ser.L/V/II.116, Doc. 5 Revs. 1 corr. 22 October 2002, para. 261.

<sup>759</sup> ICRC, Comment on article 75, Para. 4 of the *Additional Protocol to the Geneva Conventions, 12 August 1949* relating to the Protection of Victims of International Armed Conflicts (Protocol I), para. 3084. See Also: ICRC, Comment on article 6, para. 2 of the *Additional Protocol to the Geneva Conventions, 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II), para. 4601.

<sup>760</sup> Report No. 49/00, Case No. 11.182, *Rodolfo Gerbert and others (Peru)*, 13 April 2000, para. 86.

performance of judicial functions.<sup>761</sup> Thus, the independence of the courts means that judges and judicial officers and judges do not have any hierarchical subordination or dependence on other branches of government, particularly the executive<sup>762</sup>.

Enforced disappearances, extrajudicial executions and other serious violation of human rights constitute criminal offenses; in these cases, International Law considers that the competent jurisdiction to hear these crimes should be ordinary criminal courts using established legal procedures. This principle of the competent jurisdiction is reaffirmed in numerous international instruments<sup>763</sup>.

International instruments and standards exclude from jurisdiction of military criminal courts trials of persons accused of enforced disappearances and extrajudicial executions, as well as other serious violations of human rights committed by military or police personnel. With regard to enforced disappearance, this exclusion is expressly enshrined in the IACFDP<sup>764</sup> and the DED<sup>765</sup>. Even though the ICPED has an express clause in this matter, the Committee on Enforced Disappearance has stated that the jurisdiction over the offence of forced disappearance should lie with ordinary courts,<sup>766</sup> both the investigation of the crime as well as the trial. Likewise, the *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*<sup>767</sup> and the *Draft Principles on the Administration of Justice through Military Tribunals*<sup>768</sup> exclude any serious violation of human rights, including

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<sup>761</sup> See *inter alia*: *Basic Principles on the Independence of the Judiciary*, Principles 1, 2, 3 and 4; Inter-American Court of Human Rights, Judgment of 30 June 2009, *Case of Reverón Trujillo v. Venezuela*, Series C No. 197; Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights* Doc. Cit., para. 229; and Human Rights Committee, *General Comment No. 32*, Doc. Cit, para. 18.

<sup>762</sup> See, in this regard, International Commission of Jurists, *International principles on the independence and accountability of judges, lawyers and prosecutors – Practitioners' guide No. 1*, Ed. ICJ, Geneva, 2007.

<sup>763</sup> See, *inter alia*, *Basic Principles on the Independence of the Judiciary* (Principle 5).

<sup>764</sup> Article IX.

<sup>765</sup> Article 16 (2).

<sup>766</sup> *Concluding observations on: France*, CED/C/FRA/CO/1, 8 May 2013, paras 24 and 25; *Spain*, CED/C/ESP/CO/1, 12 December 2013, paras. 15-16; and *the Netherlands*, CED/C/NLD/CO/1, 10 April 2014, paras. 18-19.

<sup>767</sup> Articles 22 and 29.

<sup>768</sup> Article 9. The United Nations Special Rapporteur on the independence of judges and lawyers, Ms. Gabriela Knaul, considers that the Draft Principles reflects the development of International Law in the matter (*Report of the Special Rapporteur on the independence of judges and lawyers*, A/68/285 7 August 2013). The European Court of Human Rights has pronounced in a similar manner, taking it as a source of law

enforced disappearance and extrajudicial execution, from the scope of jurisdiction of military courts.

International jurisprudence is unanimous: only ordinary criminal courts have jurisdiction to hear cases of enforced disappearance and / or extrajudicial execution and to prosecute and punish the perpetrators of these crimes. The Human Rights Committee has repeatedly concluded that the practice of prosecuting military and police personnel responsible for human rights violations by military courts is not compatible with the obligations of States under the Covenant, including those resulting from Articles 2- (3) (right to an effective remedy) and Article 14 (right to a fair trial by a competent, independent and impartial tribunal)<sup>769</sup>.

The Special Rapporteur on extrajudicial, summary or arbitrary executions has affirmed that the jurisdiction of military courts should be limited to strictly military crimes and that serious violations of human rights, which cannot be considered as crimes committed during the course of duty, should fall within the exclusive competence of the ordinary courts<sup>770</sup>. Likewise, "The Special Rapporteur therefore once again appeals to all Governments concerned to provide for an independent, impartial and functioning civilian judiciary to deal with all cases of alleged violations of the right to life. The Special Rapporteur also calls on the authorities to ensure that the security forces fully cooperate with the civilian justice system in its efforts to identify and bring to justice those

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(see *inter alia*: Judgment of 4 May 2006, *Ergin v. Turkey*, Application No. 47533/99, and Judgment of 21 September 2006, *Maszni v. Romania*, Application No. 59892/00.

<sup>769</sup> Concluding *Observations of the Human Rights Committee*: *Peru*, CCPR/C/79/Add.8, 25 September 1992, para. 8; *Bolivia*, CCPR/C/79/Add.74, 1 May 1997, para. 11; *Colombia*, CCPR/C/79/Add.2, 25 September de 1992, paras. 5 and 6 and CCPR/C/79/Add.76, 5 May 1997, para. 18; *Venezuela*, CCPR/C/79/Add.13, 28 December 1992, paras. 7 and 10; *Croatia*, CCPR/C/79/Add.15 - A/48/40, 28 December 1992, para. 362; *Brazil*, CCPR/C/79/Add.66, 24 July 1996, para. 10; *Lebanon*, CCPR/C/79/Add.78, 1 April 1997, para. 14; *Chile*, CCPR/C/79/Add.104, 30 March 1999, para. 9; *Dominican Republic*, CCPR/CO/71/DOM, 26 April 2001, para. 10; *Guatemala*, CCPR/CO/72/GTM, 27 August 2001, paras. 10 and 20; *El Salvador*, CCPR/C/79/Add.34, 18 April 1994, para. 5; *Ecuador*, CCPR/C/79/Add.92, 18 August 1998, para. 7; *Egypt*, CCPR/C/79/Add.23, 9 August 1993, para. 9; *Poland*, CCPR/C/79/Add.110, 29 July 1999, para. 21; *Cameroon*, CCPR/C/79/Add.116, 4 November 1999, para. 21; *Morocco*, A/47/40, 23 October 1991, para. 57; *Syria*, CCPR/CO/71/SYR, 28 May 2001, para. 17; *Russian Federation*, CCPR/C/79/Add.54, 29 July 1995, para. 25; *Slovakia*, CCPR/C/79/Add.79, 4 August 1997, para. 20; and *Uzbekistan*, CCPR/CO/71/UZB, 26 April 2001, para. 15.

<sup>770</sup> See, *inter alia*, UN Docs: E/CN.4/1994/7/Add.2, 15 November 1993, para. 99; E/CN.4/1995/111, 16 January 1995, paras. 90 and 120 (f); and E/CN.4/1995/61/Add.1, 1 November 1994, paras. 70 and 81 (a).

responsible for human rights violations<sup>771</sup>. The WGEID has concluded that the crime of enforced disappearance exclusively corresponds to the competence of ordinary courts, not that of any other special jurisdiction, especially military<sup>772</sup>.

"[M]ilitary criminal courts should have a restrictive and exceptional scope, bearing in mind that they should only judge members of the armed forces when they commit crimes or misdemeanors that, owing to their nature, affect rights and duties inherent to the military system. In this regard, when the military justice system assumes jurisdiction over a matter that should be heard by the ordinary justice system, the right to have a case tried by the appropriate judge is affected. This guarantee of due process should be examined taking into account the object and purpose of the American Convention, which is the effective protection of the individual. For these reasons, and due to the nature of the crime and the rights and freedoms damaged, the military criminal jurisdiction is not the competent jurisdiction to investigate and, if applicable, prosecute and punish the perpetrators of human rights violations."

Inter-American Court of Human Rights<sup>773</sup>

The Inter-American Court of Human Rights has repeatedly stated that the enforced disappearance, extrajudicial execution and massacres<sup>774</sup>, have no connection with military discipline, therefore, are excluded from the jurisdiction of military criminal courts. The Court has affirmed that "the military jurisdiction is not competent to investigate and, if applicable, prosecute and punish the perpetrators of alleged human rights violations; instead, those responsible must always be tried by the ordinary justice system. This conclusion

<sup>771</sup> UN Doc. E/CN.4/1994/7, 7 December 1993, para. 697.

<sup>772</sup> UN Docs E/CN.4/1993/25, para. 46; E/CN.4/1990/13, para. 345; E/CN.4/1991/20, para. 408; E/CN.4/1992/18, para. 367; E/CN.4/1995/36, 21 December 1994, para. 54; and E/CN.4/2000/64/Add.1, 21 December 1999, paras. 29 and 63; and *Report of the Working Group on Enforced or Involuntary Disappearances – Addendum - Best practices on enforced disappearances in domestic criminal legislation*, A/HRC/16/48/Add.3, 28 December 2010, para. 57.

<sup>773</sup> Judgment of 11 May 2007, *Case of the Rochela Massacre v. Colombia*, Series C No. 163, para. 200.

<sup>774</sup> See, *inter alia*, Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274; Judgment of 29 November 2006, *La Cantuta v. Peru*, Series C, No. 162; Judgment of 16 August 2000, *Case of Durand and Ugarte v. Peru*, Series C No. 68; Judgment of 12 November 12, *Case of Masacre de Santo Domingo v. Colombia*, Series C No. 259; Judgment of 26 November 2008, *Case of Tiu Tojín v. Guatemala*, Series C No. 190; Judgment of 23 November 2009, *Case of Radilla Pacheco v. Mexico*, Series C No. 209; and Judgment of 24 October 12, *Case of Nadege Dorzema and others v. Dominican Republic*, Series C No. 251.

applies not only to cases of torture, forced disappearance and rape, but to all human rights violations."<sup>775</sup>

For its part, the Inter-American Commission on Human Rights has stated that "military tribunals by their very nature do not satisfy the requirements of independent and impartial courts applicable to the trial of civilians"<sup>776</sup>. The Commission has ruled that "the forced disappearance of a citizen can never be considered part of the legitimate functions of the agents who work with the security forces"<sup>777</sup> and that the fact that the crime was under the competence of the military criminal jurisdiction constituted a violation of Articles 8 and 25 of the American Convention.<sup>778</sup> The Commission has reiterated on several occasions that enforced disappearance and extrajudicial execution do not constitute a legitimate activity of the military and, thus, there is no justification for the use of the jurisdiction of military courts to try those responsible for serious violations of human rights<sup>779</sup>.

"[T]here are crimes committed during the course of duty and, therefore, they are not eligible for protection under the Code of Military Justice, or, indeed, as legal rights such as fundamental rights. Indeed, fundamental rights such as life, physical integrity, equality, sexual freedom, honor, privacy, among others, do not constitute legal interests of the Armed Forces, and they must be protected by ordinary legislation."

The Constitutional Tribunal of Peru<sup>780</sup>

## **b. Legal safeguards for the accused**

Criminal proceedings and trials brought against alleged perpetrators of enforced disappearance and/or extrajudicial execution should observe and guarantee defendants the basic rules of due process and fair trial under international law<sup>781</sup>. Even though the

<sup>775</sup> Judgment of 26 November 2010, *Case of Cabrera García and Montiel Flores v. Mexico*, Series C No. 220, para. 198.

<sup>776</sup> *Report on Terrorism and Human Rights*, Doc. Cit., Para. 231.

<sup>777</sup> Report No. 7/00, 24 February 2000, Case No. 10.337, *Amparo Tordecilla Trujillo (Colombia)*, Para. 54.

<sup>778</sup> *Ibid.*

<sup>779</sup> See, for example: Report No. 62/01, Case No. 11.654, *Ríofrío Massacre (Colombia)*; Report No. 62/99, Case No. 11.540, *Santos Mendivelso Coconubo (Colombia)*; Report No. 5/98, Case No. 11.019, *Álvaro Moreno Moreno (Colombia)*; Report No. 35/00, Case No. 11.020, *Los Uvos (Colombia)*.

<sup>780</sup> Judgment of 15 December 2006, Exp. No. 0012-2006-PI/TC.

<sup>781</sup> See, *inter alia*: *Universal Declaration of Human Rights* (Art. 10); *International Covenant on Civil and Political Rights* (Art. 14); *American Declaration of the Rights and Duties of Man* (Art. XXVI); *American Convention on Human Rights* (Art. 8.); Article 75

*International Covenant on Civil and Political Rights* does not expressly establish the non-derogability of judicial guarantees inherent to due process, the Human Rights Committee has clarified that the elements of the right to a fair trial are generally considered non-derogable even in times of war or in a state of emergency<sup>782</sup>. In this regard, the Committee has affirmed that “[s]afeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations”<sup>783</sup>. The Inter-American Commission on Human Rights has ruled in a similar fashion<sup>784</sup>.

In this regard, it is worth remembering that ICPED provides that “[a]ny person against whom proceedings are brought in connection with an offence of enforced disappearance shall be guaranteed fair treatment at all stages of the proceedings. Any person tried for an offence of enforced disappearance shall benefit from a fair trial before a competent, independent and impartial court or tribunal established by law.”<sup>785</sup> In a similar fashion, the DED stipulates that “[t]he persons presumed responsible for such acts shall be guaranteed fair treatment in accordance with the relevant provisions of the Universal Declaration of Human Rights and other relevant international agreements in force at all stages of the investigation and eventual prosecution and trial.”<sup>786</sup>

Therefore, it is important to note that the use of special courts to try serious crimes, including enforced disappearances and/or extrajudicial executions, that are characterized by the use of judges, courts and prosecutors who are “anonymous”, “secret” or “faceless”,

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of the *Additional Protocol to the Geneva Conventions, 12 August 1949, relating to the Protection of Victims of International Armed Conflicts* (Protocol I); and Article 6 of the *Additional Protocol to the Geneva Conventions, 12 August 1949, relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II).

<sup>782</sup> *General Comment No. 29 (...)*, Doc. Cit., para. 11.

<sup>783</sup> *Ibid.*, Para. 16.

<sup>784</sup> Report No. 49/00, Case No. 11.182, *Rodolfo Gerbert and others (Peru)*, 13 April 2000, para. 86.

<sup>785</sup> Article 11 (3).

<sup>786</sup> Article 16 (4).

is incompatible with the State's obligation to guarantee the right to due process.<sup>787</sup>

### **c. The rights of victims' family members during court proceedings**

Relatives of victims of enforced disappearance and/or extrajudicial execution have the right to an effective remedy and the right to know the truth, including the fate or whereabouts of their victimized loved one, to reparation and to guarantees of non-repetition. Similarly, relatives of the victims are entitled to be heard publicly and with due guarantees by a competent, independent and impartial court established by law for the determination of their rights<sup>788</sup>. In that regard, the Inter-American Court of Human Rights has stated that "the victims of human rights violations and their next of kin have the right that these violations be heard and decided by a competent court, in accordance with due process of law and access to justice"<sup>789</sup>. Family members have the right to participate in criminal proceedings against alleged perpetrators of enforced disappearance and/or extrajudicial execution within the framework of the fulfillment of their rights.

In this regard, that *Reparation Principles* and the *Principles to Combat Impunity* stipulate that "[a]lthough the decision to prosecute lies primarily within the competence of the State, victims, their families and heirs should be able to institute

<sup>787</sup> See, *inter alia*: Human Rights Committee, Views of 6 November 1997, Communication No. 577/1994, *Víctor Alfredo Polay Campos v. Peru*; Views of 28 July 2000, Communication No. 688/1996, *María Sybila Arredondo v. Peru*; Views of 21 October 2005, Communication No. 1125/2002, *Jorge Luis Quispe Roque v. Peru*; Views of 22 July 2003, Communication No. 981/2001, *Teofila Gómez Casafranca v. Peru*; Views of 11 July 2006, Communication No. 1298/2004, *Manuel Francisco Becerra Barney v. Colombia*; and *Concluding Observations of the Human Rights Committee Peru*, CCPR/C/79/Add.67, 25 July 1996, paras. 12 and 19, and *Colombia*, CCPR/C/79/Add.76, 3 May 1997, para 21; Special Rapporteur on the independence of judges and lawyers (Report on Mission to *Peru*, E/CN.4/1998/39/Add.1, 19 February 1998, and *Mission to Colombia*, E/CN.4/1998/39/Add.2, 30 March 1998); Inter-American Court of Human Rights (Judgment of 30 May 1999, *Case of Castillo Petruzzi and others v. Peru*, Series C No. 52, and Judgment of 25 November 2004, *Case of Lori Berenson Mejía v. Peru*, Series C No. 119); and Inter-American Commission on Human Rights (*Second Report on the Situation of Human Rights in Peru*, OAS/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, and *Third Report on the Situation of Human Rights in Colombia*, OAS/Ser.L/V/II.102, Doc. 9 Revs. 1, 26 February 1999).

<sup>788</sup> See: *Universal Declaration of Human Rights* (Art. 10); *International Covenant on Civil and Political Rights* (Art. 14(1)); *American Declaration of the Rights and Duties of Man* (Art. XXVI) and *American Convention on Human Rights* (Art. 8(1)).

<sup>789</sup> Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, para. 188.



proceedings, on either an individual or a collective basis, particularly as *parties civiles* or as persons conducting private prosecutions in States whose law of criminal procedure recognizes these procedures. States should guarantee broad legal standing in the judicial process to any wronged party and to any person or non-governmental organization having a legitimate interest therein.”<sup>790</sup> Likewise, the *UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems* stipulate several clauses in order to “protect and safeguard the rights of victims [...] and witnesses in the criminal justice process”<sup>791</sup>. Thus, these Principles and Guidelines stipulate that “[w]ithout prejudice to or inconsistency with the rights of the accused, States should, where appropriate, provide legal aid to victims of crime”<sup>792</sup> and that “[a]ppropriate advice, assistance, care, facilities and support are provided to victims of crime, throughout the criminal justice process, in a manner that prevents repeat victimization and secondary victimization”<sup>793</sup>.

Given the nature of criminal acts of enforced disappearance and extrajudicial execution, the criminal justice system plays an important role for the realization of the right to an effective remedy and the truth, which means knowing the identity and responsibility of the perpetrators, as only a criminal court may declare the guilt of individuals. It is, therefore, an essential element for the satisfaction of these rights for relatives of victims of enforced disappearance and/or extrajudicial execution to have access to criminal justice.

“[B]ased on Article 8 of the Convention it is understood that victims of violations of human rights, or their relatives, must be able to be heard and act on their respective proceedings, both looking for the clarification of facts and the punishment of the liable parties”

Inter-American Court of Human Rights<sup>794</sup>

The Inter-American Court of Human Rights has stated that, at all stages and instances of criminal proceedings (both investigative and trial), the State must ensure that the families of victims of enforced disappearance and/or extrajudicial execution have full access,

<sup>790</sup> Principle 19 (2) of the *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity*.

<sup>791</sup> Paragraph 3 of the Introduction.

<sup>792</sup> Principle 4.

<sup>793</sup> Guideline No. 7 (a).

<sup>794</sup> Judgment of 16 August 2000, *Case of Durand and Ugarte v. Peru*, Series C No. 68, para. 129.

capacity to act and ample procedural opportunities to formulate their claims and to present evidence, both in clarifying the facts and punishing those responsible, as well as in seeking fair reparation<sup>795</sup>. The Court has also indicated that the claims made by the victims and/or their families, as well as the evidence provided in criminal proceedings, should be analyzed fully and seriously by the judicial authorities, before ruling on the facts, determining (criminal) responsibility, penalties and reparations.<sup>796</sup>

“The right to access to justice implies the effective determination of the facts under investigation and, if applicable, of the corresponding criminal responsibilities in a reasonable time; therefore, considering the need to guarantee the rights of the injured parties.”

Inter-American Court of Human Rights<sup>797</sup>

In this regard, States must guarantee broad legal standing in criminal proceedings to the families of victims of enforced disappearance and/or extrajudicial execution. Regardless of the legal concept used for legal standing in criminal proceedings<sup>798</sup>, family members must be enabled to act as a party to the proceedings and be empowered to, *inter alia*:

- Present and request evidence;
- Present, request and obtain witnesses to appear;
- Access documentation and testing;
- Cross-examine witnesses presented by the opposing party;
- Question or challenge the evidence and witnesses presented by the defense;
- Involve experts; and,

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<sup>795</sup> See, *inter alia*: Judgment, 16 August 2000, *Case of Durand and Ugarte v. Peru*, Series C No. 68, Para. 129; Judgment of 8 July 2004, *Case of the Hermanos Gómez Paquiyauri v. Peru*, Series C No. 110, para. 231; Judgment of 3 March 2005, *Case of Huilca Tecse v. Peru*, Series C No. 121, para. 107; Judgment of 22 November 2005, *Case of Gómez Palomino v. Peru*, Series C No. 136, para. 138; Judgment of 6 April 2006, *Case of Baldeón García v. Peru*, Series C No. 147, para. 199; Judgment of 29 November 2006, *La Cantuta v. Peru*, Series C, No. 162, para. 228; Judgment of 10 July 2007, *Case of Cantoral Huamaní and Consuelo Trinidad García Santa Cruz v. Peru*, Series C No. 167, para. 191; Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 183; and Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, para. 245.

<sup>796</sup> Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274; Judgment of 4 July 2006, *Case of Ximenes Lopes v. Brazil*, Series C No. 149, and Judgment of 1 July 2006, *Case of the Ituango Massacres v. Colombia*, Series C No. 148.

<sup>797</sup> Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 124.

<sup>798</sup> Such as, for example, “Civil party”, “private prosecution” or “class action”.

- Challenge and appeal decisions of the judge or the court, including the judgment or final decisions.

The fact that the families of the victims can participate in criminal proceedings, including the investigation, and provide evidence does not exonerate the authorities from their obligations to investigate; nor does it invert the burden of proof. In this regard, the Inter-American Court of Human Rights has affirmed that “forced disappearance is characterized by its clandestine nature, which requires the State to comply with its international obligations in good faith and to provide all necessary information insofar as it is the State which has control over the mechanisms to investigate incidents that took place within its territory. Consequently, any attempt to shift the burden of proof to the victims or their next of kin is contrary to the obligation imposed upon the State by Article 2 of the American Convention and Articles I(b) and II of the Inter-American Convention on Forced Disappearance.”<sup>799</sup>

#### **4. Types of criminal responsibility**

The duty to prosecute and punish those responsible for the crimes of enforced disappearance and/or extrajudicial execution includes the perpetrators, both intellectual and material, as well as their accomplices not to mention any other person who may be criminally liable for the crime in accordance with the principles of criminal law. In that sense the Inter-American Court of Human Rights has affirmed that the obligation to repress enforced disappearance and/or extrajudicial execution involves ensuring that all perpetrators and masterminds are effectively identified, investigated, tried and, if necessary, sanctioned<sup>800</sup>.

In this regard, the ICPED prescribes that “[e]ach State Party shall take the necessary measures to hold criminally responsible at least: (a) Any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or

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<sup>799</sup> Judgment of 22 November 2005, *Case of Gómez Palomino v. Peru*, Series C No. 136, para. 345.

<sup>800</sup> See, *inter alia*: Judgment of 3 March 2005, *Case of Huilca Tecse v. Peru*, Series C No. 121, para. 107; Judgment of 22 November 2005, *Case of Gómez Palomino v. Peru*, Series C No. 136, para. 101; Judgment of 6 April 2006, *Case of Baldeón García v. Peru*, Series C No. 147, paras. 94 and 199; Judgment of 25 November 2006, *Case of Miguel Castro-Castro Prison v. Peru*, Series C No. 160, para. 441; Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 150; and Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, paras. 178 and 244.

participates in an enforced disappearance [...]”<sup>801</sup>. While, the IACFPD prescribe that “[t]he States Parties to this Convention undertake: [...] to punish within their jurisdictions, those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories”<sup>802</sup>. The Principles on Executions stipulate that “[g]overnments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice”<sup>803</sup>.

“The facts relating to a disappearance in a context of violence entail a certain complexity, taking into account that different degrees of responsibility exist at different levels; in other words, that they usually involve illegal acts committed by criminal structures and not by a single individual [...]”

Inter-American Court of Human Rights<sup>804</sup>

When these crimes are committed by organized power structures<sup>805</sup>, which generally operate in complex and compartmentalized ways and with clandestine methods, the criminal responsibility of hierarchical superiors and command responsibility for organized apparatus of power, are all of importance.

### **a. Criminal responsibility of hierarchical superiors**

The criminal responsibility of superiors, be they civil or military, for crimes committed by their subordinates is a principle that has been enshrined in International Law for a long time for crimes against humanity, war crimes and serious human rights violations that constitute international crimes. This principle is enshrined in numerous international instruments<sup>806</sup>, as well as the ICPED<sup>807</sup>, the

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<sup>801</sup> Article 6 (1).

<sup>802</sup> Article I (b).

<sup>803</sup> Principle 18.

<sup>804</sup> Judgment of 26 November 2013, *Case of Osorio Rivera and Family v. Peru*, Series C No. 274, para. 202.

<sup>805</sup> See, *inter alia*: Judgment of 29 November 2006, *La Cantuta v. Peru*, Series C, No. 162, paras. 82 et seq.; Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, paras. 79 and 153; and Judgment of 24 May 2010, *Case of Manuel Cepeda Vargas v. Colombia*, Series C No. 213, paras. 118 and 119.

<sup>806</sup> See, *inter alia*: 1907 *Hague Convention (IV) respecting the Laws and Customs of War on Land* (arts. 1 and 43); *Draft Code of Crimes against the Peace and Security of Mankind* of the United Nations International Law Commission; *Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts* (art. 86); *Statute of the International Criminal Tribunal for Rwanda* (art. 6); *Statute of the International Criminal Court for the former Yugoslavia* (art. 7); *Rome Statute of the International Criminal Court* (art. 28); *Statute*

Principles on Executions<sup>808</sup> and the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*<sup>809</sup>.

Although other international treaties and instruments do not contain an express provision on the criminal responsibility of hierarchical superiors, doctrine has clarified that this principle is implicitly incorporated therein by the very nature of both these treaties and instruments and customary international law. For example, the Independent Commission of Experts to investigate the genocide and other crimes committed in Rwanda<sup>810</sup> considered that the principle of criminal responsibility of the superior was implicitly recognized in Article IV of the *Convention on the Prevention and Punishment of the Crime of Genocide*<sup>811</sup>. Likewise, although the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* has no express provision on this issue, the Committee against Torture has considered that, in light of the obligation to prosecute and punish those responsible for the crime of torture, "those exercising superior authority - including public officials - cannot avoid accountability or escape criminal responsibility for torture or ill-treatment committed by subordinates where they knew or should have known that such impermissible conduct was occurring, or was likely to occur, and they failed to take reasonable and necessary preventive measures."<sup>812</sup>

This principle has been widely reiterated in international criminal jurisprudence<sup>813</sup>, since the cases brought against top officials of the

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*of the Special Court for Sierra Leone* (art. 6); *Regulation No. 2000/15*, 6 June 2000, *Establishment of Panels with Exclusive Jurisdiction over Serious Crimes*, of the United Nations Transitional Administration East Timor (art. 16); *Statute of the Special Tribunal for Lebanon* (art. 3); *Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea* (art. 29) and *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity* (Principle 27).

<sup>807</sup> Article 6.

<sup>808</sup> Principle 19.

<sup>809</sup> Principle 24.

<sup>810</sup> Resolution No. 935 (1994) of the UN Security Council. The work of this Commission would be the foundation for the establishment of the International Criminal Tribunal for Rwanda.

<sup>811</sup> *Preliminary Report of the Independent Commission of Experts established in accordance with Security Council resolution 935 (1994)*, UN Doc 1994/1125, p. 28, para. 130.

<sup>812</sup> Committee against Torture, *General Comment No. 2*, Doc. Cit., para. 26.

<sup>813</sup> See, *inter alia*: International Criminal Tribunal for the former Yugoslavia (Judgment of 16 November 1998 and Judgment of 20 July 2000, *Prosecutor v. Zoran Delalic and others*, Case No, IT-96-21-T; Judgment of 3 March 2000, *Prosecutor v. Blaskic*, Case

Axis forces<sup>814</sup>, and by political organs of the United Nations<sup>815</sup>. Likewise, this principle has been recognized by domestic legislation<sup>816</sup> as well as in the jurisprudence of national courts<sup>817</sup>.

“[t]he failure of a superior to fulfill his duties during and after the crimes can have a causal impact on the commission of further crimes”

International Criminal Court<sup>818</sup>

The ICRC concluded that this principle is a rule of Customary International Law applicable to both international armed conflicts and internal armed conflicts<sup>819</sup>. The international criminal tribunals

No, IT-95-14-T; and Judgment of 23 October 2001, *Prosecutor v. Zoran Kupreskic and others*, Case No, IT-95-16-A); International Criminal Tribunal for Rwanda (Judgment of 2 September 1998, *Prosecutor v. Jean Paul Akayesu*, Case No, ICTR-96-4-T; Judgment of 7 June 2001, *Prosecutor v. Ignace Bagilishema*, Case No, ICTR-95-1A-T; and Judgment of 4 September 1998, *Prosecutor v. Jean Kambanda*, Case No, ICTR-97-23-S); Special Court for Sierra Leone (Judgment of 28 May 2008, *Prosecutor v. Fofana and Kondewa*, Case No, SCSL-04-14-A and Judgment of 22 February 2008, *Prosecutor v. Brima, Kamara and Kanu*, Case No, No. SCSL-04-16-T); and International Criminal Court (Pre-Trial Chamber II, Decision of 15 June 2009, *Prosecutor v. Jean Pierre Bemba Gombo*, Case No, ICC-01/05-01/08).

<sup>814</sup> Nuremberg Tribunal, Judgment of 1 October 1946 (Case of Frick) and Tokyo Tribunal, Judgment of 12 November 1948. Likewise, the principle was applied in sentences related to the cases *Re Yamashita* (US Supreme Court, 4 February 1946); *Von Leeb – “German High Command Trial”* (United States Military Court, Nuremberg, 28 October 1948); *Pohl and others* (United States Military Court, Nuremberg, 3 November 1947); *List- “Hostage Trial”* (United States Military Court, Nuremberg, 19 February 1948); Case of *Herman Roehling et consorts* (General Court of the Military Government of the French occupation zone in Germany, Judgment 1946).

<sup>815</sup> See for example Resolution Nos. 48/143, 50/192, 51/115 and 49/205 of the UN General Assembly and la Resolution No. 1994/77 of the former UN Commission on Human Rights.

<sup>816</sup> See for example: Armenia, Penal Code (Art. 361); Belgium, the Law of 16 June 1993, concerning grave breaches of the Geneva Conventions further international 12 August 1949 and to Protocols I and II of 8 June 1977 (Art. 4); France, ordinance of 8 August of 1944 (Art. 4); Indonesia, Human Rights Act No. 26/2000 (Art. 42); Nicaragua, Penal Code (Art. 522); Panama, Penal Code (Art. 445); Uruguay, Law No. 18.026 of 25 September 2006 (Art. 10).

<sup>817</sup> See for example: The Appeal Court of the Military Tribunal of Canada, Case of *Boland* (1995); Federal Court of Florida (United States of America), Case of *Ford v. Garcia* (2000); and Human Rights Tribunal on East Timor, Case of *Abilio Soares* (2002).

<sup>818</sup> Pre-Trial Chamber II, Decision of 15 June 2009, *Prosecutor v. Jean Pierre Bemba Gombo*, Case No, ICC-01/05-01/08, para. 424.

<sup>819</sup> *Customary International Humanitarian Law, Volume No. 1 Rules*, Ed. ICRC, 2007, p. 558 et seq. “Rule 153. Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their

for the former Yugoslavia and Rwanda have reaffirmed the Customary International Law nature of this principle<sup>820</sup>.

The principle of criminal responsibility of the superior is considered different to the situation in cases in which the superior gives the order to commit a crime, or is involved in its planning, execution or concealment. In these latter cases, the superior is criminally responsible as the mastermind, instigator, determiner, accomplice or abettor. From a factual point of view, the principle of command responsibility is based on the individual criminal responsibility of superiors who are not the material or intellectual author of the crime or, indeed, a participant in the same; the superior knew or had reason to know that the subordinate was about to commit the criminal offense or was in the process of committing it or, indeed, had committed it, and yet he failed to take the necessary and reasonable measures to prevent the crime, or to punish the perpetrators. The superior failed to act having a legal duty to do so. The tolerance or criminal negligence of superiors for crimes committed by personnel under their command is sanctioned as, the International Criminal Tribunal for the former Yugoslavia ruled, the criminal responsibility of the superior "the corollary of a commander's obligation to act, [therefore] that responsibility is responsibility for an omission to prevent or punish crimes committed by his subordinates"<sup>821</sup>.

"A military commander may be held criminally responsible for the unlawful conduct of his subordinates if he contributes directly or indirectly to their commission of a crime [...] A military commander also contributes indirectly to the commission of a crime by his subordinate by failing to prevent or repress the unlawful conduct."

International Law Commission<sup>822</sup>

It should be noted that during the process of drafting and

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power to prevent their commission, or if such crimes had been committed, to punish the persons responsible".

<sup>820</sup> See for example: International Criminal Tribunal for the former Yugoslavia, Decision of 16 July 2003, *Prosecutor v. Ensee Hadzihasanovic and Amir Kubura*, Case of N IT-01-47-AR72; and International Criminal Tribunal for Rwanda, Judgment of 7 June 2001, *Prosecutor v. Ignace Bagilishema*, Case No, ICTR-95-1A-T, and Judgment of 21 May 1999, *Prosecutor v. Kayishema ay Ruzindana*, Case No, ICTR-95-1-A.

<sup>821</sup> Judgment of 15 March 2006, *Prosecutor v. Ensee Hadzihasanovic and Amir Kubura*, Case No, IT-01-47-T, para. 75.

<sup>822</sup> *Report of the International Law Commission on the work of its 48th session*, 6 May - 26 July 1996, Official Records of the General Assembly, Supplement No.10 (A/51/10), p. 25, para. 1 of the Commentary to Article 6.

negotiating the ICPED, numerous government delegations stressed the need to include in the treaty an express and independent clause on the criminal responsibility of hierarchical superiors as it is a form of criminal responsibility that is very different from complicity, conspiracy to commit crime and other forms of accessory participation in crime<sup>823</sup>.

Indeed, the principle of criminal responsibility of hierarchical superiors is based on the principle of responsibility in the command or responsible command. As affirmed by the International Criminal Tribunal for the former Yugoslavia: the notions of responsible command and command responsibility are separate but intrinsically linked. While the former refers to obligations emanating from an individual's status as a hierarchical superior, the notion of the responsibility of hierarchical superiors (command responsibility) refers to the criminal consequences that arise from the breach of these obligations<sup>824</sup>. In this way, the "the elements of command responsibility are derived from the elements of responsible command"<sup>825</sup>.

However, the principle of criminal responsibility of hierarchical superiors is applicable in both military and civilian spheres. Notwithstanding, the principle has some specific connotations with regard to the latter. The United Nations International Law Commission has stated that this principle is applied to the immediate hierarchical superior of the subordinate while being applicable to "his other superiors in the military chain of command or the governmental hierarchy if the necessary criteria are met"<sup>826</sup>. The International Criminal Court has held that the concept of "military commander" in Article 28 of the Rome Statute, refers to "a category of persons who are formally or legally appointed to carry out a military commanding function (i.e., *de jure* commanders). The concept embodies all persons who have command responsibility within the armed forces, irrespective of their rank or level. In this respect, a military commander could be a person occupying the

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<sup>823</sup> *Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*, UN Doc. E/CN.4/2004/59, 23 February 2004, paras. 55 et seq..

<sup>824</sup> International Criminal Tribunal for the former Yugoslavia, Appeals Chamber, Decision of 16 July 2003, *Prosecutor v. Ensee Hadzihasanovic and Amir Kubura*, Case of N. IT-01-47 AR72, paras. 22 et seq.

<sup>825</sup> *Ibid.*, para. 22

<sup>826</sup> *Report of the International Law Commission on the work of its 48th Session, 6 May -26 July 1996*, Official Records of the General Assembly, 51<sup>st</sup> session, Supplement No.10 (A/51/10), para. 4 of the Commentary to Article 6, pp. 25-26.



highest level in the chain of command or a mere leader with few soldiers under his or her command. The notion of a military commander under this provision also captures those situations where the superior does not exclusively perform a military function.<sup>827</sup> The Court also stated that the phrase “acting as a military commander”, in Article 28 of the Rome Statute of the ICC, is wide-ranging and covers others who have not been named officially or legally to exercise military command functions, but exercise such function through a chain of command in reality,<sup>828</sup> and thus, are comparable to the “military commanders”<sup>829</sup>. Within this category the Court included the heads and senior officials of States’ non-military security forces, irregular forces, paramilitary structures and armed opposition groups.

“This imputed responsibility or criminal negligence is engaged if the person in superior authority knows or had reason to know that his subordinates were about to commit or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them”

Secretary-General of the United Nations<sup>830</sup>

The principle of criminal responsibility of hierarchical superiors is not a form of “strict liability”, which is prohibited under international law.<sup>831</sup> With regard to the prohibition of strict criminal liability, the Inter-American Commission on Human Rights has highlighted that “this restriction does not, however, preclude the prosecution of persons on such established grounds of individual criminal responsibility such as complicity, incitement, or participation in a common criminal enterprise, nor does it prevent individual accountability on the basis of the well-established superior

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<sup>827</sup> International Criminal Court, Pre-Trial Chamber II, Decision of 15 June 2009, *Prosecutor v. Jean Pierre Bemba Gombo*, Case No. ICC-01/05-01/08, para. 408

<sup>828</sup> *Ibid.*, para. 409.

<sup>829</sup> *Ibid.*, para. 410.

<sup>830</sup> *Report presented by the Secretary-General pursuant to paragraph 2 of Resolution 808 (1993) of the Security Council*, UN Doc. 25704, 20 May 1993, Para. 56.

<sup>831</sup> See, among others: IV Geneva Convention (art. 33); II Additional Protocol to the Geneva Conventions (art. 75.4 (b)); I Additional Protocol to the Geneva Conventions (art. 6.2 (b)); *Second Protocol for the Protection of Cultural Property in the Event of Armed Conflict* (Articles 15 and 16); *Statute of the International Criminal Court for the former Yugoslavia* (art. 7); *Statute of the International Criminal Tribunal for Rwanda* (art. 6); *Rome Statute of the International Criminal Court* (art. 25); and *Statute of the Special Court for Sierra Leone* (art. 6).

responsibility doctrine.”<sup>832</sup> This is not an exception to the prohibition: quite simply, the principle of criminal responsibility of hierarchical superiors for crimes committed by subordinates does not constitute a form of strict criminal liability, as has been stated in both international doctrine and jurisprudence<sup>833</sup>. International jurisprudence has stated that this principle requires the moral element of *mens rea*, a cognitive and volitional element, which is based on criminal negligence which is treated as a criminal intent<sup>834</sup>.

It is not enough that there be a hierarchical power relationship between superior and subordinate offender, in order for criminal responsibility of hierarchical superiors to exist; International law requires three elements:

- The existence of a relationship of subordination and effective control between subordinate and superior;
- The knowledge of the superior that the crime was to be committed, was being committed or had been committed; and,
- The breach by the superior of the obligation to take necessary and reasonable measures to prevent crime, put an end to the crime or to punish the perpetrator.

Regarding the first element, the subordinate relationship between the superior and the author of the wrongful conduct must not be merely formal: it requires the superior to have effective control over the subordinate. This relationship can be both *de jure* and *de facto*, as has been reaffirmed in international criminal jurisprudence<sup>835</sup>. It

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<sup>832</sup> *Report on Terrorism and Human Rights*, Doc. Cit., para. 227.

<sup>833</sup> ICRC, Comment on Article 86 of the I Geneva Protocol and the International Criminal Tribunal for Rwanda, Judgment of 2 September 1998, *Prosecutor v. Jean Paul Akayesu*, Case No, ICTR-96-4-T, paras. 488 et seq..

<sup>834</sup> See among others: Military Tribunal of the United States of America, Nuremberg, Judgment of 28 October 1948, *United States v. Wilhelm von Leeb and others (Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, Nuremberg, October 1946 – April 1949, 1949-1953, vol. XI p. 543-544)*; International Criminal Tribunal for the former Yugoslavia, Judgment of 16 November 1998 and Judgment of 20 July 2000, *Prosecutor v. Z Delalic and others*, Case No, IT-96-21-T, and Judgment of 26 February 2001, *Prosecutor v. Dario Kordic and Mario Cerkez*, Case No, IT-95-14/2; and International Criminal Tribunal for Rwanda, Judgment of 7 June 2001, *Prosecutor v. Ignace Bagilishema*, Case No, ICTR-95-1A-T, para. 44 et seq..

<sup>835</sup> International Criminal Tribunal for Rwanda: (Judgments of 21 May 1999 and 1 June 2001, *Prosecutor v. Kayishema and Ruzindana* Case No, ICTR-95-1-A; Judgment of 7 June 2001, *Prosecutor v. Ignace Bagilishema*, Case No, ICTR-95-1A-T; and Judgment of 2 September 1998, *Prosecutor v. Jean Paul Akayesu*, Case No, ICTR-96-4-T); International Criminal Tribunal for the former Yugoslavia (Judgment of 16 November 1998 and Judgment of 20 July 2000, *Prosecutor v. Zoran Delalic and others*, Case No, IT-96-21-T; Judgment of 3 March 2000, *Prosecutor v. Blaskic*, Case No, IT-95-14-T;

has been considered that the fundamental criterion is the effective control of superiors of the acts committed by their subordinates in the sense of having the material ability to prevent crimes being committed and to punish the perpetrators. Thus, the superior-subordinate relationship may be either *de jure* or *de facto*: the determining factor is that whoever serves as the superior must have effective control, be it *de jure* or *de facto*, over the subordinate.

In the case of military commanders, a category that includes government and paramilitary forces as well as armed opposition groups, international jurisprudence has considered that there is a presumption that the status of commander comes with effective control over subordinates or the troops under command<sup>836</sup>.

International jurisprudence has used various criteria and elements for identifying the existence of effective control: the official position of the superior; the superior's powers to give orders and enforce them; the superior's disciplinary or punitive power over the subordinate; the superior's place in the military hierarchy and tasks performed in reality; not to mention the superior's powers concerning promotion, appointment, promotion and dismissal of his or her subordinates<sup>837</sup>.

With respect to the second element, *mens rea*, or the cognitive and volitional element, the superior must have "actual knowledge" or "effective knowledge" or have reasons or grounds to know that the crime was about to be committed, is being committed or had been committed. This last aspect has been described by the international jurisprudence as "inferred", "constructive" or "attributable"

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Judgment of 23 October 2001, *Prosecutor v. Zoran Kupreskic and others*, Case No, IT-95-16-A; Judgment of 21 June 1999, *Prosecutor v. Zlatko Aleksovski*, Case No, IT-95-14/1; Judgment of 21 June 2001, *Prosecutor v. Kunarac and Kovac*, Case No, IT-96-23-T and IT-96-23/1-T; and Decision of 16 June 2004, *Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54-T); Special Court for Sierra Leone (Judgment of 28 May 2008, *Prosecutor v. Fofana and Kondewa*, Case No, SCSL-04-14-A; and Judgment of 22 February 2008, *Prosecutor v. Brima, Kamara, and Kanu*, Case No, No. SCSL-04-16-T); and International Criminal Court (Pre-Trial Chamber II, Decision of 15 June 2009, *Prosecutor v. Jean Pierre Bemba Gombo*, Case No, ICC-01/05-01/08).

<sup>836</sup> International Criminal Tribunal for the former Yugoslavia, Judgment of 20 July 2000, *Prosecutor v. Z Delalic and others*, Case No, IT-96-21-T.

<sup>837</sup> See, *inter alia*: International Criminal Tribunal for the former Yugoslavia, Judgment of 15 March 2006, *Prosecutor v. Ensee Hadzihasanovic and Amir Kubura*, Case No, IT-01-47-T, paras. 83 et seq., and Decision of 16 June 2004, *Prosecutor v. Slobodan Milošević*, Case No, IT-02-54-T, paras. 304- 309; and International Criminal Court, Pre-Trial Chamber II, Decision of 15 June 2009, *Prosecutor v. Jean Pierre Bemba Gombo*, Case No, ICC-01/05-01/08, para. 417.

knowledge.<sup>838</sup> However, it is important to note that with respect to superiors who are not military commanders, international jurisprudence requires that the civilian superiors have deliberately ignored information about the crimes that were committed, were being committed or had been committed by their subordinates for the “constructive knowledge” or “knowledge” to exist.<sup>839</sup> This criterion of restrictive scope is crystallized in the *International Convention for the Protection of All Persons from Enforced Disappearance*<sup>840</sup> and other international instruments.<sup>841</sup> In this regard, it should be noted that the doctrine and jurisprudence have considered that the existence of such information in the public domain or the widespread public awareness of crimes (their preparation or commission) provides a sufficient basis to fulfill the requirement of constructive knowledge<sup>842</sup>. Likewise, jurisprudence has considered that such knowledge can be inferred when the civilian superior was called on to prevent or impede the crime by non-governmental human rights organizations or officials or representatives of intergovernmental organizations or representatives or officials from third countries<sup>843</sup>. It should also be noted that the presence of the superior in the place where the crime occurred or was planned also permits the inference of the constructive knowledge requirement.

International jurisprudence has emphasized that the “effective knowledge” cannot be presumed<sup>844</sup> and it must be established

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<sup>838</sup> See among others, International Criminal Tribunal for Rwanda, *Prosecutor v. Kayishema and Ruzindana*, Doc. Cit., and International Criminal Tribunal for the former Yugoslavia Judgment of 1 September 2004, *Prosecutor v. Radoslav Brdjanin*, Case No, IT-99-36-T, paras. 281 et seq..

<sup>839</sup> See for example, International Criminal Tribunal for Rwanda, *Prosecutor v. Kayishema and Ruzindana*, Doc. Cit., para. 703.

<sup>840</sup> Article 6.

<sup>841</sup> *Rome Statute of the International Criminal Court* (Art. 28(b)) and *Statute of the Special Tribunal for Lebanon* (Art. 3).

<sup>842</sup> See for example, Judgment of 12 November 1948, Case of Koki Hirota, in *Record of Proceedings of the International Military Tribunal for the Far East (1946-1949)*, vol. 20, pp. 49, 791 and 49, 831, reprinted in J.R. Pritchard (ed.), *The Tokyo War Crimes Trial*, Garland, New York, 1981-1988; the Commentary of the ICRC on Article 86 of Protocol I of the Geneva Conventions, paras. 3545 and 3546.

<sup>843</sup> International Criminal Tribunal for the former Yugoslavia, Decision of 16 June 2004, *Prosecutor v. Slobodan Milosevic*, Case No, IT-02-54-T, paras. 304- 309.

<sup>844</sup> See among others: International Criminal Tribunal for the former Yugoslavia, Judgment of 1 September 2004, *Prosecutor v. Brdjanin*, Case No, IT-99-36-T, para. 278, and Judgment of 15 September 2008, *Prosecutor v. Delić*, Case No, IT-04-83-T, para. 64; and International Criminal Court, Decision of 15 June 2009, *Prosecutor v. Jean Pierre Bemba Gombo*, Case No, ICC-01/05-01/08, para. 430.

through direct or circumstantial evidence. However, the International Criminal Tribunal for the former Yugoslavia and the International Criminal Court have indicated that such knowledge may be established if “*a priori* [military commander] belongs to an organized structure equipped with surveillance system and information networks”<sup>845</sup>.

Regarding the third element, international jurisprudence and doctrine has characterized this element as “physical” or “material”, since it refers to the material ability or power to act that the superior holds in order to prevent his subordinates from committing the crime, impede it or punish the perpetrators, either directly or by referring the case to the investigative and/or competent judicial authorities. International jurisprudence has emphasized that the relevant aspect of the power to act to prevent or impede the crimes or punish the perpetrators lies in the superior’s “material ability,” which is more than his official legal competence<sup>846</sup>. The International Criminal Tribunal for the former Yugoslavia has affirmed that “in some cases, it matters little whether or not a superior be officially invested with the necessary legal authority if it is proved that he had the material ability to act”<sup>847</sup>.

If, in certain cases, the supervisor has no punitive legal powers (whether in the criminal or disciplinary area), the obligation to take measures to repress the crime should be interpreted as the exercise of his actual power to transfer the case to the competent criminal or disciplinary authorities<sup>848</sup>. The International Criminal Tribunal for the former Yugoslavia has found that this duty is even enforceable in

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<sup>845</sup> International Criminal Court, Decision of 15 June 2009, *Prosecutor v. Jean Pierre Bemba Gombo*, Case No, ICC-01/05-01/08, para. 431 and the International Criminal Tribunal for the former Yugoslavia, Judgment of 15 March 2006, *Prosecutor v. Ensee Hadzihasanovic and Amir Kubura*, Doc. Cit. para. 94.

<sup>846</sup> International Criminal Tribunal for the former Yugoslavia, Judgment of 26 February 2001, *Prosecutor v. Dario Kordic and Mario Cerkez*, Doc. Cit., paras. 443 et seq.; Judgment of 3 March 2000, *Prosecutor VS. Blaskic*, doc. Cit., paras. 336 et seq.; Judgment of 15 March 2006, *Prosecutor v. Ensee Hadzihasanovic and Amir Kubura*, Doc. Cit., paras. 122 et seq.

<sup>847</sup> Judgment of 15 March 2006, *Prosecutor v. Ensee Hadzihasanovic and Amir Kubura*, Doc. Cit., para. 122. In the same regard, see International Criminal Tribunal for Rwanda, Judgment of 21 May 1999, *Prosecutor v. Kayishema and Ruzindana*, Doc. Cit., para. 230.

<sup>848</sup> International Criminal Tribunal for the former Yugoslavia, Judgment of 26 February 2001, *Prosecutor v. Dario Kordic and Mario Cerkez*, Doc. Cit., para. 446; International Criminal Tribunal for Rwanda, Judgment of 7 June 2001, *Prosecutor v. Ignace Bagilishema*, Doc. Cit., para. 50; and International Criminal Court, Decision of 15 June 2009, *Prosecutor v. Jean Pierre Bemba Gombo*, Doc. Cit., para. 440.

respect of military or civilian superiors who assumed command after the commission of the crime: they have a duty to investigate the crimes, establish the facts and transfer the case to the competent authorities<sup>849</sup>.

This material ability spans three different times: before, during and after the crime. The International Criminal Court has ruled that the superior has a specific duty at each one of these moments<sup>850</sup>. Thus, the Court held that a military commander did not prevent the commission of a crime committed by his subordinates, of which he had knowledge (either "effective" or "attributable"), and, therefore, he was not exempt from criminal responsibility as a superior despite having subsequently taken measures to punish the perpetrators of the crime<sup>851</sup>.

Obviously, as has been highlighted in international jurisprudence, the impossible cannot be demanded in order to prevent a crime, to stop its commission or to punish the perpetrators<sup>852</sup>. International Law requires the adoption of "necessary" and "reasonable" measures<sup>853</sup>. These must also be assessed in the light of the material capacity that the superior has in each case, as much as in relation to his or her effective control as well as his or her *de jure* or *de facto* powers to prevent or stop the crime or punish its perpetrators. Thus, the breach of obligations must be assessed in the light of the superior's *de jure* or *de facto* powers, on a case-by-case basis, in order to determine whether the required behavior was omitted and thus the existence criminal responsibility. In this

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<sup>849</sup> International Criminal Tribunal for the former Yugoslavia, Judgment of 26 February 2001, *Prosecutor v. Dario Kordic and Mario Cerkez*, Doc. Cit., para. 446.

<sup>850</sup> International Criminal Court, Decision of 15 June 2009, *Prosecutor v. Jean Pierre Bemba Gombo*, Doc. Cit., para. 436.

<sup>851</sup> *Ibid.* In the same regard, see International Criminal Tribunal for the former Yugoslavia: Judgment of 3 March 2000, *Prosecutor v. Blaškić*, Doc. Cit., para. 336 and Judgment of 15 March 2006, *Prosecutor v. Ensee Hadzihasanovic and Amir Kubura*, Doc. Cit., para. 126.

<sup>852</sup> See for example: International Criminal Tribunal for the former Yugoslavia, Judgment of 15 March 2006, *Prosecutor v. Ensee Hadzihasanovic and Amir Kubura*; Judgment, 3 March 2000, *Prosecutor v. Blaskic*; and Judgment of 16 November 1998 and Judgment of 20 July 2000, *Prosecutor v. Z Delalic and others*, Doc. Cit.

<sup>853</sup> The *Statute of the International Criminal Court for the former Yugoslavia*, The *Statute of the International Criminal Tribunal for Rwanda*, the *Rome Statute of the International Criminal Court* and the *International Convention for the Protection of All Persons from Enforced Disappearance* refer to "necessary and reasonable measures"; the *Statute of the Special Court for Sierra Leone* and the *Statute of the Special Tribunal for Lebanon* refer to "necessary and reasonable measures". The *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions* refer to "reasonable opportunity".

regard, the International Criminal Tribunal for the former Yugoslavia has ruled that “a superior may only be held criminally responsible for failing to take such measures that are within his powers. The question then arises of what actions are to be considered to be within the superior’s powers in this sense. [...]a superior should be held responsible for failing to take such measures that are within his material possibility”<sup>854</sup>.

There are many elements to be considered in order to determine the scope of material abilities: positions in the hierarchy and chain of command; disciplinary and even judicial powers (such as ‘judge-commander’ in the military criminal law of several countries) over the subordinate personnel; as well as the level of effective control. However, as noted by international jurisprudence, it is not possible to develop a general and abstract rule<sup>855</sup>. In this context, international jurisprudence has reiterated that the superior’s material abilities cannot be considered in the abstract but must be assessed individually, and depend on the circumstances of each case<sup>856</sup>.

#### **b. Perpetration-by-means of control over an organized apparatus of power**

Individual criminal responsibility for perpetration-by-means of control over an organized apparatus of power is a concept recognized by contemporary criminal law, both in laws<sup>857</sup> and in

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<sup>854</sup> Judgment of 16 November 1998, *Prosecutor v. Z Delalic and others*, Doc. Cit., para. 395. See also, International Criminal Tribunal for the former Yugoslavia, Judgment of 26 February 2001, *Prosecutor v. Dario Kordic & Mario Cerkez*, Doc. Cit., paras. 443 et seq.; International Criminal Tribunal for Rwanda, Judgment of 7 June 2001 of the *Prosecutor v. Ignace Bagilishema*, para. 48; and International Criminal Court, Decision 15 June 2009, *Prosecutor v. Jean Pierre Bemba Gombo*, Doc. Cit., para. 443.

<sup>855</sup> International Criminal Tribunal for the former Yugoslavia, Judgment of 16 November 1998, *Prosecutor v. Z Delalic and others*, Doc. Cit., para. 394, and International Criminal Court, Decision 15 June 2009, *Prosecutor v. Jean Pierre Bemba Gombo*, Doc. Cit., para. 443.

<sup>856</sup> International Criminal Tribunal for the former Yugoslavia: Judgment of 21 June 1999, *Prosecutor v. Zlatko Aleksovski*, Doc. Cit., para. 81; Judgment of 16 November 1998, *Prosecutor v. Z Delalic and others*, Doc. Cit., para. 394; and Judgment of 15 March 2006, *Prosecutor v. Ensee Hadzihasanovic and Amir Kubura*, Doc. Cit., paras. 122 et seq.; and International Criminal Tribunal for Rwanda, Judgment of 7 June 2001, *Prosecutor v. Ignace Bagilishema*, Doc. Cit., para. 48 and Judgment of 21 May 1999, *Prosecutor v. Kayishema and Ruzindana*, Doc. Cit., para. 231.

<sup>857</sup> See among others: Penal Code of Germany (art. 25); Penal Code of Bolivia (art. 20); Penal Code of Costa Rica (art. 45); and Penal Code of El Salvador (arts. 34) (Decreto Legislativo No. 617 2008).

case law and doctrine<sup>858</sup>. This form of individual criminal responsibility is also recognised in the field of international criminal law<sup>859</sup>.

This form of criminal liability has been used to obtain convictions in national courts for crimes under International Law such as extrajudicial execution, enforced disappearance and crimes against humanity. One of the first precedents was the judgment of the Israeli court against Adolf Eichmann for the crime of genocide<sup>860</sup>. Even though the court did not use the Hebrew phrase “perpetration-by-means,” both the factual and legal characterization of Eichmann’s criminal responsibility corresponds to what is now called and understood as “perpetration-by-means” in jurisprudence and doctrine.

In the Americas, courts in Peru, Argentina, Chile and Colombia have used this doctrine in cases of forced disappearances, extrajudicial executions and other serious violations of human rights<sup>861</sup>.

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<sup>858</sup> See among others: Roxin, Klaus, “Voluntad de dominio of the acción mediante aparatos de poder organizados”, in *Doctrina Penal*, year VIII, July/set. 1985, N 31, Buenos Aires, p. 400 et seq.; Roxin, Klaus, *Dogmática Penal and Política Criminal*, Ed. IDEMSA, Lima, 1998; Sebastián Soler, *Derecho penal argentino*, Tipográfica-editorial Argentina, Buenos Aires, 1956, 3 edition, Volume II, p. 258; Bacigalupo, Enrique, *Manual de Derecho Penal*, Ediciones Temis / ILANUD, Bogotá, 1984, p. 196; Eugenio Raul Zaffaroni, *Tratado de derecho Penal – Parte General*, Volume IV, Ed. Edier, Buenos Aires, 1984, p. 287 et seq.; Hernández Placencia, José, *La autoría mediata in derecho penal*, Editorial Comares, Granada, 1996; and Reyes Echandía, Alfonso, *Derecho Penal – Parte General*, Universidad Externado de Colombia, 6 edition, Bogotá 1979, p. 174-175.

<sup>859</sup> Even though the definitions may vary, see for example: Article 25(3)(a) of the *Rome Statute of the International Criminal Court*; Article 14 (3)(a) of the *Regulations No. 2000/15, 6 June 2000 Establishment of Panels with Exclusive Jurisdiction over Serious Crimes*, of the United Nations Transitional Administration East Timor; and Article 3 (1)(a) of *Statute of the Special Tribunal for Lebanon*.

<sup>860</sup> Judgment of 29 May 1962 of the Supreme Court of Israel, *Trial Attorney General of Israel v. Eichmann* (reproduced in *International Law Reports*, Volume No. 36, p. 297).

<sup>861</sup> See, *inter alia*: Peru (Supreme Court of Justice, Special Criminal Chamber Judgment, 7 April 2009, Exp. No. A.VS. 19 - 2001, Lima, *Trial against Alberto Fujimori Fujimori / Crimes: Homicide, assault and battery and abduction*; and Lima High Court, Judgment, 8 April 2008, Exp. No. 03-2003-1 SPE/CSJLI, *Trial v Julio Rolando Salazar Monroe and others*, and Judgment, 1 October 2010, Exp. No. 28-2001, *Case of Barrios Altos*); Argentina (National Chamber for Criminal and Correctional Matters of the Federal Capital, Judgment of 9 to 12 December 1985, *trial of military juntas – Trial N 13* (1985); Chamber of Oral Trials in Tucumán Federal Criminal Court, *Trial military juntas – Trial N 13* (1985); Chamber of Oral Trials in Tucumán Federal Criminal Court, *Trial of Videla, Jorge Rafael*, Revision of double jeopardy principle and lack of jurisdiction jurisdiction; Trial: “*Vargas Aignasse Guillermo Abduction and disappearance*”.- Expte. V - 03/08.-); Chile (Supreme Court of Justice, Judgment of 21



The doctrine of individual criminal responsibility for perpetration-by-means through an organized apparatus of power is based on the domination and control that superiors have over the apparatus, or at some level over decision-making or control over the apparatus in such a way that the criminal act performed by a member of that unit is attributable to the superior as the perpetrator. Doctrine and jurisprudence have also referred to the perpetrator as “the man behind the scenes,” or “perpetrator behind the perpetrator” who acts in the background. The classical theory of individual responsibility based on the control over the act is transformed here, by the nature of crime of the apparatus, in individual responsibility based on the control of organized apparatus of power.

The doctrine of individual criminal responsibility for perpetration-by-means through control over an organized apparatus of power requires several requirements for its application in individual cases, namely:

- The existence of an organized apparatus of power;
- A position of command and/or control within the organized apparatus of power; and,
- Membership of the immediate or direct perpetrator (the perpetrator) in the apparatus of power and his or her fungibility.

However it should be noted that some doctrinal and jurisprudential trends have pointed to the existence of other requirements, such as the “separation from the legal system of the apparatus of power” and the “high availability [of the perpetrator] for the undertaking of the act”<sup>862</sup>. Notwithstanding, the current development of jurisprudence and doctrine can only say that there is consensus on the three elements outlined above

First, it requires the existence of an organized apparatus of power. This apparatus should be relatively permanent and characterized by a vertical structure, where there is, either *de jure* or *de facto*, a functional differentiation of the levels of decision-making and control

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September 2007, Rol N 3744-07); and Colombia (Supreme Court of Justice of Colombia, Judgment of 23 February 2010, Filing No. 32805, Case of *Álvaro García Romero* – Macayepo; Judgment of 29 September 2003, Filing No. 19734, Writ 10 June 2008, Filing No. 29268; and Criminal Court 51 of the Circuit de Bogotá, Judgment of 28 April 2011, Trial no. 2009-0203, Trial of *General (r) Armando Arias Cabrales Plazas Vega* / Palace of Justice).

<sup>862</sup> As, for example, is made by the Special Criminal Chamber of the Supreme Court of Justice of Peru, in its Judgment of 7 April 2009, Exp. No. A.VS. 19 - 2001, Lima, *Trial of Alberto Fujimori Fujimori / Crimes: Homicide, assault and battery and abduction* (see par. 727 et seq.).

over the levels of performance. The legal or illegal, legitimate or illegitimate character of the apparatus is irrelevant: it is essential that there be an organized structure of objective and material power. The doctrine of perpetration-by-means has been applied in relation to organized apparatus of power that are both legal (Armies or security forces of the State) and illegal (paramilitary groups, terrorist organizations and mafia organizations). There is, therefore, no judgment on the legality or legitimacy of the organized apparatus of power. What matters is that there is "sufficient objective structure of the organized apparatus" to assign responsibility for perpetration to those who have the decision-making power or control, although it does not eliminate the responsibility of the person who actually commits the crime or participates in it. It is not required that this structure be legally regulated, what is important is that it functionally and materially operate as a vertical structure, with a kind of criminal "division of labor", either in law or in fact and understood substantively, and have chains of command. Reality has taught us that in fact these organized apparatuses of power can have complex organizational and structural forms, consisting of multiple steps and links, as much individuals and groups or collectives, all of who have a role or involvement in criminal activity. In many cases, with particular emphasis on organized apparatus of power created from government bodies or structures within the state apparatus, these structures are integrated and operate clandestinely, with their own methods of operation and / or group of clandestine assignments, with tightly-knit and compartmentalized forms of organization.

Secondly, it requires that the person exercise, either *de facto* or *de jure*, a command or control function within the organized apparatus of power. Such a function can be individual or collective. Also, as facts have shown, these organized apparatuses of power may have several centers of decision-making or control and activity, which are organized in an hierarchical sequence of links. This has been all the more apparent with larger organized apparatuses of power, in which there may be different steps or links for decision-making or control of the apparatus, and when, for example, general orders to commit crimes are given from the top of the apparatus, in what is known as "general orders" or "criminal guidelines" or "general instructions". In these cases, the general orders or directives or general instructions are not given to victimize a specific individual, who is individually determined and identified, or, indeed, the criminal method used to commit the crime. Instead, this type of "general orders" identifies a

social, political, ethnic, social, national or cultural category of humans or a community or group to be victimized. In these contexts, other levels or links of decision-making power or control, that are of less hierarchical importance and that are integrated at a lower level, determine the implementation modalities for these generic orders- in other words - the victims, methods, circumstances of time and place, etc., without thereby being placed in a position of materially or immediately perpetrating the crime. A typical case of this type of situation is that of Adolf Eichmann, who took part in the chain or sequence of a criminal organized apparatus of power, complying with general guidelines to commit genocide, using his power of decision-making and control over the links under his control to commit the crime, without having to personally have executed the material acts of placing the victims in the ovens or gas chambers.

"[T]he man behind can always trust that his orders or criminal purpose will be carried out without his having to know the immediate executor. Thus, this 'automatic operation of the apparatus' will be what which really ensures compliance with the order."  
 Special Criminal Chamber of the Supreme Court of Justice of Peru<sup>863</sup>

Thirdly, the direct and material perpetrators are part of an organized apparatus of power and thus act as fungible cogs of its criminal structure. As the doctrine and jurisprudence have characterized, the material perpetrators are characterized by their fungibility. The material perpetrator is a cog in the structure, but the decision has been made at another level. The commission and/or participation in acts of commission of the crime may be assigned to him or her as just another member of the organized apparatus of power. The direct perpetrator is merely an instrument to commit the crime of the perpetrator-by-means and there need be no personal interaction between the direct perpetrator and the perpetrator-by-means, or, indeed, no level of mutual understanding between the two is actually required. It is also unnecessary for the perpetrator-by-means to know the identity of the direct perpetrator. In fact, as noted above, the structure of organized power apparatus is often compartmentalized, with levels of secrecy, so members do not know those who are on different levels or links within the apparatus.

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<sup>863</sup> Judgment of 7 April 2009, Exp. No. A.VS. 19 - 2001, Lima, *Trial of Alberto Fujimori Fujimori / Crimes: Homicide, assault and battery and abduction*, para. 726.

## 5. Guarantees against impunity

As part of its duty to prosecute and punish crimes of enforced disappearance and/or extrajudicial execution, “the State must remove all obstacles, both factual and legal, that hinder the effective investigation into the facts and the development of the corresponding legal proceedings...”<sup>864</sup>. In that sense, in general, the Inter-American Court of Human Rights has stated that “all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.”<sup>865</sup>

Thus, International Law provides safeguards so that recognized legal measures, such as, for example, amnesty and prescription, are not unlawfully used for the purpose of obtaining the impunity of perpetrators of enforced disappearances and extrajudicial executions. When these legal measures are used with the illegitimate purpose of obtaining impunity, doctrine and jurisprudence consider that there is a “fraudulent administration of justice”.

### a. Amnesties and similar measures

Amnesties and similar measures that prevent the perpetrators of enforced disappearance and/or extrajudicial execution from being investigated, prosecuted and punished by the courts are inconsistent with States’ obligation to punish such crimes under International Law. Likewise, these measures undermine the absolute prohibition of committing these crimes, therefore, they are incompatible with the obligation to guarantee the rights of the families of victims to an effective remedy, to be heard by an independent and impartial tribunal for the determination of their rights and to the truth.

The DED<sup>866</sup>, the Principles on Executions<sup>867</sup> and the *Updated Set of*

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<sup>864</sup> Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 182.

<sup>865</sup> Judgment of 14 March 2001, *Case of Barrios Altos (Chumbipuma Aguirre and others) v. Peru*, Series C No. 87, para. 41.

<sup>866</sup> Article 18.

*principles for the protection and promotion of human rights through action to combat impunity*<sup>868</sup> expressly prohibit the granting of amnesties and similar measures to perpetrators of enforced disappearance and/or extrajudicial execution. This rule has been reaffirmed generally by the UN Security Council<sup>869</sup>, the UN Secretary-General<sup>870</sup> and the former UN Commission of Human Rights<sup>871</sup>. International human rights jurisprudence has reaffirmed the ban on amnesties and similar measures for crimes of enforced disappearance and / or extrajudicial executions<sup>872</sup>.

Amnesties “that prevent the investigation and punishment of the grave human rights violations [...] lack legal effects and, consequently, cannot continue to represent an obstacle to the investigation of the facts of this case and the identification, prosecution and punishment of those responsible.”

Inter-American Court of Human Rights<sup>873</sup>

The Inter-American Court of Human Rights has stated that “all amnesty provisions, provisions on prescription [...] designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.”<sup>874</sup> For its part, the

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<sup>867</sup> Principle 19.

<sup>868</sup> Principle 24.

<sup>869</sup> See, for example, Resolution No.1120 (1997), *Croatia*, of 14 July 1997; 1315 (2000), *Sierra Leone*, of 14 August 2000; and 1479 (2003) of 13 May 2003, para. 8.

<sup>870</sup> *Seventh Report of Secretary-General of the United Nations on the Observation Mission to Sierra Leone*, 1999/836, 30 July 1999, para. 7; *Report Establishment of the Special Court for Sierra Leone of the Secretary-General of the United Nations*, 2000/915, para. 22; and *the Report of the Secretary-General pursuant to Resolutions of the Security Council 1160 (1998), 1199 (1998) and 1203 (1998)*, UN Doc. S/1999/99 of 29 January 1999, para. 32.

<sup>871</sup> Resolutions Nos. 2004/72, “Impunity”, of 21 April 2004; 2005/81, “Impunity”, of 21 April 2005, para. 3; 2004/72 of 21 April 2004, para. 3; 2003/72 of 25 April 2003, para. 2; and 2002/79 of 25 April 2002, para. 2.

<sup>872</sup> In this regard see: International Commission of Jurists, *International Law and the fight against impunity, A Practitioner’s Guide No. 7*, Geneva/Lima, 2014.

<sup>873</sup> Judgment of 25 October 12, *Case of Massacres of El Mozote and neighboring locations v. El Salvador*, Series C No. 252, para. 286.

<sup>874</sup> Judgment of 14 March 2001, *Case of Barrios Altos (Chumbipuma Aguirre and others v. Peru)*, Series C No. 75, para. 41. See, *inter alia*: Judgment of 26 November 2006, *Case of La Cantuta v. Peru*, Series C No. 162; Judgment of 22 September 2002, *Case of Anzualdo Castro v. Peru*, Series C No. 202; Judgment of 27 February 2002, *Case of Trujillo Oroza v. Bolivia*, Series C No. 92; Judgment of 29 August 2002,

Human Rights Committee has concluded that amnesties and other measures that allow impunity for the perpetrators of enforced disappearances, extrajudicial executions and other serious violations of human rights and prevent the investigation of the facts and the prosecution and punishment of the perpetrators and/or that the victims and their families have an effective remedy and obtain redress are incompatible with the obligations of the *International Covenant on Civil and Political Rights*.<sup>875</sup>

The prohibition of amnesties and similar measures in cases of enforced disappearances, extrajudicial executions and other serious violations of human rights also applies to the crimes committed during internal armed conflicts. While the *Additional Protocol to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II) provides that amnesties may be granted at the end of hostilities to those who have taken part in the armed conflict<sup>876</sup>, international doctrine and jurisprudence have concluded that these amnesties cannot shelter the perpetrators of war crimes, including enforced disappearances and extrajudicial executions. This position was

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*Case of del Caracazo v. Venezuela*, Series C No. 95; Judgment of 1 July 2006, *Case of the Ituango Massacres v. Colombia*, Series C No. 148; Judgment of 26 September 2006, *Case of Almonacid Arellano and others v. Chile*, Series C No. 154; Judgment of 24 November 2009, *Case of the Massacre of the Dos Erres v. Guatemala*, Series C No. 211; Judgment of 1 September 2010, *Case of Ibsen Cárdenas and Ibsen Peña v. Bolivia*, Series C No. 217; Judgment of 24 November 2010 *Case of Gomes Lund and others ("Guerrilha do Araguaia") v. Brazil*, Series C No. 219; Judgment of 24 February 2011, *Case of Gelman v. Uruguay*, Series C No. 221; and Judgment of 25 October 2012, *Case of Massacres of El Mozote and neighboring location v. El Salvador*, Series C No. 252.

<sup>875</sup> See, *inter alia*, Concluding Observations: *Peru* (CCPR/C/79/Add.67, 1996, paras. 9 and 10; and CCPR/CO/70/PER, 15 November 2000, para. 9); *Argentina*, (CCPR/C/79/Add.46 - A/50/40, 5 April 1995, para. 144 and CCPR/CO/70/ARG, 3 November 2000, para. 9); *Chile* (CCPR/C/79/Add.104, 30 March 1999, para. 7); *Croatia* (CCPR/C/HRV/CO/2, 4 November 2009, para. 10; and CCPR/CO/71/HRV, 4 April 2001, para. 11); *El Salvador*, (CCPR/C/SLV/CO/6, 18 November 2010, para. 5; CCPR/CO/78/SLV, 22 August 2003; and CCPR/C/79/Add.34, 18 April 1994, para. 7); *Spain*, (CCPR/C/ESP/CO/5, 5 January 2009, para. 9); *Former Yugoslav Republic of Macedonia* (CCPR/C/MKD/CO/2, 3 April 2008, para. 12); *France* (CCPR/C/79/Add.80, para. 13); *Haiti* (A/50/40, paras. 224–241); *Lebanon* (CCPR/C/79/Add.78, para. 12); *Níger* (CCPR/C/79/Add.17, 29 April 1993, para. 7); *Republic of Congo* (CCPR/C/79/Add.118, 27 March 2000, para. 12); *Senegal* (CCPR/C/79/Add.10, 28 December 1992, para. 5); *Surinam* (CCPR/CO/80/SUR, 4 May 2004, para. 7); and *Uruguay* (CCPR/C/URY/CO/5, 2 December 2013, para. 19; and CCPR/C/79/Add.19, paras. 7 and 11; and CCPR/C/79/Add.90, Part C. "Principal areas of concern and recommendations").

<sup>876</sup> Article 6 (5).

reiterated by the UN Security Council<sup>877</sup>, the International Committee of the Red Cross (ICRC)<sup>878</sup>, the Human Rights Committee<sup>879</sup> and the Inter-American Commission on Human Rights<sup>880</sup>.

"The obligations assumed by the Peruvian State with the ratification of human rights treaties include the duty to guarantee those rights in accordance with international law, [these obligations] are irrevocable and the State is internationally bound to sanction their charge. In response to the mandate contained in the [...] Constitutional Procedural Code, we turn to the treaties that have crystallized the absolute prohibition of those offenses which, in accordance with international law, cannot be amnestied as they contravene the minimum standards of protection of the dignity of the human person."

The Constitutional Tribunal of Peru<sup>881</sup>

In this regard, the Inter-American Court of Human Rights has stated that "this norm is not absolute, because, under international humanitarian law, States also have an obligation to investigate and prosecute war crimes [... and] that article 6(5) of Additional Protocol II refers to extensive amnesties in relation to those who have taken part in the non-international armed conflict or who are deprived of liberty for reasons related to the armed conflict, provided that this does not involve facts, such as those of the instant case, that can be categorized as war crimes, and even crimes against humanity."<sup>882</sup>

### **b. Exclusion of classic exemption from criminal liability and justification clauses**

In the case of enforced disappearances and extrajudicial executions, crimes against humanity, war crimes and genocide, International Law prohibits the use of the concept of due obedience as grounds

<sup>877</sup> See, for example, Resolutions Nos. RES/1120 (Croatia), RES/1315 (Sierra Leone), and RES/1464 (2003) (Costa de Marfil) 4 February 2003.

<sup>878</sup> See *Customary International Humanitarian Law, Volume I: Rules*, Doc. Cit., Rule 159, p. 611 et seq.

<sup>879</sup> See, *inter alia*, *Concluding Observations on: El Salvador* (CCPR/C/79/Add.78, para. 12) and *Republic of Croatia* (CCPR/CO/71/HRV, 4 April 2001, para. 11).

<sup>880</sup> Case No. 11138, *Nazario de Jesús Gracias (El Salvador)*, in *Report on the Situation of Human Rights in El Salvador*, OAS/Ser.L/V/II.85, Doc. 28 Revs., 11 February 1994. In this regard, see Report No. 1/99, Case 10.480, *Lucio Parada Cea and others* (El Salvador), 27 January 1999, para. 115.

<sup>881</sup> Judgment of 2 March 2007, *Case of Santiago Martín Rivas, Constitutional Action*, File No. 679-2005-PA/TC, para. 30.

<sup>882</sup> Judgment of 25 October 12, *Case of Massacres of El Mozote and neighboring location, v. El Salvador*, Series C No. 252, para. 286.

for justification of the acts and/or exemption from criminal liability. This rule is expressly enshrined in various international instruments<sup>883</sup> and reaffirmed by international jurisprudence<sup>884</sup>. In this regard, the Human Rights Committee has considered that legislation which exonerates from criminal liability State agents involved in extrajudicial executions committed during security operations during the discharge of duties or in obedience of a superior's orders, is incompatible with the obligations of States parties under the *International Covenant on Civil and Political Rights*<sup>885</sup>.

The DED<sup>886</sup>, the ICPED<sup>887</sup>, the IACFDP<sup>888</sup>, the Principles on Executions<sup>889</sup> and the *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials*<sup>890</sup> expressly rejected the possibility of invoking superiors' orders as grounds for justification of the crime or exemption from criminal liability. On the contrary, all these instruments affirm the right and duty of all persons not to follow or execute an order to commit acts pertaining to enforced disappearance or extrajudicial execution<sup>891</sup>. Likewise, international standards establish the obligation of States to prohibit such orders<sup>892</sup> and to ensure that those who refuse to obey or implement

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<sup>883</sup> See among others: *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment* (art. 2.3); *Code of Conduct for Law Enforcement Officials* (art. 5); *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity* (principle 27); *Inter-American Convention to Prevent and Punish Torture* (art. 4); *Principles of International Law recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal* (Principle IV); Resolution 95 (I) of 1946 of the UN General Assembly; *Statute of the International Criminal Tribunal for the former Yugoslavia* (art. 7.4); *Statute of the International Criminal Tribunal for Rwanda* (art. 6.4); and *Rome Statute of the International Criminal Court* (art. 33).

<sup>884</sup> See among others: Human Rights Committee, *General Comment 31 (...)*, Doc. Cit.; Inter-American Court of Human Rights, Judgment of 14 March 2001, *Case of Barrios Altos*, Doc. Cit.; *Report of the International Law Commission on the work of its 48th Session - 6 May to 26 July 1996*, Doc. Cit., Article 5 and Commentary, pp. 23 et seq.

<sup>885</sup> Decision, 31 March 1982, Communication No. 45/1979, *Case of María Fanny Suárez de Guerrero v. Colombia*.

<sup>886</sup> Articles 6 (1) and 7.

<sup>887</sup> Articles 1 (2) and 6 (2).

<sup>888</sup> Article VIII.

<sup>889</sup> Principle 19.

<sup>890</sup> Principle 26.

<sup>891</sup> *Declaration on the Protection of All Persons from Enforced Disappearance* (Art. 6(1)); *International Convention for the Protection of All Persons from Enforced Disappearance* (Art. 23); *Inter-American Convention on Forced Disappearance of Persons* (Art. VIII); *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions* (Art. 3) and *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (Principle 25).

<sup>892</sup> *Declaration on the Protection of All Persons from Enforced Disappearance* (Art. 6); *International Convention for the Protection of All Persons from Enforced Disappearance*



them are not subject to or punished in criminal or disciplinary proceedings for such refusal<sup>893</sup>.

"The official status of the perpetrator of a crime under international law - even if acting as head of State or Government - does not exempt him or her from criminal or other responsibility and is not grounds for a reduction of sentence."

*Updated Set of principles for the protection and promotion of human rights through action to combat impunity*<sup>894</sup>

Under international law, the fact that a perpetrator of enforced disappearance or extrajudicial execution has acted as Head of State, Head of Government or, indeed, with any other status as a state official, does not exempt him from prosecution, nor may it constitute the basis for reduction of sentence or be considered a mitigating circumstance. This principle has been reiterated by international instruments, both in terms of crimes against humanity, war crimes and genocide<sup>895</sup> and gross violations of human rights<sup>896</sup>. The International Law Commission, in reference to crimes against humanity, affirmed that individual criminal responsibility applies "without exception to any individual throughout the governmental hierarchy or military chain of command who contributes to the commission of such a crime."<sup>897</sup>

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(art. 23); and *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions* (Principle 3).

<sup>893</sup> *Declaration on the Protection of All Persons from Enforced Disappearance* (Art. 6); *International Convention for the Protection of All Persons from Enforced Disappearance* (art. 23); *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions* (Principle 3); and *Basic Principles on the Use of Force and Firearms by Law Enforcement Officials* (Principle 25).

<sup>894</sup> Principle 27 (c).

<sup>895</sup> See among others: *Charter of the International Military Tribunal* (art. 7); *Principles of International Law recognized in the Charter of the Nurnberg Tribunal and in the Judgment of the Tribunal* (Principles I and III); Resolution 95 (I) de 1946 of the General Assembly of the United Nations; *Statute of the International Criminal Tribunal for the former Yugoslavia* (art. 7); *Statute of the International Criminal Tribunal for Rwanda* (art. 6); *Rome Statute of the International Criminal Court* (art. 27); and *Statute of the Special Court for Sierra Leone* (art.6).

<sup>896</sup> *Declaration on the Protection of All Persons from Enforced Disappearance* (art. 16); *Set of Principles for the protection and promotion of human rights through action to combat impunity* (principle 27, c); and *Inter-American Convention on Forced Disappearance of Persons* (art. IX).

<sup>897</sup> *Report of the International Law Commission on the work of its 48th session, 6 May t- 26 July 1996*, Official records of the General Assembly, Fifty-first session, Supplement No. 10, Document A/51/10, para. 2 of the Commentary to Article 5, p. 23.

### c. Statute of Limitations

Under international law, only a few crimes are not subject to the applicability of the statute of limitations, such as crimes against humanity, war crimes and genocide<sup>898</sup>. The non-applicability of the statute of limitations for these crimes is a rule of customary international law.<sup>899</sup>

Extrajudicial execution and enforced disappearance, despite being international crimes, are not *per se* subject to the non-applicability of statutes of limitations. Notwithstanding, when these acts are committed on a widespread or systematic basis, or within an armed conflict and in connection therewith, or with the intention of totally or partially destroying a group, they are converted into a different type of crime. Indeed, in such cases, they constitute crimes against humanity, war crimes or genocide (respectively), and therefore, are inalienable. In this regard, it is important to note that ICPED states that “[t]he widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in

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<sup>898</sup> See, *inter alia*: Law No. 10 of the Allied Control Council, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, 20 December 1945 (Art. II (5)); *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*; *European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes*; *Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity* (Principle 1); *Rome Statute of the International Criminal Court* (Art. 29); *Basic Principles and Guidelines on the right to a Remedy and Reparation for Victims of Gross Violations International Human Rights Law and Serious Violations of International Humanitarian Law* (Art. 6); *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity* (Principle 23.2); and Rule No. 160 of *Customary International Humanitarian Law*.

<sup>899</sup> See, *inter alia*: *Question of the punishment of war criminals and of persons who have committed crimes against humanity – Question of the non-applicability of statutory limitation to war crimes and crimes against humanity – Study submitted by the Secretary-General*, E/CN.4/906, 15 February 1966; *International Law Commission Fourth report on the Draft Code of Crimes against Peace and Security of Mankind*, UN Doc. A/CN.4/398, 11 March 1986, para. 172; *Inter-American Court of Human Rights, Judgment of 26 September 2006, Case of Almonacid Arellano and others v. Chile*, Series C No. 154, para. 153; *European Court of Human Rights, Judgment of 17 May 2010, Kononov v. Latvia*, Application No. 36376/04; *Inter-American Commission on Human Rights, Declaration of the Inter-American Commission on Human Rights on the duty of the Haitian State to investigate serious human rights violations committed during the regime of Jean Claude Duvalier*, 12 May 2011, paras. 10 et seq.; *Human Rights Committee, Concluding Observations: Spain*, CCPR/C/ESP/CO/5, 5 January 2009, para. 9; and *Customary International Humanitarian Law, Volume I: Rules*, Doc. Cit., Rule 160 p. 614.

applicable international law and shall attract the consequences provided for under such applicable international law.”<sup>900</sup>

“[T]he State is responsible for the prosecution of those responsible for crimes against humanity and, if necessary, the adoption of restrictive standards to prevent, for example, statutes of limitations for crimes that seriously violate human rights. The application of these standards enables the effectiveness of the legal system and is justified by the prevailing interests of the fight against impunity. The goal, obviously, is to prevent the application of certain mechanisms of criminal law with the repulsive aim of achieving impunity [for these crimes]. This must always be prevented and avoided, as it encourages criminals to repeat their conduct, serves as a breeding ground for revenge and corrodes two fundamental values of democratic society: truth and justice.”

The Constitutional Tribunal of Peru<sup>901</sup>

It is important to note that there is an emerging trend, both international<sup>902</sup> and national<sup>903</sup>, to extend the non-applicability of

<sup>900</sup> Article 5. During the negotiation and drafting of the ICPED, “[e]mphasis was placed on the non-applicability of statutory limitations to enforced disappearances that constituted crimes against humanity.” (*Report of the Intersessional Open-ended Working Group to elaborate a draft legally binding normative instrument for the protection of all persons from enforced disappearance*, UN Doc. E/CN.4/2003/71, 12 February 2003, Para. 43.).

<sup>901</sup> Judgment of 18 March 2004, Exp. No. 2488-2002-HC/TC, *Case of Genaro Villegas Namuche*, para. 23 of the legal basis.

<sup>902</sup> See, *inter alia*: *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (art. 6); Committee on Enforced Disappearances, Concluding Observations on Germany, CED/C/DEU/CO/1 10 April 2014, para. 9; Human Rights Committee, Concluding Observations on Argentina (CCPR/CO/70/ARG, 3 November 2000, para. 9), El Salvador, (CCPR/C/SLV/CO/6, 18 November 2010, para. 6), Panama (CCPR/C/PAN/CO/3, 17 April 2008, para. 7) and Uruguay (CCPR/C/URY/CO/5, 2 December 2013, para. 19); Committee against Torture, *General Comment No. 3: Implementation of article 14 by States Parties* (CAT/C/GC/3, 13 December 2012, para. 40) and Concluding Observations on Morocco (CAT/C/CR/31/2, 5 February 2004, para. 5), Chile (CAT/C/CR/32/5, para. 7), Turkey (CAT/C/CR/30/5, 27 May 2003, “Recommendation”, Para. 7), Slovenia (CAT/C/CR/30/4, 27 May 2003, para. 6), France (CAT/C/FRA/CO/3, 3 April 2006, para. 13) and Guatemala (CAT/C/GTM/CO/5-6, 24 June 2013, para. 8); and European Court of Human Rights, Judgment of 2 November 2004, *Abdülsamet Yaman v. Turkey*, Application No. 32446/96, para. 55.

<sup>903</sup> See, *inter alia*: Peru (Supreme Court of Justice of Peru, Judgment of 20 July 2009, File AV No. 23-2001, *Trial of Alberto Fujimori*; National Criminal Court, Resolution of 6 June 2006, Case of “Arbitrary Execution of the inhabitants of Cayara”; First High Court of Justice of Lima, Special Criminal Chamber, Resolution of 9 May 2005, Exp. No. 28-2001-“F-1”, Case of “Barrios Altos”; Lima High Court, High Anticorruption Chamber

the statute of limitations in cases of enforced disappearance and extrajudicial execution and other serious violations of human rights.

This trend, be it by means of constitutional, legal or jurisprudential interpretation, is particularly pronounced in Latin America, and particularly in relation to the crime of enforced disappearance. In countries where the national legal system has established the non-applicability of the statute of limitations for the crimes of enforced disappearance and/or extrajudicial execution, national authorities are obliged to observe the national standard. Indeed, in these national legal contexts, the applicability of a statute of limitations for these crimes cannot be invoked legitimately. International law prohibits the use of the applicability of a statute of limitations for war crimes, crimes against humanity and genocide, but in no way prohibits the application of this prohibition with respect to other international crimes.

While a statute of limitations can be applied to crimes of extrajudicial execution and enforced disappearance, when these behaviors are not subject to the statute of limitations under International Law or national law, it does not mean that this legal principle can be applied arbitrarily. Indeed, International Law stipulates certain conditions, both procedural and substantive, so that it can legitimately declare the statute of limitation of these crimes. Several international instruments stipulate the procedural and substantive conditions of validity therefor: the DED<sup>904</sup>; the ICPED<sup>905</sup>; IACFPD<sup>906</sup>; the *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity*<sup>907</sup> and the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations*

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"A", Resolution of 9 May 2005, Case of "El Destacamento Colina"; and High Court of Justice of Ancash, First Penal Chamber, Case of "the enforced disappearance of Pedro Haro and César Mautino"; Argentina (Federal Appeals Chamber of the Plata, Chamber II, Resolution of 17 July 2014, FLP 259/2003/17/CA3); Colombia (Constitutional Court, Judgment C-580/02 of 31 July 2002, File L.A.T.-218); Costa Rica (Supreme Court of Justice, Constitutional Chamber, Judgment No. 230-96 of 12 January 1996, Mandatory consultation, Exp. 6543-S-95 Voto N.0230-96); Ecuador (Constitution, art. 23); El Salvador (Penal Code, art. 99); Ethiopia (Constitution, art. 28); Guatemala (The National Reconciliation Act, art. 8); Honduras (Constitution, art. 325); Hungary (Penal Code, art. 33.2); Nicaragua (Penal Code, arts. 16 and 131); Panama (Penal Code, art. 120); Paraguay (Constitution, art. 5 and Penal Code, art. 102.3); Uruguay (Law No. 18.026 2006); and Venezuela (Constitution, art. 29 and Penal Code, art. 180)

<sup>904</sup> Article 17.

<sup>905</sup> Article 8.

<sup>906</sup> Article VII.

<sup>907</sup> Principles 22 and 23.

*of International Human Rights Law and Serious Violations of International Humanitarian Law*<sup>908</sup>.

The application of a statute of limitations without observing the restrictions stipulated in International Law is a form of fraudulent administration of justice. In this regard, the Inter-American Court of Human Rights has repeatedly stated that such rulings which are intended to prevent the investigation and punishment of those responsible for extrajudicial killings and enforced disappearances are unacceptable.<sup>909</sup> Likewise, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms has recommended that in the context of the struggle against terrorism that the Peruvian authorities ensure “that obstacles for prosecution and conviction for grave human rights violations in the course of counter-terrorism operations, such as those based on a statute of limitations in domestic law, are overcome in accordance with the jurisprudence of the Inter-American Court of Human Rights and applicable international human rights law.”<sup>910</sup>

International instruments<sup>911</sup> establish the conditions and safeguards for the validity of prescription, which can be summarized as follows:

- The periods of limitation should be extended and proportionate to the extreme seriousness of the crimes of extrajudicial execution and enforced disappearance<sup>912</sup>.

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<sup>908</sup> Article 7.

<sup>909</sup> See, *inter alia*: Judgment of 14 March 2001, *Case of Barrios Altos v. Peru*, Series C No. 75; Judgment of 3 September 2001, *Case of Barrios Altos, Interpretation of the fundamentals of the Judgment*, Series C No. 83, para. 15; Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 182; Judgment of 29 November 2006, *La Cantuta v. Peru*, Series C, No. 162, para. 152; Judgment of 27 February 2002, *Trujillo Oroza v. Bolivia*, Series C No. 92, para. 106; Judgment of 29 August 2002, *Case of Caracazo v. Venezuela*, Series C No. 95, para. 119; Judgment of 24 November 2010, *Case of Gomes Lund and others (“guerrilha do Araguaia”) v. Brazil*, Series C No. 219, para. 171; and Judgment of 29 November 2009, *Case of the the Dos Erres Massacre v. Guatemala*, Series C No. 211, para. 129.

<sup>910</sup> *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Schein - Addendum: Mission to Peru*, A/HRC/16/51/Add.3, 15 December 2010, para. 43, V.

<sup>911</sup> DED (art. 17); ICPFD (art. 8); IACFPD (art. VII); *Updated Set of Principles for the protection and promotion of human rights through action to combat impunity* (Principles 22 and 23); and *Basic Principles and Guidelines on the right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (art. 7).

<sup>912</sup> See additionally: Committee on Disappearances, *Concluding Observations on the Report submitted by Germany under Article 29, Para. 1, of the Convention*,

- The period of limitation should be suspended, and therefore not counted, during the time that there are no effective remedies and that such remedies have not been re-established.
- During the period of limitation, the right of the victims and their families to an effective remedy should be guaranteed.
- With respect to the crime of enforced disappearance, the period of limitation can only start being counted from the time of completion of commission of the crime. The Committee on Enforced Disappearance has stated that the requirement should take into account “the continuous nature of the crime of enforced disappearance”<sup>913</sup> and that the timeframe for counting the period should start to run “from the time that the offense of enforced disappearance ceases in all its elements”<sup>914</sup>, that is, “after the person is found alive, [or] his or her remains are found or their identity [is] restored.”<sup>915</sup>

Substantial or material conditions of the validity of the statute of limitations are fundamentally driven by the activity of the investigative and judicial authorities. When the investigations and criminal proceedings do not meet standards of due diligence or are conducted with a view to leaving the crime unpunished, or when the unwarranted delay in the criminal process is the fruit of inefficiency, negligence or omission on the part of the judicial authorities, the application of the statute of limitations is not valid.<sup>916</sup> In all these cases its application would constitute a form of fraudulent administration of justice.

#### **d. Fraudulent *res judicata***

The legal principles of double jeopardy (*Res judicata*) and *ne bis in idem* (or *non bis in idem*) are often used illegitimately in order to validate the impunity of those responsible for extrajudicial executions and forced disappearances. International Law

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CED/C/DEU/CO/1, 10 April 2014, para. 9; and Human Rights Committee, *General Comment No. 31* (...), Doc. Cit., para. 18.

<sup>913</sup> *Concluding Observations on: Belgium*, CED/C/BEL/CO/1, 24 September 2014, para. 19; and *Uruguay*, CED/C/URY/CO/1, 8 May 2013, para. 14.

<sup>914</sup> *Concluding Observations on France*, CED/C/FRA/CO/1, 8 May 2013, para. 21.

<sup>915</sup> *Concluding Observations on Spain*, CED/C/ESP/CO/1, 12 December 2013, Para. 12.

<sup>916</sup> See, *inter alia*: Inter-American Commission on Human Rights, Report No. 54/01, 16 April 2001, Case No. 12.051, *Maria da Penha Maia Fernandes v. Brazil*, para. 44, Report No. 55/01, 16 April 2001, Cases 11.286, 11.407, 11.406, 11.416, 11.413, 11.417, 11.412 and 11.415, *Aluísio Cavalcante and others v. Brazil*, paras. 127 and 128; and European Court of Human Rights, Judgment of 13 November 2013, *Anca Mocanu and others v. Rumania*, Applications Nos. 10865/09, 45886/07 and 32431/08, para. 224.

characterizes these situations as cases of “fraudulent administration of justice”, “apparent *res judicata*” or “fraudulent *res judicata*”, all of which are considered to be forms of impunity. International Law thus stipulates clear conditions and limits for the application of these two legal principles in order to prevent their arbitrary use for the purpose of cloaking impunity with trappings of “legality”.

There is a clear prohibition against national courts prosecuting and/or convicting a person twice for the same offense<sup>917</sup>. This prohibition or the *ne bis in idem* principle is one of “the most fundamental principles governing criminal prosecutions that are afforded protection under international human rights law”<sup>918</sup> and constitutes a norm of international humanitarian law<sup>919</sup> which is applicable to both international armed conflicts and internal armed conflicts.

Notwithstanding, International Law specifies the content, scope and limits of this principle, as well as the substantive and procedural conditions for the validity of the application of *res judicata*. Thus, the Inter-American Court of Human Rights has stated that “With regard to the *ne bis in idem* principle, although it is acknowledged as a human right in Article 8(4) of the American Convention, it is not an absolute right and therefore, is not applicable [in certain circumstances]... ”<sup>920</sup>.

The conditions of validity of the *ne bis in idem* principle and of *res judicata* can be summarised in the following terms:

- The *ne bis in idem* prohibition operates only for the courts of one country, but not for judicial processes and decisions of courts in different countries, as has been expressly recognized international jurisprudence<sup>921</sup>.

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<sup>917</sup> See, *inter alia*: *International Covenant on Civil and Political Rights* (Art. 14(7)); *American Convention on Human Rights* (Art. 8(4)); *Protocol Additional to the Geneva Conventions of 12 August 1949 relating to the Protection of Victims of International Armed Conflicts* (Art. 76.(4)(h)); *Rome Statute of the International Criminal Court* (Art. 20); *Statute of the International Criminal Tribunal for the former Yugoslavia* (art. 10.1); *Statute of the International Criminal Tribunal for Rwanda* (Art. 9(1)); *Statute of the Special Court for Sierra Leone* (Art. 9(1)); and *Statute of the Special Tribunal for Lebanon* (Art. 5).

<sup>918</sup> Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OAS/Ser.L/V/II.116 Doc. 5 Revs. 1 corr., 22 October 2002, para. 222.

<sup>919</sup> Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, para. 222.

<sup>920</sup> Judgment of 26 September 2006, *Case of Almonacid Arellano and others v. Chile*, Series C No. 154, para. 154.

<sup>921</sup> Human Rights Committee: *General Comment No. 32, Article 14, The right to*

- The *ne bis in idem* principle only operates in relation to a final judgment of conviction, dismissal or acquittal. This means that the principle does not apply if a higher court quashes a conviction and orders a retrial or when a criminal trial, for exceptional reasons (such as newly discovered evidence), resumes<sup>922</sup>.
- The judicial decision must be handed down by a competent, independent and impartial tribunal and be the result of a process that has fully observed the inherent judicial guarantees of due process<sup>923</sup>.
- The court decision handed down must be the result of legal proceedings conducted with due diligence and in good faith, in compliance with the obligation to investigate, prosecute and punish the perpetrators of enforced disappearance and/or extrajudicial execution.

Thus, the principles of *ne bis in idem* or legitimately valid *res judicata* cannot be invoked in cases of judgments and judicial decisions resulting from procedures that have not met international standards of fair trial and due process or those handed down by courts that do not meet the requirements of independence, impartiality and/or competence. As international jurisprudence has reiterated, in these cases the reopening of the proceedings and the holding of a new trial may be ordered without violating the principles of *ne bis in idem* or *res judicata*<sup>924</sup>.

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*equality before courts and tribunals and to a fair trial*, para. 57; Views of 2 November 1987, Communication No. 204/1986, *A.P. v. Italy*, para. 7 (3); and Views of 28 July 1997, Communication No. 692/1996, *A.R.J. v. Australia*, para. 6 (4). See also: International Law Commission, *Report of the International Law Commission on the work of its 48th Session - 6 May -26 July 1996*, United Nations General Assembly Document, (Supplement No. 10), A/51/10, Article 12, p. 36 et seq.

<sup>922</sup> United Nations Human Rights Committee, *General Comment No. 32*, Doc. Cit., para. 56. See also Views of 26 March 1992, Communication No. 277/1988, *Terán Jijón v. Ecuador*, para. 5.4.

<sup>923</sup> See, among others: Human Rights Committee, Views of 6 November 1997, Communication No. 577/1994, *Polay Campos v. Peru*; Inter-American Court of Human Rights, Judgment of 30 May 1999, *Case of Castillo Petruzzi and others v. Peru*, Series C No. 52 and Judgment of 11 May 2007, *Case of the the Rochela Massacre v. Colombia*, Series C No. 163; and Inter-American Commission on Human Rights, Report No. 15/87, 30 June 1987, Case No. 9635 (Argentina).

<sup>924</sup> See, *inter alia*: Human Rights Committee: Views of 6 November 1997, Communication No. 577/1994, *Polay Campos v. Peru*; Views of 28 October 1981, Communication No. 63/1979, *Raúl Sendic Antonaccio v. Uruguay*; Inter-American Court of Human Rights, Judgment of 30 May 1999, *Case of Castillo Petruzzi and others v. Peru*, Series C No. 52, Judgment of 17 September 1997, *Case of Loayza Tamayo Vs. Peru*, Series C No. 33, and Judgment of 25 November 2004, *Case of Lori Berenson*



“Material justice requires exceptions to the principle of *non bis in idem* in the context of the State's duty to investigate, prosecute and punish human rights violations. [...] The right of individuals to protection against subsequent proceedings initiated by the State must be considered along with the requirement that violators of international law of human rights are brought to justice.”

National Criminal Chamber of Peru<sup>925</sup>

In proceedings against alleged perpetrators of enforced disappearance and/or extrajudicial execution, *res judicata* of a judgment and the *ne bis in idem* principle cannot be invoked if the legal proceedings did not constitute a genuine attempt to bring those responsible to justice or if they were intended shield the accused from responsibility for their crimes (“fraudulent *res judicata*”).<sup>926</sup> In this regard, the *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* states that “States should adopt and enforce safeguards against any abuse of rules such as those pertaining to prescription, amnesty, right to asylum, refusal to extradite, *non bis in idem*...”<sup>927</sup> and that: “[t]he fact that an individual has previously been tried in connection with a serious crime under international law shall not prevent his or her prosecution with respect to the same conduct if the purpose of the previous proceedings was to shield the person concerned from criminal responsibility, or if those proceedings otherwise were not conducted independently or impartially in accordance with the norms of due process recognized by international law and were conducted in a manner that, in the circumstances, was inconsistent with an intent to bring the person concerned to justice”<sup>928</sup>. Likewise, in the field of international

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*Mejía v. Peru*, Series C No. 119; and Inter-American Commission on Human Rights, Report No. 15/87 30 June 1987, Case of 9635 (Argentina).

<sup>925</sup> Judgment of 30 November 2005, Exp. Incidente No. 17-05-D, *Double jeopardy principle, Case of Carlos Alberto Tello Aliaga and others / Crimes v. body and health-Aggravated homicide – Homicide / Agraviado Niberto Duran Ugarte and others*, Legal Basis No. 3, p. 5.

<sup>926</sup> See, *inter alia*, Inter-American Court of Human Rights: Judgment of 29 November 2006, Case of *La Cantuta v Peru*, Series C No. 162, Judgment of 24 November 2004, Case of *Carpio Nicolle and others v Guatemala*, Series C No. 117; Judgment of 26 September 2006, Case of *Almonacid Arellano and others v Chile*, Series C No. 154; and Judgment of 12 September 2005, Case of *Gutiérrez Soler v Colombia*, Series C No. 132. See also, Inter-American Commission on Human Rights, Report No. 36/96 of 15 October 1996, Case 10.843, *Héctor Marcial Garay Herмосilla and others (Chile)*.

<sup>927</sup> Principle 22, “Nature of restrictive measures”.

<sup>928</sup> Principle 26 (b).

criminal jurisdictions, neither the *ne bis in idem* principle nor the principle of *res judicata* can legitimately be invoked when the perpetrator of a serious international crime (crime against humanity, war crimes or genocide) has not been duly tried or punished for the same crime, the proceedings were not conducted independently and impartially or the trial was intended to exonerate the individual from international criminal responsibility<sup>929</sup>.

The Inter-American Court of Human Rights has affirmed that *res judicata* cannot be held to be valid if the court decision resulted from proceedings that had not been carried out in good faith and with due diligence in compliance with the obligation to investigate, prosecute and punish the perpetrators of enforced disappearances, extrajudicial executions and other serious violations of human rights.<sup>930</sup> Likewise, the Inter-American Commission on Human Rights has concluded that a dismissal decision issued by a national court under an amnesty law, which is incompatible with States' international obligations and which violates the right to an effective remedy for the victims, is not valid and cannot be invoked to evade or exempt States from the good faith compliance with the international obligation to prosecute and punish the perpetrators of serious violations of human rights<sup>931</sup>.

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<sup>929</sup> Report of the International Law Commission on the work of its 48th session - 6 May to 26 July 1996, Doc. Cit., Article 12 and Commentary, p. 36 et seq.; Statute of the International Criminal Tribunal for the former Yugoslavia (art. 10); Statute of the International Criminal Tribunal for Rwanda (art. 9); Statute of the Special Court for Sierra Leone (art. 9); Statute of the Special Tribunal for Lebanon. (art. 5); and Rome Statute of the International Criminal Court (art. 20).

<sup>930</sup> See, *inter alia*: Judgment of 14 March 2001, *Case of Barrios Altos v. Peru*, Series C No. 75, paras. 41-44; Judgment of 3 September 2001, *Case of Barrios Altos (Interpretation of the Judgment)*, Series C No. 83, para. 15; Judgment of 27 February 2002, *Trujillo Oroza v. Bolivia*, Series C No. 92, para. 106; Judgment of 29 August 2002, *Case of del Caracazo v Venezuela*, Series C No. 95, para. 119; Judgment of 29 November 2006, *La Cantuta v. Peru*, Series C No. 162, para. 152; Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 182; Judgment of 24 November 2010, *Case of Gomes Lund and others ("guerrilha do Araguaia") v. Brazil*, Series C No. 219, para. 171; and Judgment of 29 November 2009, *Case of the the Dos Erres Massacre v. Guatemala*, Series C No. 211, para. 129.

<sup>931</sup> Report No. 36/96, Case No. 10.843 (Chile), 15 October 1996; Report No. 34/96, Cases 11.228, 11.229, 11.231 and 11.282 (Chile), 15 October 1996, Para. 105; Report No. 25/98, Cases 11.505, 11.532, 11.541, 11.546, 11.549, 11.569, 11.572, 11.573, 11.583, 11.585, 11.595, 11.652, 11.657, 11.675 and 11.705 (Chile), 7 April 1998; Report No. 36/96 15 October 1996, Case No. 10.843, *Héctor Marcial Garay Hermosilla and others (Chile)*, para. 106 et seq., Report No. 133/99, Case No. 11.725, *Carmelo Soria Espinoza (Chile)*, 19 November 1999.

"Specifically, in relation to the concept of double jeopardy, the Court has recently held that the *non bis in idem* principle is not applicable when the proceeding in which the case has been dismissed or the author of a violation of human rights has been acquitted, in violation of international law, has the effect of discharging the accused from criminal liability, or when the proceeding has not been conducted independently or impartially pursuant to the due process of law. A judgment issued in the circumstances described above only provides "fictitious" or "fraudulent" grounds for double jeopardy."

Inter-American Court of Human Rights<sup>932</sup>

High courts in Peru<sup>933</sup>, Argentina<sup>934</sup> and Colombia<sup>935</sup> have reiterated the restrictive scope of the *ne bis in idem* principle and the principle of *res judicata*. Thus, in Peru, the National Criminal Chamber has affirmed that "International Law recognizes an exception to the principle of *non bis in idem* when justice has been administered illegitimately. The principle of double jeopardy is not absolute in international law. For the judgment to have the effect of *res judicata*, the decision must be legitimate. In general, there are three types of trials that are considered as illegitimate, thus allowing a second process: a) trials that were not impartial or independent; b) trials designed to shield the accused from international criminal responsibility; c) trials that were not conducted diligently. Such 'Sham trials' are an exception to the *non bis in idem* principle and are in line with the doctrine of bad faith."<sup>936</sup>

### **e. Proportionality of penalties and derisory sanctions**

In accordance with international law, in punishing those responsible for crimes of enforced disappearance and/or extrajudicial execution States must comply with two fundamental principles that constitute

<sup>932</sup> Judgment of 29 November 2006, *La Cantuta v. Peru*, Series C, No. 162, para. 153.

<sup>933</sup> See, *inter alia*: Constitutional Tribunal, Judgment of 15 November 2007, File No. 03938- 2007-PA/TC, *Constitutional Action, Request for defense filed by Julio Rolando Salazar Monroe*; and Judgment of 2 March 2007, File No. 679-2005-PA/TC – Lima, *Santiago Enrique Martin Rivas*.

<sup>934</sup> See, *inter alia*: Supreme Court of Justice, Judgment of 21 August 2003, *Videla, Jorge Rafael, Revision of double jeopardy principle and lack of jurisdiction. 21/08/2003— Rulings: 326:2805*; and Resolution of 14 June 2005, *Case of Simón, Julio Héctor and others false imprisonment, etc.*, Trial no. 17.768

<sup>935</sup> See, *inter alia*: Constitutional Court, Judgment C-004/03 of 20 January 2003, file D-4041, *Lawsuit of unconstitutionality against Article 220 numeral 3 partial of Law 600 2000 or the Criminal Procedure Code*.

<sup>936</sup> Judgment of 30 November 2005, Exp. Incident No. 17-05-D, *Double jeopardy principle, Case of Carlos Alberto Tello Aliaga and others / Crimes against the body and health -Aggravated homicide – Homicide / Aggravated Nlberto Duran Ugarte and others*, Legal Basis, p. 7.

part of such obligations: bans on certain types of punishment and the principle of proportionality of penalties.

With regard to the first principle, International Law absolutely prohibits the imposition of cruel, inhuman or degrading punishments<sup>937</sup>. The imposition of corporal punishment and prison sentences in prison conditions that violate international standards on conditions of the deprivation of liberty are absolutely prohibited<sup>938</sup>. Likewise, International Law absolutely prohibits penalties that transcend the convicted person<sup>939</sup>, as well as collective punishment<sup>940</sup>. Therefore, no judicial authority may impose a sentence of this nature, however serious the offense for which a person has been convicted may be<sup>941</sup>.

International Law imposes the obligation to punish with sentences that are appropriate and proportionate to the gravity of the acts committed by those convicted of enforced disappearance and/or extrajudicial execution<sup>942</sup>. Treaties and international instruments do not establish the details of sentences for crimes of enforced

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<sup>937</sup> See, *inter alia*: *International Covenant on Civil and Political Rights* (Art. 7); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; *American Convention on Human Rights* (arts. 5); and *Inter-American Convention to Prevent and Punish Torture*.

<sup>938</sup> Human Rights Committee *General Comment No. 20; Concluding Observations of the Human Rights Committee on: Iraq*, CCPR/C/79/Add.84, 19 November 1997 Para. 12; *Libya*, CCPR/C/LBY/CO/4/, Para. 16; *Trinidad and Tobago*, CCPR/CO/70/TTO, November 2000, Para. 13; and *Yemen*, CCPR/CO/84/YEM of 9 August 2005, Para. 16; Decision, 6 November 1997, Communication No. 577/1994, *Polay Campos VS. Peru*, par. 8.4 et seq., and Decision, 28 October 2005, Communication No. 1126/2002, *Marlem Carranza Alegre v. Peru*, par. 7.4); Committee against Torture (*Conclusions and recommendations of the Committee against Torture: Saudi Arabia*, CAT/C/CR/28/5 12 June 2002, par. 4 (b) and 8 (b); and "Summary of the results of the investigation in relation to Peru" (Article 20 of the Convention), A/56/44, par. 183 and 184); Inter-American Court of Human Rights, (Judgment, 25 November 2005, Case of *García Asto and Ramírez Rojas v. Peru*, Series C No.137, par. 221 et seq., and Judgment, 11 March 2005, Case of *Caesar v. Trinidad and Tobago*, Series C No. 123, par. 60 and ss).

<sup>939</sup> Article 5 (3) of the *American Convention on Human Rights*.

<sup>940</sup> Human Rights Committee: *General Comment No. 29*, Doc. Cit., para. 11; Views of 26 March 1986, Communication No. 138/1983, *Ngalula Mpandanjila and others v. Zaire*, para. 8.2; *Concluding Observations of the Human Rights Committee: Libya*, CCPR/C/LBY/CO/4, para. 20. See, also, Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, Doc. Cit., para. 227.

<sup>941</sup> Human Rights Committee, *General Comment No. 20*, Doc. Cit., paras. 2 and 3.

<sup>942</sup> *International Convention for the Protection of All Persons from Enforced Disappearance* (Art. 7); *Inter-American Convention on Forced Disappearance of Persons* (Art. III); *Declaration on the Protection of All Persons from Enforced Disappearance* (Art. 4.1); and *Principles on the Effective Prevention and Investigation of Extrajudicial, Arbitrary and Summary Executions* (Principle 1).

disappearance and extrajudicial execution. Fixing the *quantum* of punishment is left to national legislation. Notwithstanding, States do not have absolute freedom in setting penalties in their respective criminal offenses and the courts cannot ignore the aggravating circumstances in each specific case. Indeed, this principle requires that the penalties provided for in the regulations applied by the courts are not arbitrary or disproportionate to the seriousness of the crimes that are punished. Certainly, the principle of proportionality must be assessed in the light of the seriousness of the offense and the penalties imposed by law for crimes of comparable gravity.

“Impunity arises from a failure by States to meet their obligations [...] to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished”

*Updated Set of principles for the protection and promotion of human rights through action to combat impunity*<sup>943</sup>

The imposition of derisory penalties, in contempt of the principle of the proportionality of punishment, is a recognized form of *de facto* impunity under international law. This principle is widely recognised in international criminal law and is strictly regulated by the statutes of international criminal tribunals<sup>944</sup>. The statutes of these courts permit the disregard of a (domestic) court ruling which resulted from a process intended to obtain impunity through the imposition of derisory punishments. In this regard, the International Law Commission stated that it does not recognize the validity of the application of the *non bis idem* principle when the proceedings were aimed at obtaining impunity, by imposing penalties that are not proportional to the seriousness of the crime and, therefore, the International Community is not obliged to recognize decisions that are the result of a serious violation of the principles of criminal justice.<sup>945</sup>

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<sup>943</sup> Principle 1.

<sup>944</sup> See, *inter alia*: Article 12 of the *Draft Code of Crimes against the Peace and Security of Mankind* (1996); *Statute of the International Tribunal for the Former Yugoslavia* (Art. 10(2)); *Statute of the International Criminal Tribunal for Rwanda* (Art. 9(2)); and *Rome Statute of the International Criminal Court* (Art. 20(3)).

<sup>945</sup> *Report of the International Law Commission on the work of its 48<sup>o</sup> session - 6 May to 26 July 1996*, Doc. Cit., Comment on Article 12 of the Draft Code, p. 71-75; and *Report of the International Law Commission on the work of its 46 session - 2 May to 22 July 1994*, supplementary document no. 10 (A/49/10), p. 86.

International protection bodies have considered that the imposition of derisory penalties, which bear no proportion to the seriousness of the crimes, is a form of *de facto* impunity and a breach of the obligation to punish serious violations of human rights with appropriate penalties.<sup>946</sup> Even in processes of transitional justice, international human rights bodies have considered that States must respect and guarantee the principle of proportionality of penalties<sup>947</sup>.

The Committee on Enforced Disappearance has commented that the ICPEP imposes the obligation to define and punish the crime of enforced disappearance “by appropriate penalties which take into account its extreme seriousness”<sup>948</sup>. Thus, the Committee has stated that:

- The laws governing the imposition of fines as a stand-alone penalty for the crime of forced disappearance as an alternative to imprisonment should be modified to eliminate a fine as a stand-alone penalty<sup>949</sup>.
- Legislation and courts should bear in mind the extreme gravity of the crime of enforced disappearance in order to determine the minimum amount of the penalty.<sup>950</sup>
- The margin between the minimum and maximum penalties provided by the definition of the criminal offense should not be too large, and the amount of the minimum sentence should take into account the extreme gravity of the crime of enforced disappearance<sup>951</sup>.

The principle of the proportionality of punishment may be tempered by causes for mitigation of punishment or for the later reduction of sentences imposed. Generally, crimes against humanity, genocide, war crimes and serious violations of international human rights law

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<sup>946</sup> Committee against Torture, Decision of 17 May 2005, *Kepa Urra Guridi v Spain*, Communication No. 212/2002, UN Doc. CAT/C/34/D/212/2002, para. 6,7

<sup>947</sup> See, *inter alia*: *Concluding Observations of the Human Rights Committee: Colombia*, CCPR/C/79/Add.76, 5 May 1997, para. 32; and *Concluding Observations of the Committee against Torture: Colombia*, CAT/C/COL/CO/4, 19 November 2009, para. 13.

<sup>948</sup> *Concluding Observations on: Germany*, CED/C/DEU/CO/1, 10 April 2014, para. 8; *Spain*, CED/C/ESP/CO/1, 12 December 2013, para. 10; *Belgium*, CED/C/BEL/CO/1, 24 September 2014, para. 12; and *France*, CED/C/FRA/CO/1, 8 May 2013, para. 37.

<sup>949</sup> *Concluding Observations on The Netherlands*, CED/C/NLD/CO/1, 10 April 2014, paras. 16 and 17.

<sup>950</sup> *Ibid.*.

<sup>951</sup> *Concluding Observations on Uruguay*, CED/C/URY/CO/1, 8 May 2013, paras. 11 and 12.

restrict the use of such mitigating factors. These can only be applied if they are acceptable “under general principles of law [...] criteria [that] limit the possible extenuating circumstances”<sup>952</sup>. Given the seriousness of these crimes, typical causes of mitigation under criminal law have been rejected. Since the Nuremberg Tribunal, International Law has retained some causes that justify a mitigation of punishment imposed or which permit a later reduction of an imposed sentence. Under international criminal jurisprudence, these cases are limited to the age and/or personal circumstances of the offender, their degree of involvement in the crime and their state of health<sup>953</sup>.

A particular ground recognized for the mitigation and/or reduction of a sentence is the individual’s effective cooperation with justice, and, in particular, effective cooperation in clearing up the crime<sup>954</sup>. This ground acquires a particular connotation in the case of enforced disappearance and extrajudicial executions and “secret” or clandestine graves: the collaboration of the defendant should also include clarification of the fate and/or whereabouts of the victim. Indeed, the ICPED provides: “[m]itigating circumstances, in particular for persons who, having been implicated in the commission of an enforced disappearance, effectively contribute to bringing the disappeared person forward alive or make it possible to clarify cases of enforced disappearance or to identify the perpetrators of an enforced disappearance”<sup>955</sup>. Likewise, the DED stipulates that “[m]itigating circumstances may be established in national legislation for persons who, having participated in enforced disappearances, are instrumental in bringing the victims forward alive or in providing voluntarily information which would contribute to clarifying cases of enforced disappearance.”<sup>956</sup> These standards

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<sup>952</sup> *Report of the International Law Commission on the work of its 48th Session - 6 May to 26 July 1996*, supplementary document no. 10 (A/51/10), Article 15, p.42

<sup>953</sup> See *Report of the International Law Commission on the work of its 48th session - 6 May to 26 July 1996*, Doc. Cit., Comment on Article 12, p. 36 et seq.; and *Report of the International Law Commission on the work of its 46th session - 2 May to 22 July 1994*, supplementary document no. 10 (A/49/10), Article 15 and Commentary, p. 42 et seq.

<sup>954</sup> See, *inter alia*: *Declaration on the Protection of All Persons from Enforced Disappearance* (Art. 4); *Inter-American Convention on Forced Disappearance of Persons* (Art. III); *International Convention for the Protection of All Persons from Enforced Disappearance* (Art. 7); and *Rome Statute of the International Criminal Court* (Art. 110(4)).

<sup>955</sup> Article 7 (2)(a).

<sup>956</sup> Article 4(2).

are equally applicable in situations of “secret” extrajudicial executions or clandestine graves.

## 6. Extraterritorial jurisdiction and international cooperation

In order to repress crimes such as enforced disappearance and extrajudicial execution, International Law imposes certain obligations on States.

“In view of the nature and seriousness of the events, all the more since the context of this case is one of systematic violation of human rights, the need to eradicate impunity reveals itself to the international community as a duty of cooperation among states for such purpose. Access to justice constitutes a peremptory norm of International Law and, as such, it gives rise to the States’ *erga omnes* obligation to adopt all such measures as are necessary to prevent such violations from going unpunished, whether exercising their judicial power to apply their domestic law and International Law to judge and eventually punish those responsible for such events, or collaborating with other States aiming in that direction.”

Inter-American Court of Human Rights<sup>957</sup>

Firstly, the State in whose territory the alleged perpetrator of one of these crimes is found, has an obligation to try or extradite (*aut dedere aut judicare*), regardless of the nationality of the alleged perpetrator and of the victim as well as the place where the crime was committed.<sup>958</sup> Thus, a third country can and must exercise its criminal jurisdiction extraterritorially with respect to a foreign person accused of a crime of enforced disappearance and/or extrajudicial execution committed in another country against a foreign victim, if it does not extradite the accused. In that case, the intended result under International Law for extradition in political crimes, in other words the rule of non-extradition for political offenses, is not applicable. Thus, the ICPED<sup>959</sup> and the IACFDP<sup>960</sup> specify that, for the purposes of extradition, enforced disappearance cannot be considered a political offense, an offense connected with

<sup>957</sup> Judgment of 29 November 2006, *La Cantuta v. Peru*, Series C, No. 162, para. 160.

<sup>958</sup> See, *inter alia*: *International Convention for the Protection of All Persons from Enforced Disappearance* (Arts. 9 and 11); *Inter-American Convention on Forced Disappearance of Persons* (Art. IV); *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions* (Principle 18); *Principles of international cooperation in the detection, arrest, extradition and punishment of those guilty of war crimes or crimes against humanity*; and Inter-American Commission on Human Rights, Resolution No. 1/03 *on Trial for International Crimes*, 24 October 2003.

<sup>959</sup> Article 13.

<sup>960</sup> Article V.



a political offense or an offense inspired by political motives.

In this regard, the Inter-American Court of Human Rights has stated that “extradition is an important instrument to this end. The Court therefore deems it pertinent to declare that the States Parties to the Convention should collaborate with each other to eliminate the impunity of the violations committed in this case, by the prosecution and, if applicable, the punishment of those responsible. Furthermore, [...], a State cannot grant direct or indirect protection to those accused of crimes against human rights by the undue application of legal mechanisms that jeopardize the pertinent international obligations. Consequently, the mechanisms of collective guarantee established in the American Convention, together with the regional and universal international obligations on this issue, bind the States of the region to collaborate in good faith in this respect, either by conceding extradition or prosecuting those responsible for the facts [...]”<sup>961</sup>

Secondly, States are required to cooperate with each other in the repression of these crimes. The Human Rights Committee underlined that States parties should also assist each other to bring to justice persons suspected of having committed acts in violation of the Covenant that are punishable under domestic or international law.<sup>962</sup> For its part, the ICPED requires that “States Parties shall afford one another the greatest measure of mutual legal assistance in connection with criminal proceedings brought in respect of an offence of enforced disappearance, including the supply of all evidence at their disposal that is necessary for the proceedings.”<sup>963</sup>

Interstate cooperation must also be in place to ensure that “States Parties shall cooperate with each other and shall afford one another the greatest measure of mutual assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of death, in exhuming and identifying them and returning their remains.”<sup>964</sup> Likewise, as is reiterated in the ICPED<sup>965</sup>, the DED<sup>966</sup> and the

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<sup>961</sup> Judgment of 22 September 2006, *Case of Goiburú et al. v. Paraguay*, Series C No. 153, para. 132.

<sup>962</sup> *General Comment No. 31*, Doc. Cit., para. 18.

<sup>963</sup> Article 14 (1).

<sup>964</sup> Article 15 of the *International Convention for the Protection of All Persons from Enforced Disappearance*.

<sup>965</sup> Article 25 (3).

<sup>966</sup> Article 20.

IACFDP<sup>967</sup>, States must provide mutual assistance in the searching for, identifying and locating the children born during the captivity of their mothers who were forcibly disappeared.

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<sup>967</sup> Article XII.

## CHAPTER VI: THE ROLE OF FORENSIC SCIENCES

“Forensic investigations in human rights cases should guarantee independence and autonomy, even more so when the State and its agents are involved in such violations. Comparative experience shows that this has been achieved thanks to the support of civil society, the international community and the quality of the professionals involved as their expertise and experience will be the guarantee of good investigations.”

The Ombudsman of Peru<sup>968</sup>

### 1. INTRODUCTION

Since the 1970s, it has become increasingly evident that forensic science, and, forensic anthropology, in particular, must be used to clarify cases of enforced disappearances and extrajudicial executions, locate and identify the victims, and have scientific protocols for investigating these crimes. Until then, the role of forensic science in investigations into serious violations of human rights was an issue that had been rarely addressed by the international community. Notwithstanding, the need to scientifically investigate enforced disappearances and extrajudicial executions and provide effective answers on what happened to the victims has led to a gradual change to this approach.

The practice of enforced disappearance in Latin America has played an important role in this process. Thus, in Argentina, the Working Group on Enforced or Involuntary Disappearances<sup>969</sup> (WGEID) and the Inter-American Commission on Human Rights<sup>970</sup> recorded the existence of mass graves where many corpses were buried under the name of ‘NN’ “without any explanation for the lack of identification”<sup>971</sup> between 1976 and 1979. According to the Argentinean authorities the bodies were “men and women killed in confrontations with government forces”<sup>972</sup>. Often, the victims were

<sup>968</sup> Defensoría del Pueblo (Peruvian Ombudsman) and The Peruvian Forensic Anthropology Team-Epaf, *Manual para la investigación eficaz ante el hallazgo de fosas con restos humanos en el Peru*, Lima, 2002 (original in Spanish, free translation).

<sup>969</sup> See, *inter alia*, *Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/1983/14, 21 January 1983, para. 29.

<sup>970</sup> *Report on the Situation of Human Rights in Argentina*, OAS/Ser.L/V/II.49, Doc. 19, 11 April 1980, Chapter II “The Right to Life”, “D. The NN: Unidentified dead.”

<sup>971</sup> *Ibid.*

<sup>972</sup> *Ibid.*

buried late at night in mass graves by the Army, which did not permit the intervention of the cemetery officials. Likewise, the Commission found that while death certificates were issued, there were substantial deficiencies in the autopsies. The Commission reported on similar situations in other countries in the region<sup>973</sup>.

In the case of disappeared persons in Guatemala, the Inter-American Commission recorded that in 1981 “[a]s a rule, when the bodies are discovered, they appear brutally disfigured, nude and without documents or signs of identification. In many instances they have been burned, thrown into the ocean or into de mouths or craters of volcanoes. Also, as it has been possible to ascertain in a large number of cases, especially when dealing with members of Indian or rural communities, whose populations have been decimated quite frequently, their bodies have been found already decomposed and rotting, buried together in large common graves”<sup>974</sup>. Likewise, the Commission reported the existence of “what are called ‘secret cemeteries’, also called by the people “body dumps.” Their purpose, as that of the “common graves” found in some areas of the interior, has been to hide the bodies of missing persons shot en masse, without running any risk, in extrajudicial executions perpetrated in several agricultural areas and Indian communities and, by means of the body's decomposition or rotting, to make identification of the victims impossible.”<sup>975</sup>

“Assassins often conceal their crimes by making their victims 'disappear'. As a result, bodies of the victims are usually discovered months or years later, buried in shallow, unmarked graves. Disposal in this manner often complicates identification of the body and determination of the cause of death and manner of death. In some cases, the natural decomposition of the body's soft tissue erases evidence of trauma, such as bruising, stab wounds or gunpowder burns. In other cases, the perpetrators deliberately mutilate the person, either before or after death, in an attempt to thwart identification or to intimidate others.”

*Manual on the Effective Prevention and Investigation of Extra-legal, arbitrary and summary executions*

<sup>973</sup> See, for example, *Report on the Situation of Human Rights in Chile*, OAS/Ser.L/V/II.77.rev.1, Doc. 18, of 8 May 1990, Chapter III “The Right to life”; and the *Report on the Situation of Human Rights in the Republic of Bolivia*, OAS/Ser.L/V/II.53, doc. 6 rev.v2, 13 October 1981, Chapter II “The Right to life”.

<sup>974</sup> *Report on the Situation of Human Rights in the Republic of Guatemala*, OAS/Ser.L/V/II.53, Doc. 21 Revs. 2, 13 October 1981, Chapter II “The Right to life”, “E. Missing Persons”, para. 5.

<sup>975</sup> *Ibid.*, “F. Secret Cemeteries”, para. 1.

The commissions on enforced disappearances established in El Salvador (1979)<sup>976</sup> and Bolivia (1982)<sup>977</sup> also brought to attention immense deficiencies in investigations as well as the need for scientific methods and protocols. Thus, in the case of Bolivia, the WGEID pointed out the shortcomings of the Commission in the face of an absence of professionals and forensic research methods and recommended the formation of teams of forensic experts<sup>978</sup>.

The establishment of the National Commission on the Disappearance of Persons in Argentina (the *Comisión Nacional sobre la Desaparición de Personas*, or CONADEP- its initials in Spanish)<sup>979</sup>, charged with investigating cases of people who disappeared during the military dictatorship (1976-1983), marked a turning point. At the request of the CONADEP and the *Grandmothers of the Plaza de Mayo*, the Science, Human Rights and Law Program of the American Association for the Advancement of Science (AAAS) sent a delegation of forensic experts in 1984. The delegation found "several hundred exhumed, unidentified skeletons stored in plastic bags in dusty storerooms at several medical legal institutes. Many bags held the bones of more than one individual. The delegation called for an immediate halt to exhumations."<sup>980</sup> Under the direction of one member of the delegation, the forensic anthropologist Clyde Snow, an expert group was established to provide scientific advice on the work of exhumation and analysis of skeletal remains. Likewise, with the assistance of Dr. Snow, the Argentine Forensic Anthropology Team (EAAF, its initials in Spanish) was established in 1984. Later, Forensic Anthropology Teams (FAT) were founded in Peru, Guatemala, Colombia and Uruguay, and a vast international network of forensic anthropologists was established. The EAAF activities and other FATs spread to other countries in the region as well as those of other continents. Likewise, the expertise of the FATs would prove fundamental to international criminal tribunals.

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<sup>976</sup> *Special commission to investigate the issue of the disappearances and political prisoners*, established by Decree No. 9, 6 November 1979, in response to a recommendation by the Inter-American Commission on Human Rights.

<sup>977</sup> *National Investigative Committee on Disappeared Citizens*, established by Supreme Decree No. 19241 of 28 October 1982.

<sup>978</sup> *Report of the Working Group on Enforced or Involuntary Disappearances*, E/CN.4/1985/15, 25 January 1985, paras. 62 and 64.

<sup>979</sup> Established by Decree No. 187 of 15 December 1983.

<sup>980</sup> The Argentine Forensic Anthropology Team, "The History of EAAF", [http://eaaf.typepad.com/founding\\_of\\_eaaf/](http://eaaf.typepad.com/founding_of_eaaf/)

“The emergence of the FAT [Forensic Anthropology Teams] aims to increase knowledge, skills and the use of appropriate tools and to prevent unprofessional or in other words, unscientific methods exhumations. For example use of mechanical shovels can damage or destroy evidence, the intervention of police experts or those from the judicial system, are elements that interfere with the possibility of making findings or gathering evidence, and even promote conflicts of interest of the staff involved.”

Silvia Dutrénit Bielous<sup>981</sup>

In this context, international human rights bodies, NGOs and independent experts pointed out the need to adopt international standards and scientific protocols for the investigation of extrajudicial executions and enforced disappearances. Thus, since early 1979, Amnesty International has called for the adoption of standards for scientific research on extrajudicial, summary and arbitrary executions. In 1980, the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities emphasized the need for suitable methods for the search for missing persons or those unaccounted for<sup>982</sup>. Likewise, and since its creation in 1980, the WGEID noted the absence in most countries of scientific methods and protocols for the investigation of enforced disappearances and the identification of victims<sup>983</sup>. Meanwhile, since its first report in 1983, the Special Rapporteur on extrajudicial, summary or arbitrary executions highlighted the need to adopt basic standards of investigation in these cases of serious violations of human rights<sup>984</sup>.

These calls resulted in the development of several international norms and standards. The first instrument to address the issue was the *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, recommended by the Economic and Social Council of the United Nations in 1989.<sup>985</sup> Later, with the participation of several forensic experts, the *Manual on the*

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<sup>981</sup> “Los equipos de antropología forense en América Latina: coadyuvantes en el camino de la verdad y la justicia”, in *Democracia and Derechos Humanos*, Year 2- No. 3, April 3003, Ed. Centro Internacional de Estudios Políticos – Universidad Nacional de San Martín, Buenos Aires, p. 30 (Original in Spanish, free translation).

<sup>982</sup> Resolution 18 (XXXIII), “Question of human rights of the persons subjected to any form of detention or imprisonment”, 11 September 1980.

<sup>983</sup> See Reports of the WGEID: E/CN.4/1435, 22 January 1981; E/CN.4/1492, 31 December 1981; E/CN.4/1983/14, 21 January 1983; and E/CN.4/1984/21, 9 December 1983.

<sup>984</sup> UN Doc. E/CN.4/1983/16, 31 January 1983, para. 230 (4).

<sup>985</sup> Resolution No. 1989/65 of 24 May 1989.

*Effective Prevention and Investigation of Extra-legal, arbitrary and summary executions* was developed. The role of forensic science in the search for the missing persons and in the judicial repression of the crime of forced disappearance was reflected in the *International Convention for the Protection of All Persons from Enforced Disappearance*<sup>986</sup>, in 2006. Thus, forensic science has been progressively recognized by the international community as a powerful tool to clarify cases of both enforced disappearances and extrajudicial executions in order to comply with the rights to truth, justice and reparation for the families of the victims of these crimes.

“The need to know the truth, to achieve justice and reparation for victims (understood not only as those who have been killed or disappeared but also their families and relatives who have been directly affected by the violence) as well as for society in general, implies the search for scientific tools that provide methods leading to the discovery of the elements [that are necessary] for reparations. One such tool is Forensic Anthropology which, through the application of social and physical anthropology as well as archeology, provides elements to understand, clarify and redress violence where the main source[s] of information are the occasional skeletal remains of the victims of violent actions.”

Diego Casallas and Juliana Padilla<sup>987</sup>

## 2. GENERAL CONSIDERATIONS

Today, there is no doubt that forensic science plays a fundamental role in the activities of searching for, locating and identifying victims of enforced disappearance and “secret” executions and/or “secret burials” as well as in clarifying and investigating the crimes, and in criminal proceedings.

The Office of the High Commissioner for Human Rights has noted that “[f]orensic science is concerned with establishing facts, obtained through scientific means, which will be introduced as part of a criminal investigation as evidence in court, most commonly for the purpose of prosecuting crimes. It is also used, inter alia, to identify missing persons as a result of human rights violations or from multiple fatalities resulting from natural disasters. Forensic science is, therefore, one of the enabling tools to ensure the full

<sup>986</sup> Article 19.

<sup>987</sup> Casallas, Diego A. and Juliana Padilla Piedrahita, “Antropología forense in el conflicto armado in el contexto latinoamericano. Estudio comparativo Argentina, Guatemala, Peru and Colombia”, in *Revista Maguaré*, No. 18, Universidad Nacional de Colombia, 2004 (original in Spanish, free translation).

implementation of the rule of law, and as such it needs to conform to the rule of law itself.”<sup>988</sup> Likewise, the High Commissioner has highlighted that relying more on forensic and other scientific evidence will help lessen reliance on confessions or other forms of evidence that is more readily manipulated or even created by abusive police practices or corruption.<sup>989</sup>

The former UN Commission on Human Rights highlighted that “forensic investigations can play an important role in combating impunity by providing the evidentiary basis on which prosecutions can successfully be brought against persons responsible for grave violations of human rights and international humanitarian law”<sup>990</sup>.

The UN Special Rapporteur on torture has stated that “[f]orensic specialists provide expert analysis of whether there is a correlation between the medical evidence and the allegations and can provide the evidentiary basis on which prosecutions can successfully be brought against those directly responsible and their superiors. Medical records can be instrumental in overcoming the otherwise lack of objective evidence with which survivors of torture are so commonly confronted, given that torture mostly takes place without witnesses. The work of a forensic scientist is germane to the efforts to address impunity for acts of torture, as the expert opinion forms the evidential basis for prosecution of allegations of torture.”<sup>991</sup>

Forensic science encompasses medicine, genetics, forensic anthropology and archaeology as well as “other disciplines and technologies and methods, such as ballistics, graphology, [and] crime scene investigations, among others”<sup>992</sup>.

In relation to enforced disappearances and extrajudicial executions several international instruments and standards have clear requirements for investigation and forensic evidence; these include:

- The *International Convention for the Protection of All Persons from Enforced Disappearance*<sup>993</sup>;

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<sup>988</sup> *Report of the Office of the United Nations High Commissioner for Human Rights on the right to the truth and on forensic genetics and human rights*, A/HRC/15/26, 24 August 2010, para. 2.

<sup>989</sup> *Rule-of-law tools for post-conflict States, Prosecution initiatives*, HR/PUB/06/4, New York/Geneva, 2006.

<sup>990</sup> Resolution No. 2005/26 of 19 April 2005.

<sup>991</sup> *Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN Doc. A/69/387, 23 September 2014, para. 19.

<sup>992</sup> *Ibid.*, para. 20.

<sup>993</sup> Article 19.



- The *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions*<sup>994</sup> ("Principles on Executions");
- The *Manual on the Effective Prevention and Investigation of Extra-legal, arbitrary and summary executions* (the "Minnesota Protocol"); and,
- The *International consensus on principles and minimum standards in search processes and forensic investigations in cases of enforced disappearances, arbitrary or extrajudicial executions* ("International consensus").

"Forensic investigation is defined as the technical and multidisciplinary process for analyzing and identifying bodies or remains of victims of enforced disappearance and arbitrary or extrajudicial executions as scientific evidence for the identification and recognition of the circumstances related to their death. This process includes contact with the victims and their families, collection of ante mortem information, archaeological excavation and recuperation of findings, analysis of the bodies and/or remains found, identification of the same, preparation of the forensic report, and delivery to the victims and families. The objectives of forensic investigation in cases of serious violations of IHRL and IHL will be to establish the identity of the victims, the cause and the most likely form of death."

*International consensus on principles and minimum standards in search processes and forensic investigations in cases of enforced disappearances, arbitrary or extrajudicial executions*

In addition to the above and given that the victims of enforced disappearance and/or extrajudicial executions are also often victims of torture, ill-treatment and sexual violence, the following international standards are also relevant:

- The *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishments*,
- The *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* ("Istanbul Protocol"),
- The *International Protocol on the documentation and investigation of sexual violence in conflict* ("Commonwealth Protocol").

The fundamental role of these norms and standards, particularly the

<sup>994</sup> Principles 9, 12, 13, 14, 16 and 17.

Minnesota and Istanbul Protocols as well as the *International consensus on principles and minimum standards in search processes and forensic investigations in cases of enforced disappearances, arbitrary or extrajudicial executions*, and forensic science in general has been highlighted by the UN General Assembly<sup>995</sup>, the former UN Commission on Human Rights<sup>996</sup> the UN Human Rights Council<sup>997</sup> as well as the General Assembly of the OAS<sup>998</sup>.

International bodies and procedures for protection of human rights have indicated that States should scrupulously observe the rules and procedures relating to forensic science set out in these standards in the course of their work to search, investigate and prosecute. This was emphasized, among others by the Inter-American Court of Human Rights<sup>999</sup>, the Inter-American Commission on Human Rights<sup>1000</sup>, the Special Rapporteur on Executions<sup>1001</sup>, the Committee against Torture<sup>1002</sup>, the Subcommittee on the Prevention of Torture<sup>1003</sup> and the Special

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<sup>995</sup> See, for example, UN General Assembly Resolutions 61/155 of 19 December 2006 and 68/165 of 18 December 2013.

<sup>996</sup> See, for example, UN Commission on Human Rights Resolutions 1993/33 of 5 March 1993, 1994/31 of 4 March 1994, 1996/31 of 19 April 1996, 1998/36 of 17 April 1998, 2000/32 of 20 April 2000, 2003/33 of 23 April 2003, and 2005/26 of 19 April 2005.

<sup>997</sup> See, for example, UN Human Rights Council Resolutions Nos. 10/26 of 27 March 2009, and 15/5 of 29 September 2010.

<sup>998</sup> OAS General Assembly Resolution No. AG/RES. 2717 (XLII-O/12) of 4 June 12 and Resolution No. AG/RES. 2794 (XLIII-O/13) of 5 June 2013.

<sup>999</sup> See *inter alia*: Judgment of 22 September 2009, *Case of Anzaldo Castro v. Peru*, Series C No. 202; Judgment of 6 April 2006, *Case of Baldeón García v. Peru*, Series C No. 147; Judgment of 23 September 2009, *Case of Garibaldi v. Brazil*, Series C No. 203, Para. 155; Judgment of 31 August 2010, *Case of Rosendo Cantú and Others v. Mexico*, Series C No. 216; Judgment of 7 June 2003, *Case of Juan Humberto Sánchez v. Honduras*, Series C No. 99; Judgment of 31 January 2006, *Case of the Pueblo Bello Massacre v. Colombia*, Series C No. 140; Judgment of 1 March 2005, *Case of Serrano Cruz Sisters v. El Salvador*, Series C No. 120; Judgment of 3 July 2004, *Molina Theissen v. Guatemala*, Series C No. 108; Judgment of 12 September 2005, *Case of Gutiérrez Soler v. Colombia*, Series C No. 132; Judgment of 16 November 2009, *Case of González and Others ("Cotton Field") v. Mexico*, Series C No. 205; and Judgment of 14 November 2014, *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice v. Colombia)*, Series C No. 287.

<sup>1000</sup> Report No. 55/97 of 18 November 1997, Case No. 11.137, *Juan Carlos Abella and others (Argentina)*, Para. 413.

<sup>1001</sup> UN Docs. E/CN.4/1991/36, para. 591 and E/CN.4/1990/22, para. 463.

<sup>1002</sup> *General Comment No. 3: Implementation of article 14 by States parties*, Doc. Cit., para. 25.

<sup>1003</sup> *Report on the visit of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to Honduras*, CAT/OP/HND/1, 10 February 2010, para. 95.

Rapporteur on Torture<sup>1004</sup>. In this regard, for example, the Special Rapporteur on Executions and the Inter-American Court have pointed out that the failure or lack of observance of the Principles on Executions during activities related to identifying the victims, performing autopsies, burial and others, may well, in certain circumstances, constitute forms of participation in extrajudicial execution by way of concealment.

### **3. EXPERTS: INDEPENDENCE AND IMPARTIALITY**

International norms and standards emphasize that forensic services and/or experts “must be able to function impartially and independently of any potentially implicated persons or organizations or entities”.<sup>1005</sup> This arises from the State's obligation to ensure investigations “by independent and impartial bodies”<sup>1006</sup> (See Chapter IV: Investigation).

In that regard, the Special Rapporteur on Torture has recommended that “the forensic medical services should be under judicial or another independent authority, not under the same governmental authority as the police and the penitentiary system.”<sup>1007</sup>

Relatives of victims of enforced disappearance and/or extrajudicial execution have the right to have the facts effectively investigated.<sup>1008</sup> This right includes, among others, both to present

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<sup>1004</sup> *Interim Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/69/387, 23 September 2014, paras. 18 et seq.; *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/62/221, 13 August 2007, para. 47.

<sup>1005</sup> *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions* (Principle 14); *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Principle 2); *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; and *International consensus on principles and minimum standards in search processes and forensic investigations in cases of enforced disappearances, arbitrary or extrajudicial executions* (Standards 15 and 16 and Recommendations for good practices No. 16.10).

<sup>1006</sup> Human Rights Committee, *General Comment No. 31 (...)*, Doc. Cit., para. 15.

<sup>1007</sup> *Report of the Special Rapporteur on the Question of Torture submitted in accordance with Commission resolution 2002/38*, E/CN.4/2003/68, 7 December 2002, para. 26. K).

<sup>1008</sup> *International Convention for the Protection of All Persons from Enforced Disappearance* (Art. 24(2)); *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions* (Principle 16); *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Principle 4); *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian law* (Arts. 11(c) and 12); and

evidence and expert reports as well as to demand expert opinions on the evidence of forensic experts. For example, the families of the victims have the right to present evidence and have their own doctor or other qualified representative be present at the autopsy<sup>1009</sup>. In this regard that the Inter-American Court of Human Rights has stated that family members must have full access to and capacity to act at all stages and levels of investigation and present their own evidence<sup>1010</sup>.

"The lack of independence and impartiality of many forensic medical services and health professionals is a key obstacle to combating impunity for perpetrators and ensuring reparations to victims. Health professionals tasked with the medico-legal evaluation of alleged victims of torture, with investigations into deaths in custody and with providing forensic evidence in criminal proceedings must enjoy organizational, institutional and functional independence from the police, judiciary, military and prison services. The law and practice must ensure that they act in full impartiality."

*Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment*<sup>1011</sup>

The possibility for forensic experts, appointed by the families of the victims, to participate in the proceedings is of the greatest importance. In that vein, the International Consensus has recommended as good practice that "[i]n the event that the family has appointed legal representatives, psychosocial and forensic experts, their participation shall be guaranteed in all the

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*Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime* (Art. 20).

<sup>1009</sup> *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions* (Principle 16); *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Principle 4); *Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*; and *International consensus on principles and minimum standards in search processes and forensic investigations in cases of enforced disappearances, arbitrary or extrajudicial executions* (Standards 3 and Recommendations for good practices No. 3(4)).

<sup>1010</sup> See, *inter alia*: Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202, para. 118; Judgment of 4 July 2006, *Case of Ximenes Lopes v. Brazil*, Series C No. 149, para. 193; Judgment of 1 July 2006, *Case of the Ituango Massacres v. Colombia*, Series C No. 148, Para. 296; Judgment of 7 June 2003, *Case of Juan Humberto Sánchez v. Honduras*, Series C No. 99, para. 186; and Judgment of 29 August 2002, *Case of the Caracazo v. Venezuela (Reparation)*, Series C No. 95, para. 118.

<sup>1011</sup> *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/69/387, 23 September 2014, para. 62.

investigations into the whereabouts of their loved ones"<sup>1012</sup>.

"Efforts must be made to promote and facilitate the active participation of relatives in the processes of search for the victims of enforced disappearance, extrajudicial and arbitrary executions and in the forensic investigations, favoring the existence of spaces where individuals can organize and reaffirm themselves, as well as to take well informed decisions in view of the technical and legal processes that affect their rights to justice, memory and comprehensive reparation."

*International consensus on principles and minimum standards in search processes and forensic investigations in cases of enforced disappearances, arbitrary or extrajudicial executions*<sup>1013</sup>

In this regard, the Special Rapporteur on Torture has stated that "[p]rosecutors and courts should not be limited to evaluating reports from officially accredited experts, irrespective of their institutional affiliation..." and that "[c]ourts should neither rule out non-State experts nor award State expert testimony more weight based solely on their 'official' status."<sup>1014</sup> Likewise, the Special Rapporteur has stated that: "[p]ublic forensic medical services should not have a monopoly with regard to expert forensic evidence for judicial purposes"<sup>1015</sup>; States should ensure that independent forensic reports of non-governmental organizations or medical professionals may be accepted as proof in criminal proceedings<sup>1016</sup>; and that non-State experts are entitled to review the state tests and to conduct their own independent evaluations<sup>1017</sup>.

The role of non-governmental organizations in the field of forensic science is very important.<sup>1018</sup> Therefore, intergovernmental bodies have recommended that States enhance cooperation and coordination with non-governmental organizations in the planning

<sup>1012</sup> *Recommendations for good practices* No. 3(4).

<sup>1013</sup> Standard 3.

<sup>1014</sup> *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/69/387, 23 September 2014, para. 53.

<sup>1015</sup> *Report of the Special Rapporteur on the question of torture submitted in accordance with Commission resolution 2002/38*, E/CN.4/2003/68, 7 December 2002, para. 26,K.

<sup>1016</sup> *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/69/387, 23 September 2014, para. 53.

<sup>1017</sup> *Ibid.*

<sup>1018</sup> See, *inter alia*, former UN Commission on Human Rights, Resolution No. 2005/26, "Human rights and forensic science", of 19 April 2005.

and conduct of investigations.<sup>1019</sup>

#### 4. EXHUMATIONS, AUTOPSIES AND ANALYSIS OF SKELETAL REMAINS

The *Minnesota Protocol*, which includes protocols for investigation, autopsy, exhumation and analysis of skeletal remains (see Annex No. 5), provides a basic framework that States must observe in the investigation of extrajudicial or arbitrary executions, “deaths from ‘forced disappearances’”<sup>1020</sup> as well as “all violent, sudden, unexpected or suspicious deaths”<sup>1021</sup>.

“[T]he effective establishment of the truth in the context of the obligation to investigate a possible death must be apparent in the meticulous nature of the initial measures taken [...] during the processing of the crime scene and of the corpses of the victims, basic essential procedures should be performed in order to conserve the evidence and any indications that may contribute to the success of the investigation such as the removal of the corpse and the autopsy [...] due diligence in the investigation of a death requires preserving the chain of custody of every element of forensic evidence.”

Inter-American Court of Human Rights<sup>1022</sup>

In this regard, the Inter-American Court of Human Rights has stated that States must observe the *Minnesota Protocol* and that “rigorous autopsies and analyses of human remains [must] be performed by competent professionals, using the best available procedures”.<sup>1023</sup>

The requirements set out by the *Minnesota Protocol* are oriented toward: identifying the victim; determining the cause, manner, location and time of death, as well as any pattern or practice that may have caused it; distinguishing between natural death, accidental death, suicide and homicide; and recovering and preserving evidence related to the death for use in any potential prosecution of those responsible. The *Minnesota Protocol* establishes

<sup>1019</sup> See, *inter alia*: Human Rights Council, Resolution No. 10/26, “Forensic genetics and human rights”, of 27 March 2009.

<sup>1020</sup> *Manual on the Prevention and Effective Investigation of extralegal, arbitrary or summary execution*, p. 1.

<sup>1021</sup> *Ibid.*, p. 17

<sup>1022</sup> Judgment of 14 November 2014, *Case of Rodríguez Vera et al. (The Disappeared from the Palace of Justice) v. Colombia*, Series C No. 287, para. 489.

<sup>1023</sup> Judgment of 6 April 2006, *Case of Baldeón García v. Peru*, Series C No. 147, para. 96. In the same regard, see: *Case of the Pueblo Bello Massacre v. Colombia*, Doc. Cit., para. 177; *Case of the “Massacre of Mapiripán” v. Colombia*, Doc. Cit., para. 224; and Judgment of 15 June 2005, *Case of the Moiwana Community v. Suriname*, Series C No. 124, para. 149.

clear standards for these purposes in the areas of:

- Securing and registration (written and photographic) of where the body of the victim is found or his bones as well as adjoining areas;
- Management, documentary record (written and photographic) and preservation of the body, autopsy with the involvement of officials and forensic experts and scientific and technical means;
- Management, documentary record (written and photographic), examination and conservation of human remains, with the involvement of officials and forensic experts and scientific and technical means;
- Undertaking of exhumation procedures and handling, the management and digging of graves which must be handled with the involvement of officials and forensic experts and scientific and technical means;
- Collection, recovery, labeling and preservation of all physical evidence, both in terms of location and contiguous zone of the body and/or bones; and,
- Identification of potential witnesses and all persons present in the area.

"[Regarding forensic issues] the main enemy is time, in any situation of enforced disappearance or any other type of case the ideal is to investigate [...] immediately after the fact, [...] time makes things deteriorate, time leads to a series of phenomena that can alter evidence at its most basic level until that evidence really is not that useful, bones can be altered, taxonomically by water, soil acidity, or whatever"

José Pablo Baraybar Do Carmo<sup>1024</sup>

The *Minnesota Protocol* establishes the steps to be followed during autopsies, the documentation process, internal and external reviews, the methods and means to be used, as well as the role of forensic pathologists. Those conducting the autopsy must have access to all data and information from the investigation, to the places where the body was discovered and where the death is believed to have occurred<sup>1025</sup>.

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<sup>1024</sup> Expert-Witness in the public hearing held before the Inter-American Court of Human Rights, 2 April 2009, in the *Case of Anzualdo Castro v. Peru* (Judgment of 22 September 2009, *Case of Anzualdo Castro v. Peru*, Series C No. 202).

<sup>1025</sup> Principle 12 of the *Principles on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions*.

When it comes to exhumations and analysis of bones, the *Minnesota Protocol* establishes the steps and procedures that should be followed in forensic anthropology. These are not merely limited to an analysis of the skeletal remains. As “decomposition is a continuous process”; various forensic specialists may be involved and an “anthropologist may examine a fresh body when bone is exposed or when bone trauma is a factor. [...] The degree of decomposition of the body will dictate the type of investigation and, therefore, the protocol(s) to be followed.”<sup>1026</sup> Likewise, the *Minnesota Protocol* establishes the steps, procedures, and methods for excavations and the role of forensic archaeologists.

“The Ante Mortem Fact Sheet is a basic instrument of the forensic intervention. It consists of a set of specific questions about the missing persons which can establish through individual memory, the biological and social profile of the victims of enforced disappearance. The Ante Mortem Fact Sheet is a testimonial to those people, be they family members or not, who knew or last saw the disappeared person (abduction / arbitrary detention, etc.) while being a snapshot of the victim’s life. [...] The Ante Mortem Fact Sheet serves to facilitate the identification of the individual. It is necessary to compare the information contained therein with the results of the exhumation and postmortem (autopsy) examination of the recovered bones. This comparison serves to establish the identity of the victim.”

The Peruvian Forensic Anthropology Team<sup>1027</sup>

A central element in the process is the identification of the victim’s *ante mortem* information. This information consists of all personal, physical, clinical data and dental records of the missing and/or executed person. This information must be contained in an “ante mortem record”. This information is of particular relevance in the process of identification based on the analysis of skeletal remains. As noted by the Peruvian Forensic Anthropology Team, “ante mortem data are essential for the identification of victims through forensic anthropology. [...] It is not possible to identify a victim

<sup>1026</sup> *Manual on the Effective Prevention and Investigation of Extralegal, Arbitrary and Summary Executions*, Introduction to Section V Model Protocol for Disinterment and Analysis of Skeletal Remains.

<sup>1027</sup> “La Ficha Antemortem: guía de aplicación”, in Defensoría del Pueblo (Ombudsman of Peru) and The Peruvian Forensic Anthropology Team-Epaf, *Manual para la investigación eficaz ante el hallazgo de fosas con restos humanos en el Perú*, Lima, 2002 (Original in Spanish, free translation).



without them.”<sup>1028</sup>

All procedures and activities used must be documented and recorded and incorporated into the final report, which must contain the results of the findings, evidence, conclusions, causes of death and recommendations. Likewise, it must include any evidence of torture and/or sexual violence.

“During the process of searching for disappeared persons or victims of arbitrary or extrajudicial executions, and forensic investigations, the relatives should be constantly informed in a clear and precise manner favoring decision-making about future actions. The right to information includes (a) access to knowledge about the process of searching for disappeared or executed persons, the forensic investigation, its actions, implications, consequences and rights, in particular, aspects of integral reparation and rights; this is particularly relevant in terms of comprehensive reparation and the right to justice; (b) progress made, limitations and relevant technical and legal elements; (c) access to the findings to elucidate responsibilities, the conduct of the perpetrators towards the victims and the causes to commit the crimes as well as the the circumstances of the disappearance or extrajudicial or arbitrary execution.”

*International consensus on principles and minimum standards in search processes and forensic investigations in cases of enforced disappearances, arbitrary or extrajudicial executions*<sup>1029</sup>

Relatives of the victims have a right to be kept informed in a prior and timely manner with clear and precise information on forensic procedures; to be immediately notified when the victim has been identified; and to have access to the final report. Likewise, family members have the right to challenge the procedures performed and the final report, and to obtain that new or additional measures be carried out, such as an autopsy or analysis of the skeletal remains. Likewise, family members are entitled to present other evidence; to have their own doctor, forensic expert or qualified representative be present at the autopsy; as well as to attend exhumations and excavation of graves. In this regard, the WGEID has stated that the “State, or any other authority, should not undertake the process of identification of the remains, and should not dispose of those

<sup>1028</sup> *Desaparición Forzada en el Perú – El aporte de la investigación antropológica forense en la obtención of the evidencia probatoria y la construcción de un paraguas humanitario*, Ed. EPAF, p. 38 (Original in Spanish, free translation).

<sup>1029</sup> Standard 8.

remains, without the full participation of the family and without fully informing the general public of such measures”<sup>1030</sup>.

The body or the skeletal remains of the victim identified should be returned to their families after completion of the investigation. The Inter-American Court of Human Rights has stated that while the body of the victim must be handed over to their families, this must be done “on condition that they cannot be cremated and may be exhumed for new autopsies”<sup>1031</sup>.

In cases where remains have not been identified, the authorities should take appropriate measures to preserve the corpses or human remains as well as all collected material evidence. Under no circumstance may the body of the deceased person be cremated.

## 5. FORENSIC GENETICS

The fundamental role played by forensic genetics in relation to enforced disappearance, extrajudicial execution and other serious violations of human rights has been highlighted by the UN General Assembly,<sup>1032</sup> the UN Human Rights Council<sup>1033</sup> as well as by the OAS General Assembly<sup>1034</sup>.

“The past two decades have shown the clear limits of trying to identify the remains of victims of human rights violations or missing persons from internal conflicts or wars, using only background, medical and dental ante-mortem records. In this sense, forensic genetics have a crucial role to play, drastically increasing the possibility of identifying many more remains and thus providing solace to families of victims and evidence to ongoing and/or future prosecutions.”

Office of the High Commissioner for Human Rights<sup>1035</sup>

In this regard, the Human Rights Council noted that “forensic genetics, when applied in an independent manner and subject to

<sup>1030</sup> *General Comment on the right to the truth in relation to enforced disappearances*, para. 6, in *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc. A/HRC/16/48, 26 January 2011.

<sup>1031</sup> Judgment of 16 November 2009, *Case of González and Others (“Cotton Field”) v. Mexico*, Series C No. 205, para. 305.

<sup>1032</sup> See, *inter alia*: Resolution No. 67/177, “Missing Persons”, of 20 December 2012.

<sup>1033</sup> Resolutions Nos. 10/26 of 27 March 2009 and 15/5 of 29 September 2010.

<sup>1034</sup> Resolutions Nos. AG/RES. 2717 (XLII-O/12) of 4 June 2012 and AG/RES. 2794 (XLIII-O/13) 5 June 2013.

<sup>1035</sup> *Report of the Office of the United Nations High Commissioner for Human Rights on the right to the truth and on forensic genetics and human rights*, A/HRC/15/26, 24 August 2010, para. 31.

international standards, may effectively contribute to the identification of the remains of victims, to the restitution of identity to those persons illegally taken away and to address[ing] the issue of impunity".<sup>1036</sup> The Office of the High Commissioner for Human Rights has emphasized that "the use of forensic experts, and in particular the use of forensic genetics and the voluntary creation of genetic databanks, have a crucial role to play in identifying victims of serious violations of human rights and international humanitarian law"<sup>1037</sup>.

"To exhort member states, in order to allow family members to exercise their right to learn the fate and whereabouts of relatives who have disappeared in situations of armed conflict or armed violence, [...] to adopt effective measures in the context of a broad and comprehensive investigation for the location, recovery, identification, and return of human remains, using standardized forensic protocols and promoting the establishment of centralized databases, while respecting the families' dignity, traditions, and mental health."

General Assembly of the Organization of American States<sup>1038</sup>

The WGEID, the Committee on Enforced Disappearances and the Office of the High Commissioner for Human Rights have recommended that States establish genetic databanks. Meanwhile, in the light of the obligations under article 2 of the American Convention on Human Rights, the Inter-American Court of Human Rights has stated that States should take all necessary measures to create systems that gather genetic information and preserve it, so that it can be used for the identification of disappeared persons and determining and clarifying the parentage of and identification of disappeared children<sup>1039</sup>. Thus, the Court has ordered Guatemala, El Salvador and Mexico to create such genetic information systems. Likewise, the Court has indicated that in establishing these systems, the State must adopt measures to ensure the conservation of the samples, the protection of personal data contained in those databases, and to ensure that such personal information is used

<sup>1036</sup> Resolution No. 10/26, "Forensic genetics and human rights", of 27 March 2009.

<sup>1037</sup> *Report of the Office of the United Nations High Commissioner for Human Rights on the right to the truth and on forensic genetics and human rights*, A/HRC/15/26, 24 August 2010, para. 63.

<sup>1038</sup> Resolution No. AG/RES. 2794 (XLIII-O/13) 5 June 2013, operative para. 7.

<sup>1039</sup> Judgment of 3 July 2004, *Molina Theissen v. Guatemala* (Reparations), Series C No. 108, para. 91; Judgment of 1 March 2005, Case of the *Serrano Cruz Sisters v. El Salvador*, Series C No. 120, paras. 192 and 193; and Judgment of 16 November 2009, Case of *González and Others ("Cotton Field") v. Mexico*, Series C No. 205, para. 512.

only for the purpose of identifying and locating the disappeared person.

The Committee on Enforced Disappearances recommended that a State Party to the ICPED “should also step up its efforts to ensure that the national DNA bank holds genetic samples for all cases that have been reported whether through administrative or judicial channels.”<sup>1040</sup>

With respect to missing children or those taken during the captivity of their missing parents “States should create a bank of genetic data or adapt a similar institution to take DNA and blood samples and to store the genetic information of the families of disappeared children and conduct appropriate DNA tests when necessary to determine the true identity of a child or to identify their remains or the remains of their family members.”<sup>1041</sup> Likewise, the WGEID made the following recommendations with respect to the operation of such genetic databases:

- The genetic data bank should “coordinate with the body responsible for the search process, taking referrals from them for conducting DNA and blood tests of possible child victims of enforced disappearances”;<sup>1042</sup>
- “Taking into account the particular importance of not presuming the child victim dead, genetic databases must maintain and store genetic information for a disappeared child for a time greater than or equal to the average lifespan of a person in that country”;<sup>1043</sup>
- “The actual testing process should utilize the least invasive methods possible in order to minimize intrusions to privacy, taking gender and age into consideration”;<sup>1044</sup>
- Guidelines for DNA testing should be established, and must include the guarantees provided by the ICPED<sup>1045</sup>, in other words, that “[p]ersonal information, including medical and genetic data, which is collected and/or transmitted within the framework of the search for a disappeared person shall not be

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<sup>1040</sup> *Concluding Observations on Spain*, CED/C/ESP/CO/1, 12 December 2013, para. 35.

<sup>1041</sup> *General Comment on children and enforced disappearances adopted by the Working Group on Enforced or Involuntary Disappearances at its ninety-eighth session (31 October – 9 November 2012)*, A/HRC/WGEID/98/1, 14 February 2013, Para. 26.

<sup>1042</sup> *Ibid.*, para. 27.

<sup>1043</sup> *Ibid.*, para. 27.

<sup>1044</sup> *Ibid.*, para. 28.

<sup>1045</sup> *Ibid.*, para. 28.

used or made available for purposes other than the search for the disappeared person”<sup>1046</sup>.

The Office of the High Commissioner for Human Rights has stated that “[t]he more complete the databank of relatives of victims, the greater the chance of identifying remains that are found and are thought to correspond to a victim of a human rights violation or a missing person from a conflict”<sup>1047</sup>. Likewise, the High Commissioner has underlined that the creation of a databank “will also enable identifications in the future, as more grave sites are discovered, whether or not information from all relatives is available. Having the support of associations of relatives of disappeared and missing people is also crucial.”<sup>1048</sup> The High Commissioner has stated that the following conditions and basic requirements in relation to databanks of genetic material:

- A clear legal framework must be established with provisions about “goals, restrictions in use, expectations, consent, confidentiality, and procedures to be used”<sup>1049</sup>.
- Databanks should “have a board, on which sit not only officials and forensic scientists, but also representatives of associations of relatives of disappeared or missing people. This is critical to guarantee that their concerns are accounted for and to avoid political manipulation or other deviations from the founding principles of the databank”<sup>1050</sup>.
- “The donation of samples should be voluntary and forms explaining the project, its limitations, the restrictions in use of the samples, and confidentiality of the donor, among other clauses, should be provided to donors before their donation of a sample.”<sup>1051</sup>
- “Databanks should set up standard operating procedures for the collection of samples, and in particular:
  - “a) Control and assessment mechanisms when collecting samples from the target population. [...]
  - “b) Controls so that blood or saliva is correctly taken, with no contamination involved.

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<sup>1046</sup> Article 19.

<sup>1047</sup> *Report of the Office of the United Nations High Commissioner for Human Rights on the right to the truth and on forensic genetics and human rights*, A/HRC/15/26, 24 August 2010, para. 33.

<sup>1048</sup> *Ibid.*, para. 34.

<sup>1049</sup> *Ibid.*, para. 35.

<sup>1050</sup> *Ibid.*, para. 37.

<sup>1051</sup> *Ibid.*, para. 36.

- "c) Use of codes or bar codes to protect confidentiality of the victims.  
 "d) Controls for storage and transport that ensure the chain of custody."<sup>1052</sup>

"Confidentiality is essential and possible by using bar codes to identify the samples of both relatives and victims. Only the donors of the samples, the board of directors of the databank and the designated official and/or judicial bodies should have access to this information."

Office of the High Commissioner for Human Rights<sup>1053</sup>

However, the effectiveness of forensic genetics as a scientific tool to identify the remains of victims is subject to several conditions: the existence of ante mortem information; the existence of DNA samples from relatives of the alleged victim; and the genetic analysis techniques that are used. Thus, as noted by the Peruvian Forensic Anthropology Team, "not even DNA analysis can be used without *ante mortem* information as identification by this method is based on comparing the DNA of the remains of the victim with that of their alleged relatives, which means that information on the identity of the alleged victim and his family ties is required. The use of DNA is recommended only as an element of identification, and can be completely useless in cases where entire families have been wiped out or all the victims are closely related."<sup>1054</sup>

In that context, the Office of the High Commissioner for Human Rights has stressed that the "identification process needs a multidisciplinary approach, which starts with the proper recovery and documentation of the remains, and the associated evidence, and their anthropological analysis. Background information on each case and the correct collection of family samples is also crucial. Geneticists work in constant collaboration and exchange of information with anthropologists, archaeologists, and investigators, producing one final multidisciplinary identification report."<sup>1055</sup>

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<sup>1052</sup> *Ibid.*

<sup>1053</sup> *Ibid.*, para. 38.

<sup>1054</sup> *Desaparición forzada en el Perú – El aporte de la investigación antropológica forense en la obtención of the evidencia probatoria y la construcción de un paraguas humanitario*, Ed. EPAF, p. 48 (Original in Spanish, free translation).

<sup>1055</sup> *Report of the Office of the United Nations High Commissioner for Human Rights on the right to the truth and on forensic genetics and human rights*, A/HRC/15/26, 24 August 2010, para. 41.

## 6. CHAIN OF CUSTODY AND FORENSIC EVIDENCE

The evidence and expert evidence must be valid and legally produced in accordance with the parameters established in the national legislation of each country and international norms and standards. The evidence may be illegal if it was obtained or compiled by authorities who were not authorized to do so by national legislation or international standards; or if evidence is obtained by methods which do not meet the requirements set out by national law or by international norms and standards; or if the chain of custody has not been guaranteed.

“The chain of custody can extend beyond the trial, sentencing and conviction of the accused; given that old evidence, duly preserved, could help exonerate someone who has been convicted erroneously.”  
Inter-American Court of Human Rights<sup>1056</sup>

The chain of custody is one of the most important aspects in the field of forensic evidence. Not only because it is one of the most important aspects of the conditions of legality and validity of the evidence, but also because it is central to the integrity of the investigation and the possibility of conducting criminal proceedings, avoiding “the contamination or deliberate destruction” of evidence. In fact, the chain of custody is intended to ensure the incorruptibility of the evidence and that it is not destroyed or altered during the investigation and that, therefore, it can be presented in judicial proceedings or otherwise. In this regard, the *International consensus on principles and minimum standards in search processes and forensic investigations in cases of enforced disappearances, arbitrary or extrajudicial executions* stipulates that proper respect for the chain of custody of the bodies must exist in order to ensure their character as forensic evidence with legal value.<sup>1057</sup>

In terms of forensic and medico-legal evidence, the *Minnesota Protocol* sets clear standards for the chain of custody and preservation of evidence. The chain of custody is established, as noted by the Constitutional Court of Colombia, as “the set of measures by which the preservation of the existence, authenticity, [and] completeness, of all physical evidence is ensured as well as

<sup>1056</sup> Judgment of 16 November 2009, Case of *González and others* (“Cotton Field”) v. *Mexico*, Series C No. 205, para. 305.

<sup>1057</sup> Recommendations for good practices No. 16.5.

the material evidence discovered or collected with the accreditation of its identity and original state, the circumstances in which it was collected, the people involved in the collection, delivery, handling, analysis and storage of such items as well as changes made to them by each custodian<sup>1058</sup>. Thus, the chain of custody involves establishing protocols for the custody, conservation and preservation of evidence, prescribing procedures and the officials responsible thereof.<sup>1059</sup> In this regard, the Inter-American Court of Human Rights has stated that "due diligence in the legal and medical investigation of a death requires maintaining the chain of custody of each item of forensic evidence. This consists of keeping a precise written record, complemented, as applicable, by photographs and other graphic elements, to document the history of the item of evidence as it passes through the hands of the different investigators responsible for the case."<sup>1060</sup>

The absence or failure of the chain of custody, as noted by the Office of the High Commissioner for Human Rights, can "create serious difficulties for the admissibility of any evidence from a particular site. The need for urgent action should emphasize effective protection of evidential sites or documents for future investigation. Such steps may need to be taken by those who are first on the ground."<sup>1061</sup> Likewise, international standards require that the destruction, alteration, loss or concealment of evidence and circumstantial evidence and collected materials should be subject to sanction.<sup>1062</sup>

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<sup>1058</sup> Judgment C-334/10 of 12 May 2010, Exp. D-7915, *Lawsuit of unconstitutionality against Article 16, Section 1 (partial) of Law 1142 2007 and against Article 245, Section 2, of Law 906 2004 (Criminal Procedure Code)*.

<sup>1059</sup> See, *inter alia*: *Rule-of-law Tools for post-conflict States, Prosecution initiatives*, HR/PUB/06/4, New York/Geneva, 2006, p. 16.

<sup>1060</sup> Judgment of 16 November 2009, Case of *González and others ("Cotton Field") v. Mexico*, Series C No. 205, Para. 305.

<sup>1061</sup> *Rule-of-law Tools for Post-conflict States, Prosecution initiatives*, HR/PUB/06/4, New York/Geneva, 2006, p. 14.

<sup>1062</sup> See, *inter alia*: Articles 12 (4), 22 and 25 (1)(b) of the *International Convention for the Protection of All Persons from Enforced Disappearances*; Article 13 (5) of the *Declaration on the Protection of All Persons from Enforced Disappearance*.



**ANNEX 1:****DECLARATION ON THE PROTECTION OF ALL PERSONS FROM ENFORCED DISAPPEARANCE**

The General Assembly,

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

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

Deeply concerned that in many countries, often in a persistent manner, enforced disappearances occur, in the sense that persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law,

Considering that enforced disappearance undermines the deepest values of any society committed to respect for the rule of law, human rights and fundamental freedoms, and that the systematic practice of such acts is of the nature of a crime against humanity,

Recalling its resolution 33/173 of 20 December 1978, in which it expressed concern about the reports from various parts of the world relating to enforced or involuntary disappearances, as well as about the anguish and sorrow caused by those disappearances, and called upon Governments to hold law enforcement and security forces legally responsible for excesses which might lead to enforced or involuntary disappearances of persons,

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

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

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

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

Affirming that, in order to prevent enforced disappearances, it is necessary to ensure strict compliance with the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment contained in the annex to its resolution 43/173 of 9 December 1988, and with the Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, set forth in the annex to Economic and Social Council resolution 1989/65 of 24 May 1989 and endorsed by the General Assembly in its resolution 44/162 of 15 December 1989,

Bearing in mind that, while the acts which comprise enforced disappearance constitute a violation of the prohibitions found in the aforementioned international instruments, it is none the less important to devise an instrument which characterizes all acts of enforced disappearance of persons as very serious offences and sets forth standards designed to punish and prevent their commission,

1. Proclaims the present Declaration on the Protection of All Persons from Enforced Disappearance, as a body of principles for all States;
2. Urges that all efforts be made so that the Declaration becomes generally known and respected;

#### Article 1

1. Any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter

of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field.

2. Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.

#### Article 2

1. No State shall practise, permit or tolerate enforced disappearances.

2. States shall act at the national and regional levels and in cooperation with the United Nations to contribute by all means to the prevention and eradication of enforced disappearance.

#### Article 3

Each State shall take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in any territory under its jurisdiction.

#### Article 4

1. All acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness.

2. Mitigating circumstances may be established in national legislation for persons who, having participated in enforced disappearances, are instrumental in bringing the victims forward alive or in providing voluntarily information which would contribute to clarifying cases of enforced disappearance.

#### Article 5

In addition to such criminal penalties as are applicable, enforced disappearances render their perpetrators and the State or State authorities which organize, acquiesce in or tolerate such disappearances liable under civil law, without prejudice to the

international responsibility of the State concerned in accordance with the principles of international law.

#### Article 6

1. No order or instruction of any public authority, civilian, military or other, may be invoked to justify an enforced disappearance. Any person receiving such an order or instruction shall have the right and duty not to obey it.
2. Each State shall ensure that orders or instructions directing, authorizing or encouraging any enforced disappearance are prohibited.
3. Training of law enforcement officials shall emphasize the provisions in paragraphs 1 and 2 of the present article.

#### Article 7

No circumstances whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency, may be invoked to justify enforced disappearances.

#### Article 8

1. No State shall expel, return (refouler) or extradite a person to another State where there are substantial grounds to believe that he would be in danger of enforced disappearance.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

#### Article 9

1. The right to a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of persons deprived of their liberty and/or identifying the authority ordering or carrying out the deprivation of liberty is required to prevent enforced disappearances under all circumstances, including those referred to in article 7 above.
2. In such proceedings, competent national authorities shall have access to all places where persons deprived of their liberty are being held and to each part of those places, as well as to any place in which there are grounds to believe that such persons may be found.

3. Any other competent authority entitled under the law of the State or by any international legal instrument to which the State is a party may also have access to such places.

#### Article 10

1. Any person deprived of liberty shall be held in an officially recognized place of detention and, in conformity with national law, be brought before a judicial authority promptly after detention.

2. Accurate information on the detention of such persons and their place or places of detention, including transfers, shall be made promptly available to their family members, their counsel or to any other persons having a legitimate interest in the information unless a wish to the contrary has been manifested by the persons concerned.

3. An official up-to-date register of all persons deprived of their liberty shall be maintained in every place of detention. Additionally, each State shall take steps to maintain similar centralized registers. The information contained in these registers shall be made available to the persons mentioned in the preceding paragraph, to any judicial or other competent and independent national authority and to any other competent authority entitled under the law of the State concerned or any international legal instrument to which a State concerned is a party, seeking to trace the whereabouts of a detained person.

#### Article 11

All persons deprived of liberty must be released in a manner permitting reliable verification that they have actually been released and, further, have been released in conditions in which their physical integrity and ability fully to exercise their rights are assured.

#### Article 12

1. Each State shall establish rules under its national law indicating those officials authorized to order deprivation of liberty, establishing the conditions under which such orders may be given, and stipulating penalties for officials who, without legal justification, refuse to provide information on any detention.

2. Each State shall likewise ensure strict supervision, including a clear chain of command, of all law enforcement officials responsible for apprehensions, arrests, detentions, custody, transfers and imprisonment, and of other officials authorized by law to use force and firearms.

### Article 13

1. Each State shall ensure that any person having knowledge or a legitimate interest who alleges that a person has been subjected to enforced disappearance has the right to complain to a competent and independent State authority and to have that complaint promptly, thoroughly and impartially investigated by that authority. Whenever there are reasonable grounds to believe that an enforced disappearance has been committed, the State shall promptly refer the matter to that authority for such an investigation, even if there has been no formal complaint. No measure shall be taken to curtail or impede the investigation.

2. Each State shall ensure that the competent authority shall have the necessary powers and resources to conduct the investigation effectively, including powers to compel attendance of witnesses and production of relevant documents and to make immediate on-site visits.

3. Steps shall be taken to ensure that all involved in the investigation, including the complainant, counsel, witnesses and those conducting the investigation, are protected against ill-treatment, intimidation or reprisal.

4. The findings of such an investigation shall be made available upon request to all persons concerned, unless doing so would jeopardize an ongoing criminal investigation.

5. Steps shall be taken to ensure that any ill-treatment, intimidation or reprisal or any other form of interference on the occasion of the lodging of a complaint or during the investigation procedure is appropriately punished.

6. An investigation, in accordance with the procedures described above, should be able to be conducted for as long as the fate of the victim of enforced disappearance remains unclarified.

### Article 14

Any person alleged to have perpetrated an act of enforced disappearance in a particular State shall, when the facts disclosed

by an official investigation so warrant, be brought before the competent civil authorities of that State for the purpose of prosecution and trial unless he has been extradited to another State wishing to exercise jurisdiction in accordance with the relevant international agreements in force. All States should take any lawful and appropriate action available to them to bring to justice all persons presumed responsible for an act of enforced disappearance, who are found to be within their jurisdiction or under their control.

#### Article 15

The fact that there are grounds to believe that a person has participated in acts of an extremely serious nature such as those referred to in article 4, paragraph 1, above, regardless of the motives, shall be taken into account when the competent authorities of the State decide whether or not to grant asylum.

#### Article 16

1. Persons alleged to have committed any of the acts referred to in article 4, paragraph 1, above, shall be suspended from any official duties during the investigation referred to in article 13 above.
2. They shall be tried only by the competent ordinary courts in each State, and not by any other special tribunal, in particular military courts.
3. No privileges, immunities or special exemptions shall be admitted in such trials, without prejudice to the provisions contained in the Vienna Convention on Diplomatic Relations.
4. The persons presumed responsible for such acts shall be guaranteed fair treatment in accordance with the relevant provisions of the Universal Declaration of Human Rights and other relevant international agreements in force at all stages of the investigation and eventual prosecution and trial.

#### Article 17

1. Acts constituting enforced disappearance shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified.
2. When the remedies provided for in article 2 of the International Covenant on Civil and Political Rights are no longer effective, the

statute of limitations relating to acts of enforced disappearance shall be suspended until these remedies are re-established.

3. Statutes of limitations, where they exist, relating to acts of enforced disappearance shall be substantial and commensurate with the extreme seriousness of the offence.

#### Article 18

1. Persons who have or are alleged to have committed offences referred to in article 4, paragraph 1, above, shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction.

2. In the exercise of the right of pardon, the extreme seriousness of acts of enforced disappearance shall be taken into account.

#### Article 19

The victims of acts of enforced disappearance and their family shall obtain redress and shall have the right to adequate compensation, including the means for as complete a rehabilitation as possible. In the event of the death of the victim as a result of an act of enforced disappearance, their dependants shall also be entitled to compensation.

#### Article 20

1. States shall prevent and suppress the abduction of children of parents subjected to enforced disappearance and of children born during their mother's enforced disappearance, and shall devote their efforts to the search for and identification of such children and to the restitution of the children to their families of origin.

2. Considering the need to protect the best interests of children referred to in the preceding paragraph, there shall be an opportunity, in States which recognize a system of adoption, for a review of the adoption of such children and, in particular, for annulment of any adoption which originated in enforced disappearance. Such adoption should, however, continue to be in force if consent is given, at the time of the review, by the child's closest relatives.

3. The abduction of children of parents subjected to enforced disappearance or of children born during their mother's enforced disappearance, and the act of altering or suppressing documents attesting to their true identity, shall constitute an extremely serious offence, which shall be punished as such.



4. For these purposes, States shall, where appropriate, conclude bilateral and multilateral agreements.

Article 21

The provisions of the present Declaration are without prejudice to the provisions enunciated in the Universal Declaration of Human Rights or in any other international instrument, and shall not be construed as restricting or derogating from any of those provisions.

**ANNEX 2:**

**INTERNATIONAL CONVENTION FOR THE PROTECTION OF ALL PERSONS  
FROM ENFORCED DISAPPEARANCE**

(EXCERPTS)

Preamble

*The States Parties to this Convention,*

*Considering* the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and fundamental freedoms,

*Having regard* to the Universal Declaration of Human Rights,

*Recalling* the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the other relevant international instruments in the fields of human rights, humanitarian law and international criminal law,

*Also recalling* the Declaration on the Protection of All Persons from Enforced Disappearance adopted by the General Assembly of the United Nations in its resolution 47/133 of 18 December 1992,

*Aware* of the extreme seriousness of enforced disappearance, which constitutes a crime and, in certain circumstances defined in international law, a crime against humanity,

*Determined* to prevent enforced disappearances and to combat impunity for the crime of enforced disappearance,

*Considering* the right of any person not to be subjected to enforced disappearance, the right of victims to justice and to reparation,

*Affirming* the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end,

*Have agreed* on the following articles:

**PART I**

*Article 1*

1. No one shall be subjected to enforced disappearance.

2. 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.

*Article 2*

For the purposes of this Convention, "enforced disappearance" is considered to be 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.

*Article 3*

Each State Party shall take appropriate measures to investigate acts defined in article 2 committed by persons or groups of persons acting without the authorization, support or acquiescence of the State and to bring those responsible to justice.

*Article 4*

Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law.

*Article 5*

The widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law.

*Article 6*

1. Each State Party shall take the necessary measures to hold criminally responsible at least:
  - (a) Any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance;
  - (b) A superior who:
    - i) Knew, or consciously disregarded information which clearly indicated, that subordinates under his or her effective

authority and control were committing or about to commit a crime of enforced disappearance;

ii) Exercised effective responsibility for and control over activities which were concerned with the crime of enforced disappearance; and

iii) Failed to take all necessary and reasonable measures within his or her power to prevent or repress the commission of an enforced disappearance or to submit the matter to the competent authorities for investigation and prosecution;

(c) Subparagraph (b) above is without prejudice to the higher standards of responsibility applicable under relevant international law to a military commander or to a person effectively acting as a military commander.

2. No order or instruction from any public authority, civilian, military or other, may be invoked to justify an offence of enforced disappearance.

#### *Article 7*

1. Each State Party shall make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness.

2. Each State Party may establish:

(a) Mitigating circumstances, in particular for persons who, having been implicated in the commission of an enforced disappearance, effectively contribute to bringing the disappeared person forward alive or make it possible to clarify cases of enforced disappearance or to identify the perpetrators of an enforced disappearance;

(b) Without prejudice to other criminal procedures, aggravating circumstances, in particular in the event of the death of the disappeared person or the commission of an enforced disappearance in respect of pregnant women, minors, persons with disabilities or other particularly vulnerable persons.

#### *Article 8*

Without prejudice to article 5,

1. A State Party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings:

- (a) Is of long duration and is proportionate to the extreme seriousness of this offence;
- (b) Commences from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature.

2. Each State Party shall guarantee the right of victims of enforced disappearance to an effective remedy during the term of limitation.

*Article 9*

1. Each State Party shall take the necessary measures to establish its competence to exercise jurisdiction over the offence of enforced disappearance:

- (a) When the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
- (b) When the alleged offender is one of its nationals;
- (c) When the disappeared person is one of its nationals and the State Party considers it appropriate.

2. Each State Party shall likewise 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.

3. This Convention does not exclude any additional criminal jurisdiction exercised in accordance with national law.

*Article 10*

1. Upon being satisfied, after an examination of the information available to it, that the circumstances so warrant, any State Party in whose territory a person suspected of having committed an offence of enforced disappearance is present shall take him or her into custody or take such other legal measures as are necessary to ensure his or her presence. The custody and other legal measures shall be as provided for in the law of that State Party but may be maintained only for such time as is necessary to ensure the person's presence at criminal, surrender or extradition proceedings.

2. A State Party which has taken the measures referred to in paragraph 1 of this article shall immediately carry out a preliminary inquiry or investigations to establish the facts. It shall notify the States Parties referred to in article 9, paragraph 1, of the measures

it has taken in pursuance of paragraph 1 of this article, including detention and the circumstances warranting detention, and of the findings of its preliminary inquiry or its investigations, indicating whether it intends to exercise its jurisdiction.

3. Any person in custody pursuant to paragraph 1 of this article may communicate immediately with the nearest appropriate representative of the State of which he or she is a national, or, if he or she is a stateless person, with the representative of the State where he or she usually resides.

#### *Article 11*

1. The State Party in the territory under whose jurisdiction a person alleged to have committed an offence of enforced disappearance is found shall, if it does not extradite that person or surrender him or her to another State in accordance with its international obligations or surrender him or her to an international criminal tribunal whose jurisdiction it has recognized, submit the case to its competent authorities for the purpose of prosecution.

2. These authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State Party. In the cases referred to in article 9, paragraph 2, the standards of evidence required for prosecution and conviction shall in no way be less stringent than those which apply in the cases referred to in article 9, paragraph 1.

3. Any person against whom proceedings are brought in connection with an offence of enforced disappearance shall be guaranteed fair treatment at all stages of the proceedings. Any person tried for an offence of enforced disappearance shall benefit from a fair trial before a competent, independent and impartial court or tribunal established by law.

#### *Article 12*

1. Each State Party shall ensure that any individual who alleges that a person has been subjected to enforced disappearance has the right to report the facts to the competent authorities, which shall examine the allegation promptly and impartially and, where necessary, undertake without delay a thorough and impartial investigation. Appropriate steps shall be taken, where necessary, to ensure that the complainant, witnesses, relatives of the disappeared person and their defence counsel, as well as persons participating in the investigation, are protected against all ill-treatment or

intimidation as a consequence of the complaint or any evidence given.

2. Where there are reasonable grounds for believing that a person has been subjected to enforced disappearance, the authorities referred to in paragraph 1 of this article shall undertake an investigation, even if there has been no formal complaint.

3. Each State Party shall ensure that the authorities referred to in paragraph 1 of this article:

a) Have the necessary powers and resources to conduct the investigation effectively, including access to the documentation and other information relevant to their investigation;

b) Have access, if necessary with the prior authorization of a judicial authority, which shall rule promptly on the matter, to any place of detention or any other place where there are reasonable grounds to believe that the disappeared person may be present.

4. Each State Party shall take the necessary measures to prevent and sanction acts that hinder the conduct of an investigation. It shall ensure in particular 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.

### *Article 13*

1. For the purposes of extradition between States Parties, the offence of enforced disappearance shall not be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives. Accordingly, a request for extradition based on such an offence may not be refused on these grounds alone.

2. The offence of enforced disappearance shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties before the entry into force of this Convention.

3. States Parties undertake to include the offence of enforced disappearance as an extraditable offence in any extradition treaty subsequently to be concluded between them.

4. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention as the necessary legal basis for extradition in respect of the offence of enforced disappearance.

5. States Parties which do not make extradition conditional on the existence of a treaty shall recognize the offence of enforced disappearance as an extraditable offence between themselves.

6. Extradition shall, in all cases, be subject to the conditions provided for by the law of the requested State Party or by applicable extradition treaties, including, in particular, conditions relating to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition or make it subject to certain conditions.

7. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin, political opinions or membership of a particular social group, or that compliance with the request would cause harm to that person for any one of these reasons.

#### *Article 14*

1. States Parties shall afford one another the greatest measure of mutual legal assistance in connection with criminal proceedings brought in respect of an offence of enforced disappearance, including the supply of all evidence at their disposal that is necessary for the proceedings.

2. Such mutual legal assistance shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable treaties on mutual legal assistance, including, in particular, the conditions in relation to the grounds upon which the requested State Party may refuse to grant mutual legal assistance or may make it subject to conditions.

#### *Article 15*

States Parties shall cooperate with each other and shall afford one another the greatest measure of mutual assistance with a view to assisting victims of enforced disappearance, and in searching for, locating and releasing disappeared persons and, in the event of



death, in exhuming and identifying them and returning their remains.

*Article 16*

1. No State Party shall expel, return ("refouler"), surrender or extradite a person to another State where there are substantial grounds for believing that he or she would be in danger of being subjected to enforced disappearance.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations, including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights or of serious violations of international humanitarian law.

*Article 17*

1. No one shall be held in secret detention.
2. Without prejudice to other international obligations of the State Party with regard to the deprivation of liberty, each State Party shall, in its legislation:
  - (a) Establish the conditions under which orders of deprivation of liberty may be given;
  - (b) Indicate those authorities authorized to order the deprivation of liberty;
  - (c) Guarantee that any person deprived of liberty shall be held solely in officially recognized and supervised places of deprivation of liberty;
  - (d) Guarantee that any person deprived of liberty shall be authorized to communicate with and be visited by his or her family, counsel or any other person of his or her choice, subject only to the conditions established by law, or, if he or she is a foreigner, to communicate with his or her consular authorities, in accordance with applicable international law;
  - (e) Guarantee access by the competent and legally authorized authorities and institutions to the places where persons are deprived of liberty, if necessary with prior authorization from a judicial authority;
  - (f) Guarantee that any person deprived of liberty or, in the case of a suspected enforced disappearance, since the person deprived of liberty is not able to exercise this right, any persons with a legitimate interest, such as relatives of the person deprived of

liberty, their representatives or their counsel, shall, in all circumstances, be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of the deprivation of liberty and order the person's release if such deprivation of liberty is not lawful.

3. Each State Party shall assure the compilation and maintenance of one or more up-to-date official registers and/or records of persons deprived of liberty, which shall be made promptly available, upon request, to any judicial or other competent authority or institution authorized for that purpose by the law of the State Party concerned or any relevant international legal instrument to which the State concerned is a party. The information contained therein shall include, as a minimum:

- a) The identity of the person deprived of liberty;
- b) The date, time and place where the person was deprived of liberty and the identity of the authority that deprived the person of liberty;
- c) The authority that ordered the deprivation of liberty and the grounds for the deprivation of liberty;
- d) The authority responsible for supervising the deprivation of liberty;
- e) The place of deprivation of liberty, the date and time of admission to the place of deprivation of liberty and the authority responsible for the place of deprivation of liberty;
- f) Elements relating to the state of health of the person deprived of liberty;
- g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains;
- h) The date and time of release or transfer to another place of detention, the destination and the authority responsible for the transfer.

#### *Article 18*

1. Subject to articles 19 and 20, each State Party shall guarantee to any person with a legitimate interest in this information, such as relatives of the person deprived of liberty, their representatives or their counsel, access to at least the following information:

- a) The authority that ordered the deprivation of liberty;
- b) The date, time and place where the person was deprived of liberty and admitted to the place of deprivation of liberty;

- c) The authority responsible for supervising the deprivation of liberty;
- d) The whereabouts of the person deprived of liberty, including, in the event of a transfer to another place of deprivation of liberty, the destination and the authority responsible for the transfer;
- e) The date, time and place of release;
- f) Elements relating to the state of health of the person deprived of liberty;
- g) In the event of death during the deprivation of liberty, the circumstances and cause of death and the destination of the remains.

2. Appropriate measures shall be taken, where necessary, to protect the persons referred to in paragraph 1 of this article, as well as persons participating in the investigation, from any ill-treatment, intimidation or sanction as a result of the search for information concerning a person deprived of liberty.

#### *Article 19*

1. Personal information, including medical and genetic data, which is collected and/or transmitted within the framework of the search for a disappeared person shall not be used or made available for purposes other than the search for the disappeared person. This is without prejudice to the use of such information in criminal proceedings relating to an offence of enforced disappearance or the exercise of the right to obtain reparation.

2. The collection, processing, use and storage of personal information, including medical and genetic data, shall not infringe or have the effect of infringing the human rights, fundamental freedoms or human dignity of an individual.

#### *Article 20*

1. Only where a person is under the protection of the law and the deprivation of liberty is subject to judicial control may the right to information referred to in article 18 be restricted, on an exceptional basis, where strictly necessary and where provided for by law, and if the transmission of the information would adversely affect the privacy or safety of the person, hinder a criminal investigation, or for other equivalent reasons in accordance with the law, and in conformity with applicable international law and with the objectives of this Convention. In no case shall there be restrictions on the right

to information referred to in article 18 that could constitute conduct defined in article 2 or be in violation of article 17, paragraph 1.

2. Without prejudice to consideration of the lawfulness of the deprivation of a person's liberty, States Parties shall guarantee to the persons referred to in article 18, paragraph 1, the right to a prompt and effective judicial remedy as a means of obtaining without delay the information referred to in article 18, paragraph 1. This right to a remedy may not be suspended or restricted in any circumstances.

#### *Article 21*

Each State Party shall take the necessary measures to ensure that persons deprived of liberty are released in a manner permitting reliable verification that they have actually been released. Each State Party shall also take the necessary measures to assure the physical integrity of such persons and their ability to exercise fully their rights at the time of release, without prejudice to any obligations to which such persons may be subject under national law.

#### *Article 22*

Without prejudice to article 6, each State Party shall take the necessary measures to prevent and impose sanctions for the following conduct:

- a) Delaying or obstructing the remedies referred to in article 17, paragraph 2 (f), and article 20, paragraph 2;
- b) Failure to record the deprivation of liberty of any person, or the recording of any information which the official responsible for the official register knew or should have known to be inaccurate;
- c) Refusal to provide information on the deprivation of liberty of a person, or the provision of inaccurate information, even though the legal requirements for providing such information have been met.

#### *Article 23*

1. Each State Party shall ensure that the training of law enforcement personnel, civil or military, medical personnel, public officials and other persons who may be involved in the custody or treatment of any person deprived of liberty includes the necessary education and information regarding the relevant provisions of this Convention, in order to:

- a) Prevent the involvement of such officials in enforced disappearances;
  - b) Emphasize the importance of prevention and investigations in relation to enforced disappearances;
  - c) Ensure that the urgent need to resolve cases of enforced disappearance is recognized.
2. Each State Party shall ensure that orders or instructions prescribing, authorizing or encouraging enforced disappearance are prohibited. Each State Party shall guarantee that a person who refuses to obey such an order will not be punished.
3. Each State Party shall take the necessary measures to ensure that the persons referred to in paragraph 1 of this article who have reason to believe that an enforced disappearance has occurred or is planned report the matter to their superiors and, where necessary, to the appropriate authorities or bodies vested with powers of review or remedy.

#### *Article 24*

1. For the purposes of this Convention, "victim" means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance.
2. Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard.
3. Each State Party shall take all appropriate measures to search for, locate and release disappeared persons and, in the event of death, to locate, respect and return their remains.
4. Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.
5. The right to obtain reparation referred to in paragraph 4 of this article covers material and moral damages and, where appropriate, other forms of reparation such as:
- a) Restitution;
  - b) Rehabilitation;
  - c) Satisfaction, including restoration of dignity and reputation;
  - d) Guarantees of non-repetition.

6. Without prejudice to the obligation to continue the investigation until the fate of the disappeared person has been clarified, each State Party shall take the appropriate steps with regard to the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, family law and property rights.

7. Each State Party shall guarantee the right to form and participate freely in organizations and associations concerned with attempting to establish the circumstances of enforced disappearances and the fate of disappeared persons, and to assist victims of enforced disappearance.

#### *Article 25*

1. Each State Party shall take the necessary measures to prevent and punish under its criminal law:

a) The wrongful removal of children who are subjected to enforced disappearance, children whose father, mother or legal guardian is subjected to enforced disappearance or children born during the captivity of a mother subjected to enforced disappearance;

b) The falsification, concealment or destruction of documents attesting to the true identity of the children referred to in subparagraph (a) above.

2. Each State Party shall take the necessary measures to search for and identify the children referred to in paragraph 1 (a) of this article and to return them to their families of origin, in accordance with legal procedures and applicable international agreements.

3. States Parties shall assist one another in searching for, identifying and locating the children referred to in paragraph 1 (a) of this article.

4. Given the need to protect the best interests of the children referred to in paragraph 1 (a) of this article and their right to preserve, or to have re-established, their identity, including their nationality, name and family relations as recognized by law, States Parties which recognize a system of adoption or other form of placement of children shall have legal procedures in place to review the adoption or placement procedure, and, where appropriate, to annul any adoption or placement of children that originated in an enforced disappearance.

5. In all cases, and in particular in all matters relating to this article, the best interests of the child shall be a primary consideration, and a child who is capable of forming his or her own views shall have the right to express those views freely, the views of the child being given due weight in accordance with the age and maturity of the child.

[...]

### **PART III**

#### *Article 37*

Nothing in this Convention shall affect any provisions which are more conducive to the protection of all persons from enforced disappearance and which may be contained in:

- (a) The law of a State Party;
- (b) International law in force for that State.

**ANNEX 3:**

**INTER-AMERICAN CONVENTION ON FORCED DISAPPEARANCE OF PERSONS**

(excerpts)

The Member States of the Organization of American States signatory to the present Convention,

DISTURBED by the persistence of the forced disappearance of persons;

REAFFIRMING that the true meaning of American solidarity and good neighborliness can be none other than that of consolidating in this Hemisphere, in the framework of democratic institutions, a system of individual freedom and social justice based on respect for essential human rights;

CONSIDERING that the forced disappearance of persons in an affront to the conscience of the Hemisphere and a grave and abominable offense against the inherent dignity of the human being, and one that contradicts the principles and purposes enshrined in the Charter of the Organization of American States;

CONSIDERING that the forced disappearance of persons of persons violates numerous non-derogable and essential human rights enshrined in the American Convention on Human Rights, in the American Declaration of the Rights and Duties of Man, and in the Universal Declaration of Human Rights;

RECALLING that the international protection of human rights is in the form of a convention reinforcing or complementing the protection provided by domestic law and is based upon the attributes of the human personality;

REAFFIRMING that the systematic practice of the forced disappearance of persons constitutes a crime against humanity;

HOPING that this Convention may help to prevent, punish, and eliminate the forced disappearance of persons in the Hemisphere and make a decisive contribution to the protection of human rights and the rule of law,

RESOLVE to adopt the following Inter-American Convention on Forced Disappearance of Persons:



### Article I

The States Parties to this Convention undertake:

- a) Not to practice, permit, or tolerate the forced disappearance of persons, even in states of emergency or suspension of individual guarantees;
- b) To punish within their jurisdictions, those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories;
- c) To cooperate with one another in helping to prevent, punish, and eliminate the forced disappearance of persons;
- d) To take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in this Convention.

### Article II

For the purposes of this Convention, forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.

### Article III

The States Parties undertake to adopt, in accordance with their constitutional procedures, the legislative measures that may be needed to define the forced disappearance of persons as an offense and to impose an appropriate punishment commensurate with its extreme gravity. This offense shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined.

The States Parties may establish mitigating circumstances for persons who have participated in acts constituting forced disappearance when they help to cause the victim to reappear alive or provide information that sheds light on the forced disappearance of a person.

### Article IV

The acts constituting the forced disappearance of persons shall be considered offenses in every State Party. Consequently, each State Party shall take measures to establish its jurisdiction over such cases in the following instances:

- a. When the forced disappearance of persons or any act constituting such offense was committed within its jurisdiction;
- b. When the accused is a national of that state;
- c. When the victim is a national of that state and that state sees fit to do so.

Every State Party shall, moreover, take the necessary measures to establish its jurisdiction over the crime described in this Convention when the alleged criminal is within its territory and it does not proceed to extradite him.

This Convention does not authorize any State Party to undertake, in the territory of another State Party, the exercise of jurisdiction or the performance of functions that are placed within the exclusive purview of the authorities of that other Party by its domestic law.

#### Article V

The forced disappearance of persons shall not be considered a political offense for purposes of extradition.

The forced disappearance of persons shall be deemed to be included among the extraditable offenses in every extradition treaty entered into between States Parties.

The States Parties undertake to include the offense of forced disappearance as one which is extraditable in every extradition treaty to be concluded between them in the future.

Every State Party that makes extradition conditional on the existence of a treaty and receives a request for extradition from another State Party with which it has no extradition treaty may consider this Convention as the necessary legal basis for extradition with respect to the offense of forced disappearance.

States Parties which do not make extradition conditional on the existence of a treaty shall recognize such offense as extraditable, subject to the conditions imposed by the law of the requested state.

Extradition shall be subject to the provisions set forth in the constitution and other laws of the request state.

## Article VI

When a State Party does not grant the extradition, the case shall be submitted to its competent authorities as if the offense had been committed within its jurisdiction, for the purposes of investigation and when appropriate, for criminal action, in accordance with its national law. Any decision adopted by these authorities shall be communicated to the state that has requested the extradition.

## Article VII

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

However, if there should be a norm of a fundamental character preventing application of the stipulation contained in the previous paragraph, the period of limitation shall be equal to that which applies to the gravest crime in the domestic laws of the corresponding State Party.

## Article VIII

The defense of due obedience to superior orders or instructions that stipulate, authorize, or encourage forced disappearance shall not be admitted. All persons who receive such orders have the right and duty not to obey them.

The States Parties shall ensure that the training of public law-enforcement personnel or officials includes the necessary education on the offense of forced disappearance of persons.

## Article IX

Persons alleged to be responsible for the acts constituting the offense of forced disappearance of persons may be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of all other special jurisdictions, particularly military jurisdictions.

The acts constituting forced disappearance shall not be deemed to have been committed in the course of military duties.

Privileges, immunities, or special dispensations shall not be admitted in such trials, without prejudice to the provisions set forth in the Vienna Convention on Diplomatic Relations.

#### Article X

In no case may exceptional circumstances such as a state of war, the threat of war, internal political instability, or any other public emergency be invoked to justify the forced disappearance of persons. In such cases, the right to expeditious and effective judicial procedures and recourse shall be retained as a means of determining the whereabouts or state of health of a person who has been deprived of freedom, or of identifying the official who ordered or carried out such deprivation of freedom.

In pursuing such procedures or recourse, and in keeping with applicable domestic law, the competent judicial authorities shall have free and immediate access to all detention centers and to each of their units, and to all places where there is reason to believe the disappeared person might be found including places that are subject to military jurisdiction.

#### Article XI

Every person deprived of liberty shall be held in an officially recognized place of detention and be brought before a competent judicial authority without delay, in accordance with applicable domestic law.

The States Parties shall establish and maintain official up-to-date registries of their detainees and, in accordance with their domestic law, shall make them available to relatives, judges, attorneys, any other person having a legitimate interest, and other authorities.

#### Article XII

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.

[...]

#### Article XV

None of the provisions of this Convention shall be interpreted as limiting other bilateral or multilateral treaties or other agreements signed by the Parties.

This Convention shall not apply to the international armed conflicts governed by the 1949 Geneva Conventions and its Protocol

concerning protection of wounded, sick, and shipwrecked members of the armed forces; and prisoners of war and civilians in time of war.

**ANNEX 4:**

**PRINCIPLES ON THE EFFECTIVE PREVENTION AND INVESTIGATION OF EXTRALEGAL, ARBITRARY AND SUMMARY EXECUTIONS**

*Prevention*

1. Governments shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences. Exceptional circumstances including a state of war or threat of war, internal political instability or any other public emergency may not be invoked as a justification of such executions. Such executions shall not be carried out under any circumstances including, but not limited to, situations of internal armed conflict, excessive or illegal use of force by a public official or other person acting in an official capacity or by a person acting at the instigation, or with the consent or acquiescence of such person, and situations in which deaths occur in custody. This prohibition shall prevail over decrees issued by governmental authority.
2. In order to prevent extra-legal, arbitrary and summary executions, Governments shall ensure strict control, including a clear chain of command over all officials responsible for apprehension, arrest, detention, custody and imprisonment, as well as those officials authorized by law to use force and firearms.
3. Governments shall prohibit orders from superior officers or public authorities authorizing or inciting other persons to carry out any such extra-legal, arbitrary or summary executions. All persons shall have the right and the duty to defy such orders. Training of law enforcement officials shall emphasize the above provisions.
4. Effective protection through judicial or other means shall be guaranteed to individuals and groups who are in danger of extra-legal, arbitrary or summary executions, including those who receive death threats.
5. No one shall be involuntarily returned or extradited to a country where there are substantial grounds for believing that he or she may become a victim of extra-legal, arbitrary or summary execution in that country.

6. Governments shall ensure that persons deprived of their liberty are held in officially recognized places of custody, and that accurate information on their custody and whereabouts, including transfers, is made promptly available to their relatives and lawyer or other persons of confidence.

7. Qualified inspectors, including medical personnel, or an equivalent independent authority, shall conduct inspections in places of custody on a regular basis, and be empowered to undertake unannounced inspections on their own initiative, with full guarantees of independence in the exercise of this function. The inspectors shall have unrestricted access to all persons in such places of custody, as well as to all their records.

8. Governments shall make every effort to prevent extra-legal, arbitrary and summary executions through measures such as diplomatic intercession, improved access of complainants to intergovernmental and judicial bodies, and public denunciation. Intergovernmental mechanisms shall be used to investigate reports of any such executions and to take effective action against such practices. Governments, including those of countries where extra-legal, arbitrary and summary executions are reasonably suspected to occur, shall cooperate fully in international investigations on the subject.

#### *Investigation*

9. There shall be thorough, prompt and impartial investigation of all suspected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death in the above circumstances. Governments shall maintain investigative offices and procedures to undertake such inquiries. The purpose of the investigation shall be to determine the cause, manner and time of death, the person responsible, and any pattern or practice which may have brought about that death. It shall include an adequate autopsy, collection and analysis of all physical and documentary evidence and statements from witnesses. The investigation shall distinguish between natural death, accidental death, suicide and homicide.

10. The investigative authority shall have the power to obtain all the information necessary to the inquiry. Those persons conducting the investigation shall have at their disposal all the necessary budgetary and technical resources for effective investigation. They shall also have the authority to oblige officials allegedly involved in any such

executions to appear and testify. The same shall apply to any witness. To this end, they shall be entitled to issue summonses to witnesses, including the officials allegedly involved and to demand the production of evidence.

11. In cases in which the established investigative procedures are inadequate because of lack of expertise or impartiality, because of the importance of the matter or because of the apparent existence of a pattern of abuse, and in cases where there are complaints from the family of the victim about these inadequacies or other substantial reasons, Governments shall pursue investigations through an independent commission of inquiry or similar procedure. Members of such a commission shall be chosen for their recognized impartiality, competence and independence as individuals. In particular, they shall be independent of any institution, agency or person that may be the subject of the inquiry. The commission shall have the authority to obtain all information necessary to the inquiry and shall conduct the inquiry as provided for under these Principles.

12. The body of the deceased person shall not be disposed of until an adequate autopsy is conducted by a physician, who shall, if possible, be an expert in forensic pathology. Those conducting the autopsy shall have the right of access to all investigative data, to the place where the body was discovered, and to the place where the death is thought to have occurred. If the body has been buried and it later appears that an investigation is required, the body shall be promptly and competently exhumed for an autopsy. If skeletal remains are discovered, they should be carefully exhumed and studied according to systematic anthropological techniques.

13. The body of the deceased shall be available to those conducting the autopsy for a sufficient amount of time to enable a thorough investigation to be carried out. The autopsy shall, at a minimum, attempt to establish the identity of the deceased and the cause and manner of death. The time and place of death shall also be determined to the extent possible. Detailed colour photographs of the deceased shall be included in the autopsy report in order to document and support the findings of the investigation. The autopsy report must describe any and all injuries to the deceased including any evidence of torture.

14. In order to ensure objective results, those conducting the autopsy must be able to function impartially and independently of any potentially implicated persons or organizations or entities.



15. Complainants, witnesses, those conducting the investigation and their families shall be protected from violence, threats of violence or any other form of intimidation. Those potentially implicated in extra-legal, arbitrary or summary executions shall be removed from any position of control or power, whether direct or indirect. over complainants, witnesses and their families, as well as over those conducting investigations.

16. Families of the deceased and their legal representatives shall be informed of, and have access to. any hearing as well as to all information relevant to the investigation, and shall be entitled to present other evidence. The family of the deceased shall have the right to insist that a medical or other qualified representative be present at the autopsy. When the identity of a deceased person has been determined, a notification of death shall be posted, and the family or relatives of the deceased shall be informed immediately. The body of the deceased shall be returned to them upon completion of the investigation.

17. A written report shall be made within a reasonable period of time on the methods and findings of such investigations. The report shall be made public immediately and shall include the scope of the inquiry, procedures and methods used to evaluate evidence as well as conclusions and recommendations based on findings of fact and on applicable law. The report shall also describe in detail specific events that were found to have occurred and the evidence upon which such findings were based, and list the names of witnesses who testified, with the exception of those whose identities have been withheld for their own protection. The Government shall, within a reasonable period of time, either reply to the report of the investigation, or indicate the steps to be taken in response to it.

#### *Legal proceedings*

18. Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespective of who and where the perpetrators or the victims are, their nationalities or where the offence was committed.

19. Without prejudice to principle 3 above, an order from a superior officer or a public authority may not be invoked as a justification for

extra-legal, arbitrary or summary executions. Superiors, officers or other public officials may be held responsible for acts committed by officials under their authority if they had a reasonable opportunity to prevent such acts. In no circumstances, including a state of war, siege or other public emergency, shall blanket immunity from prosecution be granted to any person allegedly involved in extra-legal, arbitrary or summary executions.

20. The families and dependents of victims of extra-legal, arbitrary or summary executions shall be entitled to fair and adequate compensation within a reasonable period of time.

**ANNEX 5:****MANUAL ON THE EFFECTIVE PREVENTION AND INVESTIGATION OF EXTRA-LEGAL, ARBITRARY AND SUMMARY EXECUTIONS**

(excerpts)

**MODEL PROTOCOL FOR A LEGAL INVESTIGATION OF EXTRA-LEGAL, ARBITRARY AND SUMMARY EXECUTIONS****A. Introduction**

Suspected extra-legal, arbitrary and summary executions can be investigated under established national or local laws and can lead to criminal proceedings. In some cases, however, investigative procedures may be inadequate because of the lack of resources and expertise or because the agency assigned to conduct the investigation may be partial. Hence, such criminal proceedings are less likely to be brought to a successful outcome.

The following comments may enable those conducting investigations and other parties, as appropriate, to obtain some in-depth guidance for conducting investigations. Such guidance in a general way, has been set out in the Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions (see annex I, below, paragraphs 9-17). The guidelines set forth in this proposed model protocol for a legal investigation of extra-legal, arbitrary and summary executions are not binding. Instead, the model protocol is meant to be illustrative of methods for carrying out the standards enumerated in the Principles.

By definition, this model protocol cannot be exhaustive as the variety of legal and political arrangements escapes its application. Also, investigative techniques vary from country to country and these cannot be standardized in the form of internationally adopted principles. Consequently, additional comments may be relevant for the practical implementation of the Principles.

Sections B and C of this model protocol contain guidelines for the investigation of all violent, sudden, unexpected or suspicious deaths, including suspected extra-legal, arbitrary and summary executions. These guidelines apply to investigations conducted by law enforcement personnel and by members of an independent commission of inquiry.

Section D provides guidelines for establishing a special independent commission of inquiry. These guidelines are based on the experiences of several countries that have established independent commissions to investigate alleged arbitrary executions.

Several considerations should be taken into account when a Government decides to establish an independent commission of inquiry. First, persons subject to an inquiry should be guaranteed the minimum procedural safeguards protected by international law\* at all stages of the investigation. Secondly, investigators should have the support of adequate technical and administrative personnel, as well as access to objective, impartial legal advice to ensure that the investigation will produce admissible evidence for later criminal proceedings. Thirdly, investigators should receive the full scope of the Government's resources and powers. Finally, investigators should have the power to seek help from the international community of experts in law, medicine and forensic sciences.

The fundamental principles of any viable investigation into the causes of death are competence, thoroughness, promptness and impartiality of the investigation, which flow from paragraphs 9 and 11 of the Principles. These elements can be adapted to any legal system and should guide all investigations of alleged extra-legal, arbitrary and summary executions.

## **B. Purposes of an inquiry**

As set out in paragraph 9 of the Principles, the broad purpose of an inquiry is to discover the truth about the events leading to the suspicious death of a victim. To fulfil this purpose, those conducting the inquiry shall, at a minimum, seek:

- a. To identify the victim;
- b. To recover and preserve evidentiary material related to the death to aid in any potential prosecution of those responsible;
- c. To identify possible witnesses and obtain statements from them concerning the death;
- d. To determine the cause, manner, location and time of death, as well as any pattern or practice that may have brought about the death;
- e. To distinguish between natural death, accidental death, suicide and homicide;
- f. To identify and apprehend the person(s) involved in the death;
- g. To bring the suspected perpetrator(s) before a competent court established by law.

### **C. Procedures of an inquiry**

One of the most important aspects of a thorough and impartial investigation of an extra-legal, arbitrary and summary execution is the collection and analysis of evidence. It is essential to recover and preserve physical evidence, and to interview potential witnesses so that the circumstances surrounding a suspicious death can be clarified.

#### **1. Processing of the crime scene**

Law enforcement personnel and other non-medical investigators should co-ordinate their efforts in processing the scene with those of medical personnel. Persons conducting an investigation should have access to the scene where the body was discovered and to the scene where the death may have occurred:

- a. The area around the body should be closed off. Only investigator and their staff should be allowed entry into the area;
- b. Colour photographs of the victim should be taken as these, in comparison with black and white photographs, may reveal in more detail the nature and circumstances of the victim's death;
- c. Photographs should be taken of the scene (interior and exterior) of any other physical evidence;
- d. A record should be made of the body position and condition of the clothing;
- e. The following factors may be helpful in estimating the time of death:
  - i. Temperature of the body (warm, cool, cold);
  - ii. Location and degree of fixation of lividity;
  - iii. Rigidity of the body;
  - iv. Stage of its decomposition;
- f. Examination of the scene for blood should take place. Any samples of blood, hair, fibres and threads should be collected and preserved;
- g. If the victim appears to have been sexually assaulted, this fact should be recorded;
- h. A record should be made of any vehicles found in the area;
- i. Castings should be made and preserved of pry marks, tyre or shoe impressions, or any other impressions of an evidentiary nature;
- j. Any evidence of weapons, such as guns, projectiles, bullets and cartridge cases, should be taken and preserved. When applicable,

tests for gunshot residue and trace metal detection should be performed;

k. Any fingerprints should be located, developed, lifted and preserved;

l. A sketch of the crime scene to scale should be made showing all relevant details of the crime, such as the location of weapons, furniture, vehicles, surrounding terrain, including the position, height and width of items, and their relationship to each other;

m. A record of the identity of all persons at the scene should be made, including complete names, addresses and telephone numbers;

n. Information should be obtained from scene witnesses, including those who last saw the decedent alive, when, where and under what circumstances;

o. Any relevant papers, records or documents should be saved for evidentiary use and handwriting analysis.

## **2. Processing of the evidence**

a. The body must be identified by reliable witnesses and other objective methods;

b. A report should be made detailing any observations at the scene, actions of investigators and disposition of all evidence recovered;

c. Property forms listing all evidence should be completed;

d. Evidence must be properly collected, handled, packaged, labelled and placed in safekeeping to prevent contamination and loss of evidence.

## **3. Avenues to investigation**

a. What evidence is there, if any, that the death was premeditated and intentional, rather than accidental? Is there any evidence of torture?

b. What weapon or means was used and in what manner?

c. How many persons were involved in the death?

d. What other crime, if any, and the exact details thereof, was committed during or associated with the death?

e. What was the relationship between the suspected perpetrator(s) and the victim prior to the death?

f. Was the victim a member of any political, religious, ethnic or social group(s), and could this have been a motive for the death?

#### **4. Personal testimony**

- a. Investigators should identify and interview all potential witnesses to the crime, including:
  - i. Suspects;
  - ii. Relatives and friends of the victim;
  - iii. Persons who knew the victim;
  - iv. Individuals residing or located in the area of the crime;
  - v. Persons who knew or had knowledge of the suspects;
  - vi. Persons who may have observed either the crime, the scene, the victim or the suspects in the week prior to the execution;
  - vii. Persons having knowledge of possible motives;
- b. Interviews should take place as soon as possible and should be written and/or taped. All tapes should be transcribed and maintained;
- c. Witnesses should be interviewed individually, and assurance should be given that any possible means of protecting their safety before, during and after the proceedings will be used, if necessary.

#### **D. Commission of inquiry**

In cases where government involvement is suspected, an objective and impartial investigation may not be possible unless a special commission of inquiry is established. A commission of inquiry may also be necessary where the expertise of the investigators is called into question. This section sets out factors that give rise to a presumption of government complicity, partiality or insufficient expertise on the part of those conducting the investigation. Any one of these presumptions should trigger the creation of a special commission of inquiry. It then sets out procedures that can be used as a model for the creation and function of commissions of inquiry. The procedures were derived from the experience of major inquiries that have been mounted to investigate executions or similarly grievous cases of human rights violations.

Establishing a commission of inquiry entails defining the scope of the inquiry, appointing commission members and staff, determining the type of proceedings to be followed and selecting procedures governing those proceedings, and authorizing the commission to report on its findings and make recommendations. Each of these areas will be covered separately.

##### **1. Factors triggering a special investigation**

Factors that support a belief that the Government was involved in the execution, and that should trigger the creation of a special impartial investigation commission include:

- a) Where the political views, religious or ethnic affiliation, or social status of the victim give rise to a suspicion of government involvement or complicity in the death because of any one or combination of the following factors:
  - i. Where the victim was last seen alive in police custody or detention;
  - ii. Where the modus operandi is recognizably attributable to government-sponsored death squads;
  - iii. Where persons in the Government or associated with the Government have attempted to obstruct or delay the investigation of the execution;
  - iv. Where the physical or testimonial evidence essential to the investigation becomes unavailable.
- b) As set out in paragraph 11 of the Principles, an independent commission of inquiry or similar procedure should also be established where a routine investigation is inadequate for the following reasons:
  - i. The lack of expertise; or
  - ii. The lack of impartiality; or
  - iii. The importance of the matter; or
  - iv. The apparent existence of a pattern of abuse; or
  - v. Complaints from the family of the victim about the above inadequacies or other substantial reasons.

## **2. Defining the scope of the inquiry**

Governments and organizations establishing commissions of inquiry need to define the scope of the inquiry by including terms of reference in their authorization. Defining the commission's terms of reference can greatly increase its success by giving legitimacy to the proceedings, assisting commission members in reaching a consensus on the scope of inquiry and providing a measure by which the commission's final report can be judged. Recommendations for defining terms of reference are as follows:

- a) They should be neutrally framed so that they do not suggest a predetermined outcome. To be neutral, terms of reference must not limit investigations in areas that might uncover government responsibility for extra-legal, arbitrary and summary executions;



- b) They should state precisely which events and issues are to be investigated and addressed in the commission's final report;
- c) They should provide flexibility in the scope of inquiry to ensure that thorough investigation by the commission is not hampered by overly restrictive or overly broad terms of reference. The necessary flexibility may be accomplished, for example by permitting the commission to amend its terms of reference as necessary. It is important, however, that the commission keep the public informed of any amendments to its charge.

### **3. Power of the commission**

The principles set out in a general manner the powers of the commission. More specifically such a commission would need the following:

- a) To have the authority to obtain all information necessary to the inquiry, for example, for determining the cause, manner and time of death, including the authority to compel testimony under legal sanction, to order the production of documents including government and medical records, and to protect witnesses, families of the victim and other sources;
- b) To have the authority to issue a public report;
- c) To have the authority to prevent the burial or other disposal of the body until an adequate postmortem examination has been performed;
- d) To have the authority to conduct on-site visits, both at the scene where the body was discovered and at the scene where the death may have occurred;
- e) To have the authority to receive evidence from witnesses and organizations located outside the country.

### **4. Membership qualifications**

Commission members should be chosen for their recognized impartiality, competence and independence as individuals:

Impartiality. Commission members should not be closely associated with any individual, government entity, political party or other organization potentially implicated in the execution or disappearance, or an organization or group associated with the victim, as this may damage the commission's credibility.

Competence. Commission members must be capable of evaluating and weighing evidence, and exercising sound judgement. If possible, commissions of inquiry should include individuals with

expertise in law, medicine, forensic science and other specialized fields, as appropriate.

Independence. Members of the commission should have a reputation in their community for honesty and fairness.

## **5. Number of commissioners**

The Principles do not contain a provision on the number of members of the commission, but it would not be unreasonable to note that objectivity of the investigation and commission's findings may, among other things, depend on whether it has three or more members rather than one or two. Investigations into extra-legal, arbitrary and summary executions should, in general, not be conducted by a single commissioner. A single, isolated commissioner will generally be limited in the depth of investigation he or she can conduct alone. In addition, a single commissioner will have to make controversial and important decisions without debate, and will be particularly vulnerable to governmental and other outside pressure.

## **6. Choosing a commission counsel**

Commissions of inquiry should have impartial, expert counsel. Where the commission is investigating allegations of governmental misconduct, it would be advisable to appoint counsel outside the Ministry of Justice. The chief counsel to the commission should be insulated from political influence, as through civil service tenure, or status as a wholly independent member of the bar.

## **7. Choosing expert advisors**

The investigation will often require expert advisors. Technical expertise in such areas as pathology, forensic science and ballistics should be available to the commission.

## **8. Choosing investigators**

To conduct a completely impartial and thorough investigation, the commission will almost always need its own investigators to pursue leads and to develop evidence. The credibility of an inquiry will be significantly enhanced to the extent that the commission can rely on its own investigators.

## **9. Protection of witnesses**

- a) The Government shall protect complainants, witnesses, those conducting the investigation, and their families from violence, threats of violence or any other form of intimidation;
- b) If the commission concludes that there is a reasonable fear of persecution, harassment, or harm to any witness or prospective witness, the commission may find it advisable:
  - i. To hear the evidence in camera;
  - ii. To keep the identity of the informant or witness confidential;
  - iii. To use only such evidence as will not present a risk of identifying the witness;
  - iv. To take any other appropriate measures.

## **10. Proceedings**

It follows from general principles of criminal procedure that hearings should be conducted in public, unless in camera proceedings are necessary to protect the safety of a witness. In camera proceedings should be recorded and the closed, unpublished record kept in a known location.

Occasionally, complete secrecy may be required to encourage testimony, and the commission will want to hear witnesses privately, informally and without recording testimony.

## **11. Notice of inquiry**

Wide notice of the establishment of a commission and the subject of the inquiry should be given. The notice should also include an invitation to submit relevant information and/or written statements to the commission, and instructions to persons wishing to testify. Notice can be disseminated through newspapers, magazines, radio, television, leaflets and posters.

## **12. Receipt of evidence**

Power to compel evidence. As emphasized in Principle 10, commissions of inquiry should have the power to compel testimony and production of documents: in this context, Principle 10 refers to "the authority to oblige officials" allegedly involved in extra-legal, arbitrary and summary executions. Practically, this authority may involve the power to impose fines or sentences if the Government or individuals refuse to comply.

Use of witness statements. Commissions of inquiry should invite persons to testify or submit written statements as a first step in

gathering evidence. Written statements may become an important source of evidence if their author become afraid to testify, cannot travel to proceedings, or are otherwise unavailable.

Use of evidence from other proceedings. Commissions of inquiry should review other proceedings that could provide relevant information. For example the commission should obtain the findings from an inquest into cause of death conducted by a coroner or medical examiner. Such inquests generally rely on postmortem or autopsy examinations. A commission of inquiry should review the inquest and the results of the autopsy presented to the inquest to determine if they were conducted thoroughly and impartially. If the inquest and autopsy were so conducted, the coroner's findings are entitled to be given great weight.

### **13. Rights of parties**

As mentioned in Principle 16, families of the deceased and their legal representatives shall be informed of, and have access to, any hearing and to all information relevant to the investigation, and shall be entitled to present evidence. This particular emphasis on the role of the family as a party to the proceedings implies the specially important role the family's interests play in the conduct of the investigation. However, all other interested parties should also have the opportunity at being heard. As mentioned in Principle 10, the investigative body shall be entitled to issue summons to witnesses, including the officials allegedly involved and to demand the production of evidence. All these witnesses should be permitted legal counsel if they are likely to be harmed by the inquiry, for example, when their testimony could expose them to criminal charges or civil liability. Witnesses may not be compelled to testify against themselves regarding matter unrelated to the scope of inquiry.

There should be an opportunity for the effective questioning of witnesses by the commission. Parties to the inquiry should be allowed to submit written questions to the commission.

### **14. Evaluation of evidence**

The commission shall assess all information and evidence it receives to determine its relevance, veracity, reliability and probity. The commission should evaluate oral testimony based upon the demeanour and overall credibility of the witness. Corroboration of evidence from several sources will increase the probative value of such evidence. The reliability of hearsay evidence from several

sources will increase the probative value of such evidence. The reliability of hearsay evidence must be considered carefully before the commission should accept it as fact. Testimony not tested by cross-examination must also be viewed with caution. In camera testimony preserved in a closed record or not recorded at all is often not subjected to cross-examination and therefore may be given less weight.

### **15. The report of the commission**

As stated in Principle 17, the commission should issue a public report within a reasonable period of time. It may be added that where the commission is not unanimous in its findings, the minority commissioner(s) should file a dissenting opinion.

From the practical experience gathered, commission of inquiry reports should contain the following information:

- a. The scope of inquiry and terms of reference;
- b. The procedures and methods of evaluating evidence;
- c. A list of all witnesses who have testified, except for those whose identities are withheld for protection and who have testified in camera, and exhibits received in evidence;
- d. The time and place of each sitting (this might be annexed to the report);
- e. The background to the inquiry such as relevant social, political and economic conditions;
- f. The specific events that occurred and the evidence upon which such findings are based;
- g. The law upon which the commission relied;
- h. The commission's conclusions based upon applicable law and findings of fact;
- i. Recommendations based upon the findings of the commission.

### **16. Response of the Government**

The Government should either reply publicly to the commission's report or should indicate what steps it intends to take in response to the report.

## **MODEL AUTOPSY PROTOCOL**

### **A. Introduction**

Difficult or sensitive cases should ideally be the responsibility of an objective, experienced, well-equipped and well-trained prosecutor (the person performing the autopsy and preparing the written

report) who is separate from any potentially involved political organization or entity. Unfortunately, this ideal is often unattainable. This proposed model autopsy protocol includes a comprehensive checklist of the steps in a basic forensic postmortem examination that should be followed to the extent possible given the resources available. Use of this autopsy protocol will permit early and final resolution of potentially controversial cases and will thwart the speculation and innuendo that are fueled by unanswered, partially answered or poorly answered questions in the investigation of an apparently suspicious death.

This model autopsy protocol is intended to have several applications and may be of value to the following categories of individuals:

- a) Experienced forensic pathologists may follow this model autopsy protocol to ensure a systematic examination and to facilitate meaningful positive or negative criticism by later observers. While -trained pathologists may justifiably abridge certain aspects of the postmortem examination or written descriptions of their findings in routine cases, abridged examinations or reports are never appropriate in potentially controversial cases. Rather, a systematic and comprehensive examination and report are required to prevent the omission or loss of important details;
- b) General pathologists or other physicians who have not been trained in forensic pathology but are familiar with basic postmortem examination techniques may supplement their customary autopsy procedures with this model autopsy protocol. It may also alert them to situations in which they should seek consultation, as written material cannot replace the knowledge gained through experience;
- c) Independent consultants whose expertise has been requested in observing, performing or reviewing an autopsy may cite this model autopsy protocol and its proposed minimum criteria as a basis for their actions or opinions;
- d) Governmental authorities, international political organizations, law enforcement agencies, families or friends of decedents, or representatives of potential defendants charged with responsibility for a death may use this model autopsy protocol to establish appropriate procedures for the postmortem examination prior to its performance;
- e) Historians, journalists, attorneys, judges, other physicians and representatives of the public may also use this model autopsy

protocol as a benchmark for evaluating an autopsy and its findings;

f) Governments or individuals who are attempting either to establish or upgrade their medicolegal system for investigating deaths may use this model autopsy protocol as a guideline, representing the procedures and goals to be incorporated into an ideal medicolegal system.

While performing any medicolegal death investigation, the prosector should collect information that will establish the identity of the deceased, the time and place of death, the cause of death, and the manner or mode of death (homicide, suicide, accident or natural).

It is of the utmost importance that an autopsy performed following a controversial death be thorough in scope. The documentation and recording of the autopsy findings should be equally thorough so as to permit meaningful use of the autopsy results (see annex II). It is important to have as few omissions or discrepancies as possible, as proponents of different interpretations of a case may take advantage of any perceived shortcomings in the investigation. An autopsy performed in a controversial death should meet certain minimum criteria if the autopsy report is to be proffered as meaningful or conclusive by the prosector, the autopsy's sponsoring agency or governmental unit, or anyone else attempting to make use of such an autopsy's findings or conclusions.

This model autopsy protocol is designed to be used in diverse situations. Resources such as autopsy rooms, X-ray equipment or adequately trained personnel are not available everywhere. Forensic pathologists must operate under widely divergent political systems. In addition, social and religious customs vary widely throughout the world; an autopsy is an expected and routine procedure in some areas, while it is abhorred in others. A prosector, therefore, may not always be able to follow all of the steps in this protocol when performing autopsies. Variation from this protocol may be inevitable or even preferable in some cases. It is suggested, however, that any major deviations, with the supporting reasons, should be noted.

It is important that the body should be made available to the prosector for a minimum of 12 hours in order to assure an adequate and unhurried examination. Unrealistic limits or conditions are occasionally placed upon the prosector with respect to the length of time permitted for the examination or the circumstances under which an examination is allowed. When conditions are imposed, the

prosecutor should be able to refuse to perform a compromised examination and should prepare a report explaining this position. Such a refusal should not be interpreted as indicating that an examination was unnecessary or inappropriate. If the prosecutor decides to proceed with the examination notwithstanding difficult conditions or circumstances, he or she should include in the autopsy report an explanation of the limitations or impediments.

## **B. Proposed model autopsy protocol**

### **1. Scene investigation**

The prosecutor(s) and medical investigators should have the right of access to the scene where the body is found. The medical personnel should be notified immediately to assure that no alteration of the body has occurred. If access to the scene was denied, if the body was altered or if information was withheld, this should be stated in the prosecutor's report.

A system for co-ordination between the medical and non-medical investigators (e.g. law enforcement agencies) should be established. This should address such issues as how the prosecutor will be notified and who will be in charge of the scene. Obtaining certain types of evidence is often the role of the non-medical investigators, but the medical investigators who have access to the body at the scene of death should perform the following steps:

- a) Photograph the body as it is found and after it has been moved;
- b) Record the body position and condition, including body warmth or coolness, lividity and rigidity;
- c) Protect the deceased's hands, e.g. with paper bags;
- d) Note the ambient temperature. In cases where the time of death is an issue, rectal temperature should be recorded and any insects present should be collected for forensic entomological study. Which procedure is applicable will depend on the length of the apparent postmortem interval;
- e) Examine the scene for blood, as this may be useful in identifying suspects;
- f) Record the identities of all persons at the scene;
- g) Obtain information from scene witnesses, including those who last saw the decedent alive, and when, where and under what circumstances. Interview any emergency medical personnel who may have had contact with the body;



- h) Obtain identification of the body and other pertinent information from friends or relatives. Obtain the deceased's medical history from his or her physician(s) and hospital charts, including any previous surgery, alcohol or drug use, suicide attempts and habits;
- i) Place the body in a body pouch or its equivalent. Save this pouch after the body has been removed from it;
- j) Store the body in a secure refrigerated location so that tampering with the body and its evidence cannot occur;
- k) Make sure that projectiles, guns, knives and other weapons are available for examination by the responsible medical personnel;
- l) If the decedent was hospitalized prior to death, obtain admission or blood specimens and any X-rays, and review and summarize hospital records;
- m) Before beginning the autopsy, become familiar with the types of torture or violence that are prevalent in that country or locale.

## **2. Autopsy**

The following Protocol should be followed during the autopsy:

- a) Record the date, starting and finishing times, and place of the autopsy (a complex autopsy may take as long as an entire working day);
- b) Record the name(s) of the prosector(s), the participating assistant(s), and all other persons present during the autopsy, including the medical and/or scientific degrees and professional, political or administrative affiliations(s) of each. Each person's role in the autopsy should be indicated, and one person should be designated as the principal prosector who will have the authority to direct the performance of the autopsy. Observers and other team members are subject to direction by, and should not interfere with, the principal prosector. The time(s) during the autopsy when each person is present should be included. The use of a "sign-in" sheet is recommended;
- c) Adequate photographs are crucial for thorough documentation of autopsy findings:
  - i.- Photographs should be in colour (transparency or negative/print), in focus, adequately illuminated, and taken by a professional or good quality camera. Each photograph should contain a ruled reference scale, an identifying case name or number, and a sample of standard grey. A description of the camera (including the lens "f-number" and focal length), film

and the lighting system must be included in the autopsy report. If more than one camera is utilized, the identifying information should be recorded for each. Photographs should also include information indicating which camera took each picture, if more than one camera is used. The identity of the person taking the photographs should be recorded;

ii.- Serial photographs reflecting the course of the external examination must be included. Photograph the body prior to and following undressing, washing or cleaning and shaving;

iii.- Supplement close-up photographs with distant and/or immediate range photographs to permit orientation and identification of the close-up photographs;

iv.- Photographs should be comprehensive in scope and must confirm the presence of all demonstrable signs of injury or disease commented upon in the autopsy report;

v.- Identifying facial features should be portrayed (after washing or cleaning the body), with photographs of a full frontal aspect of the face, and right and left profiles of the face with hair in normal position and with hair retracted, if necessary, to reveal the ears;

d) Radiograph the body before it is removed from its pouch or wrappings. X-rays should be repeated both before and after undressing the body. Fluoroscopy may also be performed. Photograph all X-ray films;

i.- Obtain dental X-rays, even if identification has been established in other ways;

ii.- Document any skeletal system injury by X-ray. Skeletal X-rays may also record anatomic defects or surgical procedures. Check especially for fractures of the fingers, toes and other bones in the hands and feet. Skeletal X-rays may also aid in the identification of the deceased, by detecting identifying characteristics, estimating age and height, and determining sex and race. Frontal sinus films should also be taken, as these can be particularly useful for identification purposes;

iii.- Take X-rays in gunshot cases to aid in locating-the projectile(s). Recover, photograph and save any projectile or major projectile fragment that is seen on an X-ray. Other radio-opaque objects (pacemakers, artificial joints or valves, knife fragments etc.) documented with X-rays should also be removed, photographed and saved;

iv.- Skeletal X-rays are essential in children to assist in determining age and developmental status;

- e) Before the clothing is removed, examine the body and the clothing. Photograph the clothed body. Record any jewellery present;
- f) The clothing should be carefully removed over a clean sheet or body pouch. Let the clothing dry if it is bloody or wet. Describe the clothing that is removed and label it in a permanent fashion. Either place the clothes in the custody of a responsible person or keep them, as they may be useful as evidence or for identification;
- g) The external examination, focusing on a search for external evidence of injury is, in most cases, the most important portion of the autopsy;
- i.- Photograph all surfaces - 100 per cent of the body area. Take good quality, well-focused, colour photographs with adequate illumination;
  - ii.- Describe and document the means used to make the identification. Examine the body and record the deceased's apparent age, length, weight, sex, head hair style and length, nutritional status, muscular development and colour of skin, eyes and hair (head, facial and body);
  - iii.- In children, measure also the head circumference, crown-rump length and crown-heel length;
  - iv.- Record the degree, location and fixation of rigor and livor mortis;
  - v.- Note body warmth or coolness and state of preservation; note any decomposition changes, such as skin slippage. Evaluate the general condition of the body and note adipocere formation, maggots, eggs or anything else that suggests the time or place of death;
  - vi.- With all injuries, record the size, shape, pattern, location (related to obvious anatomic landmarks), colour, course, direction, depth and structure involved. Attempt to distinguish injuries resulting from therapeutic measures from those unrelated to medical treatment. In the description of projectile wounds, note the presence or absence of soot, gunpowder, or singeing. If gunshot residue is present, document it photographically and save it for analysis. Attempt to determine whether the gunshot wound is an entry or exit wound. If an entry wound is present and no exit wound is seen, the projectile must be found and saved or accounted for. Excise wound tract tissue samples for microscopic examination. Tape

together the edges of knife wounds to assess the blade size and characteristics;

vii.- Photograph all injuries, taking two colour pictures of each, labelled with the autopsy identification number on a scale that is oriented parallel or perpendicular to the injury. Shave hair where necessary to clarify an injury, and take photographs before and after shaving. Save all hair removed from the site of the injury. Take photographs before and after washing the site of any injury. Wash the body only after any blood or material that may have come from an assailant has been collected and saved;

viii.- Examine the skin. Note and photograph any scars, areas of keloid formation, tattoos, prominent moles, areas of increased or decreased pigmentation, and anything distinctive or unique such as birthmarks. Note any bruises and incise them for delineation of their extent. Excise them for microscopic examination. The head and genital area should be checked with special care. Note any injection sites or puncture wounds and excise them to use for toxicological evaluation. Note any abrasions and excise them; microscopic sections may be useful for attempting to date the time of injury. Note any bite marks; these should be photographed to record the dental pattern, swabbed for saliva testing (before the body is washed) and excised for microscopic examination. Bite marks should also be analysed by a forensic odontologist, if possible. Note any burn marks and attempt to determine the cause (burning rubber, a cigarette, electricity, a blowtorch, acid, hot oil etc.). Excise any suspicious areas for microscopic examination, as it may be possible to distinguish microscopically between burns caused by electricity and those caused by heat;

ix.- Identify and label any foreign object that is recovered, including its relation to specific injuries. Do not scratch the sides or tip of any projectiles. Photograph each projectile and large projectile fragment with an identifying label, and then place each in a sealed, padded and labelled container in order to maintain the chain of custody;

x.- Collect a blood specimen of at least 50 cc from a subclavian or femoral vessel;

xi.- Examine the head and external scalp, bearing in mind that injuries may be hidden by the hair. Shave hair where necessary. Check for fleas and lice, as these may indicate unsanitary conditions prior to death. Note any alopecia as this

may be caused by malnutrition, heavy metals (e.g. thallium), drugs or traction. Pull, do not cut, 20 representative head hairs and save them, as hair may also be useful for detecting some drugs and poisons;

xii.- Examine the teeth and note their condition. Record any that are absent, loose or damaged, and record all dental work (restorations, fillings etc.), using a dental identification system to identify each tooth. Check the gums for periodontal disease. Photograph dentures, if any, and save them if the decedent's identity is unknown. Remove the mandible and maxilla if necessary for identification. Check the inside of the mouth and note any evidence of trauma, injection sites, needle marks or biting of the lips, cheeks or tongue. Note any articles or substances in the mouth. In cases of suspected sexual assault, save oral fluid or get a swab for spermatozoa and acid phosphatase evaluation. (Swabs taken at the tooth-gum junction and samples from between the teeth provide the best specimens for identifying spermatozoa.) Also take swabs from the oral cavity for seminal fluid typing. Dry the swabs quickly with cool, blown air if possible, and preserve them in clean plain paper envelopes. If rigor mortis prevents an adequate examination, the masseter muscles may be cut to permit better exposure;

xiii.- Examine the face and note if it is cyanotic or if petechiae are present;

a. Examine the eyes and view the conjunctiva of both the globes and the eyelids. Note any petechiae in the upper or lower eyelids. Note any scleral icterus. Save contact lenses, if any are present. Collect at least 1 ml of vitreous humor from each eye;

b. Examine the nose and ears and note any evidence of trauma, haemorrhage or other abnormalities. Examine the tympanic membranes;

xiv.- Examine the neck externally on all aspects and note any contusions, abrasions or petechia. Describe and document injury patterns to differentiate manual, ligature and hanging strangulation. Examine the neck at the conclusion of the autopsy, when the blood has drained out of the area and the tissues are dry;

xv.- Examine all surfaces of the extremities: arms, forearms, wrists, hands, legs and feet, and note any "defence" wounds. Dissect and describe any injuries. Note any bruises about the

wrists or ankles that may suggest restraints such as handcuffs or suspension. Examine the medial and lateral surfaces of the fingers, the anterior forearms and the backs of the knees for bruises;

xvi.- Note any broken or missing fingernails. Note any gunpowder residue on the hands, document photographically and save it for analysis. Take fingerprints in all cases. If the decedent's identity is unknown and fingerprints cannot be obtained, remove the "glove" of the skin, if present. Save the fingers if no other means of obtaining fingerprints is possible. Save finger nail clippings and any under-nail tissue (nail scrapings). Examine the fingernail and toenail beds for evidence of object having been pushed beneath the nails. Nails can be removed by dissecting the lateral margins and proximal base, and then the undersurface of the nails can be inspected. If this is done, the hands must be photographed before and after the nails are removed. Carefully examine the soles of the feet, noting any evidence of beating. Incise the soles to delineate the extent of any injuries. Examine the palms and knees, looking especially for glass shards or lacerations;

xvii.- Examine the external genitalia and note the presence of any foreign material or semen. Note the size, location and number of any abrasions or contusions. Note any injury to the inner thighs or peri-anal area. Look for peri-anal burns;

xviii.- In cases of suspected sexual assault, examine all potentially involved orifices. A speculum should be used to examine the vaginal walls. Collect foreign hair by combing the pubic hair. Pull and save at least 20 of the deceased's own pubic hairs, including roots. Aspirate fluid from the vagina and/or rectum, for acid phosphatase, blood group and spermatozoa evaluation. Take swabs from the same areas for seminal fluid typing. Dry the swabs quickly with cool, blown air if possible, and preserve them in clean plain paper envelopes;

xix.- The length of the back, the buttocks and extremities including wrists and ankles must be systematically incised to look for deep injuries. The shoulders, elbows, hips and knee joints must also be incised to look for ligamentous injury;

h) The internal examination for internal evidence of injury should clarify and augment the external examination;

i) Be systematic in the internal examination. Perform the examination either by body regions or by systems, including

the cardiovascular, respiratory, biliary, gastrointestinal, reticuloendothelial, genitourinary, endocrine, musculoskeletal, and central nervous systems. Record the weight, size, shape, colour and consistency of each organ, and note any neoplasia, inflammation, anomalies, haemorrhage, ischemia, infarcts, surgical procedures or injuries. Take sections of normal and any abnormal areas of each organ for microscopic examination. Take samples of any fractured bones for radiographic and microscopic estimation of the age of the fracture;

ii) Examine the chest. Note any abnormalities of the breasts. Record any rib fractures, noting whether cardiopulmonary resuscitation was attempted. Before opening, check for pneumothoraces. Record the thickness of subcutaneous fat. Immediately after opening the chest, evaluate the pleural cavities and the pericardial sac for the presence of blood or other fluid, and describe and quantify any fluid present. Save any fluid present until foreign objects are accounted for. Note the presence of air embolism, characterized by frothy blood within the right atrium and right ventricle. Trace any injuries before removing the organs. If blood is not available at other sites, collect a sample directly from the heart. Examine the heart, noting degree and location of coronary artery disease or other abnormalities. Examine the lungs, noting any abnormalities;

iii) Examine the abdomen and record the amount of subcutaneous fat. Retain 50 grams of adipose tissue for toxicological evaluation. Note the interrelationships of the organs. Trace any injuries before removing the organs. Note any fluid or blood present in the peritoneal cavity, and save it until foreign objects are accounted for. Save all urine and bile for toxicologic examination;

iv) Remove, examine and record the quantitative information on the liver, spleen, pancreas, kidneys and adrenal glands. Save at least 150 grams each of kidney and liver for toxicological evaluation. Remove the gastrointestinal tract and examine the contents. Note any food present and its degree of digestion. Save the contents of the stomach. If a more detailed toxicological evaluation is desired, the contents of other regions of the gastrointestinal tract may be saved. Examine the rectum and anus for burns, lacerations or other

injuries. Locate and retain any foreign bodies present. Examine the aorta, inferior vena cava and iliac vessels;

v) Examine the organs in the pelvis, including ovaries, fallopian tubes, uterus, vagina, testes, prostate gland, seminal vesicles, urethra and urinary bladder. Trace any injuries before removing the organs. Remove these organs carefully so as not to injure them artifactually. Note any evidence of previous or current pregnancy, miscarriage or delivery. Save any foreign objects within the cervix, uterus, vagina, urethra or rectum;

vi) Palpate the head and examine the external and internal surfaces of the scalp, noting any trauma or haemorrhage. Note any skull fractures. Remove the calvarium carefully and note epidural and subdural haematomas. Quantify, date and save any haematomas that are present. Remove the dura to examine the internal surface of the skull for fractures. Remove the brain and note any abnormalities. Dissect and describe any injuries. Cerebral cortical atrophy, whether focal or generalized, should be specifically commented upon;

vii) Evaluate the cerebral vessels. Save at least 150 grams of cerebral tissue for toxicological evaluation. Submerge the brain in fixative prior to examination, if this is indicated;

viii) Examine the neck after the heart and brain have been removed and the neck vessels have been drained. Remove the neck organs, taking care not to fracture the hyoid bone. Dissect and describe any injuries. Check the mucosa of the larynx, pyriform sinuses and esophagus, and note any petechiae, edema or burns caused by corrosive substances. Note any articles or substances within the lumina of these structures. Examine the thyroid gland. Separate and examine the parathyroid glands, they are readily identifiable;

ix) Dissect the neck muscles, noting any haemorrhage. Remove all organs, including the tongue. Dissect the muscles from the bones and note any fractures of the hyoid bone or thyroid or cricoid cartilages;

x) Examine the cervical, thoracic and lumbar spine. Examine the vertebrae from their anterior aspects and note any fractures, dislocations, compressions or haemorrhages. Examine the vertebral bodies. Cerebrospinal fluid may be obtained if additional toxicological evaluation is indicated;

xi) In cases in which spinal injury is suspected, dissect and describe the spinal cord. Examine the cervical spine anteriorly and note any haemorrhage in the paravertebral



muscles. The posterior approach is best for evaluating high cervical injuries. Open the spinal canal and remove the spinal cord. Make transverse sections every 0.5 cm and note any abnormalities;

i) After the autopsy has been completed, record which specimens have been saved. Label all specimens with the name of the deceased, the autopsy identification number, the date and time of collection, the name of the prosector and the contents. Carefully preserve all evidence and record the chain of custody with appropriate release forms;

i) Perform appropriate toxicologic tests and retain portions of the tested samples to permit retesting;

a. Tissues: 150 grams of liver and kidney should be saved routinely. Brain, hair and adipose tissue may be saved for additional studies in cases where drugs, poisons or other toxic substances are suspected;

b. Fluids: 50 cc (if possible) of blood (spin and save serum in all or some of the tubes), all available urine, vitreous humor and stomach contents should be saved routinely. Bile, regional gastrointestinal tract contents and cerebrospinal fluid should be saved in cases where drugs, poisons or toxic substances are suspected. Oral, vaginal and rectal fluid should be saved in cases of suspected sexual assault;

ii) Representative samples of all major organs, including areas of normal and any abnormal tissue, should be processed histologically and stained with hematoxylin and eosin (and other stains as indicated). The slides, wet tissue and paraffin blocks should be kept indefinitely;

iii) Evidence that must be saved includes:

a. All foreign objects, including projectiles, projectile fragments, pellets, knives and fibres. Projectiles must be subjected to ballistic analysis;

b. All clothes and personal effects of the deceased, worn by or in the possession of the deceased at the time of death;

c. Fingernails and under nail scrapings;

d. Hair, foreign and pubic, in cases of suspected sexual assault;

e. Head hair, in cases where the place of death or location of the body prior to its discovery may be an issue;

j) After the autopsy, all unretained organs should be replaced in the body, and the body should be well embalmed to facilitate a second autopsy in case one is desired at some future point;

k) The written autopsy report should address those items that are emphasized in boldface type in the protocol. At the end of the autopsy report should be a summary of the findings and the cause of death. This should include the prosecutor's comments attributing any injuries to external trauma, therapeutic efforts, postmortem change, or other causes. A full report should be given to the appropriate authorities and to the deceased's family.

## **MODEL PROTOCOL FOR DISINTERMENT AND ANALYSIS OF SKELETAL REMAINS**

### **A. Introduction**

This proposed model protocol for the disinterment and analysis of skeletal remains includes a comprehensive checklist of the steps in a basic forensic examination. The objectives of an anthropological investigation are the same as those of a medicolegal investigation of a recently deceased person. The anthropologist must collect information that will establish the identity of the deceased, the time and place of death, the cause of death and the manner or mode of death (homicide, suicide, accident or natural). The approach of the anthropologist differs, however, because of the nature of the material to be examined. Typically, a prosecutor is required to examine a body, whereas an anthropologist is required to examine a skeleton. The prosecutor focuses on information obtained from soft tissues, whereas the anthropologist focuses on information from hard tissues. Since decomposition is a continuous process, the work of both specialists can overlap. An anthropologist may examine a fresh body when bone is exposed or when bone trauma is a factor. An experienced prosecutor may be required when mummified tissues are present. In some circumstances, use of both this protocol and the model autopsy protocol may be necessary to yield the maximum information. The degree of decomposition of the body will dictate the type of investigation and, therefore, the protocol(s) to be followed.

The questions addressed by the anthropologist differ from those pursued in a typical autopsy. The anthropological investigation invests more time and attention to basic questions such as the following:

- a) Are the remains human?
- b) Do they represent a single individual or several?

- c) What was the decedent's sex, race, stature, body weight, handedness and physique?
- d) Are there any skeletal traits or anomalies that could serve to positively identify the decedent?

The time, cause and manner of death are also addressed by the anthropologist, but the margin of error is usually greater than that which can be achieved by an autopsy shortly after death.

This model protocol may be of use in many diverse situations. Its application may be affected, however, by poor conditions, inadequate financial resources or lack of time. Variation from the protocol may be inevitable or even preferable in some cases. It is suggested, however, that any major deviations, with the supporting reasons, should be noted in the final report.

## **B. Proposed model skeletal analysis protocol**

### **1. Scene investigation**

A burial recovery should be handled with the same exacting care given to a crime-scene search. Efforts should be co-ordinated between the principal investigator and the consulting physical anthropologist or archaeologist. Human remains are frequently exhumed by law enforcement officers or cemetery workers unskilled in the techniques of forensic anthropology. Valuable information may be lost in this manner and false information is sometimes generated. Disinterment by untrained persons should be prohibited. The consulting anthropologist should be present to conduct or supervise the disinterment. Specific problems and procedures accompany the excavation of each type of burial. The amount of information obtained from the excavation depends on knowledge of the burial situation and judgement based on experience. The final report should include a rationale for the excavation procedure.

The following procedure should be followed during disinterment:

- a) Record the date, location, starting and finishing times of the disinterment, and the names of all workers;
- b) Record the information in narrative form, supplemented by sketches and photographs;
- c) Photograph the work area from the same perspective before work begins and after it ends every day to document any disturbance not related to the official procedure;

d) In some cases, it is necessary to first locate the grave within a given area. There are numerous methods of locating graves, depending on the age of the grave:

- i. An experienced archaeologist may recognize clues such as changes in surface contour and variation in local vegetation;
- ii. A metal probe can be used to locate the less compact soil characteristics of grave fill;
- iii. The area to be explored can be cleared and the top soil scraped away with a flat shovel. Graves appear darker than the surrounding ground because the darker topsoil has mixed with the lighter subsoil in the grave fill. Sometimes a light spraying of the surface with water may enhance a grave's outline;

e) Classify the burial as follows:

- i. Individual or commingled. A grave may contain the remains of one person buried alone, or it may contain the commingled remains of two or more persons buried either at the same time or over a period of time;
- ii. Isolated or adjacent. An isolated grave is separate from other graves and can be excavated without concern about encroaching upon another grave. Adjacent graves, such as in a crowded cemetery, require a different excavation technique because the wall of one grave is also the wall of another grave;
- iii. Primary or secondary. A primary grave is the grave in which the deceased is first placed. If the remains are then removed and reburied, the grave is considered to be secondary;
- iv. Undisturbed or disturbed. An undisturbed burial is unchanged (except by natural processes) since the time of primary burial. A disturbed burial is one that has been altered by human intervention after the time of primary burial. All secondary burials are considered to be disturbed; archaeological methods can be used to detect a disturbance in a primary burial;

f) Assign an unambiguous number to the burial. If an adequate numbering system is not already in effect, the anthropologist should devise a system;

g) Establish a datum point, then block and map the burial site using an appropriate-sized grid and standard archaeological techniques. In some cases, it may be adequate simply to measure the depth of the grave from the surface to the skull and

from the surface to the feet. Associated material can then be recorded in terms of their position relative to the skeleton;

h) Remove the overburden of earth, screening the dirt for associated materials. Record the level (depth) and relative coordinates of any such findings. The type of burial, especially whether primary or secondary, influences the care and attention that needs to be given to this step. Associated materials located at a secondary burial site are unlikely to reveal the circumstances of the primary burial but may provide information on events that have occurred after that burial;

i) Search for items such as bullets or jewellery, for which a metal detector can be useful, particularly in the levels immediately above and below the level of the remains;

j) Circumscribe the body, when the level of the burial is located, and, when possible, open the burial pit to a minimum of 30 cm on all sides of the body;

k) Pedestal the burial by digging on all sides to the lowest level of the body (approximately 30 cm). Also pedestal any associated artifacts;

l) Expose the remains with the use of a soft brush or whisk broom. Do not use a brush on fabric, as it may destroy fibre evidence. Examine the soil found around the skull for hair. Place this soil in a bag for laboratory study. Patience is invaluable at this time. The remains may be fragile, and interrelationships of elements are important and may be easily disrupted. Damage can seriously reduce the amount of information available for analysis;

m) Photograph and map the remains in situ. All photographs should include an identification number, the date, a scale and an indication of magnetic north;

i. First photograph the entire burial, then focus on significant details so that their relation to the whole can be easily visualized;

ii. Anything that seems unusual or remarkable should be photographed at close range. Careful attention should be given to evidence of trauma or pathological change, either recent or healed;

iii. Photograph and map all associated materials (clothes, hair, coffin, artifacts, bullets, casings etc.). The map should include a rough sketch of the skeleton as well as any associated materials;

n) Before displacing anything, measure the individual:

- i. Measure the total length of the remains and record the terminal points of the measurement, e.g. apex to plantar surface of calcaneus (note: This is not a stature measurement);
- ii. If the skeleton is so fragile that it may break when lifted, measure as much as possible before removing it from the ground;
- o) Remove all elements and place them in bags or boxes, taking care to avoid damage. Number, date and initial every container;
- p) Excavate and screen the level of soil immediately under the burial. A level of "sterile" (artifact-free) soil should be located before ceasing excavation and beginning to backfill.

## **2. Laboratory analysis of skeletal remains**

The following protocol should be followed during the laboratory analysis of the skeletal remains:

- a) Record the date, location, starting and finishing times of the skeletal analysis, and the names of all workers;
- b) Radiograph all skeletal elements before any further cleaning:
  - i. Obtain bite-wing, apical and panoramic dental X-rays, if possible;
  - ii. The entire skeleton should be X-rayed. Special attention should be directed to fractures, developmental anomalies and the effects of surgical procedures. Frontal sinus films should be included for identification purposes;
- c) Retain some bones in their original state; two lumbar vertebrae should be adequate. Rinse the rest of the bones clean but do not soak or scrub them. Allow the bones to dry;
- d) Lay out the entire skeleton in a systematic way:
  - i. Distinguish left from right;
  - ii. Inventory every bone and record on a skeletal chart;
  - iii. Inventory the teeth and record on a dental chart. Note broken, carious, restored and missing teeth;
  - iv. Photograph the entire skeleton in one frame. All photographs should contain an identification number and scale;
- e) If more than one individual is to be analysed, and especially if there is any chance that comparisons will be made between individuals, number every element with indelible ink before any other work is begun;
- f) Record the condition of the remains, e.g. fully intact and solid, eroding and friable, charred or cremated;

- g) Preliminary identification:
  - i. Determine age, sex, race and stature;
  - ii. Record the reasons for each conclusion (e.g. sex identity based on skull and femoral head);
  - iii. Photograph all evidence supporting these conclusions;
- h) Individual identification:
  - i. Search for evidence of handedness, pathological change, trauma and developmental anomalies;
  - ii. Record the reasons for each conclusion;
  - iii. Photograph all evidence supporting these conclusions;
- i) Attempt to distinguish injuries resulting from therapeutic measures from those unrelated to medical treatment. Photograph all injuries:
  - i. Examine the hyoid bone for cracks or breaks;
  - ii. Examine the thyroid cartilage for damage;
  - iii. Each bone should be examined for evidence of contact with metal. The superior or inferior edges of the ribs require particular scrutiny. A dissecting microscope is useful;
- j) If the remains are to be reburied before obtaining an identification, retain the following samples for further analysis:
  - i. A mid-shaft cross-section from either femur, 2 cm or more in height;
  - ii. A mid-shaft cross-section from either fibula, 2 cm or more in height;
  - iii. A 4-cm section from the sternal end of a rib (sixth, if possible);
  - iv. A tooth (preferably a mandibular incisor) that was vital at the time of death;
  - v. Several molar teeth for possible later deoxyribonucleic acid fingerprinting for identification;
  - vi. A cast of the skull for possible facial reconstruction;
  - vii. Record what samples have been saved, and label all samples with the identification number, date and name of the person who removed the sample.

### **3. Final report**

The following steps should be taken in the preparation of a final report:

- a. Prepare a full report of all procedures and results;
- b. Include a short summary of the conclusions;
- c. Sign and date the report

#### **4. Repository for evidence**

In cases where the body cannot be identified, the exhumed remains or other evidence should be preserved for a reasonable time. A repository should be established to hold the bodies for 5-10 years in case they can be identified at a later time.



**ANNEX 6:****INTERNATIONAL CONSENSUS ON PRINCIPLES AND MINIMUM STANDARDS IN SEARCH PROCESSES AND FORENSIC INVESTIGATIONS IN CASES OF ENFORCED DISAPPEARANCES, ARBITRARY OR EXTRAJUDICIAL EXECUTIONS**  
(excerpts)***Ethical principles****Human rights*

All actions undertaken in cases of enforced disappearances, arbitrary or extrajudicial executions, and forensic investigations should be based on the acknowledgement of the dignity and worth of the human person, as well as on the universal, individual and interdependent nature of the human rights of the victims. The enforced disappearance of persons constitutes a continuous crime that occurs until the whereabouts of disappeared persons is clarified. It violates a series of rights aimed at ensuring the validity of human rights, adopted in the form of international conventions and covenants that are binding upon the States.

*Victims as rights holders*

All actions undertaken in cases of enforced disappearances, arbitrary or extrajudicial executions, and forensic investigations must promote the ethical and legal recognition of the victims and their families as rights holders, fostering their informed participation in all stages of the process. In addition, all bodies involved should provide the support necessary to ensure that this type of cases leads to Clarification of the truth, the search of justice and provide reparation to the persons, their families, their communities and to society.

*Reparatory nature*

All actions undertaken in cases of enforced disappearances, arbitrary or extrajudicial executions, and forensic investigations must provide the elements necessary to ensure that these types of processes are reparatory as a whole for persons, families, communities and societies, so as to promote mechanisms of resistance and coping that respect the emotions, thoughts and experiences of the persons and reconstruct individual, familial, community and social life plans.

*Differential focus*

All actions undertaken in cases of enforced disappearances, arbitrary or extrajudicial executions, and forensic investigations must take into account the particularities, expectations and needs of people involved, including the social, political, economic, historical, and cultural context, and the characteristics related to gender, generation, ethnicity, language, spirituality, sexual orientation, forms of organization and traditional justice system, as well as other specific social circumstances.

*Mental integrity*

All actions undertaken in cases of enforced disappearances, arbitrary or extrajudicial executions, and forensic investigations must promote and protect the mental integrity of victims and their families, and create the conditions for prevention, rehabilitation, and strengthening, when necessary, that take into account the needs of the victims and their family members.

*Equality and non-discrimination*

All actions undertaken in cases of enforced disappearances, arbitrary or extrajudicial executions, and forensic investigations be made without any exclusion, distinction, restriction or preference based on ideology, gender, race, colour, national or ethnic origin with the purpose of or resulting in nullifying or the undermining the recognition enjoyment or exercise, in conditions or equality, of the human rights of the victims.

*Do no harm*

All the teams involved in the process of searching for disappeared persons and forensic investigations must, above all, ensure that no further harm is inflicted on victims and must promote actions of a reparatory nature. The purpose and ultimate goal of all actions taken must be to fulfil the expectations of victims and their families, and generate actions aimed at their inclusion and participation in the search processes, forensic investigation and return of their loved ones without re-traumatization.

**Minimum standards**

*Standard 1*

*Search for persons who have been the victims of enforced disappearance, extrajudicial and arbitrary executions*

All efforts must be carried out in order to look for victims of enforced disappearance and extrajudicial and arbitrary executions until they are found, to clarify the events regardless of when they occurred or whether prior formal denunciation on the part of the relatives has taken place, avoiding by all possible means any obstacles for the search processes.

Moreover, all efforts must be carried out to look and find persons who have disappeared as a consequence of hostilities, combat, armed actions or other acts related to armed conflicts and other situations of violence, on the basis of the relevant IHL and IHRL standards.

*Standard 2*  
*Finding the relatives*

All necessary efforts must be made to identify, find and facilitate the participation of the possible relatives of victims of enforced disappearance and arbitrary and extrajudicial executions, before starting forensic investigations and legal proceedings.

*Standard 3*  
*Active participation of relatives*

Efforts must be made to promote and facilitate the active participation of relatives in the processes of search for the victims of enforced disappearance, extrajudicial and arbitrary executions and in the forensic investigations, favouring the existence of spaces where individuals can organize and reaffirm themselves, as well as to take well informed decisions in view of the technical and legal processes that affect their rights to justice, memory and comprehensive reparation.

*Standard 4*  
*Clarifying the event, right to truth and memory*

The investigation of cases of enforced disappearance, extrajudicial and arbitrary executions and other human rights violations should be promoted until the events are fully clarified. Likewise, the conditions for the victims to reconstruct their historical memory should be facilitated as part of the process to ensure dignity and non-repetition.

*Standard 5*  
*Right to justice*

The State must adopt either national and international measures of legislative, administrative, judicial or any other nature to ensure the full observance of the individual and collective rights to justice for victims of enforced disappearance, arbitrary or extrajudicial executions, at the individual, family, community and social level.

*Standard 6*  
*Comprehensive reparations*

The rights of victims of enforced disappearance and other human rights violations to comprehensive reparation, contemplated in national and international regulations, must be acknowledged and put into practice and the necessary actions must be implemented in order to fulfil the rights and demands of victims, relatives, and communities. The psychosocial perspective must be considered within the individual and collective processes, and the historical experiences, expectations and differential needs for reparation of individuals, families and communities should be actively integrated.

*Standard 7*  
*Protection and security*

To make available all necessary means for guaranteeing the security of the families of victims of enforced disappearance and to clarify the events of the disappearance in conditions of dignity and security, especially in context of armed conflict or of on-going human rights violations. All information obtained throughout the process, from evidence and proof to testimonies and confidential, personal information, should be protected in a similar manner.

*Standard 8*  
*Constant information and transparency of the processes*

During the process of searching for disappeared persons or victims of arbitrary or extrajudicial executions, and forensic investigations the relatives should be constantly informed, in a clear and precise manner, favouring decision making about future actions. The right to information includes: (a) access to know about the process of searching for disappeared or executed persons, the forensic investigation, its actions, implications, consequences rights; this is particularly relevant in terms of comprehensive reparation and the right to justice; (b) progress made, limitations and relevant technical and legal elements; (c) access to the findings to elucidate responsibilities, the conduct of the perpetrators towards the victims, and the causes to commit the crimes, as well as the

circumstances of the disappearance or arbitrary or extrajudicial execution.

*Standard 9  
Right to psychosocial care*

Psychosocial care should be a fundamental pillar of comprehensive reparations and the duty humanitarian assistance to communities and relatives of victims of enforced disappearances, arbitrary, or extrajudicial executions. All the necessary steps should be undertaken in search processes and forensic investigations to prevent new forms of victimization of relatives, communities and their companions.

*Standard 10  
Self-care of people and intervening teams*

Provisions should be made for the comprehensive physical and psychological care of the people who carry out the technical, legal and psychosocial processes related to the search for victims of enforced disappearance, and arbitrary or extrajudicial execution.

*Standard 11  
Cultural context*

The procedures or protocols of search processes for victims of enforced disappearance, arbitrary or extrajudicial executions, and forensic investigations should take into account and respect the culture and meanings of the affected population.

*Standard 12  
Gender approach*

The design and implementation of psychosocial work should incorporate a gender focus, which implies raising awareness on the differential impact that the events related to enforced disappearances, arbitrary or extrajudicial executions have on women and men, as well as the differential impact as a consequence of the search processes and forensic investigations, and processes of truth, justice and reparations. It should also seek to raise awareness on the additional and different obstacles faced by women and men participating in these processes and propose differentiated measures to ensure their participation.

*Standard 13  
Work with children and adolescents*

Children and adolescents who are victims, or somehow find themselves involved in cases of enforced disappearance, arbitrary or extrajudicial executions or forensic investigations should be provided with special treatment that takes into consideration the best interest of children.

*Standard 14  
Coordination*

Mechanisms to coordinate the actions of all actors involved in the processes of searching for victims of enforced disappearances, arbitrary or extrajudicial executions should be guaranteed. This includes the processes of gathering and analysing the information available, legal, technical and psychosocial actions, as well as mechanisms for follow-up and assessment of all actions to be undertaken.

*Standard 15  
Independent teams*

To incorporate local, national and international organizations into the search processes for victims of enforced disappearances, arbitrary or extrajudicial executions, and forensic investigations, whenever the situations requires it, in order to contribute to the effectiveness of the technical, legal and psychosocial processes and guarantee compliance with the legal and scientific national and international standards, with the requirement of acting with transparency, independence and objectivity.

*Standard 16  
Scientific standards in forensic work*

To guarantee that forensic work complies with national and international scientific, legal and technical standards, ensuring that steps are taken to individualize, identify and preserve bodily remains, regardless of whether or not they have been identified.

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**International  
Commission  
of Jurists**

P.O. Box 91  
Rue des Bains 33  
CH 1211 Geneva 8  
Switzerland

**t** +41 22 979 38 00  
**f** +41 22 979 38 01  
[www.icj.org](http://www.icj.org)