

**NOW YOU SEE, NOW YOU DON'T  
THE DUTY OF THE STATE TO PUNISH  
“DISAPPEARANCES”  
AND EXTRA-JUDICIAL EXECUTIONS**

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**INTRODUCTION**

“Disappearances” and political killings are often committed in states where government forces are fighting an armed opposition movement, or where an armed conflict has broken out. The victims may include captured guerrillas and soldiers, civilians thought to support them, members of dissident groups and many others who are killed on the mere pretext of having a role in the conflict.<sup>2</sup> The use of “disappearances” and extra-judicial executions, rather than outright official execution, serves several internal purposes for repressive regimes. It allows them to get rid of actual, potential, and perceived

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<sup>2</sup> The notion that atrocities are inevitable in armed conflict or that “disappearances” and extra-judicial executions are predominantly a feature of conflict must be resisted. Amnesty International observes that:

[t]wo of the most massive programs of political killings since World War II are those in Indonesia and Kampuchea. They were not committed during periods of armed conflict and armed resistance ad been minimal in both cases. The same may be said for the majority of “disappearances” and extra-judicial executions in Iraq.

See Amnesty International, “Disappearances” and Political Killings, Human Rights Crisis of the 1990s: A Manual For Action (1994, Amsterdam: Amnesty International)

opponents without the publicity of a public trial or the risk of creating martyrs through the imposition of death sentences. It also terrorises broad sections of the population, by creating a chilling effect on political activity in general. Most significantly, the use of the mechanisms of disappearance and extra-judicial killings allows the government to avoid accountability for its actions.

For the past five decades, countless individuals worldwide have lost their lives as a result of forced “disappearances” and extra-judicial executions usually through covert or overt governmental programs.<sup>3</sup> Overtly, various government forces have performed systematic and deliberate killings and the practice has been institutionalised as a means of eliminating opponents and potential opponents.<sup>4</sup> The impunity with which the security forces are allowed to kill political opponents and criminal suspects creates the conditions in which many other people are killed by members of the security forces for criminal motives or simply

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<sup>3</sup> See eg Amnesty Manual, *ibid* 1-82; Amnesty International, *Getting Away With Murder: Political Killings and “Disappearances” in the 1990s* (1993, London, Amnesty International) 1-73; *Disappeared! Technique of Terror, A Report of the Independent Commission on International Humanitarian Issues*, (1986, London: Zed Books) 19-42; Osiel M, *Mass Atrocity, Ordinary Evil*; Arendt H, *Criminal Consciousness in Argentina’s Dirty War* (2001, New Haven: Yale University Press).

<sup>4</sup> See Amnesty Manual, *ibid* 25-32, 34-40.

at will.<sup>5</sup> Although this may be premised on a policy of increased security by granting greater powers to armed forces, occasionally it has taken the form of legislation that in reality has created an opportunity for forced “disappearances” and extra-judicial executions.<sup>6</sup>

Covertly, military units may operate as shadowy “death squads”. Moving beyond the task of fighting to defeat armed opposition groups by legitimate means, the armed forces may engage secretly in the physical elimination of members of a wide spectrum of the legal and political opposition, including other non-combatant civilians in areas of guerrilla activity.<sup>7</sup>

This article sets out to explore the duty of a state to punish “disappearances” and extra-judicial executions. Section II will introduce generally the spectre of forced “disappearances” and extra-judicial executions as conceived by Hitler (arguably the architect of the institutionalisation of this atrocious practice by the state)<sup>8</sup> and outline a

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<sup>5</sup> Ibid.

<sup>6</sup> For example, the legal basis for the formation of paramilitary “self-defence” squads in Colombia was *Law 48* of 1968 that, among other things, empowered the armed forces to provide military weapons to civilians and create peasant defence groups.

<sup>7</sup> Ibid 34.

<sup>8</sup> As Gustav Radbruch notes, “[i]n manifold ways, the rulers of the twelve-year

brief commentary on the scourge. Section III will define “disappearances” and extra-judicial executions. It will further discuss the attractiveness of this form of human rights violation as an instrument of governmental policy to states. Section IV will discuss developed principles of international law, both customary and conventional, that outlaw “disappearances” and extra-judicial executions and the significant obligations on states in this regard. It will posit the centrality evident in human rights instruments toward specifying a duty to prosecute grave violations of physical integrity with specific focus on “disappearances” and extra-judicial executions. It will mention the framework through which these are addressed. Section V will focus on the duty of states to punish perpetrators within the government for this evil. It will discuss the important conclusion on conventional law that human rights treaties do not explicitly require

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dictatorship gave unlawfulness, even crime, the form of a statute. Even institutionalised murder is said to have been founded on a statute, admittedly in the monstrous form of an unpublished secret law.” “Die Erneuerung des Rechts” (1947), reproduced in Maihofer W, (ed), *Naturrecht oder Rechtspositivismus?* (Darmstadt: Wissenschaftliche Buchgesellschaft) at 2. The Nazi’s primary legal principle was pure pragmatism; judges were to preserve and to protect the national interest at all costs. Various extraordinary tribunals were created as well as draconian legislation passed to expeditiously and efficiently implement the National Socialist program. Hitler viewed the law as a pragmatic mechanism to advance the Nazi cause. (See Remak J, (ed), *The Nazi Years: A Documentary History* (1969, Illinois, Waveland Press, Inc 1969) 61 (quoting Hitler’s statement to the Justice Minister in August 1942). The draconian dictates of the Third Reich were guided by Nazi Germany’s claim that “Gesetz ist Gesetz” (law is law). (See generally Milgram S, *Obedience to*

states parties to prosecute violations; nonetheless, they impose a general duty to investigate allegations of “disappearances” and extra-legal killings, and to prosecute those responsible. A state's complete failure to punish repeated or notorious instances of such offences violates its obligations under international law. As such, these duties represent a departure from the traditional approach of international human rights law. In rounding up the discussion, the article will also address the vexing moral, legal and political dilemmas that amnesty for “disappearances” and extra-judicial executions poses.

## II. HITLER'S LEGACY – THE NIGHT AND FOG DECREE

One of the most perverse instruments of institutionalised state tyranny by Nazi Germany was Hitler's *Nacht und Nebel Erlass* or the Night and Fog Decree<sup>9</sup> under which people were taken away from their homes, never to be heard of again. The Decree stated that within the occupied territories the only adequate punishment for persons committing offences against Germany or the occupying power that endangered security or the state of readiness was, in principle, the

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Authority: *An Experimental View* (1974, New York: Harper & Row).

<sup>9</sup> This decree is reproduced in Office Of United States Chief of Counsel For Prosecution of Axis Criminality *Nazi Conspiracy and Aggression* (1946, Washington : US Government Printing Office) Vol 7, Document No L-90.

death penalty.<sup>10</sup> Where it did not appear that the death penalty would be imposed within eight days, the prisoner would be taken to Germany where no further information on this person would be forthcoming.<sup>11</sup> Hitler's Secret Night and Fog Decree<sup>12</sup> streamlined the disposition of individuals within the occupied territories. These Night and Fog trials were to be conducted in secrecy.<sup>13</sup>

Hitler's rationale for this Decree was his belief that an effective deterrent only could be achieved through the immediate imposition of the death penalty or by secretly deporting individuals suspected of resistance to Germany. Disappearances were intended to paralyse the suspects' relatives and friends with fear and apprehension. The

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<sup>10</sup> See Secret Night and Fog Decree of Hitler, Signed by Keitel, 7 December 1941, Concerning Measures to be Taken Against Persons Offering Resistance to German Occupation, translated in United States Department of State, Trial of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No 10 (1951, Washington, US Government Printing Office) Vol III, 160 (Justice Case Docs), Article I.

<sup>11</sup> Whitney H, *Tyranny on Trial: The Evidence at Nuremberg* (1954, Dallas: Southern Methodist University Press) 221.

<sup>12</sup> See Secret Night and Fog Decree of Hitler, Signed by Keitel, 7 December 1941, Concerning Measures to be Taken Against Persons Offering Resistance to German Occupation, translated in United States Department of State, Trial of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No 10 (1951, Washington, US Government Printing Office) Vol III, 160 (Justice Case Docs).

<sup>13</sup> See Keitel, Letter of 12 December 1941, Transmitting the First Implementation Decree to the Night and Fog Decree, translated in Justice Case Docs, *ibid* 777-80 (First Decree for the Carrying Out of the Fuhrer's and Supreme Commander's Directive Concerning the Prosecution of Criminal Acts Against the Reich of the Occupying Power in the Occupied Territories).

effectiveness of this Decree required prohibiting prisoners from contacting their friends and relatives who were not even informed of the internees' death or execution.<sup>14</sup> Wilhelm Keitel, the Chief of High Command of the German armed forces instructed to implement the Decree, explained Hitler's reasons for the Decree thus:

In such cases penal servitude or even a hard labour sentence for life will be regarded as a sign of weakness. An effective and lasting deterrent can be achieved only by the death penalty or by taking measures which will leave the family and the population uncertain as to the fate of the offender. The deportation to Germany serves this purpose.<sup>15</sup>

On 2 February 1942, Keitel issued an explanatory order which stated that offences committed by civilians in the occupied territories identified by the Decree would be dealt with by the military courts only if the death sentence was pronounced within eight days of the prisoner's arrest.<sup>16</sup> The explanatory order added:

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<sup>14</sup> See Secret Instructions of Reich Ministry of Justice to Prosecutors and Judges, Initialled By Defendants Altstoetter, Mettgenberg, and Von Ammon, 6 March 1943, Concerning Measures Necessary to Maintain Secrecy of Night and Fog Procedures, translated in Justice Case Docs, *ibid* 794-96.

<sup>15</sup> International Military Tribunal (Nuremberg), Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg, 14 November 1945-15 October 1946 (1947-49 Nuremberg, Germany) Vol 1, 273.

<sup>16</sup> Office Of United States Chief of Counsel For Prosecution of Axis Criminality

In all other cases the prisoners are, in the future, to be transported to Germany secretly, and further dealings with the offences will take place here; these measures will have a deterrent effect because (a) the prisoners will vanish without leaving a trace, and (b) no information may be given as to their whereabouts or their fate.<sup>17</sup>

Under Hitler's Night and Fog program, the Ministry of Justice, courts, prosecutors, military and Gestapo caused thousands of civilians in the occupied territories to be arrested, transported to Germany, prosecuted, imprisoned in cruel and inhumane conditions and sentenced to death.<sup>18</sup>

The defendants were held incommunicado and denied due process of law. They were prosecuted in secret, denied the right to introduce evidence, to be confronted by the witnesses against them, to present evidence, to be represented by counsel and to be informed of the charges against them. Records were not maintained of the defendants' trials, imprisonments or fates.<sup>19</sup>

Secrecy under the Decree was maintained even after the death of such

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Nazi Conspiracy and Aggression (1946, Washington : US Government Printing Office) Vol 7, 872.

<sup>17</sup> Ibid.

<sup>18</sup> See United States v Joseph Altstoetter, translated in United States Department of State, Trial of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No 10 (1951, Washington, US Government Printing Office) Vol III, 984.1024-25

<sup>19</sup> Ibid 1025.



prisoners.<sup>20</sup> The Decree was one of the most bizarre aspects of Nazi repressive measures. It was a subtly woven fabric of fear cast by Hitler over the territories his military force occupied. The dread apprehension of the silent removal of loved ones made life a torment of anxiety. The lad on his way to school, the man in his workshop, the wife at home would disappear mysteriously, never to be seen or heard of again. Frantic inquiries at Gestapo offices were met with silence. Those left behind feared constantly that the missing ones would suffer torture, confinement in a concentration camp or even death. Not until liberation did they know when, how or where their family members disappeared to. Only a small percentage of such prisoners survived imprisonment and returned safely to their families at the end of the war.<sup>21</sup> Commenting on the Decree, in its judgment in the *Justice Case*, the International Military Tribunal at Nuremberg observed that the Nazis had utilised legal process to perpetrate a nation-wide, governmentally organised system of cruelty and injustice,<sup>22</sup> In the words of the

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<sup>20</sup> Ibid.

<sup>21</sup> Under the 1941 *Nacht und Nebel* (Night and Fog) Decree, 7,000 people arrested on suspicion of endangering German security were secretly transferred to concentration camps in Germany, with their families receiving no information on their whereabouts. Amnesty International USA, "Disappearances": A Workbook (1981, New York: Amnesty International USA) 2.

<sup>22</sup> See Opinion and Judgment, translated in United States Department of State, Trial of War Criminals Before the Nuremberg Military Tribunals Under Control Council

Tribunal, the “dagger of the assassin was concealed beneath the robe of the jurist.”<sup>23</sup> The Nazis distorted and perverted legal equity<sup>24</sup> by emptying legal process of its safeguards and utilising it an integral part of the government’s repressive mechanisms.<sup>25</sup>

While torture, political imprisonment, and killing of political opponents are not new, most important are the related techniques of forced “disappearance” and extra-judicial executions as repressive measures formalised within the legal framework, a system fine-tuned by Hitler through various ordinances and decrees, including the Night and Fog Decree.

Post World War II, a number of governments throughout the world embraced the perverse institutionalisation of state tyranny through both formal and informal mechanisms. Large-scale forced “disappearances” began in Guatemala in the late 1960s.<sup>26</sup> But world attention focused on the problem in the 1970s only after it came to light that thousands of

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Law No 10 (1951, Washington, US Government Printing Office) Vol III, 984-85.

<sup>23</sup> Ibid 985.

<sup>24</sup> Opening Statement for the Prosecution, translated in Justice Case Docs, ibid 31.

<sup>25</sup> Opening Statement for the Prosecution, translated in Justice Case Docs, ibid 32-33.

<sup>26</sup> Over 40,000 people have “disappeared” for political reasons in that country Americas Watch Commission, Closing The Space: Human Rights In Guatemala May

people in Chile and Argentina had disappeared during that decade.<sup>27</sup> In addition to its prevalence in Guatemala, Chile and Argentina, the technique was widely used in Uruguay, El Salvador, Afghanistan, Ethiopia, the Philippines, Equatorial Guinea, Sri Lanka, Democratic Kampuchea (Cambodia), and Uganda.<sup>28</sup> The systematic program of “disappearances” and widespread killings of the 1970s formed an indelible backdrop.<sup>29</sup> “In the 1980s, it was hoped that ‘disappearances’ and political killings would diminish following the campaigns of human rights groups and the efforts of United Nations mechanisms created to deal with these issues.”<sup>30</sup> They included the Working Group on Enforced or Involuntary Disappearances created in 1980<sup>31</sup> and the

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1987-October 1988, at 5 (1988).

<sup>27</sup> Amnesty International USA, “Disappearances”: A Workbook (1981, New York: Amnesty International USA) 2.

<sup>28</sup> See Americas Watch & ACLU, *As Bad As Ever: A Report On Human Rights In El Salvador* (1984, New York: Americas Watch Committee; Washington, DC: American Civil Liberties Union) 13 (government responsible for or complicit in disappearances of suspected opponents); Amnesty International, *Guatemala: A Government-Sponsored Campaign of Terror* (1981, New York: Amnesty International USA); Lawyers Committee on For International Human Rights, *Salvaging Democracy: Human Rights In The Philippines* (1985, New York : The Committee) 44-53 (disappearances continue); “Pretoria Rights Abuses--Dramatic Disclosures” *San Francisco Chronicle*, 2 June 1990, at A15, col 5.

<sup>29</sup> Other situations of “disappearances” and killings of concern included those in Afghanistan, Angola, Bolivia, the Central African Empire (now the Central African Republic), Chad, Chile, Colombia, Ethiopia, Guinea, India, Iraq, Lebanon, Namibia, Syria and Zaire. See generally, Amnesty International, “Disappearances” and Political Killings, *Human Rights Crisis of the 1990s: A Manual For Action* (1994, Amsterdam: Amnesty International).

<sup>30</sup> *Ibid* 92.

<sup>31</sup> The Working Group on Enforced or Involuntary Disappearances was initiated by the Commission on Human Rights in 1980 after a tense debate. See, CHR Res 20

Special Rapporteur on Summary or Arbitrary Executions established in 1982.<sup>32</sup> But such was not to be the case and, instead, the 1980s saw hundreds of thousands of “disappearances” and extra-judicial executions.<sup>33</sup>

In the 1990s, the end of the Cold War brought hopes of a New World Order where states would live in peace and human rights would flourish. But the disintegration of the old order brought about other new conflicts (including “disappearances” and political killings) in Azerbaydzhan, Georgia, Tadjhikistan, and the former Yugoslavia, for example.<sup>34</sup> Elsewhere, other forces engaged in warfare and political repression became responsible for “disappearances” and political killings.<sup>35</sup>

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(XXXVI), UN Doc E/CN4/1408, at 180 (1980).

<sup>32</sup> In March 1982, the United Nations Commission on Human Rights initiated the appointment of a Special Rapporteur on Summary or Arbitrary Executions. See CHR Res 1982/29, UN Doc E/CN4/1982/30, at 2-3, 147.

<sup>33</sup> For example this crimes were prevalent in among other countries Iraq, Lebanon, Chad, Colombia, Sudan. For a comprehensive listing of countries, see eg Amnesty International, “Disappearances” and Political Killings, Human Rights Crisis of the 1990s: A Manual For Action (1994, Amsterdam: Amnesty International) 92-96.

<sup>34</sup> See eg, Amnesty International, Getting Away With Murder: Political Killings and “Disappearances” in the 1990s (1993, London, Amnesty International) 24; Amnesty Manual, *ibid* 93.

<sup>35</sup> “Disappearances” and known or suspected extra-judicial executions were reported in the 1990s in many other countries including Algeria, Bangladesh, Chad, Egypt, El Salvador, Guatemala, Haiti, India, the Israeli-Occupied Territories, Mali, Mexico, Niger, Papua New Guinea, Peru, Senegal, Sierra Leone, Thailand, Togo, Turkey, Uganda and Venezuela.

### III. ANATOMY OF THE ATROCITIES

#### (a) “Disappearance” Defined

The term “disappearance” is really a euphemism: in practical terms it means that a person has been arbitrarily arrested, yet the authorities deny it. The term was first used in Guatemala in the 1960s when many political opponents of the regime were abducted, never to be heard from again. In Chile and Argentina during the 1970s this technique became systematic; it became the main feature in the repressive arsenal of the Argentine military dictatorship that ruled the country between 1976 and 1983. Thousands of people disappeared in El Salvador in the early 1980s, along with thousands more whose bodies were eventually found.<sup>36</sup>

Article 7 of the 1998 *Rome Statute of the International Criminal Court* defines the “enforced disappearances of persons” as:

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the arrest, detention or abduction of persons by, or with the

<sup>36</sup> Though disappearances take place in countries where the military establishment is either in power or has a high degree of autonomy from civilian authority, they are not restricted to military regimes: some of the highest numbers of reported cases come from Peru, Colombia and Sri Lanka, countries governed by democratically elected authorities.

authorisation, support or acquiescence of, a state or a political organisation, followed by 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>37</sup>

This definition mirrors Article 1(1) of the UN Draft International Convention on the Protection of All Persons from Forced Disappearances<sup>38</sup> as well as Article II of the 1994 *Inter-American Convention on the Forced Disappearance of Persons*.<sup>39</sup>

There are several elements to “disappearance” as described above. For example, the victim is *deprived of liberty* and held prisoner, and *agents of the state* may deprive the victim of liberty.<sup>40</sup> The victim's whereabouts and fate after arrest are *concealed*. The denial may be in the form of a public statement, a reply to inquiries by the victim's

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<sup>37</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, UN Doc A/CONF 183/9 reproduced in 37 ILM 999. It entered into force on 1 July 2002 in accordance with art 126. Information on the court can be accessed at <<http://www.un.org/law/icc/index.html>> (visited 6 May 2002).

<sup>38</sup> Draft International Convention on the Protection of All Persons from Forced Disappearance. This was drafted by the Office of the United Nations High Commissioner for Human Rights. The text of the draft convention can be accessed at <<http://www.disappearances.org/mainfile.php/undoc/50/>>.

<sup>39</sup> *Inter-American Convention on the Forced Disappearance of Persons* adopted at Belem Do Para, Brazil on 9 September 1994, Conf/Assem/Meeting: Twenty-Fourth Regular Session of The General Assembly To The Organisation of American states. The text of the treaty can be accessed at the OAS Website, <<http://www.oas.org/>>.

<sup>40</sup> Draft International Convention on the Protection of All Persons from Forced Disappearance. This was drafted by the Office of the United Nations High

relatives, or a response to a judicial procedure such as *habeas corpus*.<sup>41</sup>

The last remedy is sometimes sought if the authorities also fail to follow correct procedures for detention such as bringing prisoners promptly before a judicial authority and notifying relatives promptly of their arrest and place of detention.

“Disappearances” and extra-judicial execution often go hand in hand. The victim may be arrested or abducted, tortured to obtain information, and then killed. Sometimes the body is dumped in a public place. In other cases, bodies may be disposed of secretly. Even if the body is found and identified, the “disappearance” itself helps to conceal the identity of those responsible and the circumstances of the killing. “Disappearance” becomes a cover for extra-judicial execution, and extra-judicial execution perpetuates the state of “disappearance”.

***(b) Extra-judicial Executions Defined***

Extra-judicial executions *are unlawful and deliberate killings, carried*

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Commissioner for Human Rights. The text of the draft convention can be accessed at <<http://www.disappearances.org/mainfile.php/undoc/50/>> art 1(1).

<sup>41</sup> Amnesty International, “Disappearances” and Political Killings, *Human Rights Crisis of the 1990s: A Manual For Action* (1994, Amsterdam: Amnesty International) 85.

*out by order of a government or with its complicity or acquiescence.*<sup>42</sup>

The description is used to distinguish extra-judicial executions from other killings. This has several elements. For example, an extra-judicial execution is *deliberate*, not accidental. An extra-judicial execution is *unlawful* and it violates national laws such as those that prohibit murder, and/or international standards forbidding the arbitrary deprivation of life.

An extra-judicial execution, strictly speaking, is *carried out by order of a government or with its acquiescence.*<sup>43</sup> This concept distinguishes it from “extra-judicial executions” for private reasons, or killings that are in violation of an enforced official policy.<sup>44</sup> The concept of extra-judicial executions brings together several types of killings; death in police custody, assassination or killings by officers performing law enforcement functions but involving a disproportionate use of force to

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<sup>42</sup> Amnesty International, “Amnesty International 14-Point Program for the Prevention of “Disappearances” This 14-Point Program was adopted by Amnesty International in December 1992 as part of the organisation’s worldwide campaign for the eradication of “disappearances”. It can be accessed at <http://www.web.amnesty.org/web/aboutai.nsf/>>(visited 6 May 2002).

<sup>43</sup> Amnesty International, “Disappearances” and Political Killings, Human Rights Crisis of the 1990s: A Manual For Action (1994, Amsterdam: Amnesty International) 86.

<sup>44</sup> *Ibid.*



any threat posed.<sup>45</sup> The combination of unlawfulness and governmental involvement puts extra-judicial executions in a class of their own. Therefore, an extra-judicial execution is, in effect, a murder committed or condoned by the state.<sup>46</sup>

The unlawfulness of extra-judicial executions distinguishes it from justifiable killings in *self-defence*, deaths resulting from the use of reasonable force in *law enforcement*, killings in war that are not forbidden under international laws regulating the conduct of *armed conflict*, and the use of the *death penalty* following a lawful process.<sup>47</sup>

Lawful death penalty needs to be reconciled with the right to life, a right that is protected by international law which strictly provides that no one should be arbitrarily deprived of his/her life.<sup>48</sup> As noted by the

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<sup>45</sup> See eg Amnesty International, *Getting Away With Murder: Political Killings and "Disappearances" in the 1990s* (1993, London, Amnesty International) 9-38; Amnesty Manual, *ibid* 87.

<sup>46</sup> *Ibid*.

<sup>47</sup> See, Amnesty International, *Political Killings by Governments* (1983, London; Amnesty International) 89-90.

<sup>48</sup> Article 6 of the *International Covenant on Civil and Political Rights*, GA Res 2200A, 21 UN GAOR Supp (No 16) UN Doc A/6316 (1966) which provides that "every human being has the inherent right to life. *Ibid*. at 53. Prohibitions against arbitrary killings are also found in Article 4 of the *American Convention on Human Rights*, OAS Doc OEA/SerL/V/II.65, Doc 6 (1985) ("No one shall be arbitrarily deprived of his life."); Article 4 of the *African Charter on Human and Peoples' Rights*, adopted June 27, 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982)

Special Rapporteur on Summary or Arbitrary Executions, in order to give meaning to the right to be free from arbitrary killings, safeguards must be developed to make arbitrary killings less likely to occur.<sup>49</sup> A problematic issue however, arises in countries such as Saudi Arabia and China where it is perceived in certain quarters that legally sanctioned death penalties may fall into the category of arbitrary executions in the absence of sufficient and rigorous due process mechanisms.<sup>50</sup> So politically volatile though is the issue of standards that as recently as 2001 at the fifty-seventh session of the United Nations Commission on Human Rights,<sup>51</sup> a text sponsored by the European Union calling for a moratorium on executions, with a view to complete abolition of the death penalty<sup>52</sup> was defeated notwithstanding a fervent lobbying campaign by the EU.<sup>53</sup> Sixty-one countries signed a

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(“Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.”); and Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 UNTS 222 (1950) (“No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.”). Similarly, Article 3 of the *Universal Declaration of Human Rights*, adopted 10 December 1948, GA Res 217A (III), UN Doc A/810, at 71 provides, “Everyone has the right to life, liberty, and security of person.”

<sup>49</sup> Report of the Special Rapporteur on Summary or Arbitrary Executions, UN Doc E/CN4/1983/16, at 29-42 (1983).

<sup>50</sup> See Ramcharan B, “The Concept and Dimensions of the Right to Life” in Ramcharan B, (ed), *The Right To Life In International Law* (1985) 1.

<sup>51</sup> This took place in Geneva from 19 March to 27 April, 2001.

<sup>52</sup> CHR Res 2001/68 (25 April 2001).

<sup>53</sup> The final vote recorded was 27-18-7.

statement circulated by Saudi Arabia “dissociating” themselves from the resolution because “[e]very State has an inalienable right to choose its political, economic, cultural and legal systems, without interference in any form by another State.”<sup>54</sup> The United States, which voted against the resolution, argued that “[i]nternational law does not prohibit the death penalty when due process safeguards are respected and when capital punishment is applied only to the most serious crimes.”<sup>55</sup> The resolution illustrates the practical difficulties in questioning legal values and standards in view of national sovereignty considerations.

### ***3.3. The Lure of “Disappearances” and Extra–Judicial Killings as an Instrument of State Tyranny***

#### ***3.3.1. Organisational Complexity***

“Disappearances” and extra-judicial executions are often connected to a unit or branch of the security forces, where hierarchical organisation is a hallmark. The perpetration of a “disappearance” or an extra-judicial execution is likely to involve a chain of command extending from the highest official who orders or acquiesces in the crime to the lowest

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<sup>54</sup> The statement is contained in UN Doc E/CN4/2001/161 (2001). While few other industrial countries retain the death penalty, the majority of UN members retain the death penalty for the most serious offences. See the Secretary-General’s sixth quinquennial report on capital punishment, UN Doc E/2000/3 (2000).

<sup>55</sup> See Statement of Ambassador George Moose (25 April 2001). For a summary of the debate, see UN Press Release HR/CN/01/71 at 2-4 (25 April 2001).

officer who helps to carry it out.<sup>56</sup> Where there are programs of “disappearances” and extra-judicial executions, the armed forces are frequently involved. As Amnesty International notes,

[a]s an institution, the armed forces possess certain characteristics which enable them to carry out such a task: centralised command, ability to act rapidly and on a national scale, capacity to use lethal force and to overcome any resistance. In some situations, however, “disappearances” and political killings have been decentralised, localised, or carried out by forces ranging from “death squads” composed of regular police or military personnel to irregular bands which are in the pay of local landowners or other private citizens but operate with official acquiescence.<sup>57</sup>

Whatever the form of organisation, the mechanics of official murder and “disappearance” are almost certain to be concealed. Owing to organisational complexity, much research is needed to uncover “disappearances” and extra-judicial killings making it difficult to combat. The immense resources of States enable the security forces to cover their tracks through a series of sophisticated techniques. This may involve secret crack units whose agenda and operations are not officially acknowledged or the training and arming militant or

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<sup>56</sup> Amnesty International, “Disappearances” and Political Killings, Human Rights Crisis of the 1990s: A Manual For Action (1994, Amsterdam: Amnesty International) 88.

<sup>57</sup> Ibid.

extremist “pro-government vigilantes”.<sup>58</sup> Efforts by relatives, lawyers, journalists and human rights organisations to obtain information on “disappeared” individuals usually run into the Byzantine maze of government bureaucracy or the solid wall of “classified” State security information which gives the government firm ground to use the alibi of “matters of national security” to effectively forestall inquisition into its shadowy operations.

### ***3.3.2. The Iron Curtain of Secrecy***

Considering the illegality of “disappearances” and political killings, those responsible for them--the people who plan, order, carry out and acquiesce in them--will want to avoid being called to account and be punished. Secrecy helps to accomplish this. It also helps to allow a program of “disappearances” and extra-judicial executions to continue by confusing and neutralising the efforts of those who would take corrective action.

It is often the intelligence services which carry out “disappearances”

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<sup>58</sup> See eg *ibid* 27,35; Amnesty International, *Getting Away With Murder: Political Killings and “Disappearances” in the 1990s* (1993, London, Amnesty International) 33-38.

and killings or are involved in them. With their secret methods of operation, intelligence services have many of the qualities needed for these tasks. Where the facts of “disappearances” and extra-judicial executions become known, the authorities try to deflect international criticism by devising convincing excuses. For instance, the attribution of killings to independent “death squads” and the issue of lack of evidence. Other techniques include denials, misinformation, and the obstruction of attempts to investigate “disappearances” and extra-judicial executions and to bring the perpetrators to justice.<sup>59</sup>

With an iron curtain of secrecy effectively concealing facts, denials and misinformation are the armed forces’ main line of defence. Military commanders often claim that accusations against armed forces personnel form part of a campaign of black propaganda orchestrated by guerrilla groups to undermine public confidence in the army and the police.<sup>60</sup> This affords the government an opportunity to undermine the work of human rights activist workers by accusing them of being tools of subversion used by the armed opposition to attack the forces of law.

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<sup>59</sup> Ibid 34-42.

<sup>60</sup> See eg *Disappeared! Technique of Terror*, A Report of the Independent Commission on International Humanitarian Issues, (1986, London: Zed Books) 41-42.

Lack of information impedes recourse to the applicable legal remedies and procedural guarantees (either by the individual or other concerned persons--family, relatives, lawyers or human rights organisations). The traditional remedy for those detained by the government is a writ of *habeas corpus*.<sup>61</sup> Habeas writs serve to establish whether or not a violation has occurred, and to remedy it by producing the person detained. The writ of *habeas corpus* is an extraordinary remedy, and petitioners can only legitimately invoke it when they have exhausted all other administrative and legal remedies. In cases of disappearance, however, *habeas corpus* has not been an effective remedy, since many countries simply ignore it.<sup>62</sup>

Police respond to admitted writs with several types of claims: that the detention never occurred, that the disappeared had absconded and was

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<sup>61</sup> *Habeas corpus ad subjiciendum* is the most common form of habeas writ and is directed to the person detaining another, commanding him to produce the person detained. Black's Law Dictionary (5th ed, 1979) 638.

<sup>62</sup> In Argentina, habeas petitions by relatives of the disappeared went unanswered or were rejected. Most habeas petitions in Honduras have been similarly ineffectual. Communications to the UN Human Rights Committee reveal that the *habeas corpus* writ met the same fate in Uruguay.) Petitioning for a writ of *habeas corpus* is therefore an ineffective remedy in those countries that countenance the use of disappearances and death squad killings. See eg *Velasquez Rodriguez Case*, Inter-Am Ct H R 35, OAS/ser L/V/III. 19, Doc 13, appendix VI (1988) 74-76. Irene Bleier Lewenhoff & Rosa Valino de Bleier v Uruguay, UN Hum Rts Comm No 30/1978,

a proclaimed offender, that he was killed in an encounter, that terrorists had kidnapped and killed the disappeared, or that he/she had escaped. In many cases where the courts accept the police version, both at the initial stages and after an inquiry, justices cite the police denial, claims of a lack of police motive, the proclaimed offender status of the disappeared, disputed technical facts, and the lack of supporting affidavits filed by the petitioner as reasons for finding against the petitioner. In addition to revealing courts' desire to save the police from prosecution, these reasons demonstrate the courts' failure to acknowledge the realities of the police abuses, the climate of impunity that allows policemen to act without fearing the consequences, and the police's ability to manipulate or destroy evidence.

In the modern state, the judiciary serves as a bulwark against the excesses of the executive and the legislature.<sup>63</sup> However, when the state itself becomes brutal and lawless, anarchy reigns, and judicial process crumbles. Because of police harassment, inefficiency and/or corruption generally, the writ of *habeas corpus* provides the last remaining judicial avenue of redress. The failure of the judiciary to address

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13.3, UN Doc CCPR/C/OP/1 (1985) 110.



human rights violations discourages filing of petitions, with the desire to protect police morale leading to miscarriages of justice. The denial by judicial, political and military authorities in countries of the practice of disappearances or inability of preventing, investigating or punishing those responsible for the acts effectively renders *habeas corpus* ineffective and victims and families deprived of legal redress.

### **3.3.3. Immunity to Judicial Process**

Impunity for the perpetrators is a common feature of governmental programs of “disappearances” and political killings. Secrecy helps to ensure impunity by preventing the facts becoming known. “Impunity is also achieved by the passage of immunity laws and by the active obstruction of individuals and institutions attempting to take remedial action.”<sup>64</sup> Even in countries where the rule of law is generally observed, the police and armed forces often resist attempts to expose alleged wrongdoing within their ranks.<sup>65</sup>

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<sup>63</sup> See Cappelletti M, *The Judicial Process in Comparative Perspective* (1989); Lee S, *Judging the Judges* (1988).

<sup>64</sup> Amnesty International, “Disappearances” and Political Killings, *Human Rights Crisis of the 1990s: A Manual For Action* (1994, Amsterdam: Amnesty International) 89.

<sup>65</sup> For instance Sri Lanka and Colombia have been and remain formal democracies. For an analysis of “disappearances” and extra-judicial killings in these countries, see *ibid* 25-33, 34-42.

Impunity may be formalised through such legal devices as the adoption of laws<sup>66</sup> extending immunity from prosecution to members of the security forces for acts committed in the course of official duties. Such laws encourage human rights violations by demonstrating to the security forces that they will be allowed to commit such unlawful acts as “disappearances” and extra-judicial executions without fear of prosecution.

In Sri Lanka for instance, since 1979, the Sri Lankan government has used the *Prevention of Terrorism Act (PTA)* to stifle dissent and to violate individual rights. The Parliament enacted the PTA in 1979 to provide temporarily for the prevention of terrorism and unlawful activities.<sup>67</sup> However, this law was made permanent in 1982, and continues to operate. The PTA gives extensive powers to the authorities and seriously erodes constitutional guarantees of

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<sup>66</sup> The Sri Lankan government’s willingness to condone the actions of the security forces and government officials, even when they have committed gross abuses, was underlined in December 1988 when the *Indemnity (Amendment) Act* was passed days before the presidential election was to take place. The 1991 Colombian Constitution introduces the concept of “due obedience” by which “military men on active duty” will not be held criminally liable for offences (including human rights violations) if they can demonstrate that they were following orders.

<sup>67</sup> *Prevention of Terrorism Act (PTA)* (Preamble), No 48 (1979) (Sri Lanka).

fundamental rights by greatly expanding the state's powers of arrest and detention.<sup>68</sup>

In the case of India, when Punjab exploded in 1984, the Indian government began active armed oppression of Sikhs and a violent police crackdown of the Sikh insurgency. As part of its counter-insurgency operation, the Indian government passed several draconian laws that sanctioned police impunity. The *Terrorist and Disruptive Activities (Prevention) Act (TADA)* of 1987 established in camera courts and authorised detention of persons in a “disturbed area” based on mere suspicion.<sup>69</sup> Additionally, The *Armed Forces (Punjab and Chandigarh) Special Powers Act* of 1983 empowered security forces to search premises and arrest people without warrant, and the power to shoot to kill a suspected terrorist, with prosecutorial immunity, as granted in Section 7.<sup>70</sup>

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<sup>68</sup> Ibid, PTA, No 10 (amended 1982).

<sup>69</sup> Between 1985 and 1995, the police registered 17,529 TADA cases in Punjab; only one person was eventually convicted. Singh J, *Without Fear or Favour* (1998) 295. For further details see e.g, Kumar R N, & Mahmood C, *Disappearances in Punjab and the Impunity of the Indian State: A Report on Current Human Rights Efforts*, at <http://www.khalistan-affairs.org/main/Human%20Rights/dissapinpunjab.htm> (1 October 1998); Kumar R N, and ors, *Enforced Disappearances, Arbitrary Executions and Secret Cremations: Victim Testimony and India's Human Rights Obligations: Interim Report, 1998 Commission For Coordination On Disappearances In Punjab* 61-62.

<sup>70</sup> Section 7 states:

#### IV. “DISAPPEARANCES” AND EXTRA-JUDICIAL EXECUTIONS AS VIOLATIONS OF INTERNATIONAL HUMAN RIGHTS

##### 4.1. *The Universal Rights to Life, Liberty and Security of the Person*

“Disappearances” and extra-judicial executions are clear violations of fundamental rights proclaimed in the earliest human rights instruments adopted by the UN.<sup>71</sup> Article 3 of the Universal Declaration of Human Rights states: “Everyone has the right to life, liberty and security of person.” These rights are violated when “disappearances” and extra-judicial executions are perpetrated. Extra-judicial executions clearly violate the right to life. Other rights also are often violated in cases of extra-judicial executions: often, for example, the victims are made to “disappear” or tortured before being killed. “Disappearances” violate the right to liberty and security of person as provided under Article 5 of the Universal Declaration. They also violate or constitute a grave

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No prosecution, suit or other legal proceeding shall be instituted, except with the previous sanction of the Central Government, against any person in respect of anything done or purported to be done in exercise of the powers conferred by this Act.

*Armed Forces (Punjab and Chandigarh) Special Powers Act (1983).*

<sup>71</sup> Article 1 of the Declaration on Enforced Disappearance of Persons, UN Doc E/CN4/1991/49 (“Declaration on Disappearances”), states that any act of enforced disappearance “is condemned as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights...” The 1989 UN resolution whereby the Principles on Extra-Legal, Arbitrary and Summary Executions were adopted by Economic and Social Council Resolution 1989/85 of 24 May 1989 states that “...extra-legal, arbitrary and summary executions contravene the human rights and fundamental freedoms proclaimed in the Universal

threat to the right to life.<sup>72</sup> The adoption of the Universal Declaration was an immensely important event. By adopting it, the governments of the world, represented at the UN, agreed that everyone is entitled to fundamental human rights.<sup>73</sup> These rights apply everywhere, not just in those countries whose governments may choose to grant them. It follows from this that all governments must protect the rights of people under their jurisdiction, and that a person whose human rights are violated has a claim against the government that violates them.<sup>74</sup> Although the Universal Declaration does not have the formal force of a treaty, and is therefore not legally binding in and of itself, it has become so widely recognised and accepted since its adoption that it

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Declaration of Human Rights” .

<sup>72</sup> These rights are cited in Article 1 of the Declaration on Disappearances, *ibid.* The Declaration also cites the right to recognition as a person before the law. Like the right to life and the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, the right to recognition as a person before the law may never be derogated from under the *International Covenant on Civil and Political Rights* (“*International Covenant*”), adopted 16 December 1966, GA Res 2200, 21 UN GAOR Supp (No 16) at 52, 999 UNTS 171, reprinted in 6 ILM 368 (1967). The UN Working Group on Disappearances has stated that “enforced or involuntary disappearances constitute the most comprehensive denial of human rights of our time.” (WGEID 1990 Report, paragraph 338).

<sup>73</sup> “Everyone is entitled to all the rights and freedoms set forth in this Declaration...” (Universal Declaration of Human Rights, adopted without dissent and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948, Article 2).

<sup>74</sup> Article 8 of the Universal Declaration of Human Rights, *ibid.*, proclaims the right of everyone to an effective remedy before the national courts for violations of such fundamental rights as have been “granted him by the constitution or by law”. The *International Covenant on Civil and Political*, adopted 16 December 1966, GA Res 2200, 21 UN GAOR Supp (No 16) at 52, 999 UNTS 171, reprinted in 6 ILM 368 (1967) goes further by providing for the right to an effective remedy for violations of the internationally recognised human rights set forth in the Covenant.

should be regarded as obligatory for all States as part of customary international law.<sup>75</sup>

About two decades after the adoption of the Universal Declaration, the rights to life, liberty and security of person were encoded as treaty obligations in the *International Covenant on Civil and Political Rights (International Covenant)*.<sup>76</sup> Any State Party to the *International Covenant* which permits its officials to engage in “disappearances” or extra-judicial executions violates the obligations which it agreed to fulfil in becoming a party to this treaty. The *International Covenant* has the formal force of a treaty. A State’s act in becoming a party to it is in effect a promise to other States Parties to abide by its provisions.

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<sup>75</sup> According to the Proclamation of Teheran, adopted and proclaimed by the International Conference on Human Rights, convened by the UN in Iran in 1968, “The Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and *constitutes an obligation for the members of the international community*” (emphasis added; for the text of the Proclamation of Teheran, see United Nations, *Human Rights; A Compilation of International Instruments* (1988, New York: United Nations). Moreover, the fact that the *Universal Declaration of Human Rights*, adopted 10 December 1948, GA Res 217A (III), UN Doc A/810, has been accepted by so many States gives it considerable moral and political weight. The provisions of the Universal Declaration have been cited as the justification for numerous UN actions and have inspired or been used in many international conventions and national constitutions and laws. See eg Henkin L, (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981, New York: Columbia University Press) 8, 16-20.

<sup>76</sup> *International Covenant on Civil and Political*, adopted 16 December 1966, GA Res 2200, 21 UN GAOR Supp (No 16) at 52, 999 UNTS 171, reprinted in 6 ILM 368 (1967), Article 6.

Whether or not they are parties to the *International Covenant*, all States must be regarded as obliged to refrain from “disappearances” and extra-judicial executions as violations of the rights to life, liberty and security of person.

Three decades after the *International Covenant* and in response to the alarming increase in loss of life owing to “disappearances” and extra-judicial executions in the late 1960s and the 1970s,<sup>77</sup> the UN adopted its first resolutions recognising this crimes as a specific type of human rights violation and expressing general concern about “disappearances” and extra-judicial executions in 1978.<sup>78</sup> Two years later, in 1980, the UN gain adopted a resolution reaffirming its concern for these crimes.<sup>79</sup> It however took many years of discussions before the adoption of more binding instruments, the Declaration on Disappearances<sup>80</sup> and the Principles on Extra-Legal, Arbitrary and

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<sup>77</sup> In this period, “disappearances” and extra-judicial executions reached new heights particularly in Indonesia, Guatemala, Chile, Argentina, Paraguay, Ethiopia and Uganda as the countries succumbed either to oppressive military rule or despotic dictatorships. See eg Amnesty International, *Getting Away With Murder: Political Killings and “Disappearances” in the 1990s* (1993, London, Amnesty International) 1-2.

<sup>78</sup> The text of the resolution is reproduced in Amnesty International, “Disappearances”; *A Workbook* (1981, London: Amnesty International) Appendix.

<sup>79</sup> The text is reproduced in “Disappearances”; *A Workbook* (1981, New York: Amnesty International USA), Appendix.

<sup>80</sup> GA Resolution 35/172 of 15 December 1980.

Summary Executions in 1989.<sup>81</sup> This spelt out the prohibition of these crimes at any time, including a state of war, a threat of war, internal political instability or any other public emergency.<sup>82</sup>

Complementing the worldwide scope of the United Nations, five of “regional inter-governmental organisations” have adopted human rights treaties that are legally binding on the States in those regions which become parties to them.<sup>83</sup> Like the Universal Declaration and *International Covenant*, all five treaties provide for the right to life and, in particular, the right not to be arbitrarily deprived of life. All five provide for the right to liberty and security of person, the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment and the right not to be subjected to arbitrary arrest or

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<sup>81</sup> Principles on Extra-Legal, Arbitrary and Summary Executions adopted by Economic and Social Council Resolution 1989/85 of 24 May 1989.

<sup>82</sup> Declaration on Enforced Disappearance of Persons, UN Doc E/CN4/1991/49, Article 7; Principles on Extra-Legal, Arbitrary and Summary Executions, *ibid* Principle 1.

<sup>83</sup> These regional organisations are the Council of Europe, the Organisation of American States (OAS) and the Organisation of African Unity (OAU), the Arab League and the Commonwealth of Independent States. The relevant treaties are the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, adopted 4 November 1950, 213 UNTS 221, Europ. TS No 5, the *American Convention on Human Rights*, adopted 7 January 1970, OAS Official Records, OEA/serK./XVI/1.1, Doc 65 rev 1, corr 1 (1970), reprinted in 9 ILM 673 (1970), the *African Charter on Human and Peoples' Rights*, adopted June 27, 1981, OAU Doc CAB/LEG/67/3 rev 5, 21 ILM 58 (1982), the *CIS Convention* and the *Arab Charter*. Reproduction of the texts of the last two instruments can be found in Gandhi P R, (ed), *Blackstone's International Human Rights* (1995).



detention. “Disappearances” and extra-judicial executions are clearly prohibited, just as they are under the Universal Declaration of Human Rights. Each of the five regional treaties provides for the establishment of institutions to supervise its implementation.

#### **4.2. *Prohibition of “Disappearances” and Extra-Judicial Executions in War***

Prior to the 19<sup>th</sup> century, war was a very formal business, with uniformed armies occupying clearly delineated territory, a code of conduct which was usually (although not always) observed, a formal declaration and a formal end, the peace treaty.<sup>84</sup> The “decisive battle” was a feature of Clausewitzian war, formal fighting and formal peace but technological and strategic developments increasingly displaced this formal warfare dominated by set-piece battles. Technological advancements and the birth of the notion of total war marked the challenge of Clausewitzian conceptions of war. The landscape of war underwent dramatic transformation in the 19<sup>th</sup> century with the Napoleonic wars marking the dawn of the nation-at-arms and an epoch of unbridled ferocity.

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<sup>84</sup> Brown, *supra* note 4.

From the mid-19th century, increasing public dismay at the sufferings inflicted in warfare gave rise to efforts to restrict the horrors of war through international law. One branch of the laws of armed conflict which have been developed through these efforts deals with the protection of victims of war; it is often referred to as “international humanitarian law”. Its most recent expression is in the four *Geneva Conventions* of 1949, supplemented by the two *Additional Protocols* adopted in 1977.<sup>85</sup> The *Geneva Conventions*<sup>86</sup> and the *Additional Protocols*<sup>87</sup> are binding on all States, which become parties to them.

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<sup>85</sup> Like the *Universal Declaration of Human Rights*, adopted 10 December 1948, GA Res 217A (III), UN Doc A/810, the *Geneva Conventions* of 1949 were an outgrowth of the horrors of the Second World War. *Additional Protocol I* of 1977, below n 59, develops the protection of victims of international armed conflicts, while *Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, 1125 UNTS 609, develops and supplements the provisions for the protection of victims of internal armed conflicts contained in common Article 3 of the *Geneva Conventions*.

<sup>86</sup> *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August, 1949, 75 UNTS 31 (*Geneva Convention I*); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August, 1949, 75 UNTS 85 (*Geneva Convention II*); *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August, 1949, 75 UNTS 135 (*Geneva Convention III*); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August, 1949, 75 UNTS 287 (*Geneva Convention IV*). These conventions were opened for signature on 12 August 1949 and entered into force on 12 January 1951; as of 1 July 2001 there are 188 signatories to these Conventions (referred to collectively as the “1949 Geneva Conventions”).

<sup>87</sup> See *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, 8 June 1977, 1125 UNTS 3 (*Additional Protocol I*); *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, 1125 UNTS 609 (*Additional Protocol II*).

The *Geneva Conventions* set forth detailed rules of behaviour to protect actual or potential victims of war. Each Convention covers a specific class of “protected persons”. The *Geneva Conventions* do not outlaw war, but they provide that people not involved in the fighting are to be treated humanely. Enemy soldiers may be killed in combat, but a soldier who has been captured or laid down his/her arms seeking to surrender, or has been put out of action must not be killed. Nor may a country at war kill civilians protected by *Geneva Convention IV*<sup>88</sup> Extra-judicial executions constitute “wilful killings” and are thus “grave breaches” of the *Geneva Conventions* under the provisions cited above, if perpetrated in an international armed conflict against persons protected by the Conventions.<sup>89</sup> “Disappearances” also violate various provisions of the Conventions.<sup>90</sup>

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<sup>88</sup> The death penalty is not excluded, but its use is surrounded by stringent restrictions and safeguards, including a six months’ delay in the carrying out of a death sentence.

<sup>89</sup> “Grave breaches” of the *Geneva Conventions* are war crimes.

<sup>90</sup> The “disappearance” of a prisoner of war would violate various provisions of the *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August, 1949, 75 UNTS 85 including Articles 70, 71 and 118. The “disappearance” of a civilian protected by the *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August, 1949, 75 UNTS 287 would probably be considered “unlawful confinement” and possibly also “unlawful deportation or transfer”, constituting a grave breach of the Convention (See Rodley N S, *The Treatment of Prisoners under International Law* (1987, Oxford: Clarendon Press) at 198). Other acts prohibited in the *Geneva Conventions* may also be involved in cases of “disappearances”, including “wilful

Like earlier formulations of the laws of armed conflict, the *Geneva Conventions* of 1949 apply to international conflicts--wars between nations--but in an important innovation, Article 3, a text common to all four Conventions, extends to “armed conflict not of an international character”<sup>91</sup> a list of fundamental rules for the protection of persons not, or no longer, taking an active part in the hostilities, which each party to the conflict is “bound to apply, as a minimum”. “Violence to life and person, in particular murder of all kinds” is prohibited “at any time and in any place whatsoever with respect to the above-mentioned persons”. Similarly, Article 4 of *Additional Protocol II* to the *Geneva Conventions* forbids the murder of anyone not taking a direct part in hostilities in non-international armed conflicts. Thus the prohibition of wilful killing of protected persons in *international* wars is extended to

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killing, torture or inhuman treatment”, which are forbidden as grave breaches of the four Conventions.

<sup>91</sup> The extension of Common Article 3 of the *1949 Geneva Conventions* to internal conflicts received mention in the Nicaragua Case Judgement (*Case Concerning Military and Paramilitary Activities in and Against Nicaragua-Nicaragua v USA*), ICJ Reports, 1986, 14 and has received acknowledgment in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia. It is important to note that the progressive work of the ICTFY in freeing the applicability of grave breaches from the international conflict perimeter received international acceptance by the recognition of its jurisprudence with regard to the applicability of common Article 3 to all conflicts in the *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, UN Doc A/CONF 183/9 reproduced in 37 ILM 999, Article 8.

the prohibition of killing of people who have ceased taking or do not take an active part in hostilities<sup>92</sup> in *internal* armed conflicts--a category of conflict which can be taken to include some of the worst situations of “disappearances” and political killings. The prohibition of deliberate and arbitrary killings in armed conflicts applies not only to government forces but also to all parties to such conflicts including armed opposition groups and is binding on all States Parties which are bound to apply its provisions.

The *Geneva Conventions* (which form part of international customary law)<sup>93</sup> are universally accepted as binding standards of behaviour which must be observed in armed conflict.<sup>94</sup> At the same time, parallel to the development of the laws of armed conflict, successive human rights instruments adopted by the UN have made it clear that certain

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<sup>92</sup> Persons protected by common Article 3 include wounded, sick or captured combatants as well as civilians taking no active part in the hostilities.

<sup>93</sup> In his commentary on the Statute of the ad-hoc criminal tribunal established pursuant to Chapter VII of the Charter to contribute to the restoration of peace in the former Yugoslavia, the then UN Secretary-General stated that “part of the conventional international humanitarian law which has beyond doubt become part of international customary law is the law of armed conflict embodied in the *Geneva Conventions for the Protection of War Victims* of 12 August, 1949....” *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), para 35, UN Doc S/25704 (3 May 1993), reprinted in 32 ILM 1159, 1170 (1993). The *Geneva Conventions* constitute the core of the customary law applicable in armed conflicts.

<sup>94</sup> Virtually all States are parties to the *Geneva Conventions*, above n 58 and the

fundamental human rights, such as the right to life and with it the prohibition of arbitrary deprivation of life, must be respected in time of war as in peacetime. These rights are commonly known as “*non-derogable rights*”, a reference to the fact that under the *International Covenant* and other human rights treaties, States Parties may not derogate from their obligations under these treaties to respect these rights in any circumstances including times of public emergency.<sup>95</sup>

Under certain circumstances “disappearances” and extra-judicial executions may constitute war crimes and crimes against humanity.<sup>96</sup>

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majority are parties to the Additional Protocols.

<sup>95</sup> Under Article 4 of the *International Covenant on Civil and Political*, adopted 16 December 1966, GA Res 2200, 21 UN GAOR Supp (No 16) at 52, 999 UNTS 171, reprinted in 6 ILM 368 (1967) States Parties may derogate from certain obligations under the Covenant “[i]n time of public emergency which threatens the life of the nation”, but no derogation is permitted from Article 6, which provides for the right to life and prohibits the arbitrary deprivation of life; from Article 7, prohibiting torture and cruel, inhuman and degrading treatment or punishment; or from Article 16, guaranteeing the right to recognition as a person before the law. Under the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, adopted 4 November 1950, 213 UNTS 221, Europ. TS No 5 (entered into force 3 September 1953) and the *American Convention on Human Rights*, adopted 7 January 1970, OAS Official Records, OEA/serK./XVI/1.1, Doc 65 rev 1, corr 1 (1970), reprinted in 9 ILM 673 (1970) (entered into force on 18 July 1978) the right to life, the right not to be tortured and certain other rights are non-derogable. The *African Charter on Human and People's Rights*, adopted 27 June 1981 (came into force on 21 October 1986) OAU Doc CAB/LEG/67/3/Rev 5, reprinted in 21 ILM 58 (1982) does not have a provision for derogation.

<sup>96</sup> In a resolution adopted on 17 November 1983, the General Assembly of the Organisation of American States declared that “the practice of the forced disappearance of persons in the Americas....constitutes a crime against humanity” (Resolution 666 (XIII-0/83) on the *Annual Report of the Inter-American Commission on Human Rights*). Though the final text of the UN Declaration on Enforced

These phrases convey strong condemnation, but what is important in terms of bringing those responsible to justice are the legal consequences if a crime is included in one or another of these categories. The two categories apply to different circumstances. War crimes consist of violations of the laws of armed conflict,<sup>97</sup> while Crimes against humanity can be committed either in wartime or in peacetime.<sup>98</sup>

#### **4.4. *The Implementation of International Standards***

##### **4.4.1. *UN Reports and Resolutions***

The first substantial resolutions adopted by the UN on

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Disappearance of Persons, UN Doc E/CN4/1991/49, goes only so far as to say that the systematic practice of enforced disappearances is “of the nature of” a crime against humanity, the issue (or doubt) of whether “disappearances constitute a crime against humanity would seem to have been laid to rest by its experience recognition in Article 7(2) paragraph (i) of the *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, UN Doc A/CONF 183/9 reproduced in 37 ILM 999. It should be noted that the process of the Statute’s development was an effort at codification of international crimes rather than any attempt at progressive development through definition.

<sup>97</sup> They include the crimes defined as “grave breaches” of the *Geneva Conventions* of 1949 including “wilful killing” of protected persons as well as “unlawful confinement” and “unlawful deportation or transfer” of protected civilians. See eg Kalshoven F, *Constraints on the Waging of Warfare* (1987) 68.

<sup>98</sup> The *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, adopted by UN General Assembly Resolution 2391 (XXIII) of 26 November 1968 applies to crimes against humanity “whether committed in time of war or in time of peace as they are defined in the *Charter of the International Military Tribunal, Nuremberg, (Nuremberg Charter)* of 8 August 1945 and confirmed by resolutions 3 (I) of 13 February 1946 and 95 (1) of 11 December 1946 of the General Assembly”.

“disappearances” and extra-judicial executions set forth specific actions which governments should take. Resolution 33/173 on disappeared persons, adopted by the General Assembly on 20 December 1978, called upon governments “to devote appropriate resources” to searching for the disappeared, “to undertake speedy and impartial investigations”, and to ensure that law enforcement and security agencies are “fully accountable”, including “legal responsibility for unjustifiable excesses” which might lead to “disappearances”. Two years later, a resolution on extra-legal executions adopted by the Sixth UN Congress on the Prevention of Crime and the Treatment of Offenders called on all governments “to take effective measures to prevent such acts”.<sup>99</sup>

Both the Declaration on Disappearances<sup>100</sup> and the Principles on Extra-Legal, Arbitrary and Summary Executions<sup>101</sup> call on the authorities to conduct impartial investigations into complaints and reports of these abuses, to bring the alleged perpetrators to trial and to establish specific

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<sup>99</sup> See Amnesty International, “Disappearances” and Political Killings, Human Rights Crisis of the 1990s: A Manual For Action (1994, Amsterdam: Amnesty International) 187-188.

<sup>100</sup> Declaration on Enforced Disappearance of Persons, UN Doc E/CN4/1991/49.

<sup>101</sup> Principles on Extra-Legal, Arbitrary and Summary Executions adopted by Economic and Social Council Resolution 1989/85 of 24 May 1989.



safeguards for the prevention of these abuses. The measures specified in these instruments are phrased as rules constituting further standards which in turn have to be implemented. The UN has called for the instruments and the provisions therein to be incorporated *in national legislation* and has established *institutions and procedures* to monitor compliance with the standards, to make recommendations and to take action.<sup>102</sup>

#### **4.4.2. *International Penal Process***

The 1990s witnessed the establishment of the International Criminal Tribunals for the Former Yugoslavia and Rwanda. These two tribunals establish the beginning of a new pattern in the genuine international implementation of international criminal law and the move back to the international model inaugurated at Nuremberg. Forced “disappearances” and extra-judicial executions fall within the purview of Article 5 of the ICTFY and Article 3 of the ICTR.<sup>103</sup>

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<sup>102</sup> See generally, Amnesty International, “Disappearances” and Political Killings, Human Rights Crisis of the 1990s: A Manual For Action (1994, Amsterdam: Amnesty International) 178-197.

<sup>103</sup> See *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), UN Doc S/25704 of 3 May 1993. The Statute of the International Criminal Tribunal for the Former Yugoslavia formed the appendix to the Secretary-General’s report. On 8 November 1994, the Security Council adopted resolution 955 creating the International Criminal Tribunal for Rwanda, with its

The major problem though is that the ad hoc approach of enforcing international criminal law is reactive and narrowly focused on solving the international emergency of the moment. Past practice by the international community demonstrates that the practice of establishing *ad hoc* international criminal tribunals is at best, likely to be a very limited exception rather than a norm, thus not affording any comprehensive investigation and prosecution of “disappearances” and extra-judicial-executions at the international level. Arguably the creation of the International Tribunals moved the world community closer to the establishment of the permanent International Criminal Court (ICC). As the Preamble to the Treaty notes, the purpose of the Court is to end impunity for the perpetrators of “atrocities that deeply shock the conscience of humanity.”<sup>104</sup> Forced “disappearances” and extra-judicial executions fall within the purview of crimes against humanity which are mentioned in Article 5 of the *Rome Statute* and enunciated in Article 7. Additionally, these acts can be separately prosecuted under the *Rome Statute* as war crimes involving grave breaches of the *Geneva Conventions*, which include torture, inhuman

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Statute as the resolution’s annex.

treatment, wilfully causing great suffering or serious injury to body or health.<sup>105</sup>

Although the *Rome Statute* does not use the term “complementarity”, the Preamble describes the new Court as a “complement” to existing national courts and processes<sup>106</sup>--hence the coining of the term “complementarity”. The agreed formula in the *Rome Statute* is that a State with jurisdictional competence has the first right to institute proceedings unless the ICC decides that the State “is unwilling or unable genuinely to carry out the investigation or prosecution.”<sup>107</sup> Jurisdiction falls to the ICC only in the exceptional circumstance where the State is unable or unwillingly to genuinely carry out the investigation. In recognising States concurrent jurisdiction over serious violations of international law, the Court is expected to strengthen not replace national enforcement of human rights and human rights norms.

The *Rome Statute* embodies a carefully crafted compromise between a

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<sup>104</sup> Ibid Preamble.

<sup>105</sup> *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, UN Doc A/CONF 183/9 reproduced in 37 ILM 999, Articles 8(2)(a)(ii) and (iii).

<sup>106</sup> Ibid Article 17, having regard to Article 1 and the Statement of the Preamble in para 10.

State-centred idea of jurisdiction, and a more inclusive international vision. The State-centred idea, in its extreme manifestation, would uphold a State's exclusive jurisdiction to prosecute and try its own citizens for war crimes, genocide, and crimes against humanity, and to prosecute and try citizens of other States who commit such acts on the territory of the forum State. An inclusive vision would promote the idea of universal jurisdiction, whereby individuals of any nationality could be tried for certain crimes by any State acting on behalf of humanity as a whole. The ICC follows a middle path. The *Rome Statute* assigns primary jurisdiction to the ICC's member states. However, in ratifying the *Rome Statute* and becoming members of the ICC, states agree that, if they are unwilling or unable to carry out their obligation to investigate and prosecute these crimes, the ICC has "complementary" jurisdiction to do so in their stead.

#### **V. DOMESTIC ENFORCEMENT: THE DUTY OF THE STATE TO INVESTIGATE AND PROSECUTE**

While issues of jurisdictional power dominated early developments in human rights law, recent developments have emphasised domestic enforcement of international obligations. Human rights treaties drafted

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<sup>107</sup> Ibid Article 17(1).

in recent years have often specified domestic means of enforcing rights recognised in earlier conventions, including criminal prosecution of violators.<sup>108</sup>

Additionally, bodies that monitor compliance with several human rights treaties that are textually silent about punishment have made clear that investigation and prosecution play a necessary part in States Parties' fulfilment of certain duties under the conventions.<sup>109</sup> Although surprising in light of treaties failure to mention punishment, these interpretations are a natural outgrowth of broad trends in international law, as are conventions explicitly requiring punishment of human

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<sup>108</sup> For example the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 39 UN GAOR Supp (No 51 reprinted in 23 ILM 1027 (1984), as modified, 24 ILM 535 (1984), at 197, at Article 5(2) specifies a series of legal measures that States Parties must adopt to ensure suppression of torture—a practice already proscribed in the 1948 *Universal Declaration of Human Rights*, above n 46, and in the *International Covenant on Civil and Political*, adopted 16 December 1966, GA Res 2200, 21 UN GAOR Supp (No 16) at 52, 999 UNTS 171, reprinted in 6 ILM 368 (1967). Similarly, the *Inter-American Convention to Prevent and Punish Torture*, adopted 9 December, 1985, OEA/serA./42 (1986), 67 OASTS, reprinted in 25 ILM 519 (1986) (entered into force 1987), which was adopted by the General Assembly of the Organisation of American States (OAS) in 1985, sets forth measures that States Parties must adopt to eradicate torture—a practice prohibited by the *American Convention on Human Rights*, adopted 7 January 1970, OAS Official Records, OEA/serK./XVI/1.1, Doc 65 rev 1, corr 1 (1970), reprinted in 9 ILM 673 (1970).

<sup>109</sup> See Orentlicher D, "Bearing Witness: The Art and Science of Human Rights Fact-Finding" (1990) 3 *Harvard Human Rights Journal* 83, 94. As bodies that monitor compliance with human rights treaties began to examine these violations, it became increasingly important to identify States' affirmative duties to ensure fundamental rights, since direct State responsibility for violations often could not be established

rights crimes. International law has long relied upon criminal sanctions to secure compliance with norms deemed essential to international order.<sup>110</sup> When, international law established human rights guarantees, it was therefore natural that criminal law would play a role in securing rights that are of paramount importance. Even with the resolve of States to establish the ICC it is inevitable that human rights law will still continue to rely heavily on the older paradigm of international penal law, which envisaged that domestic courts would enforce criminal prohibitions.<sup>111</sup> Further, since human rights can be fully assured only when there are adequate safeguards in domestic law, it is

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conclusively.

<sup>110</sup> Blackstone offered the following rationale for States' duty to punish offences against the law of nations:

[W]here the individuals of any State violate [the law of nations], it is then the interest as well as duty of the government under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained. For in vain would nations in their collective capacity observe these universal rules, if private subjects were at liberty to break them at their own discretion, and involve the two States in a war. It is therefore incumbent upon the nation injured . . . to demand satisfaction and justice to be done on the offender, by the State to which he belongs . . . .

Blackstone W, *Commentaries on the Laws of England*, in Four books (1809, 15<sup>th</sup> ed, London, Printed by A Strahan for T Cadell etc) Vol 4, 68.

<sup>111</sup> More generally, for purposes of establishing State responsibility under international law, courts have long been regarded as organs of the State. See C. Eagleton, *The Responsibility of States In International Law* (1928, New York: The New York University Press) 68-69; Hans Kelsen, "Collective and Individual Responsibility in International Law with Particular Regard to the Punishment of War Criminals" (1943) 31 *California Law Review* 530, 538; T. Meron, *Human Rights In Internal Strife: Their International Protection* (1987, Cambridge: Grotius) 33-36; L. B. Sohn, "The New International Law: Protection of the Rights of Individuals Rather

scarcely surprising that States' duty to secure fundamental rights has been found to require an appropriate response by national courts when violations occur.<sup>112</sup>

The question whether States have an affirmative obligation to investigate and take action against those who have engaged in State-directed or condoned "disappearances" or killings has been posed most starkly in those countries where notoriously repressive regimes have been replaced by elected civilian governments.<sup>113</sup> Letting new governments preclude all possibility of civil suit or criminal prosecution leaves the victims with no redress and encourages a belief that future repressive tactics will be granted immunity. With no fear of retribution, each new regime can again succumb to the same repressive behaviour. These problems can only be remedied by placing an affirmative obligation on the State to investigate and prosecute past human rights violators.<sup>114</sup>

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than States" (1982) 32 *American University Law Review* 1.

<sup>112</sup> Diane Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime" (1991) 100 *Yale Law Journal* 2537, 2561.

<sup>113</sup> Amnesty International, *Getting Away With Murder: Political Killings and "Disappearances" in the 1990s* (1993, London, Amnesty International) 92-96; Orentlicher, *ibid.*

**5.1. *The obligation to Investigate and Prosecute as Treaty Law***

Human rights law has only recently provided rights to individuals vis-à-vis their own States. Due to widespread revulsion for the crimes committed immediately before and during the Second World War, nations finally began to accept limits on their absolute sovereignty regarding the human rights of those residing within their jurisdictions. A series of widely subscribed multilateral instruments now define many of these rights, a number of which have been discussed, above, in Part IV of this article.

Three different types of clauses in modern multilateral human rights treaties provide support for a State's obligation to investigate grave human rights violations and take action against the responsible parties. First, the "ensure and respect" provision common to many treaties has been interpreted, by at least one regional court, to impose affirmative obligations on States to investigate and prosecute. Second, criminal law treaties specify the obligation of States to extradite or prosecute perpetrators of acts defined as crimes under international law. Finally, the right to a remedy included in many human rights instruments

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<sup>114</sup> See eg Orentlicher, *ibid*; Getting Away With Murder, *ibid* 92-97.



provides a strong basis for inferring an obligation to investigate and prosecute.

**5.1.1. “Ensure and Respect” and the Velasquez Case**

It is now widely accepted that States have affirmative duties to “ensure” civil and political rights.<sup>115</sup> Courts and commentators have interpreted treaty provisions obligating States to “ensure” political and civil rights as imposing an affirmative obligation to control persons and authorities acting under official auspices.

The *International Covenant*, setting forth rights which are violated in the perpetration of “disappearances” and extra-judicial executions, includes a requirement that States Parties to the Covenant implement the standards contained in that treaty. Under Article 2, each State Party undertakes “to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant”. The word “respect” should be understood to entail a promise not to violate the rights set forth in the Covenant, while the

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<sup>115</sup> See, eg, Buergenthal T, “State Obligations and Permissible Derogations” in Henkin L, (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981, New York : Columbia University Press)72.

term “ensure” entails a positive obligation to take the necessary measures to prevent the commission of those human rights violations. In particular, each State Party undertakes under Article 2 of the Covenant to adopt the “legislative or other measures” needed to give effect to the rights recognised in the Covenant.

The European Court of Human Rights has held that the *European Convention on Human Rights* “does not merely oblige the higher authorities of the Contracting States to respect for their own part the rights and freedoms it embodies . . . in order to secure the enjoyment of those rights and freedoms, those authorities must prevent or remedy any breach at subordinate levels.”<sup>116</sup> The *Geneva Conventions* of 1949 also contain an “ensure and respect” provision. Article 1, which is common to all of the Conventions states: “The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.”<sup>117</sup> Commentators have interpreted “to ensure respect” to mean that a government must not only oblige its

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<sup>116</sup> *Ireland v United Kingdom*, 25 Eur Ct H R (ser A), 239 (1978) (Judgment).

<sup>117</sup> *Geneva Convention I*, Article 1; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August, 1949, 75 UNTS 85, Article 1; *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August, 1949, 75 UNTS 135, Article 1; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August, 1949, 75

own personnel to respect the Conventions but also other persons or entities within their range of authority or influence.<sup>118</sup> In this respect, a major battle in the struggle against disappearances was won when the Inter-American Court of Human Rights, heard three significant cases between 1986 and 1989 involving disappearances attributed to the armed and security forces of Honduras. The Court found that Honduras was responsible for violating the *American Convention on Human Rights*<sup>119</sup> by designing and implementing, between 1981 and 1984, a deliberate plan to cause forced disappearances which eventually claimed the lives of more than 140 victims. The decisions reached in *Velasquez, Godinez and Fairen and Solis*,<sup>120</sup> have become a milestone in the development of international safeguards for human rights.

The clearest exposition of the obligation to “ensure” rights by investigating and prosecuting “disappearances” is found in the decision of the Inter-American Court of Human Rights construing the *American*

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UNTS 287, Article 1.

<sup>118</sup> Murphy S, “Sanctions and Enforcement of the Humanitarian Law of the Four Geneva Conventions of 1949 and Geneva Protocol I of 1977” (1984) 103 *Military Law Review* 3, 25.

<sup>119</sup> Also known as “Pact of San Jose, Costa Rica” signed on November 22, 1969, Organisation of American States (OAS), Treaty Series, No 36; United Nations (UN) Register, August 27, 1979, No 17955.

<sup>120</sup> *Velasquez Judgment*, Inter-Am Ct H R (ser C) No 4 (1988); *Godinez Judgment*, Inter-Am Ct H R (ser C) No 5 (1989); *Fairen Garbi and Solis Corrales Judgment*,

*Convention on Human Rights*<sup>121</sup> in the *Velasquez Rodriguez Case*.<sup>122</sup>

The Inter-American Court used the “ensure to all persons” language in Article 1(1) of the *American Convention on Human Rights* to find a sweeping obligation for governments to prevent, investigate, and, if necessary, prosecute those reliably accused of “disappearances”.

Velasquez concerned the arrest, torture and execution of a Honduran student activist by the Honduran military. Honduran authorities consistently denied any knowledge of his detention. In establishing the government’s responsibility for Velasquez’s “disappearance”, the Court relied on evidence presented by the American Human Rights Commission. The Court found that Velasquez’s “disappearance” was part of the pattern of “disappearances”.<sup>123</sup> Most importantly, the Court found that the failure to guarantee the specific rights enumerated in the Convention is itself a violation of the State’s obligations under Article

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Inter-Am Ct H R (ser C) No 6 (1989).

<sup>121</sup> *American Convention on Human Rights*, adopted 7 January 1970, OAS Official Records, OEA/serK./XVI/1.1, Doc 65 rev 1, corr 1 (1970), reprinted in 9 ILM 673 (1970).

<sup>122</sup> Inter-American Court of Human Rights, Series C, Decisions and Judgments, No 4, *Velasquez Rodriguez Case*; Judgment of 29 July 1988, Secretariat of the Court, San Jose, Costa Rica (Inter-Am Ct H R 35, OAS/ser L/V/III. 19, Doc 13, app. VI, 1988).

<sup>123</sup> *Velasquez Rodriguez Case*, *ibid* 147-148. One of the alleged perpetrators, police agent Jose Isaias Vilorio, was mysteriously killed in Honduras, only days before he was scheduled to give testimony in the case. *Ibid* 40.

1 of the *American Convention on Human Rights*.<sup>124</sup> The opinion posits a State's duty to prevent, investigate, and punish any violation of the rights recognised by the Convention. In addition, the State must attempt to restore the right violated, actually restore it if possible, and provide compensation for damages.<sup>125</sup>

The Court asserted that Article 1's duty to "respect" rights implies a limitation on government power: a "negative" obligation not to interfere with the exercise of a right. But its obligation to "ensure" rights places an affirmative duty on the States Parties.<sup>126</sup> "This obligation implies the duty of the States Parties to organise the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically

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<sup>124</sup> Ibid 160-167, 182. The Court interpreted Article 1 as determining when violations of substantive rights can give rise to State responsibility. "Any impairment of those rights [recognised in the Convention], which can be attributed under the rules of international law to the action or omission of any public authority, constitutes an act imputable to the State, which assumes responsibility in the terms provided by the Convention itself." Ibid 164.

<sup>125</sup> Velasquez states:

The state has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction to identify those responsible, impose the appropriate punishment and ensure the victim adequate compensation.

Ibid 174.

<sup>126</sup> Ibid 165-166.

ensuring the free and full enjoyment of human rights.”<sup>127</sup> So long as the government exhibits a lack of diligence in preventing or responding to the violation, the government has violated its affirmative duty--even if the responsible governmental organ or official has violated domestic law or overstepped the bounds of authority,<sup>128</sup> and even if the identity of the individual perpetrator is unknown or if the perpetrator is not a government agent.<sup>129</sup> While recognising that “the duty to investigate, like the duty to prevent, is an obligation of means or conduct which is not breached merely because the investigation does not produce a satisfactory result,” the Court demanded that the duty be undertaken seriously.<sup>130</sup>

Applying this rule to the *Velasquez Case*, the Court found that the Honduran government had breached its international obligation to guarantee the full and free exercise of human rights.<sup>131</sup> The Court pointed to the judicial system’s failure to investigate the “disappearance”, compensate the victim’s family, or punish the

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<sup>127</sup> Ibid 166.

<sup>128</sup> Ibid 170.

<sup>129</sup> Ibid 172-173.

<sup>130</sup> Ibid 177.

<sup>131</sup> Ibid 178.

guilty.<sup>132</sup> It criticised the Honduran government's initial failure to investigate the allegations of "disappearances" in general and this allegation in particular.<sup>133</sup> The Court ordered the Honduran government to pay compensation to the family of Velasquez.<sup>134</sup> In sum, the Court found an affirmative obligation under the "ensure and respect" clause to prevent, investigate, prosecute and punish grave violations of human rights. These measures are necessary to "ensure" human rights by deterring both current and future violators.<sup>135</sup>

The Velasquez decision marks the leading edge in cases applying the "ensure and respect" language. If other cases are interpreted in the same fashion, the decision could have far-ranging consequences because other human rights treaties including the *International Covenant* and the *European Convention on Human Rights* have similar "ensure and respect" provisions.<sup>136</sup> Thus the potential exists for such

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<sup>132</sup> Ibid 178.

<sup>133</sup> Ibid 180.

<sup>134</sup> Ibid 194-195. Honduras was ordered to pay \$150,000 to the Velasquez family, Inter-Am Ct H R., Press Release CDH-CP2/89 (Mar. 1989), and \$130,000 to that of Saul Godinez Inter-Am Ct H R, Press Release CDH- CP8/89 (July 21, 1989). The third case that of Fairen Garbi and Solis Corrales, was dismissed for lack of sufficient evidence that the two had actually been stopped in Honduras.

<sup>135</sup> Roht-Arriaza N, "State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law" (1990) 78 California Law Review 449, 472.

<sup>136</sup> Article 1 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, adopted 4 November 1950, 213 UNTS 221, Europ. TS No 5,

provisions to become the foundation for the duty of States to investigate and prosecute forced “disappearances” and extra-judicial executions which are gross human rights violations, but the use of such language is still in its formative stages.<sup>137</sup>

### 5.1.2. *The Principle “aut dedere, aut judicare”*

The principle *aut dedere, aut judicare*--extradite or prosecute--has been included in a number of international treaties.<sup>138</sup> The purpose of the principle is to ensure that those who commit crimes under international law are not granted safe haven anywhere in the world. These treaties, whether addressing international or national crimes, show an increasing tendency in international law to require States to investigate and prosecute serious offences. Interest in the international community has

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states that “[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.” European Court jurisprudence, however, does not currently recognize Article 1 as being capable of violation independently of the substantive rights enumerated in the other sections of the Convention. *Ireland v. United Kingdom*, 25 Eur Ct H R, (ser A), 238 (1978) (judgment).

<sup>137</sup> Roht-Arriaza N, “State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law” (1990) 78 California Law Review 449, 472.

<sup>138</sup> This include the *Convention on the Prevention and Punishment of the Crime of Genocide*, GA Res 260 A (III), 78 UNTS 227, the 1949 *Geneva Conventions*, above n 58, the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, above n 80 and *Inter-American Convention on the Forced Disappearance of Persons* adopted at Belem Do Para, Brazil on 9 September 1994, Conf/Assem/Meeting: Twenty-Fourth Regular Session of The General Assembly To The Organisation of American states. The text of the treaty can be accessed at the OAS Website, <<http://www.oas.org/>>.



progressed from acts directly affecting more than one State (war crimes, hijacking etc) to more indirect concerns based on the enforcement of human rights norms even when the acts themselves affect only nationals of the offending State. These trends taken together may provide a basis for an emerging consensus that human rights violations must be investigated and prosecuted.<sup>139</sup>

The *Inter-American Convention on Forced Disappearances of Persons*,<sup>140</sup> the first and so far only specialist treaty dealing specifically with the phenomenon of forced “disappearances” places an obligation on States 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>141</sup> Further, it enjoins States to cooperate with one another in helping to prevent, punish, and eliminate the forced “disappearance” of persons and to take legislative, administrative, judicial, and any other measures necessary to comply

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<sup>139</sup> Roht-Arriaza N, “State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law” (1990) 78 *California Law Review* 449, 467.

<sup>140</sup> *Inter-American Convention on the Forced Disappearance of Persons* adopted at Belem Do Para, Brazil on 9 September 1994, Conf/Assem/Meeting: Twenty-Fourth Regular Session of The General Assembly To The Organisation of American states. The text of the treaty can be accessed at the OAS Website, <<http://www.oas.org/>>.

<sup>141</sup> *Ibid* Articles I (b) and VI.

with the commitments undertaken in this Convention.<sup>142</sup>

Nonetheless, the applicability of specific penal law treaty provisions is limited both because not all States have signed the treaties and because they do not specifically address the grave human rights violations at issue in this Article. But even if specific criminal treaty provisions have limited applicability, there are broader-based human rights treaties that provide additional treaty-based sources of an international obligation to investigate and prosecute.

### ***5.1.3. Right to a Remedy in International Instruments***

The multilateral human rights instruments that have entered into force since the founding of the United Nations in 1945 define the substantive rights of individuals vis-à-vis their own States. They represent commitments to the entire international community by each State Party. These commitments make human rights a proper subject for international concern and justify sanctions by other States, individually and collectively, for violations thereof.<sup>143</sup> Because they focus on

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<sup>142</sup> Ibid Article I.

<sup>143</sup> The International Court of Justice has drawn a distinction between “the obligations

individual rights and not on State responsibilities, general human rights instruments do not refer directly to a State's obligation to investigate or prosecute under international law. However, they do recognise an individual's right to a remedy when his/her rights have been violated.<sup>144</sup>

The Universal Declaration of Human Rights, the most accepted general articulation of recognised human rights, lists the right to a remedy in Article 8: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."<sup>145</sup> The Universal

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of a State towards the international community as a whole" and those arising among individual States. Because all States have an interest in the former, they are "obligations erga omnes." *Barcelona Traction, Light & Power Co.* (Belgium v Spain), 1970 ICJ 3, at 33.

<sup>144</sup> The *Universal Declaration of Human Rights*, adopted 10 December 1948, GA Res 217A (III), UN Doc A/810, the *International Covenant on Civil and Political*, adopted 16 December 1966, GA Res 2200, 21 UN GAOR Supp (No 16) at 52, 999 UNTS 171, reprinted in 6 ILM 368 (1967), the *American Convention on Human Rights*, adopted 7 January 1970, OAS Official Records, OEA/serK./XVI/1.1, Doc 65 rev 1, corr 1 (1970), reprinted in 9 ILM 673 (1970), above note 67 and the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, adopted 4 November 1950, 213 UNTS 221, Europ. TS No 5 are among the instruments that recognise a right to a remedy.

<sup>145</sup> *Universal Declaration of Human Rights*, adopted 10 December 1948, GA Res 217A (III), UN Doc A/810. The Universal Declaration is not a treaty but a resolution adopted unanimously by the UN General Assembly in 1948. It is considered either an authoritative interpretation of the *UN Charter* or a statement of customary law; in either case, at least its basic provisions are now considered binding on UN member States. T. Buergenthal, *International Human Rights in a Nutshell* (1988, St. Paul, Minnesota: West Publishing Co.) 29-33;

Declaration extends a right to a remedy for violations of fundamental rights, presumably including the right to life. The Declaration implies that the remedy must be individualised and adjudicatory.<sup>146</sup> The *International Covenant* develops and specifies the civil and political rights enumerated in the Universal Declaration.<sup>147</sup>

The Human Rights Committee has interpreted the obligation to provide a remedy to include an obligation to investigate and prosecute violations of the Convention.<sup>148</sup> The Human Rights Committee underscored this interpretation in findings in several cases concerning arbitrary arrests, torture, and “disappearances” in Uruguay during the late 1970s. In the *Eduardo Bleier Case*,<sup>149</sup> among others, the Committee found that the State had a duty to investigate and--if necessary--prosecute, as well as pay reparation. Thus, the body charged with interpreting the Covenant has interpreted the right to a remedy to

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<sup>146</sup> As Roht-Arriaza N, “State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law” (1990) 78 *California Law Review* 449, notes, Eleanor Roosevelt, Chair of the UN Commission on Human Rights during the period when that body drafted the Universal Declaration, had emphasised that “appealing to a tribunal was an act of a judicial nature,” not a merely administrative one.

<sup>147</sup> *International Covenant on Civil and Political*, adopted 16 December 1966, GA Res 2200, 21 UN GAOR Supp (No 16) at 52, 999 UNTS 171, reprinted in 6 ILM 368 (1967) Article 2(3).

<sup>148</sup> 37 UN GAOR Supp (No 40) at 94, UN Doc No A/37/40 (1982).

<sup>149</sup> *Irene Bleier Lewenhoff & Rosa Valino de Bleier v. Uruguay*, UN Hum Rts Comm

include an obligation to investigate and prosecute as well as to provide compensation.

The position taken by the Human Rights Committee is echoed and reinforced at the regional level. The Inter-American Commission on Human Rights has interpreted “right to a remedy” language in the *American Convention* to include the obligation to investigate and prosecute.<sup>150</sup> The Commission has repeatedly called for investigation of the facts and punishment of the responsible individuals in cases of torture or “disappearance”.<sup>151</sup> Similarly, the European Court of Human Rights has also interpreted the “right to a remedy” language of the *European Convention on Human Rights* to include the obligation to investigate and prosecute.<sup>152</sup>

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No 30/1978, 13.3, UN Doc CCPR/C/OP/1 (1985) (Bleier Case).

<sup>150</sup> Article 25(1) provides that “[e]veryone has a right to simple and prompt recourse . . . against acts that violate his fundamental rights recognized by the constitution or laws of the State concerned or by this Convention.” *American Convention on Human Rights*, OAS Doc OEA/SerL/V/II.65, Doc 6 (1985).

<sup>151</sup> See, eg, Case 7821, Inter-Am. Ct. H.R. 86, 87, OAE/serL./ V/II.57, Doc 6 rev 1 (1982) (disappearance); Case 6586 Inter-Am. Ct. H.R. 91, OEA/serL./V/II/61, Doc 22 rev 1 (1983), at 93 (torture, arbitrary arrest).

<sup>152</sup> Article 13 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, adopted 4 November 1950, 213 UNTS 221, Europ. TS No 5 provides that “everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

In sum, the right to a remedy is common to major human rights instruments. It encompasses the requirement of an adjudicatory system to hear and decide on complaints, and the availability of redress once a violation is found. The question remains, however, of what kind of redress is implied once a “disappearance” or death squad killing has occurred. In general, remedies must be both effective and adequate. While the effectiveness of a given remedy will vary depending on the specific conditions, the jurisprudence on exhaustion of remedies helps to determine when a remedy is effective. Remedies are not effective, for example, when the complainant is prevented from having recourse to them, domestic laws do not afford adequate relief, courts are not independent, or the proceedings take too long.<sup>153</sup> The basic criterion is whether the remedy gives satisfaction to the claimant.<sup>154</sup> In addition to being effective, a remedy must also be adequate given the nature of the complaint.<sup>155</sup> To be both adequate and effective, a remedy must include investigation and prosecution or other State-initiated action against those responsible for the grave human rights violations at issue. Human

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<sup>153</sup> Trindade A, *The Application of The Rule of Exhaustion of Local Remedies In International Law: Its Rationale in the International Protection of Individual Rights* (1983, New York: Cambridge University Press) 72.

<sup>154</sup> *Ibid* 74.

<sup>155</sup> *Donnelly v. United Kingdom*, 1976 *Year Book of The European Convention on Human Rights* (Eur. Comm’n on Hum Rts) 84, 234-36.

rights instruments, especially the regional treaties, recognise a broad view of remedy and place an affirmative obligation on States to act through judicial machinery.

**5.2. *The Obligation to Investigate and Prosecute as an Emerging Customary International Law Norm***

Together with treaties, customary international law is generally accepted as a binding source of law governing the international community. According to the *Restatement (Third) of Foreign Relations Law*, “customary international law results from a general and consistent practice of States followed by them from a sense of legal obligation.”<sup>156</sup> Two sources suggest that there is an emerging obligation under customary international law to investigate forced “disappearances” and extra-judicial executions which are grave human rights violations and to take action against those responsible: (1) the treaty provisions and judicial decisions discussed in the previous section, taken together; (2) State practice, including adherence to UN resolutions and State representations before international bodies.

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<sup>156</sup> American Law Institute, *Restatement of the Law, the Foreign Relations Law of The United States* (1987, St. Paul, Minnesota: American Law Institute Publishers) § 702(c).

**5.2.1. Treaty Provisions as the Basis of an Emerging International Customary Norm**

International instruments that allow any State to adhere and that are widely accepted may help to create customary international law, because they reflect the practice of States. As examined above, modern multilateral treaties can embody an obligation to investigate and prosecute human rights violations. Given their wide acceptance and universal character, they are proof that the obligation to investigate and prosecute can be considered binding on all States as customary international law, hinged on the fact that humanitarian treaties have a special character because their very goals may include the widest possible applicability and the generation or codification of custom.<sup>157</sup>

In addition, human rights treaties build on one another and frequently have provisions in common or embody parallel concepts. The fact of similar provisions in numerous conventions provides even stronger evidence of a norm.<sup>158</sup> Indeed, Professor Meron writes that “the repetition of certain norms in many human rights instruments is itself an important articulation of State practice” and may serve as a

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<sup>157</sup> D’amato A, *The Concept of Custom in International Law* (1971, Ithaca, NY, Cornell University Press) 151.

<sup>158</sup> *Ibid* 136.



“preferred indicator” of customary status.<sup>159</sup>

The obligation to investigate grave human rights violations and take action against those responsible is explicit or implicit in almost every major human rights-related instrument, through one or more of the three types of provisions discussed in the previous section. Through this repetition, the concepts of a right to a remedy and of a State’s obligation to ensure rights are emerging as part of international customary law in cases of fundamental, non-derogable rights like the prohibitions on torture and the right to life which have a direct bearing on “disappearances” and extra-judicial executions.<sup>160</sup>

Though the existence of non-derogable rights is cited by some writers as evidence of “at least a minimum catalogue of fundamental or

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<sup>159</sup> Meron T, *Human Rights and Humanitarian Norms as Customary Law* (1989, Oxford: Clarendon Press) 92-93.

<sup>160</sup> Similarly, the principle of extradition or prosecution of offenders, a common feature of penal conventions since 1945, is also ripening into a norm of customary law. (Roht-Arriaza N, “State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law” (1990) 78 *California Law Review* 449, 492) Moreover, most scholars consider at least one of the human rights instruments, the Universal Declaration, to have become customary law in its entirety. Because the Universal Declaration contains an explicit right to a remedy, the Declaration alone might be sufficient to evidence a customary international obligation to investigate and prosecute. (U.S. memorial in the *Case Concerning United States Diplomatic and Consular Staff in Tehran* (U.S. v Iran), 1980 ICJ 3).

elementary human rights,”<sup>161</sup> the relationship between *jus cogens* and derogability remains unsettled. “The principal human rights instruments (the Political Covenant, the *American Convention*, the European Convention) contain the same hard core of non-derogable rights, yet different lists of non-derogable rights. Rights that are non-derogable under such instruments are not necessarily *jus cogens*... and some of them may not even have attained the status of customary law.”<sup>162</sup> Professor Meron poses the question of whether a right whose derogation is permitted by a primary international human rights agreement (the Political Covenant) can be regarded as *jus cogens* in light of the statement of the principle of *jus cogens* in Article 53 of the Vienna Convention (a norm from which no derogation is permitted).<sup>163</sup>

In this connection, Professor Meron notes:

The use of hierarchical terms in discussing human rights reflects the quest for a normative order in which higher rights could be invoked as both a moral and a legal barrier to derogations from and violations of human rights. Their introduction into international law was inspired by the national law analogy with its firmly established hierarchical structure... Caution should however be exercised in resorting to a hierarchical terminology. Too liberal an invocation of superior rights such as “fundamental rights” and “basic rights,” as well as *jus cogens*, may adversely affect the credibility of human

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<sup>161</sup> Van Boven, “Distinguishing Criteria of Human Rights” in Vasak K, & Alston P, (eds) *The International Dimensions of Human Rights* (1982) 46.

<sup>162</sup> Meron T, “On a hierarchy of International Human Rights” (1986) 80 *American Journal of International Law* 1, 15-16.

<sup>163</sup> *Ibid* 16.

rights as a legal discipline.<sup>164</sup>

### ***5.2.2. The Practice of States***

Although State-sponsored grave violations of human rights persist, and although States often fail to uphold their duty to investigate and prosecute allegations of violations, other aspects of State practice show that States do recognise these failures as breaches of international norms. The practice of States includes diplomatic acts and instructions, public measures and governmental acts, and official statements of policy. States' attempts to initiate action against violators, verbal statements of government representatives, and resolutions and declarations are practices which may evince a customary international law obligation to investigate and prosecute. Although sporadic domestic prosecutions may demonstrate a sense of legal obligation to investigate and prosecute, they do not conclusively evidence a customary international law obligation because they may also be responses to domestic political concerns.<sup>165</sup>

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<sup>164</sup> Ibid, 21-22.

<sup>165</sup> See Zalaquett J, "Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints" in Aspen Institute, *State Crimes: Punishment or Pardon* (1989, Queenstown: Aspen Institute) 23, 45 & n 40.

The domestic legislation of States, if consistent throughout major legal systems, is another crucial indicator of State practice, especially in the human rights context.<sup>166</sup> Torture, abduction and extra-judicial execution (and probably, by extension, “disappearances”), are prohibited and subject to penal sanction throughout the world.<sup>167</sup> Many Latin American countries impose special penalties when the accused is a public official, or where public officials fail through lack of due diligence to prevent the violation.<sup>168</sup> Moreover, over the last fifty-five years, some major legal systems, especially in Western countries, have begun to provide some form of civil redress against unlawful official acts.<sup>169</sup> Nonetheless, one could conclude that there is little consistent State practice supporting an obligation to investigate and prosecute if one considered the entire corpus of internal governmental acts. The

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<sup>166</sup> See Meron, above n 129 at 93-94 (confirming that the right is incorporated in national laws and thus exists in national practice; and noting that this is a preferred indicator of customary human rights).

<sup>167</sup> Summary execution would usually be prohibited as murder, and disappearance as abduction or kidnapping.

<sup>168</sup> See, eg, *Code Penale* Article 144(3) (Argentina) (1985) (prison term for torture); Article 144(4) (prison term for complicity in permitting torture); Article 144(5) (prison term for negligence in permitting torture); *Code Penale* Article 340 (Peru) (1985) (prison for public officials who illegally arrest, mistreat or are complicit in mistreatment of persons).

<sup>169</sup> See Hurwitz L, *The State As Defendant: Governmental Accountability and the Redress of Individual Grievances* (1981, Westport, Connecticut: Greenwood Press) 22-23. For example, in U.S. law, 42 USC § 1983 allows individuals to bring a civil suit against officials acting under colour of State law; the French Conseil d’Etat and the Scandinavian Ombudsman also provide citizens with civil redress against abuse by officials.

amnesties mentioned in Section III of this article, for example, could be interpreted as examples of contrary State practice.

It should be noted however that States are quite unwilling to say outright that they have no obligation to investigate or prosecute human rights violators, just as they are unwilling to announce their rejection of other fundamental human rights. Even where governments have passed amnesty laws, they have not denied the existence of an obligation to investigate and prosecute, but rather have justified their acts as required by exigent circumstances that override the obligation.<sup>170</sup> In their representations to international bodies, State representatives have stressed their compliance with the norm.<sup>171</sup>

#### **5.2.2.1. Resolutions and Declarations of International Organisations**

As noted above in section IV of this article, the UN adopted the first resolutions expressing general concern about forced “disappearances”

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<sup>170</sup> See, eg, “Esto no me gusta” in Sancinetti M, *Derechos Humanos En La Argentina Post-Dictatorial* (1988, Bruxelles: Bruylant,) 277-78 (address to the nation by then President, Raul Alfonsín, 13 May 1987).

<sup>171</sup> For example, although the Uruguayan civilian government ultimately enacted a virtual amnesty law covering forced “disappearances” and extra-judicial executions, it assured the UN Human Rights Commission upon first taking office that it would investigate the human rights violations committed under the previous dictatorship and bring the perpetrators of these abuses to justice. For details see Americas Watch,

and extra-judicial execution in 1978 and 1980 respectively. In furtherance of the need, to deter extra-judicial executions by the States clothed with legality, the UN General Assembly established an important standard in law enforcement through the adoption of the Code of Conduct for Law Enforcement Officials in 1979,<sup>172</sup> later developed further into the UN Basic Principles in 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 of Offenders.<sup>173</sup>

In 1985, the United Nations General Assembly unanimously passed a resolution adopting the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.<sup>174</sup> The resolution calls on member states to “enact and enforce legislation proscribing acts that violate internationally recognised norms relating to human rights”<sup>175</sup> and to “establish and strengthen the means of detecting, prosecuting

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Challenging Impunity: The Ley De Caducidad and the Referendum Campaign in Uruguay (1989, New York: Americas Watch Committee) 12.

<sup>172</sup> The Code of Conduct for Law Enforcement Officials GA Res 34/169, Annex (1979).

<sup>173</sup> UN DocA/CONF 144/28/Rev1 (1990).

<sup>174</sup> GA Res 40/34, 40 UN GAOR Supp (No 53) at 213, UN Doc A/40/53 (1985).

<sup>175</sup> *Ibid* para 4(c).

and sentencing those guilty of crimes.”<sup>176</sup> In the same year, the General Assembly adopted Resolution 40/143 on summary or arbitrary executions, requesting that the Special Rapporteur on the matter consider in his next report among other issues death in custody and other suspicious deaths.<sup>177</sup> In his annual report, the following year, the Special Rapporteur stated the need “to develop international standards designed to ensure that investigations are conducted into all cases of suspicious death . . .” including provisions for an adequate autopsy.<sup>178</sup> Subsequently, the UN General Assembly adopted a resolution which condemned arbitrary executions and also endorsed the conclusion of the Special Rapporteur.<sup>179</sup>

Further evidence of State activism in relation to the two crimes under discussion comes from the adoption of the Principles on Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions, adopted by the UN General Assembly in December 1989.<sup>180</sup> The Principles, many of which are derived from various other

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<sup>176</sup> Ibid para 4(d).

<sup>177</sup> GA Res 40/143 (13 December 1985).

<sup>178</sup> UN Doc A/41/53, at 197 (1986).

<sup>179</sup> GA Res 41/144, 41 UN GAOR, Supp No 53 (1986).

<sup>180</sup> Principles on Extra-Legal, Arbitrary and Summary Executions adopted by Economic and Social Council Resolution 1989/85 of 24 May 1989.

UN human rights instruments, provide standards for governments to utilise within the framework of their national legislation and practices. The Principles set out international standards for investigating and prosecuting these grave violations of human rights.<sup>181</sup> This effort is yet another reflection of increasing concern on the part of States, at least in their statements in international bodies, to make investigation and prosecution of forced “disappearances” and extra-judicial executions clearly legally obligatory.

A wide range of reports of the United Nations and other inter-governmental organisations reinforce the view that punishment plays a necessary part in states’ duty under customary law to ensure the rights to life, and freedom from involuntary disappearance. Reports prepared by Special Rapporteurs, Special Representatives, and Working Groups appointed by the Commission on Human Rights of the United Nations to report on human rights conditions in particular countries or on particular types of human rights violations<sup>182</sup> have repeatedly

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<sup>181</sup> Ibid.

<sup>182</sup> “Theme” rapporteurs and working groups have been appointed to report upon such violations as religious discrimination, torture, disappearances, extra-legal executions, and arbitrary detention. For discussion of three of the theme rapporteurs, see Weissbrodt, “The Three ‘Theme’ Special Rapporteurs of the UN Commission on Human Rights” (1986) 80 *American Journal of International Law* 685.



condemned governments” failure to punish “disappearances” and extra-legal executions.<sup>183</sup> These Reports have asserted that a state’s failure to punish repeated violations of physical integrity encourages further violations.<sup>184</sup> Although these reports are not authoritative interpretations of international law, resolutions of the UN General Assembly have endorsed many of the reports’ conclusions regarding punishment of persons responsible for “disappearances” and extra-legal executions.<sup>185</sup>

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<sup>183</sup> These reports often cite the *International Covenant on Civil and Political*, adopted 16 December 1966, GA Res 2200, 21 UN GAOR Supp (No 16) at 52, 999 UNTS 171, reprinted in 6 ILM 368 (1967), various UN human rights declarations and customary international law as the bases of the rights examined. Several resolutions adopted by the Commission on Human Rights suggest that a duty to prevent human rights violations may inhere in member States’ human rights obligations under the *UN Charter*, a legally binding instrument. In language that evokes the human rights provisions of the Charter, the United Nations Commission on Human Rights (Comm’n on Hum. Rts) has asserted “that the obligation to promote and protect human rights and fundamental freedoms calls not only for measures to guarantee the protection of human rights and fundamental freedoms but also for measures intended effectively to prevent any violation of those rights.” Comm’n on Hum Rts Res 1988/51; Comm’n on Hum Rts Res 1988/50.

<sup>184</sup> Eg, Report prepared by the Special Rapporteur on the situation of human rights in Chile in accordance with paragraph 11 of the Commission on Human Rights resolution 1983/38 of 8 March 1983, UN Doc A/38/385, para 341 (1983); Final report on the situation of human rights in El Salvador submitted to the Commission on Human Rights by Mr. Jose Antonio Pastor Riduejo in fulfilment of the mandate conferred under Commission resolution 1986/39, 43 UN ESCOR Comm’n on Hum Rts at 13, para 60, UN Doc E/CN4/1987/21; Report of the Working Group on Enforced or Involuntary Disappearances, 45 UN ESCOR Comm’n on Hum Rts at 85, para 312, UN Doc E/CN4/1989/18; Report of the Working Group on Enforced or Involuntary Disappearances, 47 UN ESCOR Comm’n on Hum Rts at 86, para

<sup>185</sup> Eg, GA Res 37/185, para 10 (1982); GA Res 36/157, para 4(e) (1981); GA Res 33/173, para 1(b) (1978).

The evidence of an emerging norm provided by treaty provisions, state practice, verbal statements of governmental representatives, and resolutions and declarations is undoubtedly mixed. But taken together, these sources support a finding that an obligation to investigate certain gross and systematic human rights violations and take judicial or administrative action against those responsible is now part of customary law. In addition, policy reasons support reading the evidence in the broadest possible light. A determination of whether a customary rule has developed is influenced by whether the rule will contribute to international order. Imposing an affirmative obligation on states to investigate grave human rights violations and take action against those responsible would contribute to world public order and has a clear moral basis. States should therefore be held to their word.<sup>186</sup>

### ***5.3. Amnesty: Legalising Impunity?***

Before concluding, this article will deal with the divisive issue of amnesty which has arisen in many of the countries notorious for “disappearances” and extra-judicial executions. Vexing moral,

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<sup>186</sup> Roht-Arriaza N, “State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law” (1990) 78 California Law Review 449, 499-500.

political, and legal dilemmas confront newly emerging democracies in deciding whether to prosecute serious violations of human rights committed by prior regimes. In at least eleven countries--Argentina, Brazil, Chile, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Peru, Suriname, and Uruguay--new civilian leaders chose or were compelled, sooner or later, either to decree an amnesty for serious human rights violations, or to accept one previously decreed by outgoing military rulers.<sup>187</sup>

States typically grant amnesty to a group or class of persons, as opposed to granting a pardon to an individual. States grant amnesty to achieve peacekeeping, nation-building, and reconciliation objectives. Historically, states in conflict considered amnesty a necessary means to end wars, to maintain tranquility, and to establish democracy or, at least, civilian rule. Political actors often used amnesty as a bargaining tool, promising dictators immunity from prosecution in exchange for relinquishing power.<sup>188</sup>

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<sup>187</sup> See eg Douglass Cassel, "Accountability for International Crime and Serious Violation of Fundamental Human Right: Lessons From The Americas: Guidelines For International Response To Amnesties For Atrocities" (1996) 59 *Law and Contemporary Problems*, 199, 200.

<sup>188</sup> See eg, Naomi Roht-Arriaza, "Truth Commission and Amnesties in Latin America: The Second Generation" (1998) *American Society of International Law*

Throughout the human rights tragedies of recent decades, perpetrators of human rights violations have enjoyed impunity from criminal or civil prosecution. Only in Argentina have senior leaders of a ruthless regime been prosecuted, and even this exception was due mainly to factors extraneous to human rights and circumscribed by impunity for most officers implicated in more than 10,000 disappearances.<sup>189</sup> Elsewhere, only in isolated cases have prosecutions for serious violations of human rights been even partially successful.<sup>190</sup>

“The decision to grant amnesty is an expression of a political will to distance new regimes from the atrocities of past regimes. Governments assuming power after conflict consider amnesty a critical component of

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Proceedings 313, 314; Scharf M P, “The Amnesty Exception to the Jurisdiction of the International Criminal Court” (1999) *Cornell International Law Journal* 507, 508 (discussing various amnesties granted to achieve peace).

<sup>189</sup> See generally Kritz, N J, ed, *Transitional Justice: How Emerging Democracies Reckon With Former Regimes* (1995, Washington, D C: United States Institute of Peace Press) 82-103, 146-53, 417-38 .

<sup>190</sup> See generally Mayorga R A, “Democracy Dignified and an End to Impunity: Bolivia’s Military Dictatorship on Trial” in McAdams A J, ed, *Transitional Justice And The Rules Of Law In New Democracies* (1997, Notre Dame, IN : University of Notre Dame Press) 61. See Matt Miller & Arthur Golden, *Confronting the brutal past: Fledgling Democracies turn on ruthless rulers*, *The San Diego Union-Tribune*, 17 December 1995, available in NEXIS, News Library, Curnws File ; Latin American Newsletters, Ltd, *Latin America Regional Reports: Brazil*, 1 January 1997, available in LEXIS, News Library, Curnws File.

national reconciliation.”<sup>191</sup> Newly installed regimes may not want to prosecute former repressors and human rights abusers for fear of creating political backlash and increasing social tensions. Amnesties, then, are a way to deal with repressive pasts and reconcile divided societies.<sup>192</sup>

Few treaty provisions specifically prohibit amnesty and some actually allow broad grants of amnesty.<sup>193</sup> Article 6(5) of the Second *Additional Protocol II* to the Geneva Conventions<sup>194</sup> for example, permits broad grants of amnesties for those individuals involved in conflict.<sup>195</sup> However, Article 6 of *Additional Protocol II* states that *Additional*

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<sup>191</sup> Gwen K Young, “Amnesty and Accountability” (2002) University of California Davis Law Review 427, 436-437.

<sup>192</sup> *Ibid* 438.

<sup>193</sup> For a discussion on amnesties in international conventions and decisions see generally Roht-Arriaz N, “Special Problems of a Duty to Prosecute: Derogation, Amnesties, Statutes of Limitation, and Superior Orders, in Roht-Arriaza N, ed, *Impunity and Human Rights in International Law and Practice* (1995, New York: Oxford University Press) 57. Nevertheless, obligations to prosecute, investigate and provide remedies to victims of crimes may interfere with the availability of amnesty. Declaration on the Protection of All Persons from Enforced Disappearances, GA Res 47/133, UN GAOR, 47th Sess, Supp No 49, at 207, UN Doc A/47/49 (1992) (precluding amnesty); Kristin Henrard, “The Viability of National Amnesties in View of Increasing Recognition of Individual Criminal Responsibility at international Law” (1999) *MSU-DCL Journal of International Law* 595, 625 (noting that obligations to prosecute, investigate and provide remedy have implications for national amnesties).

<sup>194</sup> *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, 1125 UNTS 609; see also Bassiouni, M C, *Aut Dedere Aud Judicare : The Duty To Extradite Or Prosecute In International Law* (1995, Dordrecht ; Boston: M Nijhoff) 3, 101(discussing text of *Additional Protocol II*).

*Protocol II* applies only to civil wars and non-international armed conflicts.<sup>196</sup> The protocol additionally emphasises the need to protect victims of armed conflict.<sup>197</sup> Thus, acceptable grants of amnesty under *Additional Protocol II* are limited to those that cover internal conflicts and coexist with due process rights for victims and individuals.<sup>198</sup>

In contrast to *Additional Protocol II*, other international conventions serve to prohibit specific amnesties. Some treaties mandate investigation, prosecution, and punishment, thereby decreasing the ability of amnesty to bar prosecution.<sup>199</sup> The *Declaration on the*

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<sup>196</sup> *Additional Protocol II*, *ibid*, Preamble; United States: Message From the President Transmitting Protocol II Additional to the 1949 Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflict, Detailed Analysis of Provisions, reprinted in (1987) 26 ILM 561, 563-65 (stating that *Additional Protocol II* applies to non-international armed conflicts).

<sup>197</sup> Bassiouni, M C, *Aud Dedere Aud Judicare: The Duty To Extradite Or Prosecute In International Law* (1995, Dordrecht ; Boston: M Nijhoff) 101 (stating that *Additional Protocol II* addresses criminal prosecutions and protection of victims in non-international armed conflict).

<sup>198</sup> United States: Message From the President Transmitting Protocol II Additional to the 1949 Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflict, Detailed Analysis of Provisions, reprinted in (1987) 26 ILM 561, 562 (noting that *Additional Protocol II* designed to protect victims of conflict); Bassiouni, *Aud Dedere*, *supra* note 88, at 101 (stating that *Additional Protocol II* addresses criminal prosecutions and protection of victims in non-international armed conflict).

<sup>199</sup> *Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 26 November 1968, 754 UNTS 73, 8 ILM 68, Article IV (1969) (requiring state parties to Convention to remove domestic limitations “to the prosecution and punishment... [of] war crimes and crimes against humanity”); Scharf M P, “The Amnesty Exception to the Jurisdiction of the International Criminal Court” (1999) *Cornell International Law Journal* 507515 & n 57 (noting that only in

*Protection of All Persons from Enforced Disappearances* is an example of a treaty that precludes amnesty.<sup>200</sup> Article 18 of the Declaration does not allow amnesty to prevent criminal proceedings or sanctions for disappearance crimes.<sup>201</sup> State parties to the declaration, therefore, may not grant a broad, blanket amnesty covering criminal proceedings for disappearances.<sup>202</sup>

Additionally, the Inter-American Court and Commission have developed jurisprudence on impunity and amnesties for human rights

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narrow situations, like where 1949 Geneva Conventions and Genocide Convention apply, “the granting of amnesty to persons responsible for committing the crimes defined therein would constitute a breach of a treaty obligation” and further conceding that “a state’s prerogative to issue amnesty for an offense can be circumscribed by treaties to which the state is a party”).

<sup>200</sup> Declaration on the Protection of All Persons from Enforced Disappearances, GA Res 47/133, UN GAOR, 47th Sess, Supp No 49, at 207, UN Doc A/47/49 (1992). See generally Roht-Arriaza N, “Nontreaty Sources of the Obligation to Investigate and Prosecute” in Roht-Arriaza N, ed, *Impunity and Human Rights in International Law and Practice* (1995, New York: Oxford University Press) 39.

<sup>201</sup> Declaration on the Protection of All Persons from Enforced Disappearances, GA Res 47/133, UN GAOR, 47th Sess, Supp No 49, at 207, UN Doc A/47/49 (1992), Article 18 (stating that “[p]ersons who have or are alleged to have committed [disappearances]... 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”). See also Human Rights Questions: Including Alternative Approaches For Improving The Effective Enjoyment of Human Rights and Fundamental Freedoms, Question of Enforced or Involuntary Disappearances, UN GAOR, A/51/561, 51st Sess., Agenda item 110(b), P 1 (1996) (asking all states to implement principles in Declaration Against Forced Disappearances and remove obstacles to investigations of such acts); see generally Roht-Arriaza N, “Nontreaty Sources of the Obligation to Investigate and Prosecute” in Roht-Arriaza N, ed, *Impunity and Human Rights in International Law and Practice* (1995, New York: Oxford University Press) 44-45 (discussing aims and provisions of Declaration which sets forth “standards designed to punish and prevent” forced disappearances).

violations. In cases in the late 1980s to the early 1990s involving serious violations: forced disappearances in Honduras;<sup>203</sup> an army massacre of 74 civilians in El Salvador;<sup>204</sup> forced disappearances and kidnapping of children in Uruguay;<sup>205</sup> and forced disappearances, summary executions, torture, and kidnapping in Argentina,<sup>206</sup> both the court and commission stressed the seriousness of the violations. In the cases, the inter-American commission expressly addressed amnesties in Argentina, El Salvador, and Uruguay in light of the duty to prosecute human rights. The three amnesties before the commission covered the gamut--from worst to best--of responses by transitional governments to serious human rights violations under prior regimes. This ranged from El Salvador's "absolute and complete" amnesty, adopted in 1987 as part of the Central American Esquipulas peace process, to Uruguay's restricted amnesty. Despite these variations, the commission reached

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<sup>202</sup> *Ibid.*

<sup>203</sup> See Velasquez-Rodriguez, 1988 Ann Rep. Int.-Int.-Am Comm'n H Rts. 35 (1988). There were three Honduran disappearance cases. The Court's opinion in the second case, Godinez Cruz, 1989 Ann Rep Int.-Int.-Am Comm'n H Rts 15, 16 (1989), is nearly identical to Velasquez. In the third case, Fairen Garbi, 1989 Ann Rep Int.-Int.-Am Comm'n H Rts (1989) 69, 105-06, 156-61, the court found insufficient proof of Honduras's responsibility because of the possibility the victims might have been disappeared in a neighboring country

<sup>204</sup> See Las Hojas Massacre Case, case No 10.287, 1992-1993 Ann Rep Int.-Int-Am Comm'n H Rts (1993) 88 (Spanish).

<sup>205</sup> See Hugo Leonardo and ors, case nos 10.029 et al., 1992-1993 Ann Rep Int.-Int.-Am Comm'n H Rts (1993).

<sup>206</sup> See Alicia Consuela Herrera et al., case nos. 10.147 et al., 1992-93 Ann Rep Int.-



the same result in each case. The amnesties violated at least three, and possibly four, distinct duties of the state under the *American Convention*.<sup>207</sup>

Notwithstanding the positive aims of amnesty, it results in impunity for perpetrators of international crimes. By preventing identification and investigation of perpetrators, amnesties directly contravene judicial notions of accountability. As a result, international bodies, including the United Nations, no longer unequivocally accept all amnesties that prevent investigation and prosecution of international crimes.<sup>208</sup>

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Int.-Am Comm'n H Rts 41, 43, 6 (1993) 154, 161-62, 38.

<sup>207</sup> First, they violated the state obligation--part of its duty to "ensure" human rights under Article 1(1)--to investigate violations. Second, at least in states that permit victims to participate in criminal proceedings, the amnesties violated the state duty under Article 8(1) to afford victims a fair trial. Third, the amnesties violated rights of victims and survivors to adequate compensation, required both by Article 1(1) and by the right to judicial protection under Article 25. In other words, when serious violations of human rights are committed, states must investigate, must permit victims to participate in judicial investigations where permitted by national laws, and must ensure adequate compensation for violations. States may not excuse themselves by enacting amnesty laws

<sup>208</sup> Annual Report of the Human Rights Committee, UN GAOR, 51st Sess Supp No 40, at 1, UN Doc A51/40 (1993); see also Study on Amnesty Laws and Their Role in the Safeguard and Promotion of Human Rights, Preliminary Report by Louis Joinet, Special Rapporteur, UN Commission on Human Rights, UN Doc E/CN4/Sub.2/1985/16, par. 5 (1985); 1999 Report on Chile, Human Rights Watch, available at <http://www.hrw.org/press/2000/08/Pinochet/html> (visited 29 November 2000), § IV & n 98 (noting that Inter-American Commission on Human Rights and UN bodies criticized Peruvian amnesty for violating "the prohibition against amnesty laws covering crimes against humanity"); see Kristin Henrard, "The Viability of National Amnesties in View of Increasing Recognition of Individual Criminal Responsibility at international Law" (1999) *MSU-DCL Journal of International Law* 595, 640 (noting that UN special representative of Secretary General added

Whether an amnesty is acceptable in light of notions of international accountability depends on the process surrounding the grant of amnesty, and the crimes covered.

## **VI. CONCLUSION**

While it has long been recognised that international law requires states to respect and ensure human rights, that same law has generally allowed governments to determine how their obligations will be fulfilled. But the measures used to secure human rights are no longer subject to the broad discretion of governments when it comes to a core set of fundamental rights that merit special protection. When “disappearances” and illegal killings occur, governments must adopt good-faith efforts to bring the wrongdoers to justice. What is needed is the realisation by states of a definite corpus of international law that may be applied apolitically to internal atrocities everywhere, and that recognises the role of all states in the vindication of such law.

If international law generally requires states to punish serious violations of physical integrity, a government must realistically and

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disclaimer to Lome peace agreement that “the UN does not recognize the amnesty as

practically attempt to prosecute every such violation committed with impunity. In addressing this question, it is important to begin by making clear what is not at issue. In countries where massive human rights violations continue, governments are already violating international law. Forced “disappearances” and extra-judicial killings are violations of the Universal Declaration of Human Rights, other international and regional Conventions, and arguably part of emerging customary law.

There is reason to insist on an independent obligation to investigate and prosecute. Waves of massive human rights violations involving “disappearances” and “death squad” killings are designed to conceal as far as possible any official involvement. As discussed above, it may be very difficult to establish the names or official positions of the perpetrators or to prove that the state was involved at all. An international obligation to investigate and prosecute shifts the burden of proof to the state to find out who is responsible and bring the appropriate parties to justice. Frequently the state alone has access to this information, yet in past international proceedings states have often

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applying to international crimes of genocide, crimes against humanity and war

claimed ignorance and demanded that the complaining party produce evidence firmly establishing the violation. After imposition of the obligation on states to investigate and prosecute, states may no longer stand silent or fail to take action. Failure to fulfil this obligation places a state in a vulnerable international position, and thus removes part of the incentive to employ illegal methods in the first place.

The need for investigation is strong. Investigation of past violations is essential to provide victims' families with some relief, especially in cases of disappearance where the victim's fate may still be unknown. Furthermore, investigations establish a government's commitment to the rule of law. The arguments for obligatory prosecution and punishment are similar to those for investigation. Punishment, while it cannot bring back the victims to their families, can provide the families with a measure of satisfaction. More importantly, it can serve a deterrent function. Those punished will be less inclined to repeat the abuses, and in the future others will be reluctant to risk punishment by committing similar abuses. If the international community cannot prevent, at least it must not condone. Its words of censure or approval

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crimes").

eventually will filter through. As we move on in the new millennium, states must make a concerted effort to do away with these institutionalised forms of state tyranny.