NOW YOU SEE, NOW YOU DON'T

THE STATE'S DUTY TO PUNISH DISAPPEARANCES AND EXTRA-JUDICIAL EXECUTIONS

Jackson Nyamuya Maogoto*

I. INTRODUCTION

"Now you see, now you don't" – this was Hitler's unsung legacy. Disappearances and political killings are often committed in states where government forces are fighting an armed opposition movement or where an armed conflict occurs. The victims may include captured guerrillas and soldiers, alleged civilians supporters, members of dissident groups and many others who are killed on the mere pretext of having a role in the conflict. The notion that atrocities are inevitable in armed conflict or that disappearances and extra-judicial executions are predominantly a feature of conflict should be resisted.

Amnesty International observes that two of the most massive programs of political killings since World War II are those in Indonesia and Kampuchea. They did not occur during periods of armed conflict and armed resistance in both cases. The same may be said for the majority of disappearances and extra-judicial executions in Iraq.[1] The use of disappearances and extra-judicial executions instead of official executions serve several purposes for repressive regimes in the domestic sphere. It allows them to eradicate actual, potential, and perceived opponents without the publicity of a public trial or the risk of creating martyrs through the imposition of death sentences. It terrorises broad sections of the population by creating a chilling effect on political activity in general. Most significantly, those mechanisms allow the government to avoid accountability for its actions.

During the past 50 years, countless individuals worldwide have died from forced disappearances and extra-judicial executions by covert or

---

* LLB (Hons), LLM, PhD.

[1] Amnesty International, Disappearances and Political Killings, Human Rights Crisis of the 1990s: A Manual For Action (1994, Amnesty International, Amsterdam) 92 ("Amnesty Manual").

overt governmental programs.[2] Overtly, several government forces performed systematic and deliberate killings and the practice became institutionalised to eliminate opponents and potential opponents.[3] The impunity with which the security forces could kill political opponents and criminal suspects created the conditions under which many were killed for criminal motives or simply at will.[4] Although this could be premised on a policy of increased security by granting greater powers to armed forces, occasionally it took the form of legislation that in reality created the stage for such criminal practices.[5] Covertly, military units could operate as shadowy "death squads". Moving beyond fighting to defeat armed opposition groups by legitimate means, they could engage secretly in the physical elimination of members of a wide spectrum of the legal and political opposition including other non-combatant civilians engaged in guerrilla activity.[6]

This article sets out to explore the duty of a state to punish disappearances and extra-judicial executions. Section II introduces the spectre of those practices as conceived by Hitler, arguably the architect who institutionalised them[7] and comments briefly on that scourge.

---

[2] For example, Amnesty Manual 1-82; Amnesty International, Getting Away with Murder: Political Killings and disappearances in the 1990s (1993, London, Amnesty International) ("Getting Away with Murder") 1-73; Independent Commission on International Humanitarian Issues, "Report: Disappeared! Technique of Terror" (1986, Zed Books, London) ("Disappeared! Report") 19-42; Werendt H, Criminal Consciousness in Argentina's Dirty War (2001, Yale University Press, New Haven).

[3] See Amnesty Manual 25-32, 34-40.

[4] Ibid.

[5] For example, the legal basis for the formation of paramilitary "self-defence" squads in Colombia was Law 48 of 1968 that inter alia empowered the armed forces to provide military weapons to civilians and create peasant defence groups.

[6] Amnesty Manual 34.

[7] As Gustav Radbruch notes, "[i]n manifold ways, the rulers of the twelve-year 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" in Maihofer W (editor), Naturrecht oder Rechtspositivismus? (1947, Wissenschaftliche Buchgesellschaft, Darmstadt) 2. Hitler viewed the law as a pragmatic mechanism to advance the Nazi cause and as a primary legal principle. Consequently, judges had to preserve and protect the national interest at all costs. Various extraordinary tribunals were created and draconian legislation passed to implement expeditiously and efficiently the National Socialist program: Remak J (editor), The Nazi Years: A Documentary History (1969, Waveland Press Inc, Illinois) 61 [quoting Hitler's statement to the Justice Minister in August 1942]. Hitler's draconian dictates were

Section III defines disappearances and extra-judicial executions and discusses the attraction it holds for states in the violation of human rights as an instrument of governmental policy. Section IV discusses developed principles of both customary and conventional international law that outlaw those practices and the states' significant obligations in that regard. It posits the centrality evident in human rights instruments towards specifying a duty to prosecute grave violations of physical integrity with specific focus on the practices. It outlines the framework through which they are addressed. Section V focuses on the state's duty to punish perpetrators within the government for this evil. It concludes that although human rights treaties do not explicitly require state parties to prosecute violations, nonetheless, they impose a general duty to investigate allegations of such practices and prosecute those responsible. A state's failure to punish repeated or notorious instances of such offences violates its obligations under international law. As such, the duties represent a departure from the traditional approach of international human rights law. Finally, the article addresses the vexing moral, legal and political dilemmas that amnesty poses in this area.

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 "Decree Concerning Measures to be Taken Against Persons Offering Resistance to German Occupation", more commonly known as *Nacht und Nebel Erlass* or the Night and Fog Decree,[8] under which people were taken away from their homes to be never 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 death penalty.[9] Where it did not appear that the death penalty would be imposed within

---

guided by Germany's claim, "Gesetz ist Gesetz" [law is law]: Milgram S, Obedience to Authority: An Experimental View (1974, Harper and Row, New York).

[8] Kreitel signed the Decree on 7 December 1941 ("the Decree"): Trial of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No 10 (transl, 1951, United States Government Printing Office, Washington) Volume III at 160 ("Justice Case Documents"). For the text of the Decree see Office of United States Chief of Counsel for Prosecution of Axis Criminality Nazi Conspiracy and Aggression (transl, 1946, United States Government Printing Office, Washington) Volume 7, Document No L-90.

[9] See Article I of the Decree.

eight days the prisoner would be removed and no further information on that person would be forthcoming.[10] The Decree streamlined the disposition of individuals from the occupied territories who were sent to Germany and the Night and Fog trials were held in secret.[11]

Hitler's rationale for the Decree was his belief that an effective deterrent could only 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 suspect's relatives and friends with fear and apprehension. The effectiveness of this Decree required prohibiting prisoners from contacting their loved ones who were not even informed of the internee's death or execution.[12] Wilhelm Keitel, the Chief of High Command of the German Armed Forces, instructed to implement the Decree, explained Hitler's reasons for the Decree:

> 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.[13]

On 2 February 1942, Keitel issued an explanatory order which stated that offences committed by civilians in the occupied territories and

---

[10] Whitney H, Tyranny on Trial: The Evidence at Nuremberg (1954, Southern Methodist University Press, Dallas) 221.

[11] Keitel, Letter of 12 December 1941, Transmitting the First Implementation Decree to the Night and Fog Decree, 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: see Decree Concerning Measures to be Taken Against Persons Offering Resistance to German Occupation, Trial of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No 10 (transl, 1951, United States Government Printing Office, Washington) Volume III 160, 777-780.

[12] 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, ibid 794-796.

[13] International Military Tribunal, Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 to 15 October 1946 (1947-1949, Nuremberg, Germany) Volume 1, 273.

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.[14] The explanatory order added: [15]

> In all other cases the prisoners were, 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 could be given as to their whereabouts or their fate.

Under that 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.[16] The defendants were held *incommunicado* and denied due process. Prosecuted in secret, they had no right to introduce evidence or be confronted by the witnesses against them. They had no legal representation and were not informed of the charges. Records were not maintained of their trial, imprisonment or fate.[17] Secrecy was maintained even after their death.[18]

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 occupied. The dread of the silent removal of loved ones made life a torment. Frantic inquiries at Gestapo offices about the missing were met with silence. Those left behind feared constantly that the missing would be tortured, sent to a concentration camp or suffer death. Not until liberation did they know when, how or where their family members disappeared to. Only a small percentage of such prisoners survived and returned safely when the War ended.[19]

---

[14] Office of United States Chief of Counsel for Prosecution of Axis Criminality Nazi Conspiracy and Aggression (1946, United States Government Printing Office, Washington) Volume 7, 872.

[15] Ibid.

[16] See United States v Joseph Altstoetter (transl, Trial of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No 10 (1951, Washington, United States Government Printing Office) Volume III 984, 1024-1025.

[17] Ibid 1025.

[18] Ibid.

[19] Under the Decree, 7,000 people arrested on suspicion of endangering German security were secretly transferred to concentration camps while their families received

The International Military Tribunal at Nuremberg observed that the Nazis had utilised the legal process through the Decree to perpetrate a statewide, governmentally organised system of cruelty and injustice.[20] It noted that the "dagger of the assassin was concealed beneath the robe of the jurist."[21] The Nazis "distorted and perverted legal equity"[22] by emptying the legal process of its safeguards and utilising it as an integral part of the state's repressive mechanisms.[23] While political imprisonment, torture and killing of political opponents were old practices the new repressive techniques Hitler had fine-tuned in various ordinances and decrees, including the Night and Fog Decree became formalised within a legal framework.

After World War II, many states embraced the institutionalisation of state tyranny through formal and informal mechanisms. Although large-scale forced disappearances began in Guatemala in the late 1960s[24] the world focused on the problem only in the 1970s after it came to light that thousands in Chile and Argentina had disappeared in the previous decade.[25] In addition to its prevalence in those states, the practice was widely used in Uruguay, El Salvador, Afghanistan, Ethiopia, the Philippines, Equatorial Guinea, Sri Lanka, Democratic Kampuchea (Cambodia), and Uganda.[26]

---

no information on their whereabouts: Amnesty International USA, Disappearances – A Workbook (1981, Amnesty International USA, New York) 2.

[20] See Opinion and Judgment, United States Department of State, Trial of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No 10 (transl, 1951, United States Government Printing Office, Washington,) Volume III at 984-985.

[21] Ibid 985.

[22] Opening Statement of the Prosecution, Justice Case Documents 31.

[23] Ibid 32-33.

[24] Over 40,000 people disappeared for political reasons in that state: Americas Watch, Closing the Space: Human Rights in Guatemala, May 1987-October 1988 (1988, Americas Watch Committee, New York).

[25] Amnesty International USA, Disappearances: A Workbook (1981, Amnesty International USA, New York) 2.

[26] For state responsibility or complicity regarding suspected opponents, see Americas Watch and anor, As Bad as Ever: A Report on Human Rights in El Salvador (1984, Americas Watch Committee, New York) 13; Amnesty International, Guatemala: A Government-Sponsored Campaign of Terror (1981, Amnesty International USA, New York); Lawyers Committee for International Human Rights, "Disappearances Continue" in Salvaging Democracy: Human Rights in the Philippines (1985, The Lawyers Committee for International Human Rights, New York) 44-53; "Pretoria Rights Abuse – Dramatic Disclosures", San Francisco Chronicle, 2 June 1990 , A15.

The systematic program of disappearances and the widespread killing in the 1970s formed an indelible backdrop.[27] Therefore, to stop the practice, in the 1980s human rights groups began campaigning and the United Nations created mechanisms to deal with this.[28] They included the Working Group on Enforced or Involuntary Disappearances created in 1980[29] and the Special Rapporteur on Summary or Arbitrary Executions in 1982.[30] In spite of this, the 1980s still saw hundreds of thousands of disappearances and extra-judicial executions.[31]

In the 1990s, the end of the Cold War brought hopes of a new world order where states would live peacefully and human rights would flourish. But the disintegration of the old order brought about other conflicts including disappearances and political killings, in states such as Azerbaydzhan, Georgia, Tadzhikistan, and the former Yugoslavia.[32] Elsewhere, other forces engaged in warfare and political repression became responsible for disappearances and political killings.[33]

III. ANATOMY OF THE ATROCITIES

(a) Disappearance Defined

The term disappearance is really a euphemism. Practically, it means that a person has been arbitrarily arrested which the authorities deny. 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 in the 1970s it became a systematic practice and

---

[27] For the list of states where the practices occurred see Amnesty Manual 92-96.

[28] Ibid 92.

[29] The Commission on Human Rights introduced "Voluntary Disappearances" in 1980 after a tense debate: Commission on Human Rights Resolution 20 (XXXVI), United Nations Doc E/CN4/1408 (1980) 180.

[30] In March 1982, the United Nations Commission on Human Rights initiated the appointment of a Special Rapporteur on Summary or Arbitrary Executions: Commission on Human Rights Resolution 982/29, United Nations Doc E/CN4/1982/30 (1982) 2-3, 147.

[31] For example, those crimes were prevalent in states such as Iraq, Lebanon, Chad, Colombia and Sudan: Amnesty Manual 92-96.

[32] See for example, Getting Away with Murder 24; Amnesty Manual 93.

[33] In the 1990s, the practices were reported in states such as 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.

from 1976-1983 was the main feature in the repressive arsenal of Argentina's military dictatorship. In the early 1980s, several thousands disappeared in El Salvador including thousands more whose bodies were found later.[34]

In 1998, the Statute of the International Criminal Court was signed in Rome ("Rome Statute") creating the International Criminal Court ("ICC"). Article 7 defines "enforced disappearances of persons" as:[35]

> [t]he arrest, detention or abduction of persons by, or with the 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.

This definition mirrors Article 1(1) of the United Nations Draft International Convention on the Protection of All Persons from Forced Disappearances[36] and Article II of the 1994 Inter-American Convention on the Forced Disappearance of Persons ("Inter-American Convention on Forced Disappearance").[37]

There are several elements to disappearance as described above. For example, (1) the victim is deprived of liberty and held prisoner; (2) agents of the state deprive the victim of liberty;[38] (3) the victim's whereabouts and fate after arrest are concealed; (4) the state denies knowledge of the practice by using public statements when replying to

---

[34] Although disappearances occur in states where the military establishment is in power or has a high degree of autonomy from civilian authority, they are not limited to military regimes. Some of the highest numbers of reported cases are from Peru, Colombia and Sri Lanka where governments are democratically elected.

[35] The Rome Statute opened for signature on 17 July 1998 and entered into force on 1 July 2002 under Article 126: United Nations Doc A/CONF 183/9. For information on the Court see <www.un.org/law/icc/index.html> (visited 6 October 2002).

[36] The Office of the United Nations High Commissioner for Human Rights drafted the Draft International Convention on the Protection of All Persons from Forced Disappearance: at <www.disappearances.org/mainfile.php/undoc/50/>.

[37] Adopted at Belem Do Para, Brazil on 9 September 1994, 24th Regular Session of the General Assembly, Organization of American States.

[38] See Draft International Convention on the Protection of All Persons from Forced Disappearance Article 1(1).

enquiries from the victim's relatives or when responding in judicial procedures such as *habeas corpus*.[39] A *habeas* writ is usually sought when the state does not follow procedural fairness, for example, by not bringing detained persons promptly before judicial tribunals.

Disappearances and extra-judicial execution often go hand in hand. The victim is 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 surrounding circumstances. Consequently, the disappearance becomes a cover for extra-judicial execution while extra-judicial execution perpetuates the state of disappearance.

(b) Extra-judicial Execution Defined

An extra-judicial execution is a deliberate killing performed pursuant to a government order or with its complicity or acquiescence.[40] It has several elements. For example, it is deliberate (not accidental), unlawful and violates national laws that prohibit murder and/or international standards forbidding the arbitrary deprivation of life. This distinguishes it from extra-judicial executions for private reasons or killings that violate an enforced official policy or law.[41] It brings together several types of killing such as death in custody, assassination or killing by officers performing law enforcement functions but who simultaneously use disproportionate force to the threat posed.[42] The combination of unlawfulness and state 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.[43]

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

---

[39] Amnesty Manual 85.

[40] In December 1992, Amnesty International adopted a 14-Point Program for the Prevention of Disappearances as part of its worldwide campaign to eradicate disappearances: <www.web.amnesty.org/web/aboutai.nsf/> (visited 6 May 2002).

[41] Ibid.

[42] Amnesty Manual 87; Getting Away with Murder 9-38.

[43] Ibid.

forbidden under international law regulating the conduct of armed conflict, and the use of the death penalty following a lawful process.[44] Even so, the death penalty by law needs to be reconciled with the right to life, a right that is protected by international law providing that no one shall be arbitrarily deprived of his life.[45] As noted by the Special Rapporteur on Summary or Arbitrary Executions, in order to give meaning to the right to be free from arbitrary killing, safeguards must be developed to lessen arbitrary killings.[46]

However, a problem has arisen because certain quarters perceive that legally sanctioned death penalties fall in the category of arbitrary executions in the absence of sufficient and rigorous due process mechanisms.[47] So politically volatile was this issue of standard that at the 57th Session of the United Nations Commission on Human Rights in 2001 a European Union sponsored text calling for a moratorium on executions with a view to completely abolishing the death penalty[48] was defeated notwithstanding fervent lobbying.[49] Sixty-one states signed a statement that Saudi Arabia circulated "dissociating" them from the resolution because "[e]very State had an inalienable right to choose its political, economic, cultural and legal systems, without

---

[44] Amnesty International, Political Killings by Governments (1983, Amnesty International, London) 89-90.

[45] Article 6 of the 1966 International Covenant on Civil and Political Rights ("ICCPR") provides that "[e]very human being had the inherent right to life." The following are prohibitions against arbitrary killings: (1) Article 3 of the 1948 Universal Declaration of Human Rights ("Universal Declaration") provides that "[e]veryone had the right to life, liberty, and security of person"; (2) Article 2 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms ("European Convention") provides that "[n]o 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"; (3) Article 4 of the 1981 African Charter on Human and Peoples Rights ("African Charter") provides that "[e]very human being shall be entitled to respect for his life and the integrity of his person. No one could be arbitrarily deprived of this right"; (4) Article 4 of the 1985 American Convention on Human Rights ("American Convention") provides that "[n]o one shall be arbitrarily deprived of his life".

[46] Report of the Special Rapporteur on Summary or Arbitrary Executions, United Nations Doc E/CN4/1983/16 (1983) 29-42.

[47] See Ramcharan, "The concept and dimensions of the right to life" in Ramcharan BG (editor), The Right to Life in International Law (1985, Kluwer, Dordrecht) 1.

[48] United Nations Commission for Human Rights resolution 2001/68, 25 April 2001.

[49] The final vote recorded was 27 for, 18 against and 7 abstentions.

interference in any form by another State."[50] The United States, which voted against the resolution, argued that "[i]nternational law does not prohibit the death penalty when due process safeguards were respected and when capital punishment is applied only to the most serious crimes."[51] What happened then evidences and reinforces the practical difficulties involved when legal values and standards *vi a vis* national sovereignty considerations are questioned.

(c) Instrument of State Tyranny

(i) Organisational Complexity

Disappearances and extra-judicial executions are often connected to a unit of the security forces where hierarchical organisation is hallmark. The practice is likely to involve a chain of command extending from the highest official who orders or acquiesces in the crime to the lowest officer who helps to carry it out.[52] As Amnesty International notes:[53]

> As 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 were in the pay of local landowners or other private citizens but operate with official acquiescence.

Whatever the organisational form, the mechanics of official murder and disappearance are almost certainly concealed. Owing to this organisational complexity, much work is needed to uncover the practice since it is difficult to establish and combat. The reason is that

---

[50] United Nations Doc E/CN4/2001/161 (2001). While few other industrial states retain the death penalty, the majority of United Nations members impose the death penalty for the most serious offences: Secretary-General's 6th Quinquennial Report on Capital Punishment, United Nations Doc E/2000/3 (2000).

[51] Statement of Ambassador George Moose on 25 April 2001, United Nations Doc E/CN4/2001/161 (2001). For the debate summary, see United Nations Press Release HR/CN/01/71, 25 April 2001, 2-4

[52] Amnesty Manual 88.

[53] Ibid.

the state's immense resources 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 of militant or extremist pro-government vigilantes.[54] Efforts by relatives, lawyers, journalists and human rights organisations to obtain information on "disappeared" individuals usually run into a maze of bureaucracy or a solid wall of "classified" state security information, a legitimate ground upon which refusal may be justified. The excuse of "matters of national security" therefore effectively forestalls inquisition into this shadowy practice.

(ii) Iron Curtain of Secrecy

Considering the illegality of disappearances and political killings, those responsible, namely, those who plan, order, carry out and acquiesce in the practice would want to avoid accountability and punishment. When this happens secrecy helps to accomplish this. Secrecy also facilitates the practice by confusing and neutralising the efforts of those taking or wishing to take corrective action.

It is often the intelligence services that engage or are involved in the practice using secret methods of operation. If the practice becomes known, the state usually tries to deflect international criticism by devising convincing excuses such as attributing the killing to independent "death squads" and lack of evidence. Other techniques include denials, misinformation and obstructing the investigation so that the perpetrators cannot be brought to account.[55] The iron curtain of secrecy effectively becomes the main line of defence while the military characterise the accusations against them as part of a black propaganda campaign orchestrated by guerrilla groups to undermine public confidence in the army and police.[56] This affords the state to undermine the work of human rights activists by accusing them of being tools of subversion used by the armed opposition to attack the forces of law.

Lack of information impedes recourse to available legal remedies and procedural guarantees sought by the victim or concerned family members, relatives, lawyers or human rights organisations. A writ of

[54] Ibid 27, 35; Getting Away With Murder 33-38.
[55] Ibid 34-42.
[56] See for example Disappeared! Report 41-42.

habeas corpus is the traditional remedy for those detained by the state.[57] It serves to establish whether a violation has occurred, and if so, requires the release of the detainee. It is an extraordinary remedy and petitioners may only invoke it when they have exhausted all other legal and administrative remedies. However, in cases of disappearance the writ has not been effective because many states simply ignore it.[58]

The police respond to writs with claims such as: (1) the detention never occurred; (2) the missing had absconded as a proclaimed offender or killed in an encounter; (3) terrorists had kidnapped and killed the missing; or (4) the missing had simply escaped. If the court accepts the police version, whether at the initial stages and after an inquiry, they often cite the police denial, the claim of lack of police motive, the offender status of the disappeared, disputed technical facts, and the lack of supporting affidavits filed by the petitioner as reasons for rejecting the writ. Besides the desire to save the police from prosecution, these reasons show the judiciary's failure to acknowledge the realities of police abuse and the climate of impunity that allows the police to act without fearing the consequences including its ability to manipulate and/or destroy evidence.

In the modern state, the judiciary serves as a bulwark against the excesses of the executive and the legislature.[59] However, when the state itself becomes brutal and lawless, anarchy reigns and judicial process crumbles. Generally, because of police harassment, inefficiency and/or corruption the writ of *habeas corpus* provides the last remaining judicial avenue of redress. The judiciary's failure to address human

[57] Habeas corpus ad subjiciendum is the most common form of habeas writ and directed to the person detaining another, commanding the production of the person detained: see definition in Black's Law Dictionary (5th edition, 1979, West Publishing, United States) 638.

[58] In Argentina, writs of habeas corpus by relatives of the missing went unanswered or were rejected. Most habeas petitions in Honduras were similarly ineffectual. Communications to the United Nations Human Rights Committee showed that they met the same fate in Uruguay. Petitioning for a writ is therefore an ineffective remedy in those states that countenance the use of disappearances and death squad killings: see for example, Velasquez Rodriguez, Inter-American Court of Human Rights 35, OAS/ser L/V/III 19, Doc 13, 1988, Appendix VI at 74-76; Lewenhoff and Valino de Bleier v Uruguay, United Nations Human Rights Commission No 30/1978, 13.3 United Nations Doc CCPR/C/OP/1, 1985 at 110; refer note 138 below.

[59] See Cappelletti M, The Judicial Process in Comparative Perspective (1989, Clarendon Press, Oxford); Lee S, Judging Judges (1988, Faber and Faber, London).

rights violations discourages the filing of such writs. This desire to protect police morale leads to miscarriages of justice. By denying the practice of disappearances or by not preventing them, the judicial, political and military authorities charged with investigating or punishing those acts renders *habeas corpus* ineffective and deprives victims and their families of legal redress.

(iii) Immunity to Judicial Process

Impunity for the perpetrators is a common feature of state sponsored programs of disappearances and political killings. Secrecy helps to ensure impunity by preventing the facts from becoming known. Impunity is also achieved under immunity laws when individuals and institutions attempting to take remedial action are actively obstructed in their efforts.[60] Even in states where the rule of law is generally observed, the police and armed forces often resist attempts to expose alleged wrongdoing within their ranks.[61]

Impunity may be formalised through legal devices such as the adoption of laws[62] extending immunity from prosecution to the security forces for acts committed in the course of official duties. Such laws encourage human rights violations by demonstrating to the forces that they may "commit" disappearances and extra-judicial executions without fear of prosecution. In Sri Lanka for instance, it has been said that the 1979 Prevention of Terrorism Act No 10 (as amended) was used to stifle dissent and violate individual rights. Although the Act was passed in 1979 as an interim measure to prevent terrorism and unlawful activities,[63] it became permanent in 1982 and remains effective, eroding constitutional guarantees of fundamental rights by expanding the state's powers of arrest and detention.[64]

---

[60] Amnesty Manual 89.

[61] For example, Sri Lanka and Colombia are formal democracies. For an analysis on their practices, see ibid 25-33, 34-42.

[62] Sri Lankan's willingness to condone the acts of officials and the security forces even when they had committed gross abuses was underlined in December 1988 when the Indemnity (Amendment) Act was passed just days before the presidential election. In Colombia's 1991 Constitution, the concept of "due obedience" by which "military men on active duty" are not criminally liable for offences (including human rights violations) if they can show that they merely followed orders is introduced.

[63] Preamble.

[64] Ibid.

When Sikh unrest exploded in the Indian state of Punjab in 1984, India pursued a crackdown on that insurgency. As part of its counter-insurgency operation, India passed several seemingly draconian laws that sanctioned police impunity. For example, the 1987 Terrorist and Disruptive Activities (Prevention) Act created in camera courts and authorised the detention of persons in "disturbed areas" based on mere suspicion.[65] Under section 7 of the 1983 Armed Forces (Punjab and Chandigarh) Special Powers Act, security forces received prosecutorial immunity when they exercised the powers of search and arrest without warrant, including the power to shoot to kill suspected terrorists.

IV. VIOLATION OF INTERNATIONAL HUMAN RIGHTS

(a) Universal Right to Life, Liberty and Security of Person

Disappearances and extra-judicial executions violate fundamental rights as proclaimed in the earliest United Nations human rights instruments.[66] Article 3 of the Universal Declaration states that "[e]veryone has the right to life, liberty and security of person." Therefore, when those acts are perpetrated they clearly violate the right to life. Other examples include the disappearance and torture of victims before they are killed. Disappearances violate the right to liberty and security of person as provided under Article 5 constituting a grave threat to the right to life.[67]

---

[65] Between 1985-1995, although the police registered 17,529 cases in Punjab pursuant to the 1987 Terrorist and Disruptive Activities (Prevention) Act, only one was eventually convicted: Kumar and anor, "Disappearances in Punjab and the Impunity of the Indian State: A Report on Current Human Rights Efforts" at <www.khalistan-affairs.org/main/Human%20Rights/dissapinpunjab.htm> (visited October 1998); The Committee for Coordination on Disappearances in Punjab, Peoples Commission of Inquiry into Human Rights Violations in Punjab at <www.geocities.com/Athens/Forum/2088/r_art03.htm> (visited January 2003).

[66] Article 1 of the Declaration on Enforced Disappearance of Persons, United Nations Doc E/CN4/1991/49 ("Declaration on Disappearances") provides 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." By the Economic and Social Council resolution 1989/85 of 24 May 1989 the Principles on Extra-Legal, Arbitrary and Summary Executions was passed providing that "extra-legal, arbitrary and summary executions contravene the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights."

[67] These rights were cited in Article 1 of the Declaration on Disappearances. The Declaration also cites the right to recognition as a person before the law. Like the

The adoption of the Universal Declaration was a hallmark event because states agreed that everyone possessed fundamental human rights.[68] It follows from this that all states should protect the human rights of persons under their jurisdiction, and if a person's rights are violated he or she may claim against the state concerned.[69] Although the Universal Declaration does not have the binding force of a treaty, nonetheless it has become so widely recognised and accepted that it is regarded as part of customary international law.[70]

Two decades after the Universal Declaration was adopted, the right to life, liberty and security of person were encoded as treaty obligations in the ICCPR.[71] A state party to that instrument that subsequently permits its officials to perpetrate disappearances or extra-judicial executions violates the obligations under the treaty. Responding to the alarming increase in loss of life from 1960-1970[72] resulting from those practices

---

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 cannot be derogated from under the ICCPR. The United Nations Commission on Human Rights Working Group on Enforced or Involuntary Disappearances ("WGEID"), an expert body created to investigate "disappearance" cases observed that "enforced or involuntary disappearances constitute the most comprehensive denial of human rights of our time": WGEID Report, 1990 para 338.

[68] Article 2 of the Universal Declaration states that "[e]veryone is entitled to all the rights and freedoms set forth in this Declaration."

[69] Ibid. Article 8 proclaims the right of everyone to an effective remedy before the national courts for violations of the fundamental rights "granted [to] him by the constitution or by law." The ICCPR goes further by providing the right to an effective remedy for violations of the internationally recognised human rights set forth therein.

[70] According to the Proclamation of Teheran, adopted and proclaimed by the International Conference on Human Rights, convened by the United Nations in Iran in 1968, "[t]he 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." For the text of the Proclamation see United Nations, Human Rights: A Compilation of International Instruments (1988, United Nations, New York). The wide general acceptance of the Declaration gives it considerable moral and political weight. Its provisions have been cited to justify various United Nations actions, and have inspired or been used in many international treaties and national constitutions and laws: see Henkin L (editor), The International Bill of Rights: The Covenant on Civil and Political Rights (1981, Columbia University Press New York) 8, 16-20.

[71] ICCPR Article 6.

[72] During this period, disappearances and extra-judicial executions reached new heights particularly in Indonesia, Guatemala, Chile, Argentina, Paraguay, Ethiopia

the United Nations adopted its first resolutions recognising them as crimes against human rights.[73] In 1980, the United Nations again adopted a resolution reaffirming its concern.[74] However, it took many more years of discussion before the adoption of more binding instruments such as the 1980 Declaration on Disappearances,[75] and the 1989 Principles on Extra-Legal, Arbitrary and Summary Executions.[76] Further, Article 7 of the 1991 Declaration on Enforced Disappearance of Persons prohibited crimes such as war or its threat, internal political instability and other public emergency.[77]

Complementing the United Nations initiatives, five regional inter-governmental organisations have adopted human rights treaties that are binding on states parties.[78] Like the Universal Declaration and ICCPR, the regional treaties provide for the right to life and, in particular, the right not to be arbitrarily deprived of life. They also provide for the right to liberty and security of person, the right not to be subject to torture or cruel, inhuman or degrading treatment or punishment and the right not to be arbitrarily arrested or detained. Disappearances and extra-judicial executions are clearly prohibited, just as they are under the Universal Declaration. Each of the five regional treaties provides for the establishment of institutions to supervise its implementation.

---

and Uganda as those states succumbed either to oppressive military rule or despotic dictatorships: Getting Away with Murder 1-2.

[73] For the text of the resolution see Amnesty International, "Disappearances'; A Workbook (1981, Amnesty International, London) Appendix.

[74] Ibid.

[75] General Assembly Resolution 35/172 of 15 December 1980.

[76] Adopted by Economic and Social Council resolution 1989/85 of 24 May 1989.

[77] United Nations Doc E/CN4/1991/49; see also Principles on Extra-Legal, Arbitrary and Summary Executions Principle 1.

[78] The regional organisations are the Council of Europe, the Organization of American States, the Organization of African Unity, the Arab League and the Commonwealth of Independent States. The relevant treaties are the European Convention, the American Convention, 1981 African Charter on Human and Peoples' Rights, 1994 Arab Charter on Human Rights, and 1995 Convention on Human Rights and Fundamental Freedoms of the Commonwealth of Independent States. When the last convention was opened for signature on 26 May 1995 it was signed by seven of the eleven CIS member states (Armenia, Belarus, Georgia, Kyrgyzstan, Moldova, Russia, Tajikistan). Since then it has been ratified by the Russian Federation, Tajikistan and Belarus and entered into force on 11 August 1998.

(b) Prohibition in War

Prior to the 19th century, war was a formal activity with uniformed armies occupying clearly delineated territory, a code of conduct that was usually observed, a formal declaration and a formal end brought about by a peace treaty.[79] The "decisive battle" was a feature of Clausetwitzian war, formal fighting and formal peace but technological and strategic developments have increasingly displaced them. Technological advancements and the birth of the notion of total war have challenged the Clausewitzian conceptions of war. During the 19th century, the landscape of war underwent dramatic transformation with the Napoleonic wars marking the dawn of the nation-at-arms and an epoch of unbridled ferocity.[80]

From the mid-19th century onwards, increasing public discord at the suffering inflicted in warfare gave rise to efforts to restrict the horrors of war through international law. A branch of the laws of armed conflict that has developed through these efforts deals with the protection of victims of war, often referred to as "international humanitarian law." International humanitarian law found expression in the 1949 Geneva Conventions I-IV ("Geneva Conventions")[81] supplemented by the 1977 Additional Protocols I-II ("Additional Protocols"),[82] all of them binding instruments on the states parties.

---

[79] See generally Bassford C, Clausewitz in English: The Reception of Clausewitz in Britain and America, 1815-1945 (1994, Oxford University Press, New York).

[80] Ibid.

[81] Geneva Convention I concerns the "Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field"; Geneva Convention II concerns the "Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea"; Geneva Convention III is "Relative to the Treatment of Prisoners of War"; and Geneva Convention IV is "Relative to the Protection of Civilian Persons in Time of War". The Conventions entered into force on 12 January 1951 and as of 1 July 2001 there were 188 signatory states.

[82] The Universal Declaration and Geneva Conventions are meant to address the horrors of World War II. Additional Protocol I Relating to the Protection of Victims of International Armed Conflicts develops protection for victims of international armed conflicts. Additional II Relating to the Protection of Victims of Non-International Armed Conflicts develops and supplements the protection for victims of internal armed conflicts contained in common Article 3 of the Geneva Conventions.

The Geneva Conventions apply to international armed conflict and establish detailed rules of behaviour to protect actual or potential victims of war. Each Convention covers a specific class of "protected persons". The Conventions do not outlaw war but provide that those not involved should be humanely treated. Enemy soldiers may be killed in combat but a soldier who is captured, has laid down arms seeking to surrender or is injured, cannot be killed. A country at war cannot kill civilians protected by Geneva Convention IV.[83] Extra-judicial executions constitute "willful killings" and are "grave breaches" of the four Conventions if perpetrated during international armed conflict against protected persons. The same applies to disappearances.[84]

The Conventions have an important innovation in the form of common Article 3. This provision extends the Conventions to "armed conflict not of an international character."[85] It lists fundamental rules for the protection of persons who are not or who no longer take an active part in the hostilities. It provides that "[v]iolence 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 forbids the murder of anyone not directly taking part in hostilities in non-international armed

---

[83] The death penalty is not excluded but stringent restrictions and safeguards surround its use including a six-month delay in the execution of the order.

[84] The disappearance of a prisoner of war violates various provisions of the Geneva Convention II including Articles 70-71 and 118. The disappearance of a civilian protected by Geneva Convention IV may be considered "unlawful confinement" and "unlawful deportation or transfer", constituting a grave breach of the Convention: Rodley NS, The Treatment of Prisoners under International Law (1987, Clarendon Press, Oxford) 198. Other acts prohibited by the Geneva Conventions may involve cases of disappearances including "wilful killing, torture or inhuman treatment", all deemed grave breaches of the Geneva Conventions.

[85] The International Court of Justice referred to the extension of common Article 3 of the Geneva Conventions to internal conflicts in Case Concerning Military and Paramilitary Activities in and Against Nicaragua, Judgment (Nicaragua v United States) [1986] International Court of Justice Reports 14. The provision was also acknowledged in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"). It is important to note that the progressive work of the ICTY in freeing the applicability of grave breaches from the international conflict perimeter received international acceptance when its jurisprudence the applicability of common Article 3 to all matters under Article 8 of the 1998 Rome Statute of the International Criminal Court ("ICC") was recognised. Also, note the work of the International Criminal Tribunal for Rwanda ("ICTR"). Refer note 95 below.

conflicts. Therefore, the prohibition of the willful killing of protected persons in international wars is extended to the killing of those no longer taking part or no longer taking an active part in the hostilities in internal armed conflicts, a category of conflict that includes some of the worst situations of disappearances and political killings.[86] The prohibition of deliberate and arbitrary killings in armed conflict applies not only to government forces but also to all parties to such conflicts including armed opposition groups.

The Conventions apply to all states whether or not they are states parties. The reason is that they form part of international customary law[87] and represent binding standards of behaviour that all states have to observe during armed conflict.[88] At the same time, parallel to the development of the laws of armed conflict, successive human rights instruments adopted by the United Nations have made it clear that certain fundamental human rights such as the right to life and the prohibition of arbitrary deprivation of life must be respected at all times since they are non-derogable rights.[89]

---

[86] Persons protected by common Article 3 include the wounded, sick or captured combatants as well as civilians who take no active part in the hostilities.

[87] In his commentary on the ICTY Statute under Chapter VII of the United Nations Charter to help restore peace in the former Yugoslavia, the then United Nations Secretary-General stated that "part of the conventional international humanitarian law which had 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, United Nations Doc S/25704 (3 May 1993). The Geneva Conventions constitute the core customary law applicable in armed conflicts.

[88] Almost all states are party to the Geneva Conventions, while the majority is party to the Additional Protocols.

[89] Under Article 4 of the ICCPR state 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 that provides for the right to life. Further, no derogation is permitted from Article 7 as it prohibits the arbitrary deprivation of life; torture and cruel, inhuman and degrading treatment or punishment, or from Article 16 as it guarantees the right to recognition as a person before the law. Under the European Convention and the American Convention, the right to life, the right not to be tortured and certain other rights are non-derogable. However, the African Charter does not have a similar provision.

Disappearances and extra-judicial executions constitute war crimes and crimes against humanity under certain circumstances.[90] This position conveys the strong condemnation of those practices and warns the perpetrators that they face legal consequences. However, the two categories apply to different circumstances because war crimes consist of violations of the laws of armed conflict[91] whereas crimes against humanity may be committed during wartime and peacetime.[92]

(c) Implementation of International Standards

(i) United Nations Reports and Resolutions

The first substantive United Nations resolutions on disappearances and extra-judicial executions set forth specific actions for states to take. General Assembly resolution 33/173 adopted on 20 December 1978 requested states to devote appropriate resources to search for the disappeared, undertake speedy and impartial investigations, and ensure that law enforcement and security agencies are fully accountable and accept legal responsibility for unjustifiable excesses that may lead to disappearances. In 1980, the Sixth United Nations Congress on the Prevention of Crime and the Treatment of Offenders adopted a resolution on extra-legal executions that called on all states to take effective measures to prevent those acts.[93]

---

[90] On 17 November 1983, the General Assembly of the Organization of American States declared that "the practice of the forced disappearance of persons in the Americas...constitutes a crime against humanity": see Resolution 666 (XIII-0/83), Annual Report of the Inter-American Commission on Human Rights. The final text of the 1991 Declaration on Enforced Disappearance of Persons only goes so far as to state that the systematic practice of enforced disappearances is "of the nature of" a crime against humanity. Whether disappearances constitute a crime against humanity seem to have been laid to rest in Article 7(2)(i) of the Rome Statute.

[91] They include the crimes defined as grave breaches of the Geneva Conventions such as the "wilful killing" of protected persons and the "unlawful confinement" and "unlawful deportation or transfer" of protected civilians: Kalshoven F, Constraints on the Waging of Warfare (1987, International Committee of the Red Cross, Geneva) 68

[92] The 1968 United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity applies to crimes against humanity whether committed during war or peace as defined in the Charter of the International Military Tribunal, Nuremberg, 8 August 1945 and confirmed by General Assembly resolutions 3(I) of 13 February 1946 and 95(1) of 11 December 1946.

[93] Amnesty Manual 187-188.

The 1989 Principles on Extra-Legal, Arbitrary and Summary Executions and the 1991 Declaration on Enforced Disappearances of Persons call on states to: (1) conduct impartial investigations into complaints and reports of abuses; (2) bring the alleged perpetrators to trial; and (3) establish specific safeguards for the prevention of the abuses. The measures specified appear as rules constituting further standards to be implemented. Further, the United Nations has called upon states to include those instruments in national legislation and create institutions and procedures to monitor compliance with the standards, make recommendations, and take relevant action.[94]

(ii) International Penal Process

The 1990s saw the creation of the International Criminal Tribunals for the Former Yugoslavia and Rwanda. The tribunals renewed the implementation of international criminal law based on the model inaugurated in Nuremberg. In this regard, forced disappearances and extra-judicial executions fall within Article 5 of the Statute of the Yugoslav Tribunal and Article 3 of the Statute of the Rwandan Tribunal.[95]

However, the *ad hoc* approach in the enforcement of international criminal law causes a major problem. It is reactive and narrowly focused on solving the immediate international emergency. Past practice shows that this is at best a limited exception instead of the norm. As a result, it does not afford any comprehensive investigation and prosecution of disappearances and extra-judicial executions at the international level. Arguably, the existence of the Yugoslav and Rwandan Tribunals helped to move the world community closer to the creation of the permanent ICC.

The Preamble to the Rome Statute provides that the ICC's role is to end impunity for the perpetrators of "atrocities that deeply shock the conscience of humanity." Forced disappearances and extra-judicial

---

[94] See generally ibid 178-197.

[95] Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), United Nations Doc S/25704, 3 May 1993. The ICTY Statute appears as the appendix to the Secretary-General's Report. On 8 November 1994, the Security Council adopted resolution 955 creating the ICTR, with its Statute appears as an annexure to the resolution.

executions fall within this category as found in Articles 5 and 7. Those acts may be separately prosecuted under the Statute as war crimes involving grave breaches of the Geneva Conventions that include torture, inhuman treatment, or wilfully causing great suffering or serious injury to body or health under Article 8(2)(a)(ii)-(iii). Also, the Preamble describes the ICC as a "complement" to existing national courts and processes.[96] This means that jurisdiction falls to the ICC only in the exceptional circumstance where it decides that the state, with the first right to jurisdiction, "is unwilling or unable genuinely to carry out the investigation or prosecution."[97] In recognising the state's concurrent jurisdiction over serious violations of international law in this way, the ICC is expected to strengthen, not replace, the national enforcement of human rights and human rights norms.

The Rome Statute embodies a carefully crafted compromise between a state-centered idea of jurisdiction and a more inclusive international vision. The state-centered idea in its extreme manifestation upholds a state's exclusive jurisdiction to prosecute and try its own citizens for war crimes, genocide, and crimes against humanity. It may also try the citizens of other states who commit such acts on its territory. An inclusive vision promotes the idea of universal jurisdiction whereby individuals of any nationality may be tried for such crimes by any state acting on behalf of humanity as a whole. However, the ICC follows a middle path and the Rome Statute assigns primary jurisdiction to the ICC's member states. However, in ratifying the Rome Statute and becoming ICC members, states agree that if they are not willing or able to carry out their obligation to investigate and prosecute the crimes, the ICC has "complementary" jurisdiction to do so in their stead.

V. DOMESTIC ENFORCEMENT

While issues of jurisdictional power dominated early developments in human rights law, recent developments emphasise the domestic enforcement of international obligations. Recent human rights treaties often specify the domestic means for enforcing rights recognised in earlier conventions including criminal prosecutions.[98] Bodies that

[96] See Article 17, having regard to Article 1 and the Preamble para 10.
[97] Article 17(1).
[98] For example, Article 5(2) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as modified ("Convention against

monitor compliance with human rights treaties, silent on punishment, have made clear that investigation and prosecution form part of a state party's duties under the treaties.[99] This interpretation reflects the broad trends in international law including punishment for human rights violations. International law has long relied upon criminal sanctions to secure compliance with norms deemed essential for international order.[100] When international law first established human rights guarantees, it was natural that criminal law would have a role in securing rights of paramount importance. Even when states resolved to establish the ICC it was inevitable that human rights law would continue to rely heavily on the older paradigm of international penal law that in turn relied on domestic courts to enforce criminal prohibitions.[101] However, since human rights can only be fully assured when there are adequate safeguards in domestic law, it is not surprising

---

Torture"), specifies a series of legal measures that state parties should adopt to ensure the suppression of torture, a practice proscribed in the Universal Declaration and ICCPR. Similarly, there is the 1985 Inter-American Convention to Prevent and Punish Torture adopted by the General Assembly of the Organization of American States on 9 December 1985 establishing the measures that state parties have to adopt to eradicate torture, a practice also prohibited by the American Convention.

[99] Orentlicher, "Bearing witness: The art and science of human rights fact-finding" (1990) 3 Harvard Human Rights Journal 83, 94. When organs monitoring compliance with human rights treaties examined the violations, it became more important to identify the state's affirmative duties to ensure fundamental rights since state responsibility for violations often defied conclusive establishment.

[100] Blackstone offered the following rationale for the state's 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 could 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, (1809, 15th edition, A Strahan for T Cadell, London) Volume 4, 68.

[101] For purposes of establishing state responsibility under international law, courts have long been regarded as state organs: Eagleton C, The Responsibility of States in International Law (1928, New York University Press, New York) 68-69; Meron T, Human Rights in Internal Strife: Their International Protection (1987, Grotius, Cambridge) 33-36; Kelsen, "Collective and individual responsibility in international law with particular regard to the punishment of war criminals" (1943) 31 California Law Review 530, 538; Sohn, "The new international law: Protection of the rights of individuals rather than states" (1982) 32 American University Law Review 1.

that the state's duty to secure fundamental rights require an appropriate response from national courts when violations occur.[102]

The question whether states have an affirmative obligation to investigate and take action against those who engaged in state-directed or state-condoned disappearances or killings have been posed most starkly in states where elected civilian governments have replaced repressive regimes.[103] 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 receive immunity. With no fear of retribution, a new regime may again succumb to the same repressive behaviour. Consequently, the problems can only be remedied by subjecting states to an affirmative obligation to investigate and prosecute past and future human rights violators.[104]

(a) Obligation to Investigate and Prosecute as Treaty Law

Human rights law recently gave rights to individuals *vis-à-vis* their own states. Due to widespread revulsion for the crimes committed before and during World War II, states finally began to accept limits on their absolute sovereignty concerning the human rights of those residing within their jurisdiction. A series of widely subscribed multilateral instruments presently define many of those rights, some of them discussed above.

Three types of clauses in modern multilateral human rights instruments provide support for a state's obligation to investigate grave human rights violations and act against those responsible. First, the "ensure and respect" provision common to many have been interpreted to impose affirmative obligations on a state to investigate and prose-cute. Secondly, criminal law instruments specify the state's obligation to extradite or prosecute perpetrators for acts defined as crimes under international law. Finally, the right to a remedy found in many human rights instruments provides a strong basis for inferring an obligation to investigate and prosecute.

---

[102] Orentlicher, "Settling accounts: The duty to prosecute human rights violations of a prior regime" (1991) 100 Yale Law Journal 2537, 2561.
[103] Ibid; Getting Away with Murder 92-96.
[104] Ibid 92-97.

(i) "Ensure and Respect" and the *Velasquez Rodriguez Case*

It is now widely accepted that states have an affirmative duty to "ensure" civil and political rights.[105] Courts and commentators have interpreted treaty provisions requiring states to ensure political and civil rights as imposing an affirmative obligation to control persons and authorities acting under official auspices.

The ICCPR provides that rights are violated if acts involving disappearances and extra-judicial executions are committed. As a result, a state party has to implement the standards found therein. Under Article 2, a state party undertakes "to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised" in that Covenant. The word "respect" appears to entail a promise not to violate the rights set forth in the Covenant, while the word "ensure" entails a positive obligation to take the necessary measures to prevent human rights violations. In particular, under Article 2 a state party undertakes to adopt the "legislative or other measures" needed to give effect to those treaty rights.

In *Ireland v United Kingdom,* the European Court of Human Rights held that the European Convention "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 should prevent or remedy any breach at subordinate levels."[106] The Geneva Conventions also contain an "ensure and respect" provision in common Article 1. It provides that the states "[p]arties undertake to respect and to ensure respect for the present Convention in all circumstances."[107] Commentators have interpreted the phrase "to ensure respect" to mean that a government should obligate its servants, other persons or entities within its authority or influence to respect the Conventions.[108]

---

[105] Buergenthal, "State obligations and permissible derogations" in Henkin L (editor), The International Bill of Rights: The Covenant on Civil and Political Rights (1981, Columbia University Press, New York) 72.

[106] (1978) 25 European Court of Human Rights (Series A) 239, Judgment.

[107] See Article 1 of Geneva Conventions I-IV.

[108] Murphy, "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.

In this respect, a major battle was won in the struggle against disappearances when the Inter-American Court of Human Rights heard three significant cases between 1986-1989 involving the Honduran armed and security forces. The Court found Honduras was responsible in three landmark cases for violating the 1969 American Convention on Human Rights[109] from 1981-1984 by designing and implementing a deliberate plan to cause forced disappearances that claimed more than 140 lives. The decisions in *Velasquez Rodriguez,*[110] *Saul Godinez Cruz,*[111] and *Fairen Garbi and Solis Corrales*[112] have become milestones in developing international safeguards for human rights.

The clearest exposition of the obligation to ensure rights by investigating and prosecuting disappearances is found in the Inter-American Court of Human Rights construing the American Convention in *Velasquez Rodriguez*. The Court used the words "ensure to all persons", language that is found in Article 1(1) of the American Convention and forms the basis for states to prevent, investigate and, if necessary, prosecute those reliably accused of disappearances. This case concerned the Honduran military's arrest, torture and execution of a Honduran student whose detention the state had consistently denied any knowledge of.

In finding Honduras responsible for Velasquez's disappearance, the Court relied on evidence the American Human Rights Commission presented and found that the disappearance was part of the pattern of disappearances.[113] More importantly, the Court found that the failure to guarantee the specific rights enumerated in the Convention was itself a violation of the state's obligations under Article 1 of the American Convention on Human Rights.[114] This finding therefore posits a state's

---

[109] Also known as the "Pact of San Jose, Costa Rica" of the Organization of American States.

[110] Judgment, Inter-American Court of Human Rights (Series C), No 4 (1988).

[111] Ibid No 5 (1989).

[112] Ibid No 6 (1989).

[113] Velasquez Rodriguez at 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.

[114] Ibid 160-167, 182. The Court interpreted Article 1 as determining when violations of substantive rights can give rise to state responsibility, stating: "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

duty to prevent, investigate, and punish violation of rights found under the Convention. The state also has to restore or attempt to restore the rights violated and provide compensation for any injury suffered.[115]

The Court held that the duty in Article 1 on "respect" implies a limitation on the state's power because of the "negative" obligation not to interfere with the exercise of a right. However, the obligation to "ensure" rights places an affirmative duty on state parties.[116] In fact, "[t]his obligation implies the duty of the state parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights."[117]

If a state exhibits a lack of diligence in preventing or responding to the violation, it violates its duty to act. It is inconsequential if the responsible state organ or official violates domestic law or exceeds the bounds of authority,[118] or if the perpetrator is unknown or not a state agent.[119] 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.[120]

Applying this rule to *Velasquez Rodriguez,* the Court found that Honduras had failed to guarantee the full and free exercise of human rights[121] by not investigating, punishing and compensating.[122] It criticised the state's initial failure to investigate the allegations in general and the petition's allegation in particular.[123] In sum, the Court

---

imputable to the State, which assumes responsibility in the terms provided by the Convention itself": ibid 164.

[115] The Court held: "The state had 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.

[116] Ibid 165-166.

[117] Ibid 166.

[118] Ibid 170.

[119] Ibid 172-173.

[120] Ibid 177.

[121] Ibid 178.

[122] Ibid 178.

[123] Ibid 180.

ordered the state to compensate the victim's family[124] after finding the breach of an affirmative obligation under the "ensure and respect" clause to prevent, investigate, prosecute and punish grave violations of human rights. Those measures were deemed necessary to "ensure" human rights by deterring both current and future violators.[125]

Velasquez Rodriguez marks the leading edge in cases applying the "ensure and respect" language. If other tribunals follow this decision, there will be far-ranging consequences because human rights treaties such as the ICCPR and European Convention have similar "ensure and respect" provisions.[126] The potential exists for such provisions to become the foundation of the state's duty to investigate and prosecute forced disappearances and extra-judicial executions.[127]

(ii) ***Aut dedere, aut judicwere***

The principle *aut dedere, aut judicwere* [extradite or prosecute] appears included in many treaties.[128] It ensures that those who commit crimes under international law are not granted safe haven anywhere in the world. The treaties, whether on international or national crimes, show an increasing tendency to require states to investigate and prosecute serious offences. Interest in the international community has progressed from acts directly affecting more than one state (for example war crimes and hijacking) to more indirect concerns based on

---

[124] Ibid 194-195. Honduras was ordered to pay $150,000 to Velasquez Rodriguez's family: Inter-American Court of Human Rights, Press Release CDH-CP2/89, March 1989 and $130,000 to the family of Saul Godinez Cruz: Inter-American Court of Human Rights, Press Release CDH-CP8/89, 21 July 1989. The third case concerned Fairen Garbi and Solis Corrales that was dismissed for lack of evidence.

[125] Roht-Arriaza, "State responsibility to investigate and prosecute grave human rights violations in international law" (1990) 78 California Law Review 449, 472.

[126] Article 1 of the European Convention 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." However, the jurisprudence of the European Court does not currently recognize Article 1 as capable of being violated independently of the substantive rights enumerated in other parts of the Convention: Ireland v United Kingdom, 25 European Court of Human Rights (series A), Judgment, 1978, 238.

[127] Roht-Arriaza, "State responsibility to investigate and prosecute grave human rights violations in international law" (1990) 78 California Law Review 449, 472.

[128] This includes the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, the Geneva Conventions, the Convention Against Torture, and the Inter-American Convention on Forced Disappearance.

the enforcement of human rights norms, even if only domestically.

These trends evidence an emerging consensus that human rights violations should be investigated and prosecuted.[129] The Inter-American Convention on Forced Disappearance, the only treaty so far dealing specifically with this phenomenon, requires states to punish individuals (and accomplices and accessories) who commit or attempt to commit this act.[130] Further, it enjoins states to cooperate with one another to prevent, punish and eliminate the practice, and take legislative, judicial, administrative, and other measures to comply with the Convention's commitments.[131]

Generally, the applicability of specific penal treaty provisions is limited because not all states have accepted them and because they do not specifically address disappearances and extra-judicial executions. Nevertheless, as seen above, broader-based human rights treaties exist providing for the international obligation to investigate and prosecute.

(iii) Right to a Remedy in International Instruments

The multilateral human rights instruments existing since the United Nations' creation in 1945 define the individual's substantive rights *vis-à-vis* their own states. They also represent a state party's commitments to the whole international community regarding those rights. This makes human rights a proper subject for international concern and justifies collective or individual state sanctions for breaches.[132] However, because they focus on individual rights and not on state responsibility, general human rights instruments do not refer directly to a state's obligation to investigate or prosecute under international law. Instead, it recognises an individual's right to a remedy when a violation occurs.[133] The Universal Declaration provides this remedy in Article 8

---

[129] Roht-Arriaza, "State responsibility to investigate and prosecute grave human rights violations in international law" (1990) 78 California Law Review 449, 467.
[130] Ibid Articles I(b) and VI.
[131] Ibid Article I.
[132] The International Court of Justice has drawn a distinction between "the obligations of a State towards the international community as a whole" and those arising among individual states. Since all states have an interest in the former, they are "obligations erga omnes": Barcelona Traction, Light & Power Co (Belgium v Spain) [1970] International Court of Justice Reports 3, 33.
[133] For example, the Universal Declaration, ICCPR, American Convention, and

stating that "[e]veryone had 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."

In this sense, it extends implicitly to the right to life. It also implies that the remedy is individualised and adjudicatory in nature.[134]

The Human Rights Committee, created under Article 28 of the ICCPR, has interpreted the obligation to provide a remedy to include the obligation to investigate and prosecute violations of human rights.[135] It underscored this interpretation in many cases on torture, arbitrary arrest and disappearances in Uruguay during the late 1970s. For example, in *Eduardo Bleier v Uruguay,*[136] Irene Bleier Lewenhoff and Rosa Valino de Bleier brought a complaint alleging that their father, Eduardo, was a victim. The Committee found that Uruguay should have investigated, prosecuted and paid reparation,[137] a position which is echoed and reinforced at the regional level. For example, the Inter-American Commission on Human Rights has found the "right to a remedy" in the American Convention to include similar duties[138] and repeatedly called for violations to be investigated and those responsible prosecuted.[139] The European Court of Human Rights has done the same.[140]

European Convention are among the instruments that recognise a right to a remedy.

[134] Eleanor Roosevelt, Chair of the United Nations Commission on Human Rights when the Universal Declaration was drafted, emphasised that "appealing to a tribunal was an act of a judicial nature," not merely an administrative one: Roht-Arriaza, "State responsibility to investigate and prosecute grave human rights violations in international law" (1990) 78 California Law Review 449.

[135] 37 United Nations GAOR Supp (No 40) at 94, United Nations Doc No A/37/40 (1982).

[136] Human Rights Committee, Communication No R7/30, 23 May 1978, United Nations Doc Supp No 40 A/37/ 40, 1982 at 130.

[137] Irene Bleier Lewenhoff & Rosa Valino de Bleier v Uruguay, United Nations Human Rights Commission No 30/1978, 13.3, United Nations Doc CCPR/C/OP/1 (1985).

[138] Article 25(1) of the American Convention provides that "[e]veryone had 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."

[139] On disappearance, see for example Case 7821, Inter-American Court of Human Rights 86, 87, OAE/serL./V/II.57, Doc 6 rev 1 (1982). On torture and arbitrary arrest, see Case 6586 Inter-American Court of Human Rights 91, OEA/serL./V/II/61, Doc 22 rev 1 (1983). For the complete case list see Contentious Cases before the Inter-American Court of Human Rights at <http://heiwww.unige.ch/humanrts/iachr/contntus.htm> (visited February 2003).

[140] Article 13 of the European Convention provides that "everyone whose rights and

Therefore, it may be said that the right to a remedy is common to human rights instruments. It encompasses the requirement of an adjudicatory system to hear and decide on complaints and provides redress for violation. The question that remains, however, is what kind of redress is implied once a disappearance or death squad killing occurs and remedies have to be both effective and adequate. While a remedy's effectiveness may vary depending on specific conditions, the jurisprudence on exhaustion of remedies helps to determine when it is deemed to be so. For example, remedies are deemed ineffective if the complainant has no recourse to them, domestic laws do not afford adequate relief, courts are not independent or proceedings take too long.[141] The basic criterion is whether the remedy gives the claimant satisfaction,[142] or, in other words, an adequate remedy.[143]

(b) Obligation to Investigate and Prosecute – an Emerging Norm

Treaties and customary international law are the main sources 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."[144] At present, two sources suggest that there is an emerging obligation under customary international law to investigate forced disappearances and extra-judicial executions: the treaty provisions and judicial decisions discussed above and state practice stemming from the acceptance of relevant treaties.

(i) *Treaties*

International instruments help to create customary international law by reflecting state practice. As shown above, modern multilateral treaties embody an obligation to investigate and prosecute human rights

---

freedoms as set forth in this Convention were violated shall have an effective remedy before a national authority notwithstanding that the violation had been committed by persons acting in an official capacity."

[141] 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, Cambridge University Press, New York) 72.

[142] Ibid 74.

[143] Donnelly v United Kingdom, 1976 Year Book of the European Convention on Human Rights (European Commission of Human Rights) 84, 234-236.

[144] American Law Institute, Restatement of the Law, Foreign Relations Law of the United States (1987, American Law Institute Publishers, St Paul, Minnesota) §702(c).

violations. Therefore, due to their character and universal acceptance now they evidence the obligation as part of customary international law.[145] Human rights treaties build upon one another and frequently have provisions in common or embody parallel concepts. This fact provides even stronger evidence of an existing norm.[146] Indeed, Professor Meron states that "the repetition of certain norms in many human rights instruments is itself an important articulation of State practice" and may serve as a "preferred indicator" of customary status.[147] The state's obligation to act in cases of grave human rights violations is either explicit or implicit in practically every major instrument related to human rights. Through this, the concepts of obligation and remedy are becoming part of international customary law in relation to non-derogable rights, such as the prohibition on torture and the right to life that bear directly on disappearances and extra-judicial executions.[148]

Although some writers cite non-derogable rights as evidence of "at least a minimum catalogue of fundamental or elementary human rights,"[149] the relationship between *jus cogens* and derogability remains unsettled. Professor Meron states that the principal human rights instruments (the ICCPR, the European Convention and the American Convention) "contain the same hard core of non-derogable rights, yet different lists of non-derogable rights. Rights that were non-derogable under such instruments were not necessarily *jus cogens*...and some of

---

[145] D'amato A, The Concept of Custom in International Law (1971, Cornell University Press, Ithaca NY) 151.

[146] Ibid 136.

[147] Meron T, Human Rights and Humanitarian Norms as Customary Law (1989, Clarendon Press, Oxford) 92-93.

[148] Similarly, extradition or prosecution of offenders, common in penal conventions since 1945, is ripening into a norm of customary law: Roht-Arriaza, "State responsibility to investigate and prosecute grave human rights violations in international law" (1990) 78 California Law Review 449, 492. Moreover, most scholars consider the Universal Declaration to have at least become customary international law. Since it contains an explicit right to a remedy, it alone may be enough to show a duty to investigate and prosecute: United States memorial in Case Concerning United States Diplomatic and Consular Staff in Tehran (United States v Iran) [1980] International Court of Justice Reports 3.

[149] Van Boven, "Distinguishing criteria of human rights" in Vasak K and anor (editors), The International Dimensions of Human Rights (1982, UNESCO, Paris) 46.

them could not even have attained the status of customary law."[150] He asks whether a right whose derogation is permitted by a primary international human rights agreement (the ICCPR) may be regarded as *jus cogens* in light of the *jus cogens* provision in Article 53 of the 1969 Vienna Convention on the Law of Treaties, and therefore not derogable.[151] He continues: [152]

> 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*, could adversely affect the credibility of human rights as a legal discipline.

(ii) State Practice

Although state-sponsored violations of human rights persist and although states often fail in their duty to investigate and prosecute allegations of violations, other aspects of state practice show that the failures are recognised as breaches of international norms. State practice includes diplomatic acts and instructions, public measures, governmental acts and official statements of policy. Their attempts to initiate action against violators, statements, resolutions and declarations are practices that may evince a customary international law obligation to investigate and prosecute. Although sporadic domestic prosecutions may demonstrate this sense of legal obligation, they do not evidence conclusively a customary international law obligation since they may be deemed to be responses to matters purely domestic.[153]

---

[150] Meron, "On a hierarchy of international human rights" (1986) 80 American Journal of International Law 1, 15-16.
[151] Ibid 16.
[152] Ibid 21-22.
[153] See Zalaquett, "Confronting human rights violations committed by former governments: Principles applicable and political constraints" in Aspen Institute, State Crimes: Punishment or Pardon (1989, Aspen Institute, Queenstown) 23, 45 note 40.

Torture, abduction and extra-judicial execution (including disappearances) are prohibited and subject to penal sanction worldwide.[154] Many Latin American states impose special penalties when the accused is a public official who fails through lack of due diligence to prevent the violation.[155] Over the last 55 years, major legal systems and Western states especially have begun to provide some form of civil redress against unlawful official acts.[156] If domestic legislation is consistent in the major legal systems, it is another important indicator of state practice especially in the human rights context.[157] However, there is still little consistent state practice supporting a duty to investigate and prosecute, including inconsistent state practice in amnesty situations.

It is noted that states are generally unwilling to say categorically that they have no obligation to investigate or prosecute human rights violations just as they are unwilling to explicitly reject fundamental human rights. Even where they have passed amnesty laws, they have not denied the existence of an obligation to investigate and prosecute. Instead, in practice they prefer to justify their acts as required by exigent circumstances that override the obligation[158] and in their representations to international bodies they have stressed their compliance with the norms.[159]

---

[154] Summary execution is usually prohibited as murder, and disappearance as abduction or kidnapping.

[155] See for example Argentina's Code Penale Article 144(3) (1985) (prison term for torture); Article 144(4) (prison term for complicity in permitting torture); and Article 144(5) (prison term for negligence in permitting torture). Also, Peru's Code Penale Article 340 (1985) (prison for public officials who illegally arrest, mistreat or were complicit in mistreatment of persons).

[156] See Hurwitz L, The State as Defendant: Governmental Accountability and the Redress of Individual Grievances (1981, Greenwood Press, Westport, Connecticut) 22-23. For example, the French Conseil d'Etat and the Scandinavian Ombudsman also provide citizens with civil redress against abuse by officials: see generally ibid. The United States also allows individuals to bring a civil suit against officials acting under state law: 42 USC §1983.

[157] See Meron T, Human Rights and Humanitarian Norms as Customary Law (1989, Clarendon Press, Oxford) 93-94 confirming that the right is incorporated in national laws and exists in national practice, a preferred indicator of customary human rights.

[158] See for example, President Raul Alfonsin's address to the nation on 13 May 1987: "Esto no me gusta" in Sancinetti M, Derechos Humanos En La Argentina Post-Dictatorial (1988, Bruylânt, Bruxelles) 277-278.

[159] For example, although the Uruguayan civilian government ultimately enacted a virtual amnesty law covering forced disappearances and extra-judicial executions, it

(iii) Resolutions and Declarations

As discussed above, the United Nations adopted the first resolutions expressing general concern for forced disappearances and extra-judicial executions in 1978 and 1980 respectively. When addressing this matter and to deter extra-judicial executions by the states under the cloak of legality, the General Assembly established an important standard in law enforcement through the adoption of the Code of Conduct for Law Enforcement Officials in 1979.[160] Later, this developed into the United Nations 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.[161]

In 1985, the General Assembly unanimously passed a resolution adopting the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power[162] calling on member states to "enact and enforce legislation proscribing acts that violate internationally recognised norms relating to human rights"[163] and "establish and strengthen the means of detecting, prosecuting and sentencing those guilty of crimes."[164] In the same year, it adopted Resolution 40/143 on summary or arbitrary executions requesting the Special Rapporteur to consider in his next report death in custody and other suspicious deaths, *inter alia*.[165] In his 1986 annual report, the Special Rapporteur highlighted the need "to develop international standards designed to ensure that investigations were conducted into all cases of suspicious death" including provisions for a proper autopsy.[166] Subsequently, the General

---

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

[160] The Code of Conduct for Law Enforcement Officials, General Assembly resolution 34/169, Annex (1979).

[161] United Nations DocA/CONF 144/28/Rev1 (1990).

[162] General Assembly resolution 40/34, 40 United Nations GAOR Supp (No 53) at 213, United Nations Doc A/40/53 (1985).

[163] Ibid para 4(c).

[164] Ibid para 4(d).

[165] General Assembly resolution 40/143 (13 December 1985).

[166] United Nations Doc A/41/53 at 197 (1986).

Assembly adopted a resolution condemning arbitrary executions and endorsed the Special Rapporteur's conclusions.[167]

Other evidence of state activism on disappearances and extra-judicial executions includes the Principles on Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions adopted by the General Assembly in December 1989.[168] Many of the Principles are derived from other United Nations human rights instruments providing the standards for states to use domestically. They establish the international standards required for investigating and prosecuting those grave violations of human rights.[169] This effort reflects another rising concern to make the investigation and prosecution of those practices a clear legal obligation especially in international bodies.

Several United Nations reports and inter-governmental organisations have reinforced the view that punishment plays a necessary part in the duty of states under customary law to protect the rights to life and freedom from involuntary disappearance. The Reports of Special Rapporteurs, Special Representatives, and Working Groups appointed by the United Nations Commission on Human Rights on human rights conditions and violations[170] have repeatedly condemned the failure to punish disappearances and extra-legal executions.[171] They have

---

[167] General Assembly resolution 41/144, 41 United Nations GAOR, Supp No 53 (1986).

[168] Principles on Extra-Legal, Arbitrary and Summary Executions adopted by the Economic and Social Council Resolution 1989/85 of 24 May 1989.

[169] Ibid.

[170] "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 see Weissbrodt, "The three 'theme' Special Rapporteurs of the United Nations Commission on Human Rights" (1986) 80 American Journal of International Law 685.

[171] The reports often cite the ICCPR, other United Nations human rights declarations, and customary international law as the bases of the rights examined. Several resolutions of the Commission on Human Rights suggest that the duty to prevent human rights violations is inherent in the human rights obligations under the United Nations Charter. In language that evokes the Charter's human rights provisions, the United Nations Commission on Human Rights 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": Commission on Human Rights resolutions 1988/50 and 1988/51.

stressed that a state's failure to punish repeated violations of physical integrity encourages further violations.[172] Although the Reports do not authoritatively interpret international law, resolutions of the General Assembly have endorsed many of their conclusions on the punishment of those responsible for the violations.[173]

The evidence of an emerging norm in treaty provisions, state practice (for example oral statements by state representatives and resolutions and declarations) is undoubtedly mixed. However, taken together, those sources support that an obligation exists to investigate gross and systematic violations and to take judicial or administrative action against those responsible, which is now part of customary international law. Further, policy reasons support the broadest possible reading of the evidence while the development of the rule is usually prefaced by the question whether it will contribute to international order.[174]

(c) Amnesty: Legalising Impunity?

The role of amnesty has been divisive. Vexing moral, 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 states (Argentina, Brazil, Chile, El Salvador, Guatemala, Haiti, Honduras, Nicaragua, Peru, Suriname, and Uruguay) new civilian leaders have chosen or been compelled to

---

[172] For example, the Special Rapporteur's Report on human rights in Chile under the Commission on Human Rights resolution 1983/38 of 8 March 1983 para 11, United Nations 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 Jose Antonio Pastor Ridruejo in fulfilment of the mandate conferred under Commission resolution 1986/39, 43 United Nations ESCOR Commission on Human Rights 13 para 60, United Nations Doc E/CN4/ 1987/21; Report of the Working Group on Enforced or Involuntary Disappearances, 45 United Nations ESCOR Commission on Human Rights 85 para 312, United Nations Doc E/CN4/1989/18; Report of the Working Group on Enforced or Involuntary Disappearances 47, United Nations ESCOR Commission on Human Rights 86.

[173] For example, General Assembly resolutions 33/173 para 1(b) (1978); 36/157 para 4(e) (1981); and 37/185 para 10 (1982).

[174] Roht-Arriaza, "State responsibility to investigate and prosecute grave human rights violations in international law" (1990) 78 California Law Review 449, 499-500.

decree an amnesty for serious human rights violations or accept one previously decreed by outgoing military rulers.[175]

States typically grant amnesty to a group or class of persons, not to an individual and usually for peacekeeping, reconciliation and nation building purposes. Historically, states in conflict have considered amnesty a necessary means to end wars, maintain peace and establish democracy or civilian rule. Political actors have often used amnesty as a bargaining tool, promising dictators immunity from prosecution in exchange for relinquishing power.[176]

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 officers implicated in more than 10,000 disappearances.[177] Elsewhere, only in isolated cases have prosecutions for serious violations of human rights been even partially successful.[178]

Newly installed regimes prefer not to prosecute former repressors and human rights abusers for fear of political backlash and increasing social tension. As such, amnesties are one way to deal with repressive pasts

---

[175] Cassel, "Accountability for international crime and serious violation of fundamental human rights: Lessons from the Americas: Guidelines for international response to amnesties for atrocities" (1996) 59 Law and Contemporary Problems 199, 200.

[176] Roht-Arriaza, "Truth commission and amnesties in Latin America: The second generation" [1998] American Society of International Law Proceedings 313-314. For a discussion on various amnesties granted to achieve peace see Scharf, "The amnesty exception to the jurisdiction of the International Criminal Court" (1999) Cornell International Law Journal 507, 508.

[177] See generally Kritz NJ (editor), Transitional Justice: How Emerging Democracies Reckon With Former Regimes (1995, United States Institute of Peace Press, Washington DC) 82-103, 146-153, 417-438.

[178] Couldorga, "Democracy dignified and an end to impunity: Bolivia's military dictatorship on trial" in McAdams AJ (editor), Transitional Justice and the Rules of Law in New Democracies (1997, University of Notre Dame Press, Notre Dame) 61; Miller and anor, "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.

and reconcile divided societies.[179] As Young states:[180]

> 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 national reconciliation.

Few treaty provisions specifically prohibit amnesty and some actually allow broad grants of amnesty.[181] Article 6(5) of Additional Protocol II, for example, permits broad grants of amnesties for the individuals involved in conflict.[182] However, Article 6 of Additional Protocol II states that the Protocol applies only to civil wars and non-international armed conflicts[183] and emphasises the need to protect victims of armed conflict.[184] Thus, acceptable grants of amnesty under this instrument are limited to internal conflicts and coexist with due process rights for victims and individuals.[185]

In contrast to Additional Protocol II, there are provisions that prohibit

---

[179] Young, "Amnesty and accountability" [2002] University of California Davis Law Review 427, 438.
[180] Ibid 436-437.
[181] For discussion on amnesties in international conventions and decisions, see Roht-Arriaz, "Special problems of a duty to prosecute: Derogation, amnesties, statutes of limitation, and superior orders" in Roht-Arriaza N (editor), Impunity and Human Rights in International Law and Practice (1995, Oxford University Press, New York) 57. However, the duty to prosecute, investigate and provide remedies to victims may interfere with the availability of amnesty. Thus, the Declaration on the Protection of All Persons from Enforced Disappearances ("Declaration on Disappearances"), General Assembly resolution 47/133, United Nations GAOR, 47th Sess, Supp No 49 at 207, United Nations Doc A/47/49 (1992) precludes amnesty. Note that the duty to prosecute, investigate and provide a remedy has implications for national amnesties: 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.
[182] For discussion on Protocol Additional II, see Bassiouni MC, Aut Dedere Aud Judicwere: The Duty to Extradite or Prosecute in International Law (1995, Martinus Nijhoff, Dordrecht) 3, 101.
[183] Ibid Preamble.
[184] For reinforcement that Additional Protocol II addresses criminal prosecutions and protection of victims in non-international armed conflict, see Bassiouni MC, Aut Dedere Aud Judicwere: The Duty to Extradite or Prosecute in International Law (1995, Martinus Nijhoff, Dordrecht).
[185] Ibid 101.

specific amnesties. By mandating investigation, prosecution and punishment the ability to grant amnesty is diminished.[186] Albeit not a treaty, strictly speaking, the Declaration on Disappearances also precludes amnesty.[187] Principle 18 disallows it if it prevents criminal proceedings or sanctions for disappearance crimes.[188] It provides:[189]

> Persons who have or were 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.

Therefore, state parties to the Declaration cannot grant a broad, blanket amnesty covering criminal proceedings for disappearances.

The Inter-American Court and Commission have a developed jurisprudence on impunity and amnesties for human rights violations. They stressed the seriousness of the violations in cases from 1980-1990 involving forced disappearances in Honduras,[190] an army massacre of 74 civilians in El Salvador,[191] forced disappearances and kidnapping of

---

[186] Article IV of the 1968 United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity requires state parties to remove domestic limitations "to the prosecution and punishment [of] war crimes and crimes against humanity." Only in limited situations, such as where the Geneva Conventions and the Genocide Convention apply, a grant of amnesty to a person who commits a crime therein is a breach of treaty obligation. Further, a state's prerogative to grant amnesty may be circumscribed by the treaties to which the state is a party: Scharf, "The amnesty exception to the jurisdiction of the International Criminal Court" [1999] Cornell International Law Journal 507, 515 note 57.

[187] See generally Roht-Arriaza, "Non-treaty sources of the obligation to investigate and prosecute" in Roht-Arriaza N (editor), Impunity and Human Rights in International Law and Practice (1995, Oxford University Press, New York) 39.

[188] For discussion on the aims and provisions of the Declaration setting forth "standards designed to punish and prevent" forced disappearances, see ibid 44-45.

[189] States are asked to implement the principles in the Declaration Against Disappearances and remove obstacles to investigations: Human Rights Questions: Including Alternative Approaches for Improving the Effective Enjoyment of Human Rights and Fundamental Freedoms, Question of Enforced or Involuntary Disappearances, United Nations GAOR, A/51/561, 51st Session, Agenda item 110(b), P1 (1996).

[190] As noted above, there were three Honduran disappearance cases. Saul Godinez Cruz was almost identical to Velasquez Rodriguez while in Fairen Garbi the Inter-American Commission on Human Rights found insufficient proof of Honduran responsibility because the victims could have disappeared into a neighbouring state.

[191] See Las Hojas Massacre, Case No 10.287, 1992-1993 Annual Report, Inter-

children in Uruguay,[192] and forced disappearances, torture, summary executions and kidnapping in Argentina.[193] The Commission expressly addressed amnesties in those states in light of their duty to prosecute. The three amnesties presented before it covered the gamut of responses by transitional governments and 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 the variations, it reached the same result in each case finding that the amnesties violated at least three, possibly four, distinct state duties under the American Convention on Human Rights.[194]

Therefore, notwithstanding the positive aims of amnesty, it results in impunity for perpetrators of international crimes. By preventing the 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.[195] Whether an amnesty is acceptable in light of notions of

---

American Commission on Human Rights, 1993 at 88 (Spanish text).

[192] For example, see Hugo Leonardo, Case No 10.029, 1992-1993 Annual Report Inter-American Commission on Human Rights (1993).

[193] See Alicia Consuela Herrera, Case no. 10.147, 1992-93 Annual Report, Inter-American Commission on Human Rights (1993).

[194] First, they violated the state obligation to "ensure" human rights under Article 1(1) and investigate violations. Secondly, at least in states permitting victims to participate in criminal proceedings, the amnesties violated the state's duty under Article 8(1) to give victims a fair trial. Thirdly, Article 1(1) and Article 25 on the right to judicial protection required victims to be compensated adequately but amnesties would violate those rights.

[195] Annual Report of the Human Rights Committee, United Nations GAOR, 51st Session Supp No 40, United Nations Doc A51/40 (1993) at 1; Study on Amnesty Laws and their Role in the Safeguard and Promotion of Human Rights, Preliminary Report by Louis Joinet, Special Rapporteur, United Nations Commission on Human Rights, United Nations Doc E/CN4/Sub.2/1985/16, para 5 (1985). Human Rights Watch, 1999 Report on Chile §IV and note 98 state that the Inter-American Commission on Human Rights and United Nations bodies have criticised Peru's amnesty for violating "the prohibition against amnesty laws covering crimes against humanity"): at <www.hrw.org/press/2000/08/Pinochet/html> (visited 29 November 2000). Kristin Henrard notes that the Special Representative of the United Nations Secretary-General added a disclaimer to the 1999 Lome Peace Agreement that "the United Nations d[id] not recognize the amnesty as applying to international crimes of genocide, crimes against humanity and war crimes": Henrard, "The viability of

international accountability depends on the process surrounding the grant of the amnesty and the crimes covered.

VI. CONCLUSION

In the past, while it has long been recognised that international law requires states to respect and ensure human rights, the same law allows states to determine how they fulfill their obligations. Now, the measures used to secure human rights are no longer subject to the state's broad discretion if it affects the core set of fundamental rights that merit special protection. When disappearances and illegal killings occur, states have to adopt good-faith efforts to bring the wrongdoers to justice. They have to realise that a definite corpus of international law exists that should be applied apolitically to internal atrocities everywhere and have to accept their role in the vindication of this law.

If international law requires states to punish serious violations of physical integrity, they should realistically and practically attempt to prosecute such violations committed with impunity. In addressing this, it is important to begin by making clear what is not in issue. Forced disappearances and extra-judicial killings are violations of the Universal Declaration and other international and regional treaties. As such, they are arguably part of emerging customary law. Further, where human rights violations occur, international law is being violated.

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 have been designed to conceal official involvement. As discussed above, it is usually very difficult to establish the names or official positions of the perpetrators or to prove state involvement. The international obligation shifts the burden of proof to the state to establish responsibility and bring the offenders to justice. Frequently, the state alone has access to this information, yet in past proceedings it has often claimed ignorance and demanded that the complainant produce evidence firmly establishing the violation. However, once the obligation on a state to investigate and prosecute is established, it cannot stand silent or fail to take action.

---

national amnesties in view of increasing recognition of individual criminal responsibility at international Law" (1999) MSU-DCL Journal of International Law 595, 640. The Agreement ended a decade of civil unrest in Sierra Leone.

The need to investigate is strong. Investigation of past violations is essential to provide the victim's family with some relief especially in cases of disappearance where the victim's fate remains unknown. In addition, investigations establish a state's commitment to the rule of law. The arguments for obligatory prosecution and punishment are similar to those for investigation. While it cannot bring back the victim, punishment provides the family with a measure of satisfaction. More importantly, it has a deterrent function. Those punished will be less inclined to repeat the abuses and others will be more reluctant to risk punishment by committing similar violations. If the international community cannot prevent the abhorrent practices, it has to at least not condone it and its censure will eventually filter through. As we move on in the new millennium, states should make a concerted effort to eradicate what is a kind of institutionalised state tyranny.