

Existing domestic laws and difficulties in implementing international standards on Enforced Disappearances

Draft by Caroline Kerschbaumer, 2005

I. Introduction:

In September 2005 the Inter – sessional open – ended Working Group will decide on the final version of a draft international legally binding instrument¹ against enforced disappearances. If States – after its entering into force – ratify this instrument, they face the obligation to adapt their national penal, civil and administrative law to reach the standard of the international instrument.

This paper offers a guideline for States in complying with international standards on forced disappearance, and implementing them into domestic law. Furthermore, it will show the great importance of ratifying the future instrument and point out the specific nature of the crime forced disappearance. It will discuss and compare the existing binding and non - binding international instruments and also the new draft instrument in its current version and their definitions and provisions of enforced disappearances. Also the different nature of forced disappearance as a multiple human rights violation, as an international crime and in a humanitarian law context will be pointed out. Furthermore, the obligation to combat forced disappearance through legislative, administrative and other measures and implement it as an independent offence in domestic penal codes is reviewed.

The second chapter highlights selected elements of the international instruments on forced disappearance which have led to various discussions between the delegations in the sessions of the inter – sessional Working group and might cause difficulties implementing them into domestic penal law as existing national laws might oppose to some of these provisions.

¹ Hereinafter: draft instrument

The third part lists countries that do have national penal and civil legislation or law proposals dealing with forced disappearance. Most of them are in Latin America since many of these countries ratified the regional binding Inter-American Convention on Forced Disappearances. In this context reference is also made to national jurisprudence concerning these laws. However, this guideline is not only meant to be for Latin American countries or for countries where forced disappearance do or did occur, but for any country which decides to ratify the future Convention, since they will face the same or similar problems in implementing domestic laws to comply with international standards.

For a better overview main problems will be pointed out in the conclusion and how to solve these will be proposed in a recommendation.

1. International instruments defining enforced disappearance:

There are four international instruments on enforced disappearance.

The non-binding Declaration on the Protection of all Persons from Enforced Disappearance, adopted in 1992,² describes forced disappearance in the preamble as

“...persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law,”

Article 2 of the legally binding Inter-American Convention on forced disappearance of persons adopted in 1994 and entered into force in 1996³ defines forced disappearance very similar, but adding the impossibility of recourse in the following way

“...to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.”

² hereinafter: Declaration

³ hereinafter: Inter-American Convention

In article 7 of the Rome Statute, adopted in 1998 and entered into force in 2002, forced disappearance is classified as a crime against humanity when “*committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack*” and is defined also similar to the other instruments, but in a narrower way as it adds the element of temporal intention:

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

The definition of enforced disappearance in article 1 of the draft legally binding normative instrument⁴ is

*“the deprivation of a person’s liberty, in whatever form, committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which places such a person outside the protection of the law”.*⁵

At this point it has to be mentioned, that the Rome Statute and the draft instrument have different perspectives. The instrument has to be created to get the greatest possible protection against the human rights violation forced disappearance like other international human rights treaties. Whereas the inclusion of forced disappearance in the Rome Statute gives the International Criminal Court the competence to decide about forced disappearance and sentence the perpetrators when it constitutes a crime against humanity, i.e. when committed as a part of a widespread attack against any civilian population.⁶

2. International obligation to codify forced disappearance as an offence in domestic laws:

Treaties of international law have to be implemented into national law and then be applied by national courts; the question how to do this is usually regulated in the constitutions. The two possibilities are the monistic (automatic incorporation) and the dualistic (legislative incorporation) theory. In countries which follow the monistic theory (for example the Netherlands and most Latin American countries) international treaties that have been ratified by this country and which are self – executing have constitutional status or even a status

⁵ Report of the Chairman Mr. Bernard Kessedijan of the Intersessional Working Group E/CN.4/2005/66, 6

⁶ E/CN.4/2004/59, 5

higher than the constitution. The dualistic system (for example Great Britain) divides very strictly between international and national law. In these countries international treaties have to be explicitly transformed and implemented into national law to exercise them.⁷ However, the draft instrument concerning forced disappearances contains special clauses: Art. 2 of the draft instrument contains an obligation for every State Party to “*take the necessary measures to ensure that enforced disappearance...constitutes an offence under its criminal law*” and to take comparable measures when this offence is carried out by non-state actors. Also Art. 3 mentions to hold the perpetrators criminally responsible and Art. 4 obliges the State Parties to “*make enforced disappearance punishable by appropriate penalties that take into account its extreme seriousness*”.⁸ Due to these very clear and definite provisions also countries which follow the monistic theory have to implement legislation.

This obligation to adopt legislative, administrative, judicial and other measures to make forced disappearance an offence within domestic law is also mentioned in the Inter-American Convention⁹ as in the Declaration¹⁰. The Declaration goes further adding the word “effective” to describe the measures that have to be taken to prevent and terminate enforced disappearances. The Inter American Convention on the Forced Disappearance of Persons is the first binding international instrument concerning forced disappearances. Member states are Argentina, Bolivia, Colombia, Costa Rica, Guatemala, México, Panama, Paraguay, Peru, Uruguay and Venezuela. Brazil, Chile, Ecuador, Honduras, Nicaragua signed the treaty, but did not ratify yet.¹¹

Especially the wording of Art. 2 of the draft instrument makes the specific and complex nature of the offence of forced disappearance clear, excluding the possibility of just leaving it to the combined effect of different existing crimes. Nevertheless some delegations at the Working group sessions opposed the obligation to characterise enforced disappearance as an independent offence. Especially for federal countries it is a difficult task modifying their criminal law since they often have different criminal codes for each of the federal states. Some delegations mentioned that perpetrators of forced disappearance can already be prosecuted under their national legislations for committing offences like abduction or

⁷ Nowak Manfred, Einführung in das internationale Menschenrechtssystem (2002), p. 49; q.v. Henry J. Steiner, Philip Alston, International Human Rights in Context (2000), p. 1000

⁸ Ibidem, 8ff

⁹ Article I, III, IV Inter-American Convention

¹⁰ Article 3, 4, 17 Declaration

¹¹ <http://www.oas.org/juridico/spanish/firmas/a-60.html>

deprivation of liberty without having created an independent offence of forced disappearance. One of the main elements for the draft instrument is to make forced disappearance a separate offence. Hence, the Chairman of the Working Group Mr. Bernard Kessedjian pointed out that “*it was not appropriate to introduce into draft article 2 wording which could give rise to ambiguity in that regard*”.¹²

Also in the general comment on article 4 of the Declaration (“all acts of enforced disappearance shall be offences under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness”) the Working group points out that “it is not sufficient for Governments to refer to previously existing criminal offences relating to enforced deprivation of liberty, torture, intimidation, excessive violence, etc. In order to comply with article 4 of the Declaration, the very act of enforced disappearance as stipulated in the Declaration must be made a separate criminal offence.”¹³

At the time of writing there is no international universal treaty to prevent and investigate forced disappearance. The International Covenant on Civil and Political Rights contains most human rights, but does not apply fully to the specific crime of forced disappearance. The Declaration is a legally non binding instrument, the Inter-American Convention is a regional instrument.¹⁴ However, the Inter-American Convention is open for ratifications also for states that are not members of the Organisation of American States.¹⁵ Still, it is very unlikely that these states would ratify the Convention and put themselves under control by the Inter-American Commission on Human Rights, in the election of whose members they cannot participate. This possibility of trying to create a universal out of a regional instrument is rather theoretical than practical.¹⁶

Also the Rome Statute does not offer fully protection against forced disappearance since it is only applicable when the forced disappearance is perpetrated as a widespread or systematic attack against the civilian population, just in this case it constitutes a crime against humanity. These shortcomings of protection against forced disappearance in connection with the

¹² E/CN.4/2004/59, 9f

¹³ UN-WGEID report 1995 (E/CN.4/1996/38), General comment on article 4 of the Declaration, par.54

¹⁴ *Federico Andreu-Guzmán*, The Draft International Convention on the Protection of All Persons from Forced Disappearance in Impunity, Crimes Against Humanity and Forced Disappearance, International Commissions of Jurists (September 2001), 73f

¹⁵ Art. XVIII Inter-American Convention

¹⁶ Comparative Table: Lacunae in international law with regard to forced disappearances – International Commission of Jurists (October 2001), 2

extreme gravity and speciality of this crime shows the need to adopt an international binding instrument which overcomes the above mentioned shortcomings of the already existing instruments.¹⁷

In complying with international law it is not required to take over the exact same wording of the international treaties, but in a results – oriented way the obligations contained in the very treaty have to be implemented. Human rights of international treaties should primarily be protected by national bodies of protection since international bodies should only be addressed as *ultima ratio*.¹⁸

3. Forced disappearance as a human rights violation, as an offence in international criminal law and in an international humanitarian law context:

The crime of forced disappearance constitutes a multiple human rights violation. According to the jurisprudence of the Human Rights Committee the violated human rights include the right not to be subjected to torture or to cruel, inhuman or degrading or punishment (Art. 7), right to liberty and security of person (Art. 9) , treatment of persons deprived of their liberty with humanity and respect (Art. 10.1) and sometimes also the right to life (Art.6), the right to an effective domestic remedy (Art. 2.3), the right to recognition as a person before the law (Art. 16) and the right of children to special protection (Art. 24) of the International Covenant on Civil and Political Rights.¹⁹

Also the Inter-American Court of Human Rights has observed in various decisions similar violations of the American Convention on Human Rights of 1969.²⁰ So did the European

¹⁷ Federico Andreu-Guzmán, The Draft International Convention.. 73f

¹⁸ Nowak Manfred, Einführung in das internationale Menschenrechtssystem (2002), p. 49f

¹⁹ Human Rights Committee Case Eduardo Bleier vs. Uruguay, Communication No. 30/1978, final views of 29th march 1982; case Quinteros vs. Uruguay, Communication No. 107/1981: Uruguay.21/07/83; case Mojica vs. Dominican Republic, Communication No. 449/1991, final views 15th July 1994; Bautista de Arellana vs. Colombia, Communication No. 563/1993, final views 27th October 1995; Monaco and Vicario vs. Argentina, Communication No. 400/1990, final views 3rd April 1995;

²⁰ Art. 1, 3, 4, 5, 7, 8, 19, 25 and 63 of the American Convention in the following cases: Velázquez Rodríguez vs. Honduras, Petition No. 7920/1981, Judgement 29th July 1988; Godínez Cruz vs. Honduras, Petition No. 8097/1982, Judgement 20th January 1989; Caballero-Delgado and Santana vs. Colombia, Petition No. 10.319/1989, Judgement 8th December 1995; Blake vs. Guatemala, Petition No. 11.219/1993, Judgment 24th January 1998; Villigran Morales and Alcázar vs. Guatemala, Petition No. 11.383/1994, Judgement 19th November 1999; Bamaca Velásquez vs. Guatemala, Petition No. 11.129/1993, Judgement 25th November 2000; Durand and Ugarte vs. Peru, Petition Nos. 10.009 and 10.078/1987, Judgement 16th august 2000; Trujillo Oroza vs. Bolivia, Judgement 26th January 2000;

Court of Human Rights find violations of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 especially in disappearance cases related with the Turkish security forces and members of the Kurdistan Workers Party.²¹

Besides being a multiple human rights violation, forced disappearance at the same time constitutes an international crime. Whereas for human rights violations States are the ones responsible, international crimes refer to individuals and their personal responsibility.

As stated before, according to the Rome Statute forced disappearance constitutes a crime against humanity “*when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack*“.²² The Inter-American Convention mentions in the preamble forced disappearance constituting a crime against humanity when practiced systematically and the Declaration points out that forced disappearance is of the nature of a crime against humanity when practiced systematically. The definition in the draft instrument is based on the Rome Statute saying: “*the widespread or systematic practice of enforced disappearance constitutes a crime against humanity and shall attract the consequences provided for under international law*“.²³ Other international instruments go further calling forced disappearance *per se* a crime against humanity without the qualification of systematic or other elements.²⁴ The Parliamentary Assembly of the Council of Europe uses similar words in its Resolution No. 828 of 1984.

Also the Inter-American Court of Human Rights in the cases *Velásquez Rodríguez*²⁵ or *Godínez Cruz*²⁶ confirmed that “international practice and doctrine has categorised disappearances as a crime against humanity”. Another example of the jurisprudence is the judgement of the European Court of Human Rights in the case *Kurt vs. Turkey*.²⁷

²¹ European Court of Human Rights cases: *Kurt vs. Turkey*, Application No. 24276/94, Judgment 25th may 1998; *Kaya vs. Turkey*, Application No. 22535/93, Judgement 28th march 2000; *Tas vs. Turkey*, Application No. 24396/94, Judgement 14th November 2000;

²² Art. 7 (1) i Rome Statute

²³ E/CN.4/2005/66, 9

²⁴ Resolutions of the General Assembly of the Organization of American States: Res.666 of 1983, Res.742 of 1984, Res.950 of 1988, Res.1022 of 1989 and Res.1044 of 1990

²⁵ judgement of Inter-American Court of Human Rights of July 29, 1988, par.153

²⁶ judgement of Inter-American Court of Human Rights of January 20, 1989, par.161

²⁷ judgement of the European Court of Human Rights of may 25, 1998, par.64

None of the international instruments includes an obligation to incriminate forced disappearance as a crime against humanity into the national penal codes.

However, most of the resources calling forced disappearance *per se*, i.e. as an isolated act, as a crime against humanity are prior than the ones which only classify it as crime against humanity when part of a widespread or systematic attack. One argument that one single forced disappearance should already constitute a crime against humanity would be that one of the reasons or consequences of forced disappearance is to frighten the population. Nevertheless, this is not sufficient especially comparing it to other crimes against humanity like genocide and keeping in mind the recent international instruments mentioned above, especially the new draft instrument, which only categorise forced disappearance as a crime against humanity when committed in a widespread or systematic attack.

International humanitarian law applies – unlike crimes against humanity – only in armed conflicts, both national and international. The main objective of international humanitarian law is the same as human rights law: the protection of life, liberty, health and dignity of people, the difference lies in the method to reach this aim. Mr. Nowak describes the main features of international humanitarian law in his report as an independent expert as following: “(i) this body of law contains specific and often fairly detailed rules that parties to an armed conflict must implement upon the occurrence of such conflict; (ii) international humanitarian law unequivocally binds both state and non-state actors, so there is no ambiguity with respect to the legal obligations of the latter; (iii) there is no, and there cannot be any, derogation from the rules of international humanitarian law, as this body of law is precisely designed to deal with the inherently exceptional situation of armed conflict.”²⁸ International humanitarian law does not mention the term forced disappearance taking into account that its scope is a lot broader. However, one of its aims is also to prevent forced disappearance since it contains in the four Geneva Conventions of 1949 and the two Additional Protocols of 1977 many human rights provisions like the protection of the right to life, from torture, of liberty and the right to a fair trial, protection of family life and children.²⁹

²⁸ E/CN.4/2002/71 par.55

²⁹ E/CN.4/2002/71 par. 53ff

II. Difficulties in codifying enforced disappearance in domestic penal law:

The elements mentioned in the international instruments about forced disappearance include non-state actors as possible perpetrators, the removal from the protection of the law as a consequence or intention, the continuing nature of the crime, forced disappearance as a crime against humanity, command responsibility, mitigating/aggravating circumstances, statute of limitations, the obligation of the State Parties to exercise jurisdiction, special (military) jurisdiction, extradition, cooperation and judicial assistance between State Parties, the principle of non-refoulement, non-applicability of amnesty laws/asylum, rules and standards about the deprivation of liberty, concept of the victim, reparation, right to the truth/right to know, the position of children of disappeared parents.

In this paper only selected factors will be discussed which could cause problems in implementing into national penal law.

1. Non-state actors:

The Rome Statute includes in its article 7 political organisations as possible perpetrators of forced disappearances, while the international human rights law only relates to direct or indirect state actors. The inclusion of “political organisations” or “organized groups” lead to discussions in the Working Group Session as some delegations considered these terms as too imprecise.³⁰ The draft instrument defines the perpetrator as “*agents of the State or persons or groups of persons acting with the authorization, support or acquiescence of the State*”³¹

Mr. Nowak pointed out - using the example of Colombia in his report as an independent expert - that in many countries in Latin America the perpetrators of enforced disappearances are government officials as well as guerrilla or paramilitary groups or organized criminal gangs. Referring to the main objective of international treaties, which is obliging the State Parties to use domestic law to stop such practices, a full protection would only be possible if the international binding instrument includes also non-state actors.³² In the sixty-first session of the Inter-sessional Open-ended Working Group, several participants pointed out that

³⁰ E/CN.4/2005/59, 7

³¹ E/CN.4/2005/66, 6

³² Report submitted by *Mr. Manfred Nowak* E/CN.4/2002/71, 31

making a reference to non-state actors would lead to a too broad definition of enforced disappearances, including abduction or just the deprivation of liberty by private actors, which already was punishable under domestic laws and might lead to overlaps within their national penal codes.³³ Another problem including non-state actors is the fact that the international instrument is addressing States, since it is their responsibility to protect individuals from human rights violations and including non-state actors would “alter the traditional framework of responsibility in relation to human rights”.³⁴

According to article 2 of the draft instrument, each State Party has to take the necessary measures to constitute enforced disappearance as an offence under its criminal law. In its second part it obliges the States to take comparable measures when enforced disappearances are carried out by non-state actors.³⁵ Also the Inter-American Convention on Forced Disappearances of Persons and the Declaration on the Protection of All Persons from Enforced Disappearance contain regulations on indirect state actors.³⁶

2. Continuing nature of forced disappearance and *ratione temporis*:

All the international instruments concerning enforced disappearances contain clauses about the continuing nature of the offence until the whereabouts of the disappeared persons are found out.³⁷ This has also been stated by the Inter-American Court of Human Rights in the case of *Blake vs. Guatemala*.³⁸ Since Guatemala accepted the competence of the Court only in 1987 and the disappearance already took place in 1985, the Guatemalan government referred to its reservation in which the competence of the Court does not apply for cases that took place before its acknowledgment. However, the court declared itself competent highlighting that forced disappearance is a continuing crime that started in 1985 and lasted until 1992 when the mortal rests of Mr. Blake were found. Although the court did not judge about the facts before 1987 it assumed that a forced disappearance – of continuing nature - has taken

³³ E/CN.4/2005/66, 8

³⁴ E/CN.4/2004/59, 7

³⁵ E/CN.4/2005/66, 8

³⁶ Art. 5 Declaration, Art. II Inter-American Convention

³⁷ Art. 17 Declaration, Art. III Inter-American Convention, Art. 5 draft legally binding normative instrument

³⁸ Inter-American Court of Human Rights, Case Blake, decision of 2nd July 1996

place. As a result of this separation of the elements of the crime, the national Guatemalan court had to judge over the murder and the detention of Mr. Blake.³⁹

3. Removal from the protection of the law as intention or consequence:

Article 7 of the Rome Statute includes two additional elements in its definition of forced disappearance: the intention of removing someone from the protection of the law combined with the temporal element “*for a prolonged period of time*”. The fact that the disappeared person is outside of the protection of the law is also mentioned in the other international instruments, but only as the consequence of the offence and not as a subjective element.⁴⁰ The second element “*for a prolonged period of time*” makes the definition even narrower as it constitutes a specialisation of the intent.

There have been discussions on this topic during the working group sessions for the draft instrument as some delegations mentioned that national criminal laws require the element of intent to commit a crime.⁴¹ Several delegations opposed the incorporation of this additional element, as their national criminal laws always provide for general intent and that there was no need mentioning it in the draft instrument.⁴² Mr. Nowak alludes in his report as an independent expert that intention will be very hard to prove and often there are several perpetrators involved and some of them may not know about the fate of the victim. He comes to the conclusion that the only way to make the criminal law an effective instrument of deterrence, would be not including the subjective element of intention in the definition of forced disappearance since it constitutes a too vague element.⁴³

According to Federico Andreu-Guzmán the element “*prolonged period of time*” is imprecise and unfortunate and also the international human rights jurisprudence is neither precise, nor homogenous on these terms.⁴⁴

³⁹ *Molina Theissen, Ana Lucrecia*, La desaparición forzada de personas en América Latina KO’AGA ROÑE’ETA se.vii (1998), 17f

⁴⁰ see chapter I.1 definitions of forced disappearance

⁴¹ E/CN.4/2004/59, 6

⁴² E/CN.4/2005/66, 7

⁴³ E/CN.4/2002/71, par.74

⁴⁴ *Federico Andreu-Guzmán*, The Draft International Convention, p. 85

4. Refusal to acknowledge the deprivation of liberty or concealment of the fate or whereabouts of the disappeared person:

This is another element in the definition of forced disappearance in the draft convention as well as in all the other international instruments. According to the Constitutional Court of Colombia it is enough if the perpetrator denies without requesting family members to ask for the disappeared person at any authorities. However, this conception causes a conflict of interests with the right not to self-incriminate oneself. This difficulty can be solved saying that the right not to be disappeared is of higher legal interest than this right.

5. Right to know:

Art. 22 of the draft instrument defines victim as “*the disappeared person and any individual who has suffered direct harm as a result of an enforced disappearance*” and also establishes the right of the victims to get informed “of the circumstances of the enforced disappearance, the progress and outcome of the inquiry and the fate of the disappeared person”.⁴⁵ The “right of families to know the fate of their relatives” is also mentioned in international humanitarian law in art. 32 of the Additional Protocol I to the Geneva Conventions. This only applies in an armed conflict; furthermore there is no international instrument explicitly granting a right to truth.

Due to their extreme sufferings because of the uncertainty, relatives and dependents of the disappeared persons, are also recognized as victims. Also the Declaration mentions family members as possible victims⁴⁶. This fact has been confirmed several times in various decisions by the Inter-American Court of Human Rights, the European Court of Human Rights⁴⁷ and the Inter-American Commission on Human Rights.⁴⁸ Already in 1983 in the

⁴⁵ E/CN.4/2005/66, 5f; jurisprudence by the Inter-American Court of Human rights in the cases *Bamaca Velasquez vs. Guatemala*, Petition No. 11.129/1993, Judgement 25th November 2000; *Durand and Ugarte vs. Peru*, Petition Nos. 10.009 and 10.078/1987, Judgement 16th august 2000; jurisprudence by the Human Rights Chamber for Bosnia and Herzegovina: *Palic vs. Republican Srpska*, Case No. CH/99/3196, Decision on admissibility and merits 11th January 2001; *Unkovic vs. Federation of Bosnia and Herzegovina*, Case No. CH/99/2150, Decision on admissibility and merits 9th November 2001;

⁴⁶ Art. 1(2) Declaration

⁴⁷ *Kurt vs. Turkey*, Application No. 24276/94, Judgement 25th may 1998; *Tas vs. Turkey*, Application No. 24396/94, Judgement 14th November 2000

⁴⁸ *Federico Andreu-Guzmán*, *The Draft International Convention...*, 76f

Case *Quinteros vs. Uruguay* the Human Rights Committee recognized the mother of the disappeared daughter as a victim.⁴⁹

6. Special Jurisdiction:

The draft instrument does not exclude – in comparison to the Inter-American Convention⁵⁰ and the Declaration⁵¹ – military or any other special criminal jurisdiction.⁵² However, military jurisdiction does not comply with Art. 11 of the draft instrument, which provides a competent, independent and impartial court to guarantee a fair trial.⁵³ Excluding it can lead to difficulties within domestic laws, as for example Mexico regulates its competence in its Constitution.⁵⁴

7. Non-applicability of amnesty laws and the principle of non-retroactivity:

The 1998 Draft Convention and the Declaration⁵⁵ contain terms about the non-applicability of amnesties or similar measures before the trial and if granting amnesty, the extreme seriousness of the crime should be taken into account.⁵⁶ Even though the draft instrument in the version of the time of the writing does not include provisions about amnesties, jurisdiction by the Inter-American Court of Human Rights in the *Barrios Altos case* shows that amnesty provisions are inadmissible for forced disappearance.⁵⁷ Also the General Comment No. 20 and concluding observations of the Human Rights Committee concerning state reports amongst others in Argentina, Chile and El Salvador have showed that amnesties are incompatible with gross human rights violations like forced disappearances.⁵⁸

⁴⁹ Human Rights Committee Communication No. 107/1981: Uruguay.21/07/83. CCPR/C/19/D/107/81. par.14: “the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the covenant suffered by her daughter, in particular article 7”.

⁵⁰ Art. IX Inter-American Convention

⁵¹ Art. 16 Declaration

⁵² E/CN.4/2005/66, 13f

⁵³ Concluding observations of the Human Rights Committee: Mexico.27/07/99, CCPR/C/79/Add.109, par.9; Inter-American Commission, case Ana, Beatriz y Celia González Pérez vs. México, April 4, 2001

⁵⁴ Art. 14 of the Political Constitution of the United States of Mexico

⁵⁵ Art. 18 Declaration

⁵⁶ Art. 17 1998 Draft Convention; q.v. Art. 18 Declaration

⁵⁷ judgement by the Inter-American Court of Human Rights, *Barrios Altos case (Chumbipuma Aguirre et al vs. Peru)* of march 14, 2001, par. 41: “This court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as...forced disappearance”.

⁵⁸ Argentina: CCPR/C/79/Add.46, par.153; Chile: CCPR/C/79/Add.104, par.7; El Salvador: CCPR/C/79/Add.34, par.7;

Some countries, like Ethiopia, Ecuador or Venezuela have incorporated the principle of the non-applicability of amnesty laws for these violations in their constitutions while for example Colombia, Guatemala or the Côte d'Ivoire provide similar rules in ordinary national laws.⁵⁹

The principle of non-retroactivity of criminal law is a non – derogable element in international law⁶⁰, derived from the principle of *nullum crimen sine lege*. It means that an act can only be a criminal offence if it constitutes an offence at the time of committing. What is not important in this context is whether it is a crime under national or international (treaty based or international customary law) since both laws are applicable.⁶¹ Since enforced disappearance is an international crime, it is therefore possible to bring it to justice even if it did not constitute an offence under national domestic law at the time it was committed. Hence, if an amnesty law that is not complying with international standards gets annulled and perpetrators get convicted for a national or international crime they committed, the principle of non-retroactivity is not violated. This is confirmed by the Inter-American Commission in a decision about the Chilean amnesty law, when the Chilean government argued that repealing the amnesty law cannot affect the perpetrators of the violations due to the principle of non-retroactivity.⁶²

⁵⁹ Art. 28.1 Constitution of Ethiopia: “Criminal liability of persons who commit crimes against humanity, so defined by international agreements ratified by Ethiopia and by other laws of Ethiopia, such as genocide, summary executions, forcible disappearances or torture shall not be barred by statute of limitation. Such offences may not be commuted by amnesty or pardon of the legislature or any other state organ.”;

Art. 23.2 Constitution of Ecuador: “the prosecution and punishment of genocide, torture, enforced disappearance of persons, kidnapping and homicide, whether for political reasons or for reasons of conscience, is not be subject to any time limit. Amnesties or pardons cannot be granted for these offences...”;

Art. 29 Constitution of the Bolivarian Republic of Venezuela: “legal proceedings to punish crimes against humanity, serious violations of human rights and war crimes are not subject to any statute of limitations. Violations of human rights and crimes against humanity will be investigated and tried by the ordinary courts. Such crimes are excluded from any benefits arising from impunity, including pardons and amnesties.”

Colombia: Law No. 589 of 2000

Guatemala: Law of National Reconciliation of 1996

Côte d'Ivoire: Law No. 2003-309 of 2003

⁶⁰ Art. 4 ICCPR and Art. 27 Inter-American Convention on Human Rights (ACHR)

⁶¹ Art. 15.1 ICCPR, Art. 7 ECHR of 1950 and Art. 9 ACHR

⁶² Inter-American Commission on Human Rights, Report No.133/99, Case 11,725, *Carmelo Soria Espinoza vs. Chile*, 19 November 1999, par. 76: “the principle of non-retroactive application of the law, under which no one can be convicted retroactively for actions or omissions that were not considered criminal under applicable law at the time they were committed, cannot be invoked with respect to those granted amnesty because at the time the acts in question were committed they were classified and punishable under Chilean law in force.”

8. Obligation to establish jurisdiction:

Both the draft instrument⁶³ and the Inter-American Convention⁶⁴ contain rules to establish jurisdiction over forced disappearance when or the perpetrator or the victim is national of the particular country or the offence is committed on its territory.

9. Statute of limitations:

Article 5⁶⁵ of the draft instrument contains terms about the statute of limitations for forced disappearance, hence it only refers to countries that have established rules about statute of limitations in their domestic law. The term of limitation commences at the moment, “*when the forced disappearance ceases and the fate of the disappeared person is established*”.⁶⁶ It is important to mention the continuous nature of the offence in this context.

10. Incompatibility with anti – terrorism laws, incommunicado detention and secret detention centres:

In its most recent report the Working Group on Enforced and Involuntary Disappearances (UN-WGEID) expresses its concerns about secret detention centres which exist in a number of countries and which often lead to disappearance.⁶⁷ Article 7 of the Declaration mentions explicitly that “*no circumstance whatsoever, whether a threat of war, a state of war, internal political instability or any other public emergency, may be invoked to justify enforced disappearances*”, which includes any type of counter-terrorist campaign. The Inter-American Convention provides the same provision in Art. X, so does Art. 1 bis of the draft instrument.

In this context the UN-WGEID also mentions Art. 10 of the Declaration which regulates detention instructions for example to be held in an officially recognised place of detention (par.1), accurate information on the detention and the place of detention (par.2) and to maintain and official up-to-date register of all persons deprived of liberty in every place of detention (par.3). In its general comments on Art. 10 of the Declaration the UN-WGEID

⁶³ Art. 9, E/CN.4/2005/66, 13

⁶⁴ Art. IV Inter-American Convention; q.v. Art. 14 Declaration

⁶⁵ q.v. Art. 17 par. 3 Declaration

⁶⁶ E/CN.4/2005/66, 12f

⁶⁷ Report of UN-WGEID, 61st session, 23rd december 2004, E/CN.4/2005/65, par. 368

highlights the importance of this article as it “is one of the most practical and valuable tools for ensuring compliance by States with their general commitment not to practise, permit or tolerate enforced disappearance and to take effective legislative, administrative and judicial measures to prevent and terminate such acts.”⁶⁸ Due to this three obligations mentioned, the existence of secret detention centres constitutes – under any circumstance – a violation of the Declaration.⁶⁹

Rules about the detention of persons are also provided in the Inter-American Convention in Art. XI. The draft instrument goes even further in Art. 16 and 16 bis numerating elements which have to be considered for official registers and guaranteeing specific rights for the person deprived of liberty. Furthermore, the International Covenant on Civil and Political Rights of 1966 (ICCPR) in Art. 9, 10 and 14 implies specific rules for the deprivation of liberty.

One example of not complying with international standards are Peru’s anti-terrorism⁷⁰ and treason⁷¹ laws of 1992 since they “established a system that protected the identities of prosecutors and judges by trying individuals accused of terrorism in faceless courts and those accused of treason in secret military tribunals. Further, the anti-terrorism decrees severely restricted the rights to due process and defence, and significantly extended permissible periods of incommunicado police detention. The introduction of lengthy police detention periods resulted in an increase in the number of rapes in custody and in the use of torture as an interrogation tool. The use of torture coupled with the faceless courts routine acceptance of coerced confessions as evidence, caused the UN Special Rapporteur on Torture to state that the anti-terrorist decrees established a court system that facilitated the use of torture.”⁷²

⁶⁸ UN-WGEID, Compilation of General Comments on the Declaration on the Protection of All Persons from Enforced Disappearance, General comments on article 10 of the Declaration, WGEID Report (Excerpt of E/CN.4/1997/34/13 december 1996), par. 22

⁶⁹ Ibidem

⁷⁰ Decree Law No. 25475

⁷¹ Decree Law No. 25659

⁷² Minnesota Advocates for Human Rights Overview of the Conflict 1980-2000 (Compiled from Library of Congress Peru Country Studies, State Department Country Reports on Human Rights Practices, and the Truth and Reconciliation Committee’s Final Report)

Another main point of concern are the secret detentions and secret transfers⁷³ within those detention centres by the United States of America, such as Guantánamo Bay, Bagram air base, Abu Ghraib and others in Jordan, Diego Garcia, Pakistan, Egypt, Thailand and Afghanistan. The US did not give exact numbers of detainees or publish their identities. According to Amnesty International, one of the reasons for this “secrecy about detainees held in Afghanistan was to protect their right to privacy under the Geneva Conventions” which constitutes an “illustration of a government’s self-serving approach to international law”.⁷⁴ Amnesty International considers incommunicado detentions and the so – called “ghost detainees”⁷⁵ as disappearances, since they are held in unknown locations with a refusal to acknowledge where they are or clarify the facts about their whereabouts, leaving them outside of the protection of the law for a prolonged period of time.⁷⁶

III. Existing legislation and law proposals:

These obligations mentioned above to adopt legislative and other measures to fulfil with international obligations applies for all countries, whether forced disappearance did or did not happen there. Most of the countries that will be dealt with in this paper are Latin American countries and all of them have or used to have problems with disappearances. As mentioned above, this does not mean that countries where forced disappearances did not occur do not face this problem of implementing international standards. Every country which chooses to ratify the future Convention will have to comply with it.

Argentina, Bolivia, Colombia, Costa Rica, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, Uruguay and Venezuela are member states of the Inter American Convention; Brazil, Chile, Ecuador and Nicaragua have signed, but not ratified. Mainly these and also few other countries have taken legislative steps to codify forced disappearance as an offence in their national penal codes. Despite this national legislations and even less the practice are still not in accordance with international standards.

⁷³ Article 10 Declaration: “Accurate information on the detention of such persons and their place or places of detention, *including transfers*, shall be made promptly available to their family members, their counsel or to any other person having a legitimate interest in the information”.

⁷⁴ Amnesty International: USA: Human dignity denied Torture and accountability in the war of terror (27th of October 2004)

⁷⁵ detainees who do not appear in any book and are moved around within the detention centre to hide them from visits by international bodies

⁷⁶ AI USA: war of terror (27th October 2004)

1. Mexico:

As Mexico is a federal republic, it has one federal Mexican penal Code and penal Codes for each of the states; the penal Code of the state of the Federal District have codified forced disappearance as an offence.

The federal Penal Code⁷⁷ uses in its article about enforced disappearance a very narrow definition of the state actor as possible perpetrator. It only refers directly to persons of public service and does not include operations, which are carried out by other persons acting with their authorisation, support or acquiescence. Already the classification of the offence in the chapter of “offences committed by public servants” does not leave the possibility open to include other persons than only the state actors personally. An option would be to put it in this chapter of “*delitos contra la vida y la integridad personal*” (offences against the life and personal integrity)⁷⁸. Intention of the perpetrator is required to maintain the concealment under any form of detention, also the continuing nature of the crime is not mentioned.⁷⁹

The other relevant law on enforced disappearance in Mexico is article 168 of the Penal Code of the Federal District⁸⁰, which also refers to indirect state actors. In contrary to the federal code, the penal code of the federal district highlights the consequence of being removed from the protection of the law without requiring any kind of intention in this article.⁸¹

When ratifying the Inter-American Convention, Mexico made a reservation and an interpretative declaration to Art. IX concerning the exclusion of military tribunals “*inasmuch as the Political Constitution recognizes military jurisdiction when a member of the armed forces commits an illicit while on duty.*” The Human Rights Committee reacted to that situation in Mexico through recommendations⁸² and the Inter-American Commission through

⁷⁷ Art. 215 A Federal Penal Code of Mexico: *Comete el delito de desaparición forzada de personas, el servidor público que, independientemente de que haya participado en la detención legal o ilegal de una o varias personas, propicie o mantenga dolosamente su ocultamiento bajo cualquier forma de detención.*

⁷⁸ Art. 288 ff Federal Penal Code of Mexico

⁷⁹ Art. 215 A Federal Penal Code of Mexico: “...*propicie o mantenga dolosamente su ocultamiento bajo cualquier forma de detención.*”

⁸⁰ Art. 168 Penal Code of the Federal District: *Al servidor público del Distrito Federal que con motivo de sus atribuciones, detenga y mantenga oculta a una o varias personas, o bien autorice, apoye o consienta que otros lo hagan...*

⁸¹ Art. 168 Penal Code of Federal District Mexico: “...*impiendo con ello el ejercicio de los recursos legales y las garantías procesales procedentes, ...*”

⁸² Concluding observations of the Human Rights Committee: Mexico.27/07/99, CCPR/C/79/Add.109, par.9

jurisprudence⁸³ declaring the inefficacy of military tribunals deciding about grave human rights violations. Despite of this, these tribunals still have the competence and still decide over such cases. The main problem is that the *Procuraduría General de Justicia Militar* is not an independent and impartial instance as both the accusing and the judging instances depend on the same authority, which is the *Secretaría de la Defensa Nacional*. Also these proceedings are suffering of delays and victims are in the situation of having great difficulties with getting information about the investigations. Since the number of human rights violations committed by the military is very high in México⁸⁴, the problem of military jurisdiction leading to impunity is very serious. As the reservation and the interpretative declaration are incompatible with the Inter-American Convention there was an initiative presented to the *Cámara de Senadores* in 2003 to reiterate it, but it recently got rejected.⁸⁵

At the moment of the writing, there are five proposals for laws to implement forced disappearance into Mexican domestic law. On federal level the initiative for a law to prevent, sanction and eradicate forced disappearance and to reform article 215 A and derogate articles 215 B – D of the federal penal code was presented by the federal delegate Abdallán Guzmán Cruz. This law classifies forced disappearance as a crime against humanity and it contains all important elements prescribed in the draft instrument, hence this would be one example of complying with the international obligations.⁸⁶

During 2004 there have been two proposals of laws to prevent and eradicate forced disappearances at state level. One is in the state of Guerrero, which at the time of the writing has the highest number of disappearances in Mexico. For being voted by the *pleno*, the Commission of Justice of the Congress first has to give its approbation, which probably will not happen since it does not support this proposal. The other one is in the state of Michoacán. The initiatives have already passed through the stage of public denunciation, but there is still a lack of political will to implement these laws.

Also the jurisdiction of the Supreme Court of Justice has made important steps forward, as it for example mentioned the continuance of forced disappearances until the whereabouts of the

⁸³ Inter-American Commission, case Ana, Beatriz y Celia González Pérez vs. México, April 4, 2001

⁸⁴ In the years 2000 until 2002, the *Comisión Mexicana de Defensa y Promoción de Derechos Humanos* has received 107 cases, 14 of these are human rights violations with the military as the responsible actor.

⁸⁵ http://www.sjsocial.org/PRODH/Publicaciones/Informes/info_hm/prodh%20con%20ot..., 07.07.2005

⁸⁶ *Dip. Abdallan Guzman Cruz*, Iniciativa de Ley Federal

person are found out and also included non-state actors who act with the authorisation, support or acquiescence of the state as possible perpetrators in a recent decision⁸⁷ concerning the incompatibility of the Mexican reservation and interpretative declaration with the Inter-American Convention. Still, there are still big lacks in the Mexican jurisdiction, for example concerning the prescription of crimes against humanity. With a decision of the 23rd of February 2005 the Supreme Court of Justice rejected the accusation against among others the ex President Luis Echeverría Álvarez for the murder of the killings of the *Jueves de Corpus* for being fallen under the statutes of limitations.⁸⁸

Although there are some laws and national jurisdiction, the international standard is not by far reached by the Mexican government. The reservation to the Inter-American Convention, the statute of limitations of crimes against humanity, the non sufficiency of the *recurso de amparo* are just some examples of showing the incompatibility of Mexican penal law with international standards. There are some initiatives, but another problem is the fact that Mexico is a federal republic, which leads to the need to create besides a federal law, laws in all 32 states. Also the probability of every state creating its own law against forced disappearance that conforms to international requirements is not very high.

A possibility to create less confusion and to make it easier to comply with international instruments would be to create a general law that is applicable in the whole country.

2. Uruguay:

Uruguay does not have any laws against forced disappearance or torture yet, although it has ratified a lot of the international human rights treaties.⁸⁹

There is one draft law to prevent genocide, crimes against humanity, war crimes and cooperation with the International Criminal Court.⁹⁰ This project has been initiated as Uruguay has ratified – besides several other international human rights conventions - the Rome Statute in 2002, but it still has not been implemented into domestic law. The Rome

⁸⁷ decision from 29th of June 2004

⁸⁸ <http://proceso.com.mx/noticia.html?nid=25317&cat=2>, 20.07.2004;

http://www.sjsocial.org/PRODH/Publicaciones/Informes/info_htm/prodh%20con%20ot..., 07.07.2005

⁸⁹ <http://www.presidencia.gub.uy/Web/pag/ddhh.htm>

⁹⁰ by Dr. Oscar López Goldaracena

Statute mentions the principle of complementarity, which means that it is the primary obligation of the State Parties to judge international crimes.⁹¹ Hence, the main principle of the draft project is the right and the obligation of the state to sentence on international crimes, especially those mentioned in the Rome Statute. It contains provisions on among other things universal jurisdiction, the non-applicability of statute of limitations, command responsibility for civilians and military, exclusion of military jurisdiction or reparation. The draft proposes to implement laws against crimes against humanity, *inter alia* forced disappearances, also when they are not committed as part of a widespread or systematic attack directed against civilian population. Article 21 of the draft regulates forced disappearances of persons. In the definition it refers to state agents or others who are acting with the authorisation, support or acquiescence of state agents. Also the continuation of the offence is highlighted in this provision, and mitigating circumstances are mentioned.⁹²

Another law that should be mentioned in this context is the so called “*Ley de Caducidad de la Pretensión Punitiva del Estado*”, better known as “*ley de impunidad*”. It impedes to litigate military officials for crimes during the military government from 1973 until 1985 if they acted under orders. However, since there are many offences which are not included and therefore protected by this law, nor are military commands, civilians or actions of the Uruguayan military in other countries, this law does not really impede investigations or judgements in forced disappearances. In practice, the application of this law is more of a political nature. Also there have been many discussions about its constitutionality – without reaching any decision on that.⁹³

3. Colombia:

Although Colombia ratified the Inter-American Convention recently (April 2005), it has already before the ratification made some important legal steps to prevent forced disappearance. It is one of the only countries in which the constitution includes the right not to be disappeared.⁹⁴ With the *ley 589 de 2000* forced disappearance became an autonomous offence and is regulated in the Articles 165, 166 and 167 of the Colombian Penal Code and

⁹¹ preamble and Art. 17 Rome Statute

⁹² report by Dr. Oscar López Goldaracena, *Anteproyecto de ley sobre genocidio, crímenes de lesa humanidad, crímenes de guerra y cooperación con la corte penal internacional (Estatuto de Roma)*

⁹³ Ley 15.848 <http://www.espectador.com/text/documentos/doc05101.htm>

⁹⁴ Art.12 Constitution of Columbia: *Nadie será sometido a desaparición forzada, a torturas ni a tratos penales crueles, inhumanos o degradantes.*

the national commission for the search of disappeared persons was created. Article 14 of the Law No. 589 provides that “offences under this law shall not be made subject to any amnesty or pardon”. The provisions about forced disappearance in the Colombian penal code offer a broad definition of possible perpetrators, as they include non state actors if they are individuals belonging either to an armed group or public servants or individuals who act under the determination or the acquiescence of a public servant.⁹⁵ Nevertheless, there are still problems in applying these provisions, as there has still no court applied this law.

One point of concern is the recently adopted so called *Ley de Justicia y Paz*, since it leads to benefits of the responsibility of the perpetrators without having contributed in the clarification of the facts of the case; this is explicitly required in the Declaration. Hence, the working group in the last press release in July 2005 recommended to the president of Colombia to exercise his presidential objection to harmonise this law with international standards. Furthermore it should be examined by the Constitutional Court of Colombia to verify its compatibility with the Colombian constitution and international human rights treaties.⁹⁶

A positive development is that the Military Penal Code (Act No. 522/1999) mentions forced disappearance since it excludes the offences of torture, genocide and forced disappearance from the jurisdiction of the military criminal courts and regulates the principle of due obedience.⁹⁷

However, according to the report of the UN Working Group on Enforced Disappearances NGOs argued that there is an Anti-Terrorist Bill and draft amendments to the Colombian constitution which would allow military jurisdiction in cases of forced disappearances. Furthermore, the government is considering a draft statutory law on alternative sentencing, which would grant amnesties or pardons.⁹⁸

Not being of penal law nature, but still worth mentioning is the law about the urgent search of disappeared persons since it constitutes one important step forward in combating forced disappearances, which was recently adopted⁹⁹ by the Colombian Congress.¹⁰⁰ The Working

⁹⁵ Art. 165 Penal Code of Colombia

⁹⁶ UN Working group press release, *misión a Colombia*, 12th July 2005

⁹⁷ Conclusions and Recommendations of the Committee against Torture: Colombia 4th February 2004 (CAT/C/CR/31/1), par.3

⁹⁸ Report of the UN-Working Group on Enforced Disappearances, 23rd of December 2004, E/CN.4/2005/65, par.96

⁹⁹ after a control of constitutionality by the Constitutional Court of Colombia

group in its press release of the 12th of July 2005 highlighted this new development since it might contribute to better results in the investigations of the National Commission for the search for disappeared persons.¹⁰¹

4. Guatemala:

The *Decreto Número 33-96* reformed the Guatemalan penal code including inter alia forced disappearance classifying it as crimes against individual liberty as an independent offence. The article includes a quite broad range of perpetrators, mentions the continuous nature of the crime and even death penalty is provided if some aggravating circumstances are fulfilled.¹⁰² For non-state actors as perpetrators – constituting *secuestro* - article 201 of the Penal Code provides similar rules.

Guatemala made a reservation when ratifying the Inter-American Convention concerning extradition since its Constitution establishes that "extradition proceedings, for political crimes shall not be instituted against Guatemalans, who shall in no case be handed over to a foreign government, except as provided in treaties and conventions concerning crimes against humanity or against international law," and that for the time being, there is no domestic Guatemalan legislation governing the matter of extradition.

One positive step that should be mentioned is the press release dated with 3rd of February 2005 saying that the Guatemalan government acknowledged its international responsibility in the case of the family Azmitia, disappeared in 1981. With this act the Guatemalan government showed its political will to prevent forced disappearances through signing a treaty of friendship and paying adequate indemnification.¹⁰³

Guatemala's Law of National Reconciliation of 1996 explicitly forbids amnesties for grave human rights violations as genocide, torture or forced disappearance; furthermore these crimes cannot be subject of statute of limitations.

¹⁰⁰ ley 971 de 2005 (July 14th 2005)

¹⁰¹ UN Working group press release, *misión a Colombia*, 12th July 2005

¹⁰² Art. 201 TER Penal Code of Guatemala

¹⁰³ www.c.net.gt/ceg/diario/2005/feb2005/dimr0205.html

5. El Salvador:

Although El Salvador has not signed nor ratified the Inter-American Convention, its penal code does include forced disappearance as an independent offence. It is classified in the chapter of crimes against humanity. It distinguishes between state actors and non-state actors as possible perpetrators providing different penalties.¹⁰⁴ However, not even one of the responsible for human rights violations including forced disappearances in the armed conflict between 1980 and 1991 has been sentenced so far. Classifying the offence into the chapter of crimes against humanity without requesting special intent makes the definition broader than the one in Art. 7 of the Rome Statute, which does not violate international law since other international standards, especially the Declaration, do not request special intent for forced disappearance.

One of the main problems in the protection against human rights violations *inter alia* forced disappearances is the amnesty law of 1993, which was declared by the constitutional court in 2004 for being compatible with the constitution. This, while the constitution of El Salvador in art. 244 does not admit amnesties after 1989.¹⁰⁵ Also the Inter-American Commission has reacted to this problem saying the international obligation of art. 1 of the Inter-American Convention to prevent forced disappearance cannot be fulfilled if state parties apply amnesty laws.¹⁰⁶ So did the Human Rights Committee in its concluding observations mention their concern considering that the application of this law might lead to serious human rights violations.¹⁰⁷

There is one decision by the Inter-American Court about the forced disappearance of the sisters Ernestina and Erlinda Serrano. This is the first case at the Inter-American Court against El Salvador. In this recent decision the court also acknowledged the family members as

¹⁰⁴ *Titulo XIX Delitos contra la humanidad*: Art. 364, 365, 366 Penal Code of El Salvador; for state-actors the penalty rises between four and eight years, for non-state actors only three to six years of prison;

¹⁰⁵ Art. 244 Constitución salvadoreña: "La violación, la infracción o la alteración de las disposiciones constitucionales serán especialmente penadas por la ley, y las responsabilidades civiles o penales en que incurran los funcionarios públicos, civiles o militares, con tal motivo, no admitirán amnistía, conmutación o indulto, durante el período presidencial dentro del cual se cometieron."

¹⁰⁶ Inter-American Commission of Human Rights, Informe No. 1/99, Caso 10.480, January 27th 1999

¹⁰⁷ Concluding Observations of the Human Rights Committee: El Salvador, CCPR/CO/78/SLV, 22 August 2003, par. 6

victims. It imposed the government of El Salvador among other things the obligation to investigate the facts, identify and sanction the responsible and give adequate reparation.¹⁰⁸

6. Bolivia:

Although Bolivia ratified the Inter-American Convention already in 1996, it does not have a penal law about forced disappearance. A law about indemnification for victims of political crimes between 1964 and 1982, inter alia forced disappearance was adopted recently.¹⁰⁹

In 2000 the Inter-American Court decided over the disappearance of Trujillo Oroza; during this process Bolivia acknowledged in a public hearing on January 25th 2000 its responsibility and apologised formally promising to modify its domestic laws to punish perpetrators of forced disappearances and avoid its recurrence.¹¹⁰ This did not happen yet.

7. Paraguay:

Art. 236 of the Paraguayan Penal Code refers to other offences within the penal code like intentional homicide (Art. 105), physical injury (Art. 111.1) and grave physical injury (Art. 112), coercion (Art. 120) and privation of liberty (Art. 124); committing these crimes out of political reasons to intimidate the population it constitutes the crime of forced disappearance. It does not mention any more elements of this offence, hence it includes as well non-state actors. However, the requirements political reasons and to intimidate the population are additional comparing to international standards.

Paraguay does not provide any amnesty law which would prevent the investigations and the punishment of the perpetrators; this fact was very welcomed by the Human Rights Committee in its Concluding Observations on the state report of Paraguay.¹¹¹

¹⁰⁸ Inter-American Court of Human Rights, *Caso de las Hermanas Serrano Cruz vs. El Salvador*, Judgment march 1st 2005

¹⁰⁹ Ley No. 2640: Ley de resarcimiento a victimas de la violencia política

¹¹⁰ Inter-American Court: Case Trujillo Oroza vs. Bolivia, Judgement 26th January 2000

¹¹¹ Concluding Observations of the Human Rights Committee: Paraguay, CCPR/C/79/Add.48; A/50/40, 3 October 1995, par. 192-223

8. Argentina:

Argentina was one of the first countries to ratify the Inter-American Convention. It has even been given constitutional status through special law No. 24.820 in 1997. However, there is not yet a domestic penal law making forced disappearance an offence. Recently a group of legislators presented a law proposal to add a new chapter XIII called “*delitos contra la comunidad internacional*” to the Penal Code to fulfil with international human rights law standards. The first part of this proposal addresses crimes against humanity, where the offence forced disappearance of persons should be positioned in art. 305. For this law proposal also a part of the general penal code has to be changed to make these “crimes against the international community” not be able to fall under the statute of limitations.¹¹²

One important step forward was recently made by the Argentinean Supreme Court of Justice in a decision of June 14, 2005 declaring amnesty laws which protect perpetrators of human rights violations as unconstitutional. In this historical judgement two laws, namely “*las leyes del punto final*” (1986) and “*obediencia debida*” (1987) were declared unconstitutional since both of them impede the legal proceedings against the responsible persons. This sentence is a great victory for victims, family members and human rights defenders in their struggle against impunity.¹¹³

9. Peru:

Through Article 1 of Law N° 26926, published in 1998, Title XIV-A Crimes Against Humanity was introduced¹¹⁴ in the Peruvian Penal Code including the crimes of genocide, forced disappearance (Art. 320)¹¹⁵ and torture. Art. 320 only refers directly to state actors as perpetrators and provides a prison penalty of not less than fifteen years.

¹¹² proyecto 3.681-D-05 (21st of June 2004): Argenpress.info-“*Delitos contra la comunidad internacional en el Código Penal*”

¹¹³ International Commission of Jurists, Press Release, *Argentina: Juristas aplauden sentencia contra leyes de impunidad*, June 17th 2005

¹¹⁴ Also before that the crime of forced disappearance existed in the Peruvian Penal Code. The first time it was introduced in the new Penal Code of 1991 and classified in Chapter II to “crimes of terrorism” (Art. 323). It was derogated through Law Decree No. 25475 in April 1992 and Law Decree No. 25592 introduced forced disappearance again in the Penal Code in July 1992.

¹¹⁵ Art. 320 Peruvian Penal Code: “*El funcionario o servidor público que prive a una persona de su libertad, ordenando o ejecutando acciones que tenga por resultado su desaparición debidamente comprobada, será reprimido con pena privativa de libertad no menor de quince años e inhabilitación, conforme al Artículo 36 incisos 1) y 2).*”

Furthermore *Título II* of the Constitutional Code of Procedure¹¹⁶ includes the right not to be disappeared to the - through habeas corpus - protected rights.¹¹⁷ Art. 32 of this law about the procedure in the case of forced disappearance states that the judge should adopt all necessary measures to find out about the whereabouts of the person.

There have been two important law proposals by members of the Peruvian Congress¹¹⁸ to modify articles of the penal code concerning the statute of limitations, amnesty laws and command responsibility.

10. Venezuela:

The penal code of Venezuela was reformed in 2000 including a new article about forced disappearance in chapter III to crimes against personal liberty. Comparing art. 181 A of the penal code to the regulation this offence in other countries, Venezuela has pointed out most of the important points to combat forced disappearance. It includes members of terrorist, rebellious or subversive groups as perpetrators, mentions the continuing nature of the crime, the non-applicability of statute of limitations, amnesty laws and similar measures, mitigating circumstances and also the fact that no orders or instructions or state of emergency justify forced disappearance.¹¹⁹

This law is partly based on Art. 45 of the 1999 Venezuelan constitution, which prohibits forced disappearance. Furthermore Art. 29 of the constitution refers to violations of human rights by state authorities. According to this, grave human rights violations cannot fall under the statute of limitations, only ordinary courts (no military jurisdiction) are competent and benefits like amnesties which might lead to impunity are excluded.¹²⁰ *Título III Capítulo I* of

¹¹⁶ Law No. 28237, published 31st of May 2004, entered into force 30th of November 2004

¹¹⁷ Art. 25 par. 16 Constitutional Code of Procedure

¹¹⁸ Law No. 4314/2002-CR presented by Heriberto Benítez Rivas and Law No. 4497/2001-CR presented by Javier Diez Canseco Cisneros;

¹¹⁹ *Ley de Reforma Parcial del Código Penal, Gaceta Oficial No. 5.494, Extraordinario de fecha 20 de octubre de 2000*

¹²⁰ Art. 29 Venezuelan Constitution 1999: “*El Estado estará obligado a investigar y sancionar legalmente los delitos contra los derechos humanos cometidos por sus autoridades. Las acciones para sancionar los delitos de lesa humanidad, violaciones graves a los derechos humanos y los crímenes de Guerra son imprescriptibles. Las violaciones de derechos humanos y los delitos de lesa humanidad serán investigados y juzgados por los tribunales ordinarios. Dichos delitos quedan excluidos de los beneficios que puedan conllevar su impunidad, incluidos el indulto y la amnistía.*”

the new Constitution regulates human rights related questions. Among others there is an obligation for domestic courts and other public bodies to directly apply to human rights treaties ratified by Venezuela¹²¹ and that the guarantee of human rights is binding upon the authorities under the constitution, human rights treaties and the respective laws and that the absence of any law regulating rights does not impair their exercise.¹²²

Although Panama and Costa Rica are member states of the Inter-American Convention, they do not have penal laws codifying forced disappearance, nor did the author of this paper find anything out about law projects in this context.

11. Philippines:

In the Philippines, a bill for an anti-disappearances law has transited in various versions through both legislative chambers for a decade now. Still its final adoption has not taken place. There are 14 cases filed in court which are lodged as kidnapping, murder, serious illegal detention or a combination of the last two offences. Still, no perpetrator has yet been punished and no victim or family members of victims have been indemnified. The law proposals are called Anti-Enforced or Involuntary Disappearance Act of 2003¹²³, one of 2004¹²⁴ and of 2005¹²⁵. They contain very detailed clauses on most of the human rights mentioned in international instruments. The adoption of this Bill would make the Philippines the first Asian country to include such special penal legislation on disappearances in their domestic law.

Some detention provisions which are in accordance with international standards can already be found in the Philippines' national legislation mentioned in article 125 of the Revised Penal Code.

¹²¹ Art. 19 and 23 Venezuelan Constitution 1999

¹²² Art. 22 Venezuelan Constitution 1999; q.v. Committee Against Torture, Summary Record of the 538th meeting: Venezuela. 21/11/2002. CAT/C/SR.538.

¹²³ introduced by representatives Lagman-Luistro, Taganas-Layus, Rosales, Libanan, Ocampo, Maza, Beltran, Rodriguez, Nachura, Badelles, Barinaga, Andaya and all the members of the Committee on Justice and the Committee on Civil, Political and Human Rights

¹²⁴ introduced by Honorable Edcel C. Lagman

¹²⁵ introduced by Senator Francis N. Pangilinan

12. Ethiopia:

Article 28.1 of the Ethiopian Constitution classifies “forcible disappearances” as crimes against humanity excluding amnesties or pardons and statute of limitation for these crimes. Furthermore Art. 281 of the Penal Code also regulates genocide and crimes against humanity including the intentional, compulsory movement or dispersion of peoples or children which results in their death or disappearance providing imprisonment from five years to life and in cases of exceptional gravity death penalty.¹²⁶

Ethiopia was the only African country prohibiting forced disappearances in its domestic law, which was found out during this research.

Excursus: Civil law problems of forced disappearance:

1. Presumption of absence due to forced disappearance:

Another one of the numerous terrible effects of enforced disappearances is the problem of civil transactions through other persons in the name of the disappeared. One possibility was the declaration of absence due to the presumption of death, which is not an adequate instrument for forced disappearance, as it is not in line with the intention to localise the disappeared person alive. The form to give family members or other legitimised persons the right to carry out transactions in the name of the disappeared is the presumption of absence due to forced disappearance.¹²⁷

Art. 22 of the draft instrument considers in paragraph 6 a civil right problem of forced disappearance. It obliges the State Parties to “*take the necessary measures with regard to the legal situation of disappeared persons whose fate has not been clarified and that of their relatives, in fields such as social welfare, financial matters, custody of children and property rights*”.

Since 1994 there is a law in Argentina for the declaration of absence due to forced disappearances for persons who disappeared until the end of the dictatorship in December

¹²⁶ Art. 281 Ethiopian Penal Code: “*Whosoever, with intent to destroy, in whole or in part, a national, ethnic, racial, religious or political group, organizes, orders or engages in, be it in time of war or in time of peace:...* (c) *the compulsory movement or dispersion of peoples or children, or their placing under living conditions calculated to result in their death or disappearance, is punishable with rigorous imprisonment from five years to life, or, in cases of exceptional gravity, with death.*”

¹²⁷ Propósito de ley sobre presunción por desaparición forzada, México

1983. In the definition of forced disappearance in Art. 2 of this law, also non-state actors are included as possible perpetrators.¹²⁸

In Uruguay the executive power proposed the initiative of a law for the declaration of absence due to forced disappearance, which was approved unanimously in July 2005 by the Commission of the Delegates. According to the executive power, questions concerning compensation and indemnification were not included in this debate, as they are of a different nature and should be discussed therefore at a different occasion. On the 19th of July 2005, the Chamber of the Representatives also approved the project unanimously. Through this legal initiative, forced disappearance as a reason to absence will be incorporated in the Civil Code to realize the succession of the disappeared person.¹²⁹

Also Mexico has a law proposal about the presumption of absence due to forced disappearance.¹³⁰

3. Reparation:

The right of victims *to obtain prompt, fair and adequate reparation for the harm caused to them*” is incorporated in Art. 22 of the draft instrument. This means full compensation for material and psychological harm, and may also include restitution, rehabilitation, satisfaction, including restoration of honour and reputation and a guarantee of non-recurrence.

Terms about compensation are also included in the Declaration¹³¹ and in the Rome Statute¹³². States therefore have the obligation to take the legislative and other measures to ensure that victims can claim compensation for their sufferings before courts or other special bodies.¹³³

Argentina has a law about indemnisation of victims, including non-state actors as possible perpetrators in the definition of forced disappearance.¹³⁴

¹²⁸ Ley 24.321 <http://www.derechos.org/nizkor/arg/ley/24321.html> , 20-07-2004

¹²⁹ articles in *La Republica* 06.06.2005 (No. 1854), 30.06.2005 (No. 1878), 07.07.2005 (No. 1884), 20.07.2005 (No 1896); also

http://www.presidencia.gub.uy/Web/proyectos/2005/05/R%20106_17%2005%202005_00001.PDF

¹³⁰ Propósito de ley sobre presunción por desaparición forzada, México

¹³¹ Art. 19 Declaration

¹³² Art. 75 Rome Statute

¹³³ UN-WGEID report 1997 (E/CN.4/1998/43), General comments on article 19 of the Declaration, par. 72

¹³⁴ Ley 24411 <http://www.todoiure.com.ar/leyes/ley%2024411%20Desaparicion%20forzada.htm>, 20-07-2004