

UNIVERSAL JURISDICTION:

The duty of states to enact and implement legislation - Chapter Twelve ("Disappearances")

Individual acts of "disappearance", as well as those which are committed on a widespread or systematic basis, should be seen as crimes under international law over which states may exercise universal jurisdiction. Indeed, a number of national courts have concluded that the prohibition of "disappearances" is now part of *jus cogens*.¹

As early as 1989, it had been recognized that "general international law probably permits, though it may not require, a state to exercise criminal jurisdiction over an alleged perpetrator of enforced disappearance, regardless of the latter's nationality or the place where the offence was committed" and that, to the extent that enforced disappearances constitute torture, states parties to the UN Convention against Torture will be required to exercise universal jurisdiction over persons found in their territories who are responsible for enforced disappearances.²

This assessment has been confirmed by subsequent developments. The General Assembly has declared that all states have a duty to bring to justice those responsible for "disappearances" no matter where they occurred. Article 14 of the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearance (UN Declaration against Disappearances) provides:

¹ See, for example, *Estate of Marcos*, *supra*, 25 F.3d at 1475 ("The prohibition against . . . causing 'disappearance' is similarly universal, definable, and obligatory."); *Forti v. Suarez-Mason*, 672 F.Supp. 1531, 1542 (N.D. Cal. 1987), *amended*, 694 F.Supp. 707, 710-11 (N.D. Cal. 1989). These developments show the rapid evolution of attitudes, since as late as 1988 a leading authority suggested that acceptance of the universality principle over "disappearances" was premature. Randall, *supra*, n. 13 (Chapter Two), 838-839.

² Rodley, *Treatment of Prisoners*, *supra*, n. 28 (Chapter Nine), 206. In the second edition, the author explained that Article 14 of the UN Declaration against Disappearances provides for permissive, rather than compulsory, jurisdiction and states that "it is language that any state wishing to exercise universal jurisdiction could convincingly invoke to refute a protest from, say, the state of the alleged perpetrator's nationality". Rodley, *Treatment of Prisoners* (2nd ed.), *supra*, n. 28, 269. See also Kamminga, *Final ILA Report*, *supra*, 9 (noting adoption of UN Declaration against Disappearances and the Inter-American Convention).

“Any person alleged to have perpetrated an act of enforced disappearance in a particular State shall, when the facts disclosed by an official investigation so warrant, be brought before the competent civil authorities of that State for the purpose of prosecution and trial unless he has been extradited to another State wishing to exercise jurisdiction in accordance with the relevant international agreements in force. *All States should take any lawful and appropriate action available to them to bring to justice all persons presumed responsible for an act of enforced disappearance, who are found to be in their jurisdiction or under their control.*” (emphasis supplied)³

Ten years later, the Inter-American Convention on Forced Disappearance of Persons recognized that enforced disappearances were subject to universal jurisdiction.⁴ As of 1 September 2001 eight of the 18 members of the OAS had ratified the Convention, without any reservations, and eight others had signed it.⁵

Similarly, Article 6 (1) of the draft International Convention on the Protection of All Persons from Forced Disappearance requires every state party to take the necessary measures to provide its courts with universal jurisdiction over enforced disappearances:

“1. Forced disappearance and the other acts referred to in article 2 of this Convention shall be considered as offences in every State Party. Consequently, each State Party shall take the necessary measures to establish jurisdiction in the following instances.

....

³ UN Declaration on the Protection of All Persons from Enforced Disappearance, U.N. G.A. Res. 47/133, 18 December 1992, Art. 14.

⁴ Article IV provides:

“The acts constituting the forced disappearance of persons shall be considered offenses in every State Party. Consequently, each State Party shall take measures to establish its jurisdiction over such cases in the following instances:

a) When the forced disappearance of persons or any act constituting such offense was committed within its jurisdiction;

b) When the accused is a national of that state;

c) When the victim is a national of that state and that state sees fit to do so.

Every State Party shall, moreover, take the necessary measures to establish its jurisdiction over the crime described in this Convention when the alleged criminal is within its territory and it does not proceed to extradite him.

This convention does not authorize any State Party to undertake, in the territory of another State Party, the exercise of jurisdiction or the performance of functions that are placed within the exclusive purview of the authorities of the other Party by its domestic law.”

⁵ As of 1 September 2001, the Convention had been ratified by: Argentina, Bolivia, Costa Rica, Guatemala, Panama, Paraguay, Uruguay and Venezuela; it had also been signed by: Brazil, Chile, Colombia, Ecuador, Honduras Mexico, Nicaragua and Peru.

(b) When the alleged perpetrator or the other alleged participants in the offence of forced disappearance or the other acts referred to in article 2 of this Convention are in the territory of the State Party, irrespective of the nationality of the alleged perpetrator or the other alleged participants, or the nationality of the disappeared person, or of the place or territory where the offence took place unless the State extradites them or transfers them to an international criminal tribunal.”⁶

Article 13 of the draft International Convention requires states parties to extradite persons suspected of forced disappearances or related crimes. It provides:

“When a State Party does not grant the extradition or is not requested to do so, it shall submit the case to its competent authorities as if the offence had been committed within its jurisdiction, for the purposes of investigation and, when appropriate, for criminal proceedings, in accordance with its national law. Any decision adopted by these authorities shall be communicated to the State requesting extradition.”⁷

Further support for an *aut dedere aut judicare* obligation concerning enforced disappearances is found in the resolution adopted by the Inter-American Commission on Human Rights on 20 October 2000 recommending to the Member States of the OAS that they “refrain from granting asylum to any person alleged to be the material or intellectual author of international crimes”, including enforced disappearances.⁸

⁶ Report of the sessional working group on the administration of justice, U.N. Doc. E/CN.4/Sub.2/1998/19, Annex: Draft international convention on the protection of all persons from forced disappearances, Art. 6 (1). The other acts referred to in Article 2 include instigation, incitement or encouragement of the commission of the offence of forced disappearance; conspiracy or collusion to commit this offence; attempt to commit such an offence; concealment of such an offence; and the non-fulfilment of a legal duty to prevent a forced disappearance. The UN Sub-Commission on the Promotion and Protection of Human Rights transmitted this draft in its Resolution 1998/25 of 26 August 1998 to the UN Commission on Human Rights and urged it to give priority consideration to the draft and the Commission in Resolution 2000/37 of 20 April 2000 requested the Secretary-General to give the draft wide dissemination, asking states, intergovernmental organizations and non-governmental organizations to submit their views and comments, as a matter of high priority.

⁷ Draft International Convention, Art. 13.

⁸ Inter-American Commission on Human Rights, *Asylum and International Crimes*, 20 October 2000, obtainable from <http://www.cidh.oas.org/asylum.htm> (for the full text of this statement, see Chapter Three, Section I.C).

The Human Rights Committee, a body of 18 experts established under the International Covenant on Civil and Political Rights to monitor implementation of that treaty, in an authoritative interpretation of that treaty concluded that enforced disappearances inflict severe mental pain and suffering on the families of the victims in violation of Article 7, which prohibits torture and cruel, inhuman or degrading treatment or punishment.⁹ The European Court of Human Rights reached the same conclusion, finding that the extreme pain and suffering an enforced disappearance inflicted on the mother of the “disappeared” person violated Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which prohibits torture and inhuman or degrading treatment.¹⁰

Argentina: – The Inter-American Convention on Disappearances has been given constitutional status through special law No. 24,820 of 1997.¹¹

Jurisprudence. Judge Antonio Boggiano stated in his dissenting vote in the Suárez Mason case that enforced disappearances constitute a violation of the right to life as well as a crime against humanity.¹²

Some states have defined individual cases of “disappearance” as a crime. For example, such legislation includes:

⁹ *Elena Quinteros Almeida v. Uruguay*, Communication No. 107/1981, views of the Human Rights Committee adopted on 21 July 1983, para.14, *reprinted in* Selected Decisions of the Human Rights Committee under the Optional Protocol, 2 (1990)

¹⁰ *Kurt v. Turkey*, Judgment, Eur. Ct. Hum. Rts, Case No. 15/1997/799/1002, 25 May 1998, para. 134.

¹¹ “LEY 24820 (Sancionada el 30/4/1997 – Promulgada de hecho el 26/5/1997 – En B.O. el 29/5/1997)
JERARQUIA CONSTITUCIONAL – Otórgase dicho carácter a la Convención Interamericana sobre Desaparición Forzada de Personas, aprobada por la Vigésima Cuarta Asamblea General de la Organización de los Estados Americanos (OEA), registrada bajo la Ley 24556, publicada en la edición del 18 de octubre de 1995 El Senado y Cámara de Diputados de la Nación Argentina reunidos en Congreso. etc. sancionan con fuerza de Ley:
JERARQUIA CONSTITUCIONAL DE LA CONVENCION INTERAMERICANA SOBRE DESAPARICION FORZADA DE PERSONAS
ARTICULO 1- Apruébase la jerarquía constitucional de la Convención Interamericana sobre Desaparición Forzada de Personas aprobada por la Asamblea General de la Organización de los Estados Americanos (OEA) en su vigésima cuarta Asamblea General (Ley 24.556) en los términos del artículo 75, inciso 22 de la Constitución Nacional.
ARTICULO 2- Comuníquese al Poder Ejecutivo.”

¹² S. 1085. XXXI. Suárez Mason, Carlos Guillermo s/homicidio, privación ilegal de la libertad, etc. (13 Agosto 1998). Disidencia del Señor Ministro Doctor Don Antonio Boggiano. Para. 19.

Colombia: Article 165 of the Penal Code defines forced disappearance as a crime.¹³ Article 16 (6) of the Penal Code [former Article 15 (6)] in force since 24 July 2001 provides for universal jurisdiction over crimes punishable by no less than three years' imprisonment (for the text, see Chapter Four, Section II).

El Salvador: Articles 364 to 366 of the 1997 Penal Code provide for the crime of enforced disappearances.¹⁴

¹³ Law 589 of 6 July 2000, entered into force 7 July 2000, Art. 165 and 166 ("*Forced Disappearance, whether committed by a public servant, by a private person acting under the direction or acquiescence of a public servant, or by a member of an illegal group.*"). Spanish text reads: "*Artículo 165. Desaparición forzada. El particular que perteneciendo a un grupo armado al margen de la ley someta a otra persona a privación de su libertad cualquiera que sea la forma, seguida de su ocultamiento y de la negativa a reconocer dicha privación o de dar información sobre su paradero, sustrayéndola del amparo de la ley, incurrirá en prisión de veinte (20) a treinta (30) años, multa de mil (1.000) a tres mil (3.000) salarios mínimos legales mensuales vigentes y en interdicción de derechos y funciones públicas de diez (10) a veinte (20) años.*

A la misma pena quedará sometido, el servidor público, o el particular que actúe bajo la determinación o la aquiescencia de aquél, y realice la conducta descrita en el inciso anterior.

Artículo 166. Circunstancias de agravación punitiva. La pena prevista en el artículo anterior será de treinta (30) a cuarenta (40) años de prisión, multa de dos mil (2.000) a cinco mil (5.000) salarios mínimos legales mensuales vigentes, e inhabilitación para el ejercicio de derechos y funciones públicas de quince (15) a veinte (20) años, siempre que concurra alguna de las siguientes circunstancias:

- 1. Cuando la conducta se cometa por quien ejerza autoridad o jurisdicción.*
- 2. Cuando la conducta se cometa en persona con discapacidad que le impida valerse por sí misma.*
- 3. Cuando la conducta se ejecute en menor de dieciocho (18) años, mayor de sesenta (60) o mujer embarazada.*
- 4. Cuando la conducta se cometa, por razón de sus calidades, contra las siguientes personas: servidores públicos, comunicadores, defensores de derechos humanos, candidatos o aspirantes a cargos de elección popular, dirigentes sindicales, políticos o religiosos, contra quienes hayan sido testigos de conductas punibles o disciplinarias, juez de paz, o contra cualquier otra persona por sus creencias u opiniones políticas o por motivo que implique alguna forma de discriminación o intolerancia.*
- 5. Cuando la conducta se cometa por razón y contra los parientes de las personas mencionadas en el numeral anterior, hasta el segundo grado de consanguinidad, segundo de afinidad o primero civil.*
- 6. Cuando se cometa utilizando bienes del Estado.*
- 7. Si se somete a la víctima a tratos crueles, inhumanos o degradantes durante el tiempo en que permanezca desaparecida, siempre y cuando la conducta no configure otro delito.*
- 8. Cuando por causa o con ocasión de la desaparición forzada le sobrevenga a la víctima la muerte o sufra lesiones físicas o psíquicas.*
- 9. Cuando se cometa cualquier acción sobre el cadáver de la víctima para evitar su identificación posterior, o para causar daño a terceros."*

¹⁴ Spanish texts of relevant articles: Art. 364 "*El funcionario o empleado público, agente de autoridad o autoridad pública, que detuviere legal o ilegalmente a una persona y no diere razones sobre su paradero, será sancionado con prisión de cuatro a ocho años de inhabilitación absoluta del cargo o empleo respectivo por el mismo término.*

Art. 365. El que realizare la conducta descrita en el artículo anterior, habiendo recibido órdenes o instrucciones de funcionario o empleado público, agente de autoridad o autoridad pública, será sancionado con prisión de tres a seis años y multa de ciento ochenta a doscientos días de multa.

Art. 366. "El que por culpa permitiere que otro cometa el delito de desaparición forzada de personas, será sancionado con pena de dos a cuatro años de prisión, multa de cien a ciento ochenta días de multa. Si fuere

funcionario o empleado público, agente de autoridad o autoridad pública se le impondrá además, inhabilitación para el ejercicio del cargo o empleo respectivo por igual término".

Ethiopia: Article 281 of the Ethiopian Penal Code provides that “disappearance” of children in certain circumstances is a crime.

Guatemala: Decree No. 48-95 of 1995 (Penal Code) provides that enforced disappearances are a crime in Article 201 TER.¹⁵

Paraguay: Article 236 of the Penal Code of Paraguay provides for the crime of enforced disappearances.¹⁶

Judge Pedro Mayor decided on 26 February 1999 to institute proceedings in a case of enforced disappearances, committed by security forces of Argentina and Paraguay on Paraguayan nationals and committed in part in the territory of Argentina, on art.8.1.7 of the Penal Code granting universal jurisdiction.¹⁷

¹⁵ Spanish text reads: “*ARTICULO 201 TER. Comete el delito de desaparición forzada quien, por orden, con la autorización o apoyo de autoridades del Estado, privare en cualquier forma de la libertad a una o más personas, por motivos políticos, ocultando su paradero, negándose a revelar su destino o reconocer su detención, así como el funcionario o empleado público, pertenezca o no a los cuerpos de seguridad del Estado, que ordene, autorice, apoye o de la aquiescencia para tales acciones. Constituye delito de desaparición forzada, la privación de la libertad de una o más personas, aunque no medie móvil político, cuando se cometa por elementos de los cuerpos de seguridad del Estado, estando en ejercicio de su cargo, cuando actúen arbitrariamente o con abuso o exceso de fuerza. Igualmente, cometen delito de desaparición forzada, los miembros o integrantes de grupos o bandas organizadas con fines terroristas, insurgentes, subversivos o con cualquier otro fin delictivo, cuando cometan plagio o secuestro, participando como miembros o colaboradores de dichos grupos o bandas. El delito se considera permanente en tanto no se libere a la víctima. El reo de desaparición forzada será sancionado con prisión de veinticinco a cuarenta años. Se impondrá la pena de muerte en lugar del máximo de prisión, cuando con motivo u ocasión de la desaparición forzada, la víctima resultare con lesiones graves o gravísimas, trauma psíquico o psicológico permanente o falleciere.*”

¹⁶ Spanish text reads: art. 236 “Desaparición forzosa. 1º El que con fines políticos realizara los hechos punibles señalados en los artículos 105, 111, inciso 3º, 112, 120 y 124, inciso 2º, para atemorizar a la población, será castigado con pena privativa de libertad no menor de cinco años. 2º El funcionario que ocultara o no facilitara datos sobre el paradero de una persona o de un cadáver, será castigado con pena privativa de libertad de hasta cinco años o con multa. Esto se aplicará aun cuando careciera de validez legal su calidad de funcionario.”

¹⁷ CAUSA: "SUMARIO CRIMINAL DE AVERIGUACION DE HECHOS PUNIBLES CONTRA LA SEGURIDAD DE LA CONVIVENCIA DE LAS PERSONAS (Desaparición Forzosa). AÑO 1999, Exp No Folio No A.I. No 230. [Denuncia formulada ante el JUZGADO DE NOVENO TURNO por el Dr. Martin Almada relacionada a HECHOS PUNIBLES CONTRA LA SEGURIDAD DE LA CONVIVENCIA DE LAS PERSONAS (Desaparición Forzosa) que afectarían a los Señores, Ignacio Samaniego, Oscar Luis Rojas y Federico Tatter y vincularía como sujetos activos a miembros de las FUERZAS MILITARES, POLICIALES, PARAPOLICIALES y de Seguridad de la Rca. Argentina y de nuestro País...]

“*Que si bien los hechos en sus etapas constitutivas finales podrían haber sucedido en la ARGENTINA, nuestra legislación Penal contempla en su art.8 numeral 1 inciso 7 la posibilidad de la persecución penal de los ilícitos denunciados, aplicando como fundamento el PRINCIPIO DE JUSTICIA UNIVERSAL, siendo el ilícito denunciado,*

de aquellos contemplados en Convenciones Internacionales como la CONVENCION INTERAMERICANA SOBRE DESAPARICION FORZADA DE PERSONAS, ratificada por nuestro país por LEY No 933 de fecha 13/VIII/1996.”

Obtainable from <http://www.derechos.org/nizkor/paraguay/doc/mayor.html>

Peru: Article 320 of the Penal Code provides that forced disappearances are a crime.¹⁸

Venezuela: By means of a law adopted in 2000 amending the Penal Code (*Ley de Reforma Parcial del Código Penal. Gaceta Oficial # 5.494 Extraordinario de octubre de 2000*) a new crime has been added under Article 181-A following a mandate established in Art.187.1 of the Constitution of 1999 and of the Law implementing the Interamerican Convention on Enforced Disappearances (*Ley Aprobatoria de la Convención Interamericana sobre Desaparición Forzada. G.O. Ext. No. 5.241, 6/07/98*).¹⁹

¹⁸ Penal Code, Art. 320. The original Spanish text reads:

“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).”

¹⁹ Original Spanish text:

“La autoridad pública sea civil o militar o cualquier persona al servicio del Estado que ilegítimamente prive de su libertad a una persona y se niegue a reconocer la detención o a dar información sobre el destino o la situación de la persona desaparecida, impidiendo el ejercicio de sus derechos y garantías constitucionales y legales, será castigado con pena de 15 a 25 años de presidio. Igualmente serán castigados miembros e integrantes de grupos o asociaciones con grupos o asociaciones con fines terroristas, insurgentes o subversivos que actuando como miembros o colaboradores de tales grupos o asociaciones desaparezcan forzadamente a una persona mediante plagio o secuestro. Quien actúe como cómplice o encubridor de este delito, será sancionado con pena de 12 a 18 años de presidio”.