



*Department of Political Science*

*Course of International Law*

ENFORCED DISAPPEARANCE  
UNDER INTERNATIONAL LAW:  
The specific case of “Operation Condor”

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## CHAPTER 1

### Definition and Status of Enforced Disappeared Persons under International law

#### 1.1 Historical background

*“The importance of not forgetting what happened has nothing to do with a thirst for revenge. On the contrary, the act of remembering serves the need to keep historical memory alive and allows us to analyze, with some distance, how an organized and deliberate plan existed to do the greatest possible harm to defenseless Latin American societies”*<sup>1</sup>.

Likewise, Estela Carlotto, one of the greatest exponents of the association ‘*Abuelas de Plaza de Mayo*’, underlined the need to reconstruct an amputated memory<sup>2</sup>, specifically to return a concrete look and codify justice for *Desaparecidos*.

Forced disappearance is a systematic tool of mass repression generally diffused in states where government forces are unstable and opposition movements emerge. The logic behind this practice lies in the deterrent effect that follows its implementation, as well as in the need for protecting the State from allegations of having committed such atrocities. Even though forced disappearance is usually associated with political repression of Latin American regimes of the 1970s<sup>3</sup>, it has never had a regionalized connotation. Indeed, the practice of wiping out real or suspected political opponents, members of the resistance movements, supporters of these groups, civilians and many others is diffused in many countries around the world, and its origins date back to Hitler’s “Night and Fog” Decree of 1941<sup>4</sup>.

##### 1.1.1 Early beginnings: The Night and Fog Decree

On December 1941, the ‘*Nacht und Nebel Erlass*’ was signed by Wilhelm Keitel, the Chief of High Command of the German Armed Forces. This decree introduced condemnation procedures for all those people in occupied territories involved in offenses that could have threatened the cohesion of

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<sup>1</sup> J. P. MCSHERRY, *Predatory States: Operation Condor and Covert War in Latin America*, Lanham, 2005.

<sup>2</sup> F. PELOSO, *Gli Archivi Vaticani Rivelano Il Destino Dei Desaparecidos in Argentina*, in *Internazionale*, November 10, 2016.

<sup>3</sup> J. P. ZALAQUETT, *The Emergence of “Disappearances” as a Normative Issue*, in *Human Rights, From Practice to Policy*, Ann Arbor, October 2010.

<sup>4</sup> It refers to *Nacht und Nebel*, a directive issued by Adolf Hitler on December 7, 1941, and signed by Field Marshal Wilhelm Keitel, Chief of the German Armed Forces High Command (*Oberkommando der Wehrmacht*). See ACT 33/36/93, *Political Killings and Disappearances: Medicolegal Aspects* of Amnesty International, of September 1993.

Nazi Germany. Specifically, individuals suspected of such acts were transferred to Germany, judged and then imprisoned in inhumane conditions until the execution of their death sentence<sup>5</sup>. Moreover, no official document of incarceration proceedings was ever recorded, and the secrecy of this operation was maintained even after the death of the victims<sup>6</sup>.

Owing to the fact that these people began to disappear without leaving any trace after being deported to Germany, the Night and Fog Decree generated the desired effect of frightening the suspect's families and friends. This last assertion was later confirmed by Wilhelm Keitel, which tried to express Hitler's rationale in issuing the decree:

'In such cases, penal servitude or even a hard labor sentence for life will be regarded as a sign of weakness. An effective and lasting deterrent can be achieved only by the death penalty or by taking measures which will leave the family and the population uncertain as to the fate of the offender. The deportation to Germany serves this purpose'<sup>7</sup>.

In this way, Germany was deprived of the legitimacy of its legal framework, which instead became an integral part of the mass repression program implemented by Nazi Germany<sup>8</sup>. As Gustav Radbruch underlines, "in manifold ways, the rulers of the twelve-year dictatorship gave unlawfulness, even crime, the form of a statute, admittedly in the monstrous form of an unpublished secret law"<sup>9</sup>.

### 1.1.2 *The spread in Latin America*

After World War II, many other dictatorships adopted similar mechanisms of deterrence to affirm their power. At the beginning of the 1960s, Guatemala's military forces engaged in massive disappearances, which persisted until the end of the civil war<sup>10</sup>. The data collected by the country's official postwar truth commission were disconcerting and highlighted more than 200,000 dead or "disappeared"<sup>11</sup>. However, as the Chilean lawyer J. Zalaquett claimed, the term "disappearance" was used for the first time in Chile during the inquiry conducted by the Peace Committee's Information Department, the ecumenical organization that preceded the Vicariate of Solidarity<sup>12</sup>.

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<sup>5</sup> UNITED STATES HOLOCAUST MEMORIAL MUSEUM, *Night and Fog Decree*, in *Holocaust Encyclopedia*, available online.

<sup>6</sup> Decision of the Nuremberg Military Tribunals of December 1947, *United States v Joseph Altstoetter*. See NUREMBERG MILITARY TRIBUNALS, *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, Vol. III, Washington DC, 1951, p. 1025.

<sup>7</sup> J. N. MAOGOTO, *Now You See, Now You Don't. The State's Duty to Punish Disappearances and Extra Judicial Executions*, in *Australian International Law Journal*, 2002, print.

<sup>8</sup> *Ibid.*

<sup>9</sup> M. WERNER, *Naturrecht oder Rechtspositivismus?*, Darmstadt, 1962, p. 2.

<sup>10</sup> HUMAN RIGHTS WATCH, *Disappeared in Guatemala, The Case of Efraín Bámaca Velásquez*, Vol. 7 No.1, March 1995, available online.

<sup>11</sup> B. BRIGGS, *Billy Briggs on the Atrocities of Guatemala's Civil War: Secrets of the Dead*, in *The Guardian*, February 2, 2007, available online.

<sup>12</sup> J. P. ZALAUQUETT, *op. cit.*

On September 1973, the Chilean military army took over the Moneda Palace, the democratically elected president Salvador Allende was killed and a military junta was established. The newly recognized regime abolished the 1925 Constitution, and in 1980 a new Constitution was promulgated with the aim of concentrating civil and military power in the hands of a single person, General Pinochet<sup>13</sup>. Almost immediately after the *golpe*, the junta promoted a ruthless repression against any political opponent, which was also extended to civilians who were supporting these beliefs. For the first time, this country decided that the threat from the left was so uncontrollable that it had to physically eliminate all the people that were trying to promote this vision of society<sup>14</sup>. Shortly after President Patricio Aylwin's rise to power, Chile's National Commission for Truth and Reconciliation<sup>15</sup>, also known as "the Rettig Commission", identified 2,279 victims of human rights violations during Pinochet regime, pointing out that 45.2% of the arrested disappeared without leaving any trace<sup>16</sup>.

Similarly, on March 24, 1976, the Argentinian military junta staged a *coup d'état* presided over by the General Jorge Rafael Videla. After having dissolved the Parliament and the Supreme Court of Justice, the armed forces and police began the "Dirty War". Therefore, real or alleged opponents were kidnapped, tortured and then killed<sup>17</sup>. As in Chile before, the military junta resorted to systematic disappearance to avoid international reactions, thus decimating an entire generation<sup>18</sup>. Going deeper, a widespread practice during the Argentinian Civil War was to throw the captives still alive while in flight over the Atlantic Ocean to not leave any evidence of their period of detention. In an interview with Mr. Scilingo, ex-officer at the Navy School of Mechanics in Buenos Aires, he unveiled that the navy conducted the flights every Wednesday for two years and that 1,500 to 2,000 people were murdered through this activity<sup>19</sup>. On 15 December 1983, the elected government of President Raúl Alfonsín, which marked the end of the military regime, established by decree the *National Commission on Disappeared People* to investigate the atrocities committed during Videla's mandate.

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<sup>13</sup> M. L. SALVATORI, *LA STORIA: Dalla Guerra Fredda Alla Dissoluzione Dell'URSS*, Roma, 2004, p. 469-70.

<sup>14</sup> *Condor*, Dir. R. Mader, Tabla Filmes Focus Filmes, 2007, available online.

<sup>15</sup> Supreme Decree No. 355 of April 25, 1990, issued by President Aylwin with the signatures of the Minister of the Interior and the Minister of Justice.

<sup>16</sup> NATIONAL COMMISSION FOR TRUTH AND RECONCILIATION, *Report of the Chilean National Commission on Truth and Reconciliation*, May 1, 1990.

<sup>17</sup> M. L. SALVATORI, *op. cit.*, p. 470-71.

<sup>18</sup> *Ibid.*

<sup>19</sup> C. SIMS, *Argentine Tells of Dumping 'Dirty War' Captives Into Sea*, in *The New York Times*, March 12, 1995, available online.

In its report, the Commission pointed out that among the various victims of the conflict, 8,960 had not reappeared<sup>20</sup>.

### *1.1.3 From the regionalized phenomenon to international intervention*

In the 1980s, international human rights groups began to denounce the widespread disappearances occurring in Latin American countries, giving a boost to some inter-governmental institutions, such as the United Nations<sup>21</sup>. Therefore, in February 1980, the Commission on Human Rights, bearing in mind General Assembly's request to consider the question of involuntary disappeared persons, established for a period of one year a Working Group on Enforced or Involuntary Disappearances to examine all the relevant aspects of this phenomenon<sup>22</sup>. In September 2014, the mandate of the Working group was renewed by the Human Rights Council<sup>23</sup>.

On December 1992, the UN General Assembly finally adopted the *Declaration on the Protection of All Persons from Enforced Disappearances*, as a body of principles for all States<sup>24</sup>. In 2006, the *International Convention for the Protection of All Persons from Enforced Disappearances* entered into force to strengthen the fight against such atrocities<sup>25</sup>, and it was signed by 96 countries<sup>26</sup>. In addition, the Convention promotes co-operation between states, both in combating concrete episodes of forced disappearance and in gathering useful information to eradicate it. At present, the International Coalition against Enforced Disappearances<sup>27</sup>, which brings together non-governmental organizations for the protection of human rights and organizations of families of the disappeared, is working on an international campaign to obtain the universal ratification of the Convention<sup>28</sup>. Meanwhile, the Organization of American States ratified an *Inter-American Convention on Forced Disappearance of Persons* in 1994, because of the acute connotation of disappearances in Latin

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<sup>20</sup> ACT 33/001/1994, "Disappearances" and Political Killings: Human Rights Crisis of the 1990s: A Manual For Action of Amnesty International, of February 1994, concerning the campaign launched by AI to combat "disappearances" and political killings all over the world.

<sup>21</sup> J. P. ZALAQUETT, *op. cit.*

<sup>22</sup> Resolution 20 (XXXVI) of the United Nations Commission on Human Rights, of February 29, 1980, which led to the establishment of the Working Group on Enforced or Involuntary Disappearances, to examine questions relevant to enforced or involuntary disappearances of persons.

<sup>23</sup> A/HRC/RES/27/1 of the United Nations Human Rights Council, of October 2014, which constitutes the last resolution renewing the mandate of the Working Group on Enforced or Involuntary Disappearances.

<sup>24</sup> A/RES/47/133 of the UN General Assembly, of December 18, 1992, *Declaration on the Protection of All Persons from Enforced Disappearance*.

<sup>25</sup> J. P. ZALAQUETT, *op. cit.*

<sup>26</sup> A/RES/61/177 of the UN General Assembly, of December 20, 2006, *International Convention for the Protection of All Persons from Enforced Disappearance*, which places an obligation on the State Parties to investigate acts of enforced disappearance and to bring those responsible to justice.

<sup>27</sup> The International Coalition against Enforced Disappearances is an organ that gathers organizations of families of disappeared and human rights NGOs working peacefully against the practice of enforced disappearances at the local, national, and international level.

<sup>28</sup> The international campaign for the UN Convention to protect all persons from enforced disappearances is available directly from the ICAED's website, in section "The Campaign", which is the primary activity of this organization.

America<sup>29</sup>. For the first time, forced disappearance was legally defined as a crime against humanity, anticipating its insertion in Article 7 of the 1998 Statute of Rome.

With the end of the Cold War, hopes in a new world order determined the belief that violence between states would have soon ceased and that human rights would have been strengthened. Regarding forced disappearance, the national commitment in Chile and Argentina, and the involvement of international institutions raised awareness about it. However, the conflicts that emerged in the following years did not escape the practice of violence, including disappearances and political killings. Still, many states are involved, and the struggle to eradicate these practices is fiercer than it has ever been.

## ***1.2 Definition of “Enforced Disappearance”***

### *1.2.1 Defining Forced disappearance*

In 1994, the Organization of American States (OAS) ratified the Inter-American Convention on the Forced Disappearance of Persons to fight systematic disappearance, widely spread in Latin America. In detail, this Convention is articulated in four areas of intervention by the State Parties, which include: condemnation of such practices by government institutions; sanctions within the national jurisdiction for anyone who had committed or attempted to commit this crime; cooperation between the State Parties to prevent and eradicate the forced disappearance of persons; use of any legislative, administrative, judicial and any other measure necessary to reach the objectives listed above<sup>30</sup>.

At Art. 2 of the Convention, enforced disappearance is defined as:

“...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.”

The OAS Convention contains a first attempt to identify this practice as a crime against humanity, thus anticipating the definition of the 1998 Statute of the International Criminal Court (known also as the ‘Statute of Rome’)<sup>31</sup>. Indeed, Article 7 of the Statute of Rome recognizes this practice as a

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<sup>29</sup> J. P. ZALAQUETT, *op. cit.*

<sup>30</sup> Art. 1 of the *Inter-American Convention on The Forced Disappearance of Persons* of the Organization of American States, of June 9, 1994.

<sup>31</sup> J. N. MAOGOTO, *op. cit.*

widespread or systematic attack directed against any civilian population, with knowledge of the attack<sup>32</sup>, and Paragraph 2(i) of the same article describes it as:

“...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.”

An implicit reference to the Statute of Rome is contained in Article 5 of the International Convention for the Protection of All Persons from Enforced Disappearances, adopted by the General Assembly in Resolution 61/177 of 20 December 2006, when it states that ‘[t]he widespread or systematic practice of enforced disappearance constitutes a crime against humanity as defined in applicable international law and shall attract the consequences provided for under such applicable international law’<sup>33</sup>. In addition, the Convention provides a third definition of forced disappearance, expressed as:

“(...) the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”<sup>34</sup>

All the descriptions mentioned so far comprise some concurrent and constituent elements of enforced disappearance. Precisely, the Inter-American Court of Human Rights has specified them, according to the developments in international law: (a) The person subject to such practice is deprived of liberty and imprisoned; (2) such deprivation of liberty is exercised by agents of the state; (3) Any information regarding the victim after the arrest is kept hidden<sup>35</sup>.

### 1.2.2 *Defining Extra-Judicial Execution*

In most cases, extra-judicial execution is strictly related to forced disappearance. Indeed, even if the body of a person murdered through this practice is found, forced disappearance would disguise the identity of those responsible and the surrounding conditions. Meanwhile, extra-judicial execution would extend the status of disappearance, leaving it often unsolved<sup>36</sup>.

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<sup>32</sup> *Rome Statute of the International Criminal Court*, of July 17, 1998, a statute establishing the International Criminal Court.

<sup>33</sup> B. OSWALD, H. DURHAM, & A. BATES, *Documents on the Law of UN Peace Operations*, New York, 2011, p. 130.

<sup>34</sup> Art.2 of the *International Convention for the Protection of All Persons from Enforced Disappearance* of the UN General Assembly, of December 20, 2006.

<sup>35</sup> Judgement of the Inter-American Court of Human Rights, of November 26, 2013, *Case of Osorio Rivera and Family v. Peru*, par. 113.

<sup>36</sup> J. N. MAOGOTO, *op. cit.*

Extra-judicial execution refers to deliberate killings pursued by State security forces or paramilitary groups, death squads or other private forces cooperating with the government or with its acquiescence<sup>37</sup>. Likewise, the United States Torture Victim Protection Act<sup>38</sup> defines this practice as:

“... A deliberated killing not authorized by a previous judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.”<sup>39</sup>

According to the earliest human rights instruments adopted by the United Nations, extrajudicial execution is a clear violation of fundamental freedoms. Indeed, Article 3 of the Universal Declaration of Human Rights<sup>40</sup> states that “Everyone has the right to life, liberty and security of person”, whose infringement is a direct consequence of extrajudicial executions<sup>41</sup>. The rights to life, liberty and security of persons are enshrined in the International Covenant on Civil and Political Rights<sup>42</sup>, which requires its state parties to condemn any practice in direct contrast to them. Besides, Article 8(1) of the Inter-American Convention Against Torture<sup>43</sup> clarifies the obligation of the States to ensure the right to life and, for this, to prevent its violation, to investigate and punish those held responsible for such crimes. More broadly, an extrajudicial execution entails the violation of all human rights, since a person deprived of the right to life is no longer able to exercise any other right<sup>44</sup>.

International jurisprudence has emphasized some cases of particular nature in which extrajudicial execution is committed against specific groups of individuals or in certain contexts. These cases have been expressed by the Inter-American Court of Human Rights for what concerns children, pregnant women, trade unionists, political rivals, human rights activists and judicial officers<sup>45</sup>. Concerning the use of extrajudicial execution to eliminate political opponents, the Inter-American Court of Human Rights condemned it not only as “...the violation of several human rights, but also [as a breach of the

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<sup>37</sup> F. ANDREU-GUZMAN, *Enforced Disappearance and Extrajudicial Execution: Investigation and Sanction - A Practitioners Guide*, Geneva, 2015, p. 67.

<sup>38</sup> Pub. L. 102-256 of the United States Congress of March 12, 1992, referred to as the *Torture Victim Protection Act of 1991*.

<sup>39</sup> *Ibid.*, Sec. 3 (a).

<sup>40</sup> Resolution 217A of the UN General Assembly, of December 10, 1948, recognizing *The Universal Declaration of Human Rights*, which sets out fundamental human rights to be universally protected.

<sup>41</sup> Amnesty International, ACT 33/001/1994, cit.

<sup>42</sup> Resolution 2200A (XXI) of the UN General Assembly, of December 16, 1966, *International Covenant on Civil and Political Rights*, which is one of the two international human rights treaties that give legal force to the Universal Declaration of Human Rights.

<sup>43</sup> Treaty A-51 of the Organization of American States, of December 9, 1985, *Inter-American Convention to Prevent and Punish Torture* intended to prevent torture and other similar activities.

<sup>44</sup> Amnesty International, ACT 33/001/1994, cit.

<sup>45</sup> F. ANDREU-GUZMAN, *op. cit.*, p. 68.

principles] upon which the rule of law is based, and [a direct violation of] the democratic system, inasmuch as it results from a failure to ensure that the different authorities abide by their obligation to protect nationally and internationally recognized human rights, and submit to the domestic organs that guarantee the observance of those rights.<sup>46</sup> Similarly, in a case of judicial officers killed through extrajudicial execution during the investigation of crimes committed by members of the military and paramilitaries, the Court condemns those States that fail to adopt the necessary measures to ensure the safety of the members of judicial commissions while performing their duties<sup>47</sup>, and recognizes this practice as an attempt to achieve impunity for gross violations of human rights<sup>48</sup>. Once more, by considering attempts on the safety of human rights activists through extralegal practices, the Court recognizes their impact not just as individual, but also as collective. Indeed, “When such things happen, society is prevented from learning the truth about whether the rights of persons are being respected or violated under the jurisdiction of a given State”<sup>49</sup>.

Controversially, the capital punishment legally sanctioned in the absence of relevant allegations and a rigorous process has very often been associated with extrajudicial execution<sup>50</sup>. As pointed out by the International Covenant on Civil and Political Rights (ICCPR), “this penalty can only be carried out pursuant to a final judgement rendered by a competent court”<sup>51</sup>. Therefore, in the case of a failure to comply with the procedures established by law prior to the death sentence, there is also a violation of the inherent right to life. Howsoever, even if the ICCPR encourages states to move towards total abolition of the death penalty<sup>52</sup>, “every state ha[s] an inalienable right to choose its political, economic, cultural and legal systems, without interference in any form by another State”<sup>53</sup>, as long as it does not breach the right to have a fair trial.

### ***1.3 Status of Enforced Disappeared Persons***

In the international jurisprudence, “Enforced Disappearance” is not treated as a norm of customary international law in itself, but as a threat to a range of customary rules of international humanitarian law, most notably the right of liberty and security of persons, the right not to be subject to torture and

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<sup>46</sup> Judgement of the Inter-American Court of Human Rights, of May 26, 2010, *Case of Manuel Cepeda Vargas v. Colombia*, par. 177.

<sup>47</sup> Judgement of the Inter-American Court of Human Rights, of May 11, 2007, *Case of the Rochela Massacre v. Colombia*, par. 81.

<sup>48</sup> F. ANDREU-GUZMAN, *op. cit.*, p. 69-70.

<sup>49</sup> Judgement of the Inter-American Court of Human Rights, of November 28, 2006, *Case of Nogueira de Carvalho et al. v. Brazil (Preliminary Objections and Merits)*, par. 76.

<sup>50</sup> J. N. MAOGOTO, *op. cit.*

<sup>51</sup> Art. 6(2) of the *International Covenant on Civil and Political Rights* (ICCPR).

<sup>52</sup> INTERNATIONAL BAR ASSOCIATION, *The Death Penalty under International Law: A Background Paper to the IBAHRI Resolution on the Abolition of the Death Penalty*, London, May 2008.

<sup>53</sup> J. N. MAOGOTO, *op. cit.*, p. 186.

other cruel, inhuman or degrading treatment or punishment and the prohibition of murder<sup>54</sup>. Furthermore, its prohibition is valid in both international and non-international armed conflicts according to State practices<sup>55</sup>.

### *1.3.1 Enforced disappeared victims in international armed conflicts*

In international armed conflicts, “Enforced disappearance” is implemented in conjunction with the above-mentioned practices, that is to say arbitrary deprivation of liberty, acts of torture and other inhuman treatment, and extrajudicial execution<sup>56</sup>.

In case of arbitrary deprivation of liberty by a party to an international armed conflict, the Geneva Conventions set out a series of rules to determine the grounds of detention of the individuals concerned<sup>57</sup>. Specifically, the Third Geneva Convention legitimates the Detaining Power to impose some restrictions of liberty of movement to its prisoners of war within the limits of continuation of the circumstances that make such confinement essential, and until the cessation of hostilities<sup>58</sup>. Likewise, the Fourth Geneva Convention states that a civilian may only be interned if the security of the Detaining Power makes it unavoidable, or in the case of persons acting on its command who voluntarily ask the internment<sup>59</sup>. In addition, a legitimate deprivation of liberty must comply with some procedural requirements, also set forth in the Fourth Geneva Convention. According to this source, “Any protected person who has been interned ... shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose”<sup>60</sup>, which should then be taken into account periodically in case of non-intervention. Moreover, the Convention requires the Detaining Power to inform the Protecting Power of the names of the interned persons or of those who have already been released, as quickly as possible<sup>61</sup>. These procedures must be carried out in accordance with the provisions of the Convention, including the right to appeal for the parties involved, and their periodical review by a competent organ established by the Occupying Power<sup>62</sup>. Finally, Additional Protocol I sustains the right of persons

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<sup>54</sup> J-M. HENCKAERTS & L. DOSWALD-BECK, *Customary International Humanitarian Law*, Vol. I, Rule 98, Cambridge, 2005, p. 340.

<sup>55</sup> *Ibid.*

<sup>56</sup> *Ibid.*

<sup>57</sup> *Ibid.*, p. 344.

<sup>58</sup> Art. 21 of the *Third Geneva Convention relative to the treatment of prisoners of war*, signed in Geneva, on August 12, 1949.

<sup>59</sup> Art. 78 of the *Fourth Geneva Convention relative to protection of civilian persons in time of war*, signed in Geneva, on August 12, 1949.

<sup>60</sup> Art. 43 of the *Fourth Geneva Convention relative to protection of civilian persons in time of war*, signed in Geneva, on August 12, 1949.

<sup>61</sup> *Ibid.*

<sup>62</sup> Art. 78 of the *Fourth Geneva Convention relative to protection of civilian persons in time of war*, signed in Geneva, on August 12, 1949.

deprived of liberty for activities linked to the armed conflict to be properly informed, and through a language understandable to them, of the reasons for which they are subjected to such deprivation<sup>63</sup>.

With regard to acts of torture and other cruel or inhuman treatment, the Geneva Conventions prohibit any ‘violence to life and person, in particular ... cruel treatment and torture’ as ‘outrages upon personal dignity’<sup>64</sup>. Similarly, the Statute of the International Criminal Court describes these practices as crimes against humanity<sup>65</sup>. The Tribunals in several decisions based their definition of the war crime of torture on the 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>66</sup>, which also underlines the States’ responsibility to prevent such violations. Indeed, they cannot be justified under any circumstances, not even in case of “...a state of war or a threat of war, internal political instability or any other public emergency”<sup>67</sup>. In addition, the International Criminal Court Statute condemns any act ‘willfully causing great suffering or serious injury to body or health’<sup>68</sup>. According to the interpretation of the international Criminal Tribunal for Yugoslavia, the notion ‘causing great suffering’ incorporates not only physical violence, but also the infliction of damage to mental health<sup>69</sup>. More generally, the prohibition of torture, cruel or inhuman treatment, both in international and non-international armed conflicts, has been declared by the UN Security Council, the UN General Assembly and the UN Commission on Human Rights, and is contained in several human rights treaties that highlight its non-derogable nature<sup>70</sup>.

As in the previous case, the prohibition of murder is regulated by the Geneva Conventions, which prohibit any “violence to life and person, in particular murder of all kinds...”<sup>71</sup>. Likewise, the Statute of the International Criminal Court identifies murder as a war crime with respect both to international and non-international armed conflicts<sup>72</sup>. Furthermore, under international human rights law the killing of civilians and persons *hors de combat* is a grave breach of the prohibition of “arbitrary deprivation

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<sup>63</sup> Art. 75(3) of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I)*, signed in Geneva, on June 8, 1977.

<sup>64</sup> Common Art. 3(a)(c) of the *Geneva Conventions* signed in Geneva, on August 12, 1949. From this article, the ICC Statute derives even the term ‘violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture’, regulated under Art. 8(2)(c)(i).

<sup>65</sup> K. DÖRMANN, L. DOSWALD-BECK, & R. KOLB, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Art. 8(2)(a)(ii), Cambridge, 2003, p. 44.

<sup>66</sup> *Ibid.*

<sup>67</sup> Res. 39/46 of the UN General Assembly, of December 10, 1984, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Art. 2(2).

<sup>68</sup> K. DÖRMANN, L. DOSWALD-BECK, & R. KOLB, *op. cit.*, p. 76.

<sup>69</sup> Judgement of the International Criminal Tribunal for the former Yugoslavia, of February 20, 2001, Case no. IT-96-21-A, *The Prosecutor v. Zejnil Delalic and Others*, par. 510.

<sup>70</sup> J-M. HENCKAERTS & L. DOSWALD-BECK, *op. cit.*, p. 317.

<sup>71</sup> Common Art. 3(1)(a) of the *Geneva Conventions*, signed in Geneva, on August 12, 1949.

<sup>72</sup> *Rome Statute of the International Criminal Court*, of July 17, 1998. In the context of an international armed conflict, Art. 8(2)(a); in the context of a non-international armed conflict, Art. 8(2)(c).

of the right life”<sup>73</sup>, which includes also extralegal executions in the conduct of war. As expressed by the International Committee of the Red Cross in the collection of rules of international humanitarian law, unlawful murders can result, for instance, from an attack against civilians, from an indiscriminate attack or from an attack against military objectives causing excessive loss of civilian life<sup>74</sup>.

### *1.3.2 Enforced disappeared victims in non-international armed conflicts*

In non-international armed conflicts, “Enforced disappearance” is implemented in conjunction with the prohibitions of deprivation of liberty, acts of torture and other inhuman treatment, and extrajudicial killings, and with the duty of recording and notification of personal details of persons deprived of their liberty. Except for deprivation of liberty, the practices concerning enforced disappeared persons in non-international armed conflicts follow the same legitimate grounds and procedural requirements than the ones established for international armed conflicts.

The arbitrary deprivation of liberty in non-international armed conflicts is forbidden in many sources of differentiated nature, such as military manuals, national jurisprudence, official reports and on the basis of international human rights law<sup>75</sup>. As stipulated by the International Covenant on Civil and Political Rights, the State Parties may take measures derogating their obligations under the present Covenant, but in other situations than the armed conflict, they should carefully consider why their actions are necessary for the national safeguard<sup>76</sup>. Furthermore, the Covenant explicitly defines a series of non-derogable provisions, to which the cases in which States use “...the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance ... through arbitrary deprivations of liberty...”<sup>77</sup> are added. Since the entry into force of the Geneva Conventions, three criteria for determining the lawfulness of arbitrary deprivation of liberty have been developed. First, *the obligation to inform the interned person of the reasons for the arrest*. This principle is contained in the International Covenant on Civil and Political Rights<sup>78</sup>, in the

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<sup>73</sup> See *International Covenant on Civil and Political Rights*, Art. 6(1), the *American Convention on Human Rights*, Art. 4, the *African Charter on Human and Peoples’ Rights*, Art. 4, and the *European Convention on Human Rights*, Art. 2, that do not use the term “arbitrary” but specifies a general right to life and give a list of the features for which a deprivation of the right life may be acceptable.

<sup>74</sup> J-M HENCKAERTS & L. DOSWALD-BECK, *op. cit.*, p. 314.

<sup>75</sup> *Ibid.*, p. 347.

<sup>76</sup> *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency* of the Human Rights Committee, of August 31, 2001, par. 3.

<sup>77</sup> *Ibid.*, par. 11.

<sup>78</sup> Art. 9(2) of the *International Covenant on Civil and Political Rights*, which states that “Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him”.

European<sup>79</sup> and in the American<sup>80</sup> Conventions on Human Rights, and in the Resolution on the Right to Recourse and Fair Trial of the African Commission on Human and Peoples' Rights<sup>81</sup>, emphasizing its universal character. More generally, this procedural requirement is clarified in Principle 10 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by General Assembly resolution 43/173<sup>82</sup> of December 9<sup>th</sup>, 1988. This rule is contained in the national law of most, if not all, States in the world<sup>83</sup>. Second, *the obligation to bring a person detained on a criminal charge before a judge, right after the arrest*. This procedural requirement is contained in all the sources cited previously<sup>84</sup>, as well as in the domestic jurisprudence of many countries in the world<sup>85</sup>. Third, *the responsibility to provide a person deprived of liberty with a chance to challenge the lawfulness of the arrest* (also referred to it as *habeas corpus*). Like the two precedent requirements, the latter is guaranteed according to the International Covenant on Civil and Political Rights<sup>86</sup>, and in the European<sup>87</sup> and American<sup>88</sup> Conventions on Human Rights. In the analysis of

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<sup>79</sup> Art. 5(2) of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, of the European Court of Human Rights, of November 4, 1950, which states that "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."

<sup>80</sup> Art. 7(4) of the *American Convention on Human Rights*, of the Organization of American States, of November 22, 1969, which states that "Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him".

<sup>81</sup> *Resolution on the Right to Recourse and Fair Trial* of the African Commission on Human and Peoples' Rights, of March 9, 1992, which specifies the right of the interned person to be informed of the reasons of the arrest as part of the right to fair trial, and not as a rule in its own.

<sup>82</sup> A/RES/47/133 of the UN General Assembly, of December 18, 1992, *Declaration on the Protection of All Persons from Enforced Disappearance*. Specifically, Principle 10 states that "Anyone who is arrested shall be informed at the time of his arrest of the reason for his arrest and shall be promptly informed of any charges against him."

<sup>83</sup> J-M. HENCKAERTS & L. DOSWALD-BECK, *op. cit.*, p. 350.

<sup>84</sup> Article 9(3) of the *International Covenant on Civil and Political Rights*: "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement".

Article 5(3) of the *European Convention on Human Rights*: "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial".

Art 7(5) of the *American Convention on Human Rights*: "Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial".

The African Commission on Human and Peoples' Rights specifies the obligation to bring a person arrested on a criminal charge promptly before a judge as part of the right to fair trial, and not as a rule in its own.

<sup>85</sup> J-M. HENCKAERTS & L. DOSWALD-BECK, *op. cit.*, p. 350.

<sup>86</sup> Art. 9(4) of the *International Covenant on Civil and Political Rights*: "Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful".

<sup>87</sup> Art. 5(4) of the *European Convention on Human Rights*: "Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

<sup>88</sup> Art. 7(6) of the *American Convention of Human Rights*: "Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes

*habeas corpus* in emergency situations, the Inter-American Court of Human Rights emphasizes that “...even in emergency situations, the writ of *habeas corpus* may not be suspended or rendered ineffective. As has been pointed out already, the immediate aim of this remedy is to bring the detainee before a judge, thus enabling the latter to verify whether the detainee is still alive and whether or not he or she has been subjected to torture or physical or psychological abuse. The importance of this remedy cannot be overstated, considering that the right to humane treatment recognized in Article 5 of the American Convention on Human Rights is one of the rights that may not be suspended under any circumstances”<sup>89</sup>. In accordance with this, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment<sup>90</sup> of the UN General Assembly has specified the right of a detained person to ask for legal assistance during his or her confinement.

As stated previously, the prohibition of torture and other cruel or inhuman treatment in non-international armed conflicts follows the same norms and procedural requirements applied during international armed conflicts. Going more in depth, in the *Delalic case*<sup>91</sup> the ICTY expressed itself in favor of the omission of the element of official capability in the definition of torture or inhuman treatment, component traditionally widespread<sup>92</sup>. According to the Tribunal, this inclusion would generate the unintended impression that non-State actors are not covered, particularly in non-international armed conflicts involving rebel groups<sup>93</sup>. However, the allegation of torture has the same weight, and must be subject to the same restrictions in both the international and non-international armed conflicts.

Even for the prohibition of murder, the norms and procedures required in non-international armed conflicts remain the same ones applied in international armed conflicts. Indeed, according to the interpretation of the ICTY<sup>94</sup> there ‘can be no line drawn between “willful killing” and “murder” which affects their content’. Therefore, in relation to homicides of all natures, in both international and non-

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himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.”.

<sup>89</sup> Advisory Opinion of the Inter-American Court of Human Rights of January 30, 1987, OC-8/87, *Habeas Corpus in Emergency Situations* (Arts. 27(2) and 7(6) of the American Convention on Human Rights), par. 12.

<sup>90</sup> Res. 43/173 of the UN General Assembly, of December 9, 1988, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Specifically, Principle 17(1) states: “A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it”.

<sup>91</sup> Judgement of the International Criminal Tribunal for the former Yugoslavia, of February 20, 2001, Case no. IT-96-21-A, *The Prosecutor v. Zejnil Delalic and Others*.

<sup>92</sup> J-M. HENCKAERTS & L. DOSWALD-BECK, *op. cit.*, p. 46.

<sup>93</sup> *Ibid.*

<sup>94</sup> Judgement of the International Criminal Tribunal for the former Yugoslavia, of February 20, 2001, Case no. IT-96-21-A, *The Prosecutor v. Zejnil Delalic and Others*, par. 422.

international armed conflicts, the perpetrator is sentenced in the same way and subject to the same sanctions.

#### ***1.4 Status of the Families of Enforced Disappeared Persons***

As enounced in the UN Declaration on Enforced Disappearance, the practice of enforced disappearance “inflicts severe suffering on [the victims] and their families”<sup>95</sup>. Indeed, since the initial investigations conducted on cases of enforced disappearance, the international jurisprudence has noticed how this practice determines the denial of “a wide range of human rights of the victim himself and of his family ... These include civil and political rights as well as economic, social and cultural rights”<sup>96</sup>. Likewise, other sources of international law, such as the UN Human Rights Committee and the European Court of Human Rights, have identified the enforced disappearance of a close family member as inhuman treatment of the next-of-kin<sup>97</sup>. A particular attention to the relatives’ victims is highlighted by the International Committee of the Red Cross in the light of the rule requiring respect for family life and the rule that each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate<sup>98</sup>. Moreover, these norms are applied in both international and non-international armed conflicts.

##### ***1.4.1 Respect for family life in international and non-international armed conflicts***

According to the International Covenant on Civil and Political Rights, “The family is the natural and fundamental group unit of society and is entitled to protection by society and the State”<sup>99</sup>. Similarly, the American Convention on Human Rights<sup>100</sup> and the International Covenant on Economic, Social and Cultural Rights<sup>101</sup> adopt the protection of the family as a fundamental guarantee for the respect of individual’s identity. The obligation to respect the family rights of persons in occupied territory is a principle established within the Fourth Geneva Convention, which in addition provides that “facilities for leading a proper family life” must be provided to interned members wherever possible,

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<sup>95</sup> Art. 1(2) of the *Declaration on the Protection of All Persons from Enforced Disappearance* of the UN General Assembly.

<sup>96</sup> Report E/CN.4/1435 of the Working Group on Enforced or Involuntary Disappearances, of January 26, 1981, *Question of Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in particular: Question of Missing and Disappeared Persons*, par. 184.

<sup>97</sup> J-M HENCKAERTS & L. DOSWALD-BECK, *op. cit.*, p. 343.

<sup>98</sup> *Ibid.*, p. 340.

<sup>99</sup> Art. 23(1) of the *International Covenant on Civil and Political Rights* (ICCPR).

<sup>100</sup> Art. 17(1) of the *American Convention on Human Rights* of the Organization of American States, of November 22, 1969.

<sup>101</sup> Art. 10(1) of the *International Covenant on Economic, Social and Cultural Rights*, adopted through Res. 2200A(XXI) of the UN General Assembly, of December 16, 1966.

in particular for what concerns parents and children<sup>102</sup>. This protection is also mandatory under other several international sources<sup>103</sup>.

A set of collected State practices shows that respect for family life is linked to the protection of the unity of this fundamental group, to the contact between family members and to the communication of the placement of family members<sup>104</sup>. For the *protection of family unity*, the Fourth Geneva Convention stipulates the duty of each Party to the conflict of facilitating “enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible”<sup>105</sup>. As well, Additional Protocol I and II promote the reunion of families dispersed as a result of armed conflict, respectively through encouragement to the “humanitarian organizations engaged in this task”<sup>106</sup> and with particular attention to the condition of children who must be given the care and aid they require<sup>107</sup>. Besides, several sources of human rights law reflect the importance of family reunification, through treaties and other international instruments, resolutions and case-law<sup>108</sup>. For the need of *communication between family members*, the Fourth Geneva Convention provides that “all persons in the territory of a Party to the conflict, or in territory occupied by it, shall be enabled to give news of a strictly personal nature to members of their families, wherever they may be, and to receive news from them”<sup>109</sup>. In addition, international humanitarian law provides additional guarantees, such as the prisoner's right to communicate and receive visits from his or her relatives, within the limits legitimized by the context.

Regarding the unlawful intrusion in one's family life, the American Convention on Human Rights states that “No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation”<sup>110</sup>. On the same line, the European Convention on Human Rights refers to the ‘right to respect for private and family life’ clarifying that “There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the

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<sup>102</sup> Art. 82 of the *Fourth Geneva Convention relative to protection of civilian persons in time of war*, August 12, 1949.

<sup>103</sup> J-M. HENCKAERTS & L. DOSWALD-BECK, *op. cit.*, p. 380.

<sup>104</sup> *Ibid.*

<sup>105</sup> Art. 49 of the *Fourth Geneva Convention relative to protection of civilian persons in time of war*, August 12, 1949.

<sup>106</sup> Art. 74 of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I)*, June 8, 1977.

<sup>107</sup> Art. 4(3)(b) of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II)*, June 8, 1977.

<sup>108</sup> J-M HENCKAERTS & L. DOSWALD-BECK, *op. cit.*, p. 381.

<sup>109</sup> Art. 25(1) of the *Fourth Geneva Convention relative to protection of civilian persons in time of war*, August 12, 1949.

<sup>110</sup> Art. 11(2) of the *American Convention on Human Rights* of the Organization of American States, of November 22, 1969.

prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”<sup>111</sup>.

#### *1.4.2 The right of families to know the fate of their missing relatives in international and non-international armed conflicts*

The right of families to know the fate of their missing relatives is an implicit guarantee of the Fourth Geneva Convention, which attests the duty of States to facilitate investigations conducted by members of families dispersed because of armed conflict<sup>112</sup>. Correspondingly, Additional Protocol I emphasizes that, in the implementation of practices for missing and dead persons, the Parties of the Conflict and the international humanitarian organizations involved “shall be prompted mainly by the right of families to know the fate of their relatives”<sup>113</sup>. In any case, several international organizations safeguard the right of families to know the fate of their relatives as part of human rights law. For instance, the UN General Assembly refers to “the desire to know the fate of loved ones lost in armed conflicts [as] a basic human need which should be satisfied to the greatest extent possible”<sup>114</sup>, statement that is reflected in the resolutions by the UN Commission on Human Rights<sup>115</sup> and by the European Parliament<sup>116</sup>, as well as in the recommendations of the Parliamentary Assembly of the Council of Europe<sup>117</sup>.

In the Final Declaration of the International Conference for the Protection of War Victims held in Geneva in 1993<sup>118</sup>, the State Parties prohibited any denial of information to the families of missing persons about the fate of their relatives. Concerning deliberate refusal to inform families of persons detained by security forces or disappeared during armed conflicts about the condition of the victim, the European Court of Human Rights considers this practice equal to the perpetuation of inhuman treatment<sup>119</sup>. This statement is echoed by the Inter-American Court of Human Rights in enunciating the State's obligation to use the means at its disposal to inform the relatives of disappeared persons about the fate of their loved ones, even in case of death so that the remains can eventually be found

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<sup>111</sup> Art. 8(2) of the *European Convention on Human Rights*, of the European Court of Human Rights, of November 4, 1950.

<sup>112</sup> Art. 26 of the *Fourth Geneva Convention relative to protection of civilian persons in time of war* of August 12, 1949.

<sup>113</sup> Art. 32 of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I)*, of June 8, 1977.

<sup>114</sup> A/RES/3220(XXIX) of the UN General Assembly, of December 18, 1992, *International Convention on the Protection of All Persons from Enforced Disappearance*.

<sup>115</sup> Res. 2002/60 of the UN Commission on Human Rights, of April 25, 2002.

<sup>116</sup> Resolution on the *Missing persons in Cyprus* of the European Parliament, of March 15, 2007.

<sup>117</sup> J-M. HENCKAERTS & L. DOSWALD-BECK, *op. cit.*, p. 424. This source refers also to the Rec. 868 and Rec. 1056 of the Parliamentary Assembly of the Council of Europe.

<sup>118</sup> *Final Declaration of the International Conference for the Protection of War Victims*, held in Geneva, on August 30, and September 1, 1993, available online.

<sup>119</sup> J-M. HENCKAERTS & L. DOSWALD-BECK, *op. cit.*, p. 425. This statement is strictly connected to Article 7 of the *American Convention on Human Rights*.

and recovered<sup>120</sup>. In addition, the African Commission on Human and Peoples' Rights has specified that "holding an individual without permitting him or her to have any contact with his or her family, and refusing to inform the family whether the individual is being held and his or her whereabouts is an inhuman treatment of both the detainee and the family concerned"<sup>121</sup>.

Regarding this matter, peculiar attention is given to children, of which the African Charter on the Rights and Welfare of the Child protects the right to 'enjoyment of parental care and protection'<sup>122</sup>. According to this principle, in cases of displacement arising from an armed conflict, the State must provide information to the children on the placement of their parents, and invest its resources to trace them. As an integral part of this responsibility, each party in the conflict must keep a register of persons deceased or deprived of their liberty<sup>123</sup>.

Finally, in Resolution 3220 adopted by the UN General Assembly in 1974, parties to armed conflicts are called upon to provide information, during and after the conflict, about those who are missing in action<sup>124</sup>. This provision has been reinforced by the UN Commission on Human Rights, which stresses the duty of each party to an armed conflict to seek out persons who have been reported missing by an adverse party, as soon as the conditions permit<sup>125</sup>.

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<sup>120</sup> *Ibid.* Adapted from *Velásquez Rodríguez case* and *Bàmaca Velásquez case* of Inter-American Court of Human Rights.

<sup>121</sup> *Ibid.* Reporting *Amnesty International and Others v. Sudan* of the African Commission on Human and Peoples' Rights.

<sup>122</sup> Art. 19(1) of the *African Charter on the Rights and Welfare of the Child* of the Organization of African Unity, of July 1990.

<sup>123</sup> J-M. HENCKAERTS & L. DOSWALD-BECK, *op. cit.*, Rules 116 and 123.

<sup>124</sup> A/RES/3220(XXIX) of the UN General Assembly, of December 18, 1992, *International Convention on the Protection of All Persons from Enforced Disappearance*.

<sup>125</sup> Res. 2002/60 of the UN Commission on Human Rights, of April 25, 2002.

## CHAPTER 2

### The CIA and “Operation Condor”

#### *2.1 Historical roots and implementation of “Operation Condor”*

“Operation Condor” was a campaign of political repression and state terror carried out by the military states of the Southern Cone in the 1970s, through which the South American Intelligence agencies shared information to eradicate the “subversive threat” of a Communist penetration in the hemisphere<sup>126</sup>. The main actors involved in the implementation of the Condor Plan were the governments of Argentina, Bolivia, Brazil, Chile, Paraguay, and Uruguay. This Intelligence consortium was made effective through the support of the United States, and was subsequently associated with a wider U.S.-led counterinsurgency strategy to preempt the spread of the left-wing social movements<sup>127</sup>. In particular, the U.S. Government describes counterinsurgency as “the blend of comprehensive civilian and military efforts designed to simultaneously contain insurgency and address its root causes. Unlike conventional warfare, non-military means are often the most effective elements, with military forces playing an enabling role”<sup>128</sup>. This US military doctrine led to profound changes in the political structure of many Latin American countries by advocating: (1) The use of paramilitary and illegitimate forces, secret intelligence networks, and other auxiliary resources for gathering valuable data in the fight against the insurgent movements; (2) The spread of state intelligence system to monitor public opinion and take society under control; (3) The use of political ideologies to distinguish between sympathetic or hostile sectors to the model of society promoted; (4) the use of coercive terror and systematic violence to shape society; (5) the use of psychological fighting to polarize the political environment and manipulate the opposition<sup>129</sup>. Under these premises, the state became the promoter of a widespread climate of fear among citizens, with the ultimate end of suppressing the popular desire for a new social justice that would have otherwise inevitably subverted the previous equilibrium and overridden the privileges of the old ruling class<sup>130</sup>.

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<sup>126</sup> N. KLEIN, *The Shock Doctrine: The Rise of Disaster Capitalism*, September 2007, p. 112.

<sup>127</sup> J. P. MCSHERRY, *Predatory States*, cit., p. 1.

<sup>128</sup> UNITED STATES GOVERNMENT, *U.S. Government Counterinsurgency Guide*, United States of America, January 2009, p. 2.

<sup>129</sup> J. P. MCSHERRY, *op. cit.*, p. 12.

<sup>130</sup> *Ibid.*, p. 13.

### 2.1.1 Towards the counterinsurgency

After World War II, Latin America was characterized by a deep social discontent, mainly due to the rooted inequalities in welfare distribution that characterized the region and attributed to the neocolonial practices of the major Western states<sup>131</sup>. Therefore, the reason for the growing consensus on Communist ideals in the post-war period must be linked to the outcomes of the conflict itself<sup>132</sup>. Indeed, even if reactionary in their ideals, the Latin American Communist parties initially favored the governments in power, thus softening hostilities against them<sup>133</sup>. In addition, the refusal of a revolutionary strategy in favor of class struggle, the interest in building a national identity, and the growing development of the working class and organized work seemed to incorporate people's demand for new rights<sup>134</sup>.

A further push towards change came from the Cuban Revolution, which broke out in 1959. Under the directives of Fidel Castro, the Cuban Revolution exacerbated the fight against 'institutionalized' violence and its resulting inequality, in addition to supporting the emergence of opposition movements, including several guerrilla organizations<sup>135</sup>. The actual danger that Castro's Cuba represented was as an example to other Latin American countries, subjugated by poverty, corruption and plutocratic exploitation<sup>136</sup>. Just following the infiltration of Communist ideologies in these societies, a counter-offensive of the right-wing parties emerged. This doctrine of counterinsurgency legitimized the use of cruel practices, such as torture, enforced disappearance, and extralegal execution of political opponents and civilians, as an integral part of the struggle against subversion<sup>137</sup>.

The deep echoes of these transformations and the pursuit of social justice from a left-wing perspective led to the creation of a new security doctrine by the military, whose goal went far beyond the elimination of communists and guerrillas<sup>138</sup>. Implemented in the 1970s, the Condor Operation came to be characterized as a transnational criminal plan devoted to the extermination of political opponents of Latin American dictatorships around the world. The Condor Operation was subsequently divided into three phases: (1) An initial information exchange among the intelligence services of the military dictatorships that promoted it; (2) a more practical phase, characterized by undercover action, an anti-

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<sup>131</sup> J. P. MCSHERRY, *op. cit.*, p. 2.

<sup>132</sup> L. BETHELL, I. ROXBOROUGH, *Latin America between the Second World War and the Cold War, 1944-1948*, New York, 1992, p. 11.

<sup>133</sup> *Ibid.*, p. 12.

<sup>134</sup> *Ibid.*

<sup>135</sup> J. P. MCSHERRY, *op. cit.*, p. 3.

<sup>136</sup> W. LIPPMANN, *Cuba Once More*, in *Newsweek*, April 27, 1964, p. 23.

<sup>137</sup> J. P. MCSHERRY, *op. cit.*, p. 3.

<sup>138</sup> J. P. MCSHERRY, *Incomplete Transition: Military Power and Democracy in Argentina*, New York, 1997.

opposition system in which the identity of the mandator remained unknown; (3) finally, Condor's assassination capability, the worldwide system for targeting and killing subversive enemies<sup>139</sup>.

### 2.1.2 Phase I: The Condor prototype

By the end of 1973, South American military dictatorships began to use cross-border policies of repression, resulting in an implicit prototype of Operation Condor<sup>140</sup>. As noted by the analyst Joao Resende-Santos, this system of coordination began to expand since 1964 already, so that after a few decades it led to the establishment of a parallel system, a "state within the state", in direct contrast to a more legitimate military protection of the institutions<sup>141</sup>. Thus, "in early 1974, security officials from Argentina, Chile, Uruguay, Paraguay, and Bolivia met in Buenos Aires to prepare coordinated actions against subversive targets"<sup>142</sup>. Remembered as the First Police Seminar on the Antisubversive Struggle in the Southern Cone, this meeting settled down a first transnational collaboration between the governments of the participating States, with the aim of overthrowing the subversive threat. Specifically, these States invested intelligence resources, military knowledge, and national security officials to build a more powerful platform in the fight against emerging ideologies<sup>143</sup>.

A CIA report following such events confirms that U.S. state agencies were aware of the bilateral collaboration between the intelligence systems of Latin American states, as well as of the cruel practices that military dictatorships were using against their opponents<sup>144</sup>. These mechanisms were identified as precursors of the Condor Operation, which was subsequently formalized in 1975, between Brazil, Argentina, Chile, Paraguay and Uruguay<sup>145</sup>. However, according to McSherry, the CIA report contains some inaccuracies, as the multilateral nature of the activities carried out by the Condor Operations countries was omitted even if already known, and Bolivia was not mentioned as a member country<sup>146</sup>. On the other side, these desecrated documents demonstrated how the CIA was aware of the consortium intelligence in the Southern Cone already before 1976, contrary to what the agency previously stated<sup>147</sup>.

Still, the US support for the inhumane "anticommunist" practices used by these countries became clear when the Nixon administration recognized the military dictatorship in Chile, shortly after the

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<sup>139</sup> J. P. MCSHERRY, *Predatory States*, cit., p. 4.

<sup>140</sup> *Ibid.*, p. 69.

<sup>141</sup> J. RESENDE-SANTOS, *The Origins of Security Cooperation in the Southern Cone*, in *Latin American Politics and Society*, Vol. 44 no. 4, December 2002.

<sup>142</sup> *The National Daily Report of CIA*, June 23, 1976.

<sup>143</sup> J. P. MCSHERRY, *Predatory States*, cit., p. 79.

<sup>144</sup> Report of CIA to Congress, *CIA Activities in Chile*, of September 18, 2000.

<sup>145</sup> *Ibid.*

<sup>146</sup> J. P. MCSHERRY, *Predatory States*, cit., p. 80.

<sup>147</sup> Report of CIA, *Classified Reading Material re: "Condor" for Ambassador Landau and Mr. Propper*, August 22, 1978.

*coup d'état*<sup>148</sup>. In particular, the destruction of democracy perpetuated by Pinochet was welcomed by the Secretary of State Henry Kissinger with the following words: "In the United States, as you know, we are sympathetic with what you are trying to do here. I think that the previous government was headed toward Communism. We wish your government well... My evaluation is that you are a victim of all left-wing groups around the world, and that your greatest sin was that you overthrew a government which was going Communist... we are not out to weaken your position"<sup>149</sup>.

The demand for institutionalization of transnational repression policies in Latin American countries was first voiced by the Chilean Secret Police's Chief Manuel Contreras, which stressed the need for substituting the mere "gentlemen's agreements" used until that moment with a more effective coordination structure between countries<sup>150</sup>. Thus, in November 1975, the representatives of Argentina, Bolivia, Chile, Paraguay and Uruguay secretly met in Santiago for the first "Working meeting of National Intelligence". During this summit, the security system was advanced through the creation of three different bodies: (1) an office of coordination and security with a computerized collector of data concerning suspected activities and persons; (2) an information center with specific communication channels; (3) permanent coordination meetings<sup>151</sup>. Hence, the "Working meeting of National Intelligence" was a further step towards the structured implementation of Operation Condor.

### 2.1.3 Phase II: Condor's transnational operations

On November 21, 1975, the Condor Plan's founding act for repressive co-ordination in the Southern Cone was officially drawn up, with the final clause of entering into force by the end of January of the following year<sup>152</sup>. However, the modernization of the Condor Operation in its components, such as the technological advancement in centralized data collection and information exchange within the intelligence consortium, was only possible through the secret collaboration of the United States, as previously mentioned. Specifically, the United States allowed Condor intelligence to access the

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<sup>148</sup> J. P. MCSHERRY, *Predatory States*, cit., p. 85.

<sup>149</sup> L. KOMISAR, *Kissinger Encouraged Chile's Brutal Repression, New Documents Show*, in *Albion Monitor*, March 8, 1999, available online.

<sup>150</sup> Contained in the "Invitation by Chilean Intelligence Chief, Manuel Contreras to the first Condor meeting". This letter was addressed to the Paraguayan General Francisco Britez and is dated to October 1975. Furthermore, it is part of the Operation Condor documents revealed from Paraguayan "Archives of Terror", available online.

<sup>151</sup> J. P. MCSHERRY, *Predatory States*, cit., p. 94.

<sup>152</sup> *Acta fundacional del Plan Cóndor*, in *Posdata*, of June 18, 1999. The final Act of Operation Condor was signed on November 21, 1975 during the first Interamerican meeting of the National Intelligences, in Santiago de Chile.

headquarters of the US Southern Command<sup>153</sup>, the US Special Forces<sup>154</sup>, and the Army School of the Americas<sup>155</sup> (SOA) in Panama, whose procedures of action were contained in the manuals of torture released by the CIA and the Pentagon<sup>156</sup>. This shows how between 1976 and 1980 Condor commanders focused on expanding the Doctrine of National Security, intensifying Condor's covert abduction-disappearance-execution operations<sup>157</sup>.

At the beginning of June 1976, the Sixth General Assembly of the Organization of American States and the Conference of American Armies took place in Santiago, under control of the Pinochet's regime<sup>158</sup>. Attempts to dissuade the US Secretary of State Henry Kissinger from legitimizing the regime by participating to the meeting failed miserably, and during a conversation with Augusto Pinochet, he stated: 'I encouraged the OAS to have its General Assembly here. I knew it would add prestige to Chile. I came for that reason... We want to help, not undermine you. You did a great service to the West in overthrowing Allende'<sup>159</sup>. In doing so, Kissinger not only gave the Argentine military dictatorship the permission to continue with its repressive policies, but he also subordinated these atrocities to the need of overthrowing the subversive threat before the next President of the United States was elected and the new Congress convened<sup>160</sup>. In addition, desecrated CIA documents reported that during the June meeting, Condor Commanders of Chile, Argentina and Uruguay made a separate agreement to work undercover in Paris against the Revolutionary Coordinating Junta and other Latin American subversive activists<sup>161</sup>. Two years later, Ecuador and Peru joined Condor's intelligence consortium<sup>162</sup>, emphasizing again its escalating nature. Further declassified documents confirmed the growing interconnection between the national intelligence systems carrying out counterinsurgency operations, and their intention to expand their action overseas<sup>163</sup>.

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<sup>153</sup> Known as SOUTHCOM, it is one of the nine Unified Combatant Commands in the United States Department of Defense. It is responsible for providing contingency planning, operations, and security cooperation for Central and South America, the Caribbean, their territorial waters, as well as for ensuring the defense of the Panama Canal and the canal area.

<sup>154</sup> These are components of the Department of Defense's United States Special Operations Command. The U.S. military definition is "Those Active and Reserve Component forces of the Military Services designated by the Secretary of Defense and specifically organized, trained, and equipped to conduct and support special operations."

<sup>155</sup> It is a United States Department of Defense Institute that provides military training to government personnel in US-allied Latin American nations.

<sup>156</sup> T. TRICOT, *The CIA's "Operation Condor": Latin America's Dirty War, Death Squads and The Disappeared*, in *Global Research*, January 23, 2017, available online.

<sup>157</sup> J. P. MCSHERRY, *Predatory States*, cit., p. 108.

<sup>158</sup> *Ibid.*, p. 111.

<sup>159</sup> STATE DEPARTMENT, *Secret Memorandum of Conversation between Henry Kissinger and Augusto Pinochet*, "U.S. – Chilean Relations", June 8, 1976, p. 10.

<sup>160</sup> M. E. ANDERSEN, *Kissinger and the "Dirty War"*, in *The Nation*, October 31, 1987.

<sup>161</sup> Report of CIA, *Weekly Summary*, no. 1398, of July 2, 1976.

<sup>162</sup> J. P. MCSHERRY, *Predatory States*, cit., p. 130.

<sup>163</sup> See the Paraguayan "Archives of Terror"; see also General CIA Records, *Staff Notes: Latin American Trends*, of July 30, 1975 to find evidence of the expansion of their cooperative anti-subversive activities to include targeted opponents in exile in Europe.

#### 2.1.4 Phase III: Condor's Assassination Capability

The third and most secret stage of the Condor Plan resulted in the creation of international assassination squads, with the aim of eliminating political refugees and civilians that could have endangered the military dictatorships of the Southern Cone<sup>164</sup>. The growing amount of murders that followed this period demonstrated how the radical measures used for counterinsurgency further aggravated the erosion of democracy in Latin America<sup>165</sup>.

The Michelini-Gutiérrez Ruiz Case was a relevant illustration of the repressive practices carried out by the Condor Operation at the international level, which ended with the abductions of the Uruguayan Zelmar Michelini, a union leader associated with the Colorado Party<sup>166</sup>, and Gutiérrez Ruiz, member of the National Party<sup>167</sup> who had previously been President of the House of Representatives<sup>168</sup>. In 1973, both moved to Buenos Aires with their families, in search of protection<sup>169</sup>. Shortly before his kidnapping, Michelini wrote a letter for the Buenos Aires newspaper *La Opinión*, asking for its publication only if something happened to him<sup>170</sup>, which stated: "I have recently received telephoned threats about a possible attempt on my life ... in case a Uruguayan commando does indeed force me out of the country, I am writing these lines for you to know that I do not have, and have not had, any intention of leaving Argentina and that if the Uruguayan government says that I am in some part of Uruguay, it is because I have been taken there arbitrarily, without being asked and by force. It would not be the first time that an attempt is made to make it look like a voluntary action when it is really something that is imposed by abuse of power and savagery..."<sup>171</sup>. In May 21, 1976, the bodies of the two legislators were found in an abandoned car at the corner of Perito Moreno and Dellepiane in Buenos Aires, with obvious signs of torture and gunshots<sup>172</sup>.

These brutal acts clearly outlined the *modus operandi* of Operation Condor: the use of organized military units under the protection of national security forces<sup>173</sup>. In this way, the Latin-American military regimes annihilated their enemies with no regard for national borders and outside their jurisdictional area<sup>174</sup>. Moreover, at that time, the national security forces refused to disclose any document that could testify the torture practices used by Condor intelligence services or provide any

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<sup>164</sup> A. JIMENEZ. *The Condor Case: the human costs of militarization in Latin America*, in *Zmagazine*. January 2007, available online.

<sup>165</sup> J. P. MCSHERRY, *Predatory States*, cit., p. 166.

<sup>166</sup> It is a political party in Uruguay that unites moderate, liberal and socio-democrat groups.

<sup>167</sup> Also known as the White Party, it is a major right-wing conservative political party in Uruguay.

<sup>168</sup> J. P. MCSHERRY, *Predatory States*, cit., p. 141.

<sup>169</sup> *Ibid.*, p. 142.

<sup>170</sup> J. ELÍAS, *Montevideo, at the Corner of Buenos Aires*, in *Wayback Machine*. July 1, 2004.

<sup>171</sup> The letter was published in *La Opinión* on May 25, 1976.

<sup>172</sup> J. ELÍAS, *op. cit.*

<sup>173</sup> J. P. MCSHERRY, *Predatory States*, cit., p. 142.

<sup>174</sup> T. CUSHMAN. *Handbook of Human Rights*. New York, 2012, p. 712.

information about the fate of disappeared victims<sup>175</sup>. Later, these documents were declassified through the claim for justice brought by the NGOs and the families of the victims, a process that involved many countries outside the Southern Cone, including USA, France, Spain, Sweden, and Italy<sup>176</sup>. Thus, “The Condor militaries combined forces with fascist networks, Cuban exile terrorists, and other extremist groups worldwide to carry out their objectives, disguise their role, and forge a global counterrevolutionary movement”<sup>177</sup> that, as such, needed to be fought internationally.

## 2.2 *The notable case of Argentina*

### 2.2.1 *The Argentinian ‘Dirty War’ and Enforced Disappearances*

In 1973, The Dirty War, a massive work of repression implemented by the agency of the state against left-wing opposition groups, exploded in Argentina<sup>178</sup>. Specifically, the name chosen for it indicates the secret nature of the civil conflict in which the state itself was involved in terrorist attacks carried out by its military and paramilitary forces to kill its alleged enemies<sup>179</sup>. During that period, numerous politicians and civilians who were unfavorable to the military dictatorship were made to disappear and taken to clandestine detention centers, such as ESMA<sup>180</sup> and Orletti Motors<sup>181</sup>, to be interrogated, tortured and often killed. Such actions were initially implemented by the Argentine Anticommunist Alliance (Triple-A), the first parastatal confederation of death squads, introduced during the government of Isabel Perón<sup>182</sup>. Only after the March 1976 *coup*, the Triple-A vanished as a state organism, and its military units were thus included in the federal police, in the SIDE<sup>183</sup>, and in the army intelligence Battalion 601<sup>184</sup>, as “task forces” of Condor Plan’s operations<sup>185</sup>.

The practice of forced disappearance assumed its most violent connotations since March 24, 1976, when Videla headed a *coup d’état* that established a military junta to govern the country. The new President of Argentina was responsible for the kidnapping, torture, and killing of thousands of civilians, hiding

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<sup>175</sup> *Ibid.*

<sup>176</sup> *Ibid.*

<sup>177</sup> J. P. MCSHERRY, *Predatory States*, cit., p. 167.

<sup>178</sup> P. MARCHAK, W. MARCHAK, *God’s Assassins: State Terrorism in Argentina in the 1970s*, London, 1999, p. 109.

<sup>179</sup> *Ibid.*

<sup>180</sup> This abbreviation refers to the Higher School of Mechanics of the Navy, originally an educational facility of the Argentine Navy. It was used as an illegal, secret detention center during the Argentina’s 1976–1983 military dictatorship.

<sup>181</sup> A clandestine center for detention, torture and extermination, which ran from May to November 1976 in Buenos Aires, Argentina, during the last civil-military dictatorship.

<sup>182</sup> P. MARCHAK, W. MARCHAK, *op. cit.*, p. 112.

<sup>183</sup> This abbreviation refers to the Secretariat of Intelligence, that is the premier intelligence agency of the Argentine Republic and head of its National Intelligence System.

<sup>184</sup> This name indicates a special military intelligence service of the Argentine Army whose structure was set up in the late 1970s, active in the Dirty War and Operation Condor, and disbanded in 2000. Its personnel collected information on guerrilla groups and human rights organizations, coordinated killings, and perpetuated other abuses.

<sup>185</sup> J. P. MCSHERRY, *Predatory States*, cit., p. 75.

such acts behind the name of *Proceso de Reorganización Nacional*<sup>186</sup>. Afterward, the clandestine detention centers widened in number to advance the systematic extermination of opponents to the regime. According to the protocol used during the period of detention, the victims had to be deprived of all their personal belongings, their name, and their identity<sup>187</sup>. Another terrifying repression tool used during the Condor Plan was the so-called ‘Death flights’, which consisted of throwing the prisoners from planes directly in the ocean, taking advantage of its currents to leave no trace of them<sup>188</sup>. Emilio Mignone, human rights activist and expert of the Argentinian struggle, estimated that more than 4,000 political prisoners died in this way<sup>189</sup>. The annihilation of human dignity in the individual as a means of torture, and the dissolution of the fate of the victims under the regime coined the concept of *Desaparecido*, a term still used today for those people that disappeared during Videla’s dictatorship, without leaving any trace<sup>190</sup>. On his side, Videla never admitted of having encouraged extrajudicial killings of the alleged opponents detained, referring to them as simply “disappeared”<sup>191</sup>. Indeed, in response to a journalistic investigation of 1979 concerning the location of disappearances, he stated: “The disappeared are just that: disappeared. They are neither alive nor dead. They are disappeared”<sup>192</sup>.

The initial responder to these brutal violations of human rights was *Las Madres de Plaza de Mayo*, an organization created by mothers of Argentinian dissidents who disappeared under the military dictatorship between 1976 and 1983. At first, these mothers demanded the release of their children, while after the establishment of the civilian government in 1983, they began pushing for subjecting the military leaders to legal proceedings for crimes committed during the Videla’s regime<sup>193</sup>. This protest movement favored the democratic transition of Argentina, by influencing public opinion and political strategies of the emerging leaders<sup>194</sup>. However, with the election of Raúl Alfonsín in 1983, the issue of impunity over the crimes of the junta became urgent, leading the Congress to pass a law in December 1986<sup>195</sup> to limit the prosecution of the military officers accused<sup>196</sup>. The divergences

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<sup>186</sup> M. ARRIAGADA, *I Desaparecidos della Dittatura Argentina*, in *Antrocom Online Journal of Anthropology*, vol. 10 no. 1, 2014, p. 127.

<sup>187</sup> *Ibid.*

<sup>188</sup> V. HERNANDEZ, *Painful search for Argentina’s disappeared*, in *BBC Mundo*, March 24, 2013, available online.

<sup>189</sup> W. R. LONG, *Death Flight Tale Rekindles Memories of ‘Dirty War’: Argentina: Ex-officer describes throwing leftists out of planes into sea, Thousands believed victims of this policy*, in *Los Angeles Times*, March 13, 1995.

<sup>190</sup> M. ARRIAGADA, *op. cit.*, p. 127.

<sup>191</sup> H. C., *Death of a “Dirty War” Criminal*, in *The Economist*, Buenos Aires, May 23, 2013.

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

<sup>193</sup> TRECCANI, *Madri di Plaza de Mayo*, in *Treccani.it*, available online.

<sup>194</sup> S. ECKSTEIN, *Power and Popular Protest: Latin American Social Movements*, Berkeley, 1989, p.382.

<sup>195</sup> Law No. 23492 of the National Congress of Argentina, of December 24, 1986, also known as *Ley de Punto Final*, which mandated the end of investigation and prosecution of people accused of political violence after the Trial of the Juntas.

<sup>196</sup> L. KURTZ, *The Mothers of the Disappeared: Challenging the Junta in Argentina (1977-1983)*, International Center on Nonviolent Conflict, Washington DC, July 2010.

within *Las Madres de Plaza de Mayo* regarding the support of this political line, as well as the possibility of accepting financial compensation by the new government, split the organization in different groups<sup>197</sup>.

On December 15, 1983, the new elected President Raúl Alfonsín instituted a “Truth Commission”<sup>198</sup>, better known as the National Commission on the Disappearance of Persons (CONADEP), to investigate the fate of desaparecidos and the gross violations of human rights that took place during the Dirty War<sup>199</sup>. The official number indicated by the *Nunca Más* Report<sup>200</sup> of the CONADEP was 8,960 individuals disappeared between 1976 and 1982. As reported by the Commission, this list is not exhaustive given the profound secrecy that characterized state repression at that time. Other human rights organizations in Argentina estimated that the number of missing persons was about 30,000<sup>201</sup>.

### 2.2.2 CONADEP and its role in the development of transitional justice

*“The question of human rights transcends governments, it is the concern of civil society and the international community”*<sup>202</sup>.

In 1983, one of the most problematic tasks that the resurgent democracy in Argentina had to face was to reconstruct the fate of desaparecidos, in order to offset the demand for social justice spread in the country<sup>203</sup>. Hence, the investigations conducted by the National Commission on the Disappearance of Persons and later described in the *Nunca Más* Report, became significant for giving shape to effective transitional justice policies<sup>204</sup>. The information gathered by CONADEP became the main witness during the Trial of the Juntas<sup>205</sup> and gained international recognition in the fight against human rights violations<sup>206</sup>. In this regard, The *Nunca Más* Report turned out to be the main model of

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<sup>197</sup> TRECCANI, *Madri di Plaza de Mayo*, in *Treccani.it*, available online.

<sup>198</sup> Decree No. 187/83 of the National Congress of Argentina, of December 15, 1983, which created the CONADEP, a “Truth Commission” to investigate the fate of the *desaparecidos* in the country.

<sup>199</sup> J. SCHOFIELD, W. G. JOHNSON, C. M. BECK, *Matériel Culture: The Archeology of Twentieth-Century Conflict*, London and New York, 2004, p.104.

<sup>200</sup> CONADEP, *Nunca Más*, September 20, 1984, available online. Translated as *Never Again*, this report documents most of the investigations that CONADEP led to reveal the truth about desaparecidos.

<sup>201</sup> L. DUBOIS, *The Politics of the Past in an Argentine Working-Class Neighbourhood*, Toronto, 2005, p. 246.

<sup>202</sup> This statement was reported by the National Executive in the first clause of Decree No. 187/83 of the National Congress of Argentina, of December 15, 1983.

<sup>203</sup> CONADEP, *Nunca Más*, September 20, 1984, available online.

<sup>204</sup> E. CRENZEL, *Argentina's National Commission on the Disappearance of Persons: Contributions to Transitional Justice*, in *The International Journal of Transitional Justice*, Vol. 2, Oxford, June 17, 2008, p. 173–191.

<sup>205</sup> This denomination indicates the judicial trial of the members of *de facto* military government that ruled Argentina between 1976 and 1983. Held in 1985, the defendants were: Jorge Rafael Videla, Emilio Eduardo Massera, Roberto Eduardo Viola, Armando Lambruschini, Orlando Ramón Agosti, Omar Graffigna, Leopoldo Galtieri, Jorge Anaya, Basilio Lami Dozo.

<sup>206</sup> E. CRENZEL, *op. cit.*, p. 173-174.

opposition to political violence suffered in Latin America during the 1970s<sup>207</sup>. In other words, CONADEP was able to unveil a new public truth about the disappeared people, to punish the perpetrators of such acts, and determined the creation of specific truth commissions in many other countries of the Southern Cone, for the restoration of institutional justice<sup>208</sup>.

The use of disappearance as a method of repression in Latin American dictatorships highlighted the determination of those responsible to remain unpunished, which was also highlighted by the fragmentary nature of secret military operations<sup>209</sup>. While discussing the creation of a truth commission, President Raúl Alfonsín indicated the need for distinguish three categories of perpetrators of such violations of human rights: “those who planned the repression and issued the corresponding orders; those who acted beyond the orders, prompted by cruelty, perversion or greed; and those who carried out the orders strictly to the letter”<sup>210</sup>. This approach assumed a total lack of critical perception by the offenders in executing the orders of their superiors, encouraging the theory of military indoctrination and recognizing the vertical hierarchical structure of the armed bureaucracy<sup>211</sup>. At the end of the same year, the self-amnesty law<sup>212</sup> was approved by the Congress with the hope of reducing military objections to the prosecutions<sup>213</sup>, since it limited the accountability for political violence to some ranks of the military system and justified state terror as a maneuver to defend the nation from guerrillas’ operations<sup>214</sup>. In addition, the President favored the use of military courts to judge the accused in the first instance, with the possibility of appealing to a civil court, and supported the fulfillment of duty as a legitimate defense for the violations committed, except for senior officials<sup>215</sup>. Created by Presidential Decree No. 187, CONADEP had a six-month period to process the complaints of missing persons, investigate their fate, report the gathered information to the courts, and write a final report<sup>216</sup>.

As stated previously, CONADEP was particularly relevant in providing some key points for the development of transitional justice in those years. First, it demonstrated the importance of working against impunity of military regimes with the shortest possible times. Second, it presented the possibility to let governments and human rights organizations cooperate between each other, despite

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<sup>207</sup> *Ibid.*

<sup>208</sup> *Ibid.*

<sup>209</sup> L. DA SILVA CATELA, *No Habrá flores en la tumba del pasado: La experiencia de reconstrucción del mundo de los familiares de desaparecidos*, Buenos Aires, 2001.

<sup>210</sup> Part of President Alfonsín’s speech of September 30, 1983.

<sup>211</sup> E. CRENZEL, *op. cit.*, p. 177.

<sup>212</sup> Law No. 23492 of the National Congress of Argentina, of December 24, 1986, also known as *Ley de Punto Final*.

<sup>213</sup> HUMAN RIGHTS WATCH, *Argentina: Amnesty Laws Struck Down*, Buenos Aires, June 14, 2005.

<sup>214</sup> E. CRENZEL, *op. cit.*, p. 177.

<sup>215</sup> This proposal was discussed in the House of Representatives on January 5, 1984, and subsequently incorporated in the *Official Bulletin* (December 15, 1983).

<sup>216</sup> E. CRENZEL, *op. cit.*, p. 179.

the widespread mistrust towards institutions. Third, it highlighted how the release of reports that summarize the work of the truth commissions increases the legitimacy of such bodies. Fourth, it recognized the investigations of the truth as fundamental documents for the final decision of the courts concerning the guilt of the military officers during the regime. Fifth, it showed that the display of truth in legal terms tends to eradicate the historicization of violence. Finally, the data presented by CONADEP brought to light how institutional and non-institutional commissions can eclipse the existing dynamics between governments, human rights organizations and civil society<sup>217</sup>.

## 2.3 *The notable case of Chile*

### 2.3.1 *The raise of DINA and the first investigation on breaches of Human Rights*

Following the *coup* that led to the collapse of Allende's government in 1973, the first Chilean political intelligence, also known as National Directorate of Intelligence (DINA), was instituted under Pinochet's regime<sup>218</sup>. This apparatus soon became the coordinating structure for both national security and Condor operations abroad<sup>219</sup>. The DINA was officially established by Decree No. 521 of June 1974<sup>220</sup>, and its operations were conducted under direct control of the military Junta<sup>221</sup>. Contrary to this, the documents collected in the "Chile Declassification Project" clarified that the DINA Commander Contreras coordinated the actions of that apparatus exclusively with President Pinochet, without involving other members of the Junta<sup>222</sup>.

By recognizing the great resource of power that a system like DINA conferred upon the military regime, Pinochet favored its rapid expansion as much as he could<sup>223</sup>. Specifically, he conducted a personal investigation on human rights violations done by armed forces, which ended with the issuing of a secret decree to authorize the detention procedures used until then<sup>224</sup>. In this regard, the document stated: "The directorate of national intelligence, DINA is authorized to conduct detentions of persons suspected of subversion or political activity throughout the country. In any case in the Santiago area in which the armed forces, carabineros or the [erased] in the course of their patrol duties detain

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<sup>217</sup> *Ibid.*

<sup>218</sup> J. P. MCSHERRY, *Predatory States*, cit., p. 71.

<sup>219</sup> *Ibid.*

<sup>220</sup> Decree No. 251 of the Chilean Ministry of the Interior, of June 18, 1974, *Decreto Ley 521*, considering the need for the Supreme Government to collaborate with a specialized agency, able to provide the information required to adapt its resolutions in the field of Security and National Development.

<sup>221</sup> P. KORNBLUH, *The Pinochet File: A Declassified Dossier of Atrocity and Accountability*, New York, 2004, p. 172.

<sup>222</sup> Chile Declassification Project, held by the U.S. Department of State on June 30, 1999, through which secret documents related to the events in Chile between 1973 and 1978 were declassified.

<sup>223</sup> P. KORNBLUH, *op. cit.*, p. 173.

<sup>224</sup> *Ibid.*

individuals engaged in subversive activity, the detainees must be immediately turned over to DINA... DINA will act as the Central coordinator for all detention decrees”<sup>225</sup>.

The uncontrolled growth that DINA undertook raised concerns even among US officials, which associated this phenomenon with the fear that a modern-day Gestapo could have been created<sup>226</sup>. On the other hand, a DINA agent observed that the intelligence apparatus built by Contreras would never have developed so fast without CIA's secret intervention<sup>227</sup>. In particular, the contribution of the latter was essential to establish a collaboration with the National Intelligence Service of Brazil, whose methods of military training and interrogation procedures were taken as the main model for the repression activities used during the Chilean dictatorship<sup>228</sup>.

In March 1990, following the fall of General Pinochet's regime, Patricio Aylwin assumed the control of the government as the Chile's first elected president since 1970<sup>229</sup>. As for other new civil governments of the Southern Cone, he had to face the challenges of reducing the political power of the armed forces and addressing the human rights violations committed by them<sup>230</sup>. About that, the most significant instrument of inquiry that he introduced was the Rettig Commission<sup>231</sup>, also known as the Chilean National Commission on Truth and Reconciliation<sup>232</sup>. The main tasks that the Commission carried out during its mandate were: (1) Describe the functioning of the repressive system adopted by the military regime; (2) Account for each person who disappeared or was kidnapped; (3) Elaborate a proposal for determining measures of reparation; (4) Introduce preventive measures<sup>233</sup>. Even though the Final Report did not fully satisfy the victims of the Regime, it caused a profound social impact, as it collected undeniable evidence to condemn its perpetrators<sup>234</sup>.

On November 28, 2004, the former President Ricardo Lagos addressed the country to disclose the Valech Report, officially the National Commission on Political Imprisonment and Torture Report, a document that collects testimonies of the abuses committed between 1973 and 1990 by the agents of Pinochet's dictatorship<sup>235</sup>. Specifically, this Commission identified the official victims of the regime

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<sup>225</sup> *Ibid.*

<sup>226</sup> *Ibid.*

<sup>227</sup> J. DINGES, S. LANDAU, *Assassination on Embassy Row* (McGraw-Hill paperbacks), New York, 1981.

<sup>228</sup> J. P. MCSHERRY, *Predatory States*, cit., p. 71.

<sup>229</sup> W. S. HEINZ, H. FRÜLING, *Determinants of Gross Human Rights Violations by State and State Sponsored Actors in Brazil, Uruguay, Chile and Argentina: 1960-1990*, London, July 27, 1999, p. 563.

<sup>230</sup> *Ibid.*

<sup>231</sup> Supreme Decree No. 355, of April 25, 1990, issued by President Aylwin with the signatures of the Minister of the Interior and the Minister of Justice.

<sup>232</sup> W. S. HEINZ, H. FRÜLING, *op. cit.*, p. 565-566.

<sup>233</sup> *Ibid.*, p. 566.

<sup>234</sup> *Ibid.*, p. 567.

<sup>235</sup> NATIONAL COMMISSION ABOUT POLITICAL IMPRISONMENT AND TORTURE, *Valech Report*, October 2006, available online.

according to the following criteria: (1) those who have been detained and/or tortured for political reasons by state agents or persons under its control; (2) those who disappeared or have been killed through extra-legal procedures by state agents or persons under its control; (3) those who have been kidnapped for political motives. Furthermore, the cases had to have been occurred between September 11, 1973, and March 10, 1990<sup>236</sup>. The total number of victims identified by the Valech Commission according to these criteria was 40,018<sup>237</sup>, a much higher result than the one reported in the Rettig Report<sup>238</sup>.

The systematic repression of opponents to the Pinochet's regime led some to talk about '*politicide*', a term that properly mentions politically-motivated killings and disappearances as actions to defend the privileged position of dominant groups<sup>239</sup>. However, as the reports cited before show, the state terror has been widely implemented even among civilians, so that the fate of Chilean Desaparecidos is still today "a thorn in [the] soul's country"<sup>240</sup>.

### 2.3.2 *The Rettig Report and the revolution of the judicial branch*

*"Only on a foundation of truth will it be possible to meet the fundamental demands of justice and create the necessary conditions for achieving true national reconciliation"*<sup>241</sup>

On May 9, 1990, President Aylwin officially established the National Commission on Truth and Reconciliation, by publishing the Supreme Decree No. 355 of the Ministry of the Interior in the Diario Oficial. As previously stated, the main task of the Commission was to investigate the grave breaches of human rights during Pinochet's dictatorship so as to promote the reconciliation of all Chileans. Nevertheless, the decree imposed relevant limits on the *modus operandi* of the Rettig Commission: first, the relatively short time allowed only the most serious violations to be analyzed. The abuses listed among them included only forced disappearance of people, arrest, torture, and extra-legal execution committed by government agents, and murders committed by private citizens for political reasons. Second, the decree forbade the Commission to exercise legal functions proper to the courts, as well as to interfere in cases already pending. Clearly, this rule included the prohibition for the Commission to express its opinion concerning the extent to which the defendants might have been involved in the events taken into consideration<sup>242</sup>.

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<sup>236</sup> BBC NEWS, *Chile recognizes 9,800 more victims of Pinochet's rule*, in *BBC World*, August 18, 2011, available online.

<sup>237</sup> *Ibid.*

<sup>238</sup> Indeed, the Rettig Commission identified 2,279 victims of human rights violations. See NATIONAL COMMISSION ABOUT POLITICAL IMPRISONMENT AND TORTURE, *Valech Report*, October 2006, available online, p. 1122.

<sup>239</sup> M. KRAIN, *Democracy, Internal War, and State-Sponsored Mass Murder*, in *Human Rights Review*, April 2000, p. 41.

<sup>240</sup> BBC NEWS, *Finding Chile's disappeared*, in *BBC World*, January 10, 2001, available online.

<sup>241</sup> NATIONAL COMMISSION FOR TRUTH AND RECONCILIATION, *Report of the Chilean National Commission on Truth and Reconciliation*, May 1, 1990, p. 20.

<sup>242</sup> *Ibid.*, p. 29.

Throughout the period between 1973 and 1988, the judicial branch remained the only one of the three state powers fully in force, as underlined by the Decree Law No. 1(3) of September 11, 1973. This was further confirmed at the beginning of the 1974 judicial year in the speech held by the president of the Supreme Court, who stated: “...I can emphatically assert that the courts under our supervision have functioned in the normal fashion as established by the law, that the administrative authority governing the country is carrying out our decisions, and that our judges are accorded the respect they deserve”. Controversially, the historical context influenced the judiciary in the performance of its functions, and the widespread impunity for the crimes committed by the regime's supporters determined mistrust of Chilean citizens towards the institutions<sup>243</sup>.

The judicial branch had at its disposal two instruments to protect the human rights violation by the regime: the principle of habeas corpus and the sanctions for guilty parties<sup>244</sup>. On one side, the writ of *habeas corpus* refers to “A writ that commands an individual or a government official who has restrained another to produce the prisoner at a designed time and place, so that the court can determine the legality of custody and decide whether to order the prisoner’s release”<sup>245</sup>. While Pinochet was in power, the procedures under this principle became completely ineffective, for a variety of reasons: first, the applicable legislation that was limited by some measures issued by the government. For instance, Art. 4 of the Organic Code of Tribunals prevented judges from examining the reasons why the officials demanded the imprisonment, transfer, or exile of certain individuals, according to the separation of powers<sup>246</sup>; Secondly, the practice of the courts, which did not take advantage of their wide margin of action to protect individuals. In detail, the principle of “immediacy” was infringed, detentions without arrest warrant were tolerated, there was no attempt to delegitimize the use of any location as detention center, and, finally, no checks have been carried out to ensure compliance with the standards established for the solitary confinement of a prisoner<sup>247</sup>. On the other side, courts favored the impunity of the violators by not investigating the dynamics of the events. First, they had a very passive attitude in accepting the justifications of government officials; Second, through the amnesty law enshrined in the Decree Law No. 2191 of April 19, 1978<sup>248</sup>, the tribunals prohibited investigations for specific cases involving uniformed troops; Finally, through the decisions of

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<sup>243</sup> *Ibid.*, p. 140-141.

<sup>244</sup> *Ibid.*, p. 142.

<sup>245</sup> THE FREE DICTIONARY, *Writ of Habeas corpus*, in *thefreedictionary.com*, available online.

<sup>246</sup> NATIONAL COMMISSION FOR TRUTH AND RECONCILIATION, *Report of the Chilean National Commission on Truth and Reconciliation*, May 1, 1990, p. 143.

<sup>247</sup> *Ibid.*, p. 145.

<sup>248</sup> Decree Law 2191 of April 18, 1978, approved by Pinochet’s Military Junta. Also known as *Ley de Amnistía*.

November 13, 1973<sup>249</sup>, and August 21, 1974<sup>250</sup>, the Supreme Court stated that the war councils could not be subjected to their judgement<sup>251</sup>.

Undoubtedly, many other cases highlighted the questionable practices used by the courts. Again, this confirmed the weakness of the judicial system during the Pinochet regime<sup>252</sup>.

## **2.4 The Role of the United States: intervention in the domestic affairs of other States?**

### **2.4.1 United States' support to the dictatorships of the Southern Cone**

Operation Condor was the top-secret section of a wider Inter-American strategy of counterinsurgency, led, financed, and overseen by Washington to prevent the spread of Communist ideas in Latin America<sup>253</sup>. In July 1976, a CIA Report addressed the condition of the military regimes of the Southern Cone, and it clarified how they felt threatened, on one side, by “international Marxism and its terrorist exponents”, and on the other side by “the hostility of the uncomprehending industrial democracies misled by Marxist propaganda”<sup>254</sup>. In response, these dictatorships joined forces to form a political bloc to eradicate ‘subversion’<sup>255</sup>. In doing so, the security forces began to coordinate the activities closely, to operate in each other’s countries, and they finally founded Operation Condor to detect and kill the opponents of the “Revolutionary Coordinating Committee<sup>256</sup>”, both in Latin America and in Europe<sup>257</sup>. This campaign was first referred to as the “Third World War” by the Uruguayan Foreign Minister Blanco, an appellative used to justify the violent wartime measures adopted by the regimes, and which emphasized the exercise of power over national borders<sup>258</sup>.

In 2003, a further evidence of the support of the United States to the Argentine military junta was found through the declassification of State Department official documents by the National Security Archive under the Freedom of Information Act<sup>259</sup>. Indeed, in the Memorandum of Conversation

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<sup>249</sup> Decision of the Supreme Court of Chile of November 13, 1873, under which the high court declared itself incompetent to hear appeals against decisions previously taken by military courts.

<sup>250</sup> Decision of the Supreme Court of Chile of August 21, 1974, concerning appeals against sentences of Courts Martial.

<sup>251</sup> *Ibid.*, p. 147.

<sup>252</sup> *Ibid.*, p. 150.

<sup>253</sup> J. P. MCSHERRY, *Predatory States*, cit., p. 241.

<sup>254</sup> H. SHLAUDEMANN, *The “Third World War and South America”*, Unclassified Department of State, Washington DC, July 1976, p. 1.

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

<sup>256</sup> Originally *Junta de Coordinación Revolucionaria* (JCR), it was created in Buenos Aires in 1976, through the fusion of four national movements of Argentina, Chile, Bolivia, and Uruguay, to coordinate revolutionary actions.

<sup>257</sup> *Ibid.*

<sup>258</sup> *Ibid.*, p. 3.

<sup>259</sup> It became effective on July 5, 1967 and allows for the full or partial declassification of previously undisclosed information and files controlled by the United States Government. See C. OSORIO, K. COSTAR, *National Security Archive Electronic Briefing Book No. 104*, December 4, 2003, available online.

between the Secretary of State, Henry Kissinger, and the visiting Argentine Foreign Minister, Admiral Cesar Augusto Guzzetti, the U.S. Secretary stated: ‘Look, our basic attitude is that we would like you to succeed. I have an old-fashioned view that friends ought to be supported. What is not understood in the United States is that you have a civil war. We read about human rights problems but not the context. The quicker you succeed the better [...] The human rights problem is a growing one. Your Ambassador can apprise you. We want a stable situation. We won't cause you unnecessary difficulties...’<sup>260</sup>. Similarly, on October 6, 1976, when the Acting Secretary of State Charles W. Robinson and Assistant Secretary of State for Inter-American Affairs Harry Shlaudeman received Argentine Foreign Minister Guzzetti, the former showed solidarity with the Argentinian regime in fighting subversive groups, even in the adoption of drastic measures<sup>261</sup>. On the other hand, Robinson clarified the United States' inconvenient position with regard to public opinion, explaining that “[...] The United States is an idealistic and moral country and its citizens have great difficulty in comprehending the kinds of problems faced by Argentina... The American people, right or wrong, have the perception that today there exists in Argentina a pattern of gross violations of human rights”<sup>262</sup>.

Concerning CIA's involvement in the case of Chile, US economic and military assistance grew dramatically during Pinochet's regime. In 1962, the CIA received the order to carry out secret operations in support of the Chilean Radical Party<sup>263</sup> and the Christian Democratic Party<sup>264</sup>. The main objectives of the U.S. Central Intelligence Agency were to increase consensus on these parties, improve their organization, and influence their political choices to safeguard its interests in the area. During the 1964 electoral campaign, the main activities of CIA were directed to prevent the victory of Salvador Allende, the leftist candidate to the Presidency. Therefore, this State's Agency financed a vast propaganda work in the mass media to influence public opinion, which led to the victory of Eduardo Frei, the candidate of the Christian Democratic party. When the 1970 presidential elections approached, Allende emerged again as a potential winner. This time, the anti-Communist propaganda policy implemented by the CIA did not get the desired effect, and the growing concern in the Nixon Administration led the United States government to elaborate a more violent interventionist strategy, which consisted in organizing a *coup* to overwhelm Allende's Presidency. Thus, the U.S. Security

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<sup>260</sup> DEPARTMENT OF STATE, *Memorandum of Conversation: Secretary's Meeting with Argentine Foreign Minister Guzzetti*, October 7, 1976, available online, p. 4.

<sup>261</sup> DEPARTMENT OF STATE, *Memorandum of Conversation: U.S.-Argentine Relations*, October 6, 1976, available online, p. 3.

<sup>262</sup> *Ibid.*

<sup>263</sup> Created in 1863 by a split in the Liberal Party, it mainly represented the anticlerical position in the Chilean politics.

<sup>264</sup> By the time of Pinochet's coup, this Party showed its support to the military takeover, believing that the government would quickly be turned over to them by the military. Once it became clear that Pinochet had no intention of doing so, the Christian Democrats began to oppose to it.

Forces established a direct contact with the Chilean Military officers. However, this plan failed with the kidnapping of the Army Commander-in-Chief Schneider, supporter of the Chilean Constitution, and extraneous to the idea of a *coup*, whose death aroused deep turmoil in Chile. Despite Allende's victory, the CIA maintained a strong connection with the Chilean Intelligence apparatus, in order to monitor its activities and eventually provide help. When in late 1972 rumors of a *coup* spread, the National Military and the US government agreed to avoid the involvement of the CIA with this plan, and with the following rise of General Pinochet. Yet, both the benefits that the new dictatorship gained through the U.S. propaganda in Chile and the secret collaboration that the Central Intelligence Agency maintained with the DINA and its Chief Contreras, unquestionably demonstrated the United States' support to the regime<sup>265</sup>.

To sum up, the investigations and the disclosed documents concerning Condor Operation, and accessed until now, highlight the United States' connection with the Latin American dictatorships of the 1970s, as well as its encouragement to the creation of a consortium of intelligence agencies between these countries<sup>266</sup>. The reason for such actions, remains deeply tied to Washington's national security policies, which put Anti-Communism and Counterrevolution as top priorities during the Cold War, and whose implementation was carried out by tolerating grave violations of human rights<sup>267</sup>.

#### 2.4.2 *The doctrine of Non-intervention and the role of the United States*

In analyzing the nature of Operation Condor, it is significant to investigate how the involvement of the United States affected its development, as well as the rise of the Southern Cone dictatorships of the 1970s. These events are strictly related to the infringement of the Principle of Non-Intervention<sup>268</sup>, whose implementation is mainly regulated by the United Nations<sup>269</sup>. This Principle has become one of the fundamental pillars for Latin American countries, especially in relation to the historical defense of their territorial integrity. This lack of trust towards interventionism derives from the following reasons: (a) the imperialist origins of intervention, seen as a political tool to enforce the Western hegemony over less developed countries; (b) the abuses frequently committed by the intervening forces; (c) the unilateral nature of the intervention, which can often lead to an unbalanced relation of

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<sup>265</sup> Report of CIA to Congress, *CIA Activities in Chile*, of September 18, 2000.

<sup>266</sup> J. P. MCSHERRY, *Predatory States*, cit., p. 253.

<sup>267</sup> *Ibid.*, p. 254.

<sup>268</sup> A/RES/25/2625 of the UN General Assembly, of October 24, 1970, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*.

<sup>269</sup> M. KMACIOĞLU, *The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate*, London, 2005, p. 15.

dependence; (d) the consideration that the concept of intervention does not reflect the rationality of states' decisions, unless there are hidden benefits<sup>270</sup> for providing help<sup>271</sup>.

The doctrine of Non-Intervention is not an independent law regulating relations between states, but is part of the Principles enounced in Article 2 of the UN Charter and is mainly expressed by the prohibition of the use or threat of force<sup>272</sup>. In this regard, Article 2(4) of the UN Charter sustains that "All Members shall refrain in their international relations from the threat or use of force against territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations". According to the interpretation given by the General Assembly *Declaration on the Principles of International Law*<sup>273</sup>, the notion of "force" refers exclusively to armed force, by classifying the other types of coercion within the general principles of non-intervention in problematics concerning domestic jurisdiction of a state<sup>274</sup>. In addition, the ban on the use of force or threat of force, includes the concept of "indirect force" for cases in which a state allows the troops of another country to use its territories in the fight against a third state and/or to provide weapons to insurgent groups in another country<sup>275</sup>. In this regard, the *Declaration on the Principles of International Law* states that "Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State. Every State has the duty to refrain from organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force"<sup>276</sup>. On the other hand, jurists agree in considering illegitimate any threat of force to induce another state to cease parts of its territory and/or provide significant political concessions<sup>277</sup>.

Another issue in the interpretation of Article 2 (4) concerns the domestic use of force<sup>278</sup>. Although states may resort to repression against national riots and insurrections without violating the

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<sup>270</sup> Such as the annihilation of the Communist threat through actions of counterinsurgency.

<sup>271</sup> H. VALES, *The Latin American View on the Doctrine of Humanitarian Intervention*, in *The Journal of Humanitarian Assistance*, February 12, 2001, available online.

<sup>272</sup> M. KMACIOĞLU, *op. cit.*, p. 16.

<sup>273</sup> It is important to specify that the Principle of Non-Intervention is not part of *jus cogens*, even if it is connected to the prohibition of the use of force. See A/RES/25/2625 of the UN General Assembly, of October 24, 1970, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*.

<sup>274</sup> B. SIMMA, *The Charter of the United Nations, A Commentary*, Oxford, 1994.

<sup>275</sup> M. KMACIOĞLU, *op. cit.*, p. 18.

<sup>276</sup> A/RES/25/2625 of the United Nations General Assembly, of October 24, 1970, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*.

<sup>277</sup> *Ibid.*

<sup>278</sup> *Ibid.*

aforementioned rule, government intervention is confined to civil conflicts that do not pose a threat to international peace and security<sup>279</sup>. Moreover, international jurisprudence allows a third party to intervene in the armed conflict to assert the legitimate government, but forbids any support to revolutionary groups<sup>280</sup>. An important source for the interpretation of Article 2 (4) of the UN Charter, in which the United States played a very similar role to the one that it had during the implementation of Operation Condor, was *Nicaragua* judgement of 1986<sup>281</sup>. Indeed, since 1981 until September 1984, the United States government provided funds for military and paramilitary activities by the *contras*<sup>282</sup> in Nicaragua, justifying these massive aids as humanitarian assistance. During the proceeding, the speech held by a former officer of CIA revealed that “Covert operations under the CIA proposal, according to the NSC<sup>283</sup> records, [were] intended to: (1) Build popular support in Central America and Nicaragua for an opposition front that would be nationalistic, anti-Cuban and anti-Somoza. (2) Support the opposition front through formation and training of action teams to collect intelligence and engage in paramilitary and political operations in Nicaragua and elsewhere. (3) Work primarily through non-Americans’ to achieve these covert objectives”<sup>284</sup>. These three key points in the US strategy in Nicaragua find correspondence in the Condor Plan: First, the counterinsurgency warfare sustained by the US government was characterized by the same anti-Communist attitude<sup>285</sup>; Second, in 1990 the declassification of U.S. military and CIA manuals revealed how the army and CIA instructors trained Condor's militant activity<sup>286</sup>; Third, by operating in the shadows, the United States protected their position against human rights violations, allowing Latin American regimes to perpetuate most of the acts under Condor. The final decision of *Nicaragua* case stated that “the United States of America, by training, arming, equipping, financing and supplying the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua, has acted ... in breach of its obligation under customary international law not to intervene in the affairs of another State”<sup>287</sup>. About the right of a third party to intervene in a civil conflict following the request of a legitimate government, could U.S. intervention in Latin America to sustain

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<sup>279</sup> B. ASRAT, *Prohibition of Force Under the UN Charter: a study of Art. 2(4)*, Uppsala, 1991, p. 70-71.

<sup>280</sup> M. KMATIOĞLU, *op. cit.*, p. 20.

<sup>281</sup> Judgement of the International Court of Justice, of June 27, 1986, *Case concerning Military and Paramilitary Activities in and against Nicaragua*, p. 48. See also S. FERRARI, *Sovranità, Diritti Umani e Uso della Forza: L'Intervento Armato "Umanitario"*, Roma, 2002.

<sup>282</sup> Right-wing militant groups that were active from 1979 to the early 1990s in opposition to democratic socialist Sandinista Junta of National Reconstruction government in the country.

<sup>283</sup> U.S. National Security Council, which is the main forum used by the U.S. President for consideration of national security and foreign policy matters with senior national security advisors and Cabinet officials.

<sup>284</sup> *Ibid.*

<sup>285</sup> J. P. MCSHERRY, *Predatory States*, cit., p. 16.

<sup>286</sup> *Ibid.* p. 17.

<sup>287</sup> Judgement of the International Court of Justice, of June 27, 1986, *Case concerning Military and Paramilitary Activities in and against Nicaragua*, p. 136.

the emergence of military regimes, such as Pinochet's dictatorship in Chile<sup>288</sup> and Videla's junta in Argentina<sup>289</sup>, be judged to serve legitimate governments if, in doing so, they had overthrown administrations elected in compliance with democratic principles?

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<sup>288</sup> P. KORNBLUH, *Chile and the United States: Declassified Documents Relating to the Military Coup, September 11, 1973*, in *The National Security Archive of The George Washington University*, available online.

<sup>289</sup> DEPARTMENT OF STATE, *Memorandum of Conversation: Secretary's Meeting with Argentine Foreign Minister Guzzetti*, cit.

## CHAPTER 3

### Judicial accountability for Condor Crimes

#### 3.1 Judicial proceedings for “Operation Condor” Crimes in Latin America

##### 3.1.1 The trial of the Argentine Junta

The trial of the Argentine Junta was a significant point of departure in the fight against impunity of human rights violators during the military dictatorships in Latin America. Conducted by an Argentinian civil court, better known as *Cámara Federal de Apelaciones Criminal* (the *Cámara*), this tribunal chose to analyze only 700 relevant cases of the nearly 9,000 episodes of “enforced disappearances” reported by CONADEP<sup>290</sup>.

Although the *Cámara* was not the first court to judge high-ranking military officers for grave violations of human rights, this tribunal distinguished itself from its predecessors<sup>291</sup> for a variety of reasons: (1) in the Nuremberg trials of Nazi officers, as well as in similar cases, the defendants represented a defeated power after the end of the conflict, while the Argentine junta emerged victorious from the Dirty War; (2) The Argentine tribunal applied exclusively the national criminal law in force during the trial, while the Nuremberg proceedings took into consideration the international jurisprudence; (3) the *Cámara* confined its judgement on the crimes committed by the junta while in charge of the government, without considering the violent *coup* organized by the military officers<sup>292</sup>.

Shortly after the rise to power of the New President Alfonsín, the government promulgated a decree by which it handed over to the *Consejo Supremo Militar*, the highest military court, the task of judging members of the first three juntas that operated during the regime, for the grave breaches of human rights committed in those years<sup>293</sup>. This decree allowed both the prosecution and the defense to appeal to the *Cámara Federal* and stated the right of the *Cámara* to formulate a verdict *de novo*<sup>294</sup> in the event that the *Consejo* failed to provide its judgement within six months<sup>295</sup>. To avoid further

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<sup>290</sup> P. K. SPECK, *The Trial of the Argentine Junta: Responsibilities and Realities*. Miami, April 1, 1987, p. 493.

<sup>291</sup> Such as the proceedings against the Japanese General Yamashita after World War II, the trials for the massacre at My Lai in Vietnam, and the trial of the Greek junta after its fall in 1974.

<sup>292</sup> P. K. SPECK, *op. cit.*, p. 494.

<sup>293</sup> Decree 158/83 of the Poder Ejecutivo Nacional, of December 15, 1983, concerning the responsibilities of the *Consejo Supremo Militar* in the exercise of its legal functions.

<sup>294</sup> When a court hears a case *de novo*, it does not take into account the legal conclusions made by the previous court to hear the case.

<sup>295</sup> Decree 158/83 of the Poder Ejecutivo Nacional, of December 15, 1983.

slowdowns in issuing a final decision, both courts were required to operate according to a shorter procedure, better known as *juicio sumario en tiempo de paz*<sup>296</sup>. In September 1984, the Council declared that the political strategies used by the junta during the Dirty War were legitimate, accusing them exclusively of negligence towards the actions of their subordinates<sup>297</sup>. This verdict focused on two further issues: (1) the responsibility of those who acted as subordinates during the regime; (2) the illegal actions of the victims of forced disappearance as a justification for the atrocities committed against them<sup>298</sup>.

In October 1984, the *Cámara Federal* took into analysis the case of the Argentine junta, after announcing that it would have released a final decision *de novo*<sup>299</sup>. In February of the following year, the *Cámara* began the trial, in which the victims of the 700 cases considered, witnessed directly for the abuses suffered<sup>300</sup>. In response, the defense never denied the atrocities of the Dirty War, but tried to justify the legal meaning of such actions<sup>301</sup>. Their main point was that the civil struggle of the country could not guarantee the respect of all constitutional norms<sup>302</sup>. In other attempts to diminish the responsibility of the junta, the defense stated that some violent practices were connected to orders given by the previous governments and that such acts were unassailable if related to the fight against subversive groups<sup>303</sup>. On December 9, 1985, the final decision of the trial against Argentina's junta was announced: Videla and Massera<sup>304</sup> were sentenced to life imprisonment; Agosti, Viola, and Lambruschini<sup>305</sup> were condemned with shorter periods of reclusion; the remaining defendants were released<sup>306</sup>.

The *Cámara* found enough evidence to show that the junta directly coordinated the activities of repression during the Dirty War<sup>307</sup>. Specifically, it focused on the complexity of such operations, which could not have been realized without the logistical support of the existing institutions<sup>308</sup>, and

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<sup>296</sup> Law 23049 of the *Consejo Supremo de las Fuerzas Armadas*, of February 9, 1984, regulating the *Summary trial in peace time*. Specifically, these procedures "... shall only take place in peacetime, where immediate repression of a crime is necessary to maintain the morale, discipline, and military spirit of the armed forces, and in case of serious crimes...", and is defined according to art. 502-504 of the *Código de Justicia Militar*.

<sup>297</sup> P. K. SPECK. *op. cit.*, p. 501.

<sup>298</sup> *Ibid.*

<sup>299</sup> BUENOS AIRES HERALD, *Appeals Court to Handle Junta Trials*, in *Buenos Aires Herald*, October 5, 1984, available online.

<sup>300</sup> P. K. SPECK, *op. cit.*, p. 502.

<sup>301</sup> *Ibid.*

<sup>302</sup> *Ibid.*

<sup>303</sup> *Ibid.*

<sup>304</sup> He was an Argentine Naval military officer, as well as one of the major executives of the 1976 coup.

<sup>305</sup> They were major officers during Videla's dictatorship, which actively participated to the National Reorganization Process.

<sup>306</sup> L. CHAVEZ, *Argentine Court finds five guilty for junta roles*, in *The New York Times*, December 10, 1985, available online.

<sup>307</sup> P. K. SPECK. *op. cit.*, p. 506.

<sup>308</sup> *Ibid.*

justified its juridical opinion in relation to the three main defenses of the offenders: necessity, obedience to the law, and self-defense or defense of others<sup>309</sup>. Regarding the first argument, the *Cámara* pointed out that the revolutionary onslaught against which the military junta claimed to have fought was not an imminent threat, and that the alleged humanitarian violations that leftist militants could have done were no longer serious than those supported by the regime<sup>310</sup>. In addition, the court noted that the defendants could have fought subversion through legal means, such as those statutes and decrees that since 1973 increased military power in the country<sup>311</sup>. Concerning obedience to the law, the defense directly quoted a decree of the Peronist government, stating that “the Armed forces ... will proceed to carry out whatever military and security operations are necessary to *destroy the activity* of subversive elements in the entire national territory”<sup>312</sup>. The court not only stressed the incongruity of overthrowing a government whose orders were then maintained, but also underlined the illegality of the Peronist government in abolishing the Constitution<sup>313</sup>. In dealing with the motivation of self-defense and defense of others, the *Cámara* suggested again that legal action against the subversive groups would have sufficed<sup>314</sup>. Furthermore, the tribunal rejected the doctrine of *antijuricidad material*<sup>315</sup>, underlining that the efforts of the military junta to keep the disappearances hidden was a clear sign of the unacceptability of such acts for the people of Argentina<sup>316</sup>. Finally, while accepting the “state of war” label given by the defendants, the judges cited Art. 23 of the Argentine Constitution<sup>317</sup>, which limits the military power even in cases of turmoil, and that consequently denies the principle of *inter arma enim silent leges*<sup>318</sup>.

Another issue that the process brought to light was the responsibility of high-ranking officers belonging to the military junta for crimes committed by their subordinates<sup>319</sup>. In this regard, the

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<sup>309</sup> *Ibid.*

<sup>310</sup> *Ibid.*

<sup>311</sup> *Ibid.*

<sup>312</sup> *Ibid.*, it refers to Decree no. 2772/75, of October 1975, issued by President Martínez de Perón, which extended to the rest of the country the powers given by Decree 265/76, of February 1975, authorizing the armed forces to carry out any military action against the subversive groups in the province of Tucumán.

<sup>313</sup> P. K. SPECK, *op. cit.*, p. 508.

<sup>314</sup> *Ibid.*

<sup>315</sup> Indicating an act that may be criminal and fall outside statutory justifications, yet be excused because it conforms to a society's true values.

<sup>316</sup> *Ibid.*

<sup>317</sup> Art. 23 of the Constitution of the Argentine Nation: “In the event of domestic disorder or foreign attack endangering the full enforcement of this Constitution and of the authorities hereby established, the province or territory which is in a turmoil shall be declared in a state of siege and the constitutional guarantees shall be suspended therein. But during such a suspension of the President of the Republic shall not pronounce judgement or apply penalties on his own. In such case, his power shall be limited, with respect to persons, to their arrest or transfer from one place of the Nation to another, should they not prefer to leave the Argentine territory”.

<sup>318</sup> Literally, “in time of war, the laws are disregarded”.

<sup>319</sup> P. K. SPECK. *op. cit.*, p. 509.

defense stated that, according to national law<sup>320</sup>, only those who execute the act are accountable for it, that when a violation is carried out by an independent human being there can be no condemnation of his commanders, and that even though the junta instigated such acts, it had to be processed together with the lower-ranking officers<sup>321</sup>. In the attempt to find an answer to this matter, the court took into consideration Article 514 of the Còdigo de Justicia Militar, which specified: “When a crime has been committed by executing a military order, the superior who gave it shall be held solely responsible, and the subordinate shall be considered an accomplice only when he has committed excesses in carrying out the said order”<sup>322</sup>. Conversely, Art. 45 of the Còdigo Penal, states that: “Those who take part in the execution of a crime or lend the author or authors aid or cooperation without which it could not have been committed, will suffer the punishment established for that crime. The same punishment will fall on those who directly cause another to commit the crime”. The court found in these two statements greater adherence to the control theory, explained according to the concept of ‘el aparato organizado de poder’<sup>323</sup>. This notion suggested that commanders derived their power not merely from direct relationships with the executors, but from the entire institutional apparatus conceived as an instrument of control<sup>324</sup>. In other words, even if a subordinate refused to obey an order of the junta, he would have just been replaced by another officer<sup>325</sup>. This outcome did not neglect the judicial liability of subordinates, for which further proceedings were held<sup>326</sup>. Besides, by following these several considerations, the court accepted the accusation against defendants for crimes committed by their subordinates during the Dirty War<sup>327</sup>.

### 3.1.2 Further Developments: Accountability for Condor Crimes in South America

In the following years, several criminal investigations of Operation Condor's activities in Latin America have been conducted. The data gathered under the “Justice without Borders” Project identifies 23 proceedings concerning this matter, mainly held in Uruguay, and at various stages of the judicial process<sup>328</sup>. In detail, 43 individuals have already been sentenced, while other 77 are still

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<sup>320</sup> Art. 45-49 of the Argentine Còdigo Penal, which recognize different grades of accountability for the participation in a criminal action.

<sup>321</sup> P. K. SPECK, *op. cit.*, p. 510.

<sup>322</sup> This Article is also the main source for the “due obedience” doctrine. The Law of Due Obedience was introduced in Argentina on June 4, 1987. According to this notion, all officers and their subordinates cannot be legally punished for crimes committed during the dictatorship, since they were just obeying orders of their commanders.

<sup>323</sup> Translated, “the organized apparatus of power”.

<sup>324</sup> *Ibid.*

<sup>325</sup> *Ibid.*

<sup>326</sup> *Ibid.*

<sup>327</sup> P. K. SPECK. *op. cit.*, p. 512.

<sup>328</sup> F. LESSA, *Justice without Borders: Accountability for Plan Condor Crimes in South America*, Oxford, 2016.

awaiting trial<sup>329</sup>. At the same time, the cases of victims that have already been considered amount to 247, even if most of them have not been inspected or have not received a definitive verdict yet<sup>330</sup>.

In Argentina, Latin American regimes were examined by two separate courts, of which the former operated within the "Plan Condor" trial launched in 1999, and the second in the "Automotores Orletti" trial, investigating detention centers in which the Uruguayan and Argentinean militants carried out most of the human rights violations<sup>331</sup>. Undoubtedly, the judicial proceedings that obtained the greatest results are the ones before the Federal Criminal Tribunal 1 in Buenos Aires, that included three segments of the Plan Condor and one of the Automotores Orletti investigation<sup>332</sup>. Before the court made the final decision, 174 cases of victims of Condor activities were examined, of which 65 were linked to Automotores Orletti, 107 to the military intervention of the apparatus, and the remaining ones to both<sup>333</sup>. Accused of illegal detention and torture, as well as of the creation of a criminal consortium, many of the 27 defendants died before the end of the trial, including the Argentinian dictator Jorge Rafael Videla<sup>334</sup>. Finally, on May 27, 2016, the court pronounced its verdict<sup>335</sup>, condemning 18 former military officers of Condor<sup>336</sup>. According to Gastón Chillier, the executive director of CELS<sup>337</sup>, "What distinguishes this trial from other cases involving isolated crimes committed by Operation Condor is that the defendants now face[d] being condemned for being members of an illegal association"<sup>338</sup>.

At the same time, the Chilean trial under Operation Condor has been divided into two separate proceedings: *Rol 2182-98 CONDOR* that investigates the actions of 68 military agents for 12 casualties, and *Rol 2182-98 CONDOR BIS*, which analyzes cases of 11 victims<sup>339</sup>. The main violation of human rights taken into consideration by the court is enforced disappearance, which led the

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<sup>329</sup> MINISTERIO PÚBLICO FISCAL, *La Judicialización De la Operación Cóndor*, in *Informe De La Procuraduría De Crímenes Contra la Humanidad*, Argentina, November 2015.

<sup>330</sup> *Ibid.*

<sup>331</sup> *Ibid.*

<sup>332</sup> F. LESSA, *Justice without Borders*, cit.

<sup>333</sup> *Ibid.*

<sup>334</sup> *Ibid.*

<sup>335</sup> Judgement of the Federal Criminal Tribunal 1, of May 27, 2016, in Buenos Aires.

<sup>336</sup> U. GOÑI, *Operation Condor conspiracy faces day of judgement in Argentina court*, in *The Guardian*, May 26, 2016, available online.

<sup>337</sup> Known as *Centro de Estudios Legales y Sociales*, it is an Argentine non-governmental organization based in Buenos Aires and oriented to the promotion and defense of human rights with the aim of strengthening the democratic system.

<sup>338</sup> *Ibid.*

<sup>339</sup> F. LESSA, *Final Report on the Workshop Forty years on from Operation Condor*, of December 18, 2015.

prosecutors to focus also on extrajudicial killings<sup>340</sup>. On February 16, 2016, the court proceeded to the trial stage, by questioning the allegations of 7 instances of kidnapping and 5 cases of murder<sup>341</sup>.

➤ **Table 1. Judicial proceedings for Condor Crimes in Latin America**

These data are reported in Table 1 on the Judicialization of Condor in South America of the “Justice without Borders” Project.

	Case file name	Crime(s) and number of victims	Defendant(s)	Status	Countries involved
ARG	Arancibia Clavel	Murder; joint criminal enterprise - 2	1	Verdict (2004)	CHI; ARG
ARG	Automotores Orletti I	Murder, kidnapping, torture - 65	4	Verdict (2011)	ARG; URU
ARG	Automotores Orletti II	Kidnapping, torture - 67	1	Verdict (2016)	ARG; URU; CHI; CUB
ARG	Automotores Orletti III y IV	Murder, kidnapping, torture - 9	4	Trial	URU; ARG
ARG	Plan Condor I, II, y III	Kidnapping, joint criminal enterprise - 107	17	Verdict (2016)	ARG; URU; CHI; PAR; BOL
ARG	Plan Condor IV	348		Pre-Trial	ARG; URU; CHI; PAR; BOL; PER; BRA
CHI	Orlando Letelier	Homicide – 1	2	Verdict (1995)	CHI; EEUU
CHI	Carlos Prats	Murder, joint criminal enterprise - 2	9	Verdict (2010)	CHI; ARG
CHI	Operacion Condor	Kidnapping, murder – 12	68	Trial	CHI; ARG
CHI	Operacion Condor BIS	Kidnapping - 11		Pre-Trial	CHI; ARG
URU	Anatole y Victoria Julién	Enforced disappearance, appropriation of minors - 2		Pre-Trial	URU; ARG; CHI
URU	Antonio Viana	Torture - 1		Pre-Trial	URU; ARG
URU	Edison Inzaurrealde y Nelson Santana	Enforced disappearance, kidnapping - 2		Archived	URU; PAR; ARG
URU	Fusilados de Soca	Murder, appropriation of minors, identity theft - 5		Pre-Trial	URU; ARG
URU	Grupos de Acción Unificadora	Murder, enforced disappearance, refoulment - 37	2	Verdict (2009)	URU; ARG
URU	Hector Giordano	Enforced disappearance – 1		Pre-Trial	URU; ARG
URU	Maria Claudia Gelman	Appropriation of minors, enforced disappearance - 1	5	Trial	URU; ARG
URU	Montoneros	Appropriation of minors, torture, kidnapping, enforced disappearance, joint criminal enterprise - 22		Pre- Trial	URU; ARG
URU	Orletti (“primer vuelo”)	Torture, murder, kidnapping, enforced disappearance - 25		Pre-Trial	URU; ARG
URU	Orletti (Soba y otros)	Enforced disappearance, kidnapping - 28	8	Verdict (2011)	URU; ARG

<sup>340</sup> *Ibid.*

<sup>341</sup> PODER JUDICIAL, *Ministro Mario Carroza dicta Acusación por Secuestros y Homicidios calificados en “Operación Cóndor”*, in *Aracuanía Cuenta*, February 23, 2016.

URU	Universindo Rodriguez y Lilian Celiberti	Torture, kidnapping – 4		Pre-Trial	URU; BRA
URU	Washington Barrios	Kidnapping – 1		Merged with Orletti (Soba and others)	URU; ARG
URU	Zelmar Michelini	Murder – 4	2	Verdict (2011)	URU; ARG

### 3.2 The Italian trial over crimes related to “Operation Condor”

The investigations conducted by the Italian judicial authorities, guided by the Assistant Public Prosecutor Giancarlo Capaldo, regarding the responsibilities for serious human rights violations committed under the Condor Operation, began in 1999<sup>342</sup>. The trial took into consideration the cases of 43 victims of Condor with Italian origins, which included also 20 Uruguayan citizens for which the sole defendant was Jorge Nestor Troccoli, former officer of *Fusileros Navales*<sup>343</sup>. Moreover, 33 were the defendants judged by the court, all members of the Condor Intelligence apparatus<sup>344</sup>.

Given the absence of Italian legal norms concerning crimes of forced disappearance and torture, the accused were charged with multiple aggravated murder<sup>345</sup>. In this regard, Italy actively participated in the *Ad hoc* Working Group for the ratification of the *International Convention for the Protection of All Persons from Enforced Disappearance*, with the aim of establishing an international legal instrument for the protection of individuals from the phenomenon of forced disappearance<sup>346</sup>. On July 29, 2015, the Chamber of Deputies and the Senate of the Republic approved the Convention in Italy, through Law No. 131<sup>347</sup>. However, the ratification of the Convention did not include the offense of forced disappearance in the domestic jurisprudence, clarifying the existence of similar norms of the Penal Code that already embody this practice<sup>348</sup>.

On January 17, 2017, the III Court of Assizes of Rome emanated its final verdict on the “Plan Condor” trial, by condemning 8 offenders to life imprisonment, granting 19 absolutions, and excluding the

<sup>342</sup> ITALIAN COALITION FOR CIVIL LIBERTIES, *Plan Condor: un processo italiano per la giustizia dei desaparecidos*, January 18, 2017, available online.

<sup>343</sup> This denomination indicates the Corps of Naval Fusiliers of the Eastern Republic of Uruguay. See ITALIAN COALITION FOR CIVIL LIBERTIES, *op. cit.*

<sup>344</sup> *Ibid.*

<sup>345</sup> *Ibid.*

<sup>346</sup> Ratification of execution of the International Convention for the Protection of All Persons from Enforced Disappearance, adopted by the UN General Assembly on December 20, 2006, Bill no. 2674 discussed in the Chamber of Deputies on October 16, 2014.

<sup>347</sup> Law No. 131 approved by The Chamber of Deputies and the Senate on July 29, 2015.

<sup>348</sup> M. CASTELLANETA, *L'Italia ratifica la Convenzione sulle sparizioni forzate ma non introduce il reato ad hoc nel codice penale*, in *Notizie e commenti sul diritto internazionale e dell'Unione Europea*, September 10, 2015, available online.

remaining defendants mostly because of their death<sup>349</sup>. The ones to be condemned were the main political-military officers active during Operation Condor, which included Luis Garcia Meza Tedaja (Ex-President of Bolivia), Luis Arce Gomez (Ex Minister of the Interior in Bolivia), Juan Carlos Blanco (Ex Minister of Foreign Affairs in Uruguay), Herman Jeronimo Raminez, Francesco Morales Cerruti Bermudez (Ex-President of Perú), Valderrama Ahumana (retired Colonel of the Chilean Army), Pedro Richter Prada (Ex-Prime Minister in Perú), and German Ruiz Figueroa (Former Head of Secret Services in Chile)<sup>350</sup>. However, the lack of sufficient evidence towards some perpetrators of the repressive actions of counterinsurgency regarding the murders committed, led the court to decide for their release<sup>351</sup>. In this concern, the most relevant case is that of the Italo-Uruguayan torturer Jorge Nestor Fernandez Troccoli, who confessed his crimes in an open letter to the newspaper *El Pais* in 1996, in which he stated that he had abused and killed prisoners of the military regime between 1973 and 1985<sup>352</sup>. In addition, he supported his innocence in front of the Italian court, by appealing to the Principle of Due Obedience in relation to the orders of his commanders<sup>353</sup>. Further testimony of the victims directly involved in the crimes committed by Troccoli, who after having been tortured and held in the Uruguayan Cooperative Center recognized the voice and face of their assailant, could not prevent the absolution of the accused<sup>354</sup>.

The “Plan Condor” trial could be examined in Italy for two main reasons: (1) the large number of Italian citizens, either migrants or their descendants, who disappeared or were killed during the Latin-American dictatorships<sup>355</sup>; (2) the existence of an Italian law<sup>356</sup> that allows national legal bodies to prosecute *in contumacia*<sup>357</sup> the presumed perpetrators of crimes against Italian citizens in other countries<sup>358</sup>. The Italian court was the first to treat Operation Condor as a transnational associative crime, precisely investigating the secret co-ordination between the various intelligence services in Latin America, as well as the influence of CIA’s control<sup>359</sup>. As Patrizio Gonnella, President of the

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<sup>349</sup> It is the case of the former Chilean commander of DINA Manuel Contreras and the Argentine dictator Jorge Rafael Videla. See FARODIROMA EDITING, *Le motivazioni della sentenza di condanna per l’operazione Condor, Una decisione che fa onore al nostro Paese*, in *FarodiRoma*, May 14, 2017, available online.

<sup>350</sup> *Ibid.*

<sup>351</sup> *Ibid.*

<sup>352</sup> D. IOZZI, *The Italian Trial on Operation Condor: Justice from Abroad*, Council on Hemispheric Affairs, November 21, 2016, available online.

<sup>353</sup> *Ibid.*

<sup>354</sup> *Ibid.*

<sup>355</sup> A. LEOGRANDE, *Cos’è il Plan Condor e perché è finito sotto processo in Italia*, in *Internazionale*, January 19, 2017, available online.

<sup>356</sup> See Art. 420 bis c.p.p., modified by Law 67, of April 28, 2014, which introduced an *ad hoc* discipline of the defendant’s in absentia process.

<sup>357</sup> Especially in criminal and civil procedural law, it indicates the condition of those who, although having an obligation to stand before a judge who examines a trial in relation to him, omits to do so. In this case, it does not penalize the work of the court, which can operate even in the absence of the defendant.

<sup>358</sup> ITALIAN COALITION FOR CIVIL LIBERTIES, *op. cit.*

<sup>359</sup> *Ibid.*

Italian Coalition for Civil Liberties, stated, this interpretation of Operation Condor “... is a revolutionary process, since it gave the possibility to address a topic that was almost forgotten, at least in Europe, and by offering at the same time a contribute to the truth and justice concerning the tragic events that took place in some Latin-American countries, during the 1970s of the last century”<sup>360</sup>.

### ***3.3 Difficulties and challenges in investigating crimes related to “Operation Condor”***

#### ***3.3.1 The main obstacles in investigating Operation Condor***

In investigating the grave violations of human rights that took place during Operation Condor, three main thematic areas were identified: (1) The judicial construction of Operation Condor Transnational Crimes; (2) The necessary resources to inquire Operation Condor Transnational Crimes; (3) Access to proofs of Condor violations and communication among judicial bodies and civil society<sup>361</sup>.

In the judicial construction of Operation Condor Transnational Crimes, the main difficulties concerned: the lack of proper norms for sanctioning such crimes, and the role of the victims in the complaint of the abuses suffered; The judicial interpretation of Condor crimes; The need to understand the overall background of Operation Condor; The identification of cases specifically linked to Condor Crimes. In the analysis of the first point, the judicial proceedings held in Uruguay and Chile became concrete examples of the unsuitability of procedural law in examining Condor crimes, since the defendants were judged by applying rules referred to common crimes, not to systematic offenses. Similarly, in the “Plan Condor” trial held in Italy, the lack of *ad hoc* measures describing the procedural stages in considering crimes such as torture and forced disappearance, led the judges to formulate their final verdict according to the charge for multiple aggravated murder, instead of referring to the real nature of the perpetuated crimes. Therefore, in absence of specific rules in dealing with Condor offenses, the courts were not able to indicate penalties that fully considered the gravity of such actions, leaving some aspects unpunished. In considering the role of the victims of Operation Condor, the cases of Uruguay and Chile highlighted the failure of the State to accept its responsibility to investigate and punish the perpetrators of such crimes. Indeed, during these judicial trials the victims had to directly report the abuses suffered, without being able to participate actively in the trial stage. An additional and controversial aspect when looking at the sentences issued on Condor acts is the invisibility that was given to gender violence<sup>362</sup>. Accordingly, the crimes of sexual violence were not directly mentioned in the *Nunca Más* report published by CONADEP in 1984

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<sup>360</sup> FARODIROMA EDITING, *op. cit.*

<sup>361</sup> F. LESSA, *Justice without Borders*, cit.

<sup>362</sup> *Ibid.*

among the means of torture used within the Detention Centers<sup>363</sup>. Still, despite these violent practices have been emphasized by several testimonies during the Trial of the Junta in Argentina, the alleged leaders were sentenced exclusively for killings, torture, enforced disappearance and illegal deprivation of liberty carried out during the regime<sup>364</sup>. Concerning the second point, the main issues surrounding the characterization of Condor crimes emerged in the legal interpretation issued during the Uruguayan trials. Specifically, on May 6, 2011, the Supreme Court of Uruguay released two military officers accused of forced disappearance enacted during the military dictatorship, since this crime was included in the national legislation only in 2006, in a posterior period to the events analyzed<sup>365</sup>. This final decision was criticized by the Inter-American Court of Human Rights<sup>366</sup>, especially since only two years before the Uruguayan government ratified the *International Convention for the Protection of All Persons from Enforced Disappearance*, accepting the obligation to prosecute perpetrators and provide reparation to the victims of such crimes<sup>367</sup>. Moreover, Article 72 of the Uruguay Constitution states: “The enumeration of rights, duties and guarantees made in this Constitution does not exclude others that are inherent in human beings or which are derived from a republican form of government”, which refers also to the applicability of international treaties in Uruguay to defend individuals from crimes against humanity. Therefore, this case highlights how very often issues may arise in the interpretation of juridical sources by courts, rather than in the absence of relevant legal norms<sup>368</sup>. According to the third point, the identification of the context within which Operation Condor was implemented and the clarification of Condor *modus operandi* in all its components could be convenient in determining a systematic procedure to be used in the future prosecution of similar cases. This observation follows the model of Argentina's lawsuit 13/84, implemented against the Military Junta, which proved the existence of a complex consortium of Intelligence Agencies in Latin America, and whose legal findings were used in all subsequent proceedings concerning the repressive military actions used by the South American regimes in the 1970s. The last issue about the judicial construction of Operation Condor transnational crimes concerns the lack of proper criteria to identify Condor Cases. Indeed, concrete practices show that each country has taken different measures in this respect. In Argentina, all cases of foreign citizens illegally deprived of their liberty were identified *prima facie* as potential victims of Operation Condor, without considering the difference between activists against the regimes and individuals belonging to

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<sup>363</sup> A. L. ZAVALA GUILLÉN. *Argentinian Transitional Justice Process: Women Behind*, in *Journal of Peace, Conflict and Development*, Sheffield, April 20, 2013.

<sup>364</sup> *Ibid.*

<sup>365</sup> Decision of the Supreme Court of Uruguay, of May 6, 2011. See HUMAN RIGHTS WATCH, *Uruguay: Prosecute Dictatorship Era Abuses, Crimes Against Humanity Not Subject to Statutes of Limitation*, June 10, 2011, available online.

<sup>366</sup> Judgement of the Inter-American Court of Human Rights, of February 24, 2011, *Case Gelman v. Uruguay*.

<sup>367</sup> *Ibid.*

<sup>368</sup> F. LESSA, *Justice without Borders*, *op. cit.*

political groups. On the other hand, Chile did not follow a systematic framework to identify Condor cases, leading to the inclusion of victims of these abuses in other trials, such as the ones involving the secret Detention Center of Villa Grimaldi<sup>369</sup>.

More briefly, in the examination of the necessary resources to inquire Operation Condor Transnational Crimes, only two issues were identified: the discontinuity with which the investigations were conducted and the absence of multidisciplinary teams in the analysis of the documents collected to support these allegations. The lack of continuity in observing Condor crimes was caused by the change of judges and judicial operators at every stage of the proceedings, as it often happened in Chile and Uruguay, causing even delays in the announcement of the final verdict. On the other hand, several experts stressed the importance of setting up multidisciplinary teams to investigate Condor Crimes, specifically composed of forensic doctors, anthropologists, psychologists, historians, and so on, as was the case in Argentina. This awareness raised by looking at the complexity of the Intelligence apparatus analyzed, for which a mere judicial analysis of the facts would not have sufficed<sup>370</sup>.

Finally, by questioning the access to proofs of Condor violations and communication among judicial bodies and civil society, the researchers identified four main problems. First, the inability of the courts to have access to all documents related to Operation Condor<sup>371</sup>, including for example the Paraguayan “Archives of Terror”, found on December 22, 1992 by the human-activist Martín Almada<sup>372</sup>. This problem is mainly caused by the military nature of such information, generally collected during the dictatorships by Condor Intelligence Forces and other Special Agencies<sup>373</sup>. The second relevant matter concerns the existence of multiple judicial proceedings in several countries<sup>374</sup>. Due to the high number of guiding interpretations issued by courts on this topic, the complexity of using pre-existing sources in dealing with future similar violations has been increased. A third pertinent issue deals with the extremely slow communication between countries, following the request to obtain information proving the crimes committed within Operation Condor. Indeed, despite the technological advances of recent years, states can still wait months, if not years, to get a useful response. In conclusion, the fourth point draws attention to the lack of expertise on Operation Condor, especially within the public officials who have to investigate the grave violations of human rights perpetuated during the Latin-

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<sup>369</sup> *Ibid.*

<sup>370</sup> *Ibid.*

<sup>371</sup> *Ibid.*

<sup>372</sup> S. WATTS, *How Paraguay's 'Archive of Terror' put Operation Condor in focus*, in *BBC News*, December 22, 2012, available online.

<sup>373</sup> Such as the CIA Declassified Documentation provided by the US National Security Archive, during the historic Trial held in Argentina.

<sup>374</sup> F. LESSA, *Justice without Borders*, cit.

American regimes of 1970s. In this regard, the development of transnational justice requires specialization and training of special prosecutors dealing with Condor trials<sup>375</sup>.

### 3.3.2 *Recommendations for further Developments*

In order to encourage future developments in Condor investigations, and to accelerate the formulation of a final verdict for several cases, three main recommendations have been formulated<sup>376</sup>.

First, the need to set up interdisciplinary teams capable of analyzing the complexity of the Condor system, consisting of experts with specific backgrounds, such as historians and analysts interpreting carefully the disclosed documents, psychologists and social workers, to provide support to victims of forced disappearance, torture and deprivation of liberty, in the release of testimonies during the pre-trial phase, forensic doctors for asserting the identity of Condor victims, and, finally, translators, for the analysis of documents written in different languages<sup>377</sup>.

Second, the creation of a database containing most of the sources and proofs related to Operation Condor. In detail, this information gatherer would contain all the information collected during the judicial proceedings held in various countries, as well as a large part of the disclosed files of the National Security Archives and the recordings of the Intelligence Agencies during the Latin American regimes inquired. On the other hand, it could be organized according to different levels of access for lawyers, judges, and prosecutors, with public consultation only for the most general sources<sup>378</sup>.

In the end, the experts' final recommendation emphasizes the importance of strengthening channels to guarantee a better flow of information, so as to facilitate consultation of different sources during the trials against Operation Condor's offenders. The main objectives in this regard would be to: (1) reduce the processing time for receiving legal assistance from other countries; (2) establish Memoranda of Understanding between states to identify a common line of action at the international level; (3) Finally, work on the drafting of new conventions for judicial cooperation at the transnational level, facilitating the direct exchange of documents and information between courts investigating Operation Condor<sup>379</sup>.

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<sup>375</sup> *Ibid.*

<sup>376</sup> F. LESSA, *Justice without Borders*, cit.

<sup>377</sup> *Ibid.*

<sup>378</sup> *Ibid.*

<sup>379</sup> *Ibid.*

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## **Riassunto dell'elaborato finale in lingua italiana**

*“Quelli che non ricordano il passato sono condannati a ripeterlo...Se comprendere è impossibile, conoscere è necessario” – Primo Levi*

In queste pagine, ho tentato di riassumere i punti più salienti del mio lavoro di tesi, che affronta il tema della sparizione forzata di persone secondo i principi del diritto internazionale. In particolar modo, ho focalizzato la mia attenzione sull'analisi dell'Operazione Condor, e sul supporto che gli Stati Uniti diedero ai regimi militari dell'epoca.

La Sparizione Forzata è uno strumento sistematico di repressione di massa generalmente associato ai regimi politici e militari che si formarono in America Latina a partire dagli anni '70 del secolo scorso. La logica sottesa all'utilizzo di tale pratica risiede nella sua capacità di mascherare la violenza di Stato a difesa delle istituzioni vigenti, e nel conseguente effetto deterrente che essa genera tra la sua popolazione.

Per combattere la diffusione della pratica di sparizione forzata specificatamente nei Paesi dell'America Latina, nel 1994 l'Organizzazione degli Stati americani (OSA) ratificò la *Convenzione Inter-americana sulla scomparsa forzata di persone*, documento che a sua volta codificò quattro aree di intervento fondamentali: la condanna di tali pratiche da parte delle istituzioni governative; l'adozione di sanzioni per tutti coloro che commisero o tentarono di perpetuare simili azioni secondo la giurisdizione nazionale; la cooperazione tra gli Stati membri per prevenire ed arrestare la sparizione forzata di persone; l'utilizzo di ogni misura legislativa, amministrativa, o giudiziaria necessaria al raggiungimento degli obiettivi sopraelencati. Nello specifico, l'Articolo 2 di tale Convenzione definisce la sparizione forzata di persone come “...l'atto di privare una o più persone della libertà, in qualunque modo, posto in essere da agenti dello Stato o da persone o gruppi di persone che agiscono con l'autorizzazione, il sostegno o l'acquiescenza dello Stato, a cui segue la mancanza di informazioni o il rifiuto di riconoscere la privazione di libertà o di dare informazioni sul luogo in cui la persona si trova, impedendogli in tal modo l'utilizzo dei ricorsi previsti dalla legge e delle forme di garanzia della procedura.” Questa definizione costituisce il primo tentativo di descrivere la sparizione forzata come un crimine contro l'umanità, anticipando la connotazione che ne diedero sia lo *Statuto di Roma della Corte penale internazionale* nel 1998, che la *Convenzione internazionale per la protezione di tutte le persone dalla sparizione forzata*, adottata dall'Assemblea Generale delle Nazioni Unite nel 2006. A tal proposito, la Corte Americana dei Diritti dell'Uomo ha specificato gli elementi costituenti la pratica di sparizione forzata di persone, compresi in tutte le fonti

menzionate finora: gli individui vittime di sparizione forzata sono private della loro libertà ed imprigionate; tale privazione di libertà è esercitata da agenti di Stato e qualunque informazione riguardo la vittima successiva al suo arresto è tenuta nascosta.

In molti casi, alla sparizione forzata consegue l'esecuzione extragiudiziale, termine che si riferisce all'uccisione deliberata da parte di forze militari, paramilitari e private sotto il controllo dello Stato, e non autorizzata da un giudizio pronunciato da una corte regolarmente costituita che abbia attuato tutte le garanzie giuridiche considerate indispensabili dalla società civile. Tale pratica rappresenta una chiara violazione delle libertà fondamentali sancite nell'Articolo 3 della *Dichiarazione Universale dei diritti umani*, secondo cui "Ogni individuo ha diritto alla vita, alla libertà ed alla sicurezza della propria persona", il cui infrangimento è intrinseco nella natura stessa dell'esecuzione extragiudiziale. L'impiego congiunto della sparizione forzata e di quest'ultima pratica ha un'utilità ambivalente: da un lato, anche se i resti di un individuo ucciso tramite procedura extragiudiziale venissero ritrovati, la sparizione forzata celerebbe l'identità dei responsabili e le condizioni circostanti; dall'altro lato, l'esecuzione extragiudiziale estenderebbe lo status di sparizione della vittima, lasciando il caso irrisolto.

La sparizione forzata di persone non viene trattata come una norma di diritto internazionale consuetudinario a sé stante, ma come minaccia ai principi dello stesso, riferendosi soprattutto al diritto alla libertà ed alla sicurezza della persona, al divieto di tortura e di trattamento inumano o degradante, ed al divieto di uccidere. Tale pratica è espressamente proibita sia nei conflitti armati internazionali che in quelli non internazionali.

Inoltre, come espresso dalla *Dichiarazione delle Nazioni Unite sulla protezione di tutte le persone dalle sparizioni forzate*, la pratica della sparizione forzata infligge gravi sofferenze non solo a coloro che ne sono vittime, ma anche alle loro famiglie. Similmente, la *Commissione dei diritti umani delle Nazioni Unite* e la *Corte europea dei diritti dell'uomo* hanno identificato la scomparsa di un familiare come trattamento disumano nei riguardi di un parente prossimo. Secondo ulteriori fonti di diritto internazionale, la protezione della famiglia, intesa come il nucleo naturale e fondamentale della società, è una garanzia indispensabile per il rispetto dell'identità della persona. In aggiunta, il Comitato internazionale della Croce Rossa rivolge un'attenzione particolare al tema, secondo i principi che regolano il rispetto della vita privata e familiare e la responsabilità delle parti in conflitto nel prendere tutte le misure necessarie sia nella ricerca degli individui scomparsi durante il periodo di ostilità, che nel comunicare ai familiari di questi qualsiasi informazione in loro possesso riguardante la vittima. Anche in questo caso, tali misure si applicano nei conflitti armati internazionali e non internazionali.

Come accennato in precedenza, la sparizione forzata è strettamente connessa ai regimi militari che si svilupparono in Sud America a partire dagli anni '70. In particolar modo, tale pratica divenne un mezzo di repressione politica ampiamente utilizzato dai servizi segreti Latinoamericani nell'attuazione dell'Operazione Condor, organizzazione dedicata alla lotta contro la "minaccia sovversiva" dell'ideologia Comunista in Argentina, Bolivia, Brasile, Cile, Paraguay ed Uruguay. Tale consorzio di Intelligence divenne effettivo grazie al supporto continuo degli Stati Uniti, e venne successivamente associato alla strategia di contro-insorgenza americana per prevenire la diffusione dei movimenti sociali di sinistra. Questa strategia apportò profondi cambiamenti nella struttura politica dei Paesi Latinoamericani sostenendo: l'uso di forze paramilitari ed illegittime, networks d'Intelligence ed altre risorse ausiliarie per raccogliere dati utili nella lotta contro i movimenti insorgenti; l'espansione di un sistema di controllo segreto per monitorare l'opinione pubblica; l'uso delle preferenze politiche per distinguere settori simpatizzanti o ostili al modello di società promossa; l'utilizzo della violenza sistematica come deterrente nei confronti del popolo; l'attuazione di una lotta psicologica per polarizzare l'ambiente politico e manipolare l'opposizione. Pertanto, nel conseguimento dei propri obiettivi, l'Operazione Condor legittimò l'utilizzo di pratiche brutali, quali la tortura, la sparizione forzata e l'esecuzione extragiudiziale di oppositori politici e civili. Successivamente, gli studiosi articolano le operazioni di Intelligence in tre diverse fasi: un iniziale scambio di informazioni tra i servizi segreti delle dittature militari che promossero l'Operazione Condor; una fase più pratica e per così dire "operativa", caratterizzata da azioni sotto copertura, il cui mandante rimaneva ignoto nella maggior parte dei casi; infine, la creazione di un sistema di dimensione mondiale per individuare ed uccidere personaggi politici avversi ai regimi. Peraltro, gli Stati Uniti contribuirono al rafforzamento della Dottrina di Sicurezza Nazionale permettendo ai servizi di Intelligence Latinoamericani di accedere ai manuali di tortura rilasciati dalla CIA, i quali a loro volta intensificarono le operazioni segrete di adduzione, sparizione ed uccisione dell'Operazione Condor.

In Argentina, la pratica di sparizione forzata assunse i suoi connotati più violenti a seguito del colpo di stato che destituì il governo legittimo del Presidente Isabel Perón nel 1976, insediando la giunta militare capeggiata dal Generale Jorge Rafael Videla a guida del Paese. Tramite il Processo di Riorganizzazione Nazionale, il nuovo Presidente argentino giustificò azioni di sequestro, tortura e assassinio di migliaia di civili, generalmente eseguite all'interno di centri di detenzione clandestini, come l'ESMA e l'Automotores Orletti a Buenos Aires. Secondo il protocollo attuato durante il periodo di detenzione, le vittime venivano private di tutti i loro beni personali, del loro nome e della loro identità. A tal proposito, furono proprio l'annientamento della dignità umana nell'individuo

come mezzo di tortura e la dissoluzione delle vittime di simili atrocità a coniare il concetto di *Desaparecido*, termine tuttora utilizzato per definire coloro che scomparvero durante la dittatura argentina. D'altro canto, Videla non riconobbe mai di aver incoraggiato la tortura e l'uccisione extragiudiziale dei suoi presunti oppositori politici, riferendosi a loro come semplici dispersi. Con la destituzione del Generale Videla, la crescente richiesta del popolo di giustizia sociale effettiva condusse il nuovo Presidente Raúl Alfonsín ad istituire la Commissione nazionale sulla scomparsa di persone (CONADEP). Il rapporto *Nunca Más*, pubblicato dalla Commissione nel 1984, divenne il principale modello di lotta contro le violazioni di diritti umani attuate dalle dittature militari in America Latina, individuando all'incirca 8.960 casi di sparizioni forzate tra il 1976 ed il 1982. Precisamente, la CONADEP indagò le sorti delle vittime di sparizione forzata, punì i responsabili di tali atti, e favorì la diffusione di commissioni d'inchiesta specifiche in numerosi altri Paesi del Cono Sud, per la restaurazione della giustizia istituzionale.

Similmente, a seguito del colpo di stato che portò alla caduta del governo Allende in Chile nel 1973, il nuovo Presidente Augusto Pinochet favorì la nascita della Dirección de Inteligencia Nacional (DINA), la prima agenzia di Intelligence del Paese. La DINA divenne presto lo strumento di coordinamento delle operazioni di sicurezza nazionale, e nel contempo il principale organo cileno coinvolto nel Piano Condor. L'agenzia di Intelligence cilena venne automaticamente deposta nel marzo 1990, a seguito dell'elezione del Presidente Patricio Aylwin. Così come era accaduto in Argentina, il nuovo governo cileno dovette affrontare la sfida di ridurre il potere politico delle forze armate ed investigare le violazioni di diritti umani avvenute sotto il controllo di queste. Il più significativo strumento di inchiesta che venne introdotto a tal proposito fu la Commissione Rettig, anche conosciuta come la Commissione per la verità e la riconciliazione, i cui principali obiettivi furono: descrivere il funzionamento del sistema repressivo adottato dal regime militare cileno; stimare il numero approssimativo di casi di sparizione forzata e sequestro nel Paese; elaborare una proposta riguardante le misure di riparazione da adottare; introdurre politiche di prevenzione. Anche se il Report Finale della Commissione non soddisfò pienamente l'opinione pubblica, la sua azione causò un profondo impatto sociale, poiché raccolse prove innegabili per la condanna dei responsabili delle atrocità commesse. Successive evoluzioni nelle investigazioni della Commissione Rettig vennero documentate nel Rapporto Valech, che raccolse diverse testimonianze degli abusi commessi tra il 1973 ed il 1990 dagli ufficiali del regime di Pinochet. Nello specifico, la Commissione identificò le vittime della dittatura come: coloro che vennero detenuti e/o torturati per ragioni politiche dagli agenti di stato o da individui sotto il controllo di organi istituzionali; coloro che scomparvero o vennero uccisi tramite procedure extragiudiziali da agenti di stato o da individui sotto il controllo di

organi istituzionali; coloro che vennero sequestrati per motivi politici. Il numero totale di casi accertati di violazione di diritti umani ed aderenti a tali presupposti, furono 40.018 vittime, risultato molto più alto di quello contenuto nel Rapporto Rettig.

Per un'analisi più approfondita dell'Operazione Condor, è importante interrogarsi su come l'intervento degli Stati Uniti abbia influenzato il suo sviluppo, così come abbia determinato l'ascesa delle dittature militari in Sud America negli anni '70. Tale operazione si caratterizza come violazione del Principio di non-intervento, in relazione al concetto di uso della forza, proibito dall'Articolo 2(4) della *Carta delle Nazioni Unite*, secondo cui "I Membri devono astenersi nelle loro relazioni internazionali dalla minaccia o dall'uso della forza, sia contro l'integrità territoriale o l'indipendenza politica di qualsiasi Stato, sia in qualunque altra maniera incompatibile con i fini delle Nazioni Unite". Inoltre, la dottrina di non-intervento include anche l'utilizzo indiretto della forza e delegittima qualunque tentativo che induca le istituzioni di un Paese a cedere parte dei propri territori e/o a rilasciare concessioni politiche significanti. Una fonte importante per l'interpretazione di tale Principio è il caso riguardante le *Attività militari e paramilitari in e contro il Nicaragua* (Nicaragua vs. United States) del 1986, in cui gli Stati Uniti rivestirono un ruolo molto simile a quello ricoperto durante l'implementazione dell'Operazione Condor. Infatti, la CIA predispose operazioni sotto copertura in Nicaragua, con l'intento di orientare il consenso popolare verso un fronte politico nazionalistico ed anti-cubano, supportare l'opposizione tramite la preparazione di gruppi di azione paramilitari, ed operare evitando il coinvolgimento diretto delle forze armate statunitensi. I tre punti focali che gli Stati Uniti adottarono in questa strategia trovano corrispondenza nel Piano Condor: in primo luogo, la guerra di contro-insorgenza sostenuta dal governo americano aveva una natura prettamente anti-comunista; in secondo luogo, il declassamento dal segreto di stato dei manuali militari statunitensi evidenziò come gli istruttori della CIA addestrarono gli agenti dell'Operazione Condor; infine, anche in questo caso gli Stati Uniti protessero la loro posizione dall'accusa di violazione di diritti umani, spingendo gli ufficiali Latinoamericani ad agire all'interno dell'operazione.

Il processo alla Giunta militare argentina fu uno dei punti di partenza nella lotta all'impunità dei responsabili delle violazioni di diritti umani durante le dittature in America Latina. La *Cámara Federal de Apelaciones Criminal*, corte civile argentina che condusse le investigazioni, prese in esame i 700 casi più rilevanti di "sparizione forzata" riportati dalla CONADEP. Nel suo giudizio finale, la *Cámara* riportò evidenze sufficienti a constatare la colpevolezza della giunta nell'aver coordinato le attività di repressione durante la Guerra Sporca, contrastando così i tre punti a difesa degli imputati: la necessità di debellare la diffusione di ideologie Comuniste, il rispetto delle norme

stabilite dai governi precedenti e la violenza come mezzo di difesa. Un'altra questione che emerse durante il processo agli ufficiali della giunta fu l'attribuzione di responsabilità per i crimini commessi dalle forze militari ad essa subordinate. La risoluzione conclusiva non considerò le accuse alla giunta e ai suoi subalterni come mutualmente escludibili, bensì incluse entrambe le fazioni in un singolo apparato istituzionale, regolato da rapporti di controllo reciproco. Ciò non negò la responsabilità giudiziale delle forze subordinate che eseguirono le azioni di repressione, citate in giudizio solo in seguito.

Negli anni successivi, numerosi Paesi latinoamericani avviarono inchieste riguardanti le attività dell'Operazione Condor, di cui si enumerano ben 23 processi giudiziari, tenuti perlopiù in Uruguay. Ad oggi, nei confronti di 43 individui la sentenza è già passata in giudicato, mentre per la restante parte il processo è ancora pendente. In Argentina, le violazioni di diritti umani compiute dai regimi militari vennero esaminate all'interno di due processi distinti: il "Plan Condor" del 1999, e l'"Automotores Orletti", che si occupò prettamente dei centri di detenzione clandestini gestiti dai militanti uruguaiani ed argentini. Allo stesso modo, l'inchiesta condotta in Cile contro l'Operazione Condor si articolò in due differenti procedure giudiziarie, che presero principalmente in esame i crimini di sparizione forzata.

Nel 1999, in Italia ebbe inizio l'inchiesta condotta dalle autorità giudiziarie riguardo i crimini commessi dall'Operazione Condor, ai danni di 43 persone di origini italiane. Data l'assenza di norme giuridiche che condannino i reati di sparizione forzata e tortura nel diritto italiano, gli imputati vennero processati per omicidio plurimo aggravato. Il verdetto finale del 17 Gennaio 2017 pronunciato dalla Terza Corte d'Assise di Roma, ha condannato all'ergastolo 8 ufficiali militari implicati nel Piano Condor, assolvendo i restanti 19 indagati. Due furono le ragioni che portarono all'analisi dell'Operazione Condor nel nostro Paese: l'elevato numero di cittadini italiani coinvolti e la possibilità delle corti italiane di processare in contumacia. Per la prima volta, questo caso venne trattato come un crimine associativo transnazionale.

I principali ostacoli nell'indagare l'Operazione Condor vennero identificati all'interno di tre aree tematiche: la descrizione dei crimini commessi secondo termini giuridici; le risorse necessarie ad indagare le diverse fasi dell'Operazione Condor; l'accesso ai documenti ufficiali prodotti agli organi giudiziari in merito. Le maggiori difficoltà in relazione al primo punto vennero dalla mancanza di norme giuridiche che regolamentassero tali pratiche, dal ruolo che le vittime assunsero durante i processi, dall'interpretazione giudiziaria che i tribunali diedero e, infine, dal bisogno di contestualizzare tale operazione. Riguardo il secondo punto, i processi giudiziari rilevarono la

discontinuità con cui le indagini vennero condotte e la totale assenza di individui competenti nell'analisi dei documenti raccolti per supportare le accuse. In merito al terzo punto, furono quattro le problematiche evidenziate dai giudici: le difficoltà delle corti nell'accedere ai documenti relativi all'Operazione Condor, l'elevato numero di processi sul caso con sentenze finali discordanti, l'inefficienza burocratica e comunicativa tra i Paesi interessati, e le limitate conoscenze riguardo ai regimi latinoamericani degli anni '70.

In conclusione, dall'analisi dell'Operazione Condor sono emerse tre linee guida fondamentali agli sviluppi successivi delle indagini. Innanzitutto, il bisogno di formare gruppi di esperti sull'argomento; in secondo luogo, la creazione di un database che raccolga le fonti più rilevanti delle violazioni di diritti umani avvenute durante tale operazione, soprattutto per quanto concerne le prove raccolte durante i vari processi giudiziari; infine, il consolidamento di canali di comunicazione più efficienti tra le diverse istituzioni coinvolte.