Newsletter

Issue 9 /
December 2010

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NEW DISAPPEARANCES CONVENTION COMES INTO FORCE

The International Convention for the Protection of All Persons from Enforced Disappearance (2006) has received the required number of ratifications and has entered into force on 23 December 2010. Iraq became the 20th State to ratify the Convention in accordance with Article 39(1).

The Convention aims to establish the truth about enforced disappearances, punish perpetrators and provide reparations to victims and their families.

Article 2 of the Convention defines 'enforced disappearance', *"which is considered to be 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."*

The Convention provides for universal jurisdiction, unless the state extradites to another state or surrenders the person to an international criminal court whose jurisdiction it has recognised.

Now that the Convention has entered into force, a Committee on Enforced Disappearances will be established, which will monitor the implementation of the Convention. The Committee will also be able to receive and consider complaints by or on behalf of victims, if the State Party has made the declaration that it recognizes this competence by the Committee. There are now 21 States that have ratified the Convention: Albania, Argentina, Bolivia, Brazil, Burkina Faso, Chile, Cuba, Ecuador, France, Germany, Honduras, Iraq, Japan, Kazakhstan, Mali, Mexico, Nigeria, Paraguay, Senegal, Spain and Uruguay.

Article 9 of the Convention reads:

1. Each State Party shall take the necessary measures to establish its competence to exercise jurisdiction over the offence of enforced disappearance:

(a) When the offence is committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;

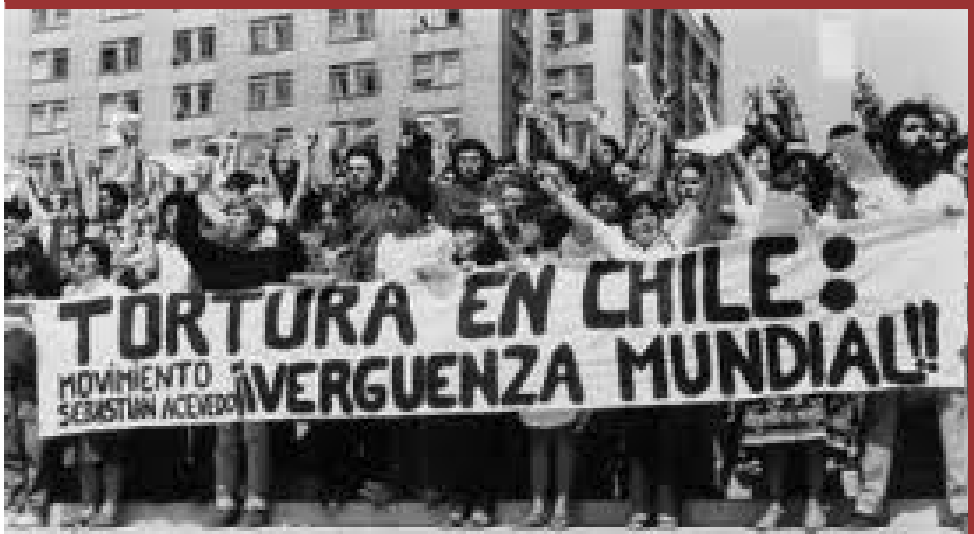
(b) When the alleged offender is one of its nationals;

(c) When the disappeared person is one of its nationals and the State Party considers it appropriate.

2. Each State Party shall likewise take such measures as may be necessary to establish its competence to exercise jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized.

3. This Convention does not exclude any additional criminal jurisdiction exercised in accordance with national law.

Chilean Dictatorship Trial in Paris



Demonstrations against torture during the Chilean dictatorship.

Between 8 and 17 December 2010 a historic trial took place before the Paris *Cour d'assises*, the highest French criminal court. Fourteen officials who served under the military rule of General Augusto Pinochet in Chile were tried in absentia, as Chile refused to extradite them. Well informed of the proceedings, the accused expressly decided not to be represented. The charges include the crimes of torture and enforced disappearances.

The alleged crimes were committed against Franco-Chilean citizens during the first years of the military dictatorship in Chile. The grounds of jurisdiction are based on personal (or passive) jurisdiction, due to the French nationality of the victims.

Initially international arrest warrants were issued against 19 suspects, although five of them, including Pinochet, have since passed away. Among the remaining 14 suspects, General Manuel Contreras, exleader of DINA (the first secret police of the military regime of Chile) is one of those put on trial in Paris.

As stated by FIDH, which is one of the civil parties in the trial: *"Beyond recognition of the individual responsibility of the accused, the trial will be the opportunity to establish and punish* ***the system of repression*** *set up and operated by the Pinochet dictatorship that reigned in Chile from 1973 to 1990. Although there are existing proceedings in Chile, none of these has concerned the victims of different crimes jointly, to permit a complete picture to be drawn up of the way the dictatorship operated."* [1]

The proceedings also focus on the criminal liability of civilians, especially of company directors who played an important role in carrying out the crimes. In addition to the plaintiffs, family members of the victims and associations, a large number of witnesses from Chile and elsewhere will appear before the court. The witnesses are factual witnesses as well as specialists on the context and situation in Chile and the Operation Condor.

The trial revealed the impossibility for the families to obtain justice in Chile, and also the impact of the crime of disappearances on the family and more broadly on the whole Chilean society. "For the first time said the victims' family, we are able to exercise our right to truth and justice which is an inherent part of any reparatory process".[2]

On December 17. the Court entered convictions for abduction, illegal detention and torture. Juan Manuel Contreras and Pedro Espinoza Bravo Sepulveda were sentenced to the maximum penalty of life imprisonment; Hernan Julio Brady Roche, Marcelo Luis Moren Brito, Miguel Kraznoff Martchenko to 30 years in prison, Gerardo Godoy Ernesto Garcia, Basclay Humberto Zapata Reyes, Enrique Lautaro Arranciaba Clavel, Raul Iturriaga Neumann, Joaquim Luis Ramirez Pineda, Jose Osvaldo Rivera to 25 years in prison, Ahumada Francisco Rafael Valderama to 20 years in prison, and Emilio Sandoval Poo to 15 years in prison.♦

[1] FIDH Press Kit "The Trial of the Pinochet Dictatorship", p. 3. See further, http://www.fidh.org/IMG/pdf/CHILI_DosPress_UK-CS3-02-2-2.pdf

[2] Id.

Norway: Supreme Court ruling on non-retroactivity

On 3 December 2010, the Supreme Court of Norway (*Norges Høyesterett*) quashed the sentence of a Bosnia-born man previously found guilty of war crimes, stating that the law cannot be applied retroactively.

Mirsad Repak, 44, a former member of the Croatian HOS military, became a Norwegian citizen in 2001 having lived in the country since 1993. He is said to have taken part in illegal detention and violence against Serbs at the Dretelj detention camp in southern Bosnia in 1992. The facility became infamous during the Bosnia war for the camp guards' brutality.

Repak was sentenced to five years in jail in December 2008 for crimes committed against Serbs in 1992. The Appeals Court reduced his sentence by six months in April this year. The sentencing was however cancelled outright last week by the Supreme Court, for the following reasons, as summarised (in English) by the Supreme Court:

"The issue in the case was whether the provisions on crimes against humanity and war crimes in Chapter 16 of the Penal Code 2005, which entered into force on 7 March 2008, could be applied to acts that took place in Bosnia-Herzegovina in 1992. The crucial issues were whether criminal liability was statute-barred, and whether the application of the new provision to these acts would represent a violation of Article 97 of the Norwegian Constitution, which prohibits laws being given retroactive effect. The Supreme Court held that the crimes were not statute-barred. However, a majority of eleven justices held that the application of sections 102 and 103 of the Penal Code 2005 to the crimes would violate Article 97 of the Norwegian Constitution. Developments in international law and Norway's interest in assisting international criminal courts could not undermine the fundamental requirement that a criminal conviction must have an authority in Norwegian law. A minority of six justices were of the view that conviction pursuant to sections 102 and 103 of the Penal Code 2005 would not be manifestly more onerous than conviction pursuant to section 223 of the Penal Code 1902, which applied at the time, coupled with the possibility of trial before an international court, and held that conviction pursuant to sections 102 and 103 of the Penal Code 2005 would not violate Article 97 of the Constitution."[1]

Repak could still be sentenced on a "deprivation of liberty" charge that the court will rule on next year.♦

[1] Supreme Court of Norway, Summary of Recent Supreme Court Decisions, HR-2010-2057-P, case no. 2010/934, criminal appeal against judgment.

Norway Supreme Court

The Bazaramba Case in Finland

Susanna Mehtonen, Amnesty International, Finland

On 11 June 2010 a Finnish court handed down its judgment in a case concerning the Rwandan genocide. The District Court of Itä-Uusimaa held the accused, Mr Francois Bazaramba responsible for genocide in the Butare prefecture during 1994 and sentenced him to a life sentence. The case was in many ways a landmark case for Finland as it was the first case in Finland concerning a core international crime and the first based on universal jurisdiction.

Francois Bazaramba arrived in Finland in 2003 and applied for asylum. The application was denied on the grounds of exclusion clauses, as the Finnish Immigration Service held that Bazaramba was potentially suspected of international crimes. The suspicions did however not lead to criminal investigations at that time and Bazaramba was allowed to stay in Finland, most likely on grounds of *non-refoulement*. In 2006 FIDH and REDRESS published a list of European countries harboring persons suspected of involvement in the Rwandan genocide. Finland was among those countries. Later in the year Rwanda issued an international arrest warrant for Bazaramba. In early 2007 the Finnish National Bureau of Investigation commenced an investigation into the suspected crimes and on 6 April 2007 Mr Bazaramba was placed in pre-trial detention.

The Rwandan government requested that Mr Bazaramba be extradited to stand trial in Rwanda, but the Finnish Ministry of Justice denied the request on grounds that it was unlikely that Rwanda would be able to guarantee a fair trial for Mr Bazaramba. This denial of the extradition request triggered jurisdiction for the case, as the Finnish penal code provides for a provision on *aut dedere aut judicare* for all crimes with a maximum sentence of over six years. The court's jurisdiction was also based on a provision in the Finnish penal code which provides for universal jurisdiction for international crimes, including genocide. In its judgment the district court did not take a stance on whether it considered the jurisdiction to be based on universal jurisdiction, *aut dedere aut judicare* or both.

In 2009 the Finnish State Prosecutor indicted Mr Bazaramba for five counts of genocide in the Butare prefecture between 1 January 1993 and 31 May 1994. According to the prosecution Bazaramba had an intent to destroy in whole or part the Rwandan Tutsis and had worsened their life conditions, killed tutsis and instigated killings, spread anti-tutsi propaganda, organized road blocks and military training, distributed matches and weapons, lead attacks at the Cyahinda church and Mount Nyakizu, and redistributed tutsi property. The prosecution held that Mr Bazaramba was a prominent member of his community and a companion of Nyakizu mayor Mr Ladislas Ntagawanza, who has been indicted by the ICTR.

Mr Bazaramba denied all allegations and held that he had not been in a prominent position in his community and therefore not able to conduct the operations of the indictment. During the genocide he had been hiding and helping Tutsis flee the genocide. Bazaramba also held that Rwandan government was actively seeking political indictments of educated hutu living abroad and that the allegations against him were false and based on witness statements retrieved by torture.

The court conducted its proceedings in Finland, Rwanda and Tanzania. Incarcerated witnesses of the prosecution were cross-examined at hearings conducted by the court in Kigali and the bench travelled to Butare for a fact-finding mission. Witnesses of the defense were invited to hearings conducted in Tanzania and held behind closed doors for their protection.

Throughout the proceedings the defense claimed that a number of prosecution witnesses had been tortured or held under inhumane conditions by the Rwandan authorities. A number of prosecution witnesses told the court about regular beatings, deprivation of food and denial of medical assistance while incarcerated in Rwanda. Even if they had not been tortured or treated inhumanely by the Finnish investigators, the defense held that it was a key aspect that the court had to consider. The defense requested the court to remove from the record the statements by those nineteen witnesses. Finnish law does not contain any provisions on evidence obtained by torture, nor are there specific rules or procedures for the admission of evidence. The principle of free evidence allows the parties to present any relevant evidentiary material to the court, which then considers the credibility of evidence in its judgment.

The court applied a restrictive approach to the torture allegations and held that it would disregard only the statements of those witnesses who had either been tor-

tured specifically in order to retrieve information about Mr Bazaramba or those who had given information about Bazaramba under those conditions. In its judgment the court held that two witnesses, Celestin Nkeramihigo and Elias Ntelaziyayo, had given statements about Bazaramba to the Rwandan authorities under such conditions, while interrogated by the Rwandan authorities as suspected genocidiaires. Nkeramihigo was arrested in 1996 and placed in the Nyakizu municipal prison where he was detained for 7 years. For the first nine months of his imprisonment he had been beaten on a daily basis during interrogations. It was during these interrogations that Nkeramihigo had confessed his own crimes and also shared information about Bazaramba. Ntelaziyayo had been arrested in 1997 and beaten until he confessed to crimes. In that connection he had also told the interrogators about Bazaramba. Ntelaziyayo's gacaca trial was held in 2008 and he was sentenced to 18 years in prison. The court concluded that these witnesses had either been tortured or treated inhumanely and thus the court did not take the statements of these witnesses into consideration in its judgment. To this date however it remains unclear whether the Rwandan authorities have initiated further investigations into the treatment of these two witnesses.

Even if two witness statements were removed, the court held that the body of evidence presented by the prosecutor was sufficient to hold Mr Bazaramba accountable for four accounts of complicity in genocide. Bazaramba was sentenced for the infliction of life conditions calculated to bring about the physical destruction of the tutsi by inciting violence and spreading anti-tutsi propaganda, organizing road blocks and night patrols set up in order to control Tutsis, forcing Tutsis to leave their homes, acquiring and distributing matches and inciting others to burn buildings owned by Tutsis and redistributing property owned by the Tutsi. In addition he was sentenced for five killings and for attacks at the Cyahinda church and in the Nyakizu mountains. Mr Bazaramba was acquitted on three specific accounts or events; the organization of military training, acquisition of weapons and ten killings. The district court sentenced Mr Bazaramba to life imprisonment. Both parties of the case have appealed the judgment and the appellate stage is expected to commence at the Helsinki Court of Appeals during 2011.♦

The Ben Saïd judgment: a Tunisian diplomat and torturer sentenced on appeal

On 24 September 2010 the Criminal Court of Nancy *(la Cour d'assises de Meurthe et Moselle*) sentenced Khaled Ben Saïd to 12 years imprisonment for having given instructions to commit crimes of torture on the person of the plaintiff at the Jendouba Police Station in Tunisia. The court thereby increased the sentence delivered in first instance by the Strasburg Criminal Court (*la Cour d'assises du Bas-Rhin*) on 15 December 2008, where Ben Saïd was sentenced to 8 years imprisonment.

In May 2001, the plaintiff, Mrs. Zoulaikha Gharbi, filed a complaint for torture against Mr. Ben Saïd, a diplomat, whom she recognized as the Chief of the Jendouba Police Station where she was tortured, under his orders, in October 1996. After being informed that legal proceedings had been initiated against him, the accused immediately fled to Tunisia, where he is reported to still be working for the Ministry of the Interior. Throughout the proceedings in France, Ben Saïd has been represented by his defense lawyer.

This case was the first time in France when a foreign diplomat was tried on the basis of universal jurisdiction. [1] ♦

[1] For a comprehensive overview of the proceedings as well as the situation in Tunisia, please refer to FIDH's report 'The Conviction of Khaled Ben Saïd: A Victory Against Impunity in Tunisia'
http://fidh.org/IMG/pdf/Bensaid550ang2010.pdf

UN General Assembly decides to continue to consider the principle of universal jurisdiction

During its 65th Session, the UN General Assembly decided to continue considering the principle of universal jurisdiction. For that purpose, it will set up a working group of the Sixth Committee (Legal) during the 66th session next year, in order to undertake a thorough discussion of "the scope and application of the scope and application of universal jurisdiction".

The background to this decision is the following. At the request of the Republic of Tanzania, on behalf of the Group of African States, an item concerning the scope and application of the principle of universal jurisdiction was added to the agenda during the General Assembly's 64th session. In short, this request emanated from a 2008 statement by the African Union, which expressed concern that the principle was applied in an abusive way by some non-African States. [1]

Consequently, during the 64th session, the principle of universal jurisdiction was considered by the Sixth Committee. Following its recommendations, the General Assembly adopted a resolution, according to which, the Secretary-General should invite UN Member States to submit *"information and observations on the scope and application of the principle of universal jurisdiction, including information on the relevant applicable international treaties, their domestic legal rules and judicial practice"*. The Secretary-General was requested to prepare a report based on this to the 65th Session.[2]

There were 44 UN Member States that replied to the Secretary-General's request. [3] Out of these, 18 were from European Governments and 7 from African Governments. Some of the answers were very brief, whereas others went into some detail. The report prepared by the Secretary-General prepared is based solely on the information provided by the Member States. [4] It is useful in that it gives a good overview of the responses. It also illustrates how diverse the understanding of the principle of universal jurisdiction is among the different UN Member States. The report does not provide any comments or give any guidance on the Secretary-General's understanding of the issues at stake.

During the 65th Session, the Sixth Committee considered the principle of universal jurisdiction and prepared a draft resolution,[5] which was adopted without any amendment in resolution A/RES/65/33 by the General Assembly on 6 December 2010.[6] The GA recognized *"the diversity of views expressed by States and the need for further consideration towards a better understanding of the scope and application of universal jurisdiction"* and reiterated its commitment *"to fighting impunity, and noting the views expressed by States that the legitimacy and credibility of the use of universal jurisdiction are best ensured by its responsible and judicious application consistent with international law"*. The GA took note with appreciation of the Secretary-General's Report and decided that *"the Sixth Committee shall continue its consideration of the scope and application of universal jurisdiction, without prejudice to the consideration of this topic and related issues in other forums of the United Nations, and for this purpose decides to establish, at its sixty-sixth session, a working group of the Sixth Committee to undertake a thorough discussion of the scope and application of universal jurisdiction"*. Further, in its resolution the General Assembly invited *"Member States and relevant observers, as appropriate, to submit, before 30 April 2011, information and observations on the scope and application of universal jurisdiction, including, where appropriate, information on the relevant applicable international treaties, their domestic legal rules and judicial practice, and requests the Secretary-General to prepare and submit to the General Assembly, at its sixty-sixth session, a report based on such information and observations"*. This wording is almost identical to the text contained in the above-mentioned resolution from the 64th Session. **There is one important difference: the invitation is not limited to UN Member States. Other 'relevant observers' are also welcome to submit information and observations on the topic. This is a welcome development and a golden opportunity for NGOs, academics and other experts in the field to submit relevant information. Any gaps caused by the lack of replies from Member States can consequently be filled by information from such observers.** The next report by the Secretary-General should therefore be expected to be more complete and a good basis for further consideration by the Sixth Committee and

the new working group during the 66th session of the General Assembly.

Finally, as set out above, the GA decided that the Sixth Committee should continue to consider this item *"without prejudice to the consideration of this topic and related issues in other forums of the United Nations".* **In this connection it should be noted that the International Law Commission is currently working on two related topics, namely 'Immunity of State officials from foreign criminal jurisdiction' and 'Obligation to extradite or prosecute (*aut dedere aut judicare*)'. In fact, the General Assembly invited the International Law Commission to consider these topics as a priority.** [7]

[1] Decision Assembly/AU/Dec. 199(XI), 1 July 2008. This resulted in a subsequent Report prepared by the AU - EU Technical Ad hoc Expert Group on the principle of universal jurisdiction, dated 16 April 2009, see http://register.consilium.europa.eu/pdf/en/09/st08/st08672.en09.pdf

[2] General Assembly Resolution A/RES/64/117 of 16 December 2009.

[3] The full text of all the replies are available at the following site: http://www.un.org/en/ga/sixth/65/ScopeAppUniJuri.shtml

[4] The scope and application of the principle of universal jurisdiction: Report of the Secretary-General prepared on the basis of comments and observations of Governments, UN Doc. A/65/181. For a comprehensive commentary of report, please refer to Amnesty International's Report 'Universal Jurisdiction: UN General Assembly should support this essential international justice tool', http://www.amnesty.org/en/library/info/IOR53/015/2010/en

[5] The scope and application of the principle of universal jurisdiction: Report by the Sixth Committee, 11 November 2010, UN Doc. A/65/474.

[6] http://www.un.org/Depts/dhl/resguide/r65.shtml

[7] General Assembly Resolution A/RES/65/26 of 6 December 2010, see also http://www.un.org/News/Press/docs//2010/ga11030.doc.htm

UN General Assembly UN Photo/Ryan Brown

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