

# Some Previous Questions

## The Approach of International Law to Victims

Traditionally, International Law has not paid sufficient attention to victims.<sup>1</sup> An explanation for this can be found in the particular nature of international law: States make, interpret and apply international law. Therefore, as a result of this and owing to the predominantly interstate structure of the international community, international norms have been created to respond to states' interests and goals. In this context, states have paid attention to persons or individuals only in some particular fields of international law.

This is the case, for example, with human rights, international criminal law (with regard to international criminal responsibility of individuals)<sup>2</sup> or international humanitarian law. But in each of these branches of international law, the way in which victims are considered differs. So, in international law of human rights, victims are considered when the State is the author of the breach of the international obligation, but this branch of international law does not consider the breach of international obligations in this field by non-state actors.<sup>3</sup>

Nevertheless, such an approach does not mean that only states breach human rights because non-state actors do so as well. Although this is an established fact, it has taken a lot of time for it to gain global recognition and acknowledgement in the international arena by international norms and by statements of international organs.<sup>4</sup> An example of this is the report to the Sub-Commission on the Promotion

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<sup>1</sup> As Bottiglierio clearly states, victims have been left on the periphery of domestic and international political agenda (cf. Bottiglierio 2004, 2).

<sup>2</sup> See Fernández de Casadevante Romani (ed) (2011).

<sup>3</sup> On this issue, see Clapham (2006).

<sup>4</sup> An example of it are the resolutions adopted since 1994 onwards by the UN Commission on Human Rights under the title "Humans rights and terrorism". The UN Commission on Human Rights has also qualified terrorism as a violation of human rights (see resolutions 1994/46, 1995/43, 1996/47, 1997/42, 1998/47, 1999/27, 2000/30, 2001/37, 2002/35 and 2003/37). Also, the Sub-

and Protection of Human Rights submitted in 2001 by the Special Rapporteur on “Terrorism and Human Rights” K. KOUFA, where it states:

102. Terrorist acts, whether committed by States or non-State actors, may affect the right to life, the right to freedom from torture and arbitrary detention, women’s rights, children’s rights, health, subsistence (food), democratic order, peace and security, the right to non-discrimination, and any number of other protected human rights norms. Actually, there is probably not a single human right exempt from the impact of terrorism.<sup>5</sup>

Yes, on the one hand, non-state actors breach human rights but international law only pays attention and give legal consequences to the breaches of human rights by states. On the other hand, the responsibility of non-state actors for the breaches they have perpetrated is the concern of international criminal law and of international humanitarian law. In both cases, such breaches are envisaged from the perspective of the international criminal responsibility of the individual.

In contrast to the international law of human rights (where the author is always the state) in international criminal law and in international humanitarian law, however, individuals may be regarded as victims as a consequence of acts perpetrated by individuals (even by individuals exercising public functions) as well as by non-state actors. In both cases, international responsibility rests only with the individuals and victims are recognized. Nevertheless, the way in which they are recognized is inadequate.<sup>6</sup>

This situation guides Bottiglierio to ask for reasons why victims of some of the worst crimes have received “second class” treatment or no justice at all because whereas victims of ordinary crimes can access established means for redress, the situation of victims of crimes and of violations on a grand scale (such as those perpetrated during a war, involving large numbers of victims) is more complicated.<sup>7</sup>

Taking these precedents into account, one can better appreciate the advances that the creation of the International Criminal Court (ICC) and the international criminal courts in the 1990s as well as the international norms

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Commission on the Promotion and Protection of Human Rights (see resolutions 1994/18, 1996/20 and 1997/39). In 1993, this Sub-Commission had even condemned “the violations of human rights by the terrorist groups Sendero Luminoso and Movimiento Revolucionario Tupac Amaru” in Perou (resolution 1993/23).

<sup>5</sup> UN, Doc. E/CN.4/Sub.2/2001/31, p. 46. She drafted a preliminary report (E/CN.4/Sub.2/1999/27), a progress report (E/CN.4/Sub.2/2001/31), a second progress report (E/CN.4/Sub.2/2002/35), an additional progress report with two addenda (E/CN.4/Sub.2/2003/WP.1 and Add.1 and 2) and a final report (E/CN.4/Sub.2/2004/40). In fact, a lot of rights are concerned by terrorism: the right to liberty and security, the right to family life, the right of movement, the right to information, the right to fair trial, etc.

<sup>6</sup> This is the case of the statutes of the International Criminal Court (ICC) and of the international criminal courts of the former Yugoslavia and Rwanda. See also the Statute of the *Special Tribunal for Lebanon* and the rules and Procedure and Evidence of this tribunal, as well as the Statute of the Extraordinary Chambers in the Courts of Cambodia.

<sup>7</sup> Bottiglierio, *op. cit.*, 5.

adopted in the last several years represent for the process of humanization of international law.

Previously, both international and domestic law had ignored the victim. Domestic law because the state's *ius puniendi* embodied in criminal law has traditionally had the criminal as the exclusive reference without considering the victim.<sup>8</sup> International law because its approaches on the matter of responsibility have been always focused upon the author of the wrongful act: the state (in international law of human rights), the individual or the state (in international humanitarian law) or the individual (in international criminal law), but always ignoring the victim.

Nevertheless, the characteristics of the legal context of the social and democratic rule of law together with the existence of an important number of treaties on human rights guide us to a reinterpretation of the aim of the criminal process quoted here. According to that reinterpretation, the criminal process is conceived of as an instrument of guarantee both for the person to whom the crime is attributed and for the victim. It is an instrument of guarantee for the accused because he/she cannot be condemned without destroying the principle of presumption of innocence through a fair process. But it is also an instrument of guarantee for the rest of the citizens and for the victims of crime. For the rest of the citizens because it is within the framework of criminal proceedings that the State exercises the *jus puniendi* that citizens have delegated to him. For the victims of crime because it is in the frame of the criminal process that victims shall be protected and adequately supervised on their rights. This is why the protection of victims of crime begins to be one of the specific aims of the criminal process.<sup>9</sup>

The panorama quoted here shows that, despite the relevance of this subject, victims have been either ignored or insufficiently considered by domestic as well as by international norms. But this panorama has begun to change since different international norms relating to victims have been progressively introduced. These are norms generally characterized by a certain concept of the respective victim, as well as by the enumeration of a list of rights to which the victim in question is entitled to. It is upon that list or catalogue of rights in favour of victims that an international statute of victims is built. In reverse, these catalogues of rights are obligations in the charge of States.

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<sup>8</sup> As a consequence of such a concept, the criminal process has been understood in domestic law as an instrument to realize the state's *ius puniendi*. That is, the process through which the state's right to punish because of the commission of a criminal offence is realized. In this concept, the idea of the offence as an act causing damages to victims in their condition as concrete and individual citizens is not retained and victims neither appear nor are envisaged. This is why "allowing victims' participation in criminal proceedings and recognizing the right of the victims to be informed of progress in the case, serves to rebalance a criminal justice system that would otherwise only address the relationship between the State and the offenders and the rights of the defence" (UNODOC (2011), 33, para. 134).

<sup>9</sup> See Sanz Hermida (2009), pp. 25–28 et seq. As UNODOC states, "a system that merely punishes those persons convicted for criminal acts, while simultaneously ignoring the needs and interests of victims, cannot be considered as fulfilling its objectives" (UNODOC, *op. cit.*, 15, para. 56).

Most of these rights are common to all categories of victims. Others are, on the one hand, rights only related to a particular category of victims. Most of the rights are rights already existent in the international law of human rights. Consequently, they are not new but consolidated rights. On the other hand, they are also rights related to one another so that the breach of one implies the breach of all others related or connected to it.

These international norms related to victims are also recent. The most ancient were born in the 1980s. The most recent belong to 2006.

These are norms of an institutional, customary or conventional nature of a general or regional frame, all related to concrete categories of victims: victims of crime, victims of abuse of power, victims of gross violations of international human rights law, victims of serious violations of international humanitarian law, victims of enforced disappearance, victims of violations of international criminal law and finally victims of terrorism.

Most of these norms are of an institutional nature. This fact raises questions about their binding effects. Independent of this discussion and the doctrinal approaches traditionally related to it, it must be remembered that the absence of formalism in international law can also lead to international obligations rising from institutional norms. From another perspective, it should also be remembered that international treaties are frequently preceded by institutional norms adopted on the same subject as that of the future treaty.<sup>10</sup> This is why actual institutional norms relating to the different categories of victims could lead, in the future, to international treaties.<sup>11</sup> In the meantime, they show the existence of a consensus, on the part of states, on the necessity of taking certain victims into account. They also demonstrate recognition of the existence of victims by states and also by international organizations. Particularly, in the case of institutional norms that have been adopted without a vote, by consensus.

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<sup>10</sup> Such a procedure is frequent in the field of international human rights law. For example, the Convention Against Torture of 1984 was preceded by the Declaration on the Protection of All Persons from being subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment adopted by A/RES/3452 (XXX) of 9 December 1975. Also, the International Convention on the Elimination of All Forms of Racial Discrimination adopted and opened for signature by A/RES/2106 (XX) of 20 December 1965, which was also preceded by the Declaration on the Elimination of All Forms of Racial Discrimination adopted by A/RES/1904 (XVIII) of 20 November 1963. More recently, the International Convention for the Protection of All Persons from Enforced Disappearance adopted on 20 December 2006 by A/RES/61/177, which was preceded by the Declaration on the Protection of All Persons from Enforced Disappearance adopted by A/RES/47/133 of 18 December 1992.

<sup>11</sup> Actually, only two treaties exist and both concern victims of enforced disappearance, the United Nations International Convention for the Protection of All Person from Enforced Disappearance, 2006 (entry into force on 23 December 2010, in accordance with article 39(1) which reads as follows: "This Convention shall enter into force on the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession") and the Inter-American Convention on the Forced Disappearance of Persons of 9 June 1994 (into force on 28 March 1996).

In any case, the problem of the legal effects of institutional norms on states is here a relative one because institutional norms relating to victims do not do anything other than reiterate the rights and obligations already existent in international law on human rights. From this point of view, they only express *lex data*. Questions, nevertheless, can arise with regard to those rights that could be qualified *de lege ferenda* rights.

Due to the plurality of the categories of victims envisaged by international norms and the particularism inherent to them, I would like to underline that that plurality of categories does not constitute an obstacle in the way of building a common minimal protection to each victim because the different categories of victims have the same common denominator: the fact of being victims as a consequence of a wrongful act that is a crime. This is why independent of the possible particularization and possible inclusion in a certain category as a result of the wrongful act suffered, the different categories of victims are *all of them*—at the same time that victims belong to a certain category of victims—victims of crime.<sup>12</sup> Consequently, they all have the same rights that belong to the international statute of victims of crime with regard to the criminal process. In addition, they also have other rights not linked to the criminal process but to their condition as victim. Most of them are rights common to all categories of victims as well as rights that are enshrined in other international norms.<sup>13</sup> This is in the case of the following: the right to effective access to law and justice, the right to administration of justice, the right to fair trial, the right to investigation, the right to compensation and reparation, the right to the protection of private and family life, the right to protection of the dignity and security and the right to information. Finally, there are other rights specifically connected to some particular categories of victims. This is in the case of those relating to the assistance to victims like the right to emergency and continuing assistance, the right to specific training for persons responsible for assisting victims, or the right to truth and to memory.

So, it is possible to state the existence of a common international legal statute for the victim (including all categories of victims) that is compatible and complementary with the particular international legal statute of each category of victims that is built in the international norms related to them. That is, an international legal statute for the victim made up of a catalogue of rights to which *all* victims are entitled.

It is an international legal statute, too, characterized by the victim's right to justice and to redress that has become an indispensable element of the efforts to protect individual human rights.<sup>14</sup>

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<sup>12</sup> Only victims of abuse of power do not become victims as a consequence of a crime. According to UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power adopted by the General Assembly resolution 40/34 of 29 November 1985, they become victims through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights.

<sup>13</sup> Basically norms belonging to international law of human rights.

<sup>14</sup> See Bassiouni (2002), 136.

This statement shall be completed with the fact that most of these rights are not other than the particularization with regard to the victims of rights already existent in international law on human rights where international treaties declare that *everyone* is entitled to them. This is a very important element reinforcing the international legal statute of the victim.

With this new approach, the practically exclusive preoccupation of the criminal system of justice, which focused on the search for the crime's author as well as on the sanction applied to that criminal conduct before the commission of a crime, ends. It has been a situation in which the other face of the crime—the victim—never appeared. Fortunately, due to the work of many victims' organizations, this panorama has begun to change.<sup>15</sup>

As we will see, it is a panorama characterized by the following elements. First, international norms take victims into account. Concerning its legal nature, only a minority of them have a conventional source,<sup>16</sup> whereas the great majority has an institutional nature. With regard to the differences in the problems that institutional norms belonging to international organizations of co-operation present to determine their legal effects, institutional norms adopted inside the European Union have the advantage of being clearly binding on the Member States because of the obligations imposed on them by the constitutive treaties.

Second, with regard to its territorial scope, some of these norms have been adopted in the UN, whereas the others have been adopted in the European (Council of Europe and European Union) and in the American regional system (OAS).

Third, they are all international norms of a recent date.

Fourth, there does not exist an only formal concept of victim but so many concepts as categories of victims.<sup>17</sup> As we will see, some international norms related to victims opt for a general concept of victim. This approach makes it possible to include in it other particular categories of victims not expressly envisaged or not sufficiently developed by the particular norm in question. In any case, the interaction between the different international norms related to victims makes it possible to base it on a general, wide concept of victim.

Five, those international norms envisage eight categories of victims: victims of crime, victims of abuse of power, victims of gross violations of international human rights law, victims of serious violations of international humanitarian law, victims of enforced disappearance, victims of violations of international criminal law, victims of trafficking and victims of terrorism.

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<sup>15</sup> See Cario, "Terrorisme et droit des victimes", in SOS Attentats, *op. cit.*, 345.

<sup>16</sup> So the European Convention on the Compensation for Victims of Violent Crimes adopted on 24 November 1983 (entered into force on 1st February 1998), the United Nations International Convention for the Protection of All Persons from Enforced Disappearance, adopted on 20 December 2006 (into force on 23 December 2010) and the Inter-American Convention on enforced disappearance of persons, on the 9th July 1994 (this convention entered into force on 28 March 1996).

<sup>17</sup> I say nearly because there is no international norm giving a definition of victim of terrorism.

Six, each category of victim can be generally individualized according to the elements such as the nature of the breach, its perpetrator, the nationality or place of the victim as well as its interests and specific needs.<sup>18</sup> Nevertheless, all victims have in common the fact of being victims of a previous wrongful act (a crime or the breach of an international obligation) attributed to an individual or group of individuals or to a State.

Seven, as a consequence of it nearly all victims are victims of a crime. At the same time, they are also victims belonging to the category of victim that is determined by the wrongful act in question.

In the following pages, I will study both existent international norms related to the different categories of victims and international treaties (of a general or universal scope as well as of a regional scope) on human rights, as well as international case laws on matters handled by international organs of human rights (international courts and body treaties on human rights). This task will be done, first, to know, examine and describe the international law related to victims. Second, with the aim of trying to build a general, global concept of victim (independent of the category to which the victim belongs) on the basis of the common elements present in the existent definitions. Finally, to determine a common catalogue of the rights of victims in general, valid for any category of victim, built upon the existent international norms. A catalogue that is compatible with particularism envisaged in the international norms related to victims with regard to each category of victim.

## The International Norms Related to Victims

Like the birth of the international human rights law, the relatively recent interest in victims finds its origin in the social situation created after World War II. As a consequence of this dramatic experience, a legislative policy began to coordinate measures to revitalise the status of the victim, in particular, within the criminal proceedings. This initiative became more intense in the 1980s. States and international organizations began to codify law on the matter. An ensemble of international norms solely concerned with victims and their rights began to emerge. They are international norms of a different nature (most of them institutional norms). They are also norms of a different territorial range (general or universal and regional). Still most of the rights building the international statute of the victim are still rights enshrined in international treaties; mainly human rights treaties ratified by the large majority of states.

As we will see, the international statute of victims built on such norms have a more acute legal effect on the framework of the European Union as a consequence

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<sup>18</sup> See Almqvist (2006), 6.

of the legal binding effects the norms, created inside this frame of integration, have upon State members. Its obligatory character is undisputable and this fact is a great advantage with regard to the norms adopted in International Organizations of cooperation such as the UN or, in the regional frame, the Council of Europe or the Organization of American States.

Nevertheless, despite the deficiencies that institutional norms of International Organizations of cooperation present the fact is that most of the rights making up the international statute of victims have their origin in international treaties of human rights. As a consequence of it, almost all of these rights have become customary obligations binding States.

### ***International Norms of a General or Universal Scope: United Nations***

In the *general or universal frame* of the UN, there are, at the moment, seven international norms related to six categories of victims. First, the General Assembly Resolution 40/34 adopted on 29 November 1985, the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.<sup>19</sup> Second, related to victims of enforced disappearance, the *Declaration on the Protection of All Persons from Enforced Disappearance* adopted by the General Assembly of the United Nations in its resolution A/RES/47/133 of 18 December 1992. That was recently followed on 20 December 2006 by resolution A/RES/61/177 that the General Assembly adopted as the *International Convention for the Protection of All Persons from Enforced Disappearance*.<sup>20</sup> Third, General Assembly Resolution 60/147 adopted on 16 December 2005 through which the *Basic principles and guidelines of the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of International Humanitarian Law*<sup>21</sup> adopted by the UN Commission on Human Rights on 19 April 2005, by Resolution 2005/35, were adopted. Finally, and with regard to victims of violations of international *criminal law* (war crimes, crimes against humanity and genocide), the *Statute of the International Criminal Court* (ICC) adopted by the Conference of Rome on 17 July 1998, and the *Statutes* of the international criminal courts *ad hoc* for the *former Yugoslavia* and for *Rwanda* adopted by Security Council resolutions in the frame of Chap. VII of the Charter.

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<sup>19</sup> Adopted by General Assembly Resolution 40/34 of 29 November 1985 it is based on Article 18 of the Universal Declaration on Human Rights, adopted and proclaimed by General Assembly Resolution 217 A (III) of 10 December 1948. Article 8 contains the right of everyone to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law. See Bassiouni (2003), 134–185.

<sup>20</sup> See <http://www2.ohchr.org>

<sup>21</sup> UN E/CN.4/2005/L.10/Add. 11. It was adopted by a recorded vote of 40 to none, with 13 abstentions.

Consequently, six categories of victims are envisaged by these norms: victims of crime, victims of abuse of power, victims of gross violations of international human rights law, victims of serious violations of international humanitarian law, victims of enforced disappearance and victims of violations of international criminal law.

As it can be appreciated, no international norm related to victims of terrorism has yet been adopted by UN. It is a regrettable lack. In particular because of the many terrorist attacks that have taken place and continue take place in the international community. Despite this reality, the action of the UN with respect to victims of terrorism has been unfortunately limited to expressions of mere courtesy deprived of any legal obligations. This is the case of General Assembly resolutions showing the General Assembly's solidarity with victims of terrorism or requesting the Secretary-General to seek the views of Member States on the possible establishment of a United Nations voluntary fund for victims of terrorism. This position is similar to the attitude of the Security Council<sup>22</sup> and the Commission on Human Rights.<sup>23</sup>

These statements of the UN are very poor and unsatisfactory. It is evident that the UN cannot remain deaf to the pleas for justice for victims of terrorism; victims who in most corners of our little planet do not have the most basic human rights<sup>24</sup>; victims who furthermore have never called for revenge. On the contrary, they have placed their trust in the state to deliver the justice that is their due.

In consequence, it is the responsibility of the UN itself to urge and promote international norms recognising and guaranteeing victims of terrorism the effective enjoyment of their human rights. This is particularly true of their effective right to justice and to redress. This is why associations of victims of terrorism call for such actions.<sup>25</sup> This is also what elementary considerations of justice demand. I will deal with this question later.<sup>26</sup>

An initial approach to the norms related to the categories of victims quoted here reveals two things. On the one hand, the recent attention paid by international law—that is by states—to victims. On the other hand, the progressive legal approach to the problem on the basis of categories of victims that result from different wrongful victimizing acts.

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<sup>22</sup> See its resolution 1566 (2004), adopted on 8th October 2004 that considers the possibility of establishing an international fund to compensate victims of terrorist acts and their families. Also resolution 1624 (2005) of 14 September which reaffirms “its profound solidarity with the victims of terrorism and their families”; or resolutions 1611 (2005) of 7 July and 1618 (2005) of 4 August, in which it expresses “its deepest sympathy and condolences to the victims. ... and their families” of the terrorist attacks that took place in London and Iraq, respectively.

<sup>23</sup> See resolution 2003/37 of the Commission on Human Rights adopted on 23 April 2003 and related to the establishing of an international fund to compensate victims of terrorist acts.

<sup>24</sup> Among them, the effective right to justice or the right to redress. This is the case of situations described in the preceding footnote. They all lead, *de facto*, to deny victims of terrorism their effective right to justice and, as a consequence, their right to redress.

<sup>25</sup> See Bou Franch and Fernández de Casadevante Romani (2009).

<sup>26</sup> See chapter “Special Reference to the Victims of Terrorism” of this book.

In a certain way, the manner in which international law pays attention to the victim is similar to the way in which the protection of several groups (women, children, disabled persons) or the fight against certain practices breached of human rights (torture, race discrimination, discrimination of women, enforced disappearance, etc.) has been done in international law of human rights.

With regard to the first aspect, that is, the recent attention given by states to victims it must be remembered that the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* of 29 November 1985 is the first international norm related to victims adopted in the UN. On the one hand, it is an international norm of a general or universal character. On the other hand, it is a norm related only to two categories of victims: victims of crime and victims of abuse of power. Later other international norms taking into account other categories of victims followed this Declaration.

In addition to the concepts of victim of crime and victim of abuse of power, the Declaration of 1985 also includes a catalogue of rights. They are the right of access to justice and fair treatment linked to the prompt redress of victims and to the necessary adaptation of judicial and administrative mechanisms to the needs of victims, and the rights of restitution, compensation and assistance.

A few years later, the Declaration of 1985 was followed by the *Declaration on the Protection of All Persons from Enforced Disappearance* adopted by the General Assembly of the United Nations in its resolution A/RES/47/133 of 18 December 1992. Related to the same practice of enforced disappearance, the Declaration of 1992 was recently followed on 20 December 2006 in the resolution A/RES/61/177 by the General Assembly adopting the *International Convention for the Protection of All Persons from Enforced Disappearance*.<sup>27</sup>

In contrast to the Declaration of 1992, the Convention of 2006 contains a definition of “enforced disappearance”. So, according to article 2:

For the purposes of this Convention, ‘enforced disappearance’ 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.<sup>28</sup>

<sup>27</sup> It entered into force on 23 December 2010. As stated earlier, it is the only treaty related to victims in the general or universal frame. In the regional frame, it was preceded by the Inter-American Convention of the 9th July 1994 (this convention entered into force on 28 March 1996) on enforced disappearance of persons. See its text at <http://www.oas.org/juridico/spanish/Tratados/a-60.html>.

<sup>28</sup> According to Article 1: “1. Any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field. 2. Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be



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