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الدورة السابعة
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تعزيز وحماية جميع حقوق الإنسان، المدنية والسياسية والاقتصادية
والاجتماعية والثقافية، بما في ذلك الحق في التنمية

تقرير الفريق العامل المعني بحالات الاختفاء القسري أو غير الطوعي

إضافة

البعثة التي قام بها إلى السلفادور*

* يُعمم موجز تقرير هذه البعثة بجميع اللغات الرسمية. أما التقرير ذاته فيرد في مرفق الموجز ويُعمم باللغة التي قدم بها وباللغة الإنكليزية فقط.

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موجز

بدعوة من حكومة السلفادور، قام الفريق العامل المعني بحالات الاختفاء القسري أو غير الطوعي بزيارة السلفادور في الفترة من ٥ إلى ٧ شباط/فبراير ٢٠٠٧. وكان الفريق العامل ممثلاً برئيسه - مقرر، السيد سانتياغو كوركويرا، وبأحد أعضائه، السيد داركو غوتليشر. وكانت هذه الزيارة جزءاً من زيارة إقليمية لأربعة بلدان في أمريكا الوسطى يرتفع فيها عدد الحالات المعلقة التي تنتظر توضيحاً، وهي: غواتيمالا وهندوراس والسلفادور ونيكاراغوا.

وتمثل الهدف الرئيسي لهذه الزيارة في جمع أقصى ما يمكن من معلومات بغية توضيح أكبر عدد ممكن من الحالات المسجلة لدى الفريق العامل. كذلك، أعرب الفريق العامل خلال هذه الزيارة عن اهتمامه بتحليل سبل التعاون الممكنة بين حكومة السلفادور والفريق العامل بقصد بحث حالات الاختفاء القسري في ضوء المعايير الدولية لحقوق الإنسان، وتحديدًا في ضوء الإعلان المتعلق بحماية جميع الأشخاص من الاختفاء القسري ("الإعلان")، والصادر عن الجمعية العامة بموجب القرار ٤٧/١٣٣ المؤرخ ١٨ كانون الأول/ديسمبر ١٩٩٢.

وعقد الفريق العامل اجتماعات مع وزير الخارجية، ورئيس المحكمة العليا، ومع أعضاء في لجنة العدل وحقوق الإنسان، ولجنة العلاقات الخارجية والتكامل لأمريكا الوسطى والسلفادوريين المغتربين التابعة للجمعية التشريعية الموقرة، ومع نائب وزير الأمن العام والعدل، والمدعية المعنية بالدفاع عن حقوق الإنسان، ووكيل النائب العام للجمهورية، ووزير الدفاع الوطني، وأعضاء في اللجنة المشتركة بين المؤسسات والمعنية بالبحث عن الأطفال الذين اختفوا بسبب النزاع المسلح في السلفادور.

واجتمع الفريق العامل أيضاً مع أعضاء في منظمات مجتمع مدني شتى ومع أسر ضحايا الاختفاء القسري وأجرى معهم حواراً صريحاً وموضوعياً. وقدم الفريق العامل إلى جميع المعنيين بالأمر قائمة الحالات المعلقة التي تنتظر توضيحاً وأعلمهم بالمعايير التي يطبقها الفريق لكي يمكن اعتبار الحالات المعلقة قد وضحت. وعقد الوفد في ختام الزيارة مؤتمراً صحفياً.

وينقسم التقرير التالي إلى ستة فصول. ويتناول الفصلان الأول والثاني مسائل عامة، منها الغرض من الزيارة والسياق التاريخي والسياسي وظاهرة الاختفاء القسري في السلفادور.

ويقدم الفصل الثالث لمحة عن الأحكام الدستورية والقانونية المتعلقة بالاختفاء القسري في السلفادور، بما في ذلك المعاهدات الدولية التي دخل البلد طرفاً فيها. كما يتضمن تحليلاً لأحكام قانون العقوبات الذي يعرف جريمة الاختفاء القسري كجريمة قائمة بذاتها في ضوء الإعلان.

ويرد في فصول التقرير اللاحقة تحليل للتدابير التي اتخذتها السلفادور للتصدي لظاهرة الاختفاء القسري ولضمان حقوق الإنسان للضحايا بغية إعمال أحكام الإعلان. ويتضمن كذلك تحليلاً لبعض ما يواجهه البلد من عوائق تحول دون تطبيق الإعلان.

ويشير الفصل الرابع إلى ما تبذله الحكومة من جهود في سبيل البحث عن الأطفال المختفين، وكذلك إلى ما تبذله المنظمات غير الحكومية من جهود شتى في مجال البحث عن المختفين. ويرز هذا الفصل أيضاً عدم وجود خطة متكاملة أو برنامج متكامل للبحث عن المختفين يتضمن مخططاً شاملاً لجبر الضرر.

ويشار في هذا الفصل أيضاً إلى أن هذه الخطة أو هذا البرنامج ينبغي أن يتيح لكل من يعنيه الأمر بصفة مشروعة الوصول الكامل إلى كل المعلومات والوثائق التي ربما ظلت سرية حتى الآن، بغية تدعيم حظوظ العثور على المختفين. ويشار في هذا السياق إلى أن الإطار القانوني الموجود في السلفادور يمكن أن يشكل عائقاً أمام الشفافية والوصول إلى المعلومات.

ويشير الفصل الخامس إلى سريان قانون العفو الصادر في عام ١٩٩٣ وآثاره. ويشير التقرير إلى بعض الاعتبارات التي أثارها جهات شتى في الأمم المتحدة وفي منظومة حقوق الإنسان للبلدان الأمريكية على حد سواء. كما يتناول هذا الجزء السياق الوطني، بما في ذلك قرار صادر عن المحكمة العليا للسلفادور بخصوص دستورية ذلك القانون، وتناقض المواقف داخل الجمعية التشريعية بهذا الشأن. أما بخصوص آثار قانون العفو، فيبين التقرير مبدأ وتبعات الطابع المستمر لجريمة الاختفاء القسري.

ويشير الفصل السادس من التقرير إلى ما تلقاه الفريق العامل من معلومات تفيد بأن المدافعين عن حقوق الإنسان والأشخاص المشاركين في التحقيق في حالات الاختفاء القسري يتعرضون بسبب نشاطهم للتهديد والتخويف والمضايقة.

وبناءً على استنتاجات الفريق العامل، يتضمن التقرير عدداً من المسائل المثيرة للقلق وعدداً من التوصيات التي يقدمها الفريق العامل باحترام إلى حكومة السلفادور كي تنظر فيها وتنفذها.

ومن بين التوصيات الواردة في التقرير، يسلط الفريق العامل الضوء على ما يلي:

(أ) التصديق على اتفاقية البلدان الأمريكية المتعلقة بالاختفاء القسري للأشخاص، ونظام روما الأساسي للمحكمة الجنائية الدولية، واتفاقية عدم تقادم جرائم الحرب والجرائم المرتكبة ضد الإنسانية، والاتفاقية الدولية لحماية جميع الأشخاص من الاختفاء القسري؛

(ب) تنقيح الأحكام القانونية التي تعرف جريمة الاختفاء القسري، مع مراعاة التعليقات الواردة في التقرير بخصوص مواطن القصور التي لمسها الفريق العامل؛

(ج) اعتماد تدابير فعالة من أجل ضمان وإعمال الحق في تحقيق العدالة ومعرفة الحقيقة والجبر ورد الاعتبار؛ لذلك يُناشد الفريق العامل الجمعية التشريعية إدخال تعديل جوهري على قانون العفو الصادر في عام ١٩٩٣ ومواءمته مع أحكام الفقرة ٨ من التعليق العام الذي أصدره الفريق العامل بخصوص المادة ١٨ من الإعلان؛

(د) اعتماد تدابير لإنفاذ أحكام المادة ٥ من الإعلان، التي تنص على أن المشتبه في ارتكابهم جرائم الاختفاء القسري تقع عليهم، بالإضافة إلى العقوبات الجنائية الواجب تطبيقها، مسؤولية عامة بموجب القانون المدني. إذ يجب عليهم تعويض الضحايا عما لحقهم من أضرار، ويجب منعهم من تولي المناصب الرسمية، عملاً بأحكام الفقرة ١ من المادة ١٦ من الإعلان؛

(هـ) صياغة وتنفيذ خطة فعالة للبحث عن المختفين، دون أن تقتصر على البحث عن الأطفال المختفين. ويوصى أيضاً بأن تشرك الخطة بصورة فعلية منظمات المجتمع المدني وأن يحظى بإقرار السلطة التشريعية؛

(و) القيام، في سياق برنامج البحث المتكامل، بتنفيذ خطة جبر متكاملة تشمل تعويضاً ملائماً وغير ذلك من وسائل الجبر، مثل رد الاعتبار على أكمل وجه ممكن، في ظل الاحترام التام للحق في تحقيق العدالة ومعرفة الحقيقة؛

(ز) إتاحة المعلومات والوثائق التي ربما ظلت سرية حتى الآن للمعنيين بالأمر، بغية تدعيم حظوظ العثور على المختفين، وذلك من باب ممارسة الحق في المعلومات.

Annex

**REPORT SUBMITTED BY THE WORKING GROUP ON
ENFORCED OR INVOLUNTARY DISAPPEARANCES**

MISSION TO EL SALVADOR

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I. INTRODUCTION

1. At the invitation of the Government of El Salvador, the Working Group on Enforced or Involuntary Disappearances visited the country from 5 to 7 February 2007. The Working Group was represented by its Chairperson-Rapporteur, Mr. Santiago Corcuera, and Working Group member, Mr. Darko Göttlicher. The mission was part of a regional visit planned to four Central American countries with significant numbers of cases which have been outstanding for many years: Guatemala, Honduras, El Salvador and Nicaragua. The Working Group visited Guatemala in September 2006 and, immediately before its visit to El Salvador, it visited Honduras. With respect to Nicaragua, the Working Group is continuing its dialogue with the authorities with a view to visiting the country.

2. The main purpose of the mission was to gather information to serve as a basis for clarifying the greatest possible number of cases on the Working Group's registers. During its visit, the Working Group also showed an interest in analysing the possibilities of cooperation between the Government of El Salvador and the Working Group in order to examine cases of disappearance in the light of international human rights standards, and more specifically the Declaration on the Protection of All Persons from Enforced Disappearance (the "Declaration"), proclaimed by the General Assembly in resolution 47/133 of 18 December 1992.

II. GENERAL OBSERVATIONS

A. Purpose of the visit

3. Since it was established, the Working Group has received for consideration 2,661 cases of enforced disappearances in El Salvador dating from the armed internal conflict. The Working Group still has 2,270 cases pending for clarification of the whereabouts or fate of the victims concerned.

4. Following the invitation from the Government of El Salvador, the Working Group decided to make an official visit to the country from 5 to 7 February 2007. The purpose of the mission was to forge links with the Government of El Salvador and civil society organizations responsible for investigating cases of enforced disappearance that occurred during the period of internal armed conflict. The aim of the exercise is to strengthen the mechanisms that in the near future should the greatest possible number of cases on the Working Group's registers.

5. During their visit to El Salvador, the members of the Working Group stressed the humanitarian character of their mandate, with the main objective of assisting the families of disappeared persons in determining the fate or whereabouts of their relatives. Furthermore, the Working Group members highlighted that, in addition to its central mandate, they are entrusted to monitor States' compliance with their obligations deriving from the Declaration on the Protection of All Persons from Enforced Disappearance and to provide Governments with assistance in its implementation.

6. The Working Group held meetings with the Minister for Foreign Affairs, the President of the Supreme Court of Justice, members of the Justice and Human Rights Commission and the Legislative Assembly's Commission on Foreign Relations, Central American Integration and Expatriate Salvadorans, the Vice-Minister for Public Security and Justice, the Procurator for the Protection of Human Rights, the Deputy Attorney-General of the Republic, the Minister of National Defence, and members of the Inter-institutional Commission to Search for Children who Disappeared owing to Armed Conflict in El Salvador.

7. The Working Group also met members of various civil society organizations and the families of victims of enforced disappearances. The members of the Working Group who participated in this mission wish to highlight the important work done by these organizations and consider that the information they provided is vital for the Group's work.

8. The Working Group expressed the wish to strengthen the channels of communication with official and non-governmental sources so that links with the families of the victims might be maintained with the goal of clarifying the maximum number of cases. The Working Group gave all those concerned a list of the above cases and explained the applicable criteria for considering the cases pending to be resolved.

9. The members of the Working Group who participated in this mission wish to express their deep gratitude for the support given by the Government of Guatemala to ensure the success of the visit.

B. Historical and political background

10. El Salvador is a country in Central America with a population of around 6.7 million inhabitants and a surface area of 21,041 km², giving it the highest population density in mainland America. Having won its independence from Spain in 1821, it left the United Provinces of Central America in 1839.

11. During the 1970s, discussions about undertaking an armed struggle gathered force among some sectors of the opposition. During the first half of the decade, several politico-military organizations decided to take up arms in their fight to win power. By the end of the decade each guerrilla organization had forged links with a massive front of the population.

12. In the early 1980s the five existing politico-military organizations joined forces and formed the Farabundo Martí National Liberation Front (Frente Farabundo Martí para la Liberación Nacional, FMLN). In 1981 the FMLN organizations decided to launch an offensive to promote a popular uprising with the aim of toppling the military junta in power. Although it failed in that objective, the FMLN managed to control a number of settlements, established its areas of political influence and won international recognition as a fighting force.

13. In the 1980s civil war broke out in the country and left a death toll of more than 75,000.¹ The year 1980 was decisive for the beginning of the civil war in the country, owing to the number of acts of repression carried out by the State and paramilitary organizations.

14. The first years of the conflict were the most violent. The Salvadoran armed forces (Fuerza Armada de El Salvador, FAES) implemented a deliberate strategy to eliminate or terrorize the rural population, symbolized by the massacre perpetrated in El Mozote, where troops from the Atlacatl atallón, part of the Batallón de Infantería de Reacción Inmediata (BIRI), murdered a number of defenceless peasants in December 1981.²

¹ United Nations, *El Salvador Agreements: The Path to Peace*, p. 1: Background.

² United Nations, *From Madness to Hope. The 12-year war in El Salvador*, Report of the Commission on the Truth for El Salvador. San Salvador, New York, 1992-1993, p. 12 (English version).

15. The Inter-American Commission on Human Rights (IACHR) reported on the violence committed during that period and estimated that, between 1980 and 1984, the total number of persons who died as a consequence reached 50,000, “many of them assassinated in the most inhumane way, in acts attributable to the security forces or those that operate with their acquiescence”.³

16. The 12-year armed conflict ended in January 1992, when the Government and left-wing guerrillas signed the Peace Accords, which led to a number of military, social and political reforms. The armed conflict was formally ended on 15 December 1992, in an official ceremony celebrated in San Salvador, attended by the Secretary-General of the United Nations.

17. The support of the United Nations and various governments in late 1991 and early 1992 was extremely important for the signing of the Peace Accords.

18. The signing of those Accords marked a new stage in the history of El Salvador. One of the results of the Accords was the creation in April 1991, during the round of talks held in Mexico City, of the Commission on the Truth, which began working at the end of that year with the investigation of human rights violations committed during the 12-year conflict. The Truth Commission was set up to investigate “serious acts of violence that have occurred since 1980 and whose impact on society urgently demands that the public should know the truth”.

19. A day before the Commission on the Truth submitted its report, President Cristiani gave a speech to the nation in which he proposed a general and absolute amnesty for all those involved in the Report of the Commission on the Truth. On 20 March 1993, the Legislative Assembly approved the general amnesty for all those reported to be responsible for the gravest human rights violations committed during the armed conflict.

C. The phenomenon of enforced disappearance in El Salvador

20. The practice of disappearance started in El Salvador in 1978, according to the IACHR. The IACHR carried out an on-site visit, which gave rise to a special report on El Salvador in the same year, in which reference was made to denunciations of murders and disappearances.⁴

21. Against this background, it may be considered that the enforced disappearance of persons in El Salvador, in the meaning of the concept deduced from the Declaration, was practised systematically both before and during the years of internal armed conflict. This can be corroborated by the reports of various Salvadoran NGOs, who estimated that more than 8,000 individuals disappeared during the Salvadoran armed conflict, and by the information produced by the Office of the Procurator for the Protection of Human Rights of El Salvador, which stated the following on this subject: “Disappearances usually took place during operations whose purpose was the detention and later the disappearance or execution of persons identified as or suspected of being government opponents, including civilians who had nothing to do with the conflict, with the

³ IACHR, Annual Report, 1983-1984.

⁴ IACHR, Report on the Situation of Human Rights in El Salvador, 17 November 1978 (OEA/Ser.L/V/II.46doc.23 rev.1), chap. II (“Right to Life”), para. 18.

apparent aim of generating terror and eliminating members of the population who might potentially become guerrillas.”⁵

22. According to the Procurator’s Office, the most widespread modus operandi of the disappearances consisted in taking the victims to detention centres, many of them clandestine, located in military facilities and/or security corps. Some detainees were handed over to civilians, presumably members of the “death squads”, who often took the victims to a particular place of detention in order to prevent their being located.

23. One phenomenon that occurred during the armed conflict in El Salvador was the enforced disappearance of children. According to the sources consulted, the phenomenon was part of a deliberate strategy within the violence institutionalized by the State during the period of conflict.⁶ According to those sources, the children were abducted during the execution of military operations after which their families were executed or forced to flee to save their lives. Children were frequently taken away by military chiefs who brought them up as their own children.

24. As was pointed out earlier, since it was established the Working Group has received for consideration 2,661 cases of enforced disappearances in El Salvador dating from the armed internal conflict. The Working Group still has 2,270 cases pending for clarification of the whereabouts or fate of the victims concerned. This falls far short of the total number of cases of enforced disappearance in El Salvador, given that, according to the Report of the Commission on the Truth for El Salvador, it is estimated that more than 5,500 persons may have been the victims of enforced disappearance, or 25 per cent of the 22,000 cases of serious human rights violations.⁷ The Working Group has received no case of any enforced disappearance that reportedly occurred since the end of the internal armed conflict, which demonstrates the progress made since the 1992 Peace Accords. Of the 2,661 cases, 73 have been clarified by the Working Group thanks to the information provided by the sources and 318 thanks to information supplied by the Government.

III. CONSTITUTIONAL AND LEGAL FRAMEWORK ON ENFORCED DISAPPEARANCE

A. The Constitution

25. The 1983 Constitution of El Salvador contains a fairly comprehensive list of human rights. Although, as is the case of most constitutions, it makes no explicit reference to enforced disappearance, it protects all the fundamental human rights that are violated whenever that offence is committed.

⁵ Case of Ernestina and Erlinda Serrano Cruz, Report of the Procurator for the Defence of Human Rights on the enforced disappearances of two girls, Ernestina and Erlinda Serrano Cruz, the current impunity and the pattern of violence in disappearances of this kind. Office of the Procurator for the Defence of Human Rights, September 2004, p. 70.

⁶ *La paz en construcción. Un estudio sobre la problemática de la niñez desaparecida por el conflicto armado en El Salvador*, Asociación Pro-Búsqueda and Save the Children, January 2003, San Salvador.

⁷ Report of the Commission on the Truth for El Salvador, chap. IV, sect. A.

26. Title II recognizes the individual's fundamental rights and guarantees. Article 2 recognizes each person's right to life, physical and moral integrity, freedom and security. The Constitution protects everyone from arbitrary detentions and establishes the basic safeguards in cases of privation of liberty.

27. Furthermore, the Constitution recognizes everyone's right to apply for *amparo* in the event of the violation of any of the rights recognized in it. Accordingly, it lays down that everyone is entitled to file a writ of habeas corpus whenever any authority or individuals illegally restrict their freedom.

28. With regard to international human rights treaties, under the Constitution of El Salvador these are enshrined in domestic law as soon as they enter into effect and national law may neither amend nor derogate from what has been agreed in a treaty in force. The Constitution establishes that, in the event of a conflict between a treaty and the law, the treaty shall prevail. Nevertheless, unlike other more advanced Latin American constitutions, such as those of Guatemala, Colombia, Peru, Argentina and Venezuela, which establish that international human rights treaties have a constitutional hierarchy, according to the Salvadoran legal framework the Constitution takes precedent over international human rights treaties.

B. The Criminal Code

29. In 1998 work was begun on reforming Salvadoran criminal law, with the entry into effect of a new criminal code and code of criminal procedure. In the same year, the offence of enforced disappearance was defined.⁸

30. The definition of the offence of enforced disappearance is partial in that it refers only to acts committed by State agents or individuals acting under orders or instructions from State agents. Nevertheless, the definition of enforced disappearance does not include the acts committed by individuals acting on behalf of the Government or with its direct or indirect support, without necessarily having received orders or instructions from government agents to commit the offence.

31. The Criminal Code allows for the possibility that the offence of enforced disappearance may be committed negligently, as follows:

Section 366. Anyone who negligently allows another person to commit the offence of the enforced disappearance of persons shall be liable to two to four years' imprisonment and to 100 to 180 days' fine. In the case of civil servants or public employees, or agents of authority or State authority, they shall also be suspended from their post or duties for the same period.

32. Nevertheless, the Working Group maintains that enforced disappearance is a criminal offence in all cases.

33. The Working Group noticed that the Criminal Code provides for a lighter penalty for enforced disappearance than for less serious offences, such as abduction and aggravated abduction, which is regarded as contrary to the provision contained in article 4 of the Declaration, namely that enforced disappearance shall be an offence under criminal law punishable by appropriate penalties which shall take into account their extreme seriousness.

⁸ See sections 364 to 366 of the Criminal Code of El Salvador.

34. The Criminal Code also establishes that anyone who commits the offence of enforced disappearance shall be suspended from any official post or duties, in keeping with what is laid down in article 16, paragraph 1, of the Declaration.

C. International human rights treaties

35. El Salvador is party to the seven principal international human rights treaties: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the International Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention on the Rights of the Child and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. El Salvador is also party to the First Optional Protocol to the International Covenant on Civil and Political Rights and both Optional Protocols to the Convention on the Rights of the Child, but it is not party to the Second Optional Protocol to the International Covenant on Civil and Political Rights nor to the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. El Salvador has signed the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women.

36. El Salvador is also party to the American Convention on Human Rights, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belém do Pará).

37. El Salvador is not, however, party to the Inter-American Convention of Enforced Disappearance of Persons. Nor is El Salvador party to the Rome Statute of the International Criminal Court, which defines the international crime of enforced disappearance of persons as one embodying the characteristics of crime against humanity. Nor is it party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which lays down that crimes against humanity are prosecutable irrespective of their date of commission.

D. Office of Procurator for the Protection of Human Rights

38. The Mexico City Agreements of April 1991 gave rise to the creation of the institution of Procurator for the Protection of Human Rights, whose mandate is principally to promote human rights and see that they are respected. The constitutional reform of 1992 established the institutional nature of the Procurator⁹ and his or her functions. The Procurator for the Protection of Human Rights Act of 20 February 1992 regulates the organization, functions and operation of the institution.

39. The Office of Procurator for the Protection of Human Rights has been invested with wide-ranging constitutional and legal powers to carry out its work, including that of seeing to the respect and guarantee of human rights, investigating cases of human rights violations and promoting judicial or administrative resources to protect them.

⁹ Constitutional Reform Agreement No. 1 of 29 April 1991, ratified by Legislative Decree No. 64 of 31 October 1991, *Official Journal* No. 217 of 20 November 1991.

E. 1993 Amnesty Act

40. On 20 March 1993, the Law on General Amnesty for the Consolidation of Peace (Amnesty Act) was approved. By means of this law, the Legislative Assembly enacted an absolute and general amnesty, exonerating from criminal and civil liability all those responsible for human rights violations committed during the armed conflict.

41. The effects of the Act are laid down in section 4:

(a) In the case of persons sentenced to custodial penalties, the judge or court which handed down the sentence shall decide in favour of their immediate release without bail; the same procedure shall apply to the court that recognized the sentence, albeit without a writ of execution;

(b) In the case of persons sentenced to custodial penalties in absentia, the relevant judge or court shall immediately annul all arrest warrants issued in their regard, without bail;

(c) In cases of persons facing trial, the relevant judge shall immediately dismiss the proceedings against the accused with no restrictions, owing to the extinction of the penal action, and order their immediate release;

(d) In the case of persons who have not yet been subjected to any proceedings, the present decree shall ensure that, at such a time as proceedings are initiated against them for the offences included in this amnesty, they may plead extinction of the penal action and request annulment of the case; and in the event that they have been captured, they shall be brought before the relevant judge in order to be formally released;

(e) Persons not covered by the above and who, on their own initiative or for any other reason, wish to benefit from the present amnesty may appear before the respective assizes court, which shall issue them with a certificate containing the reasons why their rights as citizens may not be restricted; and

(f) The amnesty granted by this act extinguishes all civil liability.

42. A later chapter in this report addresses the scope of this Act and its implications in the light of the Declaration and international human rights law.

IV. SEARCH FOR DISAPPEARED PERSONS

43. The main purpose of the mission was to gather information to serve as a basis for clarifying the greatest possible number of cases on the Working Group's registers.

44. To that end, the Working Group held meetings with all those, whether working for the Government or not, who are involved in that activity. At the meetings, the Working Group gave all those concerned a list of the cases in its archives pending to be resolved.

45. The Working Group noted with concern that the relations between government officials and the civil society organizations whose aims include the investigation of cases of enforced disappearances seemed not to be based on a spirit of real confidence and cooperation. On more than one occasion the Working Group heard negative comments from State officials about NGOs, with which, they claimed, it was difficult to establish fruitful and constructive communications. Similarly, the NGO representatives whom the Working Group met displayed mistrust of the Government and pointed out that they perceived a lack of genuine political will on its part to

support efforts to find disappeared persons, and that when they did make efforts the reasons seemed to be political rather than truly humanitarian as they ought to be.

46. The Working Group found that the Government of El Salvador is making some efforts to search for disappeared children. The Working Group was informed that the Inter-institutional Commission to Search for Children who Disappeared owing to Armed Conflict in El Salvador had been set up mainly as a result of the judgement of the Inter-American Court of Human Rights in the case of the Serrano sisters of 1 March 2005. In its judgement the Court said that the State of El Salvador was obliged to set up a national commission to trace the young people who disappeared when they were children during the armed conflict, with the participation of civil society, to create a search web page and create a genetic information system.

47. This Commission was set up pursuant to Decree No. 45 of the President of the Republic, published in the *Official Journal* on 6 October 2004. According to the decree, the members of the Commission shall come from the Ministries of Foreign Affairs, Internal Affairs and National Defence, the National Civil Police, the Instituto Salvadoreño para el Desarrollo Integral de la Niñez y la Adolescencia (Salvadoran Institute for the Integral Development of Children and Adolescents), the Office of the Procurator-General of the Republic and the Office of the Attorney-General of the Republic.

48. The executive decree does not stipulate that civil society institutions will be members of the Commission, as called for in the judgement of the Inter-American Court mentioned earlier. Article 4 of the decree states, however, that the Commission may call upon the cooperation and support of other State institutions [...] and private institutions whose purpose is the same as that of the Commission.

49. The Working Group was informed that, regardless of the provision contained in article 4 of the executive decree, the Inter-institutional Commission to Search for Children who Disappeared owing to Armed Conflict in El Salvador was set up with the clear intention that various governmental institutions and civil society organizations should participate in it, in particular the Asociación Pro-Búsqueda de Niñas y Niños Desaparecidos (Pro-Búsqueda), which for over a decade has been involved in the search for children who have disappeared in El Salvador. Nevertheless, the Working Group received reports from both institutions that civil society had stopped participating in the Inter-institutional Commission owing to various differences that had arisen, leading to their separation, such that NGOs no longer took part in the Inter-institutional Commission, as required by the IACHR judgement.

50. The Working Group met officials from the Inter-institutional Commission and was informed that to date it had located 17 children, 2 of them dead and 11 resulting in reunions.

51. Separately, the Working Group met the Association in Search of Missing Children, which, according to its registers at the time of the Working Group's mission, had succeeded in locating 317 persons alive and bringing about 181 cases of family reunion. It had also located 42 children who had died.

52. The Working Group again urged governmental and non-governmental bodies to strengthen cooperative links in order to resolve problems relating to cases of enforced disappearance that remained to be clarified.

53. At the end of its mission, the Working Group held a meeting with officials of the Ministry of Foreign Affairs, at which specific cases of disappeared persons reported to the Working Group were discussed. Laudably open to the idea of analysing certain cases, the government officials

explained to the Working Group the difficulties they faced with regard to the lists of cases which the Working Group had given them and in the search for relevant information, as a result of the intervening years. There was a discussion of the different ways in which the Government and the Working Group might cooperate to overcome their respective obstacles.

A. Right to truth and information

54. The Working Group is concerned at the fact that El Salvador has no comprehensive plan or programme for searching for disappeared persons. To ensure that such a search plan or programme is institutionally permanent, along with the independence of its management and budget, it is recommended that it should be entrusted to a body created by a law and should involve the organized involvement of civil society, particularly the families and loved ones of missing persons, pursuant to article 13, paragraphs 1 and 4, of the Declaration.

55. With an institutional effort, such as that outlined above, it would undoubtedly be possible to clarify some of the cases of enforced disappearance that remain active on the Working Group's registers.

56. The Working Group considers that, under the suggested comprehensive search programme, there is a need for a comprehensive programme of redress, pursuant to article 19 of the Declaration, to include adequate compensation and other means of redress, such as the fullest possible rehabilitation and full observance of the right to justice and truth.

57. The suggested body, and all persons with a legitimate interest, should be given full access to all information and documentation that may still be restricted, in order to improve the results of the search for disappeared persons, in full exercise of the right to information and truth.

58. In its judgement of 1 March 2005 in the case of the *Serrano-Cruz Sisters v. El Salvador*, the Inter-American Court of Human Rights refers to the procedural actions related to the Armed Forces, and notes the difficulty in gaining access to information in the "logbooks", which might presumably contain information needed to clarify the facts related to enforced disappearances.

59. The Working Group received information on certain provisions contained in the Criminal Code that might prove to be real obstacles to effective investigations into cases related to enforced disappearances. This is true of the offences referred to as "Revealing secret facts, acts or documents by an official employee" (sect. 324), "Disloyalty in the custody of public registers or documents" (sect. 334) and "Revealing State secrets" (sect. 355).

60. These three types of offence have the following in common:

(a) They make any State employee or official who allows anyone to gain access to State information liable to sentences of between two and six years;

(b) The information protected by the State by means of the application of these sanctions is considered to be a "restricted" document, a "political secret" or a "closed document or military secret".

61. The Working Group is concerned not only at the existence of a legal framework that might prove an obstacle both to transparency and to access to any information that might help to clarify cases of enforced disappearance, but also, and above all, at the absence of a law positively guaranteeing access to that information. Comparative law abounds on the subject and the Working Group urges the Salvadoran legislature to act in the interest of increasing the transparency of

information leading to the recovery of the collective memory concerning the serious human rights violations committed during the armed conflict, including enforced disappearances, and to pass a law on transparency and access to information that complies with international standards.

V. IMPUNITY AND EFFECTS OF THE AMNESTY ACT

62. In this chapter, some remarks are made about the fact that the Law on General Amnesty for the Consolidation of Peace (General Amnesty Act) remains in effect and the consequences of that fact.

63. The Secretary-General of the United Nations submitted to the General Assembly an assessment of the non-compliance with the recommendations of the Commission on the Truth, referring to the approval of the amnesty act as a clear instance of the rejection of the findings of the Commission on the Truth.¹⁰ In 2003 the Human Rights Committee reiterated its concern at the General Amnesty Act and at the murder of Archbishop Óscar Arnulfo Romero and other similar cases, which had been filed under the statute of limitations, even though the supposed perpetrators had been identified.¹¹ Both the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have recommended that the law should not be implemented and should be nullified.¹²

64. At the meetings held by the Working Group with the President of the Supreme Court of Justice it was revealed that a request had been made to the Supreme Court of Justice in 2000 to declare the Law on General Amnesty for the Consolidation of Peace unconstitutional. The Supreme Court had delivered a judgement on the matter on 26 September 2000, in which it had stated that, although the Amnesty Act was constitutional, judges may decide not to apply it when giving judgements on specific cases, adding that “it shall be for the judge to decide in each specific case when this exception applies, by means of an interpretation in keeping with the Constitution”.

65. According to reports received during the mission, in particular from senior officials at the Office of the Attorney-General, despite the possibility for the judiciary not to implement the Amnesty Act in specific cases, in practice no such cases had arisen. Non-governmental sources told the Working Group that subsequently the Amnesty Act had become a major obstacle to fulfilment of the right to justice and redress, since the Act not only extinguished criminal proceedings but also “extinguishes all civil liability”, in accordance with section 4, indent (e), of the Act, a violation of article 5 of the Declaration.

66. During some of the meetings held with senior officials of the Government of El Salvador, the Working Group was told that it was important to protect the reconciliation process since, according to them, there were many wounds that should not be reopened and, although it was important to determine the truth, it should be established in such a way that did not reopen those wounds. Some of those officials pointed out that many Salvadorans had come to accept that those who had been involved in war crimes (a clear allusion to members of the FMLN) were currently

¹⁰ Secretary-General's report of 1 July 1997, para. 25.

¹¹ *Official Records of the General Assembly, Fifty-eighth session, Supplement No. 40 [A/58/40 (vol. 1)]*, chap. IV, para. 84.

¹² IACHR: Report No. 136/99, Ignacio Ellacuría S. J. *et al* and Report No. 37/00, Monsignor Óscar Arnulfo Romero y Galdámez. Inter-American Court of Human Rights: case of the *Serrano-Cruz Sisters v. El Salvador*, judgement (merits, reparation and costs).

taking part in politics, and they suggested that the same should be allowed in the case of members of the armed forces and State agents who may have been responsible for serious human rights violations, including enforced disappearances, perpetrated during the armed conflict.

67. Furthermore, the Working Group was told by senior government officials that it ought to be borne in mind that the peace process had ended the war and that, in their opinion, it should neither be changed nor reopened. The members of the Working Group were told that, whatever happened, and regardless of the various opinions of the peace process, it had to be recognized that it had ended the war and that was the most important.

68. With regard to this issue, during its meeting with the Justice and Human Rights Commission and the Legislative Assembly's Commission on Foreign Relations, Central American Integration and Expatriate Salvadorans, the Working Group was made aware of the considerable polarization that remains between the political and social groups vis-à-vis the internal armed conflict and the crimes committed during that time. Moreover, the Working Group realized that positions also differed on the recovery of the historical truth and the effects of the Amnesty Act on that recovery. Indeed the stances taken by the different political and social groups were diametrically opposed.

69. Bearing this in mind and recognizing the undeniable benefits of the peace process in El Salvador, after a measured analysis of the contents and scope of the Amnesty Act, the Working Group respectfully calls upon the legislature of El Salvador to review the Act and bring it into line with the provisions of international human rights law. In the Working Group's view, the Amnesty Act produces the effects mentioned in several of the subparagraphs of paragraph 2 of its general comment on article 18 of the Declaration and is also contrary to articles 2, 3, 5, 9, 13, 14, 16 to 19, and 20 of the Declaration.

70. The Working Group respectfully emphasizes the fact that, although the domestic law of El Salvador does not grant constitutional rank to international human rights treaties and the Supreme Court of Justice has declared that the Amnesty Act does not conflict with the Constitution, the Working Group's function is to assist States in properly implementing the Declaration, regardless of the provisions of national law, on the basis of the general principle of international law according to which no State may invoke the provisions of its domestic law to justify its failure to comply with international law.

71. Although El Salvador is not party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, the Working Group recalls the provision laid down in article 15, paragraph 2, of the International Covenant on Civil and Political Rights, according to which nothing in that article "shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations".

72. The Working Group reiterates what it stated in paragraph 5 of the general comment on article 18 of the Declaration, namely that in States where serious or massive violations of human rights, including enforced disappearances, have occurred as a result of internal armed conflict, legislative measures to grant pardon might be the only option for achieving national reconciliation. Nevertheless, the Working Group also reiterates what it stated in paragraph 8 of the same general comment, respectfully calling on the legislature of El Salvador to bring the Amnesty Act into line with those parameters, so as to restore the victims' rights to justice, truth and fair and appropriate redress, for the cases of enforced disappearance committed in any circumstance and at any time.

73. Accordingly, it is important to recall a fundamental principle of international law on enforced disappearances, namely that it is a crime of a continuous nature. It must be investigated as long as its effects continue to be felt, in other words until the fate or whereabouts of the victim are clearly determined. The crime must also be investigated until those responsible for it have been identified, captured and subjected to legal proceedings, in which they must be duly tried and, if their guilt is demonstrated, punished.

74. Overwhelming proof that the principle of the continuous nature of the crime of enforced disappearance is true lies, *inter alia*, in the fact that, as stated in article 1, paragraph 2, of the Declaration, enforced disappearance inflicts severe suffering not only on the direct victims but also on their families and loved ones. In the various meetings held with the families of disappeared persons, the Working Group became aware of the tremendous grief that they have suffered and continue to suffer, every moment of the day, owing to the fact that they know neither the fate nor the whereabouts of their loved ones. It is therefore not gratuitous that enforced disappearance is a serious attack against the right to moral integrity of the families and loved ones of disappeared persons. Nor is it possible to assert that the wounds of the families and loved ones of disappeared persons can heal; that will be possible only once their right to truth, justice, comprehensive redress and rehabilitation has been properly satisfied.

75. Moreover, the Working Group received information according to which the supposed perpetrators of serious human rights violations, including disappearances, not only were at liberty but also were not subjected to any effective investigation and, even less, to any condemnation. This situation is brought about by the Amnesty Act, and is a violation of articles 5 and 14 of the Declaration.

VI. HARASSMENT OF HUMAN RIGHTS OMBUDSMEN

76. The Working Group was told by a number of non-governmental sources that the human rights Ombudsmen and other persons dedicated to investigating cases of enforced disappearances were subjected to threats, intimidation and harassment in the course of their work.

77. The Working Group points to the content of paragraph 5 of article 13 of the Declaration:

“Steps shall be taken to ensure that any ill-treatment, intimidation or reprisal or any other form of interference on the occasion of the lodging of a complaint or during the investigation procedure is appropriately punished.”

78. The Working Group urges the Government of El Salvador to take effective steps to ensure that those working on the investigation of cases of enforced disappearance are safe and secure.

VII. CONCLUSIONS AND RECOMMENDATIONS

79. The Working Group is grateful for the hospitality and cooperation extended by the Government during its visit. During their visit, the members of the Working Group were able to carry out their duties in full freedom, and they met senior officials of the Government of El Salvador, members of various civil society organizations and the families of the victims of enforced disappearances, with whom it held open and objective discussions. The Working Group considers it vital, in order to gain a balanced overview, to meet and gather information from both official sources and civil society, in particular with civil society organizations whose main aim is to search for the victims of enforced disappearance.

80. The main purpose of the mission was to gather information to serve as a basis for clarifying the greatest possible number of cases on the Working Group's registers. The Working Group expressed a wish to look into ways of strengthening channels for cooperation with official and non-governmental sources so that links can be maintained with the victims' families in order to clarify the greatest possible number of cases. The Working Group gave all those involved a list of the cases and informed them of the applicable criteria for considering the cases pending to be resolved (for example, the persons' address or location, if they have been found alive; their death certificate, if their death has been proved; or a death declaration, with the consent of the victim's family).

81. The Working Group acknowledges that, compared with its predecessors, the current Salvadoran Government has been making some institutional efforts to search for children who disappeared during the armed conflict and some isolated efforts to search for disappeared persons in general. However, following the mission, it reached the conclusion that El Salvador does not have an institutional system to search for persons who have disappeared that meets international standards for that kind of institution, such as the Principles relating to the status and functioning of national institutions for protection and promotion of human rights (Paris Principles).

82. Nevertheless, it may be concluded that the efforts made by civil society, in spite of their scarce material resources and staff, are a cause for great hope, since their results in the search for disappeared persons have been considerable. This shows that, despite the difficulties, which are many and great, it is possible to find out the fate or whereabouts of the disappeared persons.

83. With regard to the right of victims and their families to the truth, justice and redress, the Working Group concludes that the 1993 Law on General Amnesty for the Consolidation of Peace clearly departs from the principles of the Declaration, in particular its article 18, as interpreted by the Working Group in one of its general comments.

84. The Working Group is concerned that there is no law in force in El Salvador that guarantees the right to information that might be useful for clarifying cases of enforced disappearance, and that some legal provisions are an obstacle to the effective exercise of the right to information.

85. It may be concluded that in general terms El Salvador has fulfilled its obligation to enshrine the offence of enforced disappearance as an independent offence in its criminal legislation, albeit with certain shortcomings, already noted in this report.

86. Accordingly, the Working Group highlights the permanent or continuous nature of the offence of enforced disappearance, such that it should be applied to enforced disappearances

that began to be committed even before the relevant law entered into force, provided that does not interfere with the principle according to which criminal law may not be applied retroactively to the detriment of the person presumed responsible. Consequently, in a strictly rigorous application of international law, cases of enforced disappearances that have yet to be clarified continue to be committed since it is a continuous offence and not a matter of the past.

87. Subsequently, the Working Group submits the following recommendations to El Salvador, in the hope that they will be implemented as soon as possible and that their implementation will enable the pending cases of enforced disappearance to be resolved and future cases to be prevented.

88. While the Working Group recognizes the need to reform domestic legislation, the Working Group respectfully suggests that El Salvador should become a party to the Inter-American Convention of Enforced Disappearance of Persons and the Rome Statute of the International Criminal Court, which defines the international crime of enforced disappearance of persons as one embodying the characteristics of crime against humanity. It also recommends that El Salvador become a party to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, which lays down that crimes against humanity are prosecutable irrespective of their date of commission. In particular, it recommends that El Salvador should become a party to the new International Convention for the Protection of All Persons of Enforced Disappearance.

89. The Working Group respectfully calls on the Legislative Assembly to review the legal provisions defining the offence of enforced disappearance, taking into account the comments made in this report on the shortcomings that the Working Group has detected, particularly with reference to the established penalties, in comparison with less serious offences for which heavier penalties are laid down than those established for the offence of enforced disappearance.

90. The Working Group recommends that El Salvador should take effective steps to guarantee and implement the rights to justice, truth, redress and rehabilitation. It therefore respectfully but forcefully urges the Legislative Assembly to amend the 1993 Amnesty Act substantially and bring it into line with the points made in paragraph 8 of the general comment issued by the Working Group on article 18 of the Declaration.

91. The Working Group recommends that the Government of El Salvador should take steps to implement what is laid down in article 5 of the Declaration, according to which, in addition to such criminal penalties as are applicable, those presumed to be responsible for enforced disappearances shall be liable under civil law. In other words, they must compensate the victims for any damage caused and shall be suspended from any official duties, in accordance with the provision in article 16, paragraph 1, of the Declaration.

92. The Working Group strongly recommends that El Salvador should create and implement an effective plan to search for disappeared persons, not limited to the search for missing children. It also recommends that the plan should include genuine participation by civil society organizations, in particular the families and loved ones of the disappeared persons, in the terms of article 13, paragraphs 1 and 4, of the Declaration. This institutional plan to search for disappeared persons should be sanctioned by the legislature.

93. The Working Group considers that, with regard to the comprehensive search programme suggested earlier, a comprehensive redress scheme should be implemented which,

in the terms of article 19 of the Declaration, includes adequate compensation and other means including as complete a rehabilitation as possible, in full exercise of the right to justice and truth.

94. The Working Group calls on the relevant authorities to make available to the interested parties any information and documentation that might still be restricted, in order to improve the results of the search for disappeared persons, in full exercise of the right to information. The Working Group urges the Legislative Assembly to revoke any legal provisions that might impede compliance with this recommendation and to create a legal framework on transparency and access to information, not only to make that possible, but also to make it compulsory that any information which may be useful for investigations into cases of enforced disappearances to be made available to the interested persons.

95. The Working Group urges both government and non-governmental bodies to work towards forging closer ties in order to solve the problems relating to the cases of enforced disappearance that have yet to be clarified.

96. The Working Group invites the Government of El Salvador, within 90 days from the date of publication of this report, to present the Working Group with a timetable showing the steps it intends to take in order to implement the recommendations of the Working Group, the dates by which each measure will be taken, and the dates by which it intends to complete implementation of the recommendations.
