

Sistema Penal & Violência

Revista Eletrônica da Faculdade de Direito
Programa de Pós-Graduação em Ciências Criminais
Pontifícia Universidade Católica do Rio Grande do Sul – PUCRS

Porto Alegre • Volume 7 – Número 1 – p. 162-177 – janeiro-junho 2015

SISTEMAS JURÍDICO-PENAIIS CONTEMPORÂNEOS

The crime of enforced disappearance under the Rome Statute

The possibility for prosecution of the crimes committed
during the Brazilian dictatorship

Crime de desaparecimento forçado no Estatuto de Roma

A possibilidade de abertura de processos por crimes cometidos durante a ditadura brasileira

GABRIEL WEBBER ZIERO

Editor-Chefe
JOSÉ CARLOS MOREIRA DA SILVA FILHO
Organização de
JOSÉ CARLOS MOREIRA DA SILVA FILHO



The crime of enforced disappearance under the Rome Statute

The possibility for prosecution of the crimes committed
during the Brazilian dictatorship

Crime de desaparecimento forçado no Estatuto de Roma

A possibilidade de abertura de processos por crimes cometidos durante a ditadura brasileira

GABRIEL WEBBER ZIERO^a

Abstract

This paper addresses the possibility that the International Criminal Court (ICC) has to prosecute the perpetrators of the crimes of enforced disappearance committed during the dictatorship period (1964-1985) in Brazil. As a consequence, this study analyzes the elements of the crime of enforced disappearance under international criminal law and the ICC jurisdiction in the light of the Final Report of the Brazilian National Truth Commission. Moreover, this paper briefly inquires on the possible impacts that international prosecutions could have in the country through the lenses of the fight against impunity for the crimes committed by state agents in Brazil.

Keywords: enforced disappearance; International Criminal Court; Brazilian dictatorship.

Resumo

Este artigo aborda a possibilidade de que o Tribunal Penal Internacional (TPI) possui para julgar os autores dos crimes de desaparecimento forçado cometidos durante o período da ditadura no Brasil (1964-1985). De tal maneira, o artigo analisa os elementos que compõem o crime de desaparecimento forçado no direito penal internacional e os requisitos jurisdicionais do TPI à luz do relatório produzido pela Comissão da Verdade Nacional. Além disso, o presente estudo disserta brevemente sobre os possíveis impactos que processos internacionais poderiam ter no país por meio das lentes da luta contra a impunidade para crimes cometidos por agentes estatais no Brasil.

Palavras-chave: desaparecimento forçado; Tribunal Penal Internacional; ditadura brasileira.

^a Mestre em Direito pelo Programa de Estudos Avançados (Adv. LL.M.) em Direito Internacional Público da Universidade de Leiden. Bacharel em Direito pelo Centro Universitário Metodista, do IPA. Atualmente faz parte do corpo editorial do Leiden Journal of International Law. É membro do Núcleo de Pesquisas em Direito Penal e Criminologia da UFRGS e do projeto Global Justice – Development, Human Rights and the Law of Recognition: Critical and Renewed Approaches do Instituto de Estudos Políticos de Paris (Sciences Po). Possui experiência nas áreas de pesquisa relacionadas a direito internacional público e direito internacional dos direitos humanos.

[...] what causes most fear is not when you kill the person. It is when you make the person disappear. The destination is uncertain. Your destiny remains ... is uncertain. What happened; what will happen to me? Am I going to die? Will I not die? Did you get it? Fear is much higher with disappearance than with death. Death, no, you see the body of the man, the guy there, it is over, over: No more ... thinking about it. My destiny, if I fail, will be like this. But when you disappear (this is a foreign teaching), when you disappear, you cause a much more violent impact on the group. Where is the guy? I do not know, no one saw him, no one knows. How? How did he disappear? (BRASIL, 2014, p. 500)

Introduction

The practice of enforced disappearance was and still is used by governments or organizations in order to remove a person from the protection of the Law. The victim is dehumanized by entering into a state of exception where his/her right to have rights is constantly denied (Silva Filho, 2002, p. 284-291). In the Latin American context, the crime of enforced disappearance was used as a weapon by the dictatorship governments between the 1960's and 1990's against its opponents. With the re-democratization several countries prosecuted state agents involved in the perpetration of the most hideous crimes. Although almost thirty years have passed since the end of the Brazilian civil-military dictatorship (1964-1985), the country until now remained immune to the phenomenon of the justice cascade (Sikkink, 2011).

Thus, this paper wants to address the possibility, which the International Criminal Court (hereinafter ICC) has to prosecute the perpetrators of the crimes of enforced disappearance perpetrated during the dictatorship period in Brazil. Moreover, it aims to briefly analyze the impacts that such prosecutions might have in the context of the fight against impunity for the crimes committed by state agents in the country.

This analysis aims to add to the current debate related to the Brazilian dictatorship, especially after the release of the Final Report of the National Truth Commission in December 2014. Moreover, it is important to highlight that until now, the discussions about the period were mostly done through a human rights perspective. On the contrary, the debates that use an international criminal law approach are still incipient even though the country is signatory of the Rome Statute of the International Criminal Court (hereinafter: Rome Statute, ICC Statute) since 2002.

Hence, this paper in order to better assess its problematic is divided in four parts. The first section aims to give a historical overview on how the practice of enforced disappearance was addressed by international law until now.

The second part focuses on addressing enforced disappearances as a crime against humanity through a systemic analysis of the Rome Statute. This section, first will analyze the chapeau requirements for crimes against humanity in the Rome Statute. After, it will be divided into two sub-sections: The first analyzes the elements of the crime of enforced disappearance; the second is concentrated on the continuous nature of the crime, which is of particular importance for the ICC jurisdiction in the case of the crimes of enforced disappearance committed in the context of the Brazilian dictatorship.

The third part is devoted to the presentation of the factual situation of the Brazilian civil-military dictatorship. In order to better assess it, first this part will elaborate on the general trends that the practice of enforced disappearance followed during the relevant period, based on the Final Report of the National Truth Commission from 2014. After, it will provide an overview about the Brazilian legal system and how it dealt and still deals with the crimes committed during the dictatorship period.

Finally, the fourth part adopts a systematic approach of international law in order to verify the possibility for the ICC to prosecute the perpetrators of the crimes of enforced disappearance, which were committed during

the Brazilian dictatorship. After this assessment, the investigation ends up discussing how such a prosecution could help the fight against impunity of crimes committed by state agents that offend not only the victims and their relatives, but the international community as a whole.

1 Short overview of the historical development of the international *corpus iuris* on enforced disappearance

The origins of the phenomenon of enforced disappearance can be traced back in history. It was during the Nazi regime that it first appeared and also was used as a common and widespread technique by the government against its opponents, known as *Nacht und Nebel Erlass* (LOT VERMEULEN, 2012, p. 4-5). In the aftermath of the war, German officials involved in this program were judged by the International Military Tribunal at Nuremberg (*Keitel* case) and by the US Military Tribunals sitting at Nuremberg (*Justice* or *Judges' case*) for war crimes and crimes against humanity. However, a conviction for the crime of enforced disappearance was not possible, because such a crime cannot be found in the London Charter. Nevertheless, according to the rulings, the actions that nowadays are defined as enforced disappearance were considered to be violations of international customary law and war crimes, which were expressed, for example, in Article 46 of 1907 Hague Convention (FINUNCANE, 2010, p. 171).

After the Nuremberg precedents of individual criminal accountability for international crimes, an international criminal law approach was set aside and the international community started to address the practices of enforced disappearance primarily as a question of state responsibility under international human rights law (GIORGOU, 2013, p. 1001). This approach is exemplified by the United Nation General Assembly Resolution 33/173 (1978), the United Nations Declaration on the Protection of All Persons from Enforced Disappearances (1992) and the Inter-American Convention on Forced Disappearance of Persons (1994).

Although, the practice of enforced disappearance is considered a crime against humanity in those documents and according to the literature such crimes “are particularly odious offences in that they constitute a serious attack on human dignity or a grave humiliation or degradation” (Cassese, 2003, p. 99), the statutes of the *ad hoc* international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) did not contemplate the analyzed phenomenon as an international crime. Also, during the drafting process of the Rome Statute, it was very controversial whether the crime of enforced disappearance should be included as a crime against humanity (Finuncane, 2010, p. 172). Its codification in the ICC Statute occurred especially due to the activism of the civil society and Latin-American countries that were part of the Inter-American Convention on Forced Disappearance of Persons. Thus, different from other crimes that had a strong background in customary international law, the crime of enforced disappearance was a rule emerged from the work of international organizations and treaty law (Casese, 2013, p. 98).

Further, in 2000, the ICTY in the *Kupreškić* case has considered enforced disappearances as a crime against humanity and like that enabled its prosecution in front of the Tribunal due to the expression *other inhumane acts* in its Statute (Hall, 2008, p. 225). In the following, the United Nations in the human rights sphere adopted in 2006 the International Convention for the Protection of All Persons from Enforced Disappearance (hereinafter UN Convention).

The development of international criminal law and international human rights law, especially after the end of World War II, walked side by side and both disciplines often address the same facts and actions through different angles due to their inherent purposes. In short, the main difference thereby is that the first deals with individual responsibility, while the former focuses at state responsibility. As the elaborations above showed, the same holds true for the practice of enforced disappearance, i.e. it can be addressed through a human rights

as well as a criminal law perspective. As particularly the perspective of international criminal law has only rarely been addressed in regard to the enforced disappearances occurred during the Brazilian civil military dictatorship, this paper will focus on this aspect. However, before analyze such scenario, this paper will address the crime of enforced disappearance in the Rome Statute.

2 Enforced Disappearance through the lenses of the Rome Statute

The crime of enforced disappearance is a complex crime *par excellence*, as it can involve the perpetration of several crimes such as kidnapping, torture, extrajudicial killing, hiding bodies, etc. As elaborated above, such a crime was absent in the statutes of the former special international criminal tribunals. Hence, just with the Rome Statute the international community acquired the means to prosecute and hold individuals accountable for the crime of enforced disappearance as such (Ambos, 2014, p. 108).

2.1 *Chapeau requirements for crimes against humanity*

Under the ICC Statute, the crime of enforced disappearance was categorized as a crime against humanity and as such its perpetration needs to follow the conditions established in Article 7, paragraph 1 of the statute. The chapeau requirements establish a framework in which the crimes listed within Article 7 have to be committed in order to allow their judgment by International Criminal Court (Hall, 2008, p. 168). Consequently, a crime against humanity must be committed during a widespread or systematic attack, which is directed against the civilian population, and represent a part of a state or organizational policy (Schabas, 2010, p. 147-157). Moreover, Article 7 of the Rome Statute does however not require a link between the perpetration of crimes against humanity and armed conflicts.

Reading the chapeau requirements, the doctrine affirms that if a case is perpetrated “outside the framework of a widespread or systematic attack it is not a crime against humanity as it is understood in international criminal law and cannot be prosecuted under the Rome Statute” (Ott, 2011, p. 162). On the other hand, if a single case of enforced disappearance happens “as a part of a widespread or systematic attack on a civilian population” (Hall, 2008, p. 225), its perpetrator can be held accountable in front of the International Criminal Court.

Moreover, the paragraphs 1 and 2 of Article 7 have to be assessed together as jurisdictional and material requirements of crimes against humanity are enshrined in both (Bassiouni, 2011, p. 203). This means, there is a symbiosis between the chapeau requirements, the definition of the crime and its elements. In the context of enforced disappearance, for example, the presence of a state or organizational policy is a common characteristic of the three mentioned aspects. Thus, such element will just be analyzed together with the ones that compose the definition of the crime in the next subsection. Consequently, only the element of the widespread or systematic attack against the civilian population will be analyzed briefly at this point.

Within the Rome Statute an attack is defined as “a course of conduct involving the multiple commission of acts”¹ against the civilian population, which does not require a nexus between it and an armed conflict. This means that the attack can be classified as an overall conduct (*conduite globale*) (Kolb, 2008, p. 98), which includes all the prohibited actions occurred in order to commit a determined crime. Further, according to the ICC “the commission of the acts referred to in Article 7 (1) of the Statute constitute the *attack* itself and, beside the commission of the acts, no additional requirement for the existence of an *attack*”² has to be proven.

¹ Rome Statute, Elements of the crimes. Article 7 (introduction), para. 3.

² Bemba (ICC-01/05-01/08) Decision Pursuant to Article 61 (7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor against Jean-Pierre Bemba Goombom 15 June 2009, para. 75.

The range of such an attack according to the ICC Statute must be widespread or systematic. Even though these notions can sometimes overlap (Schabas, 2010, p. 149), the ICC case law has already laid down some distinctions between the concepts. It stated that these requirements have an alternative nature, i.e. once it is proven that an attack was widespread there is no need for the Court to assess whether it was also systematic³. The widespread character of an attack is related with its magnitude in geographical terms or in the number of victims⁴. On the other hand the systematic nature of an attack is given when it follows an organized plan based in common directives (policy) for its continuous perpetration. This means, the crime happens in “a *non accidental repetition*”⁵, i.e. it occurs regularly.

2.2 Elements of the crime

Although the definition of enforced disappearance enshrined in the ICC Statute is slightly different from the others that can be found in international law, especially in the field of human rights, they all share the same core features (Hall, 2008, p. 266). These are the deprivation of the victim’s liberty and the refusal to acknowledge or give information about the victim (Ott, 2011, p. 21). Furthermore, the Rome Statute allows also for the participation of any political organization and not only of a state in the perpetration of enforced disappearance (Joruvics, 2012).

The first element of the crime of enforced disappearance is the *deprivation of the victim’s liberty*, which according to the ICC Statute can happen by arrest, detention or abduction. However, the doctrine as well as international instruments, like the UN Convention, recognize “that the deprivation of liberty, which leads to enforced disappearance can take place in any form” (Ott, 2011, p. 178). Moreover, it is important to highlight, that for the configuration of such a crime, it does not matter if the act to deprive someone of its liberty was lawful or not (Ambos, 2014, p. 111); it only “requires an objective nexus between the deprivation of freedom and the refusal to give information” (Wierda and Unger, 2009, p. 309) about the victim.

The *refusal to acknowledge or give information about the whereabouts or the fate of the victim* is a requirement from the *actus reus*, which shall be linked with the *mens rea* element that asks for the intention to remove the victim from the protection of the law for a prolonged period of time (Wierda, 2009, p. 309-310). This time requirement is however not present in other international instruments related to enforced disappearance (Ott, 2001, p. 186). In order to bring certainty to this imprecise notion of prolonged period, scholars point out that the International Criminal Court has to take into account the already existent standards in international law regarding the rights of detained persons (Hall, 2008, p. 271).

Another important element for the configuration of the crime of enforced disappearance is the *participation of a state or a political organization* in its perpetration. The addition of a non-state actor in the *actus reus* of the crime of enforced disappearance was done for the first time in the Rome Statute. This inclusion “indicates that enforced disappearance constitutes an underlying act of crimes against humanity even when perpetrated by individuals that are not linked to the state” (Giorgou, 2013, p. 101). Moreover, the Pre-Trial Chamber of the International Criminal Court in the *Kenya* decision clarified the meaning of the word *organization* within Article 7 of the Rome Statute, which is at the same time a chapeau and an *actus reus* requirement in the case of the crime of enforced disappearance.

³ Bemba, *supra* note 2, para. 82. *Katanga decision* (ICC-01/04-01/07-717) Pre-Trial Chamber I, para. 412.

⁴ Bemba, *supra* note 2, para. 83. *Bashir* (ICC-02/05-01/09), Decision on the Prosecutor’s application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para. 81.

⁵ Katanga et al. (ICC-01/04-01/07), Decision on the Confirmation of the Charges, 30 September 2008, paras. 397-398.

In its decision, the Court made use of a teleological interpretation of the Rome Statute, which understood that “organizations not linked to a State may, for the purposes of the Statute, elaborate and carry out a policy to commit an attack against a civilian population”⁶. The term *policy* in this context is thus related to the organizational capacity that organizations should have to commit, promote or encourage an attack against the civilian population with the intention to perpetrate crimes against humanity. Furthermore, it is important to highlight in the context of the *mens rea* element of the crime of enforced disappearance, that the perpetrators should be aware that their actions make part of such attack against the civilian population.

After having analyzed the elements of the crime of enforced disappearance, it is necessary to address an important and at the same time problematic characteristic of this crime, i.e., the nature of its perpetration.

2.3 The continuing nature of the crime of enforced disappearance and the ICC jurisdiction

Enforced disappearance is classified by the doctrine as a continuous crime even though the Rome Statute is silent about it (Wierda and Unger, 2009, p. 310). A continuous crime can be defined as “a violation of a primary obligation targeting a potentially ongoing situation that has been committed and then maintained” (Nissel, 2005, p. 661-662). Applying this concept to the crime of enforced disappearance means that its execution starts with the deprivation of the victim’s liberty that is followed by the refusal to give information about him/her and just ends when the whereabouts or the fate of the victim is known (Ambos, 2014, p. 112). This continuous nature of the crime lets emerge interesting questions in regard to the temporal jurisdiction of the ICC and the application of the Rome Statute dispositions throughout the time.

In this context two articles of the ICC Statute become relevant: Article 11, which states that the ICC only has jurisdiction over the “crimes committed after the entry into force of the Statute”⁷; while Article 24 (1) expresses the principle of non-retroactivity *ratione personae*, which establishes that no one can be held criminally responsible in front of the ICC for conducts committed before the entry into force of the Statute. Thus, it can be stated as a general rule that crimes committed before the critical date in which the Rome Statute entered into force, shall be persecuted by the national courts and not by the ICC.

Article 11 of the Rome Statute, by its turns, is a temporal jurisdiction clause that has to be read together with the Elements of the Crimes of the ICC Statute related to Article 7, in particular, the footnote 24. The outcome of this evaluation reveals a statutory limitation to the Court’s jurisdiction, which makes the prosecution of enforced disappearance cases that have started before the entry into force of its statute more difficult (Wierda and Unger, 2009, p. 310). This bar establishes namely that the Court can only exercise its jurisdiction if the chapeau requirement, i.e. widespread or systematic attack against the civilian population happens after the entry into force of the Rome Statute (Ambos, 2014, p. 112).

In what concerns the principle of non-retroactivity *ratione personae*, which is stated in Article 24 (1) of the Statute, it can be affirmed that enforced disappearance was already a crime under international law before the Rome Conference as it could be showed above (Finuncane, 2010). Hence, the prosecution for enforced disappearances that have started before the entry into force of the ICC Statute would not represent a *post facto* criminalization of such conduct. Moreover, in order to assess if the agent’s conduct was done before or after the entry into force of the Rome Statute, it requires an analysis based on the continuous nature of the crime of enforced disappearance and in the light of the facts of each particular case.

⁶ *Situation in the Republic of Kenya* (ICC-01/09) Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, para. 92. In para. 93 the Court establishes some conditions for determine an organization.

⁷ Rome Statute, Article 11(1). The critical date of the Rome Statute is 1st of July 2002.

Thus, the continuing character of the crime of enforced disappearance and more specifically the question when the attack and the agent's conduct have begun and finished becomes crucial in order to assess whether the ICC can exercise its jurisdiction over continuing crimes that have started before the entry into force of its statute. However, this question can only be answered in the basis of a concrete situation.

Hence, in the following section, this research will give an overview of the practices of enforced disappearances happened in Brazil during the civil-military dictatorship (1964-1985). Moreover, it will also look how the country dealt with the individual criminal accountability for committing or participating in these crimes, which are also important in the light of the Rome Statute.

3 The practice of enforced disappearances during the Brazilian civil-military dictatorship

During twenty-five years (1964-1985) Brazil was governed by a civil-military dictatorship regime. This period in the country's history has to be assessed by taking into account the general geopolitical context. This includes the Cold War, but also the victory of the Cuban Revolution and the powerful influence of the United States over Latin America. As a consequence of such scenario, several legitimate elected governments in the region were overthrown by *coup d'états* perpetrated by Armed Forces. The American government and the local elites supported these actions because they feared the implementation of political regimes that would push forward the realization of structural reforms, such as the agrarian reform and the nationalization of natural resources.

3.1 General overview of the practice of enforced disappearance

In Brazil just after the *coup d'état*, in early April of 1964 the validity of the national constitution was suspended and the political parties were dissolved by the adoption of Institutional Acts, which did not have any legal basis in the domestic legal order (Silva Filho, 2002, p. 287). The legal argumentation used to justify the adoption of the Institutional Acts, as it can be seen in the Preamble of the Institutional Act n. 1, was that the Armed Forces conducted a revolution, in the name of the people, to save the country from the bolshevization. Based on this reasoning, the Armed Forces perceived themselves as the legitimate representative of the people and thus as the original and unlimited constituent power⁸.

In 1968, the repression got stronger with the adoption of the Institutional Act n. 5, which among other dispositions has closed the National Congress and suspended the right to *habeas corpus* for political crimes⁹. As a consequence, the political opposition was increasingly pressured into clandestine activities and some groups adopted armed resistance strategies, such as urban and rural guerrilla. On the other hand, the security apparatus formed by the Armed Forces (Army, Air Force and Navy), Federal Police, Military Police (*gendarmérie*) and Civil Police made widespread and systematic use of torture and inhumane treatment to repress the political opponents (Brazil, 2014).

State agents often used the practice of enforced disappearances during the Brazilian dictatorship as a strategy to hide the crimes committed by the state forces (Brazil, 2014, p. 501). According to the National Truth Commission, enforced disappearances were the result of a systematic policy that caused more than half

⁸ Brasil, *Ato institucional nº 1, de 9 de abril de 1964*. Dispõe sobre a manutenção da Constituição Federal de 1946 e as Constituições Estaduais e respectivas Emendas, com as modificações introduzidas pelo Poder Constituinte originário da revolução Vitoriosa.

⁹ Brasil, *Ato institucional nº 5, de 13 de dezembro de 1968*. São mantidas a Constituição de 24 de janeiro de 1967 e as Constituições Estaduais; O Presidente da República poderá decretar a intervenção nos estados e municípios, sem as limitações previstas na Constituição, suspender os direitos políticos de quaisquer cidadãos pelo prazo de 10 anos e cassar mandatos eletivos federais, estaduais e municipais, e dá outras providências.

of the fatal victims of the regime (Brazil, 2014, p. 500). The disappearances generally happened in the cities and started with the detention of a political opponent by the security forces. During the custody, the prisoner has to endure several interrogations that usually made use of torture and often ended up in the death of the detained. After that, death certificates with false names and causes of the death were signed by doctors and confirmed by the judiciary system. The body would thus be buried as an indigent person, probably in a clandestine mass grave as the one found in a periphery of São Paulo at the *Cemitério Dom Bosco*¹⁰. Alternatively, bodies were incinerated, dismembered or just thrown into the sea or rivers (Brazil, 2014, p. 518-523). Moreover, the families of the victims constantly faced an “institutionalized evasion of information” (Brazil, 2014, p. 504) during their search. Still today, some of them are struggling to know where their relatives remain. This is confirmed by the final report of the National Truth Commission, which states that the fate or whereabouts of around 210 persons who disappeared during the dictatorship are still unknown (Brazil, 2014, p. 576-582).

One of the most important cases related to enforced disappearance of persons during the Brazilian dictatorship is the disappearance of the militants of the *Partido Comunista do Brasil (PCdoB)* that participated in armed activities (guerrilla) in the Amazon rainforest in the region of the Araguaia’s riverbank. The *Guerrilha do Araguaia* (1972-1974) was exterminated after four military incursions, which used around ten thousand troops of the Armed Forces¹¹ and heavy armament, such as napalm (Brazil, 2014, p. 690). The bodies of the victims “were exhumed and incinerated or thrown into the rivers of the region”¹². The families of the disappeared brought a claim against Brazil in the Inter-American Human Rights system, which resulted in the condemnation of the country by the Inter-American Human Rights Court in 2010 (*Gomes Lund v. Brazil*). Notwithstanding this international judgment, the prosecution of the perpetrators of these crimes in Brazil remained impossible, as will be exposed in the following section.

3.2 Answers provided by the Brazilian legal system to the crimes committed during the dictatorship

The process for the adoption of the Amnesty Law can be linked with the end of the “economic miracle”¹³ when the government was pressured by several socio-economic factors. Particularly relevant were the raising civil society movements, such as the Brazilian Committee for Amnesty (*Comitê Brasileiro pela Anistia*), which was founded in 1978 by the Female Movement for Amnesty (*Movimento Feminino pela Anistia*), sectors of the Catholic Church and the Brazilian Press Association (*Associação Brasileira de Imprensa*). This Committee was in favor of a wide, general and unrestricted amnesty for all the exiled and political opponents. On the other hand, the political forces in power, especially the government, preferred a slowly, gradual and safe process. In a National Congress, dominated by pro-regime members, the 1979 Amnesty Law was approved and amnesty was thus granted for all political and connected crimes committed by the opponents and by state agents between 1961 and 1979.

After the re-democratization of the country in 1988, the Brazilian state recognized that persons have disappeared during the civil-military dictatorship and established the Special Commission on Political Deaths and Disappearances through the adoption of the Law n. 9.140/95. The second step taken by the country was

¹⁰ According to the National Truth Commission in 1990, almost 1.050 bones were found without identification in this cemetery. This general pattern is described in Chapter 12 of the final report of the National Truth Commission.

¹¹ Gomes Lund et. al. (*“Guerrilha do Araguaia”*) v. Brazil (IACtHR, November 24, 2010), para. 89.

¹² Gomes Lund et al. (*“Guerrilha do Araguaia”*) v. Brazil, para. 90.

¹³ The term Brazilian economical miracle (1969-1973) was used by governmental campaigns to denominate national-development projects, especially in the area of infrastructure like the construction of the Trans-Amazonian Road, the Itaipú Hydroelectric Dam and the Angra Nuclear Power Plant. During this period, the National Gross Product had an average grow of 10% per year.

the creation of the Amnesty Commission in 2002. Both organs possess as one of their main characteristics the power to grant moral and monetary reparation for the victims or their close relatives. Furthermore, they have the task to gather information, documents and testimonies from this period. However, the commissions do not have a judicial function and as a consequence they cannot prosecute the perpetrators of the crimes committed during the dictatorship. Although the Federal Prosecution Service brought some of the cases investigated by those organs to the Courts, they were all dismissed due to the 1979 Amnesty Law.

Taking in account such scenario, a Claim of Breach of Fundamental Precept n. 153 (*Ação de descumprimento de preceito fundamental – ADPF*) was brought before the Federal Supreme Court for it to decide on the validity of the 1979 Amnesty Law. The applicant, the Brazilian Bar Association, claimed that the law, which was used as legal bar by the courts, was not in accordance with the 1988 Brazilian Federal Constitution. The claim was however not successful. In its decision, the constitutional court did not take into account the extensive catalogue of fundamental rights and guarantees present in the constitution; neither, considered it the international obligations of the Brazilian state, nor the jurisprudence of the relevant international courts and tribunals, in particular the Inter-American Court of Human Rights' case law, which condemned the use of auto-amnesty laws. As a consequence, the 1979 Amnesty Law is still applicable in the Brazilian legal order.

The decision of the Supreme Court supports the continuation of the impunity for the crimes against humanity committed by state agents. Moreover, it represents a “contribution for the deepening of the mix between ignorance and contempt for international public law that still characterizes the Brazilian legal culture” (Ventura, 2011, p. 314).

In 2011, months after the judgment of the constitutional court, which validated the Amnesty Law, the Inter-American Court of Human Rights issued its decision in the above-mentioned case *Gomes Lund v. Brazil (Guerrilha do Araguaia)*, which dealt with enforced disappearances during the dictatorship regime. The Court declared in its judgment that:

The provisions of the Brazilian Amnesty Law that prevent the investigation and punishment of serious human rights violations are not compatible with the American Convention, lack legal effect, and cannot continue as obstacles for the investigation of the facts of the present case, neither for the identification and punishment of those responsible, nor can they have equal or similar impact regarding other serious violations of human rights enshrined in the American Convention which occurred in Brazil¹⁴.

As a follow-up of this international judgment, the country adopted the Law on Public Access to Information and it created the National Truth Commission that worked between 2012 and 2014. However, nothing was done concerning the 1979 Amnesty Law that still remains in force.

The IACtHR, by its turn, released in October 2014 a resolution regarding the Brazilian compliance with the judgment. The Court concluded that the country did not fully implement its decision, as it still considers the Amnesty Law applicable and refuses to investigate, prosecute and punish the ones responsible for the committed crimes against humanity¹⁵. This confirms that the Brazilian state is still in breach of its international obligations by its unwillingness to revise the 1979 Amnesty Law, which makes the prosecution of internationally recognized crimes committed during the dictatorship regime impossible.

¹⁴ Gomes Lund et al. (*“Guerrilha do Araguaia”*) v. Brazil, para. 325 (3).

¹⁵ Gomes Lund et al. (*“Guerrilha do Araguaia”*) v. Brazil, paras. 9-23.

Moreover, it is not possible to deny the role that the ICC Statute plays in the Brazilian legal system, especially in the context of the crimes committed during the civil-military dictatorship. The Rome Statute was signed by Brazil on the 7th February 2000 and after having passed the procedure of internalization, the treaty entered into force for the country on the 1st of September of 2002¹⁶. Despite differences between the ICC and a human rights court, the National Congress and the government justified the accession of the country to the International Criminal Court with Article 7 of the Temporary Constitutional Provisions Act¹⁷ that was adopted together with the 1988 Federal Constitution. This Article determines that Brazil shall be engaged in the creation of an international court of human rights¹⁸.

Additionally, in 2005 the Constitutional Amendment 45 added a paragraph to Article 5 (Individual and Collective Rights and Duties) of the Brazilian Constitution, which awarded the ICC Statute the status of constitutional norm. Thus, it could be argued that even constitutional dispositions, which are contrary to the Rome Statute, become invalid due to the application of the traditional interpretation rules, such as the one used to solve the conflict of norms from the same hierarchy by the criteria of time (Mazzuoli, 2012, p. 962). However, there are several doctrinal debates about this topic and the plenum of the Supreme Court has not yet developed its understanding. However, in a single decision taken by Judge Celso de Mello, member of the Supreme Court, he stated that several questions of constitutional relevance arise from the adoption of the Rome Statute as a constitutional norm. He thus proposed to the Federal Prosecution Service to present a case in order to enable the Court to analyze these indeterminacies¹⁹.

After having analyzed the crime of enforced disappearance in the Rome Statute and given an overview about how it had happened in Brazil between 1964 and 1985 as well as the way that the Brazilian national legal system has dealt with the crimes committed during the analyzed period, this paper shall move towards the last part of its assessment. The next section of this investigation will assess the possibility of the ICC to prosecute the perpetrators of the crime of enforced disappearance during the Brazilian dictatorship regime and how such prosecutions might influence the fight against impunity for crimes committed by state agents in the country.

4 Prosecution in front of the ICC for the enforced disappearances committed during the civil-military dictatorship in Brazil and its role in the fight against impunity of crimes committed by state agents

In this fourth part, the abstract analysis and questions raised during the assessment of the crime of enforced disappearance under the Rome Statute will be applied to the Brazilian situation presented in the previous part. As exposed above, the issues of non-retroactivity *ratione personae* and temporal jurisdiction of the Court are key points for the prosecution of the crime of enforced disappearance due to its continuous nature. This is of particular importance for situations such as in Brazil, where the perpetration of the crimes committed before the entry into force of the Rome Statute. Moreover, this part will analyze how such prosecutions might impact in the country, especially in the context of the fight against impunity for crimes committed by state agents.

In order to conduct such analysis, this part will be concentrated in two particularly crucial issues of this case: First, the continuing character of the crime of enforced disappearance, in particular how it is related to the attack requirement present in the Elements of the Crimes of the Rome Statute; Second, the question of

¹⁶ Brasil. *Decreto nº 4.388, de 25 de setembro de 2002*. Promulga o Estatuto de Roma do Tribunal Penal Internacional.

¹⁷ Article 7. Brazil shall strive for the creation of an international court of human rights.

¹⁸ Brasil, *Decreto Legislativo nº 112 de 2002*, Aprova o texto do Estatuto de Roma do Tribunal Penal Internacional, aprovado em 17 de julho de 1998 e assinado pelo Brasil em 7 de fevereiro de 2000. Moreover, see the message from the Ministry of Justice (para. 10) attached to this decree.

¹⁹ Supremo Tribunal Federal, *Petição 4.625*. Ementa do despacho proferido pelo Min. Celso de Mello, no exercício da Presidência, em 17-7-2009, DJE de 4-8-2009 e Informativo 554.

complementarity of the ICC Statute and its role in the fight against impunity against the crimes committed by state agents.

4.1 The ICC as a possible forum for prosecutions

According to the Rome Statute and its Elements of the Crimes, it might be argued that the ICC has *prima facie* limitations that prevent it from holding prosecutions of a crime of enforced disappearance in which the attack against the civilian population and the conduct of the perpetrator have occurred before the entry into force of its statute. However, it has to be kept in mind that the analyzed crime has a continuous nature. Thus, the question arises: How can the ICC assess its jurisdiction *ratione temporis* as well as the issue of the non-retroactivity *ratione personae* in this case?

Although other courts have already dealt with similar questions in cases concerning enforced disappearances, those looked at the crime from a human rights perspective²⁰. Thus, the practice of enforced disappearance was mostly addressed through lenses that are not the ones of international criminal law. Taking into account such scenarios, it is necessary to employ a systematic approach of international law in order to answer this question.

A first relevant factor for the answer of the above-posed question is the complex nature of the crime of enforced disappearance, which involves the execution of several crimes, for example, illegal detention, torture, extrajudicial killing, etc²¹. As enforced disappearance is however codified as one single crime²², its assessment should be done integrally²³. This means, that it is not possible to analyze each of the crimes committed during the *iter criminis* separately.

The IACtHR, for example, applied this integral assessment of enforced disappearances in one of its leading cases concerning the analyzed practice. In the case *Radilla Pacheco v. Mexico*, the Court held the country responsible even for the acts of enforced disappearance that happened before Mexico ratified the American Convention on Human Rights and the Inter-American Convention on Forced Disappearances of Persons²⁴ (with an interpretative declaration excluding acts that happened before the entry into force of the Convention)²⁵. The Court based its assessment on Article 14 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, which emphasizes that “the breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation”²⁶. As a consequence of this reasoning, the IACtHR considered all substantial and procedural violations within its jurisdiction *ratione temporis*. Moreover, the Court dismissed the argument of a retroactive application of the Convention in *malam partem*²⁷.

²⁰ *Radilla Pacheco v. Estados Unidos Mexicanos* (IACtHR, November 23, 2009). *Varnava and Others v. Turkey*, Appl. No. 16064/90, 16065/90, 16066/90, [...] ECtHR [GC], 18 September 2009, para. 192. Eduardo Bleier v. Uruguay, Communication No. R.7/30, U.N. Doc. Supp. No. 40 (A/37/40) at 130 (1982). Para. 7 (b). Mr. S. Jegatheeswara Sarma v. Sri Lanka, Communication No. 950/2000, U.N. Doc. CCPR/C/78/D/950/2000 (2003), para. 6 (2).

²¹ Gomes Lund et al. (“*Guerilha do Araguaia*”) v. Brazil, para. 101. *Radilla Pacheco v. Estados Unidos Mexicanos* (IACtHR, November 23, 2009), para. 138. *Ibsen Cárdenas and Ibsen Peña v. Bolivia* (IACtHR, September, 1, 2010).

²² It can be seen in the Rome Statute, but it remains clearer with instruments from the human rights field such as the Inter-American Convention on Enforced Disappearances of Persons, especially its Preamble with articles II and IV.

²³ *Blake v. Guatemala* (IACtHR January, 24, 1998) Dissenting Opinion Judge Cañado Trindade. *Radilla Pacheco v. Estados Unidos Mexicanos* (IACtHR, November 23, 2009). *Varnava and Others v. Turkey*, Appl. No. 16064/90, 16065/90, 16066/90 [...], ECtHR [GC], 18 September 2009.

²⁴ *Radilla Pacheco v. Estados Unidos Mexicanos* (IACtHR, November 23, 2009), para. 15.

²⁵ Mexico’s interpretative declaration: [...] Based on Article 14 of the Political Constitution of the United Mexican States, the Government of Mexico declares, upon ratifying the Inter-American Convention on the Forced Disappearance of Persons adopted in Belem, Brazil on June 9, 1994, that it shall be understood that the provisions of said Convention shall apply to acts constituting the forced disappearance of persons ordered, executed, or committed *after* the entry into force of this Convention. [...] highlighted by the author. Available at: <<http://www.oas.org/juridico/english/signs/a-60.html#Mexico>>. Accessed on: 06 Feb. 2015.

²⁶ International Law Commission. *Draft Articles on Responsibility of States for Internationally Wrongful Acts*.

²⁷ *Radilla Pacheco v. Estados Unidos Mexicanos* (IACtHR, November 23, 2009), paras. 21-32.

A second important factor is the nature of the element of the attack, which is included in the chapeau requirements for crimes against humanity in the Rome Statute. The attack against the civilian population, not only in the crime of enforced disappearance, is composed by several acts that only when analyzed together can be understood as such (*conduite globale*) (KOLB, 2008, p. 98). It means, there is a symbiosis between the executions of the acts that form the crime, the conducts of the perpetrators and the attack itself. Hence, it can be affirmed that in the crime of enforced disappearance, which is composed by several acts, not only its perpetration has a continuing character, but also the attack against the civilian population as well as the conducts of the perpetrators involved are continuous (NISSEL, 2005, p. 670). For example, the relatives of the victims from the Brazilian dictatorship still nowadays do not have any information about the fate or the whereabouts of the victim. The perpetrators, by their turn, are still holding this information.

Therefore, the question that the footnote 24 of the Elements of the Crimes of the ICC Statute puts forward in the cases of enforced disappearance cannot be understood as a temporal limitation for the court to exercise its jurisdiction over situations involving this crime that have started before the entry into force of the Rome Statute. Such interpretation is possible because the text of the footnote does not refer to the attacks that have started before the entry into force of the Rome Statute, but it refers to attacks that occur after it. Thus, in the cases of enforced disappearances, where not only the crime is continuous, but also the attack, the Court “can rely on the conduct taking place prior to the critical date” (NISSEL, 2005, p. 687).

Moreover, the limitation of non-retroactivity *ratione personae* present in Article 24 (1) due to its ambiguity enables the prosecution for continuous crimes that happened before the entry into force of the Rome Statute, as such as the enforced disappearances occurred during the Brazilian dictatorship. In order to arrive at such conclusion, it is necessary to balance the principle of non-retroactivity *ratione personae* with the general principles of Law and the goals of the ICC, for example, the effectiveness of the Law and the end of impunity for international crimes (NISSEL, 2005, p. 687-689). Also, it crucial to bear in mind that enforced disappearance was already a crime under international law before the Rome Statute (FINUCANE, 2010, p.173). Furthermore, the conducts of the agents have to be analyzed as a whole due to the fact that they are an essential element of the attack. It means, if the attack against the civilian population has a continuous character, the conducts of the perpetrators that are determinant for its realization are embodied with the same nature of the attack.

Following this reasoning, it is possible to affirm that the International Criminal Court can hold the prosecution of the perpetrators of the crime of enforced disappearance that were perpetrated in the context of the civil-military dictatorship in Brazil. Also, by judging the perpetrators of those crimes, due to the unwillingness and inability of the Brazilian state to hold prosecutions for such crimes, the ICC acting in its complementary role in relation to the national courts would be fulfilling its mandate, that is, to put an end to the impunity.

4.2 Implications of the ICC complementary nature and its role in the fight against impunity

The consolidation of international criminal law, especially after 1945, was based upon the necessity to hold the perpetrators of international crimes accountable for their actions. It was necessary to fight against the impunity for international crimes. As a consequence of this movement, the sovereign powers of states in relation to the administration of their criminal policies were limited due to the understanding that certain crimes offend not only one particular state, but the international community as a whole (DELMAS-MARTY, 2005, p. 236). In this context, the International Criminal Court presents itself above the differences between monist and dualistic approaches towards international law as it is based on the complementarities between domestic and international legal systems (DELMAS-MARTY, 2002, p. 1916).

The discussion treating the fight against impunity and the complementary role of the ICC becomes important in the context of the crimes of enforced disappearance started during the Brazilian dictatorship as the non-prosecution of the perpetrators still has impacts on the current situation in the country. This means, even though the Brazilian state was held accountable for the violation of its international obligations, the state agents that were involved in the perpetration of crime were not. This untouchable character of those who committed crimes as well as the permanence of a military structure within the public security forces since the end of the dictatorship caused have effects on the institutional culture of this branch of the Brazilian state.

For example, the levels of state violence²⁸ and political terror²⁹ in the country have constantly increased since the end of the civil-military dictatorship. The population by its turn has the vivid fear to be tortured if arrested by the Police³⁰. Thus, it might be affirmed that the state of impunity for the crimes committed during the dictatorship by state agents was incorporated in the institutional culture of the security forces. This environment develops new generations of agents to engage in similar practices as the one performed by their predecessors. This can be exemplified by several cases of enforced disappearances from the post-dictatorship regime period, such as the well-known cases of *Chacina de Acari*³¹ and *Amarildo de Souza*³².

The international community, by its turn, has expressed to the country its position regarding the situation of impunity concerning the crimes committed by state agents. It recommended Brazil to “ensure that all members of the police and prison officers that commit human rights violations and abuses, such as torture and ill-treatment, are held accountable”³³. However, it is important to highlight that the international community has also a subsidiary obligation to assure that international crimes do not end up unpunished. As a consequence, in the context of the international criminal law system, the complementarity principle in which the ICC is founded has to be comprehended as a double-edge rule, i.e. as an element for the assessment of the Court’s jurisdiction³⁴ over a case as well as a guidance for states to harmonize their national legal systems with the international standards (Delmas-Marty, 2009, p. 158).

As a result, the Rome Statute and its Court appears as one of the most prominent places to create a dialogue between the different legal cultures in the light of the values on which the international community bases itself (Delmas-Marty, 2005, p. 233). Moreover, the ICC has a duty to engage itself in a cross-reference process in the interpretation and application of the law, i.e. in a judicial dialogue with the case law of other international tribunals due to the common values and complexities that are inherent to international law, particularly in the ones from the fields of international human rights (Delmas-Marty, 2009, p. 25).

²⁸ For example, according to the 8^o *Anuário Brasileiro de Segurança Pública* (2014) between 2009 and 2013, around 11.200 people were killed by the Police in Brazil. This number exceeds the number of people killed by the American police in 20 years (1983-2012), which was around 11.100 people. See: 8^o *Anuário Brasileiro de Segurança Pública* (2014) 6.

²⁹ According to the Political Terror Scale (PTS), in 1988 when the actual constitution was adopted, the Brazilian situation was considered as level 3 (There is extensive political imprisonment, or a recent history of such imprisonment. Execution or other political murders and brutality may be common. Unlimited detention, with or without a trial, for political views is accepted). In 2013, the country was classified in the level 4 (Civil and political rights violations have expanded to large numbers of the population. Murders, disappearances and torture are a common part of life. In spite of its generality, on this level terror affects those who interest themselves in politics or ideas). Information available at: <<http://www.politicalterrorsscale.org/countries.php?region=SouthAmerica&country=Brazil>>. Accessed on: 31 Jan. 2015.

³⁰ As appointed by the Torture Global Survey (2014), in Brazil around 80% of the population has the fear to be tortured if taken into custody. See more at: *Torture Global Survey*. Available at <<http://www.amnesty.org/en/library/asset/ACT40/005/2014/en/571ddea2-66dd-4f77-81e3-053339d3a096/act400052014en.pdf>>. Accessed on: 31 Jan. 2015.

³¹ In the *Chacina de Acari* (1990), eleven children from the Favela de Acari were supposedly killed by a group of policemen and their bodies are still disappeared. Until now, no investigation was conducted by the authorities concerning this case. Information available at: <<http://oglobo.globo.com/rio/maes-de-acari-pedirao-ajuda-internacional-2975046>>. Accessed on: 04 Feb. 2015.

³² Amarildo de Souza lived in the *Favela da Rocinha* and was a bricklayer assistant when he was arrested by the policemen from the Pacifying Police Unity of Rocinha in July 2013. Since then, Amarildo is disappeared. His disappearance caused great repercussion in the social media. Information available at: <http://www.bbc.co.uk/portuguese/noticias/2013/09/130914_amarildo_2meses_jd_dg>. Accessed on: 04 Feb. 2015.

³³ United Nations, Human Rights Council. Brazil: Universal Periodic Review. UN Doc. A/HRC/21/11. para. 119 (122).

³⁴ Combined reading of Articles 1 and 17 of the Rome Statute.

As Cassese has pointed out, even though the spectrum of analysis in the human rights courts cases is different, the case law from those courts has an *importance capitale* in the job of international criminal courts, as it can voice general principles of law that can be applied in criminal cases (Cassese, 2002, p. 149-150). Thus, it can be affirmed that the current international legal and judicial system has the possibility to fight against impunity in a holistic way. This means, the international system has mechanisms at its disposal to hold both the state and individuals accountable for their violations of international obligations.

Hence, the prosecution of the state agents involved in the perpetration of enforced disappearances during the civil-military dictatorship in front of the International Criminal Court due to its complementary role can present a powerful tool against the impunity that surrounds those crimes. Moreover, the crime of enforced disappearance due its characteristics presents several challenges for the ICC fully implementing its mandate, especially if the Court analyzes it through a systemic perspective. Thus, the ICC has the duty to overcome the doctrinal debates about a fragmentary international legal system and to perform a judicial dialogue with other relevant areas, such as international human rights law.

Conclusion

After having analyzed throughout this paper the crime of enforced disappearance and the Brazilian case, it is possible to conclude that the International Criminal Court can hold the prosecution of the perpetrators of the crimes of enforced disappearance that have started to occur during the dictatorship period in Brazil (1964-1985).

One of the main reasons why it is possible for the ICC to hold these prosecutions is the continuous nature of the crime of enforced disappearance. As mentioned before, such a crime starts with the detention of the victim and is followed by the denial of information about his/her whereabouts or fate. The crime is just finished with the appearance of the persons or with the knowledge of his/her fate. Between these two moments, i.e. the temporal boundaries of the perpetration, the crime is being continuously perpetrated as it is understood by the doctrine (Nissel, 2005) and widely recognized by the case law of human rights organs concerning enforced disappearances.

As previously acknowledged, according to the data provided by the Final Report of the National Truth Commission, nowadays in Brazil about 210 crimes of enforced disappearance that started during the dictatorship regime are still being perpetrated as the whereabouts or the fate of the victims is still unknown (Brazil, 2014, p. 576-582). Until now, the Brazilian state seems to be unwilling and unable to prosecute the state agents that have perpetrated those crimes, due to the maintenance of the validity of the 1979 Amnesty Law. Thus, the ICC, especially due to its complementary role and mandate becomes the most suitable existing forum to hold such prosecutions.

Moreover, it is not possible to deny the powerful impact that such prosecutions can have in the context of the fight against impunity for the crimes committed by state agents, especially the ones perpetrated by members of the security forces, which had an obligation to protect the citizens from crimes. Furthermore, it is also important to highlight the pedagogical character that these prosecutions can have for the future generations in the sense to prevent them from cases of state violence as well as in the construction of the national memory.

Finally, it has to be kept in mind that the prosecution of the perpetrators of the crime of enforced disappearance, which is a crime against humanity, is also an imperative of Justice. This means, if the intention of such crime is to remove a person from the protection of the Law, it is necessary to (re)affirm that nobody, in any condition, can be subject of a process of dehumanization that denies the inherent right to have rights.

References

- AMBOS, Kai. *Treatise on International Criminal Law*. Oxford: Oxford University Press, 2014. Vol. II: The crime and the sentencing.
- BASSIOUNI, Mahmoud Cherif. *Crimes against humanity: historical evolution and contemporary application*. Cambridge: Cambridge University Press, 2011. <http://dx.doi.org/10.1017/CBO9780511976537>
- BRASIL. *Comissão Nacional da Verdade – Relatório Final*. Brasília: CNV, 2014.
- CASSESE, Antonio. *International Criminal Law*. Oxford: Oxford University Press, 2003.
- CASSESE, Antonio. L'influence de la CEDH sur l'activité des Tribunaux pénaux internationaux. In: CASSESE, Antonio; DELMAS-MARTY, Mireille (Ed.). *Crimes internationaux et juridictions internationales*. Paris: PUF, 2002. p. 143-182.
- DELMAS-MARTY, Mireille. *A imprecisão do Direito: do Código Penal aos Direitos Humanos*. São Paulo: Manole, 2005.
- DELMAS-MARTY, Mireille. The ICC and the Interaction of International and National Legal Systems. In: CASSESE, Antonio; GAETA, Paola; JONES, John (Ed.). *The Rome Statute of the International Criminal Court: a commentary*. Oxford: Oxford University Press, 2012. Vol. II.
- DELMAS-MARTY, Mireille. *Ordering pluralism: a conceptual framework for understanding the transnational legal world*. London: Hart, 2009.
- FINUCANE, Brian. Enforced Disappearance as a Crime Under International Law: A Neglected Origin in the Laws of War. *Yale Journal of International Law*, New Haven, v. 35, p. 171-197, 2010.
- GIORGOU, Irena. State involvement in the perpetration of enforced disappearance and the Rome Statute. *Journal of International Criminal Justice*, Oxford, v. 11, p. 1001-1021, 2013. <http://dx.doi.org/10.1093/jicj/mqt063>
- HALL, Christopher. K. Article 7 Crimes against humanity. In: TRIFFTERER, Otto (Ed.). *Commentary on the Rome Statute of the International Criminal Court*. London: Hart Publishing, 2008.
- JUROVICS, Yann. Article 7 – Crimes contre l'humanité. In: FERNANDEZ, Julian; PACREAU, Xavier (Ed.). *Statut de Rome de la Cour pénale internationale, commentaire article par article*. Paris: Editions Pedone, 2012.
- KOLB, Robert. *Droit international penal*. Bruxelles: Helbing Lichtenhahn & Bruylant, 2008.
- LOT VERMEULEN, Marthe. *Enforced disappearance: determining state responsibility under the International Convention for the Protection of All Persons from Enforced Disappearance*. Cambridge: Intersentia, 2012.
- MAZZUOLI, Valerio. *Curso de Direito Internacional Público*. São Paulo: RT, 2012.
- NISSEL, Alan. Continuing crimes in the Rome Statute. *Michigan Journal of International Law*. Michigan v. 25, p. 653-689, 2004.
- OTT, Lisa. *Enforced disappearance in International Law*. Cambridge: Intersentia, 2011.
- SCHABAS, William. *The international criminal court: a commentary on the Rome Statute*. Oxford: Oxford University Press, 2010.
- SIKKINK, Kathrin. *The Justice Cascade: how human rights prosecutions are changing world politics*. London: The Norton Series in World Politics, 2011.
- SILVA FILHO, José Carlos Moreira da. Memória e reconciliação nacional: o impasse da anistia na inacabada transição democrática brasileira. In: PAYNE, Leigh; ABRÃO, Paulo; TORELLY, Marcelo (Org.). *A anistia na era da responsabilização: o Brasil em perspectiva internacional e comparada*. Brasília e Oxford: Ministério da Justiça; Oxford University, 2011. p. 278-307.
- VENTURA, Deisy. A interpretação judicial da Lei de Anistia Brasileira e o Direito Internacional. In: PAYNE, Leigh; ABRÃO, Paulo; TORELLY, Marcelo (Org.). *A anistia na era da responsabilização: o Brasil em perspectiva internacional e comparada*. Brasília e Oxford: Ministério da Justiça; Oxford University, 2011. p. 308-343.
- WIERDA, Marieke and UNGER, Thomas. Enforced disappearances. In: CASSESE, Antonio (Ed). *The Oxford Companion to International Criminal Justice*. Oxford: Oxford University Press, 2009.

Recebido em: 02/07/15

Aceito em: 23/07/15