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## THE CONCEPT OF ENFORCED DISAPPEARANCES IN INTERNATIONAL LAW

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**Abstract.** *Enforced disappearance is not a new type of human rights violation. This phenomenon is taking place all over the world. Nevertheless, with the exception of the single provision in the Rome Statute, there is no universal legally binding document which would be applicable in all the cases of enforced disappearances. This article introduces the phenomenon of enforced disappearances, analyses its multiple nature, and overviews the latest developments in drafting legally binding documents within the UN framework.*

**Keywords:** *enforced disappearances, torture, human rights, humanitarian law, Rome Statute of the International Criminal Court, effective remedy.*

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### Introduction

The crime of enforced disappearance of persons became known for the first time when Adolf Hitler (on December 7, 1941) issued “Nacht und Nebel Erlass” (the Night and Fog Decree). Hitler is known to have admired Stalin’s reign of terror and secret arrests, and this admiration may have been an inspiration for the Decree. Its purpose was to seize persons in Nazi occupied territories that were “endangering German security”

and make them vanish without a trace. No information was given to victim's families as to their fate, even when, as often occurred, it was merely a question of the place of burial in the "Reich".<sup>1</sup> This practice re-emerged during the reign of the national security ideology of Latin American military dictatorships in the late 1960s—first in Brazil and then in Guatemala. During the 1970s and the early 1980s, the practice of enforced disappearance was a common feature in many countries of this region. In addition to Latin America, the highest numbers of enforced disappearances were reported as taking place in Iraq, Sri Lanka and the former Yugoslavia.<sup>2</sup>

The complexity of enforced disappearances is well known. Enforced disappearance is often categorized as multiple human rights violations which simultaneously covers the violation of several human rights such as: the right to security and personal dignity; the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment; the right to humane conditions of detention; the right to legal representation; the right to a fair trial; the right to a family life; and even the right to life, when the abducted person is killed.<sup>3</sup> The international non-governmental organisation, *Amnesty International* describes the phenomenon of enforced disappearance as a human rights violation when a person is arrested, detained or abducted by the state or agents acting for the state, who then deny that the person is being held or conceal their whereabouts, placing them outside the protection of the law. Very often, people who have disappeared are never released and their fate remains unknown to their families and friends. The abducted person is often tortured and in constant fear for their life, removed from the protection of the law, deprived of all their rights, and at the mercy of their captors. It is a continuing violation which often persists for many years after the initial abduction.<sup>4</sup>

The international community has taken steps to combat enforced disappearance, both at the regional and international level, with the Declaration on the Protection of all Persons from Enforced Disappearance<sup>5</sup> (1992) ("Declaration"), the Inter-American Convention on Forced Disappearance of Persons<sup>6</sup> (1994) ("Inter-American Convention"), and the Rome Statute of the International Criminal Court (1998)<sup>7</sup> ("Rome Statute"). The last document to enter into force is the International Convention for the Protection of All Persons from Enforced Disappearance, which has been open for signature since 2007 ("the Draft Convention").

1 Boot, M.; Hall, C. K. Crimes against Humanity. In *Commentary on the Rome Statute of the International Criminal Court: Observer's Notes, Article by Article*. Second Edition. Triffterer, O. (ed.). C.H. Beck-Hart-Nomos, 2008, p. 221.

2 Nowak, M. Torture and enforced disappearance. In *International Protection of Human Rights: A Textbook*. Krause, C.; Scheinin, M. (eds.). Turku: Institute for Human Rights, Abo Akademi University, 2009, p. 152.

3 Boot, M.; Hall, C. K., *op. cit.*, p. 221.

4 *Amnesty International* website [interactive]. [accessed 25-04-2010]. <<http://www.amnesty.org/en/enforced-disappearances>>.

5 UN General Assembly resolution 47/133 of 18 December 1992.

6 Inter-American Convention on Forced Disappearance of Persons [interactive]. [accessed 25-04-2010]. <<http://www.cidh.oas.org/Basicos/English/Basic11.Disappearance.htm>>.

7 Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9\* [interactive]. [accessed 25-04-2010]. <<http://untreaty.un.org/cod/icc/statute/rome.htm>>.

Various human rights bodies have dealt with the criminal human rights violations of enforced disappearances. This article also covers the case-law of the Inter-American Court on Human Rights, the European Court of Human Rights and the Human Rights Committee. The most notorious cases of enforced disappearances, such as *Velasquez-Rodríguez v. Honduras*,<sup>8</sup> *Bazorkina v. Russia*,<sup>9</sup> and *Edriss El Hassy v. The Libyan Arab Jamahiriya*,<sup>10</sup> will be discussed.

In order to understand the complexity of this phenomenon, this article is divided into two parts. The first part analyses the multiple nature of enforced disappearances, discussing its interrelation with torture and crimes against humanity. The second part discusses the principal provisions of the International Convention for the Protection of All Persons from Enforced Disappearance. The article concentrates on several ideas introduced by the Convention—the positive obligations of States Parties, the “victim” notion, effective remedies for enforced disappearances, and monitoring mechanisms.

## 1. Enforced Disappearance as a Multiple Breach of Human Rights

Enforced disappearances are not new to the history of human rights violations. However, their systematic and repeated use—as a means of creating a general state of anguish, insecurity and fear—is a recent phenomenon.<sup>11</sup> Considerable human rights violations in the form of enforced disappearances have taken place in South America, Asia, Central and Eastern Europe (in particular Belarus). Although this practice exists virtually worldwide, it has occurred with exceptional intensity in Latin America in the last several years.<sup>12</sup>

Enforced disappearance is a particularly complicated issue and is difficult to discuss in a single article because it is a human rights violation falling under the scope of human rights law, international criminal law and international humanitarian law. Due to its continuity and complexity, it must be understood and confronted in an integral fashion.<sup>13</sup> The Human Rights Committee denoted that any act leading to such a disappearance constitutes a violation of many of the rights enshrined in the International Covenant on Civil and Political Rights—the right to liberty and security of person (art. 9); the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7); and the right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (art. 10). It also violates, or constitutes a grave threat, to the right to life (art. 6).<sup>14</sup>

8 I/A Court H.R., *Case of Velásquez-Rodríguez v. Honduras*. Merits. Judgment of July 29, 1988. Series C No. 4.

9 *Bazorkina v. Russia*, No. 69481/01, ECHR-2006.

10 *Edriss El Hassy v. The Libyan Arab Jamahiriya*, No. CCPR/C/91/D/1422/2005.

11 I/A Court H.R., *Case of Velásquez-Rodríguez v. Honduras*, *op. cit.*

12 *Ibid.*, §149.

13 Rehman, J. *International Human Rights Law*. 2nd edition. Harlow, England: Longman, 2010, p. 855.

14 See Communication No. 950/2000, *Sarma v. Sri Lanka*, Views adopted on 16 July 2003, § 9.3.

Due to the nature of “multiple” human rights violations, enforced disappearances most commonly represents a violation of the right to life;<sup>15</sup> the prohibition on torture and cruel, inhuman or degrading treatment; the right to liberty and security of the person;<sup>16</sup> and the right to a fair and public trial.<sup>17</sup>

International human rights protection bodies have adopted relevant jurisprudence involving the interpretation of so called enforced disappearances. The term “enforced disappearances” is not included in regional human rights catalogues such as the European Convention of Human Rights and Fundamental Freedoms (ECHR) or the American Convention on Human Rights. Therefore, every segment of human rights violations which corresponds to enforced disappearance should be examined separately. Due to the difficulty in disclosing all possible linkages of human rights violations and enforced disappearances, this article further examines torture as one of the gravest human rights violations in the context of enforced disappearances.

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15 The Human Rights Committee is forming its jurisprudence mostly referring to Article 6 of the International Covenant on Civil and Political Rights: In respect of the alleged violation of article 6, paragraph 1, the Committee recalls its General Comment 6[16] on article 6, which states that States Parties should take specific and effective measures to prevent the disappearance of individuals and establish effective facilities and procedures to investigate thoroughly, by an appropriate impartial body, cases of missing and disappeared persons in circumstances that may involve a violation of the right to life. See further *Mojica v. Dominican Republic* (449/1991), ICCPR, A/49/40 vol. II (15 July 1994) 142 (CCPR/C/51/D/449/1991) at paragraphs. 2.1, 2.2, 5.5, 5.6, 6 and 7.

16 The Inter-American Court on Human Rights, while analysing enforced disappearances in the *Velasquez Rodriguez* case under the American Convention on Human Rights, has linked this violation of human rights with the right to personal liberty and has recognised that *the forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties are obligated to respect and guarantee. The kidnapping of a person is an arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest, all in violation of Article 7 of the Convention which recognizes the right to personal liberty.* Also see Article 7 on the American Convention on Human Rights:

1. Every person has the right to personal liberty and security.
2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto.
3. No one shall be subject to arbitrary arrest or imprisonment.
4. Anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him.
5. Any person detained shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to be released without prejudice to the continuation of the proceedings. His release may be subject to guarantees to assure his appearance for trial.
6. Anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful. In States Parties whose laws provide that anyone who believes himself to be threatened with deprivation of his liberty is entitled to recourse to a competent court in order that it may decide on the lawfulness of such threat, this remedy may not be restricted or abolished. The interested party or another person in his behalf is entitled to seek these remedies.

17 Rehman, J., *supra* note 13, p. 855.

### 1.1. The Inter-Relation between Enforced Disappearances and Torture as the Gravest Breach of Human Rights

Inter-American institutions have defined the phenomenon of enforced disappearances as representing acts of torture or cruel, inhuman or degrading punishment or treatment.<sup>18</sup> Torture can be defined as the intentional infliction of severe pain or suffering on a powerless victim, usually a detainee, for a specific purpose—extraction of a confession or information, intimidation, or punishment. The international community has taken a number of steps to combat torture and enforced disappearance. In addition to the absolute prohibition of torture and other forms of cruel punishment in international and regional human rights treaties, the United Nations, the Council of Europe and the Organization of American States have adopted various treaties which establish the specific obligations of states to prevent torture and ill-treatment, to bring individual perpetrators of torture to justice, and to find an effective remedy and reparation for the pain suffered by the tortured.<sup>19</sup>

A number of decisions of international human rights bodies have identified the elements of torture that relate to enforced disappearances. For example, the European Court of Human Rights, in the case of *Bazorkina v. Russia*, examined the alleged violation of Article 3 of ECHR in respect to the applicant. The Court emphasised that the essence of such a violation does not mainly lie in the fact of the “disappearance” of the family member, but rather concerns the authorities’ reactions and attitudes to the situation when it was brought to their attention. It is especially in respect to the latter that a relative may directly claim to be a victim of the authorities’ conduct.<sup>20</sup> Finally, the Court found that the applicant suffered, and continues to suffer, distress and anguish as a result of the disappearance of her son and her inability to find out what happened to him. The manner in which her complaints have been dealt with by the authorities must be considered to constitute inhuman treatment contrary to Article 3.<sup>21</sup>

It is noteworthy that the United Nations Convention against Torture (CAT) has become a source of reference for the International Convention for the Protection of All Persons from Enforced Disappearance.<sup>22</sup> One of the most important features of the CAT is the obligation of States Parties, under Article 4, to criminalise torture under their domestic laws with appropriate penalties and to eliminate safe havens for perpetrators of torture by establishing various types of jurisdictions, including criminal jurisdictions, in accordance with the detailed provisions in Articles 5–9.<sup>23</sup> Similar obligations to punish

18 Rehman, J. *International Human Rights Law*. London: Longman, 2003, p. 214. See also *Lissardi and Rossi v. Guatemala*, Case 10.508, Report No. 25/94, Inter-American Human Rights Commission, OEA/Ser.L/V//II.88 rev.1 Doc. 9 at 51 (1995).

19 Nowak, M., *supra* note 2, p. 152.

20 *Bazorkina v. Russia*, no. 69481/01, ECHR-2006; §139.

21 *Ibid.*, §141

22 The text was adopted by the UN General Assembly on 20 December 2006 and opened for signature on 6 February 2007. As of December 2009, 83 states have signed, and eighteen have ratified. The Convention will come into force when 20 States Parties will have ratified it.

23 Nowak, M., *supra* note 2, p. 180.

perpetrators are found in regional human rights documents related to enforced disappearance such as the Declaration on the Protection of all Persons from Enforced Disappearance,<sup>24</sup> the Inter-American Convention on the Enforced Disappearance of Persons, and in the International Convention for the Protection of All Persons from Enforced Disappearance. The central objective of the CAT and enforced disappearance conventions, is modelled on earlier treaties combating terrorism (e.g. Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 1971). The provision is based on the experience that impunity for perpetrators of torture is one of the main reasons that torture (and enforced disappearances) continues to be widely practised in many countries despite its absolute prohibition under international human rights and humanitarian law.<sup>25</sup>

The importance of torture as an element of enforced disappearances, and State Parties' obligation to criminalise torture, is beyond the scope of the previously mentioned human rights documents. The positive obligations of State Parties to prevent, investigate and punish the perpetrators in cases of enforced disappearances and torture are explicitly developed in the jurisprudence of regional human rights courts like the European Court of Human Rights and the Inter-American Court on Human Rights. In the case of *Velasquez Rodriguez*, the Inter-American Court on Human Rights referred to Article 1 (1) of the Convention and analyzed the obligation to respect rights. The first obligation of the State Party is "to respect the rights and freedoms", and the second is to "ensure" the free and full exercise of the rights recognised by the Convention of every person subject to its jurisdiction. The Court indicated that the States must prevent, investigate and punish any violation of the rights recognised by the Convention and, if possible, attempt to restore the violated rights and provide compensation as warranted for damages resulting from violation.

Interpreting Article 2 of the Convention, the American Court has denoted the obligation of the State Parties to adopt [...] such legislative or other measures as may be necessary to give effect to those rights or freedoms. The Court has recognised the responsibility of the state for the acts that its agents undertake in their official capacity and for their omissions—even when those agents act outside the sphere of their authority or violate international law. In this case, The Court was convinced that the disappearance was carried out by agents who acted under the cover of public authority. The Court noted that according to the principle of the continuity of the State in international law, responsibility exists independently of changes of government and that responsibility exists continuously from the time of the act that created the responsibility to the time when the act is declared illegal.<sup>26</sup>

A similar decision was also adopted by the European Court of Human Rights dealing with the *Bazorkina v. Russia* case. The Court, like its American counterpart, also stressed the obligation of the authorities to act on their own volition once the matter

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24 A/RES/47/133 18 December 1992.

25 Nowak, M., *supra* note 2, p. 181.

26 I/A Court H.R., *Case of Velásquez-Rodríguez v. Honduras*, *supra* note 8, § 170.

has come to their attention. For an investigation [...] to be effective it may generally be regarded as necessary for the persons responsible for the investigation to be independent from those implicated in the events. The investigation must also be effective in the sense that it be capable of leading to a determination of whether the force used in such cases is or is not justified and lead to punishment for those who are responsible. This is not an obligation of result, but of means.<sup>27</sup> The Court noted that investigation delays compromised the effectiveness of the investigation and had a negative impact on the prospects of arriving at the truth.<sup>28</sup>

Universal human rights bodies such as the Human Rights Committee have also become relevant in similar cases involving torture and enforced disappearances. In the *Edriss El Hassy v. The Libyan Arab Jamahiriya* case the Committee concentrated on the obligations of the State Party and referred to the importance of States Parties' establishment of appropriate judicial and administrative mechanisms for addressing the alleged violations of rights under domestic law. It referred to its General Comment No.31, which states that failure by a State Party to investigate allegations of violations could give rise to a separate breach of the Covenant. The Committee concluded that the State Party was duty-bound to conduct thorough investigations into alleged violations of human rights—particularly enforced disappearances and acts of torture—and also to prosecute, try and punish those held responsible for such violations.<sup>29</sup>

To sum up, the various international human rights bodies have denoted the importance of positive obligations and the role of the state in combating the phenomenon of enforced disappearances. Due to the gravity of the crime of enforced disappearance, the possible human rights violations extend beyond international human rights law. The complexity of the nature of the enforced disappearances is reflected in human rights law and also humanitarian and international criminal law.

## 1.2. Enforced Disappearance as a Crime against Humanity under the Rome Statute of the International Criminal Court

The Rome Statute of the International Criminal Court was adopted in 1998 and came into force in 2002. The crime of enforced disappearance was enshrined in Article 7, 1(i) with a more exact definition provided in 2(i). Enforced disappearance is defined in the Statute as follows:

*“Enforced disappearance of persons” means the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.<sup>30</sup>*

27 I/A Court H.R., *Case of Velásquez-Rodríguez v. Honduras*, *supra* note 8, § 118.

28 *Ibid.*, §121.

29 See Communication No. 1196/2003, *Boucherf v. Algeria*, Views adopted on 30 March 2006, para 11; and Communication No. 1297/2004, *Medjnoune v. Algeria*, Views adopted on 14 July 2006, para 10.

30 Rome Statute of the International Criminal Court. UN. Doc. A/CONF.183/9/1998.

This definition was generally based on already existing sources—the previously mentioned Declaration on the Protection of all Persons from Enforced Disappearance (1992) and the Inter-American Convention on Enforced Disappearance of Persons (1994). In fact, the debate on enforced disappearance as an inhumane act of crimes against humanity started before the time of the Statute. Hitler’s Field Marshal Keitel was convicted of carrying out enforced disappearances back in 1945, although the judgement of the International Military Tribunal (Nuremberg) did not expressly state whether it was a war crime, a crime against humanity or both. However, lawyers involved in drafting the decrees and regulations implementing and carrying out the Night and Fog Decree were convicted of crimes against humanity and war crimes.<sup>31</sup> In the last decade of 20<sup>th</sup> century the Declaration and the Inter-American Convention, in their preambles, pointed out that the systematic practice of forced disappearance constitutes a crime against humanity.<sup>32</sup> Enforced disappearance was also included on the list of inhumane acts of crimes against humanity in the Draft Code of Crimes against the Peace and Security of Mankind (1996 ILC Draft Code) (Article 18, i) prepared by the International Law Commission (ILC).<sup>33</sup> In its short commentary the ILC emphasized that although this type of crime is rather recent, it should be included in the list of crimes against humanity because of its cruelty and gravity.<sup>34</sup> The International Criminal Tribunal for the Former Yugoslavia (ICTY) highlighted enforced disappearance as an example of inhumane acts not specifically listed in the definition of crimes against humanity in the ICTY Statute (together with the forcible transfer of groups of civilians and enforced prostitution) in its decision on the *Kupreskic* case.<sup>35</sup> However, as noted by Herman von Hebel and Darryl Robinson, enforced disappearance (as well as another rather new crime in the Rome statute—the crime of apartheid) did not appear in the major precedents, so there was some initial reluctance to include them in the Rome Statute. Nevertheless, a majority of States (Latin American states in particular) pressed for the recognition of these inhumane acts.<sup>36</sup> In the words of Antonio Cassese,

*with respect to this crime the ICC statute has not codified existing customary law but contributed to the crystallization of a nascent rule, evolved primarily out of treaty law (that is, the numerous treaties on human rights prohibiting various acts falling under this heading) as well as the case law of the Inter-American Commission and Court of Human Rights, in addition to a number of UN General Assembly resolutions. These various strands have gradually contributed to the formation of a customary rule prohi-*

31 Boot, M.; Hall, C. K., *supra* note 1, p. 221.

32 Inter-American Convention on Forced Disappearance of Persons, 33 ILM 1994, 1529.

33 Draft Code of Crimes against the Peace and Security of Mankind [interactive]. [accessed 25-04-2010]. <[http://untreaty.un.org/ilc/texts/instruments/English/draft%20articles/7\\_4\\_1996.pdf](http://untreaty.un.org/ilc/texts/instruments/English/draft%20articles/7_4_1996.pdf)>.

34 *Yearbook of the International Law Commission*. 1996, 2(2), A/CN.4/SER.A/1996/Add.1 (Part 2), p. 50.

35 Schabas, W. A. *An Introduction to the International Criminal Court*. Second edition. CUP, 2004, p. 49.

36 Von Hebel, H.; Robinson, D. Crimes within the Jurisdiction of the Court in *The International Criminal Court*. In *The Making of the Rome Statute. Issues, Negotiations, Results*. Lee, R. S. (ed.). Kluwer Law International, 1999, p. 102.

*biting the enforced disappearance of persons. The ICC Statute has upheld and codified the criminalization of this conduct.*<sup>37</sup>

However, it should not be forgotten that the crime of enforced disappearance and crimes against humanity, in the form of enforced disappearance, are not the same things. While dealing with enforced disappearance as a crime against humanity we have to apply all the general elements that are necessary to qualify the criminal offence as a crime against humanity. These general elements are: being part of state policy, attacks being directed against a civilian population, being of a widespread or systematic nature.<sup>38</sup> Even a single case of enforced disappearance is a crime against humanity (when committed as part of a widespread or systematic attack on a civilian population). However, enforced disappearances do not themselves have to be carried out on a widespread or systematic basis.<sup>39</sup>

The crime of enforced disappearance under Article 7 of the Rome Statute is a complex offence. It has been called an “octopus crime” as well as a “permanent crime”. Several persons could be prosecuted at different stages of the disappearance even though some of them may or may not be aware of the acts committed by others in the chain of events.<sup>40</sup> The crime consists of two major alternative types of conduct—deprivation of liberty and withholding information. The perpetrator of the deprivation of liberty need not be the one who withholds information<sup>41</sup> and vice versa, but all of them have to know the context of the act. There might be a number of persons responsible for the crime. As it is provided in the Elements of Crimes, a person may be responsible if the person arrested, detained, or abducted someone and refused to acknowledge it, or if they refused to give information on the fate or whereabouts of such a person or persons.<sup>42</sup> The perpetrator has to be aware that they’re acting in the context of a widespread or systematic directed attack against a civilian population. In addition, if the perpetrator intended to remove a person or persons from the protection of the law for a prolonged period of time, they are performing a kidnapping.<sup>43</sup>

The definition embedded in the Rome Statute, despite the similarities to the previous and later definitions of enforced disappearance, contributed some interesting aspects to the concept of the crime. The definition in the Rome statute provides that a person who is committing an act of enforced disappearance has to do it “*with the authorization, support or acquiescence of, a State or a political organization* (emph. added)”. It means that the policy of enforced disappearance has to originate not from personal intentions,

37 Cassese, A. *International Criminal Law*. OUP: New York, 2003, p. 80.

38 See Clark, R. S. Crimes against Humanity and the Rome Statute of the International Criminal Court. In *The Rome Statute of the International Criminal Court. A Challenge to Impunity*. Politi, M., Nesi, G. (eds.). Ashgate, 2001, p. 75–93.

39 Boot, M.; Hall, C. K., *supra* note 1, p. 225.

40 Kittichaisaree, K. *International Criminal Law*. OUP, 2001, p. 123.

41 Werle, G. *Principles of International Criminal Law*. The Hague: TMC Asser Press, 2005, p. 260–261.

42 Elements of the Crimes, (PCNICC/2000/1/Add.2) [interactive]. [accessed 01-05-2010]. <<http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=PCNICC/2000/1/Add.2&Lang=E>>.

43 *Ibid.*

but from the policy of a state or from the activity of a political organisation. Curiously, neither the Declaration nor the Inter-American convention mentioned political organisations as entities that authorise or support such an act. Moreover, the most recent Draft Convention refers only to the state's direct or indirect participation, though it provides for the State Party's responsibility to investigate the cases of disappearances committed without the state's intervention (Article 3 of the Convention). Therefore, it is important to discuss what the rationale behind the Rome Statute provision was and how the term "political organisation" should be understood in the present case. This was not the first instance when the Rome Statute referred to political organisation. Slightly different wording was used in the general definition of an "attack directed against any civilian population" (Article 7, 2(a)). The statute conveys that such an attack could be a state policy result or the result of organisational policy. Therefore, it is a wider phenomenon than the case of enforced disappearance on its own.

The fact that crimes against humanity might be committed not only by the classic definition of the state became apparent in the last decade of 20<sup>th</sup> century (experience of the International Military Tribunal). In the 1996 ILC Draft Code, in the case of crimes against humanity, incitement or support of the crime by a government organization was a requirement.<sup>44</sup> This position was summarized by the ICTY in the landmark Tadic case:

"Therefore, although a policy must exist to commit these acts, it need not be the policy of a State",<sup>45</sup> however, it also explained that understanding the entity behind the policy would

*take into account forces which, although not those of the legitimate government, have de facto control over, or are able to move freely within, defined territory. <...> under international law crimes against humanity can be committed on behalf of entities exercising de facto control over a particular territory but without international recognition or formal status of a de jure state, or by a terrorist group or organization. <...> this assertion <...> conforms with recent statements regarding crimes against humanity.<sup>46</sup>*

Distinguished writers like Bassiouni also supported this assertion, although they have emphasized the need for political organisations, as a subject of crimes against humanity, to be very close to *de facto* statehood.<sup>47</sup> This is in regard to the Yugoslavian case with such entities as the non-recognised Republika Srpska. After the shocking experiences of September 11<sup>th</sup> and other instances of the growing destructive power of non-state actors (such as Al Qaeda, Hezbollah, HAMAS, MEND, etc.), the provision of the Rome Statute seems to be much more far reaching and resembles the position of the 1996 ICL Draft Code. In the words of Gerhard Werle, ultimately, any group of people

44 Werle, G., *supra* note 41, p. 226.

45 *Tadic*, IT-94-1, Trial Chamber, Opinion and Judgement, § 654.

46 *Ibid.*

47 Žr. Bassiouni, M. C. *Crimes against Humanity in International Criminal Law*. The Hague, Boston, London, 1999, p. 275.

can be categorized as an organization if it has at its disposal, in material and personnel, the potential to commit a widespread or systematic attack on a civilian population. In addition to paraimilitary units, this particularly includes terrorist organizations. The participation of states or state-like entities is the rule in practice, but not a legal requirement. This leads to the conclusion that, in order to classify the attacks [...] on 11 September 2001 as crimes against humanity, it does not matter whether the acts can be ascribed to a terrorist organization alone or also to a state or state-like entity.<sup>48</sup>

Unfortunately, there seems to be no sources who can confirm directly that the content of the term “political organisation”, used in the definition of enforced disappearance, has exactly the same content as the term “organisational policy”, used as a general element of crimes against humanity. Nevertheless, we consider that the content of the term “organisational policy” should be taken as a guideline for dealing with the issue of enforced disappearance. It would be illogical to presume otherwise. It can be said that the Rome statute, at least theoretically,<sup>49</sup> has adopted a wider interpretation of enforced disappearance in comparison with other international instruments. Despite the development in the Rome Statute, the Draft Convention returned to the state-oriented concept of enforced disappearance.

## 2. The International Convention for the Protection of all Persons from Enforced Disappearance: an Overview

In 2003 the Commission on Human Rights decided to establish an Inter-sectional Open-ended Working Group to elaborate a legally binding normative instrument for the protection of all persons from enforced disappearance (ISWG). Throughout the three-year negotiation process, over 70 States, as well as numerous NGOs, associations for the families of victims, and experts participated in the sessions of the ISWG. *The International Convention for the Protection of all Persons from Enforced Disappearances* was adopted by the Human Rights Council during its first session in June 2006 and by the General Assembly in December of that same year.<sup>50</sup>

The Convention on Enforced Disappearance is the first universal legally binding instrument that addresses this complex crime. It is pending ratification by the required number of states to come into force and its provisions were modelled mostly on the CAT. The principal provisions of the Draft Convention—the positive obligations of the StatesParties, the definition of “victim”, an effective remedy, and monitoring mechanisms—will be discussed later in more detail.

48 Werle, G., *supra* note 41, p. 228–229.

49 Even though the International Criminal Court has started its first cases, there is still not any jurisprudence on enforced disappearance.

50 Fact Sheet no. 6/ Rev.3 Enforced Disappearances [interactive]. [accessed 09-04-2010]. <<http://www2.ohchr.org/english/issues/disappear/index.htm>>.

## 2.1. The Positive Obligations of States Parties

Despite highly controversial discussions during the drafting process, the Draft Convention contains, in Article 2, a state-centered definition of enforced disappearances similar to the one in Article 1 of the CAT. Article 3 requires States Parties to take appropriate measures to investigate acts of enforced disappearances committed by persons or groups acting without the authorisation, support or acquiescence of the state and to bring those responsible to justice. Article 5 reiterates Article 7(1)(i) of the ICC statute by affirming that the widespread or systematic practice of enforced disappearance constitutes a crime against humanity which requires the consequences provided for under applicable international law.<sup>51</sup>

The Draft Convention has been formulated on the basis of the CAT—it provides an explicit list of obligations envisioned for the States Parties (Article 17), it enables States Parties to take the necessary measures to hold persons criminally responsible (Article 6), it makes the offence of enforced disappearances punishable by appropriate penalties (Article 7), it ensures the right of individuals to report the fact of enforced disappearance to the competent authorities (Article 12), and it provides mutual legal assistance among the States Parties (Article 14). In comparison to the CAT, Article 4 has similar provisions to ensure that enforced disappearance constitutes an offence under domestic criminal law. Article 7 (1) adds the need for appropriate penalties, taking into account the extreme seriousness of crime. Article 9 is identical to Article 5 of the CAT and establishes universal jurisdiction. The obligations of any state exercising jurisdiction laid down in articles 10, 11, 13 and 14 correspond to those in Articles 6–9 of the CAT. The right to complain about cases of enforced disappearance and the obligation to investigate such cases are brought together in Article 12 and are linked to the criminal investigation provisions (whereas in the CAT these provisions are separated). The non-refoulement provision in Article 16 resembles the one in Article 3 of the CAT.<sup>52</sup>

The main source of inspiration for the draft Convention was the CAT. However, the draft Convention has also inherited the positive obligations established in the Declaration on the Protection of all Persons from Enforced Disappearance. The Declaration encourages taking effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in any territory under its jurisdiction. It states that all acts of enforced disappearance should be offences under criminal law punishable by appropriate penalties which will take into account their extreme seriousness. The Convention expands these provisions of the Declaration, adding sensitive groups such as children and explicitly listing acts punishable by law, such as:

a) *The wrongful removal of children who are subjected to enforced disappearance, children whose father, mother or legal guardian is subjected to enforced disappearance, or children born during the captivity of a mother subjected to enforced disappearance.*

51 Nowak, M., *supra* note 2, p. 181.

52 *Ibid.*, p. 182.

b) *The falsification, concealment or destruction of documents attesting to the true identity of the children [...].*

Similar provisions are not foreseen in the CAT, in the Declaration, nor in the Inter-American Convention on Forced Disappearance of Persons.

## 2.2. “Victim” Definition

The Convention, contrary to the Declaration or the regional conventions, goes further when defining the concept of “*victim*”. According to the Convention “*victim*” means the abducted person and any individual who has suffered harm as the direct result of an enforced disappearance. This definition covers both—direct and indirect—victims. This means that a broad “*victim*” definition encompasses both the abducted person and any individual who has suffered harm as a direct result of an enforced disappearance.<sup>53</sup> The latter is particularly important in enforced disappearance cases when close relatives suffer from an ignorance of the whereabouts of their family members and can, therefore, be qualified as (direct or indirect) torture victims.<sup>54</sup> It establishes, for the first time in a human rights treaty, the explicit *right of each victim to know the truth* regarding the circumstances of the enforced disappearance, the progress and results of the investigation, and the fate of the person who has disappeared.<sup>55</sup>

## 2.3. Effective Remedy

The Convention, contrary to the Declaration and related human rights documents, defines the “*victim*” and also lists forms of reparation:

The right to obtain reparation [...] covers material and moral damages and, where appropriate, other forms of reparation such as:

- a) *Restitution;*
- b) *Rehabilitation;*
- c) *Satisfaction, including restoration of dignity and reputation;*
- d) *Guarantees of non-repetition.*<sup>56</sup>

These forms of reparation echo the provisions of the General Assembly resolution A/RES/60/147.<sup>57</sup> This resolution recognised the need for an *effective remedy* and its importance in cases of gross violations of international human rights law and serious violations of international humanitarian law. The resolution denoted the obligation of the States Parties to have the duty to investigate and, if there is sufficient evidence, the duty to prosecute the person allegedly responsible for the violations. And, if found guilty, the

53 Nowak, M., *supra* note 2, p. 182.

54 See *Bazorkina v. Russia*, No. 69481/01, ECHR-2006; also *Edriss El Hassy v. The Libyan Arab Jamahiriya*, No. CCPR/C/91/D/1422/2005. § 6.6.

55 Nowak, M., *supra* note 2, p. 182.

56 See Article 24 of the Convention.

57 UN General Assembly resolution no. A/RES/60/147 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

duty to punish the perpetrator, to cooperate with one another, and assist international judicial organs competent in the investigation and prosecution of these violations. The States Parties are encouraged to facilitate extradition, to surrender offenders to other States Parties, to appropriate international judicial bodies, to provide judicial assistance, and to cooperate in the pursuit of international justice. This would include assisting and protecting victims and witnesses, consistent with international human rights legal standards and subject to international legal requirements such as those relating to the prohibition of torture.<sup>58</sup> Among other forms of effective reparation, the resolution includes the possibility of *rehabilitation*, which should include medical and psychological care, as well as legal and social services. It is noteworthy that the Convention also foresees the possibility of rehabilitation.<sup>59</sup> While other forms of reparation are widely used for human rights violations according to all core United Nations human rights treaties, this form of reparation should be considered as a novelty in international human rights treaties and is currently used only in the practice of the Committee against Torture, which is responsible for monitoring the prevention of torture and other cruel, inhuman or degrading treatment or punishment.

#### 2.4. Monitoring Mechanisms

Lastly, the Convention establishes a Committee on Enforced Disappearances to supervise the implementation of the Convention. The Committee on Enforced Disappearances may consider state reports, requests and communications.

Interestingly, in addition to the mandatory reporting procedure under Article 29, as well as optional individual and interstate complaints procedures, in accordance with Articles 31 and 32, the Convention also contains a *tracing procedure* in Article 30 which empowers the Committee to communicate requests for urgent action and interim measures to States Parties. This is similar to the practice of the Working Group on Enforced and Involuntary Disappearances (WGEID).<sup>60</sup> The Committee may consider the *request* that an abducted person be sought and found, and request the State Party concerned to provide it with information on the situation of the persons sought, within a time limit set by the Committee.<sup>61</sup> This request may be presented as a matter of urgency by relatives of the abducted person, their legal representatives, or any person authorized by them, as well as any other person having a legitimate interest. In order for the request to be admissible, it should satisfy certain admissibility conditions. Those conditions resemble the admissibility criteria of individual petitions: (i) the request is not manifestly unfounded; (ii) it does not constitute an abuse of the right of submission of such requests;

58 UN General Assembly resolution no. A/RES/60/147 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, § 4 and 5.

59 The possibility of rehabilitation was initially foreseen in the resolution of Assembly General RES/60/147. See Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Humanitarian Law. Resolution adopted by the General Assembly A/RES/60/147.

60 Nowak, M., *supra* note 2, p. 180–182.

61 Article 30.

(iii) it has already been duly presented to the competent bodies of the State Party concerned, where such a possibility exists; (iv) it is not incompatible with the provisions of this Convention; and (v) the same matter is not being examined under another international investigation or settlement of the same nature.<sup>62</sup>

The inquiry procedure in Article 33 is modelled on Article 20 of the CAT and also permits visits to the territory of the States Parties only if the respective government agrees. But in the case of a widespread or systematic practice of enforced disappearances, the Committee, pursuant to Article 34, may also urgently bring the matter to the attention of the General Assembly. Finally, Article 35 clarifies that the Committee has competence solely in respect to enforced disappearances which occur after the Convention comes into force, which will take place after ratification or the accession of 20 states.<sup>63</sup>

The creation of this supervision mechanism under the provisions of the Convention gives hope that as soon as this Convention enters into force, the workload in the Human Rights Council will decrease with respect to procedure 1503. In the meantime, the Human Rights Council, which includes the International Criminal Court on the one hand and the Working Group on Enforced and Involuntary Disappearances on the other, will remain a major forum to deal with the phenomenon of enforced disappearance.

## Conclusions

Enforced disappearance is widely recognised as a very grave breach of human rights. This assertion is supported by specific (the Rome Statute) and regional human rights documents, as well as the case law of various international human rights bodies. Even though its definition has some differences in different documents, there is general agreement on its nature, danger, and the need to deal with it and to help its victims. The International Convention for the Protection of all Persons from Enforced Disappearances is open for signature and, hopefully, will enter into force soon. The Convention introduces several developments, such as a definition of enforced disappearance, at the international level. It addresses the possibility of using effective remedies for persons who have suffered human rights violations and it creates a supervision mechanism for combating this phenomenon. It is hoped that this new core United Nations document will help to develop the relevant jurisprudence and will establish another alternative complaint mechanism for the victims of human rights violations.

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62 Compare to inadmissibility criteria applicable to individual communications under the same convention (Article 31):

- a) The communication is anonymous;
- b) The communication constitutes an abuse of the right of submission of such communications or is incompatible with the provisions of this Convention;
- c) The same matter is being examined under another procedure of international investigation or settlement of the same nature, or where
- d) All effective available domestic remedies have not been exhausted. This rule shall not apply where the application of the remedies is unreasonably prolonged.

63 Nowak, M., *supra* note 2, p. 182.

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## PRIEVARTINIŲ DINGIMŲ SAMPRATA TARPTAUTINĖJE TEISĖJE

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**Santrauka.** Amnesty International apibūdina prievartinių dingimų fenomeną kaip žmogaus teisių pažeidimą, kai asmuo yra suimamas, sulaikomas arba pagrobtas valstybės ar jos vardu veikiančių agentų, kurie neigia bet koki asmens sulaikymo arba pagrobimo faktą ir atsisako suteikti žinių apie jo buvimo vietą ar likimą. Tai yra tęstinis nusikaltimas, kuris dažnai tęsiasi daugelį metų nuo asmens pagrobimo momento. Labai dažnai dingusių asmenų likimas yra nežinomas šeimos nariams arba draugams. Neretai dingęs asmuo yra kankinamas, jo gyvybei gresia pavojus, jam neleidžiama naudotis jokiomis įstatymų garantuojamomis teisėmis. Todėl dažnai prievartiniai dingimai yra apibūdinami kaip daugiabiniai žmogaus teisių pažeidimai, kurie tuo pat metu apima keletą paraleliai vykdomų žmogaus teisių, tokių kaip teisės į asmens saugumą ir orumą, kankinimų draudimo, teisės į žmonišką sulaikymo sąlygas, teisės į teisingą teismą, teisės į gyvybę ir kitas teises, pažeidimų.

Šis straipsnis suskirstytas į dvi dalis. Pirmoje dalyje analizuojamas prievartinių dingimų, kaip žmogaus teisių pažeidimo, kompleksiskumas, ypač daug dėmesio skiriant jų ryšiumi su kankinimu bei prievartiniais dingimais, kaip nusikaltimų žmoniškumui veika. Antrajame skyriuje analizuojamos dar nepasirašytos Tarptautinės konvencijos dėl visų asmenų apsaugos nuo prievartinių dingimų (toliau – Konvencija) nuostatos. Atskleidžiama, jog ši remiantis Juntinių Tautų konvencija prieš kankinimą, žiaurų ir nežmonišką elgesį arba baudimą parengta Konvencija pateikė aukos, nukentėjusios nuo prievartinių dingimų, apibrėžimą, išplėtojo valstybių pozityvias pareigas, numatė poreikį šio nusikaltimo aukoms suteikti patirtos žalos kompensavimo priemones bei nustatė šios konvencijos priežiūros mechanizmus.

**Reikšminiai žodžiai:** prievartiniai dingimai, kankinimai, žmogaus teisės, humanitarinė teisė, Romos statutai, veiksminga padarytos žalos kompensavimo priemonė.

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