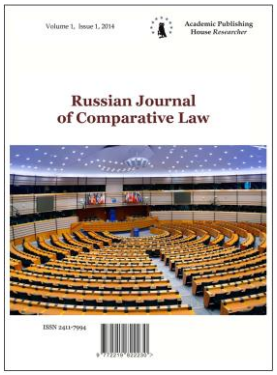
Published in the Slovak Republic
Russian Journal of Comparative Law
Has been issued since 2014.
E-ISSN 2413-7618
2020, 7(1): 3-16

DOI: 10.13187/rjcl.2020.1.3
http://ejournal41.com



Articles

The Crime of Enforced Disappearance of Persons When Political Organisations Commit Crimes against Humanity

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Abstract

The paper identifies an inconsistency that exists in the definition of the international crime of enforced disappearance of persons. The Rome Statute (hereinafter – RS) and the 2006 International Convention on Enforced Disappearances differ in the acceptance of political organisations that fight against the State as perpetrators of the crime. Through the analysis of this apparently minor inconsistency, we address the question if leaders and members of political organisations other than the official government of the State may hold criminal responsibility for gross human rights violations and international crimes.

The International Law of Human Rights (hereinafter – ILHR) and International Criminal Law (hereinafter – ICL) converge at integrating the international system of protection of the human being and humanity. Beyond their characterizing differences, they are part of a system and as such they are expected to maintain a minimum of coherence. We forward the opinion that any contradictory development regarding definitions of international crimes should be solved in the benefit of the victims and Humanity as a whole. Thus, the narrow definition of the crime given by the ILHR shall match the wider concept set by ICL.

Reasons are given to accept political organisations as eventual perpetrators of international crimes to consolidate the international legal system of human rights protection. But to come to this aim, a major change in the human rights approach should take place, recognizing other subjects different than the State and its proxies as eventual perpetrators of human rights gross violations. The paper ends with a prospective that wonders whether this accommodation is likely to happen.

Keywords: enforced disappearance, international human rights, international criminal law, victims, perpetrators.

1. Introduction

The crime of enforced disappearance of persons is part of the crimes against humanity. Its unique character is based on multiple violation of rights and victims. Regardless whether the perpetrator is the State or any other political organization that fights against it, all victims suffer equally. However, there are two types of definitions of the crime. While international human rights law only considers the State as a possible perpetrator, international criminal law includes any political organization. While the first approach leaves the victims of enforced disappearance

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unprotected when the perpetrator is a political organization different than the State, we believe that the solution is to unify definitions, accepting political organizations that fight the State or fight between them, as also their leaders and members, as possible perpetrators of the crime, expanding access to justice for all victims equally.

2. Materials and methods

The material used to carry on the study is composed of both international legislation related to the specific crime of enforced disappearance of persons and the case law of international and regional bodies of human and criminal law such as the UN Human Rights Committee (actual Council), the Interamerican Court of Human Rights and the European Court of Human Rights. We also use the doctrine as a source of law through the writings of international jurists. The research methodology is based on general and specific scientific methods of cognition (the dialectical method, methods of analysis and synthesis, deduction and induction and comparative and historical legal methods).

3. Discussion

3.1. Different approaches to international crimes

International Law of Human Rights (hereinafter – ILHR) and International Criminal Law (hereinafter – ICL) play different roles in protecting the human being and combating impunity. It was argued that the complex phenomenon of the enforced disappearance was 'conceived precisely to evade the legal framework of human rights protection' (Tayler, 2001: 22). Thus, to face this phenomenon it is wise to make use of different approaches that belong to each of the intertwined subsystems. We start assessing the offence from each perspective.

3.a. The International Law of Human Rights subsystem

Historically, the ILHR considered relations between unequal entities forbidding violations of rights perpetrated by the State against its subjects. The modern concept of human rights is '*rooted in the experiences of legal lawlessness when crimes are committed with the authorization of the law and when some human beings were denied their status as such*' (Piechowiak, 2002: 3). Precisely, the emergence of the ILHR was an answer to these situations. It is easy to infer that according to this approach the involvement of the State is a natural element of any violation of rights. A human rights approach prevailed in the consideration of the crime of enforced disappearance along the last decades of the XX century. This perspective is 'victim – centred' in the sense that its main concern spans around the protection of the individual who suffers persecution from the government and is eventually disappeared. The ILHR proceedings also protect the *relatives* of the immediate victim from further sufferings and ill treatment. This 'victim centred' methodology still prevails in the legal consideration of human rights violations. An example is given by the creation of the UN Working Group on Enforced Disappearances (hereinafter – UN WGED), the first and most important thematic body on the subject. It '*(…) only deals with disappearances for which governments can be held accountable and it does not accept cases arising from armed conflict*' (Economic and Social Council, 2005: 13).

At present, this narrow approach that only considers the State as a possible author notably stands against the evolving and widened character of authorship set by the Rome Statute and ICL.

3.1.b. The International Criminal Law subsystem

ICL is the newest subsystem, aiming at integrating the preceding perspectives of human rights and humanitarian law. It affirms the existence of a set of basic human rights whose violation triggers the prosecution and eventual punishment of individual perpetrators. To achieve this end, ICL sets the elements of the crimes that must be present at the time of the commission. In the opinion of Meron (Meron 1998: 266):

'*Without doubt, however, the offences included in the ICC statute under crimes against humanity and common Article 3 (of the Geneva Conventions) are virtually indistinguishable from major human rights violations. They overlap with violations of some fundamental human rights, which thus become criminalized under an instrument of international humanitarian law.*'

Nowadays through the ICL subsystem, the individual becomes a centre of international obligations. The RS does *formally* criminalize violations of the ILHR in order to give access to the jurisdiction of the Court. Robinson remarks that '*all delegations* [at the Rome Conference] *agreed that the court's jurisdiction relates to serious violations of international criminal law, not*

international human rights law.' (Robinson, 1999). ILHR provides for certain '*international goods*' to be protected while ICL criminalises acts that violate them in a widespread and systematic way. In the ILHR view, the individual is treated as a victim needing protection *from the State,* while under the ICL perspective, the individual is a possible perpetrator of international crimes deserving punishment.

Anyhow, ICL has *distinctive* features. Considering the list of acts regarded as crimes against humanity by the RS, the distinction between such crimes from any other serious violation, it is their notoriousness and systematic nature. So, there are some grave, wrongful acts which are internationally punished under the label of crimes against humanity, which incidentally *happened* to be the most important human rights breaches as considered by international customary law.

We set the question: could definitions of these crimes differ depending on the approach we take?

3.2. An inconsistency in the definition: a clash between approaches

Of all the crimes against humanity, enforced disappearances typify gross violations of ILHR as expressed in the RS. As Meron (Meron, 1998: 265) notes, *'whereas at Nuremberg only persecution committed on political, racial, or religious grounds in execution of or in connection with any crime within the Tribunal's jurisdiction constituted a crime against humanity, at Rome the grounds were expanded to read: "political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court". '*

3.2.a. Main characteristics

The crime of enforced disappearance constitutes a global phenomenon. More than 50,000 individual cases have been transmitted by the UNWGED to governments in more than 90 countries since its creation. It can be considered as a global menace to political opponents not restricted to any particular area of the world. These facts turn it into an international crime that according to the ILHR approach is mainly characterised by three elements: *deprivation*, *involvement* and *refusal*. Thus, there must be:

(a) an unlawful deprivation of liberty;

(b) a direct involvement of governmental authorities or their indirect participation by acquiescence, and a refusal to acknowledge the detention and/or disclose the fate and whereabouts of the disappeared person.

The paper disputes the second requirement as it was initially set by the ILHR. Both ILHR and ICL under certain circumstances agreed on calling it a crime against humanity, since it aims to eradicate an ideology from the surface of the earth by physically eliminating political opponents. The case law of the Inter American system of human rights refers to it as a complex crime, while it encompasses multiple violations of internationally recognized human rights. The 1992 UN Declaration on Enforced or Involuntary Disappearance (hereinafter - UNDED) states that any act of enforced disappearance, *'constitutes a violation of the rules of international law guaranteeing (...) the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life'.*

In the case law of the Inter American Court of Human Rights (hereinafter – IACHR), it *"constitutes a multiple and continuing violation of a number of rights protected by the (American) Convention"* as it was stated in Blake v. Guatemala. Its complexity is also evident as regards different levels of *victims* who may suffer from an act of enforced disappearance.

Last but not least, it is a continuous offence. The refusal of perpetrators to acknowledge the deprivation of freedom or to give information on the fate or whereabouts of the victims is a basic element of the crime. While the refusal persists, the commission of the crime only ends when the disappeared person appears alive, its fate is known or its remains are found. The continuing character was analysed in the Blake v. Guatemala case before the IACHR, when the Court stated that 'relatives of Mr. Blake (...) had been uncertain about his fate for seven years due to the *continuity* of the crime'.

3.2.b. Comparing definitions

The RS represents the first binding codification of international crimes. It includes the acts of enforced disappearance as a crime against humanity. Crimes against humanity comprise part of customary international law (Mugwanya, 2007). Their customary character means that they

impose an obligation on the international community to prosecute, punish or extradite offenders with the same force of a treaty, surpassing a State's conventional or treaty-based obligations. Bassiouni expresses '*as a jus cogens international crime, crimes against humanity are presumed to carry the obligation to prosecute or extradite, and to allow States to rely on universality for prosecution, punishment, and extradition*' (Bassiouni, 2001). Before the adoption of the RS, the closest approximation to a codification of crimes against humanity, existed in the numerous separate conventions and treaties proscribing individual crimes. We noticed that every criminal behaviour that appear in the RS giving jurisdiction to the ICC has its matching international human rights or humanitarian document underpinning its placing there. Comparing the definitions of crimes that appear in international specific documents and the RS, there are almost no differences among them. But when the time comes to incorporate the acts of enforced disappearance of persons, the definition of ICL does not match the preceding definitions of the same crime as conceived in ILHR documents.

In 1992 the UN General Assembly approved the UN Declaration on Enforced Disappearance (hereinafter – UNDED, 1992), stating the first important definition, depicting the acts as when '*persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, which places such persons outside the protection of the law'*.

When committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, the crime of enforced disappearance constitutes a crime against humanity as we read in article 7(i) of the Rome Statute. Concerning authorship, the UNDED required the *active involvement* of the State through its agents and authorities or its passive involvement through its acquiescence.

The Organisation of American States General Assembly (OAS GA) was the first regional body in passing a binding document on the subject. The 'Inter American Convention on Forced Disappearance of Persons' (hereinafter – IACFD, 1994) considers the crime: '*to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees'*.

A new, the direct or indirect *involvement* of the State as the author is mandatory.

Finally, the series of '*human rights law*' definitions end with the latest piece of discussion: the UN 'International Convention for the Protection of All Persons from Enforced Disappearance' (UNCED, 2006). Enforced disappearance is considered *'to be the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law'*.

As we read, the presence of the State is a basic element of the crime.

On the contrary and assessing the ICL view, none of the Statutes of the International Criminal Tribunal for the former Yugoslavia (hereinafter – ICTY) or International Criminal Tribunal for Rwanda (hereinafter – ICTR) specifically provided for a definition of the crime. Notwithstanding this, the pertinent case law submitted the acts within the residual category of *'other inhuman acts'* as provided in the Statutes of both Tribunals (Cassese, 2004: 259). None of these documents makes direct reference to the authorship. The only document that recognizes a wide authorship is the RS of the International Criminal Court (RS, 1998). At the Rome Conference in 1998, '*delegations agreed that enforced disappearance, also previously identified as a crime against humanity in international instruments, was an inhumane act similar to the other acts in character and gravity, which warranted specific acknowledgment. The inclusion of enforced disappearance (...) explicitly acknowledges two types of inhumane act that are of particular concern to the international community*.' (Robinson, 1999: 43).

The RS defines crimes against humanity as certain 'acts when committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack' including among other acts, the '... (i) enforced disappearance of persons' (article 7). The definition is further developed by the Elements of Crime. It is noteworthy that article 7 was developed through multilateral negotiations involving 160 states instead of being imposed as preceding definitions. This fact is relevant when talking about the relationship about this crime and ius cogens. With respect to authorship, the RS reads 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 organisation, 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*' (article 7.2(i)). Recognizing a possible authorship on behalf of the chain of command of political organisations other than the State, the door is open to protect any victim and not only civilians affected by criminal acts in which the State has been involved.

3.2.c. The inconsistency about authorship

From the first definition of the crime adopted by the UN Working Group on Enforced or Involuntary Disappearances to present, there has been a slow but continuous assertion of the offence as an international crime and particularly as a crime against humanity. As compared to the 1998 RS, the provisions of the 2006 UNCED merges elements of the two different subsystems (ILHR and ICL) but clashes when dealing with authorship. An inconsistency is evident when the ILHR emphasizes a narrow approach to authorship that contrasts with the wide ICL approach. The inconsistency spins around accepting or denying the status of political organisations other than the States as perpetrators of the crime. States are reluctant to give international recognition to political organisations different than States. As we see, the definition given by the RS includes crimes committed by non-State actors in the context of a political organisation, even though there is no clear definition of what *it* may mean. A political organisation may encompass from a political party through a movement of national liberation to a terrorist group so wide it can be. The inconsistency is also reflected in the legal treatment and the case law, as we will see now.

3.3. Enlarging authorship

Both ILHR and ICL provide for a definition of the crime. From the ILHR subsystem we consider definitions provided by the 1992 UNDED, the 1994 Inter American Convention and the 2006 International Convention while ICL brings the RS definition. Judicial interpretation plays a significant role in the evolution of the crime. The lack of specific legal documents make the judges rely on other international conventional law, when identifying possible victims and rights violated.

3.3.a. A crime with a plurality of victims

There is consensus on stating that apart from the disappeared person itself, other people may qualify as a victim. There is no specific binding document which provides for a definition of 'victim' of an enforced disappearance. First, this lack of legal basis makes any violation of rights depend on other binding documents that mostly belong to the ILHR approach, namely the International Bill of Rights. Second, if the enforced disappearances are committed within an armed conflict, then International Humanitarian Law (hereinafter – IHL) will apply. Third, in case the crimes are committed as part of a widespread or systematic attack against a civilian population with knowledge of the attack, ICL will apply. We see that the three international legal approaches are intertwined.

The IACFD does not bring a specific definition of victim. Eventually, there is the 1992 UNDED and the 2006 UNICED. Both documents refer to the qualification of 'victim'. The 1992 UNDED reads: '*The victims of acts of enforced disappearance and their family shall obtain redress...*' (art. 19). This is the original narrow approach that considered the disappeared person as the only victim. Presently, the 2006 UNCED defines a victim as the '*disappeared person and any individual who has suffered harm as a direct result of an enforced disappearance*' (art. 24(1)).

This is the current broad 'victim-approach' which contrasts with a narrow 'author-approach' that prevails in the same document. Thus, the immediate victim is the disappeared person but there are other individuals who suffer harm as a direct result of the crime. First, any relative who alleges and proves to have suffered harm would be entitled with the rights of a victim. Second, a special situation is created when children are born during the captivity of their mothers or have been kidnapped with their parents. The new born is often given in adoption and maybe removed to

another country. Third and closely intertwined with the latter, there are the grandparents who shall be entitled to look for and bring back their grandchildren into their real family life.

3.3.b. A crime with a plurality of rights' violations

Human rights bodies are important at the time of identifying the rights that may be violated by an act of enforced disappearance. Both UN Human Rights Committee and adjudicatory bodies such as the European Court of Human Rights and the Inter American Court of Human Rights have interpreted the violations committed. For the purposes of our paper, we will group the rights violated in three categories according to the 'specific good' they intend to protect.

3.3.b.1. Rights related to the physical liberty and integrity

Including the right to personal liberty and security and eventually the right to life; the right to legal personality; the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment; the right to humane treatment; and the protection of family life. There is a tendency to broaden the scope of protection admitting other rights such as the right not to be disappeared and the right to know the truth.

At the UN level, in Bleier, the first communication received by the UN Human Rights Committee related to a disappearance case, as well as in Quinteros Almeyda, there were found breaches of the International Covenant on Civil and Political Rights (ICCPR) related to 'torture or cruel, inhuman or degrading treatment or punishment' (article 7), and the 'right of liberty and security of person' (article 9), and even '*serious reasons to believe that the ultimate violation of article 6 has been perpetrated by the Uruguayan authorities*' (Economic and Social Council, 2002: 12). In Quinteros Almeyda, the Committee referred to the right to know the truth. Other pronouncements repeated the scope of violations as it happened in Sanjuan Arevalo and Mojica.

In America, Velasquez Rodríguez became the leading case of disappearances, containing a far-reaching pronouncement on the principle of State responsibility for enforced disappearance in the absence of full direct evidence. The IACHR found breaches of the 'right to life', the 'right to humane treatment' and the 'right to personal liberty' (articles 4, 5 and 7 of the American Convention on Human Rights, ACHR). The failure of Honduras to investigate the disappearance was a breach of the generic 'obligation of States to respect rights' (article 1 (1) of the ACHR). In Bamaca Velasquez the Court dealt for the first time with the right to enjoy a legal personality under article 3 of the ACHR in a disappearance case. It was decided that since the IACFD '*does not refer expressly to this right among the elements that typify the complex crime of forced disappearance of persons*', the right had not been violated. With respect to the right to know the truth, the IACHR emphasized that '*The right to truth (…) implies to know the reality of certain facts. From them on, a juridical, political or moral consequence of a different nature will be built. On one side the right is assigned to the society in general, on the other side, the right is entitled to the direct or indirect victim of the human right violation.*' A consistent and evolving case law made the Inter American Court the most active judicial body in dealing with the subject as Durand and Ugarte, Trujillo Oroza and Caracazo cases revealed.

In the European system, Kurt constituted the leading case. The European Court of Human Rights (ECtHR) found a violation of the 'right to liberty and security' (article 5 of the European Convention on Human Rights, hereinafter – ECHR) in respect of Mr. Kurt, but held that it was not necessary to decide on the alleged violation of the 'right to life' and the 'prohibition of torture' (articles 2 and 3). Anyhow, it found a breach of the 'right to an effective remedy' (articles 3 and 13) in respect of his mother, considering that she had been left with the anguish of knowing the fate of her son over a prolonged period of time. The Kaya case was submitted in 1993 by Dr. Kaya's brother to the European Commission of Human Rights, which referred it in 1999 to the ECtHR. Although the Court concluded that there was insufficient evidence to support a finding beyond reasonable doubt that State officials had carried out the disappearance and killing of Dr. Kaya, it held that Turkish authorities had '*failed to take reasonable measures available to them to prevent a real risk to the life of Hasan Kaya*'. This failure was considered as a violation of the right to life (ECHR), and the ECtHR also found a violation of the prohibition of torture on the basis that Turkey had not taken adequate measures to protect Dr. Kaya against inhuman and degrading treatment. Other judgements referred to the crime in similar terms. In Tas the Court found violations of article 2 ECHR on the grounds that '*Mushin Tas must be presumed dead following his detention by the security forces*', engaging State responsibility and that 'the investigation carried out into the disappearance of the applicant's son was neither prompt, adequate or effective

and therefore discloses a breach of the State's procedural obligation to protect the right to life'. The ECtHR found a violation of article 3 in respect of the father. In Hamsa Cicek who submitted an application in respect of her two sons and her grandson, the Court found similar breaches.

3.3.b.2. Rights linked to the guarantees of the due process of law.

Here we include the right to an effective domestic remedy and the right to a fair trial and judicial protection which encompasses the right to be treated with humanity and respect for human dignity. In the case of detainees, the case law has established violations involving the right to personal integrity especially when the person is imprisoned.

In Mojica, the UN Human Rights Committee referred for the first time that according to the ICCPR each contracting party undertakes to ensure 'an effective remedy' (article 2 (3), ICCPR). This matter was further developed in Bautista and in Laureano. In Bautista, the Committee found violations of articles 6, 7 and 9 of the ICCPR, adding that in the event of serious human rights violations '*purely disciplinary and administrative remedies cannot be deemed to constitute adequate and effective remedies*'. In Laureano, the Committee found that Ana Laureano's right to life had not been effectively protected by Peru and concluded on violations of articles 7 and 9 of the ICCPR. Both in Bleier and in Quinteros Almeyda, the UN Human Rights Committee found a breach of article 10 (1) of the ICCPR which states that '*all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person*'.

In Blake, the IACHR ruled that the right to a fair trial 'recognizes the right of Mr. Nicholas Blake's relatives to have his disappearance and death effectively investigated by the Guatemalan authorities; to have those responsible prosecuted for committing said unlawful acts; to have the relevant punishment, where appropriate, meted out; and to be compensated for the damages and injuries they sustained' (article 8, ACHR). In Street Children, the IACHR found breaches of the right to judicial protection (articles 8 and 25, ACHR) to the detriment of the victims and of their close relatives. It established that article 25 'assigns duties of protection to the States parties through their domestic legislation, from which it is clear that the State has the obligation to design and embody in legislation an effective recourse and also to ensure the due application of the said recourse by its judicial authorities'. Similar situations were identically solved as it happened in Bamaca Velazquez, Durand and Ugarte and Trujillo Oroza.

3.3.b.3. Rights related to the special situation of children

Rights related to the special situation of children include *the right to special measures of protection*; the *right to know their real identity* and the *rig*ht to education. Grandparents are entitled with the right to know the fate of their grandchildren. In Laureano case, the UN Human Rights Committee concluded that Ms. Laureano had not benefited from the special measures of protection she was entitled to on account of her status, confirming the violation of the right of every child to special measures of protection, including the recognition of the child's legal personality (article 24 (1), ICCPR). In this case, the communication had been submitted by her grandfather.

3.3.c. Multiple victims and violations, but are members of the State the only possible perpetrators?

First, it is possible to identify four groups of victims:

(a) the immediate victim or disappeared person;

(b) the close relatives;

(c) children abducted or born in captivity and

(d) grandparents.

Second, concerning *fundamental* rights, there is agreement on the existence of breaches of the right to life, liberty and security, the prohibition of torture and other cruel, inhuman and degrading treatment or punishment. However, there is no agreement on fully recognizing the violation of the prohibition of torture with respect to relatives.

Third, concerning *procedural guarantees*, there is agreement on the existence of an obligation of States to implement within their domestic legal systems effective measures to turn operative those rights recognized in international documents.

Fourth, concerning *the rights of the child*, the numbers of documents that refer the situation of children imply important differences amongst States as regards ratification and implementation. Here we find from the UN Convention on the Rights of the Child adopted by Resolution 44/25 of the G.A. 1989 to the Convention on the Civil Aspects of International Child Abduction, adopted in The Hague on 25 October 1980.This turns difficult to provide a coherent set of rules. As a

consequence, the legal status of their grandparents is also disputed.

Assessing the case law we have made reference to, it is evident that the complexity that ILHR recognises with respect to victims and eventual violations of rights is not reflected as regards authors. The only exception to the principle of multiplicity that governs this crime is given by the consideration of its authorship. All the case law we made reference to imply cases in which the State appears as the direct perpetrator. In very few cases there is the presence of paramilitary forces acting with the acquiescence of the government. There is no case in which the perpetrator has been a political organisation that opposed the State. It could not be other way since the administrative and judicial bodies apply an ILHR legal framework. Consequently, the ILHR approach leaves internationally unprotected those civilian victims of acts committed by authors in the context of political organisations not affiliated to the State while the RS criminalizes their acts.

According to the ILHR approach *there is not access to international justice* for any victim whenever the crime is committed by political organisations which fight the State or against each other. Consequently, there will *not be international investigations or truth commissions neither report on the situation*. Humanity will remain ignorant of the criminal facts which would remain within the domestic jurisdiction of the concerned State. The whole international system of *prevention, protection and punishment* is flaw. Of course as we could see in the case law cited, victims could resort to States' responsibility for failing their general obligation to protect people who inhabit their territory. But a broader recognition of authorship accepting political organisations as eventual perpetrators of international human rights violations constitutes a step forward in the protection of the human being. To denounce a State for failing to comply with its general obligation of protecting rights will never mean to prosecute leaders and members of political organisations who are responsible for perpetrating criminal acts.

In brief, the consequences of persisting on a narrow concept that comes out from a consideration of a single authorship may be detrimental to the international system of justice as a whole.

3.4. Is the inconsistency important?

Up to now we have identified an inconsistency about the authorship of the crime of enforced disappearance of persons by contrasting ILHR and ICL approaches to international crimes. It spins around the recognition of political organisations as possible perpetrators of this international crime. We believe that the inconsistency goes far beyond the mere crime of enforced disappearance to tackle a bigger matter related to the acceptance of political organisations which fight the State as eventual perpetrators of gross human rights violations.

3.4.a. Why is it necessary that political organisations be recognised as perpetrators?

The State has been the traditional perpetrator of the acts of enforced disappearance. The origins of the crime go back to the Nazi regime when it tried to get rid of hostile political opponents. Thus, from the very beginning some kind of State involvement was considered as paramount when attempting to typify the offence. The ILHR framework and its case law set the initial characterisation when international NGOs assuming the defence of fundamental rights opposed the State criminal activity based on the international bill of human rights. In time, this requirement entered undisputed as a main constitutive element and persists still today. This is the ILHR perspective: '*… enforced disappearances render their perpetrators and the State or State authorities which organize, acquiesce in or tolerate such disappearances liable under civil law (…)*' (UNDED, article 5); '*… forced disappearance is considered to be the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the state or by persons or groups of persons acting with the authorization, support, or acquiescence of the state (…)*' (IACFD, article 2); '*… enforced disappearance is considered to be the arrest, detention, abduction or any other form of deprivation of liberty committed by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State (…)*' (ICED, article 2).

The criminal phenomenon started in Latin America, and it was revealed through a governmental policy planned and executed with the clear intention of 'cleansing' any political opposition: '*The phenomenon reappeared as a systematic policy of State repression during the late 1960s and early 1970s in Latin America, starting in Guatemala and Brazil*' (Economic and Social Council, 2002: 2).

Political activism against the official authorities plays a central role in deciding the perpetration of the crime in a systematic and widespread basis. Cases submitted to the UN WGED during the 80s involving Latin American authoritarian political regimes are a proof that one basic aim of the crime points to silence the political opposition. According to the UN Commission on Human Rights they all have a political factor as a *nexus causae* between the crime and the targeted victims (Economic and Social Council, 2004).

In every case, the policy planned and executed by the Latin America military juntas was the answer to revolutionary movements which tried to gain power (Calvocoressi, 2001: 786). The relationship was established between political activism and massive and gross violations. So, the mediate aim of the crime of enforced disappearance is directed to conquer or retain power.

Under circumstances of fighting for power using political violence as a means any party to the conflict may resort to the wrongful acts which characterised the crime. The commission presupposes (a) the existence of at least two antagonistic political organisations; (b) the impossibility of coexistence among them; (c) the determination to commit the crimes enforced through a policy of political cleansing. The latter is obviously concealed and could be mostly revealed through the widespread or systematic commission of the acts.

The existence of a policy is essential since no 'political cleansing' could be executed through isolated efforts of individuals who eventually happen to perpetrate the crime at their own risk. And even if it happened the acts will not be considered a crime against humanity. The RS demands the crime to be committed as part of a *widespread or systematic* attack against any civilian population to be considered a crime against humanity (article 7, paragraph 1). Thus, the recognition of a '*premeditated policy aimed at the commission of disappearances*' helps when trying to prove a systematic or widespread perpetration.

'Once the existence of a widespread or systematic practice directed to eliminate the political opposition by disappearing people and later covering and destroying the evidence has been established, it is possible by means of using circumstantial or indirect proof or both, or by pertinent logical inferences to demonstrate the disappearance of a person which other way would be impossible, by the nexus that the disappearance has with the systematic practice referred.'

In only a few cases, the judges make reference to the existence of a 'planned policy' pointed to the perpetration of the disappearances or to impede victims their access to justice afterwards. This absence of reference greatly limits the subsequent State responsibility.

As an exception, the IACHR considered that circumstantial and presumptive evidence was especially important in this crime, due to the attempt to suppress all information about the victim that characterises it. Other judgements of the IACHR lead the way to accept indirect evidence to declare the existence of a policy, such as it was stated in Velasquez Rodriguez, Godinez Cruz, Bámaca Velasquez and Massacre of Ituango.

The European system looks reluctant to recognize the existence of a policy. In Kaya the applicant maintained that Turkish authorities '*had adopted a policy of denial of breaches of the (European) Convention of Human Rights, thereby frustrating the rights of victims to effective remedies. As a consequence of this policy, allegations of unlawful killings are either not investigated at all or are processed in a biased and inadequate manner.*'

Anyhow, the ECourtHR did not find the existence of an administrative practice of the kind. In Kurt, the applicant argued that in south-east Turkey there was an officially *'policy of denial of incidents of extra-judicial killing, torture of detainees and disappearances and of a systematic refusal or failure of the prosecuting authorities to conduct investigations into victim's grievances.*' Even though the Court did not confirm the existence of a policy, Judge Pettiti in his dissenting opinion, affirmed: '*The Kurt case concerns a presumed disappearance. Under the ordinary criminal law, disappearances may involve cases of running away, false imprisonment or abduction. Under public international law, a policy of systematic political disappearances may exist, as occurred in Brazil, Chile, Argentina, etc.'.*

Few more cases run the same fate as it happened in Ergi.

In brief, a previous and deliberate plan becomes a natural element of the perpetration when the crime is considered as a massive violation of rights. The enforcement of the plan exposes the existence of an organisational criminal policy which demands to be executed in a systematic or widespread way against political enemies. This circumstance is contemplated by ICL when it takes care of massive and gross violations but under the same conditions it is basically neglected by the ILHR approach.

If we acknowledge the existence of a political driving force which underpins the perpetration, then it will be easier to accept that any of the parties to the dispute for power may commit the crime and therefore should be held responsible. Notwithstanding this fact, as we have seen neither the international legal framework nor the case law reflects the importance of the political factor in order to lead the way to the accountability of political organisations who planned and carried out policies of '*political cleansing'*.

3.4.b. Political organisations not affiliated to the State may have a policy to commit enforced disappearances

In this particular crime, victims have historically been targeted due to their shared character of political opponents of the perpetrator group which *happened* to be the State. Nowadays, the State is no more the only perpetrator in the exercise of a '*public criminal service*'. There are clandestine groups, groups of extermination and militias that fight against the State and also against each other without the involvement of the State. Any of them could commit acts of enforced disappearance. Civilian populations are at their mercy. There is no reason to forbid the civilian population to enter international justice when they become victims of criminal acts committed by people in the context of political organisations who opposed the State. And if the prohibition comes from the ILHR the solution is *less* understandable.

Considering authorship, the big difference between the State and any other political organisation lies in the legal use of force that the former is entitled to and the latter lacks. When ILHR refers to 'perpetrators' of an enforced disappearance, the legal framework is modelled thinking of an individual who takes advantage of the State machinery in order to commit the crime or a private perpetrator who acts knowing he will not be punished because he counts on the authorisation or acquiescence of the State. But when we turn to the same acts committed by any other civilian who politically opposed the government of the State, we lack the component of the legal use of the State machinery for illegal purposes.

Clandestine groups, groups of extermination and the like may monopolise force *de facto* but nevertheless their acts will always be illegal. Under this circumstance, should perpetrators be held internationally and individually responsible for their criminal acts or not? The ILHR answers on the negative since the State machine is not used and the State is not involved neither directly nor indirectly. ICL responds differently: perpetrators shall be punished. Both approaches *should* match.

3.4.c. Why is it that definitions should match?

There are four arguments for asking definitions to match. First, if we understand the RS as a codification of the most representative international crimes that come to be considered as such because they previously existed as part of international customary law, then our assumption could only be that definitions shall match.

Second, the focus of attention of each approach is the protection of the *human being* and *humanity*. In order to come to that end, they all establish rights which belong to both present subjects -former objects- of international law. Subsequently they also set up mechanisms to enforce that protection together along with international bodies which institute their own procedures to solve controversies by negotiation or adjudication. This main mission of protecting the human being and humanity allows them to propose different ways to come to the end, but *forbids* them to enter into any significant contradiction.

Third, if we conceived the international system of justice as a whole, we must recognize that human rights, humanitarian law and criminal law are only different perspectives which apart from serving special aims they all have an overarching purpose as part of that international system.

Fourth, while international tribunals start growing up both in number and quality of their decisions, contradictions between judgements start appearing. But on the other side, there is a consistent trend on behalf of international adjudicatory bodies to read, know, interpret and make use of the case law of similar bodies in analogue cases. The crossed references of the Inter American Court of Human Rights, the Inter American Commission of Human Rights and the European Court of Human Rights are a good example. This tendency is also evolving vertically: domestic tribunals make current use of decisions of international tribunals. The evolution should probably go on horizontally when international human rights tribunals and international criminal tribunals make use of precedents set up by their peers.

Thus, if we are prone to solve the inconsistency, then we should ask the ILHR approach to accept political organisations as eventual authors. But we face a problem. This apparently minor

requirement strikes directly one of the pillars of international law: the sovereignty of States principle. It is here where our paper turns from presenting an inconsistency of definitions to consider some ways to solve it and eventually the necessity of updating basic concepts of the ILHR.

3.4.d. Consequences of solving the inconsistency

Enlarging the notion of authorship would be useful to attain some basic developments that otherwise will not be produced.

First, a wider notion will enlarge international protection and widen the access to international justice. The international system of protection of the human being basically takes into consideration any victim of a breach of an ILHR document. However we have seen that to uphold a narrow approach to authorship leaves aside civilian victims of criminal acts performed by people in the context of political organisations who have no affiliation to the State machine. An inclusive notion of authorship will serve to enlarge the international scope of protection entitling those civilian victims with access to international administrative and adjudicatory mechanisms of protection which otherwise would be closed. This way the scope of victims is enlarged while the whole system gains certainty.

Second, an inclusive definition will serve to improve the trust in the international system as a whole. An effective international system shall recognize three basic steps which are *prevention*, *protection* and *punishment*. ILHR has traditionally taken care of the first and second step while IHL basically deals with protection and ICL is mainly related to the punishment of individual perpetrators. Anytime the preventive and protective mechanisms fail, justice is done through punishment. Anyhow, ICL only constitutes a kind of symbolic punishment since only very few of the gravest breaches of rights will be prosecuted before an international criminal tribunal. The incorporation into the ILHR of political organisations different than the State will improve the standards of protection since their illegal activity could be internationally outlawed. This will stand as a symbol of effectiveness and enforcement of international law and the international legal system of protection of human rights.

Third, an enlarged notion is useful to increase guarantees for civilian people. Every right which is part of the ILHR framework needs to be exercised in order to give trust to the whole system. International mechanisms constitute real guarantees when establishing proceedings by which a person may obtain redress from a breach of a right internationally recognised that could not be protected domestically. The redress may consist of civil reparation or of an order given to the political organisation to do or to abstain from doing something, leaving for ICL the eventual condemnation of the individual criminals.

Fourth, the acceptance of a wider definition will help to face global menaces like any violent political organisation –even terrorist ones- within the rule of international law. This is surely an arguable concept. Since many political organisations that fight against the State use violent methods and do not distinguish between civilian and military targets, they are to be called 'terrorist or criminal organisations' by the government against which they fight. At the international level there is still no agreement on the qualification of terrorism. As a global menace, terrorism shall be faced within the rule of international law. This may mean to make use of every approach to include it within the international proceedings, opening a subsidiary and complementary regional or international jurisdiction, what is initially forbidden for simple domestic crimes. At present the qualification of what a terrorist act is remains within each domestic legal system. Enlarging authorship will serve to bring members of these organisations which perpetrate acts of enforced disappearance to international civil and eventually criminal justice, making them accountable for their crimes and including them as actors of the international legal system.

Fifth and finally, the enlargement will facilitate the fight against international impunity. A narrow approach to authorship will leave the punishment of the individual perpetrators and the political organisation to which they belong at the discretion of the concerned State. This way, the State (a) may determine to prosecute and punish the authors within the rule of the law or *not*, depending on the kind of government that is running at the time; (b) may decide to pass amnesty laws or to concede a general pardon to pacify the situation or (c) may decide not to act institutionally, leaving each victim to start a proceeding or not depending on personal circumstances. In none of these situations, victims have an international way out since ILHR bodies will not admit any presentation in which the State is not party.

4. Results

4.a. Compounding ambiguities in the benefit of justice

The study of the international crime of enforced disappearance of persons gave us an opportunity to link the major subsystems that converge on the subject: ILHR and ICL. While their basic aim is the same, they all must respect a coherency as regards their definitions of crimes. And they do, except as far as the crime of enforced disappearance of persons is concerned. And there is a simple explanation for this. ILHR could not accept up to the present any other subject different than the State as an eventual perpetrator of international breaches. The contrary would mean to recognize that the State has given up its domestic sovereignty, together with a possible intromission of international bodies in domestic policy and maybe paving the way for the overthrown of the government. As we see reasons for denying the acceptance are extremely powerful. It is probable that ILHR keeps on its narrow approach to the crime of enforced disappearance of persons. But this situation is detrimental to the international system of human rights (namely the ILHR perspective) which tries to prevent and protect, as well as to the international criminal system (namely the ICL approach) which tries to prosecute and punish.

Holding a narrow approach, *some victims* will not be considered as such, *some political leaders* acting in the context of political organisations will not be prosecuted before international criminal tribunals while *some political organisations* will not be held responsible before international human rights tribunals.

4.b. Changes to be done

ILHR should recognize political organisations not affiliated to the state as eventual perpetrators of the crime. Apart from this, the international scheme would need some practical changes in order to be prepared. First, political organisations should be strictly defined in order to avoid ambiguities when trying to denounce the activity of any of them before an international jurisdiction. Second, regional systems should accept the allegation of political organisations as perpetrators of human rights breaches. Third, these organisations should be granted the guarantees of the due process of law in order to establish a channel of dialogue between them and the international community. Fourth, the proceedings should also try to find out the name of individuals who have taken part in the wrongful acts that are under investigation which could be useful for a subsequent criminal investigation. Fifth and finally the judgments of international human rights tribunals condemning the political organisation –and not the individual themselves – should mention the kind of reparation it ought to afford. The condemnation could be from a simple recognition of the wrongful doings to monetary reparation through an order to do or to abstain from doing something. In due time the relevant findings of the ILHR proceedings may serve to ICC or any other ICL tribunals when trying to convict individual perpetrators. The whole system of protection would gain in strength and trust matching the basics of ILHR and ICL approaches.

For the ILHR approach it is difficult to recognize any other perpetrator of human rights violations different than the State. The next step forward to the consolidation of a sustainable system of international justice will consist of the mixing of principles between the global approach of human rights and the territorial perspective of criminal law. The former will lose its narrow consideration of the State as the only possible perpetrator of human rights. The latter will have to consolidate a unique procedure which takes into account the different criminal proceedings that composed the ICL system.

4.c. Prospective

Since its inception the crime of enforced disappearance was inextricably linked to its political grounds that differentiated it from common offences of international or domestic law. The acts of enforced disappearance of persons violate a plexus of rights and freedoms and generate a plurality of victims precisely because they were originally thought to escape any formal criminal classification. In this crime the dispute for political power becomes paramount. Its commission is merely one of various means used in order to come to or retain power. The crime itself is generally linked to a historical situation that takes place in a particular region where territorial power is being disputed among two or more political factions, being the State one of them *or not*.

Compounding some ambiguities among the perspectives that have incidence upon the subject will help to start a coherent approach to the crime. If egregiousness and the systematisation of the acts are differentiating characteristics to make it become a crime against humanity, then the recognition of its political grounds turns to be fundamental to prove the existence of an

organisational criminal policy. In due time this fact will lead to accept a multiple concept of authorship that encompasses political organisations which fight the State and even against each other, making those organisations accountable before human rights tribunals and their individual members accountable before the ICC or any other international criminal tribunal.

5. Conclusion

We firmly believe that an imperative of justice demands to apply equal terms to equal situations. Individual perpetrators should be punished in case they are found guilty but the political organisations to which they belong should also be condemned by international human rights tribunals. This fact would help not only in the international fight against impunity but also to integrate them into the system of international justice in an effort to bring violent organisations within the rule of law when the domestic dialogue with local authorities is broken. In this way ILHR tribunals could also perform the mission of a broker.

In brief, we conclude that anytime the international crime of enforced disappearance of persons is committed as part of a widespread or systematic attack against a civilian population and with knowledge of the attack, there is a plan to end political opposition which openly expresses a policy of political cleansing. Therefore, with due respect to principles of subsidiarity and complementarity, members of any political organisation who perpetrate the criminal acts should be individually held accountable before an international criminal tribunal. But this solution is incomplete if the political organisations to which they belong do not go through a civil procedure and eventual condemnation before an international human rights tribunal.

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