

THE DUTY TO PROSECUTE UNDER THE INTERNATIONAL CONVENTION ON ENFORCED DISAPPEARANCES

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1. Introduction

Enforced disappearances constitute one of the most atrocious crimes experienced by humankind. They were first committed by the Nazis -the 1941 *Nacht und Nebel* Decree ordered the kidnapping and disappearance of many political activists throughout Nazi Germany's occupied territories- and continued to be committed during the second half of the twentieth century, having become a characterizing feature of military dictatorships and authoritarian regimes, particularly in Latin America (*Plan Condor*). Since then, they have spread around the world and are now used as a tool of state repression and political intimidation in many countries¹. The lack of investigation and punishment of those responsible for this crime has been identified as one of the main reasons for its wide use. Impunity for this crime is not only morally unacceptable, but also incompatible with the international legal obligations of states. This paper submits that the future obligation established by the International Convention for the Protection of All Persons from Enforced Disappearance of 2006² (hereinafter “the Convention”) of states to prosecute those responsible for this crime applies not only with regard to cases of enforced disappearance that might occur in the future, but also to those cases that began before a given state ratified the Convention, and have not yet been clarified. Furthermore this paper argues that states will be obliged to exercise limited universal jurisdiction in order to prosecute those responsible of this crime present in their territory.

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¹ See, e.g. the reports of the working group on enforced and involuntary disappearances.

² International Convention for the Protection of All Persons from Enforced Disappearance (CED), adopted December 20, 2006 by the 61st General Assembly of the United Nations. Hereby, the new convention was adopted more than 20 years after the first proposal was drafted by families of victims of enforced disappearance from Latin America in 1983.

2. Enforced Disappearance in International Law

Enforced disappearances constitute an appalling violation of human rights and human dignity as they constitute not only a multiple violation of human rights, protected under the general human rights framework, but also because they place the victim entirely outside the protection of the law. While the definition of enforced disappearance varies slightly depending on the specific legal source, the essence of the crime is always the same: the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate and whereabouts of the disappeared person. An enforced disappearance violates a number of fundamental human rights, both of conventional and (at least some) customary sources³, such as, the right to personal liberty⁴; the right to personal integrity and its collateral prohibition of torture and other cruel, inhumane, or degrading punishment or treatment⁵ and the right to a fair trial⁶. Furthermore, in most cases this crime involves secret execution without trial, which constitutes a violation of or a threat to the right to life⁷.

In addition to the general human rights framework, since the 1990s several international legal instruments have tried to achieve a more effective protection against the practice of enforced disappearance, defining it as a specific crime. In this sense, the United Nations' Declaration on the Protection of all Persons from Enforced Disappearance of December 18, 1992⁸ was a first attempt on the international level to take action against this horrible practice. In June 1994, the General Assembly of the Organization of American States adopted the Inter-American Convention on Forced Disappearance of Persons⁹, establishing a more efficient protection as it is a legally binding instrument, but limited to the American hemisphere. However, the existing legal framework contained many gaps and ambiguities (*inter alia* the varying definition of the crime) and has proven to be insufficient to protect people from enforced disappearance¹⁰. In order to prevent the practice of enforced disappearance there was an urgent need for a legally binding universal instrument. The International Convention for the Protection of All Persons from Enforced

³ See, e.g. Nowak, *Introduction to the International Human Rights Regime* (2003); Tomuschat, *Human Rights, Between Idealism and Realism* (2003), p. 35.

⁴ Articles 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 7 of the American Convention of Human Rights (ACHR), 6 of the African [Banjul] Charter on Human and Peoples' Rights (AfCHPR), 3 Universal Declaration of Human Rights (UDHR), and 9 International Covenant on Civil and Political Rights (ICCPR).

⁵ Articles 3 ECHR, 5 ACHR, 5 AfCHPR, 5 UDHR, and 7 ICCPR.

⁶ Articles 6 ECHR, 8 ACHR, 7 AfCHPR, 10/11UDHR, and 14 ICCPR.

⁷ Articles 2 ECHR, 4 ACHR, 4 AfCHPR, 3 UDHR, and 6 ICCPR.

⁸ Declaration on the Protection of All Persons from Enforced Disappearances (DED) of December 18, 1992.

⁹ Inter-American Convention on Forced Disappearance of Persons (IACED), of July 19, 1994.

¹⁰ Nowak, M., *Report by the independent expert charged with examining the existing international criminal and human rights framework for the protection of person from enforced or involuntary disappearances, pursuant to paragraph 11 of the Commission Resolution 2001/46* (8 January 2002), UN Doc E/CN.4/2002/71.

Disappearance finally fills this gap in the international legal framework. It was adopted unanimously on December 20, 2006, and will enter into force on the 30th day after the deposit with the United Nations of the 20th ratification.¹¹ The Convention is revolutionary in many ways: for the first time in such an explicit way, a global and binding human rights instrument provides for the right not to be subjected to enforced disappearance. Also, it reinforces existing international law, codifying the right of victims to truth, justice and reparation and containing important provisions concerning the prevention, investigation and sanctioning of this crime. Finally, it creates a Committee that will receive reports from the States Party, issue comments, observations and recommendations to them and, an innovative feature of the Convention, deal with cases of enforced disappearances that happened after the Convention came into force by an urgent humanitarian procedure to search and find disappeared persons on the request of a relative.¹²

3. The Duty to Prosecute under the Convention on Enforced Disappearance

The Convention reaffirms and develops the duty to prosecute and punish those responsible for enforced disappearance. In the beginning, the duty to prosecute this crime was based on the general duty to protect and ensure the rights enshrined in general human rights instruments as well as on the right to a remedy for human rights violations as a general obligation of states. Later it was established explicitly in Article 4(1) of the Declaration in 1992, and confirmed in the Inter-American Convention in 1994.

The affirmation in the Convention is an important step for strengthening and reinforcing this obligation and making it more effective. In the first place, the preamble of the Convention emphasizes the determination to prevent acts of enforced disappearances and combat impunity for this crime.¹³ Secondly, Articles 3 and 4 CED establish the obligation of states to take the necessary measures and to criminalize enforced disappearance as an offence in domestic legislation¹⁴ and Article 7 enshrines the obligation to ensure severe punishment of those responsible.¹⁵ Finally, the obligation to prosecute and punish those responsible, has to be interpreted in conjunction with Article 9 of the Convention, that establishes the principle of *aut dedere, aut judicare*, and therefore the

¹¹ On February 6 2007 the Convention was opened for signatures and signed by 57 States. It will come into force upon ratification by 20 countries. Until now (July 2009) 13 countries have ratified the Convention.

¹² For an extensive analysis of the new Convention see Scovazzi / Citroni, *The Struggle Against Enforced Disappearance and the 2007 United Nations Convention* (2008), p. 265ss.

¹³ CED, Preamble: "Aware of the extreme seriousness of enforced disappearance, which constitutes a crime and, in certain circumstances defined in international law, a crime against humanity; Determined to prevent enforced disappearances and to combat impunity for the crime of enforced disappearance".

¹⁴ CED, Article 3: "Each State Party shall take appropriate measures to investigate acts defined in Article 2 [...] and to bring those responsible to justice" and Article 4: "Each State Party shall take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law".

¹⁵ CED, Article 7.1. "Each State Party shall make the offence of enforced disappearance punishable by appropriate penalties which take into account its extreme seriousness".

Article 6 concretizes by specifying the persons that should be held accountable: "Each State Party shall take the necessary measures to hold criminally responsible at least: (a) Any person who commits, orders, solicits or induces the commission of, attempts to commit, is an accomplice to or participates in an enforced disappearance".

obligation of states to exercise limited universal jurisdiction or to extradite any person suspected of having committed acts of enforced disappearance if this person is present in the state's territory (*forum deprehensionis*). This principle entails a "mandatory jurisdiction" for enforced disappearances, whenever the alleged perpetrator is present in its territory, regardless of his or her nationality, the nationality of the victim, or the territory in which the crime was committed.¹⁶ Consequently, according to the Convention, all the States party to the Convention are obliged to *prosecute or extradite* the alleged perpetrators if found in their territory.

4. The Continuous Nature of Enforced Disappearances

The continuous nature of enforced disappearances is of fundamental importance for the question of the applicability of the Convention to cases of enforced disappearances that started before its entry into force. The recognition of the continuous nature of enforced disappearances arises from the very nature of the offence, in particular from the refusal of the actors to disclose what has happened to the victim. In principle, the violation only ends when the fate or whereabouts of the disappeared person are known, which usually occurs when the person reappears still alive or his or her remains are found. What is relevant in determining the continuity of the crime is that the perpetrators who know the truth about the whereabouts of the disappeared person continue to hide it. This means that an enforced disappearance continues as long as the fate and whereabouts of the disappeared person remain unknown. International legal instruments¹⁷ and doctrine¹⁸ have long acknowledged the continuous character of enforced disappearances.

The fact that enforced disappearances are continuous crimes implies as a corollary that the obligations of states under international law, and particularly their conventional duty to investigate the crime and prosecute the perpetrators, continue to apply as long as the act persists, even to acts that began before the entry into force of a certain legal instrument. This interpretation has already been confirmed repeatedly by international jurisprudence and practice.¹⁹ Taking into account this approach, several domestic courts in

¹⁶ CED, Article 9.2 "Each State Party shall likewise take such measures as may be necessary to establish its competence to exercise jurisdiction over the offence of enforced disappearance when the alleged offender is present in any territory under its jurisdiction, unless it extradites or surrenders him or her to another State in accordance with its international obligations or surrenders him or her to an international criminal tribunal whose jurisdiction it has recognized."

¹⁷ See DED, Article 17 (1): "Acts constituting enforced disappearance shall be considered a continuing offence as long as the perpetrators continue to conceal the fate and the whereabouts of persons who have disappeared and these facts remain unclarified."; IACED, Article III: "[...] This offense shall be deemed continuous or permanent as long as the fate or whereabouts of the victim has not been determined"; CED, Article 8 (1) (b): "Without prejudice to article 5, (1) A state Party which applies a statute of limitations in respect of enforced disappearance shall take the necessary measures to ensure that the term of limitation for criminal proceedings: (b) Commences from the moment when the offence of enforced disappearance ceases, taking into account its continuous nature."

¹⁸ See, *inter alia* Scovazzi / Citroni, *supra* note 12, p. 310; and an extensive analysis on this matter in Dijkstra et al., 'Enforced disappearances as continuing violations' (2002).

¹⁹ See, *inter alia*, HRC, *Quinteros v. Uruguay*, Communication no. 107/1981, of 21 July 1983; *Norma Yurich v. Chile*, Communication no. 1078/2002, of 2 November 2005, § 82; *Simunek, Hastings, Tuzilova and Prochazka v. the Czech Republic*, Communication no. 516/1992, § 4.5; *Esther Soriano de Bouton v. Uruguay*, Communication no. 37/1978, § 10; *Moriana Hernandez Valentini de Bazzano v. Uruguay*, Communication no.

Latin America even have applied newly adopted criminal legislation to ongoing acts of enforced disappearance that had started before its adoption, but continued to last beyond this date. For example, in 2004 the 5th Chamber of the Appellate Court of Santiago de Chile convicted those responsible for acts of enforced disappearance on the basis of the new criminal code arguing being it a continuous crime; thus, the principle of legality was not violated.²⁰ In Argentina the Supreme Court held in two cases in 2004 and 2005 that in the case of a continuous crime, such as enforced disappearance, it is possible that the applicable law might change during the continuity of the crime. Therefore, the law that serves as basis for the conviction does not necessarily have to be the same at the time of conviction as at the time of commission of the crime.²¹ Similarly, the Peruvian Constitutional Court expressly adhered to this interpretation in *Villegas Namuche* and *Vera Navarrete* and affirmed that the application of a new criminal norm to a continuous crime did not violate the principle of non-retroactivity, and consequently the principle of legality. Additionally, the Court underlined that national and international law had already undoubtedly protected the violated rights before the commission of the crime.²² Based upon this interpretation, in the *Castillo Páez*²³ and *Chuschi*²⁴ cases the Peruvian Sala Penal Nacional found the accused guilty of committing the crime of enforced disappearance, basing its verdicts on the new criminal norm of enforced disappearance, despite it not having existed at the time of the commission. The Higher Court of Lima applied the same argument in 2008 in the case of *La Cantuta*.²⁵ Moreover, the Peruvian Supreme Court confirmed this interpretation in the appellate proceedings of the *Chuschi* case.²⁶

Consequently, in international and domestic jurisprudence and practice the criminal prosecution of those responsible for acts of ongoing enforced disappearances has not been considered as a retroactive application of the law as the crime still continues. It could even be considered that this rule has evolved into international customary law.

5/1977, § 9 sub (i); *Mónaco de Gallicchio, on her behalf and on behalf of her granddaughter Ximena Vicario v. Argentina*, Communication no. 400/1990, § 10.4; IACtHR, *Goiburú et al. v. Paraguay*, Judgment of September 22, 2006, § 83 and 85; *Blake v. Guatemala*, Judgment of July 2, 1996, § 39; *19 Tradescmen v. Colombia*, Judgment of July 5, 2004, § 142; *Serrano-Cruz Sisters v. El Salvador*, Judgment of November 23, 2004, § 100-106; *Anzualdo-Castro v. Peru*, Judgment of September 22, 2009. See also, ICJ, “Legal Brief Amicus Curiae presented by the International Commission of Jurists before the Inter-American Court of Human Rights in the Case of *Efraín Bámaca Velásquez vs. Guatemala*”, § 71; Scovazzi / Citroni, *supra* note 12, p. 310 and the extensive analysis on this matter in Dijkstra et al., *supra* note 19.

²⁰ 5th Chamber of the Appellation Court of Santiago, Judgment of 5 January 2004, Rol N° 11.821-2003, Case *Fernando Laureani Maturana and Miguel Krassnoff Marchenko*, § 33/34.

²¹ Supreme Court of the Nation of Argentina, Judgment of 24 August 2004, causa A.533.XXXVIII “*Arancibia Clavel, Enrique Lautaro y otros s/ homicidio calificado y asociación ilícita -causa n° 259-*”; and Judgment of 14 July 2005, Causa S. 1767. XXXVIII “*Simón, Julio y otros s/ privación ilegítima de la libertad -causa n° 17768-*”.

²² Constitutional Court of Peru, *Villegas Namuche* (Exp. N° 2488-2002-HC/TC), § 26; and *Vera Navarrete* (Exp. N° 2798-04 HC/TC), § 22.

²³ Sala Penal Nacional, *Castillo Páez*, Judgment of March 20, 2006 (Exp. 111-04). See also Rivera Paz, *Una sentencia histórica. La desaparición forzada de Ernesto Castillo Páez* (2006).

²⁴ Sala Penal Nacional, *Chuschi Massacre*, Judgment of February 5, 2007 (Exp. N° 105-04).

²⁵ Corte Superior de Justicia de Lima, Sala Penal Especial, *La Cantuta*, Judgment of April 8, 2008 (Exp. N° 03-2003-1°SPE / CSJLI), p. 101.

²⁶ Corte Suprema de Justicia, Sala Penal Permanente, *Chuschi Massacre*, Judgment of September 24, 2007 (Exp. 1598-2007), § 14, p. 19.

5. The Applicability of the Convention to Ongoing Cases

As a consequence of the foregoing analysis, the application of the Convention to ongoing cases of enforced disappearance -and the exercise of the newly established competence in order to prosecute those responsible- does not violate the principle of non-retroactivity. It has been shown that in cases of continuous crimes, such as ongoing enforced disappearances, it is well established in customary law that a conviction, based on domestic criminal legislation that was not yet in force at the time the enforced disappearance initiated, is possible and does not violate the principle of non-retroactivity, due to the continuity of the crime. Correspondingly, the application of the Convention, and the compliance of states with their obligation to prosecute acts of enforced disappearance, is compatible with the principle of legality²⁷.

Another element that suggests that this interpretation is consistent with the purpose and aim of the Convention is its Article 35. While this provision limits the competence of the Committee *pro futuro* to cases of “enforced disappearances which commenced after the entry into force of this Convention”²⁸, the Convention does not exclude the applicability of the Convention to ongoing cases of enforced disappearances. Interpreting this omission, and recalling the continuous nature of this crime, the delegations of Argentina, Chile, and Italy emphasized their intention to make interpretative declarations when ratifying the Convention whereby certain rights and obligations, such as the victims’ rights to truth, justice and reparation, would extend also to cases of enforced disappearance that started before its entry into force, but had not yet been clarified.²⁹

Additionally, as we have seen, States have the obligation to establish “mandatory jurisdiction” over this crime, whenever the alleged perpetrator is present in its territory, according to article 9 of the Convention. This is one of its most revolutionary features, as it establishes that states not only have the *competence*, but the *obligation* to prosecute (or extradite) the alleged perpetrators found in their territory. As a result, States party to the Convention have the unambiguous obligation to prosecute *all* acts of enforced disappearances, whether they started before its entry into force, and have not yet been clarified or begin only after that date; and whether they happened in a State party to the Convention, or in another state, as soon as those responsible are found later in a member states’ territory.

The clear obligation of States party to the Convention, to prosecute *all* acts of enforced disappearance, including also acts of ongoing enforced disappearance, and those

²⁷ See for a more detailed analysis of this issue: Claudia Josi, “*The duty to prosecute enforced disappearances in international law and the Conventions’ applicability to cases of enforced disappearance that started before its entry into force*”, Master Thesis at the Graduate Institute of International and Development Studies, IHEID 55, ME Univ. Geneva / Switzerland, 2008.

²⁸ CED, Article 35: “*The Committee shall have competence solely in respect of enforced disappearances which commenced after the entry into force of this Convention.*”

²⁹ Report of the Intersessional Open-Ended Working Group to elaborate a Draft Legally Binding Normative Instrument for the Protection of all Persons from Enforced Disappearance (E/CN.4/2006/57) of February 2, 2006, § 66.

not having taken place in its territory, is one of the most innovative and important achievements of the Convention. In the past, all too often the perpetrators of enforced disappearances have not been brought to justice. This was partly due to a deficient international legal framework, including the lack of possibility for other states to act concerning enforced disappearances that happened in another state, and the possibility of the actors to hide behind concept of non-retroactivity of the law and the inactivity of their own government. Therefore, strengthening the international means of prosecution is an important step in order to effectively combat impunity of this crime and seek justice for so many victims of enforced disappearances that happened many years, or even decades ago, and have not been clarified until today.